

BILL WATCH 77/2020

[27th November 2020]

The Zimbabwe Independent Complaints Commission Bill

Section 210 of the Constitution states:

“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.”

In 2015 Veritas applied to the Constitutional Court for an order calling on the Government to enact legislation implementing section 210. On the 23rd September this year the Constitutional Court finally gave judgment in the case, giving the Government 45 days in which to gazette the requisite Bill. The Government did not meet that deadline, but on Tuesday it published the Zimbabwe Independent Complaints Commission Bill in the Gazette.

In this Bill Watch we shall outline the provisions of the Bill, which can be accessed on the Veritas website [\[link\]](#).

Scope of Bill

The Bill will establish a commission to investigate complaints of misconduct on the part of members of the security services and to provide remedies for such misconduct. The extent of the Commission's powers, and therefore the scope of the Bill, depends very much on the meaning of “misconduct”, and fortunately the word is defined widely in clause 2 of the Bill to cover acts or omissions, whether criminal or not, on the part of members of the security services which are contrary to the proper exercise of their functions. The definition lists as examples of misconduct: death in custody, illegal discharge of firearms, rape, torture and violations of human rights.

Establishment and Membership of Commission

The Zimbabwe Independent Complaints Commission is established by clause 4 of the Bill. It will consist of:

- a chairperson, who will be a judge or former judge, or a person qualified to be a judge, appointed by the President after consultation with the Judicial Service Commission *[Note this means that the President need merely ask the JSC for its views and does not have to follow its advice]*, and
- four other commissioners appointed by the President from a list of seven candidates chosen by Parliament's Committee on Standing Rules and Orders. The Committee will choose the candidates after holding public interviews in the same way that it chooses candidates for appointment to independent commissions under the Constitution. Of these four commissioners:

- one must be a lawyer
- one must be a medical practitioner
- one must be a psychologist, and
- one must have had experience in the security services.

According to the Schedule to the Bill, non-citizens and insolvents will be disqualified from appointment to the Commission, and so will people who have been convicted of crimes of dishonesty and certain other serious crimes.

Clause 6(5) of the Bill provides for the appointment of serving or retired security service members to be observers at any meeting or hearing of the Commission at which the conduct of members of a security service is being considered. Observers will attend meetings and hearings and may participate in the proceedings if invited by the chairperson to do so, but will have no vote on any decision taken.

Various provisions of the Constitution and the Public Entities Corporate Governance Act are applied to the Commission, the effect of which is that:

- Commissioners will be appointed for five-year terms, renewable once.
- Commissioners must not be politically partisan and must not belong to any political party or organisation.
- Nor may they be Members of Parliament, members of local authorities, parastatals or other government-controlled entities.
- Commissioners' remuneration and allowances will be fixed by the President and will not be reducible while they remain in office.
- The President will have power to dismiss commissioners from office for conduct inconsistent with their membership of the Commission or because they lack qualifications for appointment, or if they fail to attend three or more consecutive meetings. Before dismissing them however the President will have to get approval from the Minister responsible for administering the Act – the President himself, by virtue of clause 2(2) of the Bill – and also the Vice-President responsible procurement and research, who currently administers the Public Entities Corporate Governance Act.

Comment: The provisions for dismissing commissioners come about through the application of section 16 of the Public Entities Corporate Governance Act to the Commission. The provisions are clearly unsatisfactory. Apart from the nonsense of making the President get approval from himself and a Vice-President before dismissing a commissioner, the grounds on which commissioners may be dismissed are far too wide, giving them no real security of tenure. It is to be hoped that when the Bill passes through Parliament Members will insist that commissioners be given the same

security of tenure as members of Independent Commissions under the Constitution.

Staff of the Commission

Under clause 9 of the Bill the Commission will appoint an Executive Secretary to be the Commission's chief executive officer and responsible for running its day-to-day affairs. The appointment will be made in accordance with the Public Entities Corporate Governance Act, which means that:

- The Executive Secretary will be appointed for a five-year term, renewable for one further such term if he or she complies with his or her performance contract, and
- The appointment will have to be approved by the President.
- The Commission will have power to appoint other staff members, including investigators who will have to have "knowledge and relevant experience of criminal investigations", so presumably they will be former police officers.

Functions of Commission

Under clause 5 of the Bill, the Commission's functions will be:

- to investigate complaints made to it about misconduct on the part of members of the security services,
- to investigate contraventions of section 206 of the Constitution [*which requires the security services to respect the Constitution, fundamental rights and freedoms, democratic values and the rule of law*] and section 208 of the Constitution [*which forbids members of the security services from being politically partisan and prohibits their employment in civilian institutions*]. The Commission will be able to act on its own initiative in carrying out these investigations, without waiting for a complaint.
- to inspect detention facilities controlled by a security service – again the Commission will not have to wait for a complaint before inspecting police cells and prisons.

Investigation of Complaints by Commission

People who can submit complaints

Under clause 13 "any person who is aggrieved by misconduct on the part of a member of a security service" will be entitled to submit a complaint about it, in writing, to the Commission. This is not as wide as it sounds, because an aggrieved person must be someone who has suffered a legal grievance. Hence only people who have suffered legally actionable harm from misconduct [i.e. harm for which a remedy can be obtained in civil proceedings in court] will be entitled to complain to the Commission, though in the event of such people having died or being unable to make a complaint themselves, a representative or family member will be able to do so on their behalf.

Complaints that cannot be investigated

In terms of clauses 13(2) and 14(1) of the Bill, the Commission will be obliged to investigate all complaints submitted to it, except:

- complaints submitted more than three years after the misconduct complained of occurred, and
- complaints about misconduct that is the subject of court proceedings or an investigation by an independent constitutional commission such as the Zimbabwe Human Rights Commission.

Comment: The Bill does not say whether the Commission can reject complaints that are obviously frivolous and without merit. The Commission should have this power.

Time-limit for investigating complaints

Clause 14 of the Bill, which deals with the Commission's response to complaints, is not at all clear. Under subclauses (1) and (2) the Commission will have to start investigations within seven days of receiving complaints and notify complainants of progress within 21 days. After that, things get a bit murky. Subclause (5) permits the Commission to extend the period for responding to 60 days if it needs more time to investigate a complaint: this implies that the Commission must complete its investigations within seven days or at most 60 days, an impression reinforced by clause 15(2). All one can say with certainty is that the Commission is expected to investigate complaints quickly.

Hearings or inquiries

Under clause 15 the Commission will have power to hold formal hearings or inquiries conducted in much the same way as hearings by a commission of inquiry. Hearings will be held in public though the Commission will be able to order evidence to be heard *in camera* – in private – and will have to do so if the President so orders. Security services and the members whose conduct is under investigation will be entitled appear and to be legally represented.

Comments: Complainants are not mentioned, and their rights should be clarified. They should be entitled to appear at hearings either in person or represented by a lawyer – and if necessary they should be given legal aid. Also, the clause does not state who will preside over hearings and inquiries: whether the whole Commission will have to preside, or one or two commissioners, or anyone else appointed by the Commission. This point too should be clarified.

Remedies

After conducting its investigations into a complaint the Commission will have power under clause 16(1) of the Bill to “make such order or recommendation in the matter as it considers appropriate in the circumstances for the redress of the misconduct”.

Comment: No legal problem arises with the Commission's power to make recommendations, but the power to make orders should be dealt with in more detail because, under clause 18 it will be a criminal offence for anyone to contravene the Commission's orders.

The Commission will be able to order redress for complainants [clause 16(1)(c)] and the institution of disciplinary proceedings against security service members [clause 16(2)(e)]. If therefore a commander of a security service refuses to discipline a member or pay compensation to a complainant, or if the Minister of Finance refuses to release funds for compensation, the commander and the Minister will be liable to prosecution under clause 18.

Comment: However gratifying that may be for complainants, it is probably not what the drafters of the Bill intended.

Another way of enforcing the Commission's orders and recommendations is set out in clause 17, whereby officials to whom orders and recommendations are directed will have to report to the Commission on the steps they have taken to comply with them, and if the Commission is not satisfied with their response it will report them to Parliament.

The Commission's orders will be subject to review by the High Court under clause 19.

Funding of Commission

The Commission, like other Government institutions, will receive its funds from annual appropriations by Parliament. It will be entitled to accept donations and grants from other sources but before it does so it will have to consult the President or whichever Minister the President assigns responsibility for administering the Act.

It should be noted that the Government will have a general obligation to keep the Commission properly funded. Section 325 of the Constitution states that the Government must ensure that adequate funds are provided to all institutions of the State and government, to enable them to perform their obligations.

General Provisions

Three further provisions of the Bill call for comment:

- Clause 24 will require all the security services and the Ministers responsible for administering the security services, as well their civil servants, to co-operate with the Commission. Failure to do so will be a criminal offence.

Comment: Whether any senior official will ever be prosecuted for that offence may be open to doubt.

- Under clause 25 the Commission's records will be open to public inspection.

Comment: This is a most welcome provision which will ensure transparency.

- Clause 29 will give the President, or the Minister to whom the President may assign the administration of the Act, power to make regulations covering matters such as the procedure for investigations, access to records and so on. The President or the Minister will make regulations “in consultation with” the Commission”.

Comment: That is a legally imprecise term: it can mean “after consulting the Commission” or “with the agreement of the Commission”. The clause should be amended to state which is intended.

Independence of Commission

The Commission will be called “the Zimbabwe *Independent* Complaints Commission” but how independent will it be?

On the one hand, clause 3 of the Bill states that the first objective of the Bill is:

“to give effect to section 210 of the Constitution by providing for an independent and effective mechanism for the investigation of misconduct committed by members of security services”.

This means that the Bill must be interpreted so as to preserve the Commission’s independence.

Also clause 24, as we have already pointed out, will oblige Ministers and government officials to co-operate with the Commission and help it exercise its functions. This does not suggest the Commission is supposed to be subservient to those Ministers and officials.

A further, and very important, point is that there is no provision in the Bill giving the President or a Minister power to give the Commission instructions or directives on policy or anything else. In the absence of such a provision it must be presumed they will have no such power.

On the other hand, the Bill has features that cast doubt on the Commission’s independence:

- There is no express statement, as there is in section 235 of the Constitution in regard to the independent constitutional commissions, that the Commission will be independent and not subject to the direction or control of anyone.
- The Commission’s chairperson will be a presidential appointee.
- All the commissioners will be liable to be dismissed by the President on vaguely-stated grounds – for “conduct inconsistent with their membership of the Commission” – and there is no provision for an independent inquiry to be held before they are dismissed.

- The appointment of the Commission's Executive Secretary will have to be approved by the President.

Since the Commission's actual, as opposed to legal, independence will depend on the quality of its members and staff, these features are worrying.

At the very least, the Bill should be amended to include a provision stating unambiguously that the Commission will be independent and not subject to control by the Government.

Conclusion

The Bill has flaws, some of which we have pointed out above, but generally it is a good one. It will set up a commission with sufficient powers to investigate abuses that have become all too prevalent in Zimbabwe. The Commission's functions will go beyond those set out in section 210 of the Constitution – investigating instances of misconduct – and will extend to investigating political interference in the security services, inspecting places of detention and recommending changes to the law. All this is welcome.

Whatever limitations and defects the Bill may have, may not matter much in the long run because the Commission's effectiveness will depend more on the integrity and qualities of its members and staff than on the provisions of the law under which it operates. Also, the very fact that such a commission is in existence may go some way to deter members of the security services from committing misconduct.

Veritas makes every effort to ensure reliable information, but cannot take legal responsibility for information supplied.

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