



UNIVERSITY *of the*  
WESTERN CAPE



**Submission by Africa Criminal Justice  
Reform (ACJR) to the NCOP Select  
Committee on Security and Justice on the  
Independent Police Investigative  
Directorate Bill (B21B – 23)**

Jan 2024

## Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute at the University of the Western Cape.
2. We made a submission to the Portfolio Committee on Police on the Independent Police Investigative Directorate Bill (B21– 23) (the Bill) and welcomes this opportunity to highlight a number of issues that we submit require further attention in the B-version.

## Proclamation of amendment

3. The Committee's attention is drawn to the amended section 6A of the IPID Act, the result of Act 27 of 2019, which the President has assented to, but is apparently awaiting proclamation. The amendment deals with the removal from office of the Executive Director of IPID. It is submitted that clarification be sought on why the proclamation remains wanting yet the legislature is asked to deal with another amendment to the same section.

## Selection of Executive Director

4. Clause 4 (amending s 6) deals with the selection and appointment of the Executive Director. The proposed amendment must be read together with the proposed amendment of section 4, as per clause 3. The following subsection is to be inserted, and this is supported: "(3) The Directorate must be independent, impartial and must exercise its powers and perform its functions without fear, favour, prejudice, or undue influence.". Seen against this standard, the proposal that the Minister appoints the panel to assist him or her to identify suitably qualified candidates is then contrary to the requirements set. The requirement that IPID must perform its functions without fear, favour, prejudice, or undue influence becomes less than plausible when, as is proposed, the Minister selects the panel in the absence of any consultation or external input, against unknown criteria, without any defined mandate using a procedure defined by the minister to nominate one person. This one name is then forwarded to Parliament which has the choice to confirm or reject.
5. Given the requirements for a transparent public service and the importance of IPID in protecting democratic values pertaining to the police, it is not apparent why the selection process of the IPID Executive Director must be such a closed and secret process. By

comparison, much was gained in the legitimacy and support for the National Prosecuting Authority (NPA) when the interview process for the National Director of Public Prosecutions (NDPP) was done publicly by a panel which made a recommendation to the President. Even if this process (selecting the NDPP) was not perfect and is as such not yet formalised in law, it was a substantial improvement on past practices. It is submitted that a similar open and transparent selection and appointment process be adopted in the legislation to call for applications, have public engagement and identify suitable candidates.

## Relationship with the NPA

6. Section 7 (4-5) of the IPID Act 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, whereafter the Executive Director must notify the Minister thereof and provide a copy thereof to the Secretary.

7. The most recent IPID annual report reports on cases referred to the NPA and is presented below in Table 1.<sup>1</sup> In short, IPID was awaiting a response from the NPA in two-thirds of cases referred. This is of itself not a satisfactory situation. S 7(5) of the IPID Act requires the NPA to inform the IPID Director of its intention to prosecute.

*Table 1*

Category	N	%
Awaiting response from NPA	1347	64.4
Decline to prosecute	684	32.7
Prosecute	53	2.5
Withdrawn	9	0.4
Total	2093	

8. An important omission in law appears to require the NPA to make a decision within a reasonable time period and, importantly, to present the reasons why it has declined to prosecute. The decision not to prosecute may indeed be of great value to IPID in respect of its own performance and investigation standards.

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<sup>1</sup> Independent Police Investigative Directorate, 'Annual Report 2022/23' (Pretoria: IPID, 2023), 76.

## Crimes to be investigated

9. Clause 16 seeks to amend section 28 of the IPID Act and deals with the crimes that IPID must investigate. The deletion of section 28(1)(c) is proposed, which deals with complaints about the discharge of a police firearm. Firearm management is already a problem with nearly two firearms going missing per day in the previous financial year; 712 in total.<sup>2</sup> In 2021/22 a total of 830 complaints concerning the discharge of a firearm were received by IPID, the second highest category of all complaints.<sup>3</sup> This is evidently an important part of the IPID mandate and most likely indicative of problem behaviour from police officials. Removing this from the IPID mandate will not solve the problem. Moreover, no evidence is presented to motivate for the deletion of s 28(1)(c). The fact that more than 800 such complaints were received in the last year (and increase from the previous year) is indicative that members of the public felt sufficiently aggrieved to take the trouble to lodge a complaint and this should thus not be trivialised. If the deletion is accepted, it raises the question as to who will then investigate such complaints? There is no realistic expectation that SAPS will investigate such allegations.
10. The memorandum to the Bill, on this point, notes as follows:

“The complaint of a discharge of an official firearm has been deleted as it was thought that investigation should only be conducted if the discharge of an official firearm is linked to an allegation of attempted murder. As such, a new type of matter to be investigated by IPID, which is attempted murder in relation to a discharge of an official firearm has been inserted in the Bill.”.
11. The above extract from the memo uses the wording “as it was thought that investigation should only be conducted if the discharge of an official firearm is linked to an allegation of attempted murder”. No motivation nor evidence is presented for this “thought”. There is equally no motivation presented for setting the threshold at “attempted murder” as opposed to intimidation, torture or any other crime that can be linked to the discharge of a firearm.
12. Attention is drawn to the fact that South Africa ratified the UN Convention against Torture (UNCAT) in 1998 and is thus a state party, and obliged to fulfil its obligation under the treaty. The first and primary issue is that there can never be any excuse for the crime or torture and the right to be free from torture is a non-derogable right in the Constitution.<sup>4</sup>

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<sup>2</sup> SAPS, ‘Annual Report 2021/22’ (Pretoria: South African Police Service, 2022), 93.

<sup>3</sup> Independent Police Investigative Directorate, ‘Annual Report 2021/22’ (IPID, 2022), 38.

<sup>4</sup> ‘Constitution of the Republic of South Africa’ (1996), secs 12 and 37.

13. UNCAT, in Art 16 read with Art 12, sets the bar low for what must be investigated:

16(1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

14. As referred to above in Art 16 of UNCAT, Art 12 of the treaty places an obligation on the state to investigate where there are reasonable grounds to believe that torture and/or other ill treatment had taken place:

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

15. The reckless and dangerous use of firearms must be investigated to ensure effective and correct firearm use and management. To set the threshold for a firearm-linked investigation at the level of attempted murder, as is proposed in s 28(1)(gA), is contrary to section 12(1)(c) of the Constitution affirming the right to be free from all forms of violence, whether from a private or public source. Section 12(1)(c) of the Constitution is an all-encompassing standard and the applicable to the mandate of IPID. In this regard, attention is drawn to section 2 of the IPID Act, detailing the objects of the IPID Act with reference to subsections 2(d) and (g):

(d) to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services;

...

(g) to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution.

16. Deleting s 28(1)(c) would have the effect of further entrenching impunity in the police for firearm misuse. The crisis in SAPS discipline was already noted in the submission to the Portfolio Committee on Police. It is therefore submitted that s 28(1)(c) be retained in its current form and that the proposed section 28(1)(gG) not be incorporated. It is submitted that the proposed section 28(1)(gG) be omitted as it is contrary to constitutional obligations,

international law and domestic legislation. The obligation is to prevent and combat torture and ill treatment under all circumstances and especially when police officials are implicated.

17. Clause 16 also seeks to amend section 28(1)(f) to include the full reference to the torture legislation as per the proposed section 28(1)(f)(i) and this is supported. However, the proposed insertion of section 28(1)(f)(ii) which sets the threshold at assault with intent to cause grievous bodily harm is contrary to the obligations and rights under section 12(1)(d) and section 12(1)(e) of the Constitution as well as the Prevention and Combatting of Torture of Persons Act. The definition of torture in the torture legislation covers both severe physical and mental harm and the definition is purposefully inclusive. It does not set a threshold with respect to the extent of physical injuries as the amendment proposes to do, but rather asks for a case-by-case approach.

18. The definition of torture in the UNCAT<sup>5</sup> and the domestic legislation has four essential requirements, being:

- It must be committed by a public official (e.g. a police official)
- It must result in severe mental and/or physical suffering
- It must be intentional for such as purposes as extracting a confession, punishment or based on discrimination
- It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

19. Moreover, section 28(1)(f)(i) states that IPID will investigate torture as defined in the legislation but then in section 28(1)(f)(ii) seems to qualify that very provision by intending to limit the threshold to assault with intent to cause grievous bodily harm. The essential point is that if a police officer is suspected of having committed assault with intent to cause grievous bodily harm, it must be accepted that he or she is suspected of having committed the crime of torture.

20. The proposed section 28(1)(f)(ii) then also appears to place the emphasis on 'grievous bodily harm' as the requirement for torture. This interpretation is of course not congruent with the

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<sup>5</sup> UNCAT Art 1(1) For the purposes of this Convention, the term "torture" means 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 suspected of having committed, or intimidating or coercing him or a third person, or 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 sanctions.

definition in Art 1 of UNCAT (as set out above) and also not with the definition in the domestic legislation.

## SAPS Discipline

21. Clause 18 seeks to amend section 30 of the IPID Act by the insertion of subsection 30(aA) stating that National Commissioner “may initiate disciplinary proceedings after the investigation of allegations has been finalised by the Directorate and upon receipt of an investigation report from the Directorate”.
22. It is submitted that the proposed amendment conflates the mandates of IPID and that of the National Commissioner. The National Commissioner is the employer and has an employer-employee relationship with police officials. He or she is mandated to investigate transgressions of the rules of employment and maintain discipline as the employer. That is a process governed by the labour relations legislation and mechanisms. IPID’s mandate is to conduct criminal investigations into alleged transgressions by police officials with a particular requirement in respect of those offences listed in section 28 of the IPID Act. These are two different processes in character and purpose. Moreover, the burdens of proof are different.
23. It is submitted that there is nothing preventing the National Commissioner from conducting and concluding a disciplinary investigation against an employee while an IPID investigation focusses on alleged criminal conduct.

## Police detention monitoring

24. It remains a fundamental weakness in the human rights architecture that police detention remains without a designated inspection and monitoring mechanism. A recent report by the SAHRC found abysmal conditions of detention at most police stations.<sup>6</sup> The need for such a mechanism was realised more than 25 years ago in respect of prisons and saw the establishment of the Judicial Inspectorate for Correctional Services with its system of Independent Correctional Centre Visitors. It is commonly accepted in the literature that the

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<sup>6</sup> SAHRC NPM, ‘The Conditions and Treatment of People in Police Custody in South Africa - Report on Visits to Police Stations by Independent Custody Visitors - 2019-2020’ (Johannesburg: SAHRC, 2021), <https://sahrc.org.za/npm/index.php/npm-resources/general-reports>.

period immediately after arrest poses the highest risk of torture and ill treatment,<sup>7</sup> yet police detention remains without a basic monitoring and inspection mechanism.

25. Consideration should consequently be given to IPID as part of the National Preventive Mechanism (NPM) under OPCAT, and its powers and functions in relation to the requirements under OPCAT – to conduct regular monitoring visits to police stations. Alternatively, serious consideration should be given to a lay-visitor scheme to enhance transparency around police detention.

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Prof Lukas Muntingh  
[lmuntingh@uwc.ac.za](mailto:lmuntingh@uwc.ac.za)  
Dullah Omar Institute  
082 200 6395  
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<sup>7</sup> R Carver and L Handley, 'Conclusion', in *Does Torture Prevention Work?*, ed. R Carver and L Handley (Liverpool: Liverpool University Press, 2016), <https://doi.org/10.2307/j.ctt1gpcbdt>; L Muntingh and G Dereymaeker, 'South Africa', in *Does Torture Prevention Work?*, ed. Richard Carver and Lisa Handley (Liverpool University Press, 2016), <https://www.cambridge.org/core/books/does-torture-prevention-work/F052646B3EFDE26F5D6BF44F34739838>.