

Responses to Questions from the Parliamentary Special Select Committee for the Consideration of Bills on the Bill regarding the Independent Police Complaints and Misconduct Commission (IPCMC)

1. Is the IPCMC constitutional?

Yes, it is constitutional. Article 140 of the Federal Constitution states that exercise of disciplinary control over members of the police force is vested in the Police Force Commission. It goes on to state that Parliament may legislate for the exercise of disciplinary control over the police force by an authority other than the Police Force Commission. It also clarifies that legislation vesting disciplinary control in another authority is not inconsistent with what is stated earlier in Article 140.

The Federal Constitution thus expressly provides for and envisages the setting up of an authority such as the IPCMC to exercise disciplinary control over members of the police force.

2. Is it constitutional for the IPCMC to have powers to investigate alleged disciplinary misconduct?

The exercise of disciplinary control can include the related power to investigate any alleged misconduct that would give rise to disciplinary proceedings.

The Constitution is silent on who may conduct an investigation into police misconduct. Parliament is therefore free to enact legislation to empower an independent body such as the IPCMC to investigate allegations of police misconduct.

In fact, investigations regarding alleged misconduct by the police force have already been carried out in the last 10 years by the Enforcement Agency Integrity Commission (EAIC), which is empowered to do so under the Enforcement Agency Integrity Commission Act 2009.

3. What role will the Police Force Commission play with the formation of the IPCMC? Will it be defunct?

The Police Force Commission will continue to play all its other functions set out in Article 140 of the Federal Constitution, except for disciplinary control. This includes responsibility for the appointment and confirmation of police force members, emplacement on the permanent or pensionable establishment, and decisions on promotion and transfers.

Members of the Police Force Commission will also maintain some jurisdiction to deal with misconduct through their involvement as members of the Disciplinary Board, appointed by the IPCMC. The composition of the Disciplinary Board is set out in the First Schedule of the IPCMC Bill and shall consist of a chairperson, who will be a member of the IPCMC, two members of the IPCMC, a representative from the police force of a higher rank than the accused and a representative from the Police Force Commission who is not a member of the police force.

4. Does the IPCMC have too much power if it both investigates and punishes police misconduct?

The IPCMC does not have the power to punish police misconduct.

- a) For minor misconduct, investigations and any disciplinary action will remain within the police force. Appeals against that decision will be dealt with by a Minor Misconduct Disciplinary Appeal Board which will consist of two IPCMC members and a representative from the police force who shall be of a higher rank than the aggrieved member of the police force.
- b) For other complaints, disciplinary powers will rest in the Disciplinary Board appointed by the IPCMC. As stated above, the Disciplinary Board will consist of two members from outside the IPCMC, namely a representative from the police force, and a representative from the Police Force Commission who is not a member of the police force.

Nevertheless, it is not a breach of natural justice for the IPCMC to conduct investigations and also be involved with disciplinary action. Disciplinary

proceedings for professions such as the medical and legal professions, commonly involve the relevant authority having the power to both investigate as well as mete out disciplinary action regarding alleged misconduct. Disciplinary proceedings regarding alleged misconduct differ from criminal prosecutions and are therefore subject to higher evidentiary and procedural regulations.

As stated, the EAIC has the powers to investigate misconduct but does not have the power to punish. In the last 10 years, it has not made any significant impact on decreasing the incidents of police brutality and deaths in police custody. Instead, the EAIC has frequently been accused of being “toothless” as the police can choose to ignore its recommendations for disciplinary action to be taken.

For instance, in the 2013 death in custody case of Dhamendran Narayanasamy, the EAIC made findings of misconduct on the part of the police. It recommended that disciplinary action be taken against police officers for a host of serious acts of misconduct including fabricating false information in the lock-up diary, making a false police report, abuse of power, unreasonable delay in granting family members access to the deceased and failing to supervise prompt investigations be carried out regarding the deceased. To date, no reports have emerged of any disciplinary action having been taken in accordance with the EAIC’s above recommendations.

5. Why can’t police officers be part of the IPCMC?

Members of the police force are not completely excluded from the disciplinary process as the police force is represented on the Minor Misconduct Disciplinary Appeal Board and the Disciplinary Board that is responsible for meting out disciplinary action regarding any alleged misconduct.

It is vital that the public have confidence in the IPCMC given the popular belief that a “blue wall of silence” prevails in many situations. This was even mentioned in the Royal Commission of Inquiry into the death of Teoh Beng Hock. Indeed, the continuing occurrence of police misconduct demonstrates that an independent body like the IPCMC is necessary.

The exclusion of police officers and retired police officers from the IPCMC was mooted by the Royal Commission of Inquiry on the police set up in 2004. The members of the Royal Commission included the former Inspector General of Police Tun Mohammed Hanif Omar and was headed by former Chief Justice Tun Mohamed Dzaiddin Abdullah.

It is important that the IPCMC be seen to be completely independent for the public to have confidence that it will be able to investigate allegations impartially. This is important to deliver public accountability, transparency and trust.

6. Does the IPCMC protect the rights of the police in receiving a fair hearing?

The rules of natural justice require that those adversely affected by any charge or allegation have the right to a fair hearing including a right to counsel.

Natural justice should apply regardless of whether it is stated expressly in the bill. However, it would be beneficial for the IPCMC bill to expressly state that police officers should receive a fair hearing to ensure their right to be heard. It should also state that all those who appear before the IPCMC will be entitled to be represented by counsel.

Decisions of the IPCMC, being an inferior tribunal, should also be automatically subject to challenge via the judicial review process, which would give the police the opportunity to take matters to court should they feel aggrieved by the IPCMC's decisions. Alternatively, there ought to be provision allowing for an automatic right of appeal all the way to the Federal Court as there is in the case of the legal profession.

7. What happens if a complaint involves a potential criminal offence as well as disciplinary misconduct? Can there be investigation by two different bodies involving the same facts?

Given the scope of the IPCMC's jurisdiction, it is inevitable that some complaints will contain elements of criminal offences as well as those involving disciplinary misconduct. An assault by a police officer on a member of the public, for instance,

constitutes both an offence under the Penal Code which should be investigated by the police, as well as disciplinary misconduct that should be investigated by the IPCMC.

The evidence and standard of proof for establishing a criminal offence will differ from establishing misconduct. Rude and aggressive behaviour by a police officer, for instance, may or may not constitute a crime, depending on whether criminal intimidation was involved, but would likely constitute a minor misconduct, which would warrant an investigation. It is thus possible for a police officer to be cleared of a criminal offence but found guilty of a breach of misconduct before the IPCMC.

Thus, in instances where a complaint involves a potential criminal offence as well as possible misconduct, both the police and the IPCMC should be able to conduct their own investigations and come to their own findings. The IPCMC cannot fetter its discretion and delegate its investigative function to the police in such instances, as the standards and criteria for a finding of misconduct would differ from those necessary for a finding of a criminal offence.

Such an issue is present in all disciplinary bodies of professional organisations. The issue of misconduct is a separate and independent inquiry which does not necessarily mean there is a criminal offence committed.

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Submitted by the following civil society organisations:

National Human Rights Society (HAKAM)

Centre to Combat Corruption and Cronyism (C4)

Citizens Against Enforced Disappearances (CAGED)

Justice for Sisters

Malaysian Centre for Constitutionalism and Human Rights (MCCHR)

Suara Rakyat Malaysia (SUARAM)

Society for the Promotion of Human Rights (PROHAM)

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