

EXPLANATION OF COMMITTEE STAGE AMENDMENTS TO ZIMBABWE INDEPENDENT COMPLAINTS COMMISSION BILL

Preamble

The amendment to the preamble will correct an error in the quote from section 210 of the Constitution.

Clause 1 (Short title)

The Bill needs a delayed date of commencement, to give time for members of the Commission to be appointed and for the Commission to appoint staff, get premises and generally get ready to start operations. Once they are ready to start, the Bill (now an Act) can be brought into operation.

Clause 2 (Interpretation)

The Bill needs a proper definition of “head of a security service”, since the term is used in clauses 6 and 15.

The definition of “misconduct” in the Government Bill is defective in two respects:

1. It covers only conduct that is contrary to section 208(2) of the Constitution, i.e. conduct which is politically partisan or which violates a person’s human rights. Hence it does not cover other forms of illegal conduct, e.g. demanding a bribe, misuse of government property, incompetent or inadequate investigation of a crime – all of which the Commission should be able to investigate.
2. In paragraph (vii) it specifies as misconduct any conduct that is the subject of a complaint. This means that if a member of the public complains about the conduct of a member of the security services, that conduct becomes misconduct automatically, by definition.

The substituted definition is shorter and clearer, and does not have these defects.

The amendment to the definition of “observer” is needed because of later amendments.

Clause 5 (Functions of Commission)

The new paragraphs (c) and (d) to be inserted in clause 5(1) will give the Commission the functions of monitoring internal investigations units and making recommendations to Ministers and Parliament on matters relating to the conduct and discipline of the security services. The new paragraph (e) will enable the Commission to perform functions conferred on it by other enactments such as the Defence Act and the Police Act.

The new subclause (2) will give the Commission the ancillary powers set out in the First Schedule which will be inserted into the Bill by the Committee Stage amendment explained below. Parastatal bodies like the Commission are almost invariably given these ancillary powers – for example, the power to acquire premises for offices and to pay pensions to its employees [there is judicial authority, admittedly old, to the effect that the power to pay pensions cannot be inferred from a power to employ staff].

The amendment to the existing subclause (2) – which will become subclause (3) – will correct an obvious error.

Clauses 6 and 7 (Composition of Commission and Disqualifications for appointment)

The new clauses which will replace the existing clauses 6 and 7 will bring some order to the provisions relating to the appointment and tenure of office of members of the Commission, and will give the members sufficient security of tenure to make them independent (under the Bill at present, members hold office at the President’s pleasure – see the existing clause 6(3) as read with section 320(2) of the Constitution).

In more detail:

- The new clause 6 sets out the composition of the Commission, which will be the same as before but allowing more flexibility in the choice of members other than the chairperson.
- The new clause 7 will prescribe how members are appointed. The chairperson will be appointed in the same way as judges under the Constitution, i.e. by the President from a list prepared by the Judicial Service Commission. The other members will be appointed in the same way as members of independent constitutional commissions, i.e. by the President from a list prepared by the Committee on Standing Rules and Orders. The clause will also incorporate provisions taken from the Constitution, requiring equal gender representation and fair regional representation on the Commission.
- Clause 8 will reproduce provisions of section 320 of the Constitution which are only referred to in the original clause 6(3).
- Clause 9 will give members of the Commission the same security of tenure as judges under the Constitution.
- Clause 10 will reproduce, with greater clarity, subclauses (5) to (8) of the existing clause 6.
- Clause 11 will spell out what is stated only by reference in clause 7(1) of the Bill.
- Clause 12 will reproduce, with greater accuracy, the existing clause 7(2) of the Bill. The existing clause 7(2) refers to the Public Entities Corporate Governance Act; there is no need to do so because clause 23 of the Bill states that that Act will apply to the Commission and its members.

New clause (Offices of Commission)

The new clause 11 will require the Commission to establish offices and provide facilities throughout Zimbabwe to give people access to its services. It will also allow the Commission to make use of the offices of other suitable institutions such as the Zimbabwe Human Rights Commission and the National Peace and Reconciliation Commission.

Clause 11 (Commission to report to Parliament)

The amendment to clause 11(2) of the Bill will make it clear that the Commission has a discretion to submit additional reports to Parliament, in addition to the annual report prescribed in clause 11(1). The word “must” which is used in the clause at present is wholly inappropriate.

New Part (Internal investigation units)

The New Part provides for each security service to set up internal investigation units to investigate misconduct on the part of members of the service concerned. Most services already have such units: the military police, for example. The internal investigation units will operate subject to directives given to them by the Commission through the commanders of the services concerned; they will be obliged to investigate complaints referred to them by the Commission. The units will also have to keep the Commission informed on progress in their investigations. The existence of the units would not prevent the Commission from conducting its own investigations into complaints of misconduct.

Clause 12 (Appointment and powers of investigators)

The first amendment to this clause, to subclause (1), will give the Commission rather than the Executive Secretary power to appoint investigators. The Commission will be able to delegate the power to the Executive Secretary, but he or she should not have an independent power to appoint them. Also, since investigators will be employees and agents of the Commission the power to appoint them should at least nominally vest in the Commission.

The second amendment will replace subclause (8) with a new clause which will give persons questioned by investigators all the privileges to which witnesses are entitled when giving evidence in civil court cases. At present the subclause gives them only the privilege against self-incrimination, whereas they should be entitled to all the other privileges as well, such as marital privilege and legal practitioner and client privilege.

Clauses 13 to 15 (complaints, hearings and inquiries)

The new clauses which the amendments propose to substitute for these clauses will generally broaden the ways in which complaints are made and will permit the Commission greater flexibility in the way in which it investigates and deals with them.

- The new clause 13 will allow complaints to be made to the Commission in various ways – orally, in writing or electronically – but will require the person receiving oral complaints to reduce them to writing, and will require the Commission to keep a record of all complaints received. The Commission will be able to refer complaints to internal investigation units or to investigate them itself. The clause will also give the Commission the right to refuse to investigate complaints which are frivolous or vexatious, though if the Commission does refuse to investigate a complaint it will have to tell the complainant why and inform him or her of the right to appeal to the Administrative Court.
- The new clause 14 will give the Commission the right to investigate misconduct without having received a specific complaint.
- Clause 15 will give the Commission a broad discretion as to how to conduct investigations, so long as they are conducted efficiently, fairly and quickly. The Commission will have to keep interested parties informed of progress in its investigations.
- Clause 16 will set out the way in which the Commission is to conduct hearings. It will not make provision for hearings to be held in camera, as the existing clause 15 does, but it will give the Commission the same powers as courts under the

Courts and Adjudicating Authorities (Publicity Restriction) Act, which provides for in camera hearings.

- Clause 17 will allow the Commission to approach the High Court for a ruling as to whether or not conduct which is the subject of a complaint is misconduct.

Clause 19 (Appeals)

The new clause 19 will allow people who are aggrieved by the Commission's decisions to appeal to the Administrative Court, which is a more appropriate forum than the High Court. Appeals to the Administrative Court will give a wider range of remedies to aggrieved persons than review by the High Court, since reviews are concerned primarily with the procedure by which a decision was reached rather than with the merits of the decision. It should be noted incidentally that under section 20 of the Administrative Court Act an appeal lies to the Supreme Court from the Administrative Court's decisions.

Clause 29 (Regulations)

The existing clause will give the President or a Minister power to make regulations in consultation with the Commission. This amendment will require regulations to be made with the approval of the Commission, which is necessary if the Commission is to be an "independent" mechanism as required by section 210 of the Constitution.

New clause 30 (Transitional provision)

This new clause will enable existing investigatory units such as the Military Police as to be recognised as internal investigation units for the purposes of the Bill.

New First Schedule

The new Schedule will give the Commission the usual ancillary powers that are exercisable by parastatal bodies.

Second Schedule

The new paragraph 1(e) will disqualify Members of Parliament, members of local authorities and members of parastatal bodies from being appointed as members of the Commission.

The amendment to paragraph 3(7) of the Schedule will make three members a quorum of the Commission. This will be consistent with the existing clause 6(4) of the Bill, and is a more realistic quorum for a five-member Commission than four members.