



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África

Failing to discipline in SAPS

Fostering a culture of impunity

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Introduction

It is with unfortunate regularity that we read reports in the media about corrupt South African Police Service (SAPS) officials and officials implicated in other crimes, including human rights violations.¹ Indicative of the scale of the problem is that the Ethics Institute found that for the first time, bribes for police matters and criminal charges moved into the top five of categories of bribes reported, with 7% of respondents reporting that they knew someone that were asked to pay a bribe to the police.² This translates to nearly one in ten South Africans. Soliciting bribes on such a scale is deeply damaging to public trust and confidence in the police. Moreover, the prevalence of the problem indicates that there is a perception amongst a substantial number of police officials that nothing can or will happen when soliciting a bribe even if it is reported. This raises serious questions about the enforcement of internal discipline in SAPS as the prevalence of bribery is indicative of the extent to which internal discipline is enforced in the organisation. This does not bode well for trust in the police and its perceived legitimacy. Given its core mandate to uphold the law, police officials engaging in criminal activity are extremely damaging to the rule of law and thus democracy itself.

This fact sheet looks at accountability in SAPS by firstly outlining the accountability framework with reference to the Constitution. In the following section, quantitative data is presented on disciplinary code enforcement in SAPS and comparisons are drawn with the Department of Correctional Services (DCS). The next section looks at the relationship between the Independent Police Investigative Directorate (IPID) and the National Prosecuting Authority (NPA) as two important players in the accountability architecture.

The accountability framework

The Constitution requires that public officials be accountable.³ Accountability is understood to mean the relationship “between the bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right”.⁴ This means that a

government must be able to and indeed explain how it executed its mandate.⁵ The point has also been made that the normal features of a democracy (e.g. multi-party elections and universal suffrage) are necessary, but not sufficient to ensure healthy accountability between citizens and the government.⁶ Democratic elections therefore do not make for clean government and new democracies remain haunted by human rights violations, nepotism and corruption, which do not disappear with the advent of democratic elections.⁷

The fact that a relationship exists between the state and another internal or external body does not automatically result in an effective accountability relationship, and three principles need to be adhered to, namely transparency, answerability, and controllability. Transparency means that state officials have a duty to act visibly, predictably and understandably.⁸ The actions of officials must be predictable in that they should be guided by policy, legislation, regulations, standing orders and good practice. When called to account, officials must be able to justify their decisions and actions in a manner that is rational and justifiable. In sum, it needs to be known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer.⁹ The answerability requirement states that decision-makers must be able to justify their decisions and actions publicly in order to substantiate that they are reasonable, rational and within their mandate.¹⁰ Answerability (and transparency) will, however, be meaningless if there are not mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions must therefore be able to exercise control over the institutions that they are overseeing.¹¹ Failure to hold government and individuals accountable creates the conditions for impunity to exist.¹²

A democratic society agrees to give extraordinary powers to the police, but only if these powers are subject to external scrutiny. Even if a few police officials abuse their powers, it risks affecting the legitimacy and integrity of an entire police force.¹³ It is that need for police legitimacy that firstly drives the need for accountability mechanisms. Secondly, the purpose of an effective accountability structure is its proactive function: the outputs and consequences of action taken by accountability mechanisms must lead to changing police behaviour and deter misconduct.¹⁴

Internal accountability in SAPS

All government departments are required to have internal disciplinary structures to enforce its disciplinary code.¹⁵ A comparison is made between SAPS and DCS and questions may be raised about the different types of work and their respective powers. Officials of both departments are defined as ‘peace officers’ with powers of arrest in the Criminal Procedure Act.¹⁶ Officials of both departments have the powers to exercise minimum force.¹⁷ The officials of both departments hold considerable power, if not the monopoly of power, in respect of suspects and detainees in the case of SAPS, and prisoners in the case of DCS officials. Whilst the work of SAPS is in general in the public arena and the work of DCS officials not, there are nonetheless strong similarities in the type of work they do, as well as the risks for the abuse of power and position. There are also strong similarities in the disciplinary offences officials from both departments are charged with, as reported in the respective annual reports, with the most common being:

- Failed to comply with or contravened an act, regulation or legal obligation.
- Absence or repeated absence from work without a valid reason or permission.
- Dereliction of duties.
- Breaching of security measures.

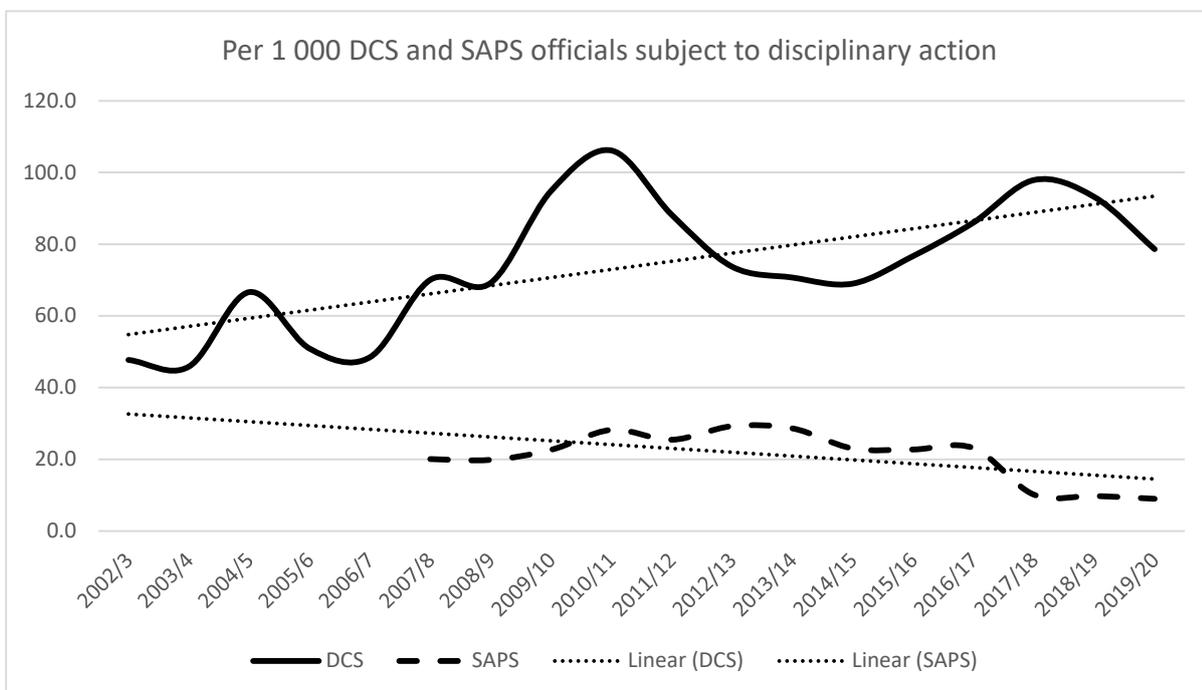
- Conducted himself or herself in an improper, disgraceful and unacceptable manner.

Figure 1 presents the number of disciplinary actions against SAPS and DCS officials per 1 000 employees in the respective departments.¹⁸ DCS data is available from 2002/3 and SAPS data from 2007/8. Two trends are immediately visible. The first is that disciplinary action against DCS officials have been on a steady increase since 2002/3, whilst the opposite is true for SAPS as from 2007/8. In the case of DCS this increased from below 50 officials per 1 000 officials to a high of 106 per 1 000 in 2010/11, followed by a decline to 79 per 1 000 officials by 2019/20. In the case of SAPS there were 20 disciplinary actions per 1 000 in 2007/8 after which it increased to 29 per 1 000 by 2012/13. Since then, it has been in decline. Notable is that from 2016/17 to 2017/18, this figure dropped from 23 per 1 000 to 10 per 1 000, or by 56%. It should be noted that in 2016 a new SAPS disciplinary code was gazetted and the sharp decline may be attributed in part to teething problems in enforcing the new code.¹⁹ Nonetheless in the following two years, the number of disciplinary actions per 1 000 employees declined further to 9.8 and then 9.0.

The second observable trend is the vast difference in numbers between the two departments. On average, from 2007/8 to 2019/20, DCS initiated disciplinary action against 83 officials per 1 000 officials annually. In the case of SAPS, this figure is 21 per 1 000 officials, or 4 times less.

It is also noteworthy that from 2012/13 till 2019/20 an average of 44% of SAPS disciplinary cases were withdrawn or the finding was not guilty. In the case of DCS this figure on average is 6.6%. The implication is that even if disciplinary proceedings are brought against a SAPS official, the chances are still 44% that he or she will walk away scot-free, compared to 6.6% in DCS. It is therefore evident that disciplinary cases are not effectively investigated and pursued.

Figure 1

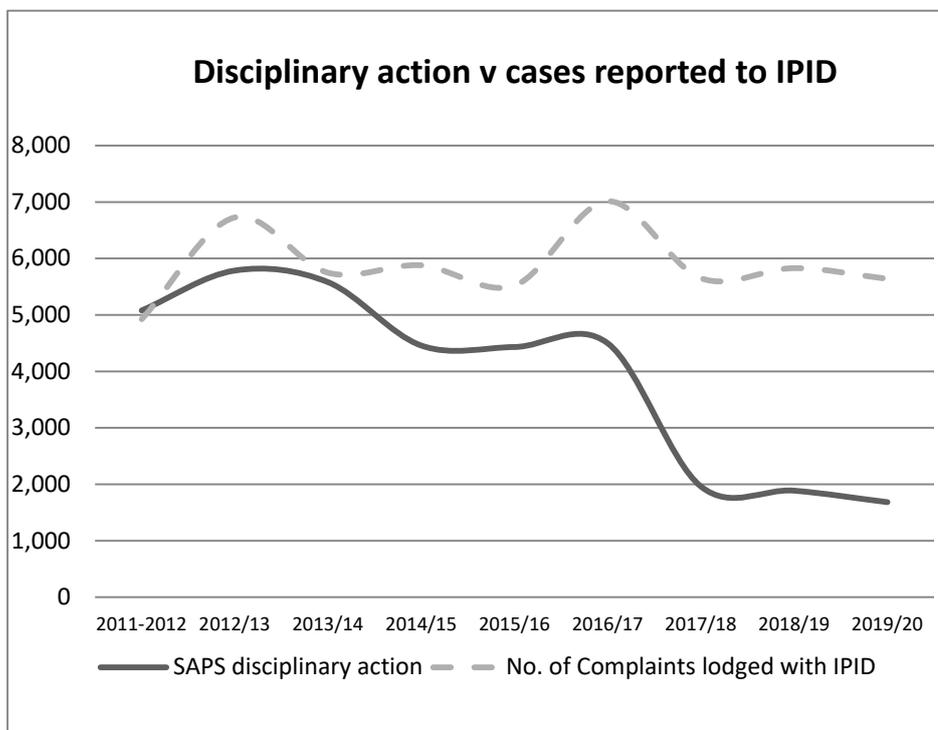


From the comparison it is evident that discipline is enforced at vastly differing rates in the two departments. Bear in mind that internal disciplinary action will be used for less serious violations, relating to the performance of employees and that more serious offences will comprise a lesser percentage. That DCS is enforcing its disciplinary code at the current rate is important in order to strengthen compliance with daily performance requirements, with the argument being that if less serious offences are addressed through disciplinary action, it will discourage more serious violation by holding transgressing officials accountable. The flip side of this argument is that if less serious transgressions are not addressed, it opens the door for more serious violations, engendering a culture of impunity. A further indication in SAPS that transgressions need to be fairly serious before disciplinary action is undertaken is that over the period 2012/13 to 2019/20 on average 9.4% of disciplinary proceedings resulted in dismissal compared to 3.8% in DCS for the same period.

IPID investigations compared to internal discipline

The Independent Police Investigative Directorate (IPID) has a specific mandate to investigate serious complaints against SAPS officials.²⁰ From Figure 2 below it is apparent that more cases are reported to IPID, and thus serious cases, than all the cases handled by SAPS through internal disciplinary procedures. This creates the impression that IPID is somehow responsible for discipline in SAPS, whereas the truth is that this responsibility rests squarely on the shoulders of SAPS management.

Figure 2



IPID refers between 980 and 2400 cases to the NPA annually which may recommend a criminal prosecution or not.²¹ However, feedback from the NPA on whether it has decided to prosecute or not, is by and large not forthcoming although there has been some improvement in later years. For example, in 2016/17 IPID reported that it was awaiting a response from the NPA in 96% of cases. In 2017/18 this figure dropped to 72%; the lowest level since 2013/14. In 2018/19 it climbed back to 85%, but improved the following year to 66%. One reason for the apparent reluctance to prosecute police officials is that if a prosecutor wants to prosecute a SAPS member, permission needs to be obtained from a senior prosecutor.²² This is undoubtedly extra work and thus a natural disincentive to pursue a prosecution. It may also be the case that such requests are indeed made, but declined by senior prosecutors and further investigation is required. In the past two years, only 110 SAPS officials were prosecuted by the NPA of the 4 477 cases referred to it by IPID, or 2.5%. The NPA is a critical part of the accountability architecture, yet it seems not to fulfil its mandate in holding police officials accountable.

Discussion

From the above it is concluded that the accountability chain in SAPS is broken and that this is clear when the comparison is made with disciplinary code enforcement in DCS. The Ethics Institute research findings referred to above indicated that police officials are engaged in corruption on a substantial scale and based on that, it is safe to assume that disciplinary infringements would at least be of a similar frequency in these two departments and it is therefore simply not a credible explanation that police officials are more compliant with departmental prescripts and applicable legislation than DCS officials. A further lesson to be taken from DCS is that at the time of the Jali Commission, there was a realisation that the enforcement of discipline is integral to the management function and this responsibility rests with all managers.²³ Following from this, the disciplinary code was renegotiated with organised labour; officials were trained in conducting and presiding over disciplinary hearings, and support structures established for staff. In short, there was a concerted effort to regain control over internal discipline and the results are visible, as shown in Figure 1.

In this brief overview it is apparent that accountability of SAPS fails on four fronts. Firstly, very few officials are subject to internal discipline, especially given the size of the SAPS staff establishment, some 195 000 employees. Calculated as a per 1 000 ratio, on average SAPS disciplined 21 employees per 1 000 annually compared to DCS at 83 per 1 000. From 2016/17 to 2019/20 there was a decline of 63% in the number of officials subject to internal discipline, making a bad situation even worse. Secondly, when disciplinary action is instituted, in 44% of cases on average the charges are either withdrawn or the official acquitted (compared to DCS at 6.6%). This indicates that matters are not properly investigated and/or presented to the disciplinary tribunal. Thirdly, the few cases that do proceed to the NPA via IPID, appear to get stuck there with a decision from the NPA not forthcoming. Fourthly, seen together, the message is not communicated to SAPS officials that transgressing officials will be held accountable, even when transgressions are relatively minor. This is important, because it is not reacting to the small transgressions that create the scope for more serious transgressions. The more important and also disconcerting conclusion is that in the absence of a functioning disciplinary system, command and control has collapsed and the organisation is adrift, bobbing from one crisis to the next.

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- ² Dobie, C. (2017) *South African Citizen's Bribery Survey 2017*, The Ethics Institute, Pretoria, p. 8, http://www.tei.org.za/phocadownload/CBS%202017_29%20November%202017_Upload%20to%20web.pdf
- ³ S 195(1)(f) Constitution.
- ⁴ U4 Anti-Corruption Resource Centre *Corruption Glossary* <http://www.u4.no/document/glossary.cfm> Accessed 6 October 2011.
- ⁵ Muntingh, L. (2007) *Prisons in the South African constitutional democracy*, Johannesburg: Centre for the Study of Violence and Reconciliation, p. 16.
- ⁶ Schacter, M. (2001) When Accountability Fails – a framework for diagnosis and action, *Isuma* Vol. 2 No. 2, p. 1.
- ⁷ Muntingh, L. (2007) p. 16.
- ⁸ Transparency International 'What is transparency?' http://www.transparency.org/news_room/faq/corruption_faq
- ⁹ Muntingh, L. (2007) p. 25.
- ¹⁰ U4 Anti-corruption Resource Centre, Glossary, <http://www.u4.no/document/glossary.cfm> Accessed 6 October 2011.
- ¹¹ U4 Anti-corruption Resource Centre, Glossary, <http://www.u4.no/document/glossary.cfm> Accessed 6 October 2011.
- ¹² Muntingh, L. (2007) p. 16.
- ¹³ UNODC (2011) *Handbook on police accountability, oversight and integrity* New York: United Nations, p. iv; Brannagan, C. (2011) 'Police Misconduct and Public Accountability: A Commentary on Recent Trends in the Canadian Justice System' 30 *WRLSI* 61 at 62.
- ¹⁴ UNODC (2011) p.14
- ¹⁵ The South African Police Service Discipline Regulations, Government Gazette No. 40389, 1 November 2016, https://www.gov.za/sites/default/files/40389_rg10662_gon1361.pdf
- ¹⁶ S 40 Criminal Procedure Act.
- ¹⁷ S 32 Correctional Services Act, S 49 Criminal Procedure Act.
- ¹⁸ All data obtained from relevant SAPS and DCS annual reports.
- ¹⁹ Regulations for the SAPS – Disciplinary Code for SAPS, Government Gazette 40389, https://www.gov.za/sites/default/files/gcis_document/201611/40389rg10662gon1361.pdf
- ²⁰ IPID Act S 28. (1) The Directorate must investigate- (a) any deaths in police custody; (b) deaths as a result of police actions; (c) any complaint relating to the discharge of an official firearm by any police officer (d) rape by a police officer, whether the police officer is on or off duty; (e) rape of any person while that person is in police custody; (f) any complaint of torture or assault against a police officer in the execution of his or her duties; (g) corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be; and (h) any other matter referred to it as a result of a decision by the Executive Director, or if so requested by the Minister, an MEC or the Secretary as the case may be, in the prescribed manner.

²¹ See IPID annual reports 2011/12 to 2019/20.

²² Part 8, Prosecution Policy Directives NPA (2014 as amended).

²³ Department of Correctional Services (2011) *Department of Correctional Services implementation of the recommendations of the Jali Commission of Inquiry on Systems and Policies – Section A*, Report presented to the Portfolio Committee on Correctional Services on 7 September 2011.