Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África

ACJR SUBMISSION ON THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE AMENDMENT BILL (2018)

Introduction

1. African Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR (formerly CSPRI) was established in 2003 as a research and advocacy project focussing on prisons and places of confinement in the African region, with the aim of furthering human rights in these settings. ACJR appreciates the opportunity to provide comment on the Independent Police Investigative Directorate Bill (the Bill).
2. The Bill focuses on the amendment of section 6 of the Independent Police Investigative Directorate Act following the decision in *McBride v Minister of Police and Another* [2016] ZACC 30. It is our submission that the issue to be addressed, namely the independence of IPID also relates to the relationship between IPID and the National Prosecuting Authority (NPA) and this submission focuses on that relationship as described in section 7(4-5) of the IPID Act. It will be submitted below that the effectiveness and impact of IPID is essentially at the mercy of the NPA as the latter does not have to account to any entity for its decisions to prosecute or not, unless taken on judicial review – a state of affairs that does not foster cooperative governance as required by the Constitution.
3. The overarching aim of the submission is to strengthen oversight over and accountability of SAPS with reference to human rights violations and crimes alleged committed by police officials. It is essential that the police is trusted by the public, but that trust will not prosper if police officials who are breaking the law are not prosecuted and not seen to be held accountable. The NPA therefore has a critical role to play in fostering accountability and supporting the mandate of IPID.
4. It is our submission 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, namely 'to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution.'[1] 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.

Impunity and accountability[2]

5. The UN Commission on Human Rights defines impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."[3] Impunity therefore implies a political and social context in which laws against human rights violations are either ignored or perpetrators inadequately punished by the state.[4]
6. The duty to combat impunity rests firmly with the State and Principle 20 of the 1996 UN Report of the Independent Expert on the Question of Impunity made it clear that impunity is a consequence of "the failure of States to meet their obligations under international law to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, ensure that they are prosecuted and tried and provide the victims with effective remedies."[5] The updated UN report on impunity of 2005 omits this particular sentence but explains more clearly what it is that states must do to combat impunity, noting that states have a duty to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[6]
7. The 2005 UN report on impunity furthermore recognises that while the decision to prosecute lies primarily with the state, the state should also not impede other procedures that victims and their families may initiate such as civil actions and private prosecutions (where this is possible, as is the case in South Africa[7]). Moreover, states should afford "broad legal standing" to any

[1] s 2(g) IPID Act, 1 of 2011.
[2] This section is based on Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre.
[3] E/CN.4/2005/102/Add.1 Definitions. This definition differs slightly from the one adopted in 1996 (E/CN.4/Sub.2/1996/18) by adding the words "if found guilty, sentenced to appropriate penalties, and to making reparations to their victims"
[4] Jorgensen, N. (2009) Impunity and oversight: when do governments police themselves, *Journal of Human Rights*, Vol. 8, p. 386.
[5] E/CN.4/Sub.2/1996/18.
[6] E/CN.4/2005/102/Add.1 Principle 19.
[7] s 7 Criminal Procedure Act (51 of 1977).

individual, collective or non-governmental organisation that has a legitimate interest in such as matter.[8]

8. Impunity is not easy to measure but the following are possible indicators:
    - the number of prosecutions initiated against law enforcement officials compared to the number of complaints lodged
    - the extent to which and quantum of internal disciplinary actions instituted
    - the sanctions imposed, either in criminal cases or disciplinary proceedings, is a qualitative indicator of how rights violations are regarded by the sanctioning authority.
    - how the executive responds to input and recommendations from designated oversight structures as well as the broader civil society is furthermore regarded as indicative of accountability *vis a vis* impunity.
    - Are recommendations are indeed effectively considered, adhered to and followed-up?
9. Ultimately, the question of impunity must be answered by the level of accountability enforced with regard to rights violations allegedly committed by law enforcement officials. While the primary focus of combating impunity is towards the past by investigating, prosecuting and punishing perpetrators for events that had already taken place, the duty to combat impunity must also keep an eye on the future. Failure to investigate, prosecute and punish perpetrators appropriately sets up a dynamic where a culture of impunity takes root, or is entrenched in organisations, such as a police force. Combating impunity is therefore not only about what has already happened but also about preventing its repetition.
10. Addressing impunity in the police requires the close cooperation between SAPS, the NPA and IPID as there is a collective duty under the Constitution to hold perpetrators of rights violations accountable. We can refer to this as the accountability triangle. It is in the interests of SAPS that crimes and rights violations allegedly perpetrated by police officials are investigated and that transgressing police officials criminally prosecuted or disciplined, as the case may be, because this will communicate to all officials that transgressions and violations are not tolerated. It is then the task of the NPA to criminally prosecute officials implicated in crimes to ensure that guilty officials are removed from the service and that SAPS operates with integrity and public trust is built in the organisation. It is to no one's benefit that police officials are not held accountable for crimes and rights violations and it undermines trust in the police and ultimately its legitimacy.

[8] E/CN.4/2005/102/Add.1 Principle 19. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.

What does the Constitution, legislation policy and international law say about police accountability?

11. The Constitution in section 195(1) sets down the values and principles for public administration, requiring that the public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following '(f) Public administration must be accountable. (g) Transparency must be fostered by providing the public with timely, accessible and accurate information'. Transparency and accountability are central to the IPID mandate.
12. 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 National Prosecuting Authority for criminal prosecution and notify the Minister of such referral. (5) The National Prosecuting Authority 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.
13. 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.
14. The NPA Act, in section 22(4)(f), places a duty on the NDPP to 'bring the United Nations Guidelines on the Role of Prosecutors to the attention of the Directors and prosecutors and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation'. The UN Guidelines on the Role of Prosecutors in Guideline 15 reads 'Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.'[9] It therefore follows that the NPA must pay particular attention, if not prioritise, cases against police officials. Cases against police officials are not ordinary cases, because accountability of police officials goes to the heart of the integrity of law enforcement.
15. The NPA Prosecution Policy Directives read:

    (3) In the interest of transparency and accountability - and in accordance with section 33(2) of the Constitution[10] - reasons should as a rule be given upon request. (4) The nature and

[9] *UN Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[10] S 33. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

detail of the reasons given will depend upon the circumstances of each case, although in general the ratio, rather than specific detail (e.g. the evaluation of a particular witness's evidence or credibility), should be given. Prosecutors should be careful not to infringe the rights of anyone when providing such reasons.[11]

16. At policy level it is evident that transparency and accountability are recognised as important values to the NPA. However, it is submitted below that this is not expressed in practice.
17. It is furthermore noteworthy that neither the NPA Prosecution Policy nor the NPA Prosecution Policy Directives mention IPID, yet IPID is a key stakeholder and has a statutory duty to refer deserving cases to the NPA for prosecution.
18. It is a recommendation from the NDP that SAPS should professionalise: 'The Commission recommends the professionalisation of the police by enforcing the code of conduct and a police code of ethics, appointing highly trained and skilled personnel, and establishing a body to set and regulate standards.[12] The sub-text is that rights violations by the police need to be addressed as a priority.
19. *The Service Charter for Victims of Crime in South Africa* states that:
    - You can request to be informed of the status of the case, whether or not the offender has been arrested, charged, granted bail, indicted, convicted or sentenced.
    - You may request reasons for a decision that has been taken in your case on whether to prosecute or not.[13]

    The Charter therefore recognises the importance of transparency.

20. The UN Convention against Torture, to which South Africa is a party, places an obligation on the state to either extradite or prosecute persons suspected of having committed the crime of torture: 'The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4[14] is found shall in the cases contemplated in article 5[15], if it does not extradite him, submit the case to its competent authorities for the

[11] *NPA Prosecution Policy Directives*, Part 6 B para 3-4, p. 19 (effective June 2014).
[12] National Planning Commission (2013) *National Development Plan - Vision 2030*, p. 388.
[13] Department of Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, p. 7.
[14] Article 4 (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.
[15] Article 5 (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. (2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. (3) This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

purpose of prosecution.'[16] There is therefore little room for manoeuvring in the duty to prosecute.

21. UNCAT General Comment No. 3 in para 17, on the right to redress, states: A State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a *de facto* denial of redress and thus constitute a violation of the State's obligations under article 14[of UNCAT].[17] Failure to prosecute therefore has very real consequences for victims.

Outcomes of criminal recommendations to NPA

22. 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. Table 1 reflects that in 2016/17 IPID referred a total of 1140 cases to the NPA. However, IPID was still expecting response from the NPA in nearly 97% of cases referred with a recommendation to criminally prosecute.[18] Whilst it is understandable that there may be some time lapse with cases received late in the financial year, it is inexplicable that nearly all cases referred by IPID had not received a decision. It is also noteworthy that no cases were pending because the NPA requested further information. Of the 1140 cases, less than 1% were prosecuted. This can only be interpreted as a high level of reluctance on the part of the NPA to prosecute police officials. What motivates this inaction is not clear.

Table 1

Response	Number	Percentage
Awaiting response	1105	96.9
Declined to prosecute	26	2.3
Prosecute	9	0.8
NPA requested more information	0	0.0
Total	1140	

23. Criminal convictions in 2016/17 recorded by IPID are reflected in Table 2, showing that in 2016/17 there were a total of 45 convictions, 31.5% of which were for deaths due to police action.[19] The 45 convictions should be seen against the total number of cases referred to the

[16] Art. 7(1) UNCAT.
[17] Article 14 (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.
[18] IPID (2017) *Annual Report 2016/17*, p. 60.
[19] IPID (2017) *Annual Report 2016/17*, p. 62.

NPA for prosecution – 1140 as reported in Table 1 above. This is by all accounts a dismal result.

Table 2

Category	Convictions
Deaths in custody	
Deaths as a result of police action	17
Complaint of discharge of firearms	4
Rape by police officer	2
Rape in police custody	
Torture	
Assault	13
Corruption	3
Systemic corruption	
Non-compliance with IPID Act	
Other criminal offence	6
Total	45

24. Under the heading '*Co-operation and interaction with police and other constituent agencies*' the Prosecution Policy states as follows:

> Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. . . . With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close cooperation, with mutual respect for the distinct functions and operational independence of each profession. Prosecutors should cooperate with other departments and agencies such as Correctional Services, Welfare, lawyers' organisations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.[20]

25. While the above generally refers to cooperation between the police and the NPA, it is assumed that this also applies to cooperation with IPID. The data in Tables 1 and 2 does not indicate productive cooperation between IPID and the NPA, but rather the opposite. IPID does not receive feed-back on cases referred to the NPA and prosecution appear to be a rare occurrence. The above shows that the lack of prosecutions of police officials is not an isolated incident, but that it is systemic and most likely the results of the failure to implement policy, with specific reference to the Prosecution Policy. The situation falls therefore squarely in the realm of Parliament.

[20] NPA (2014) *Prosecution Policy*, pp. 12-13.

Do the police perceive themselves to be accountable?

26. The above figures indicate that there is little reason to believe that the police perceive themselves to be accountable – the simple truth is that they are not prosecuted for serious crimes, including rights violations. The same appears to apply in respect of internal discipline.
27. SAPS management is responsible for internal discipline and the data on internal disciplinary hearings shed some light on how accountability is fostered, or rather not. Table 3 below presents the number of disciplinary actions over the last three years and Table 4 the results of such hearings. Table 3 does reflect a notable increase in disciplinary hearings over the preceding three years, which is encouraging. Given the size of SAPS staff establishment (some 194 000), the number of officials subjected to disciplinary action is miniscule; less than 2.5%. By way of comparison, in 2016/17 the Department of Correctional Services (DCS) conducted 3379 disciplinary hearings with a total staff of 39 634[21], or nearly one out of every ten DCS officials, resulting in 117 dismissals.[22] DCS has maintained this level of disciplinary action since 2010 once it had established internal capacity to deal more effectively and efficiently with disciplinary matters.[23] It is also noteworthy that in 2016/17, roughly 50% of SAPS disciplinary cases were withdrawn or the finding was not guilty. In the case of DCS this figure is 5.4%. The implication is that even if disciplinary proceedings are brought against a SAPS official, the chances are still 50% that he or she will walk away scot-free. It is therefore evident that disciplinary cases are not effectively investigated and pursued.

Table 3 Total number of disciplinary hearings

	2014/15	2015/16	2016/17
Total number of disciplinary hearings	2482	4443	4265

Table 4 Outcome of disciplinary hearings

	2014/15		2015/16		2016/17	
Outcome	**Number**	**%**	**Number**	**%**	**Number**	**%**
Correctional counselling	151	2.9	96	2.2	113	2.5
Demotion	0	0.0	0	0.0	0	0.0
Dismissal	409	7.9	361	8.1	323	7.2
Final written warning	419	8.1	313	7.1	339	7.5
Fine	807	15.5	629	14.2	512	11.4
Suspended action	38	0.7	0	0.0	0	0.0
Suspended dismissal	638	12.3	539	12.2	478	10.6
Case withdrawn	756	14.5	622	14.0	539	12.0
Not guilty	1266	24.4	1378	31.1	1741	38.7

[21] DCS (2017) Annual Report 2016/17, pp. 95 &109.
[22] DCS (2017) Annual Report 2016/17, p. 107.
[23] Muntingh, L. (2012) *An analytical study on prison reform after 1994*, Unpublished PhD Thesis, UWC, p. 200.

	2014/15		2015/16		2016/17	
Suspended without payment	103	2.0	55	1.2	40	0.9
Verbal warning	51	1.0	40	0.9	36	0.8
Written warning	560	10.8	398	9.0	375	8.3
Total	5198	100	4431	100	4496	100

28. Criminal prosecutions against police officials cannot be detached from internal discipline in SAPS as they form part and parcel of the accountability architecture. The overall impression is that few officials are subject to internal discipline seen against the volume of complaints lodged with IPID for more serious offences. Further, even when disciplinary action is brought, the chances are 50% for a not guilty verdict or withdrawal of charges. This situation severely undermines fostering a culture of individual accountability. The situation at DCS appears to present an opportunity for SAPS to learn from them.
29. IPID reports annually on the details of disciplinary convictions following its investigations and recommendations. Table 5 below presents a sample for three offences, being assault with intent to cause grievous bodily harm, murder (death in police custody) and murder (due to police action) for 2016/17. The sample covers 45 cases from 2014/15. The table indicates that dismissal was the sanction in two thirds of murder (due to police action) and in 11.1% of cases murder (death in custody). Written warnings were used in the majority of cases relating to Assault gbh and Murder (death in police custody). Even if the details of the specific cases are not available, it appears at least at face value that these are shockingly lenient sanctions.

Table 5 Sanctions imposed for three serious crimes

Sanction	**Assault gbh**	**Murder (death in police custody)**	**Murder (due to police action)**
Dismissal	12.5	11.1	66.7
Verbal warning	16.7		8.3
Written warning	50.0	55.6	8.3
Suspended without pay			8.3
Dismissal suspended for less than 2 months	4.2	11.1	
Fine	12.5	11.1	
Suspended		11.1	
Dismissal suspended for 6 months			8.3
Final written warning	4.2		
Total	**100**	**100**	**100**

30. Data from the 2016/17 IPID Annual Report is not disaggregated according to offence and sanction as shown in Table 5 above. However, a total of 276 convictions were received for different types of misconduct as shown Table 6. [24]

Table 6

Sanction	**N**	**%**
Written warning	145	52.5
Verbal warning	38	13.8
Fined	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**

31. The 2016/17 data is therefore broadly in line with the 2014/15 sample, indicating 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.
32. Seen against the background of few disciplinary processes initiated, the high attrition rate of disciplinary proceedings, the low conviction rate, the disproportionately light sanctions add to undermining efforts to build a culture of accountability and rather achieves the opposite, namely a culture of impunity.

Reasons for not prosecuting

33. The existing Prosecution Policy does have an overall tenor of discouraging prosecution. The Prosecution Directives, which are determined by the NDPP alone and contain detailed guidelines to prosecutors, are treated as 'confidential' by the NPA. The Prosecution Directives currently provide that the written consent of the NDPP must be sought whenever specified public officials – primarily officials working in the criminal justice system such as members of the SAPS are to be prosecuted and that this requirement is necessary to avoid prosecutions in 'inappropriate circumstances'.[25] The UN Guidelines on the Role of Prosecutors are alive to this problem inasmuch it pertains specifically to public officials suspected of corruption, abuse of power and serious human rights violations, with the Guidelines requiring that special attention

[24] IPID (2017) *Annual Report 2016/17*, p. 61.
[25] NPA (2014) Prosecution Policy, p. 9 and NPA Prosecution Directives, Part 8: Prosecution of certain categories of person p25 .

should be given to such cases.[26] The Venice Commission acknowledges that not bringing prosecution which ought to be brought is probably a more common problem than incorrectly brought prosecutions and, furthermore, that it is more difficult to counter due to lack of judicial control.[27] The Supreme Court of Appeal (SCA) has held that equal weight and scrutiny must be accorded to the decision *not* to prosecute in apparent 'inappropriate circumstances' as to the decision to prosecute.[28]

34. The Prosecution Policy Directives sets out the framework for providing the reasons for decisions to prosecute or not prosecute. The Directives sets out the following 'typical reasons for a decision not to prosecute':

    (a) The State would not be able to prove that the accused person had the necessary intention to commit the offence in question.

    (b) The State would not be able to disprove the defence of the accused person (e.g. self-defence, alibi or criminal incapacity).

    (c) The complainant is a single witness. However, there are several defence witnesses who corroborate the version of the accused person.[29]

35. The risk with the 'typical reasons' is that they may be used in a rout fashion without disclosing the factual issues at hand. This impacts on both IPID and the victim. If the reason not to prosecute is due to some inadequacy in IPID's investigation, then IPID needs to learn from its mistakes and/or shortcomings and the consequences thereof. The victim on the other hand deserves a proper explanation, even if this may not be what the victim wants to hear.

What are the possible remedies?

36. Section 7 of the IPID Act needs to be amended to address the lack of transparency and accountability and to compel the NPA to make decisions to prosecute or not and report on them. The aim is to avoid the current situation where cases are apparently in limbo at the NPA.

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[26] 'Guideline 15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.' *Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990.

[27] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para. 21.

[28] See also *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

[29] NPA (2014) *Prosecution Policy Directives*, Part 6B.

37. It is therefore proposed that the NPA submits regular reports (e.g. quarterly) to IPID on the status of cases under consideration for prosecution. Such a report should reflect whether a decision to prosecute or not has been taken, and if not, the reasons thereto.
38. It is furthermore proposed that the NPA must make a decision to prosecute within a set period, unless further investigation is required. What such a time period will be, is for the Committee to determine.
39. If the NPA declines to prosecute, it should submit the precise reasons for the decision to IPID inn order that IPID can address any shortcomings and also that this information can be conveyed to the alleged victim.

End

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