



HELENSUZMAN FOUNDATION

Parliament of the Republic of South Africa
W/S 091
3rd Floor
90 Plein Street
Cape Town
Attention: Mr P Gwebu
pgwebu@parliament.gov.za

29 June 2018

**Submission in response to the Independent Police Directorate Amendment
Bill, 2018 (Notice 300 of 2018, Gazette No. 41667)**

Dear Mr Gwebu

Please find attached the submission by the Helen Suzman Foundation for the Portfolio Committee's consideration.

Francis Antonie
Director

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Trustees: Ken Andrew • Cecily Carmona • Jane Evans • Paul Galatis • Daniel Jowell • Temba Nolutshungu • Kalim Rajab
Gary Ralfe • Rosemary Smuts • Richard Steyn • Phila Zulu

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Submission in response to the Independent Police Directorate Amendment Bill, 2018 (Notice 300 of 2018, Gazette No. 41667)

1. Introduction

The Helen Suzman Foundation (“**HSF**”) welcomes the opportunity to make submissions to the Portfolio Committee on Police on the Independent Police Investigative Directorate Amendment Bill, 2018.

The HSF is a non-governmental organisation whose main objective is to defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

The HSF has a longstanding interest in the independence of policing institutions¹ and presented written and oral arguments to the Constitutional Court as *amicus curiae* in the case of *McBride v Minister of Police and Another*² which confirmed the order to amend the Independent Police Investigative Directorate Act (IPID Act). Should the opportunity arise, the HSF wishes to make oral presentations to this Committee.

¹ The HSF were applicants in the case of *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2014] ZACC 32, which is cited extensively by the Constitutional Court case which ordered this amendment. The HSF also intervened in the cases of *Glenister I and II*, *Dramat*, and *Ntlemeza*.

² [2016] ZACC 30

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2. Preliminary Comments

The HSF has had the benefit of reading the African Policing Civilian Oversight Forum's (APCOF) submission to this Committee. We make two comments in this regard:

2.1 We understand that the Civilian Secretariat of Police (CSP) serves as a legislative partner to IPID, and that it plays a crucial role in placing relevant information before Parliament. We note, and share, APCOF's concern that the CSP "did not facilitate the necessary process of ministerial and cabinet review in time to allow the draft Bill to be presented before Parliament."³

2.2 We have been made privy to the workshop documents that informed APCOF's submission.⁴ These documents comprise of reports from stakeholder engagement sessions. The HSF presented at the first of these sessions and shared our view that the starting point for building a new IPID Act, was to ensure that IPID enjoyed a sufficient degree of independence – this in practice means structural and operational independence.⁵ We urge the Portfolio Committee to take full cognisance of all relevant information that may assist in amending the IPID Act to ensure full compliance with the directives of the Constitutional Court.

2.3 To this end, we endorse the recommendations contained in APCOF's submission, especially as pertains to the appointment criteria and removal procedures of the Executive Director, but we acknowledge that it may be inappropriate to make submissions on these aspects in response to the current Bill.

³ APCOF Submission to Portfolio Committee on Police, 2018, p 2.

⁴ African Policing and Civilian Oversight Forum and Independent Police Investigative Directorate 13-14 July & 20-21 November 2017 Workshop Report: *Strengthening the Independence of the Independent Police Investigative Directorate*.

⁵ [2016] ZACC 8

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We recommend the following approach be taken by the Portfolio Committee:

- (a) Given the time constraints and in order to avoid being in contempt of the Constitutional Court Order, the Committee must ensure compliance by enacting the Bill before 6 September 2018.
- (b) While the Bill may meet strict compliance with the Order, it is limited in scope in so far as it only addresses removal. We do not believe that enacting this Bill can constitute the final step of bringing the Act in line with Constitution. We therefore urge that beyond this legislative step, the Committee urgently considers further amending the IPID Act to address the concerns identified by APCOF in their submission under the headings ‘Appointment of the Executive Director’ and ‘Removal of the Executive Director’.⁶ Assurances in this regard from the Committee may avoid the need for a legal challenge in order to make the IPID Act constitutionally compliant.

2.4 The HSF thus urges continued legislative review and engagement with stakeholders in order to strengthen both the IPID Act and the institution.

3. Substantive Comments

3.1 The proposed Section 6A (1)

3.1.1 The proposed subsection 1 of the new Section 6A of the Bill makes reference to “a Committee of the National Assembly”. This wording is drawn directly from Section 17DA (3) of the South African Police Service Act⁷ (the SAPS Act). The use of the words “a Committee” is ambiguous for the following reasons:

⁶ Pp 4-7

⁷ 68 of 1995

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- a) Section 1 of the SAPS Act makes reference to “the Standing Committees of the National Assembly and the Senate [*sic*] responsible for safety and security issues”;
- b) “Committee” is defined in the IPID Act as follows: “**Committee**” means the Management Committee established under section 11”;
- c) Section 6(2) of the existing IPID Act states, “The relevant Parliamentary Committee must, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.”.

This Section makes clear reference to a Committee distinct from the Management Committee contemplated in 3.1.1. above, through use of the words “relevant Parliamentary”. This anomaly must be addressed.

3.2 The proposed Section 6A (3)(a)

- 3.2.1 The proposed wording of this clause is drawn from Section 17DA (5) of the SAPS Act. The use of the word “Committee” is ambiguous for the same reasons set out in Section 3 (1) of this submission.

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4. Recommendations

4.1 Insertion of the words “relevant Parliamentary” before the word “Committee” in the proposed Section 6A 1(a) to bring the clause in line with the wording in Section 6(2) of the IPID Act.

4.2 Addition of the words, “and as contemplated in Sections 12, 13 and 14” in the definition of “Committee” in Section 1 of the IPID Act.

4.3 Addition of the definition of “Parliamentary Committee”, in section 1 of the IPID Act, that describes the specific Committee referred to in Section 6(2) of the IPID Act and Section 6A of the the proposed Amendment. This definition must make clear that the relevant Parliamentary Committee which is empowered to appoint the Executive Director in Section 6(2), is the same Parliamentary Committee referred to in the proposed Section 6A. This distinction is important in order to differentiate it from “the Committee” as contemplated in Sections 11, 12, 13 and 14 of the IPID Act which concern the “Management Committee”.

5. Conclusion

The Helen Suzman Foundation is encouraged by the steps taken by the Portfolio Committee on Police to bring the IPID Act in line with the Order handed down by the Constitutional Court. We believe this is an important step in imbuing IPID with the requisite degree of institutional independence.

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The Constitutional Court observed:

*What then does the independence of IPID mean? Does it mean complete or sufficient independence? Admittedly, it is difficult to attempt to define the precise contours of a concept as elastic as this. It requires a careful examination of a wide range of facts to determine this question. Amongst these are the **method of appointment**, the method of reporting, disciplinary proceedings and **method of removal** of the Executive Director from office, and security of tenure [our emphasis].⁸*

We strongly urge that this Committee continue the process of amending the IPID Act beyond the passing of this Bill into law. There is room to improve the IPID Act beyond a mere technical incorporation of the SAPS Act, which effectively forms the entirety of this current Bill. Should the Committee decide against a broader consideration of the Bill, we caution that the Committee opens up the proposed amendments to judicial review. The inclusion of appointment criteria and the procedural requirements of removal of the Executive Director are necessary additions to the IPID Act in order to ensure that IPID is imbued with a sufficient degree of operational and structural independence, as envisaged by the Constitutional Court.

6. Postscript

6.1 In a recent judgment handed down by the Pretoria High Court⁹, Tuchten, J touches on relevant aspects of IPID's independence and its relationship to SAPS. The HSF would like to highlight the following to the Committee:

- (a) It was made clear in the Judgment that the relationship between IPID and SAPS had broken down. Thus none of eight letters sent by IPID received a reply from SAPS. The HSF is concerned about the negative consequences this sort of behaviour has on the perceived legitimacy of IPID by SAPS. In addition, it does not augur well for a constructive working relationship between

⁸ [2016] ZACC 31

⁹ Independent Police Investigative Directorate and Others v Lt. General Johannes Khomotso Phahlane and Others (85894/17) [2018] ZAGPPHC Unreported (26 June 2018)

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IPID and SAPS.¹⁰

- (b) Again, a Court has ruled on the important and special position of IPID and pointed to the fact that “members of SAPS are constitutionally obliged to protect the independence and effectiveness of IPID.”¹¹ These observations must inform the ongoing work done by the Committee.
- (c) The fact that a “Conflict of Interest and disclosure of interest” provision such as that in Section 25 of the IPID Act does not exist to regulate the conduct of SAPS members towards IPID members during investigations of SAPS, is another instance of where work must be done to strengthen policing legislation. This provides further evidence for the recommended approach discussed in Section 2 of the HSF’s submission.

29 June 2018

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Legal Researcher

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Legal Researcher

Francis Antonie
Director

¹⁰ Ibid at paras 12-14

¹¹ Ibid at para 23

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