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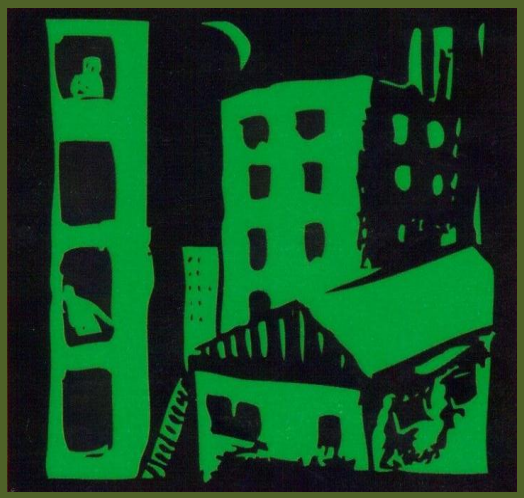

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Who is watching the watchers?[1]: A critical assessment of the Independent Police Investigative Directorate's prospects of investigating misconduct in the South African Police Service

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1 INTRODUCTION

Recent events have again turned the public spotlight on the conduct of police officers in the execution of their duties.

[1] A gender-sensitive translation of the Latin maxim *Quis custodiet ipsos custodes*?, found at line 347 of the Satires of Roman poet Juvenal see: http://www.fordham.edu/halsall/ancient/juvenal-satvi.asp (accessed 23 July 2012). It succinctly captures the necessity of oversight over law-enforcement agencies, and the irony associated with this.

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The public display of violence and brutality against a Mozambican taxi driver, Mido Marcia, by members of the South African Police Service (SAPS) in Daveyton, Gauteng in February 2013, exposed the brazen abuse of power by some elements within the SAPS. Against this background, it can be asked whether the institutions established in terms of legislation relating to oversight of the police are capable of investigating police misconduct. This article examines whether the recently-established Independent Police Investigative Directorate (IPID) has the potential to be an effective oversight mechanism to ensure accountability – in respect of the SAPS. It examines, in particular, the IPID's mandate to investigate corruption matters within the SAPS, and whether – in its current form and capacity – it is effectively fulfilling its mandate. It is concluded that while much progress has been made since the time of the largely ineffectual Independent Complaints Directorate (ICD), the predecessor of the IPID, there remain significant risks to the efficient, effective and independent execution of the IPID's mandate.

2 BACKGROUND

The maturity of our democracy may be measured by the extent to which our society is effective in managing and keeping a check on institutional authority. Recent events have again turned the public spotlight on the conduct of police officers in the execution of their duties. The public display of violence and brutality against a Mozambican taxi driver, Mido Marcia, by members of SAPS in Daveyton, Gauteng in February 2013, exposed the brazen abuse of power by some elements within the SAPS. Mr Marcia died in police custody after allegedly being assaulted by SAPS officers.[3] The incident was widely condemned by all quarters of society, including the National Police Commissioner, the Premier of Gauteng Province, opposition parties, and civil society.[4] It brought into sharp focus the need for an accountable and humane police service. Moreover, the August 2012 shootings at the Marikana platinum mine compound, which resulted in the death of 34 miners and injury to another 78, also resulted in widespread public condemnation of police conduct. In this latter case, a judicial commission of enquiry into the incident was instituted by President Zuma.[5] This is all against the backdrop of regular reports in the media of the abuse of powers by members of the SAPS, as well as allegations of widespread corruption within this institution. Within this context, it may legitimately be asked whether the oversight institutions established in terms of legislation are capable of executing the task of investigating police misconduct, and pertinently – are they being adequately monitored and evaluated in terms of their performance? In other words: who is watching the watchers?

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[3] Staff Reporter "Taxi driver killed after alleged police brutality" *Mail & Guardian*, 28 February 2013, at http://mg.co.za/article/2013-02-28-taxi-driver-killed-after-alleged-police-brutality (accessed 1 March 2013).

[4] SAPA "Phiyega 'concerned' by police brutality" *News24*, 28 February 2013, at http://www.news24.com/SouthAfrica/News/Phiyega-concerned-by-police-brutality-20130228 (accessed 1 March 2013)..

[5] De Wet P, "Zuma announces inquiry into Marikana shooting" *Mail & Guardian*, 17 August 2012, at http://mg.co.za/article/2012-08-17-police-go-with-bravado-on-marikana (accessed 29 March 2012).

3 BRIEF HISTORY OF POLICE OVERSIGHT IN SOUTH AFRICA

Investigation into police misconduct is not a new phenomenon in South Africa. The South African Police (SAP), the predecessor of the current SAPS, did not have a permanent mechanism to deal with allegations into police misconduct and rather dealt with them on an ad hoc basis.[6] In reviewing the situation in 1991, Haysom states that the SAP dealt with alleged police misconduct by commissioning a special investigative unit to investigate politically motivated violence.[7] Such units were headed by a senior member of the SAP and were considered by many to be ineffective.[8] Perceptions in the community were that the SAP was biased in favour of the Inkatha Freedom Party (IFP) in the political violence involving the African National Congress (ANC).[9] The Goldstone Commission concluded that there were hit squads within the KwaZulu Police force, confirming that these perceptions were well founded.[10]

In response to the increasingly unstable political environment, 26 organisations including political parties, signed the National Peace Accord (Peace Accord) on 14 September 1991.[11] The Peace Accord sought to regulate the relationship between political parties and to defuse the political violence rampant at the time. It sought to address the problems regarding the SAP collusion identified above. The Peace Accord represented the first institutional response to dealing with complaints against the police. It established "a quasi-ombudsman body headed by a police reporting officer (who would be a civilian) appointed by the Minister of Law and Order from a list submitted to him by the two principal lawyers associations representing attorneys and advocates."[12] This development represented the first step towards establishing public confidence in the SAP through oversight.[13]

In line with the Peace Accord, the SAP established the Police Reporting Officer System throughout the country.[14] Police Reporting Officers (PROs) were appointed by the Minister of Law and Order and were empowered to hear complaints and to investigate any incidents which had the effect of damaging relations between the police and the community. The PRO system failed for various reasons, such as, lack of commitment from the police, insufficiency of its powers, and strong resistance from the police to the new system.[15] Advocate Munnik believed that "certain senior officers were

[6] Haysom N, "Policing" (1992) *South African Human Rights Yearbook* 182 at 182.

[7] Haysom (1992) at 182.

[8] Haysom (1992) at 182.

[9] Haysom (1992) at 182.

[10] Palmer R, "Policing" (1996) *South African Human Rights Yearbook* 193 at 193.

[11] Tessendorf H, "The national peace accord in South Africa's political transition: 1991–1994" (1996) 23 (1) *Politikon: South African Journal of Political Studies* 79 at 79.

[12] Haysom (1992) at 193.

[13] Manby B, "The Independent Complaints Directorate: An opportunity wasted?" (1996) 12 *South African Journal on Human Rights* 419 at 419.

[14] De Vos P "Policing" (1994) *South African Human Rights Yearbook* 211 at 211.

[15] De Vos (1994) at 211.

trying to minimise the role of reporting officers who were seen as outsiders meddling in police affairs."[16]

Once negotiations for a political settlement began, it was envisaged that a police complaints mechanism would be a permanent feature of policing in the new South Africa. This notion was cemented by section 222 of the Interim Constitution which stated that:

> There shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner.[17]

Drawing on this provision, Chapter 10 of the South African Police Service Act[18] established the Independent Complaints Directorate (ICD)[19] which would eventually be replaced by the Independent Police Investigative Directorate (IPID).

4 INTERNATIONAL AND FOREIGN EXPERIENCES

This article also draws on the experiences of other jurisdictions with a comprehensive history of police oversight and proven oversight techniques. Firstly, it considers the United Nations Office on Drugs and Crime's (UNODC) perspective on the issue.[20] Secondly, it reviews trends which necessitated the establishment of the Independent Police Complaints Commission (IPCC) in the UK.

The UNODC Handbook suggests that public confidence in the police will be improved through the mechanism of civilian oversight.

> Accountability involves a system of internal and external checks and balances aimed at ensuring that police perform the functions expected of them to a high standard and are held responsible if they fail. It aims to prevent the police from misusing their powers, to prevent political authorities from misusing their control over the police and most importantly, to enhance public confidence.[21]

There are two distinct models of civilian oversight over the police, namely, internal oversight and external oversight. Internal oversight exists where officers are accountable to their superiors in the chain of command. This is complemented by state oversight through the executive, legislative and judicial arms of government. The police should be accountable to the responsible government department. Judicial oversight includes the relationship between the police, prosecutors, magistrates and judges. The

[16] De Vos (1994) at 211.

[17] Interim Constitution, 1993.

[18] Act 68 of 1995.

[19] The shortcomings of the ICD are discussed in various sections of this article.

[20] UNODC "Handbook on Police Accountability, Oversight and Integrity" (2011).

[21] UNODC (2011) at 9.

Legislature also plays a crucial role in the oversight of government departments, which include the police service.[22]

On the other hand, external oversight takes many forms and may be direct or indirect, and includes community policing forums, civilian oversight bodies and the media. Further, structures such as human rights institutions and commissions, ombudsmen and women, police complaints commissions and bodies all fulfil the function of external oversight.[23]

In 2002 the UK passed the Police Reform Act[24] which created the (IPCC).[25] This constituted an attempt to reform the prevailing complaints mechanism in the UK. At the time, the UK public believed that the complaints system lacked independence and transparency, and thus undermined public confidence in the police.[26] This perception stemmed from the practice that complaints had been investigated internally, with an external oversight body supervising the investigation.[27] The public believed that it was unlikely that the police would investigate their colleagues impartially and thoroughly. The Liberty Report describes the situation that prevailed at the time as follows:

> Opinion surveys, high profile cases and civil actions against the police all show that the general public and complainants do not trust a system where the police are allowed to investigate complaints internally, even when there is an oversight body to supervise those investigations.[28]

Thus, the objective of the Reform Act was, inter alia, to restore public confidence in the police complaints structure.[29] This objective resonates strongly with the clamour locally for independent, external oversight of complaints against police.

5 CAN THE IPID PERFORM BETTER THAN THE ICD?

This article examines whether the IPID has the potential to be an effective oversight mechanism to ensure accountability, in respect of the SAPS. It examines, in particular, IPID's mandate to potentially investigate corruption matters within SAPS and whether, in its current form and capacity, it is effectively fulfilling its mandate. The article includes a comparative analysis of the IPID and the Independent Complaints Directorate

[22] UNODC (2011) at 12.

[23] UNODC (2011) at 12.

[24]United Kingdom Police Reform Act, 2002.

[25] S 9 United Kingdom Reform Act, 2002.

[26] Harrison & Cunneen "An independent complaints commission" (2000) *Liberty* at http://www.liberty-human-rights.org.uk/policy/reports/an-independent-police-complaints-commission-april-2000.pdf (accessed 26 May 2013) at vii.

[27] Harrison & Cunneen (2000) at ix.

[28] Harrison & Cunneen (2000) at 8.

[29] Harrison & Cunneen (2000) at 5.

(ICD),[30] the predecessor to the IPID, and draws conclusions about the efficacy of the new agency.

Though the Independent Police Investigative Directorate Act[31] ("IPID Act") is a substantial improvement on the previous dispensation governing the ICD, we argue that there are significant shortcomings in the new legislation which may have a direct impact on the efficacy of this important institution.

A fundamental tenet of the oversight of public institutions is that there must be unequivocal political commitment to ensure their accountability. Thus, any strategy to address police misconduct and corruption must be accompanied by unwavering political will on the part of government – to give effect to such strategy. A preliminary review of the literature[32] on police oversight, reveals that an effective external complaints body, such as the IPID, must, firstly, be given a clear mandate; secondly, be empowered to execute that mandate; and thirdly, be independent and free from undue influence.

Burger *et al* criticised the erstwhile ICD as "a watchdog without teeth."[33] This may have been because the ICD's mandate was not clearly defined. Another factor that possibly contributed to the ICD being viewed as a paper tiger is that it had no compelling legal powers to follow through with action based on its findings. We consider whether this serious defect has been remedied by the new dispensation. Montesh and Dintwe argue, further, that the ICD was fatally crippled, and unable to fulfil its mandate because it was not sufficiently independent from the police structures and the executive arm of government.[34] We evaluate whether this deficiency has been remedied by the new dispensation.

It is suggested that the afore-mentioned three objectives (mandate, enforcement and independence) can be realised only if the political will to do so exists. Recent events provide hopeful signs that such will does in fact exist. The Minister of Justice and Constitutional Development has "committed to fighting corruption at all levels and areas of our society." He has pledged to "deal effectively with corrupt officials whose actions undermine the integrity of the criminal justice system."[35] Furthermore, the National Police Commissioner has pledged her support for and cooperation with the IPID's investigation into Mr Marcia's death – a perhaps expected, but nonetheless, welcome statement. It is crucial that her office respects the independence of IPID, in

[30] Established in terms of s 50(1)(a) (Chapter 10) of the South African Police Service Act 68 of 1995.

[31] Act 1 of 2011.

[32] Manby (1996) at 419.

[33] Burger J & Adonis C "A watchdog without teeth? The Independent Complaints Directorate" (2008) 24 *South African Crime Quarterly* 29 at 29. Another major criticism of the ICD includes its performance, and in particular, whether it has been effective given budgetary and other constraints. For more detailed information, see: ICD "Independent Complaints Directorate Annual Report 2010-2011" (2011).

[34] Montesh M & Dintwe SI "How independent is South Africa's Independent Complaints Directorate?" (2008) *Acta Criminologica* at 163.

[35] Radebe J "Statement issued by Justice Crime Prevention and Security Cluster" 24 February 2013 GCIS, 24 February 2013 at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=360548&sn=Detail&pid=71656 (accessed 1 March 2013)..

order that it is able to discharge its functions. We firstly consider the mandate and powers of the IPID.

6 MANDATE

The types of matters that can be investigated by the IPID are set out in section 28 of the IPID Act. Significantly, it states that the IPID must investigate "corruption matters within the police" that are initiated by the Executive Director or on receipt of a complaint from the public.[36] Section 28(2) also grants the IPID the discretion to investigate systemic corruption involving the police. In addition, the IPID must investigate:

> (a) any deaths in police custody; (b) deaths as a result of police action; (c) any complaint relating to the discharge of an official firearm by any police officer; (d) rape by a police officer, whether the police officer is on or off duty; (e) rape of any person while that person is in police custody; (f) any complaint of torture or assault against a police officer in the execution of his or her duties.[37]

In addition to the various instances of misconduct to be investigated, the inclusion of an explicit mandate to investigate corruption is a novel development, as the ICD's mandate did not include corruption investigations explicitly. This is a welcome development, as it indicates the State's resolve to combat police corruption. The difficulty, however, is that the IPID Act does not define what constitutes a "corruption matter" and how it is distinct from "systemic corruption." Thus, the mandate to investigate corruption is not comprehensively outlined in the IPID Act.

Sayed and Bruce state that a clear and workable definition of corruption is the first step in addressing this social ill.[38] They argue that there are two ways in which the term corruption is used: a formal legalistic usage, and a social colloquial usage. The formal definition, they argue, is unduly restrictive, and does not encompass corruption as understood by the lay public. On the other hand, the social definition seems too broad and too vague. They further argue that the social definition seems to include all police misconduct under the term corruption, and imports notions of morality which are hard to define objectively. Thus it is submitted that the omission of a clear mechanism to define corruption, as used in the IPID Act, could negatively impact on IPID's ability to fulfil its mandate effectively.

The Independent Police Investigative Directorate Regulations 2012 (IPID Regulations)[39] do not offer clarity on what constitutes police corruption for the purposes of the IPID Act. Regulation 5(2) (d) refers to the term, but does not offer a definition. Regulation 3(f), which makes reference to the offence contemplated in sub-regulation (2)(d), does not make it explicit that corruption in the IPID Act is the same as

[36] S 28(1)(g) of the IPID Act.

[37] S 28(1)(a)-(f) of the IPID Act.

[38] Sayed T & Bruce D, "Police corruption: Towards a working definition" (1998) 7(1) *African Security Review* 3 at 3.

[39] Published under GN R98 in GG 35018 of 10 February 2012.

the offences contained in the Prevention and Combating of Corrupt Activities Act (PCCA ACT).[40] This ambiguity is further exacerbated by the fact that legally there are two forms of corruption. In common law, the crime of bribery continues to exist alongside the statutory offence of corruption.[41] Thus, in the absence of a clear definition, the IPID Act in all probability refers either to the common law crime of bribery, or to the offences envisaged in the PCCA Act, or both.

This subtle distinction seems to fall foul of the courts' interpretation of the PCCA Act. In the highly publicised corruption case of the former National Police Commissioner, Mr Jackie Selebi, the Court found that he was guilty of the offence of corrupt activities relating to public officers, in terms of section 4(1) of PCCA Act.[42] It was always common cause that the National Police Commissioner was a public officer and so the PCCA Act applied to that office. Thus, in line with this approach, it is submitted that the IPID should investigate police officials who contravene the provisions of the PCCA Act, even though this is not explicitly provided for in the IPID Act.

The advantage of the IPID utilising the power to investigate corruption matters in terms of the PCCA Act is that this Act contains other specific offences which go beyond the common-law crime of bribery, and correspond with the broader social definition of corruption, as discussed by Sayed and Bruce. These offences include offences relating to tampering with witnesses or evidentiary material[43] and offences regarding any conduct intended to adversely affect any investigation.[44]

Section 34 of the PCCA Act creates a legal duty to report the commission of any offence covered by that Act. This duty applies to a "person who holds a position of authority" who knew or should reasonably have known of such commission. The problem with this provision is that such person must report the commission of an offence to any police official. Thus, where the offence is committed by a member of the SAPS, there is a duty to report the matter to another member of the same institution, heightening the inherent risk of "cover-ups" of police misconduct. There are no additional precautions in the PCCA Act to ensure that there is no interference or partiality when police investigate the corrupt conduct of a colleague. This runs counter to the very rationale for the enactment of the IPID Act – namely that the police cannot and often will not effectively investigate crimes committed by their colleagues. It is thus suggested that the IPID's corruption mandate should correlate with those offences in the PCCA Act, and that the term corruption explicitly encompasses those offences in the PCCA Act. It is also suggested that the PCCA Act should be amended to ensure that the IPID is the "first port of call" when allegations against members of the police are made in terms of the PCCA Act.

A further issue is the distinction between corruption matters and systemic corruption, as contained in the IPID Act. These two concepts are not clarified in the IPID

[40] Act 12 of 2004.

[41] Burchell "Bribery and Corruption" in *Principles of Criminal Law* (2005) at 891.

[42] *S v Selebi* 2012 (1) SA 487 (SCA).

[43] Ss 11 and 18 of PCCA Act.

[44] S 19 of PCCA Act.

Act or the IPID Regulations. Newham and Faull argue that all corruption is *per se* systemic, for it stems from a system's failure within an organisation – to prevent corrupt behaviour.[45] Thus "(a) police organisation itself, characterised by weak management, discipline, professionalism, and command and control"[46] creates a climate where corruption can fester. Berg, on the other hand, argues that the distinction between these two concepts is "a shift in understanding, from individual to organisational deviance."[47] Corruption matters look at corruption at a micro-level, where individuals perpetrate the offences and should be punished accordingly. Systemic corruption operates at a macro-level, where organisational defects and systems' weaknesses create a climate where the individual can commit corruption-related offences. It could be argued that these concepts are two sides of the same coin, and that neither can be neglected if police corruption is to be addressed. If the IPID is only to investigate individual violations, but not the issues underlying the violations, then it is merely treating the symptoms and not the causes of these organisational ills.

Faull then enquires: "if 'systemic corruption' is a by-product of widespread systemic and cultural flaws in a police agency, will the IPID have expertise to identify these systemic and cultural challenges?"[48] The mandate to investigate systemic corruption is discretionary and not obligatory.[49] Thus, where there is a shortage of expertise to deal with the issues of systemic corruption, then the IPID may choose not to investigate. However, as stated above, systemic corruption cannot be ignored. It is submitted that the Civilian Secretariat of Police (Secretariat)[50] may potentially be the institution best positioned to deal with systemic corruption.[51]

The Secretariat is an independent body charged with advising the Minister of Police on all relevant policy matters concerning the police.[52] The Secretariat has a mandate to, inter alia, "monitor the performance of the police service and regularly assess the extent to which the police service has adequate policies and effective systems and to recommend corrective measures."[53] This provision, if interpreted widely, gives the Secretariat a mandate which overlaps with the anti-corruption mandates of the IPID.

Chapter 4 of the IPID Act envisages a strong partnership between the IPID and the Secretariat through the establishment of the Consultative Forum.[54] The function of the Forum is to facilitate closer co-operation between the Secretary and the Executive

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[45] Newham G & Faull A, "Workshop Report: Understanding the IPID mandate for addressing police corruption" (2010) at http://www.iss.co.za/pgcontent.php?UID=30731 (accessed 24 July 2012) at 3.

[46] Newham & Faull "Workshop Report" (2010) at 3.

[47] Newham & Faull "Workshop Report" (2010) 5.

[48] Newham & Faull "Workshop Report" (2010) at 4.

[49] S 28(2) of the IPID Act states that IPID may investigate systemic corruption.

[50] Instituted in terms of the Civilian Secretariat for Police Services Act 2 of 2011 (Secretariat Act).

[51] See discussion below.

[52] Faull A, "Oversight agencies in South Africa and the Challenge of Police Corruption" (2011) *Institute for Security Studies Paper 227* at http://www.issafrica.org/publications/papers/oversight-agencies-in-south-africa-and-the-challenge-of-police-corruption (accessed 27 May 2013) at 6.

[53] S 6 (1) (a) of the Secretariat Act.

[54] S 16 of the IPID Act.

Director, to discuss trends within the police service, to make recommendations, and to monitor the implementation of those recommendations.[55] The Act gives both the Secretary and the Executive Directorate the freedom to determine the details of the meetings of the Forum.[56]

It is a fair assumption that the Forum was designed to address systemic corruption. Through the exercise of its discretion to investigate police corruption, the IPID could potentially establish a pattern of corruption and identify possible gaps in command and control structures. It could then – through the Consultative Forum – communicate these defects to the Secretariat, which would make policy recommendations where the defects stem from policy deficiencies. Thus, it is suggested that systemic corruption investigations are primarily preventative, and should of necessity fall within the mandate of the Secretariat, whereas corruption-matter investigations are primarily punitive and should fall within the competence of the IPID. However, this is purely speculative, as the IPID Act does not expressly provide for such a role. The IPID's powers to execute this mandate are now considered.

7 POWERS

The erstwhile ICD was referred to as a "toothless watchdog" due to the weak powers it had – firstly to conduct an investigation effectively, and secondly to enforce its recommendations. Burger and Adonis found that the level of police compliance with recommendations relating to misconduct had "the highest frequency of non-compliance."[57] They conclude, after an evaluation of the evidence, that the ICD was for the most part ignored by the police, with the lament that "(t)his is an untenable situation and makes a farce of the oversight function of the ICD."[58] They attribute this situation firstly to the wording of the ICD's enabling legislation, and secondly to the lack of an obligation on the police to report to the ICD on progress in the implementation of the recommendations.[59]

The IPID Act has sought to remedy these shortcomings. Firstly, investigators have been given the powers to investigate corruption matters, which powers are bestowed upon a peace officer or a police official in accordance with the Criminal Procedure Act.[60] These powers include those relating to the investigation of offences, the ascertainment of bodily features of an accused person, the entry and search of premises, the seizure and disposal of articles, arrests, the execution of warrants, and the attendance of an accused person in court.[61] In addition to these powers, the IPID Act

[55] S 17 of the IPID Act.

[56] S 18 of the IPID Act.

[57] Burger & Adonis (2008) at 31.

[58] Burger & Adonis (2008) at 31.

[59] Burger & Adonis (2008) at 32.

[60] Act 51 of 1977.

[61] Section 24 (2) (a)-(g) of the IPID Act.

confers additional powers to investigators in terms of section 24 (3) (a) and (b).[62] Secondly, there is an obligation on members of SAPS to immediately notify the Directorate of any corruption matter in the police. They must report to the IPID within 24 hours of the member becoming aware of the commission of the offences identified under section 28(1)(a) to (f).[63] They are further obliged to submit a written report on the incident to the IPID within 24 hours after the initial report.[64] Thirdly, the police are required to:

> Provide their full cooperation to the Directorate, including but not limited to- *(a)* the arrangement of an identification parade within 48 hours of the request made by the Directorate; *(b)* the availability of members for the taking of an affidavit or an affirmed declaration or to give evidence or produce any document in that member's possession or under his or her control which has a bearing on the matter being investigated; and *(c)* any other information or documentation required for investigation purposes.[65]

These obligations are welcome initiatives and go some way in addressing the challenges highlighted by Burger and Adonis. The IPID Act provides for sanctions when these obligations are breached by members of the police, and contains a series of offences designed to protect the work of the IPID. Section 33 states that:

> Any person or private entity, who interferes, hinders or obstructs the Executive Director or a member of the Directorate in the exercise or performance of his or her powers or functions, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years; … any police officer who fails to comply with section 29 is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years … Any person, who pretends to be an investigator in terms of this Act, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.[66]

The legislature has significantly bolstered the IPID through these enactments and it is clear that the IPID has the potential to shake off the "toothless watchdog" tag. It is submitted, however, that these obligations and corresponding offences assist the IPID with conducting investigations, but do not address the implementation of recommendations.

Burger and Adonis state that once the erstwhile ICD had recommended that the SAPS take disciplinary action against the offending member, such action was not necessarily taken, and the reasons for not doing so were not communicated to the ICD. This was viewed as the biggest stumbling block to the work of the ICD. Section 30 of the

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[62] S 24(3) (a) and (b) of the IPID Act states that "An investigator may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in that person's possession or under his or her control which has a bearing on the matter being investigated, and may question such person thereon. An investigator may further request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated."

[63] S 29(1)(a) of the IPID Act.

[64] S 29(1)(b) of the IPID Act.

[65] S 29(2) of the IPID Act.

[66] Ss 33 (1), (3) and (5) of the IPID Act.

IPID Act deals with the procedure to be followed when the IPID makes disciplinary recommendations, and requires that:

> The National Commissioner or the appropriate Provincial Commissioner to whom recommendations regarding disciplinary matters were referred must, *(a)* within 30 days of receipt of the recommendation, initiate disciplinary proceedings in terms of the recommendations made by the IPID and inform the Minister of Police in writing, and provide a copy to the Executive Director and the Secretary; (b) quarterly submit a written report to the Minister on the progress regarding disciplinary matters made in terms of paragraph *(a)* and provide a copy to the Executive Director and the Secretary; and (c) immediately on finalisation of any disciplinary matter referred to it by the IPID, to inform the Minister in writing of the outcome thereof and provide a copy thereof to the Executive Director and the Secretary.

Section 30 of the IPID Act casts the IPID as a passive bystander in the disciplinary process, and there are no mechanisms to ensure that the recommendations are implemented. It can be argued that once the IPID elects to refer to the Commissioner, it relinquishes control of the process. There should, however, be a mechanism that allows the IPID to reinstate the matter if it believes that the recommendations have not been handled properly. It appears that too much power is placed in the hands of the National Commissioner and the Minister, which has implications for the effectiveness of IPID to fulfil its mandate. It is suggested that, in addition to the quarterly reports to the Minister, some mechanism should be devised, such as reporting to the Parliamentary Portfolio Committee on Police, so that matters of serious misconduct do not disappear behind a veil of official secrecy. This would ensure some form of independent oversight of the police in the implementation of disciplinary recommendations, and would increase public scrutiny of the Commissioner's response. In such a context, an independent IPID will have a crucial role in ensuring that issues of concern to the public, however embarrassing to officials, see the light of day. We next consider the independence of the IPID.

8 INDEPENDENCE OF 'OVERSIGHT' INSTITUTIONS

Since the Constitutional Court judgment in the case of *Glenister v President of the Republic of South Africa*,[67] the imperative for anti-corruption bodies to be effectively independent has taken centre stage. The question that thus arises is whether the IPID is sufficiently independent, as envisaged by this judgment.

The *Glenister* judgment ruled on whether the Directorate of Priority Crime Investigation (DPCI) was effectively independent to combat corruption in general. The object of this article is to assess to what extent the IPID – as a specialist structure with a discretionary anti-corruption mandate – is effective. Though not directly applicable to the IPID, the *Glenister* judgment identifies crucial parameters which are relevant to the IPID, and are highly persuasive. It is submitted that the requirements set out in the judgment are relevant not merely to DPCI, but also to the IPID. The application of its principles may be extrapolated to any oversight institution. It is further submitted that

[67] 2011 (3) SA 347 (CC).

the IPID need only be independent of police structures to prevent any undue influence from the member of the police service, police management or the political leadership of the police.

The *Glenister* judgment settled the issue regarding an obligation on the state to establish an independent corruption-fighting institution. Furthermore, the court held that this obligation emanates from the Constitution itself, read as a whole.[68] The Constitutional Court firstly defined the meaning of independence. In the minority judgment, delivered by Ngcobo CJ, the court held that:

> The independence of anti-corruption agencies is a fundamental requirement for a proper and effective exercise of (their) function. This is because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office. Hence the need to shield anti-corruption units from undue influence … Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency.[69]

Extending this reasoning to the IPID, for it to be truly independent, it must be free from undue influence. The potential for undue influence is expected to emanate from the membership and political leadership of the police service.

The Constitutional Court proceeded to define the requirements of an anti-corruption body that is independent. Those requirements can be stated as "two basic interrelated requirements"[70] – namely, structural and operational independence. De Vos states that structural independence

> [R]elates to the appointment of its [the anti-corruption body's] members, the conditions under which its members operate and its funding, which must all be regulated in such a manner as to ensure it is independent in fact and is also perceived to be independent by the public.[71]

He proceeds to define operational independence as the "body's relationship with the legislature and executive, oversight over the body, and accountability to the two political branches of government."[72] The Constitutional Court did not impose a structure or form which would definitively meet these requirements. The prerogative remains with the legislature to determine how these two broad requirements can be met. The court did, however, state that any measure taken must be reasonable.[73]

The test used to assess the independence of an anti-corruption body, is not only the actual mechanisms put in place, but also public perceptions of the independence of

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[68] *Glenister* para 175.

[69] *Glenister* para 118.

[70] De Vos P, "The South African Police Amendment Bill: Possible compliance with *Glenister v President of the Republic of South Africa*' (2012) *SSRN* at http://ssrn.com/absract=2050861 (accessed 27 May 2013) at 4.

[71] De Vos (2012) at 5.

[72] De Vos (2012) at 5-6.

[73] De Vos (2012) at 7.

the body.[74] De Vos distils the test as follows: "(w)hether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features…' He concludes (echoing the court) that it applied this additional test because "public confidence is a component of, or is constitutive of, its independence."

8.1 Independence of the ICD

As early as 1996, various authors identified the need for bodies investigating complaints against the police to be independent in general and, more specifically, independent of the police command structure and hierarchy.[75] Manby raised several criticisms directed at the independence of the erstwhile ICD. She says that the ICD's enabling legislation did not ensure the independence of the ICD at an operational level, since the ICD's work was subject to the discretion of the Minister of Police (then known as the Minister of Safety and Security). This meant that the ICD was vulnerable to the whims of the Minister, and was thus not fully independent.[76] Manby further submits that other defects existed in ICD. Firstly, she states that the appointment of the ICD's Executive Director was made by the Minister, and the requirements in the legislation were not comprehensive enough. This gave the Minister too much power in making appointments. Furthermore, the Executive Director could also be removed at the discretion of the Minister – effectively offering the appointee no security of tenure. A further critique was that the budget of the ICD was allocated to it by the Minister. Thus, the *modus operandi* of the ICD in the stated respects, would have fallen foul of the standards identified in *Glenister.* The scenario was also problematic because it posed a conflict of interest where the Minister in charge of the SAPS would play a determining role in the structural and operational make-up of a police oversight and complaints mechanism. Montesh *et al* echo these sentiments: "The lack of independence creates a serious challenge with regards to the overall functioning of the ICD. An important institution like the ICD should not receive its budget from the same minister who is in charge of an agency that is supposed to be investigated by the ICD."[77]

Another issue that impacted on the independence of the ICD, is its lack of a constitutional mandate. One criticism was that the ICD's independence was not constitutionally entrenched.[78] Section 222 of the Interim Constitution[79] made provision for the establishment of "an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner". This provision placed a direct obligation on the State to create an independent police oversight mechanism. However, the final Constitution does not have a

[74] De Vos (2012) at 7.

[75] Manby (1996) at 422.

[76] Manby (1996) at 422.

[77] Montesh & Dintwe (2008) at 163.

[78] Montesh & Dintwe (2008) at 163.

[79] Constitution of the Republic of South Africa, 1993.

corresponding section, but rather makes an indirect reference to such an oversight body. Was the omission an oversight – or a function of political expediency? Section 206(6) of the Final Constitution states 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.[80]

Montesh *et al* conclude that this is wholly inadequate, and propose a constitutional amendment.[81] The benefit of such an amendment would be to entrench the oversight body in the Constitution – giving it constitutional protection. Reeves supports this proposition, and states that where the institution of an investigative body is not entrenched in the Constitution, it runs the risk of being disbanded.[82] However, it is submitted that there is no need for a constitutional amendment, since the *Glenister* judgment has settled the issue regarding the need for an independent anti-corruption body. However, the decision to form or disband law-enforcement agencies remains the prerogative of the legislature and the executive – and thus the risk identified cannot be eliminated. Nonetheless, the spirit of the *Glenister* judgment suggests that it is incumbent on the state to ensure the continued existence of an independent anti-corruption body, in whatever form.

8.2 Independence of the IPID

The legislature sought to remedy some defects inherent in the erstwhile ICD, with the promulgation of the IPID Act. Section 4 for the Act lays the foundation for interpreting this legislation. It requires that the "Directorate functions independently from the South African Police Service."[83] It further states that each organ of the state must assist the Directorate to maintain its impartiality, and to perform its functions effectively.[84] The minority judgment in *Glenister* was of the view[85] that where a statute regulating an anti-corruption body includes a section dealing with its independence, that section must inform the "proper implementation and application" of that statute.[86] The majority judgment, delivered by Moseneke DCJ and Cameron J, had the following to say regarding this interpretive assumption:

> The new provisions contain an interpretive injunction: in their application 'the need to ensure' that the DPCI 'has the necessary independence to perform its functions' must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in

[80] Constitution of the Republic of South Africa, 1996.

[81] Montesh & Dintwe (2008) at 173.

[82] Reeves C, "After *Glenister*: The case for a new dedicated agency" (2012) 39 *South African Crime Quarterly* 23 at 24.

[83] S 4 (1) of the IPID Act.

[84] S 4(2).

[85] Regarding section 17B of Chapter 6A of the South African Police Services Act 68 of 1995 (SAPS Act), which dealt with the independence of DPCI.

[86] See *Glenister* para 133.

> general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification - power to determine policy guidelines and to oversee the functioning of the DPCI.[87]

Thus the mere fact that section 4 is included in the IPID Act, is not the end of the enquiry. The actual measures of independence must be assessed. Section 4 runs the risk of creating "smoke and mirrors" – distorting the true nature of the IPID's independence or lack thereof. The two requirements identified above will be applied to the IPID.

8.2.1 *Structural independence of the IPID*

Section 6 of the IPID Act deals with the appointment of the Executive Director of the IPID. It states that the Minister of Police must nominate a suitably-qualified person for appointment to the Office of the Executive Director, in accordance with a procedure to be determined by the Minister.[88] This section is problematic, as it does not set the parameters for such an appointment, the requirements for the position, or some guidance as to the calibre of the person required to assume this important responsibility. It leaves too much power in the hands of the Minister, who as the political head of the police service, should not have an unfettered discretion to appoint an Executive Director and set the guidelines for such an appointment. There is a risk that the Minister may appoint an Executive Director who is not impartial, nor willing to investigate police corruption vigorously. Furthermore, there is no requirement that the appointee be a fit and proper person. It is suggested that section 6 be amended to limit the discretion enjoyed by the Minister, and also to establish criteria for the qualities of the appointee.

Fortunately, however, the section has a counter measure. It states that the relevant Parliamentary Committee must either confirm or reject an appointment. Thus, the Minister does not have the final say as to the appointment of the Executive Director.

The Executive Director, once appointed, may serve for a term of five years, which is renewable for one additional term only.[89] The majority judgment in *Glenister* was of the view that a renewable term of office posed a risk to independence. It held that "(a) renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures."[90] It is also in line with good practice in governance, that the Executive Director should be appointed for a non-renewable term. However, there ought to be some flexibility in this regard – for example, where the Executive Director is engaged in a crucial process such as restructuring, and may require more time to complete the process.

The Executive Director appears to enjoy considerable security of tenure. There are only three reasons that warrant his or her removal from office, namely misconduct,

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[87] See *Glenister* para 237.

[88] S 6 (1) of the IPID Act.

[89] S 6(3)(b) of the IPID Act).

[90] *Glenister* para 223.

ill health, or inability to perform the duties of the office effectively.[91] This is a considerable improvement on the corresponding position with regard to the erstwhile ICD, and is a welcome development.

The IPID Act appears to be silent on the remuneration of the Executive Director. This is problematic. The Constitutional Court, in the majority judgment, held that "the absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure."[92] Thus, this is a crucial omission, and should be remedied. The regulations do not assist in this regard either, as there is no mention of the Executive Director's remuneration, or even a mechanism to ensure that the remuneration of the Executive Director is not tampered with during his or her tenure. It is suggested that the remuneration of the Executive Director be comparable to that of the SAPS National Commissioner – to reflect the seniority and importance of this office.

Regarding the appointment of provincial heads, the Executive Director has the requisite authority. Such appointments must be made in accordance with the laws governing the public service.[93] The IPID Act is, however, silent regarding the criteria for terminating the service of provincial heads. Similarly, the IPID Act is silent regarding the remuneration of the provincial heads. Thus, the discussion above applies equally with regard to the provincial heads. The second requirement identified in *Glenister*, is that of operational independence, which is now discussed.

8.2.2 *Operational independence of the IPID*

The relationship between the Directorate and the organs of State is regulated by, *inter alia*, section 4 of the IPID Act. It states, as mentioned above, that each organ of State must assist the Directorate to maintain its impartiality and to perform its functions effectively.[94] Thus, the legislature, executive and the judiciary are obligated to enable the IPID's independence. The IPID Act further states that:

> Any person… who interferes, hinders or obstructs the Executive Director or a member of the Directorate in the exercise or performance of his or her powers or functions is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.[95]

This provision is intended to ensure the operational independence of the IPID from undue influence, and is a welcome development.

A potential risk to the operational independence of the IPID may be posed by other law enforcement agencies which are also mandated to investigate police misconduct.[96] Since South Africa has a proliferation of anti-corruption bodies, the

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[91] Ss 6(6)(a), (b) and (c) of the IPID Act.

[92] *Glenister* para 227.

[93] S 20(1) of the IPID Act.

[94] S 4(2) of the IPID Act.

[95] S 33(1) of the IPID Act.

[96] These agencies include SAPS itself (particularly the Directorate of Priority Crimes), The Public Protector, The National Prosecution Authority (particularly the Asset Forfeiture Unit), The Special

question raised is to what extent is there an overlap of mandate between the IPID and other bodies, and what effect such an overlap could have on the operational independence of the IPID. In relation to this issue, the Organisation for Economic Co-operation and Development (OECD) states that:

> The main challenge of institutions mandated to fight corruption through law enforcement is to specify their substantive jurisdiction (offences falling under their competence), to avoid the conflict of jurisdiction with other law enforcement agencies and to ensure efficient co-operation and exchange of information.[97]

Furthermore, Reeves believes that "an anti-corruption entity's relationship with other institutions will largely depend upon its mandate." He proceeds to state that "the enabling legislation must specify the entity's substantive jurisdiction to avoid a conflict of jurisdiction and the duplication of functions…' [98]

As indicated, the IPID Act requires organs of the State – which include law enforcement agencies – to aid the IPID in the fulfilment of its mandate. The relationship between the SAPS and the IPID – focusing particularly on DPCI – is now considered.

After the dissolution of the Directorate of Specialised Operations (DSO), the DPCI was established to replace the specialist unit. In terms of section 17D of the SAPS Act, DPCI is mandated to prevent, combat and investigate any offences of national priority and any other offence or category of offences referred to it by the National Commissioner of Police. However, what constitutes a national priority offence is determined by policy guidelines issued by a ministerial committee.[99] A national priority offence is defined as "organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation."[100]

According to Colonel Lebakeng, the DPCI has a specialist unit named the Anti-Corruption Unit (ACU), which is mandated to investigate, prevent and combat corruption within and outside SAPS. This includes the power to investigate corruption claims against DPCI members, as well as against any SAPS member holding the rank of colonel or above. The ACU reports directly to the Head of the DPCI.[101] The ACU is not a structure mandated by the SAPS Act. This situation is problematic, as there is a clear overlap between the work of the DPCI and that of the IPID, and thus the creation of the ACU, having concurrent jurisdiction with the IPID, could well be interpreted and has the potential to be used as a means to keep investigations "in house", and to thus circumvent the IPID entirely. On a more favourable interpretation, the DPCI may be viewed as an internal measure to combat police corruption, whereas the IPID is an external measure. This relationship is not problematic in itself, unless it has the effect of

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Investigative Unit, South African Revenue Services (SARS), and civil-society formations such as the Congress of South African Trade Unions' Corruption Watch initiative.

[97] OECD "Specialised Anti-Corruption Institutions: Review of the Models" (2008) at 21.

[98] Reeves (2012) at 25.

[99] S 17D of the SAPS Act.

[100] S 17A of the SAPS Act.

[101] Newham & Faull (2010) at 8.

excluding the jurisdiction of the IPID. Thus, the ACU ought not to be used to exclude the IPID from fulfilling it legislative mandate. It is submitted that the role of the ACU be clarified to minimise the potential risk highlighted above. It is further submitted that the DPCI and the IPID arrive at an understanding as to the scope of the respective institutions' mandates.

The legislature envisaged a multi-disciplinary approach to the investigation of national priority crimes.[102] The SAPS Act obliges government departments and institutions to assist the DPCI, when required to do so.[103] It is envisaged that the National Commissioner may require personnel to be seconded from other government institutions, who must assist the DPCI to execute its mandate.[104] It appears that the list of relevant government institutions is not a closed one, and could include investigators from the IPID. Such an integration of IPID personnel could have implications for the independence of IPID, as elaborated below. By virtue of the DPCI falling within the SAPS, its members may also be investigated by the IPID. If this is the case, there may be a conflict of interest. This potential conflict is evidenced by a recent complaint of assault laid against the Head of the DPCI in Gauteng Province.[105] The IPID was then charged with investigating the complaint against the provincial head. If the DPCI has a close relationship with the IPID, the latter may be partial in its investigations of the DPCI and its members. It is suggested that the IPID should maintain an "arm's length" distance from the DPCI.

Notwithstanding this complication, the collaboration between the DPCI and the IPID offers an opportunity for mutual assistance. The recent "Cato-Manor hit squad" case demonstrates this. The IPID and the DPCI mounted a joint operation where 20 members of the Durban Organised Crime Unit were arrested for alleged extra-judicial killings.[106] While the case is still in the early stages, the development demonstrates that different corruption-fighting bodies can complement each other, in order to achieve positive results. However, it is suggested that in joint operations there must be a clear distinction between the areas of competency of each agency. To achieve this objective, such agencies should maintain a degree of independence from each other, collaborating on a case-by-case basis only.

More problematic though, is the relationship between the Minister of Police and the IPID, regarding the operations of the latter. Section 34 deals with the regulations that accompany the IPID Act. Subsection 1 states that the Minister may make regulations regarding a number of matters, after consultation with the Executive Directorate. It is accepted that the Minister, in general terms, is best suited to make such

[102] S 17F of the SAPS Act.

[103] S 17F (1) of the SAPS Act.

[104] Ss 17F (2) and (3) of the SAPS Act.

[105] Lewis "Parliament confirms Hawks complaint" SABC, 16 July 2012 at http://www.sabc.co.za/news/a/c36086004bfe2170be6bffa583a5af00/Parliament-confirms-Hawks-complaint-20121607 (accessed 5 August 2012).

[106] Harper "Cato Manor cops spend night behind bars" 20 June 2012 at http://m.news24.com/citypress/SouthAfrica/News/Cato-Manor-cops-spend-night-behind-bars-20120620 (accessed 27 May 2013).

regulations. However, it is suggested that this power should be limited to those regulations that deal with purely procedural issues, and do not affect the operations of the IPID. In terms of subsection 2, parliament has a right to scrutinise the regulations the Minister intends to promulgate. On a broad interpretation, "scrutinise" implies some level of influence as to the final make-up of regulations to be promulgated. However, it would be desirable if the role of the legislature in this process were set out more clearly for, on a narrow interpretation, it may have no right to reject the regulations if it does not agree with them. This severely curtails any potential checks on the Minister's power to promulgate regulations.

The majority judgment in *Glenister* had the following to say regarding the potential conflict between political oversight on the one hand, and undue political interference, on the other:

> We accept that financial and political accountability of the executive and administrative functions requires ultimate oversight by the executive. But power given to senior political executives to determine policy guidelines and to oversee the functioning of the DPCI[107] goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.[108]

For the purposes of this discussion, this dictum brings the conflict between legitimate political oversight and undue political involvement into sharp relief. Though the risk of political involvement in the DPCI is much greater than in the IPID, it remains a potential risk to the work of the IPID.

As stated above, a distinction needs to be made between regulations of a purely procedural/administrative nature, and those that deal with operational issues. Section 34(1) (b)-(f) of the IPID Act[109] deals with the procedure to be followed by the IPID when performing its core functions. There are no checks and balances on the Minister's discretion in promulgating these operationally-significant regulations. It is submitted that, at the very least, subsection 2 should be amended to expressly state what the legislature's role is in the process. It is further submitted that where a regulation deals with an operational issue, a different promulgation procedure ought to be followed, which would limit the role of the Minister in determining the IPID's operational

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[107] The Constitutional Court was here assessing the role and function of the Ministerial Committee in the functions of DPCI. In essence, Ministerial Committees – through policy guidelines – could determine which crimes were priority crimes, and the manner in which these crimes were to be investigated. This excerpt highlights the delicate balance that must be struck between political oversight and political micro-managing of corruption investigations.

[108] *Glenister* para 236.

[109] S 34 (1) - The Minister may, after consultation with the Executive Director, make regulations regarding

(b) the procedure to be followed when investigating matters referred to in section 28 (1) *(a)* to *(h)*;

(c) the procedure to be followed when reporting on cases dealt with under this Act;

(d) the procedure to be followed for referring, receiving, registering, processing and disposing of complaints;

(e) the procedure to be followed when investigating criminal matters;

(f) the procedure to be followed for initiating special investigations.

guidelines. Ultimately, it would be beneficial for the IPID to "maintain an arms-length relationship" with the Minister of Police.[110] It would also be desirable if the IPID was, instead of being a part of the Ministry of Police, housed in another ministry, such as Justice and Constitutional Development – as is the case with the Public Protector. Such a change would do much to alter the public's perceptions regarding the independence of IPID.

Recent executive initiatives have sought to harmonise the State's response to corrupt activity. The government has realised that there is a need to coordinate anti-corruption efforts. President Jacob Zuma has stated that there are several anti-corruption structures in government. This results in overlapping mandates and duplication. There is therefore a need to ensure that all anti-corruption structures are coordinated by the Anti-Corruption Task Team (ACTT), created by the executive.[111] The ACTT is a subcommittee of the Justice, Crime-Prevention and Security (JCPS) cluster of cabinet, and was formed to coordinate the work of anti-corruption institutions. The Minister of Justice and Constitutional Development stated that the ACTT is viewed by the JCPS as "the coordinated multidisciplinary capacity required to achieve the target set…'[112] The task team consists of the National Treasury, the Department of Public Service and Administration, the Special Investigative Unit, and the DPCI.

The ACTT needs to guard against becoming a mechanism to centralise anti-corruption efforts, with the executive micro-managing the work of the various agencies involved. This could constitute the death knell for the independence and efficacy of the various investigative agencies. The ACTT should rather provide the various anti-corruption bodies with a forum to discuss strategy and to clearly demarcate jurisdictions for their respective responsibilities, and offer mechanisms to deal with issues of overlap. If the ACTT can play this role, it is submitted that the IPID should be included in the ACTT – provided independence is unequivocally protected.

9 CONCLUSION

One of the founding values of our constitutional democracy is accountable government. In upholding this value, the state must create effective and efficient mechanisms to ensure government accountability. This obligation is particularly relevant where State organs exercise far-reaching powers and which may potentially abuse such powers. This principle may be secured only if there is the requisite political will to maintain a check on State power. Although the IPID seeks to play a meaningful role in ensuring the accountability of the police, it risks failure if the political will to support this important institution is lacking. The enactment of the IPID Act goes some way to demonstrate that such a will exists. The following recommendations are offered in the hope that

[110] A similar approach was submitted by Vawda "Ensuring access through the Medicines and Related Substances Amendment Act 72 of 2008 – Another lost opportunity" (2009) 126 4 South African Law Journal 667 at 672.

[111] Zuma "Presidency Budget Vote Speech" (30 May 2012).

[112] Radebe "Statement" (24 February 2013).

legislators may further refine the IPID Act, in order to secure the oversight and accountability of the SAPS:

1. The IPID should investigate police officials who contravene the provisions of the PCCA Act, even though this is not explicitly provided for in the Act.
2. The IPID's corruption mandate should correlate with the corresponding offences in the PCCA Act, and the term "corruption" should be interpreted to incorporate those offences in the PCCA Act. Furthermore, the IPID Act should be amended to ensure that any corruption reported to the SAPS must be referred to the IPID.
3. The Secretariat 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. Issues regarding the capacity of the Secretariat to undertake this significant challenge will have to be addressed.
4. As the obligations and corresponding offences are currently couched, they only assist the IPID with completing investigations, and do not address the implementation of recommendations. Thus, the hand of the IPID needs to be strengthened to enable it to pursue the outcomes of its investigations to their logical end.
5. Section 6 should be amended to limit the discretion enjoyed by the Minister, and to establish criteria for the qualities required of an appointee. Furthermore, the Executive Director should be appointed for a non-renewable term, with some flexibility to extend the tenure in exceptional circumstances.
6. The power of the Minister to promulgate regulations should be limited to those regulations that deal with purely procedural issues, and not affecting the operations of the IPID.
7. The role of the legislature in this process ought to be clarified, to enable it to reject the regulations if it finds them contrary to acceptable standards of good governance. This would be a welcome check on potentially unfettered ministerial power. At a minimum, section 34(2) should be amended to expressly state what the legislature's role is, in the process. Where a regulation deals with an operational issue, a different promulgation procedure ought to be followed, which would limit the role of the Minister in determining the IPID's operational guidelines.
8. 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.

As elaborated in the discussion above, our jurisprudence provides useful parameters to ensure that the investigative body overseeing police misconduct is efficient, effective and acts independently of any undue influence. However, as the legal and institutional framework currently stands, the risk that these core values may be undermined is real. Oversight is an important function of governmental accountability. The public deserves to be satisfied, both that the watchers of our safety and security are

being watched, and that oversight organs are appropriately empowered to execute their mandate.

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