



REPORT ON THE INDEPENDENT COMPLAINTS MECHANISM



Commentary Regarding the Zimbabwe Independent
Complaints Commission Bill



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Complaints Commission Bill**

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INTRODUCTION

1. This is a commentary on the Zimbabwe Independent Complaints Commission Bill (*hereafter "the Bill"*) which seeks to implement section 210 of the Constitution which requires the establishment of an independent complaints mechanism (*hereafter, "ICM"*). However, since it is called the Independent Complaints Commission in the Bill, it shall also be referred as the *"ICC"* where necessary. The principal purpose of the ICM is to provide an avenue for members of the public to pursue their grievances against misconduct by members of the security services.
2. The purpose of this commentary is to critically examine whether the Bill meets the constitutional mandate as provided for in section 210 of the Constitution. This is because section 210 is the enabling provision which means the Bill's terms must fit within its parameters and fulfil its promise.
3. The second reason is that under the principle of constitutional supremacy, the Constitution is the highest law in the country with which every law must comply.¹ For this reason, it is important to ensure that the Bill is consistent with the basic structure of the Constitution. Where it contravenes the Constitution, it will be rendered invalid to the extent of that inconsistency. This report, therefore, critically examines the extent to which the Bill complies with the Constitution.
4. Before dealing with the specific issues arising, it is important to set out the legal context of the analysis.

The purpose of this commentary is to critically examine whether the Bill meets the constitutional mandate as provided for in section 210 of the Constitution.

1. Section 2 of the Constitution of Zimbabwe

CONSTITUTIONAL CONTEXT

5. The idea of an ICM was motivated by a need to promote accountability of members of the security services in their engagements with citizens. “*Security services*” are defined by the Constitution and the Bill as the police service, defence forces, correctional services, and intelligence services. The ICM would play an investigatory and adjudicatory role between members of the security services and the citizens, carrying out investigations into any misconduct and providing remedies to the aggrieved. The remedial measures include holding perpetrators to account and steps that must be taken to prevent future occurrences.
6. The ICM must be seen as an alternative and additional to existing mechanisms of accountability under the general law. For example, under the Common Law, the law of delict provides an avenue for any person who is aggrieved by the wrongful conduct of another to sue that person for compensation. There are specific legal requirements, including the existence of a duty of care, that must be satisfied to establish liability.
7. There is also a constitutional route to compensation under section 50(9) of the Constitution. It provides that an aggrieved person may sue any person who is responsible for their illegal arrest or detention and claim damages. The purpose is to ensure that public officers take personal responsibility for their misconduct. They are only protected if they act reasonably and in good faith and without culpable ignorance or negligence. Personal responsibility for misconduct which harms others is likely to incentivise them into good behaviour.



8. Under Zimbabwe's penal law, there is also criminal prosecution where the misconduct of a member of a security service breaches any provision of the Criminal Code. Therefore, both criminal prosecution and civil liability processes may be concurrently pursued in some cases, where appropriate.

9. However, these three legal remedies necessarily involve litigation in the courts of law. This is a critical point of distinction with the ICM. While the ICM must respect the right to a fair hearing and the rules of natural justice, it must not mimic the judicial process with its package of elaborate rules, formalities, and rigidities. Instead, it should be flexible, cheaper, and quicker. It must be readily available to citizens who otherwise lack the financial resources to litigate.

10. Certainly, the intention behind section 210 of the Constitution was to provide for a mechanism that would deal with complaints that members of the public might have against members of the security services in a flexible, cheaper, and expeditious way. It is, therefore, important to make it user-friendly by keeping formal rules at a bare minimum. The design of the ICM must be more inclusive.

The ICM would play an investigatory and adjudicatory role between members of the security services and the citizens, carrying out investigations into any misconduct and providing remedies to the aggrieved.

FOUNDING VALUES AND PRINCIPLES

11. In designing the ICM, it is important to fulfil the basic structure of the Constitution. The basic structure of the Constitution consists of the pillars upon which the supreme law in the country is built. Some of these key pillars of the Constitution are to be found in the founding values and principles of the Constitution.²

12. The founding values and principles provide the moral campus for all laws and conduct in Zimbabwe. For this reason, the design of the ICM must promote and uphold these founding values and principles. The following founding values and principles are relevant when assessing the constitutionality of the Bill:
 - supremacy of the Constitution;
 - the rule of law;
 - fundamental human rights and freedoms;
 - gender equality;
 - recognition of the inherent dignity and worth of each human being;
 - recognition of the equality of all human beings;
 - good governance;
 - transparency, justice, accountability and responsiveness; and
 - observance of the principle of separation of powers.

13. This means whenever examining the constitutionality of the Bill, it is important to measure the extent to which it fulfils this set of founding values and principles. Failing to do that renders it unconstitutional. The key principles that are relevant to the design of the ICM are discussed in a separate section below and are used to measure the Bill's fitness for purpose.

Recommendation

The design of the ICM must be based on the founding values and principles of the Constitution.

² Section 3 of the Constitution of Zimbabwe

FUNDAMENTAL RIGHTS AND FREEDOMS

14. Another important point of measuring the Bill's compliance with the Constitution is the Declaration of Rights. Chapter 4 of the Constitution sets out the fundamental rights and freedoms to which every person is entitled. Section 44 of the Constitution provides that:

"The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."

15. Therefore, every legislation must respect, protect, promote and fulfil the rights that are in the Declaration of Rights. In the case of the ICM, the following fundamental rights are relevant points of measurement:
- Right to Life
 - Freedom from torture or cruel, inhuman, or degrading treatment or punishment
 - Right to Liberty
 - Rights of Arrested and Detained Persons
 - Right to a Fair Hearing
 - Right to Administrative Justice
 - Right to Personal Security
 - Right to Dignity
 - Right to equality and non-discrimination, which includes the right to the protection and benefit of the law
16. It is critical for the Bill to ensure that these and other rights and freedoms are promoted and protected. Where provisions of the Bill undermine them, these will be contraventions that ought to be corrected.

Recommendation

The design of the ICM must reflect and fulfil these fundamental rights and freedoms.

PRINCIPLES OF THE ICM

17. Considering the founding values and principles, and the fundamental rights and freedoms in the Constitution, there are certain core principles that must provide the foundation for the ICM. This commentary will use these principles to critically examine the Bill's compliance with the Constitution.

17.1 Independence

17.1.1 Independence is the cornerstone of any entity that performs the role of a referee. Independence exists at two levels: institutional and individual. This means the ICM as an institution must be independent but also at the individual level, the commissioners and staff must also be free from any undue influence or capture. There must be operational, political and financial independence.

17.1.2 Like the judiciary, the ICM must not only be independent, but it must also be seen to be independent. The features that support the ICM's independence must strongly resemble the principles of judicial independence. In this regard, the Bill must ensure that members of the ICM are treated similarly to the way members of the judiciary are treated.

17.1.3 More significantly, since the functions of the ICM affect the security services, which is a powerful sector, there is need to ensure that its independence is protected from this sector. There must be no perception that the ICM is captured or unduly influenced by the security services or the executive. If the ICM lacks independence or is perceived to be lacking independence, members of the public will lose confidence in it and it may become redundant and at worst, it might become an enabler of repression. This analysis will demonstrate several areas of the Bill where the principle of independence is compromised.

17.2 Accessibility

17.2.1 The ICM must be accessible to all aggrieved members of the public. This means the cost of bringing a complaint must be kept at a bare minimum, while the rules of access must be flexible. The ICM must not take a formalistic and rigid approach to the handling of complaints. The complexity of rules in litigation means that complainants almost always need a lawyer and sometimes cases are dismissed because of mere technicalities. The ICM must be designed so that there is no need for a complainant to have a lawyer and technicalities are not used to bar complaints.

17.2.2 In this regard, there are some progressive provisions of the Bill such as section 4(5) which states that *“The Commission shall take all reasonable steps to facilitate access to its services by the public”*. There is also section 13(4) which dispenses with rigidities and technicalities when it says, *“The Commission shall not refuse to investigate a complaint solely on the grounds that the complaint is not in the prescribed form or in any way fails to comply with any of the prescribed requirements, and a complaint may be made by such other means as the Commission may allow with a view to making its services accessible to all persons.”*

17.2.3 However, as this analysis demonstrates further below, there are other provisions of the Bill which create barriers to complainants and which, therefore, detract from these progressive provisions.

17.3 Speedy Resolution

17.3.1 It is important for the ICM to resolve complaints quickly and without undue delays. Litigation has been ineffective in promoting accountability because it is costly, and results take an inordinately long time, often rendering it not victim-friendly. Even if a party succeeds in a lower court, there will almost always be an appeal which causes further delays and frustrations.

17.4 Impartiality

17.4.1 The ICM must not only be impartial, but it must also be believed to be impartial. While it is a separate principle, it goes hand in hand with independence of the ICM. Again, if it is perceived to lack impartiality, the public will lose confidence in it.

17.5 Transparency

17.5.1 The processes of the ICM must be open and transparent. This means its matters must be heard in an open forum. This is the reason why provisions of section 15 of the Bill which permit certain matters to be held in camera might be problematic because they are prone to abuse. It is important to ensure that there is a quick and easy remedy in the courts of law should there be a person who is aggrieved by a decision to hold proceedings in camera.

17.6 Accountability

17.6.1 The ICM must be accountable under the Constitution. This means its decisions must be open and public. It must give reasons and justifications for its decisions. At the moment, the Bill creates an elaborate process where the ICM is accountable to Parliament but via the President or the Minister. This creates a filter which can delay the processes of accountability especially where the ICM has concerns over the President or the Minister. The experience of other independent commissions such as the National Peace and Reconciliation Commission and the Auditor General highlights this problem. The 2019 Auditor General's Report to Parliament

COMPOSITION OF THE ICC

18. Like the judiciary, the independence of the ICC is affected by the method by which its members are appointed into office. The ICC has 5 members. The Chairperson is appointed by the President after consultation with the Judicial Service Commission. The other 4 members are also appointed by the President but from a shortlist selected by Parliament's Committee on Standing Rules and Orders. This method of appointment is like the current method used for members of other independent constitutional commissions.
19. However, the weakness of this method is that it gives a disproportionate amount of power to the President. The result is that the ICC will suffer the same fate as other commissions that are perceived to be captured by the presidency. After the two recent constitutional amendments there is already a growing perception that the President has too much power over institutions such as the judiciary.
20. This is a good opportunity to take a different approach particularly considering the important role of referee between members of the public and the security services that the ICC will assume. The commissioners must not be seen as the President's people. The starting point of change is the appointment procedure.

Recommendation

The CLC recommends an appointment procedure like that used for the appointment of High Court judges or independent commissioners. At present all judges of the High Court are appointed following public nominations and public interviews by the Judicial Service Commission (JSC). The President makes the appointments from the small pool of candidates recommended by the JSC. Such a method would be preferable for all members of the Commission, including the Chairperson and Deputy Chairperson.

After the two recent constitutional amendments there is already a growing perception that the President has too much power over institutions such as the judiciary.

has taken an inordinately long time, partly due to the COVID19 pandemic but also because of delays on a route which involves the Minister of Finance and Economic Development.

17.7 Effectiveness

17.7.1 Section 210 of the Constitution provides that there must be an “*effective and independent*” ICM. It is not enough merely to have an ICM. It must be effective. The Bill says its object is to provide for an “*independent and impartial mechanism*” to investigate acts of misconduct by members of the security services. This language is inconsistent with the language of the Constitution. Section 210 says an “*effective and independent*”. If Parliament wants to add “*impartial*” that is commendable, but it must not leave out “*effective*” because effectiveness is a fundamental principle upon which the ICM is built. Ultimately, effectiveness is what the ICM should be established for, to be able to meaningfully and definitively resolve complaints brought by the public against members of security services.

17.8 Gender Equality

17.8.1 Gender equality is one of the major pillars of the Constitution. Several provisions require the recognition of equality between men and women and equal representation in state institutions and agencies. It is one of the founding principles and values of the Constitution.³ The equality and non-discrimination provision in the Declaration of Rights requires equal treatment of women.⁴ The National Objective of achieving gender balance requires that women must comprise at least half of the membership of any commission or body established under the Constitution or any Act of Parliament.⁵ It is therefore important for the ICC to be designed in a way that promotes and fulfils the principle and value of gender equality.

17.9 Responsiveness

17.9.1 The ICM must be responsive in its handling of public complaints. It must not only respond expeditiously but it must also adapt to changing conditions and adjust its processes.

Recommendation

The design of the ICM must reflect and fulfil these fundamental principles

3. Section 3(1)(g) of the Constitution of Zimbabwe

4. Section 56(2) of the Constitution of Zimbabwe states that “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.” In addition, section 80(1) of the Constitution of Zimbabwe states that “Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities”

5. Section 17(1)(b)(ii) states that “The State must promote full gender balance in Zimbabwean society, and in particular--b. the State must take all measures, including legislative measures, needed to ensure that-- ii. women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament”

QUALIFICATIONS OF COMMISSIONERS

21. Section 6(1) of the Bill states the specific qualifications of the commissioners. The Chairperson must be a person who is qualified to be a judge of the High Court. The person can be a sitting or former judge. Section 6(2) states the professional qualifications of the other 4 commissioners: one must be a lawyer, the second must be medical doctor, the third must be a psychologist and the fourth must be someone with security services experience.

22. This is problematic for 3 reasons.

First, members of the legal profession almost always occupy the chair's role in most constitutional commissions, even when this is not an absolute necessity. This monopolisation of leadership roles at state institutions by the legal profession is a weakness because it is exclusionary and limits the skills available for leadership roles of state institutions to a small group of legal elites. The chairpersonship is a leadership role, and one does not have to be a lawyer to be a good leader. Over-reliance on lawyers as head of state institutions is a bad habit which needs to change. Any other person, including members of the clergy, business or academia can provide leadership skills that are required for these roles. The notion that the chairperson needs to have legal knowledge is fallacious because ultimately the work is done by members of the executive staff. If the Chairperson needs legal advice, there are legal professionals to provide it.

23. Second, there is no convincing explanation why some professions have been specified while other have been excluded. Why, for example a psychologist and not a sociologist? Why a medical doctor and not an engineer? Why a lawyer and not a forensic criminologist or an arbitrator? Yet again, the specification of professions reeks of exclusionary elitism. Many people who are not in the specified professions could still perform adequately as leaders of the ICC. If these specified professions are necessary for the work of the ICC, the skills will be filled at the staff level. After all, they are the ones who do the actual work. There is no need for the exclusionary provisions in section 6(2).

24. Finally, regarding the person who must have experience in any security service, the problem is that in the context, this individual will be perceived as a gatekeeper for the security establishment. If experience in the security services is so essential, it could be procured in other ways instead of creating a

permanent seat for a security services' representative on the panel of commissioners. If such a representative is necessary, then it would also be fair to have a citizens' representative on the panel, nominated by registered members of civil society. In addition, if it is necessary to have a member with security service experience, he or she must not only be retired, but must have served a "cooling off" period of at least 5 years since he or she left the security service.

25. Another issue concerning composition is the representation of young people on the panel of commissioners. Although the minimum age of independent commissioners is 40 years, this is unfairly discriminatory against youth who are defined in the age group between 15 and 35. However, young people are also victims of misconduct of members of the security services. There is a need to improve the representation of young people and an exception should be made for the ICC which is a commission sui generis to include younger people in its ranks.

Recommendations

- The CLC recommends the removal of specific professional qualifications for the Chairperson and the other 4 members of the ICC. The key qualities for members who occupy the roles at the ICC are independence, integrity, and the leadership experience that the person possesses.
- Second, the CLC recommends that where a retired member of the security services is appointed, there should be a requirement for a 5-year cooling off period from the time they retired.
- Third, the CLC recommends that there be representatives of youth and civil society on the panel of commissioners.

The Chairperson must be a person who is qualified to be a judge of the High Court. The person can be a sitting or former judge.

SECURITY ESTABLISHMENT AT THE ICC

26. The notion of independence in the ICC is severely undermined by provisions which make the security establishment a permanent feature and influence at the institution. While section 6(1) and (2) give the impression that the ICC consists of the Chairperson and 4 other members, lurking in section 6(5) and (6) are further provisions which open doors for the security establishment to strongly impact the ICC and negatively affect its independence.
27. The Chairperson may invite the head of each security service to *“appoint a serving or retired member of that service of sufficient seniority to sit together with the membership of the Commission whenever the Commission is investigating or conducting an inquiry into any act of misconduct on the part of any member or former member of that security service.”*⁶ There is no clarity regarding the role of these security service appointees.
28. The head of a security service has the power to appoint an observer at the ICC for a term of at least twelve months.⁷ The observer has the right to be present at any meeting of the Commission during which a member of that security service is being investigated.⁸ The Chairperson can even invite the observer *“to participate in the deliberations of the Commission during any investigation, hearing or inquiry”*⁹ although they will not have the right to vote on any question that may arise. The observer can also *“put questions to any complainant or other person who is a party to any investigation, hearing or inquiry being conducted by the Commission”*.
29. These two provisions create gatekeepers of the security establishment at the ICC, which impacts its independence. Both the senior member who sits with the commissioners in a vague and undefined role, and the so-called observer who can participate in proceedings and question the complainant and other witnesses are essentially the eyes and ears of the security establishment at the ICC. There is no requirement anywhere in the Constitution to have *“observers”* in courts or hearings of any of the other Chapter 12 Commissions. It is enough to open proceedings of the commission to the public as necessary, and members of the security services may be free to attend those commission hearings as with any other citizen.

6. Section 6(5)

7. Section 6(6)

8. Section 6(7)

9. Section 6(8)

30. It is also a violation of the principles of natural justice and the right to a fair hearing to have an “observer” who is part of the perpetrating institution/security service, to participate in determining redress without the victims also being involved in such deliberations. While the Bill states that the observer may be invited to ask questions, there is no provision that the complainants can also ask questions of them. Examination or cross-examination cannot be one way traffic.
31. Their presence as sentinels for the security establishment is likely to lead to an intimidatory atmosphere not only for the commissioners but for complainants and witnesses as well. Complainants who have a grievance are likely to make a rationale choice between going to the ICC where there is a visible presence and influence of the security services and going to a court of law. The outcome is that the ICC will end up being under-utilised with aggrieved persons choosing the longer judicial route.
32. This excessive presence of the security establishment at the ICC defeats the whole purpose of creating an accessible forum for the resolution of disputes between citizens and members of the security services. It creates a barrier of entry which will keep complainants away from the ICC, causing it to be a white elephant. It undermines the principles of independence, impartiality, effectiveness, and transparency.

Recommendations

The CLC recommends the removal of these provisions regarding additional members and observers. They severely undermine the independence of the ICC and might lead to its redundancy. These defensive mechanisms only serve to create barriers of entry to the ICC. If expert testimony is required by the ICC, it can call on the security service to provide experts on a case-by-case basis. If the security service wishes to be heard, again, it can present its testimony on a case-by-case basis. To make its presence at the ICC a permanent feature is a serious assault on the independence of an institution whose credibility lies in its autonomy from the security services and the executive.

The notion of independence in the ICC is severely undermined by provisions which make the security establishment a permanent feature and influence at the institution.

CONDITIONS OF SERVICE

33. As with judges, conditions of service of members of the Commission affect their independence. There are elaborate provisions to ensure that judges' remuneration is protected, and their tenure of office is also safeguarded. Similar provisions apply with necessary modifications to members of independent commissions under the Constitution. Section 6(3) of the Bill proposes that Section 320 of the Constitution shall apply to the conditions of office of members of the Commission.¹⁰ It is therefore important to consider the nature of these conditions of service under this provision.
34. The first observation is that the term of office for members of the ICC five years and renewable for one additional term only.¹¹ The relevant provision of the Constitution also states that members of commissions, except the independent commissions, the Judicial Service Commission, the Zimbabwe Anti-Corruption Commission, and the Zimbabwe Land Commission hold office at the pleasure of the President. This is very significant because it means members of the ICC serve at the pleasure of the President. This is because although it bears the term "*independent*" in its name, it is not one of the independent commissions that are in Chapter 12 of the Constitution.
35. The fact that members of the ICC hold office at the President's pleasure means that they are vulnerable to the whims of the President. The President can remove them at any time, and he does not have to give reasons. Being at the President's mercy undermines their independence because if they should do anything that displeases him, that will be the end of their tenure. This is the reason why members of other independent commissions and judges do not serve at the pleasure of the President. Their removal must follow due process and must be recommended by an independent tribunal after an investigation.

Recommendations

The CLC recommends a change to this provision so that members of the ICC do not serve at the pleasure of the President. A new clause in the Bill can replicate the provisions governing the removal of members of independent commissions¹² and judges. This principal feature of those provisions is that they set out the specific grounds of removal and the JSC has the role of recommending the setting up of an independent tribunal to investigate a member of the commission. It is only that independent tribunal that can recommend the removal of the commissioner. Adopting the same provisions would offer stronger and better protection to members of the ICC and therefore strengthen their independence.

10. It also adds that Parts III, VII and sections 34 and 37 of the Public Entities Corporate Governance Act [Chapter 10:31] shall also be applicable to their conditions of service.

11. Section 320(1) of the Constitution of Zimbabwe

12. Section 237(2) and (3) provide that: "2. A member of an independent Commission may be removed from office only on the ground that the member concerned-- a. is unable to perform the functions of his or her office because of physical or mental incapacity; b. has been grossly incompetent; c. has been guilty of gross misconduct; or d. has become ineligible for appointment to the Commission concerned. 3. The procedure for the removal of judges from office applies to the removal from office of a member of an independent Commission."

FUNCTIONS OF THE ICC

36. Under Zimbabwean law, functions are also the powers of a statutory entity.¹³ Therefore, the functions of the ICC define its mandate and powers – what it can do and what is beyond its jurisdiction. The problem is that the mandate in the Bill is thin and does not comply with the enabling provision in the Constitution.¹⁴ Section 210 of the Constitution states that:

“An Act of Parliament must provide for 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 conduct”.

37. These functions/powers can be broken down into the following:
- Receiving complaints
 - Investigating complaints
 - Remedying any harm caused by misconduct
38. However, section 4 of the Bill which lists the functions of the ICC only deals with the second function, which is to investigate complaints. It does not deal adequately with the functions of *receiving complaints and providing remedies*. It is important for the language of the Bill to closely reflect the language of the Constitution, which is the enabling law. Failure to do so renders it unconstitutional. It is important for the Bill to reflect all three functions as stated in the enabling provision.

Recommendation

The CLC recommends a clear statement of the functions of receiving complaints and providing remedies.¹⁵

13. Interpretation Act [Chapter 1:01]

14. Section 210 of the Constitution

15. However, there is a reference to remedies in subsection 2, but even that is also vague and inadequate, as discussed in the section that follows.

REMEDIAL FUNCTION

39. The function of providing remedies is given vague treatment in section 4(2) of the Bill which states as follows:

“The Commission shall make such recommendations or orders as it considers appropriate to the security service concerned or any other relevant authority, including recommendations or orders for prosecution, compensation or any other appropriate relief or internal disciplinary action.”

40. Remedies for harm done are one of the core functions of the ICM. For this reason, it is important for the language of the Bill to be clear regarding power of the ICC to make orders and for their enforcement. Section 4(2) states that the ICC *“shall make recommendations or orders as it considers appropriate to the security service concerned”*. This is problematic for two reasons. First, the remedy is for the aggrieved person against the person who caused the harm. If it is an order for compensation, it may bind both the perpetrator and the security service that he works for.
41. The second problem is that *“recommendations”* and *“orders”* have different consequences and there is danger of conflating them. Orders are commands that must be obeyed while recommendations can be received but ignored unless there is a mandatory duty to implement them. If there was any doubt as to the difference between orders and recommendations, it is removed by section 16 of the Bill which deals with measures that the ICC can take after an investigation. The words *“recommend”* is used 3 times while the word *“order”* is used only once. The other word used is that the ICC can *“refer”* a matter for prosecution. This is section 16(3) of the Bill:

(3) The Commission may, where it considers it necessary:

(a) recommend the immediate release of any person from unlawful detention by a security service;

(b) recommend the payment of compensation to the complainant;

(c) *recommend that the complainant seek redress through the courts;*

(d) *refer the matter to the National Prosecuting Authority for the prosecution of the member complained against; or*

(e) *order the appropriate security service concerned to institute appropriate internal disciplinary processes against the member complained against”*

42. The only time that the ICC can make an order is when telling the security service to conduct internal disciplinary measures against a member. Where compensation is required, however, the ICC can only recommend. Where even a person who is unlawfully held by a security service, the ICC can only recommend. This is weak. As already noted, one of the principal functions of the ICM as stated in the Constitution is to provide remedies, which remedies should be effective. One of the principal remedies for an aggrieved person is compensation. Yet the Bill only mandates the ICC to make recommendations, which the security service has no legal obligation to follow

Recommendation

- The language of remedies must be clear and straightforward. To be effective, and effectiveness is a key principle of the ICM, the ICC's power to issue orders must not be diluted by a power to make recommendations. If it is necessary to have the power to make recommendations, this must be stated as a separate and additional power to the power to make orders.
- In particular, the power to order compensation as a remedy for an aggrieved person should be clearly stated. Likewise, the remedy of ordering the release of an unlawfully detained person must also be clearly stated in the legislation.
- To promote effectiveness of the ICM, consideration must be given to ensuring that all orders that are issued by the ICC must be treated like orders of the High Court. This would facilitate the enforcement of orders made by the ICC by the Sheriff and other enforcement officers.

“Remedies for harm done are one of the core functions of the ICM. For this reason, it is important for the language of the Bill to be clear regarding power of the ICC to make orders and for their enforcement.”

GENDER EQUALITY

43. As already noted in the section outlining the founding values and principles of the Constitution, gender equality is one of the pillars of the Constitution. Nevertheless, since the Constitution was adopted in 2013, there has been no real progress in fulfilling this important principle and value, thereby undermining the Basic Structure of the Constitution. This Bill is an excellent opportunity for the State to meet its constitutional obligations.
44. While the Bill has a progressive provision that requires the top two positions at the ICC to be shared equally between men and women,¹⁶ it does not go far enough to promote gender equality. There should be a specific provision requiring equal representation both among the commissioners and members of the executive staff. It would also be progressive to have a provision which requires that if the Chairperson is a man, then the Executive Secretary of the ICC, another leadership position should be a woman. This type of deliberate measure to promote women is justified under the equality and non-discrimination provision of the Constitution.¹⁷ The ICC is a great opportunity for the State to legislate in specific terms the requirement for equal representation between men and women.

Recommendations

- The CLC recommends that there must be a specific clause guaranteeing equal representation of women and men both at the level of commissioners and the executive staff of the ICC.
- The CLC also recommends there should be a provision that if the Chairperson is a man, then the Executive Secretary of the ICC should be a woman.

There should be a specific provision requiring equal representation both among the commissioners and members of the executive staff.

16. Section 8(2) of the Bill states that “The Deputy Chairperson must be of a different gender to that of the Chairperson.” This guarantees that there will be at least a woman in the top two roles at the ICC.

17. Section 56(6) of the Constitution of Zimbabwe allows affirmative action measures to promote marginalised groups as follows: “The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and a. such measures must be taken to redress circumstances of genuine need; b. no such measure is to be regarded as unfair for the purposes of subsection (3)”

JURISDICTION OF THE ICC

45. The jurisdiction of the ICC refers to the power that the ICC can exercise. It should be consistent with the broad powers that are given to it by the enabling constitutional provision.
46. The first issue arises in section 2 of the Bill which defines misconduct as meaning “*any criminal or other act contrary to the proper exercise of their functions as specified in section 208(2) of the Constitution...*”. Although it is not limited to these acts, there is no need to specify the criminality of the acts. Section 210 of the Constitution, which is the enabling provision refers to any type of misconduct, which can be criminal or civil. There is, therefore, no need for the legislation to characterise the criminal nature of the conduct as that might lead to a limitation of the scope of misconduct that may be subject to complaints.
47. The second issue arises from section 13 of the Bill which limits the types of cases that the ICC may investigate. Section 13(2)(a) states that the ICC shall not investigate complaints that are more than 3 years old. Valid complaints must be brought within 3 years of the date the act that is complained of happened. The short prescription period does not consider the effects of organised violence, torture, and cruel treatment, which may render complainants unable to raise complaints for some time. They may wait until they feel more confident and have the emotional stability to do so. In cases of this nature, there is a need to extend the prescription period beyond 3 years.
48. The third issue arises from section 13(2)(b) which ousts the jurisdiction of the ICC on the grounds that the matter is before the courts or before another independent commission. The problem with this is that it might render the ICC redundant if most cases are said to be under investigation elsewhere. The ICC should still be able to investigate these matters. The fact that a court is conducting criminal proceedings should not preclude the ICC from carrying on an investigation where the complainant is seeking compensation. The current provision is an attempt to unduly limit the avenues available to victims such that one must choose whether to go to court or to go to the ICC. This limits the effectiveness of the ICC.
49. Unlike other independent commissions such as the Zimbabwe Human Rights Commission, the ICC has the power to issue enforceable remedial orders, not

just recommendations. If anything, its investigations and adjudicatory mechanisms should take precedence over others because they are likely to be more effective. In practice, there is no reason why the ICC cannot work together with other bodies so that their work is complementary rather than rivalrous. What is needed is a memorandum of understanding (MoU) between the different bodies charged with investigations and dispute resolution so that there is coordination, complementarity, and no duplication of the work they do.

Recommendations

- The definition of misconduct should be broadened from the current terms which lean toward criminality.
- The prescription period should be lengthened beyond the 3- year period in the current provision.
- The ouster of jurisdiction of the ICC merely because there are proceedings before the courts or other independent commission should be removed.

The jurisdiction of the ICC refers to the power that the ICC can exercise. It should be consistent with the broad powers that are given to it by the enabling constitutional provision.

CONCLUSIONS

50. This commentary has critically analysed the Bill based on the basic features of the Constitution as defined in the founding values and principles. The values and principles that have formed the core of this analysis are independence, impartiality, effectiveness, transparency, and accountability of the ICM that is established by the Bill pursuant to section 210 of the Constitution.
51. The main observation is that while on the face of it there are some efforts to promote accessibility, the net result is that the current Bill has many barriers that are likely to hinder the independence and effectiveness of the ICM. These barriers affect stand in the way of creating an effective and independent ICM as required by the enabling provision of the Constitution.
52. The suggestion for an ICM was made in good faith, the framers of the Constitution believing that it would create a cheaper, quicker, and more efficient way of handling disputes between citizens and members of the security services. However, it appears that there are stakeholders who feel they must have a gatekeeping role at the ICC, which unfortunately detracts from its independence. The essential principles underpinning the ICC are independence, impartiality, and effectiveness. However, the current design of the ICC does not fulfil these key principles.
53. The CLC has made several recommendations throughout this commentary, pointing out ways by which the Bill can be significantly enhanced to ensure compliance with the enabling provision and with the Constitution as a whole. We urge the relevant authorities to pay particular attention to the matter of independence of the ICC. Without independence, there will be concerns that it may become an enabler rather than an institution that plays the role of a referee that was envisaged by the framers of the Constitution.

This commentary has critically analysed the Bill based on the basic features of the Constitution as defined in the founding values and principles.

RECOMMENDATIONS

- 54.** The following is a complete list of recommendations drawn from this assessment of the Bill:
- 54.1** The ICC must be built upon the foundation set by the founding values and principles of the Constitution.
- 54.2** The critical pillars in the design of the ICC are the principles of independence, effectiveness, transparency, responsiveness, gender equality, impartiality, accountability, and accessibility.
- 54.3** The appointment procedure for commissioners of the ICC must be like the procedure used for appointing High Court judges.
- 54.4** The specific professional qualifications for the Chairperson and the other 4 members of the ICC must be removed. The key qualities for members who occupy the roles at the ICC are independence, integrity, and the leadership experience.
- 54.5** The provision for a person with experience in the security services must be removed. However, if it is retained the person should be retired, there should be a requirement for a 5-year cooling off period from the time of retirement before joining the ICC.
- 54.6** The membership of the ICC commissioners should have representatives of youth and civil society.
- 54.7** The provisions regarding additional members and observers that are drawn from the security services must be removed because they pose a serious hazard to the independence of the ICC.
- 54.8** The provision that members of the ICC serve at the pleasure of the President must be removed because it undermines independence. Instead, there must be provision that commissioners can only be removed on specific grounds and only using the procedure that is used for the removal of judges or members of independent commissions.
- 54.9** There must be a clear statement of the two critical functions of receiving complaints and providing remedies to reflect the constitutional mandate of the ICC.

- 54.10** The language of remedies must be clear and straightforward. To be effective, the ICC's power to issue orders must be separated from its other power to make recommendations.
- 54.11** The power to order compensation as a remedy for an aggrieved person should be clearly stated. Likewise, the remedy of ordering the release of an unlawfully detained person must also be clearly stated. They must not be left as mere recommendations.
- 54.12** To promote effectiveness of the ICM, consideration must be given to ensuring that all orders that are issued by the ICC must be treated like orders of the High Court. This would facilitate the enforcement of orders made by the ICC by the Sheriff and other enforcement officers.
- 54.13** There must be a specific clause guaranteeing equal representation of women and men both at the level of commissioners and the executive staff of the ICC.
- 54.14** There should be a provision that if the Chairperson is a man, then the Executive Secretary of the ICC should be a woman.
- 54.15** The definition of misconduct should be broadened from the current terms which lean toward criminality.
- 54.16** The prescription period should be lengthened beyond the 3-year period in the current provision
- 54.17** The ouster of jurisdiction of the ICC merely because there are proceedings before the courts or other independent commission should be removed.



The CLC is a consortium of 6 organizations that are involved in research and advocacy regarding constitutionalism, the rule of law and human rights. They are ZimRights, Centre for Applied Legal Research, WeLead Trust, Women's Institute for Leadership Development, Justice for Children Trust, and Zimbabwe Human Rights NGO Forum. Together, the organizations bring an array of skills and resources that set the CLC on a firm foundation to promote, defend and protect the Constitution.



The CLC is designed to ensure that its output feeds into the work of the consortium partners, providing intellectual leadership in research and development. We are united in the belief that as the supreme law of the country, citizens' awareness of the Constitution is essential for developing and enhancing a culture of constitutionalism and the rule of law.