
SUMMARY ANALYSIS OF THE INDEPENDENT COMPLAINTS COMMISSION BILL, 2020



Introduction

This analysis has been compiled by Zimbabwe Lawyers for Human Rights.

On 03 November 2020 Cabinet approved the formulation of the Zimbabwe Independent Complaints Commission Bill H.B. 5, 2020 that would operationalise section 210 of the Constitution of Zimbabwe which provides that “An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct.”

The Bill will, therefore, establish an independent commission that will allow complaints of misconduct from members of the public against members of the security services to be investigated and provide remedies for such misconduct. The Bill also makes provision for the functions, composition and obligations of the Commission.

The Bill was published in an Extraordinary Government Gazette on 24 November 2020.

The table below considers potentially unconstitutional provisions. The analysis assesses if the proposed amendments are indeed reasonably justifiable in a democratic society or undermine the objectives that are set out in the Constitution of Zimbabwe, 2013.

“An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct”

Clause in Bill (Section in Constitution)	Summary of Provisions	Comment
Clause 6	<p>This clause provides for the composition of the Commission, made up of five members. The Chairperson is a person eligible for appointment as a High Court Judge, a sitting Judge or a former judge appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders of Parliament.</p> <p>The other four members are appointed by the President from a list of not fewer than seven nominees submitted by the Committee on Standing Rules and Orders of Parliament. Of these four, one must be a legal practitioner, one must be a medical practitioner, one must be a psychologist, and one must have experience in security services.</p> <p>The five members must have at least seven years' practical experience in their fields. The members will serve the Commission on a full-time basis.</p> <p>Section 320 of the Constitution and Parts III, VII and sections 34 and 37 of the Public Entities Corporate Governance Act [Chapter 10:31] apply concerning the conditions of office of members of the Commission.</p>	<p>This provision is open to abuse. In the appointment of the Chairperson of the Commission, the President is given broad powers to freely appoint the Chairperson after and not in consultation with the Judicial Service Commission (JSC). The implication is that the President is not bound to follow the advice of the JSC and may appoint whoever he/she desires without scrutiny. Whether the President consults or not is hidden in obscurity.</p> <p>There is also no clarity on why only four members of the Commission are appointed from a list of nominees submitted by the Committee on Standing Rules and Orders of Parliament to the exclusion of the Chairperson of the Commission. To ensure the Independence envisaged by section 210 of the Constitution, the appointment process for the Chairperson should be the same as for the other four members of the commission. It also enables parliament to exercise its oversight role over the independent mechanism.</p> <p>To enhance participatory and transparent democracy, it is recommended that the Parliamentary Committee on Standing Rules and Orders be required to advertise the positions of the Commissioners, including the Chairperson. The Committee should also invite the public to make nominations and conduct public interviews. These safeguards will ensure that the appointment process of the Commissioners is transparent and subject to public scrutiny. This will be necessary in order to build public confidence in the Commission.</p>
Clause 9	<p>Clause 9 provides for the appointment of the Executive Secretary of the Commission and other members of the Commission who will be part of the public service and not the Civil Service. The following important powers are given to the Executive Secretary:</p> <ul style="list-style-type: none"> (a) Responsible for carrying out the decisions of the Commission and the executive day-to-day administration and management of the affairs, staff and property of the Commission (b) The custodian of the Commission's records; (c) Must attend all meetings of the Commission, but has no vote on any matter before the Commission; and 	<p>This provision undermines the independence of the Independent Complaints Mechanism by placing the appointment of the Commission's Executive Secretary in the hands of the President, a member of the executive. This is a violation of the doctrine of the separation of powers.</p> <p>As a presidential appointee, the Executive Secretary is susceptible to undue influence, thereby threatening the functioning of the Commission. Since this is an executive appointment, solely made by the President there is no guarantee that the appointment will be based on need, or motivated by the experience and expertise of the person to be appointed. This provision should be revised because it violates section 210 of the Constitution to the extent that it fails to guarantee the independence of the independent complaints mechanism.</p>

Clause in Bill (Section in Constitution)	Summary of Provisions	Comment
	<p>Act as may be assigned to him or her by the Commission.</p> <p>(d) Must perform any other functions in connection with this</p> <p>The Executive Secretary is appointed for a five-year term, renewable for one further such term if he or she complies with his or her performance contract</p> <p>The Executive Secretary and the other staff are appointed subject to Part IV of the Public Entities Corporate Governance Act. In terms of this Act, the President approves the appointment of the Executive Secretary.</p>	
Clause 13	<p>This clause provides for the submission of complaints to the Commission by members of the public. A complaint must be in the prescribed form although the Commission is not strict on the formalities. The Commission may not refuse to investigate a matter solely because of failure to comply with the prescribed requirements.</p> <p>This provision sets a time limit of which complaints must be submitted to the Commission. The timeframe is three years from the date on which the cause of action arose.</p> <p>This clause reserves the right to make a written complaint for investigation to only a person who is aggrieved by any act of misconduct by a member of a security service. This provision only makes an exception in the cases where the complainant has died or is unable to make a complaint themselves. When that is the case, the complaint may be made by a personal representative or a member of family of the complainant or such other person as the Commission considers suitable to represent the complainant.</p>	<p>This provision is problematic. Firstly, it fails to widen the scope of complainants by limiting the complaints to direct victims of conduct complained of. It fails to consider several categories of complainants who could submit complaints for investigation. This clause does not take into account circumstances in which persons other than the victim are: adversely affected by the conduct because;</p> <ul style="list-style-type: none"> (i) they were physically present or sufficiently nearby when the conduct took place or when the events occurred to see or hear the conduct or its effects or (ii) they knew the person who suffered the direct adverse effect or (iii) they witnessed the conduct by either : <ul style="list-style-type: none"> (a) acquiring knowledge of the conduct in a manner which would make them a competent witness capable of giving admissible evidence in criminal proceedings; or (b) Possessing or controlling anything which would constitute admissible evidence in any such proceedings. It should also allow for investigations into unlawful conduct by the security services made not by victims seeking redress, but for institutional reform in the public interest (ie. whistleblowers with credible evidence) <p>Secondly, the time limit or prescription period for bringing complaints is limiting and an affront to the right to access to justice. The complaints against state security agents usually involve gross violation of human rights and given the fact that state security agents throughout our history have been the dominant actors in the commission of such grave abuses, it is not desirable to set the time</p>

Clause in Bill (Section in Constitution)	Summary of Provisions	Comment
		<p>limit for complaints to only three years from the date on which the cause of action arose. In terms of international human rights law there can be no statutes of limitation for crimes against humanity. The three-year time limit is unreasonable, too short and restrictive of the constitutional rights to a fair hearing, equality and non-discrimination that are protected under sections 69 (3) and section 56 of the Constitution. The result of the limitation is that it denies redress to those with genuine claims, especially in a social context where poverty and legal illiteracy abounds. The provision also fails to give an exception or condonation to those who are out of the three year prescription period. Condonation is necessary because it provides complainants with an opportunity to give reasons for their failure to comply with the time limit.</p> <p>This provision fails to take into account the many reasons why victims of gross human rights abuses such as torture and rape choose not to report a violation immediately or ever. These reasons include intimidation, fear of reprisal and trauma, among other valid reasons.</p>
Clause 15	<p>Clause 15 provides for the conduct of hearings or inquiries by the Commission in respect of any complaint submitted to it if it considers it necessary to do so. For that purpose, some provisions of the Commissions of Inquiry Act [Chapter 10:07] will apply concerning the conduct of any investigations, inquiries or hearings of the Commission.</p> <p>If the circumstances so require and subject to the rights of the persons concerned, hearings or inquiries may be held in camera. Information disclosed in camera may not be disclosed to the public without the authority of the Commission or be used for the benefit of any member of staff of the Commission.</p>	<p>There is an anomaly in this provision. It fails to mention in clear terms the rights and obligations of complainants and their role during a hearing. Although clause 15(3) allows for a member of a security service against whom a complaint is made to be legally represented during the proceedings, there is no mention of the complainant's rights and their entitlement to legal representation.</p> <p>The provision could potentially be used to violate the right to a fair hearing protected under section 69 of the Constitution. It is recommended that the provision be made clear to give effect to the principle of legal certainty which will enable subjects to this law to regulate their conduct. This will allow them to understand their rights and obligations.</p>
Clause 16	<p>Clause 16 provides for measures to be taken following investigations, hearings or inquiries. If the Commission determines that the act complained of constitutes an act of misconduct by a member of a security service and requires to be redressed, the Commission will make recommendations or orders which it considers appropriate in the circumstances.</p>	<p>This clause is open to abuse. It is clear from the text that clause 16(3) empowers the Commission to make recommendations or orders pursuant to an investigation hearing or inquiry. Clauses 16(3) (a)-(d) provides for instances in which the Commission makes recommendations including making recommendations for redress and compensation through the courts. On the other hand, clause 16(3) (e) stipulates that the Commission can order security services to institute internal disciplinary process against the member complained against.</p>

Clause in Bill (Section in Constitution)	Summary of Provisions	Comment
	<p>The recommendations or orders may include compensation, reference of the matter for prosecution by the National Prosecution Authority, requiring that internal disciplinary processes be undertaken against the member by the security service concerned or a reconsideration of any relevant law</p>	<p>A recommendation is a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body whilst an order is a written direction or mandate directing that something be done or that there is prohibition against some act. It can be deduced from this that an order has more power and carries more legal weight than a recommendation because a recommendation can simply be accepted or rejected.</p> <p>This provision fails to justify the rationale for the differentiation between the recommendations and the orders considering the ever-increasing culture of impunity in our country. There is also no clarity on the measures that should be taken when the recommendations are rejected. Internal disciplinary proceedings are also shrouded in secrecy. The victim has the right to be heard and know the outcome in and of any such proceedings.</p>
Clause 18	<p>Clause 18 provides for offences for failure to comply with orders of the Commission. It provides that subject to clause 17, any person who, without lawful excuse, contravenes or fails to comply with any order made by the Commission in terms of this Act, shall be guilty of an offence and liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.</p>	<p>This provision violates the right to equal protection before the law that is provided for under section 56 of the Constitution. This clause only criminalises failure to comply with any order made by the Commission in the Act. The analysis of clause 16 dealing with the measures taken by the Commission after an investigation, inquiry or hearing has shown that the only order that may be given is in terms of subsection clause 16(3)(e), for the security services to institute internal disciplinary proceedings against the offending member.</p> <p>This means that the other recommendations discussed under clause 16 have no legal persuasion as they can be accepted or rejected without consequences. It is suggested that the clause be revised to give effect to one of the most important objects of section 210 of the Constitution, which is remedying harm caused by the conduct of members of the security services. An effective remedy cannot be given if impunity is perpetuated through these clauses.</p> <p>This clause violates international human rights law and conventions to which Zimbabwe is a party, for instance, Article 2(3) of the International Covenant on Civil and Political Rights which enshrines the right to an effective remedy. According to this provision, a victim's right to an effective remedy not only obligates the state to prevent, investigate and punish serious human rights violations, but to also provide reparations. Among the various reparations mechanisms that are required, states should restore the rights violated and provide compensation for damages.</p>

Clause in Bill (Section in Constitution)	Summary of Provisions	Comment
Clause 23	<p>This clause provides that the Public Entities Corporate Governance Act [Chapter 10:31], applies in every respect to the Commission in its capacity as a public entity provided that it is not inconsistent with any provision of the Independent Complaints Commission Bill</p> <p>The result is that in terms of dismissal of the Commissioners, the provisions of section 16 of the Public Entities Corporate</p>	<p>In terms of the dismissal of Commissioners, this provision is vague and it gives the executive, the President in particular, wide powers to dismiss Commissioners without providing for an independent investigative process into the disputes.</p> <p>The listed grounds in terms of section 16 of the Public Entities Corporate Governance Act are vague and problematic. They are a threat to the independence of the complaints mechanism because they fail to provide security of tenure for Commissioners. The consequence is that Commissioners will be at the mercy</p>
	<p>Governance Act applies. Section 16 lists the grounds on which board members of public entities are dismissed and these are:</p> <ul style="list-style-type: none"> • Guilty of conduct inconsistent with membership of the entity; • Disqualification for appointment to the board; • Lack of qualifications; • Failure to comply with conditions of service or with the provisions of performance contract; • Failure to draw up a strategic plan or to comply with its provisions or to attain any material objective set out in it; • Absence without just cause and leave of the board or its chairperson, from three or more consecutive meetings of the board. <p>In these circumstances, the President can dismiss a Commissioner but the approval of the Minister responsible for this Bill must be sought first.</p>	<p>of the appointing authority and there is no guarantee that due process will be followed in dismissals and disputes. The provision must be removed for violating section 210 of the Constitution. To ensure that the mechanism effectively carries out its mandate, there is a need to ensure the security of tenure of commissioners.</p> <p>One way is to apply the same security of tenure for judges to members of independent Commissions in terms of the Constitution. It is also recommended that the procedure for the removal of judges from office as prescribed by the Constitution, apply to the removal from office of a member of the Commission.</p>

Harare Office (National coverage) Kodzero-Amalungelo House, 103 Sam Nujoma Street, Harare Phone: (+263 242) 705370/708118/764085 Fax: (+263 242) 705641

Mutare Office (Covering Manicaland and Masvingo) Winston House, Ground Floor, Cnr 1st Avenue / 2nd Street, Mutare. Phone: (+263 20) 60660

Bulawayo Office (Covering Matabeleland, Midlands and Bulawayo) 3rd Floor Barclays Building, 8th Avenue & JNM Nkomo Street, Bulawayo. Phone: (+263 29) 722014

24-Hour Hotlines National: (+263) 772 257 247 Matabeleland/Midlands: (+263) 773 855 635 Manicaland/ Masvingo: (+263) 773 855 718

Email: info@zlhr.org.zw Website: www.zlhr.org.zw

Facebook: Zimbabwe Lawyers for Human Rights

Twitter: @ZLHRLawyers