

Safeguard INDECOM's Independence: Reform the INDECOM Act

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On May 27, 2020, Minister of Justice the Honourable Delroy Chuck tabled a motion in Parliament regarding amendments to the INDECOM Act, 2010. This action follows a recent ruling of the Judicial Committee of the Privy Council – Jamaica's highest court of appeal – on whether the INDECOM Act empowers the Independent Commission of Investigations (INDECOM) to arrest, charge, and prosecute members of the security forces who commit offences while serving in an official capacity.

The Court decided that the INDECOM Act, as presently worded, empowers the Commission to investigate incidents of wrongdoing but not to arrest, charge, or prosecute members of the security forces. INDECOM does, however, have the power to prosecute members of the security forces for breaches of the INDECOM Act itself, such as obstructing INDECOM from fulfilling its functions.

As the Privy Council put it, the decision was **not** about whether INDECOM *should* have these powers but strictly about whether the present wording of the INDECOM Act gives it those powers. Jamaica's longstanding issue with impunity for acts of wrongdoing by members of the security forces and the important progress that INDECOM has achieved for the nation since its establishment require that we take all reasonable measures to strengthen the Commission's operations and safeguard its independence. A Joint Select Committee of Parliament already recommended amendments to the INDECOM Act to explicitly recognize these powers in law. It is the failure to execute these legislative amendments that has produced this situation.

Jamaicans for Justice calls for lawmakers to safeguard INDECOM's independence and explicitly recognize its powers to arrest, charge, and prosecute within reasonable parameters.

Background to the Privy Council's Decision

The contention over INDECOM's powers arises from the attempt to prosecute Corporal Malica Reid for the 2010 fatal shooting of Frederick "Mickey" Hill. In July 2013, the Court, upon enquiring into INDECOM's powers, held that it had authority to arrest accused members of the security forces under section 20 of the INDECOM Act and at common law, but that INDECOM only had the power to prosecute at common law not in statute. That decision was reversed in part by the Court of Appeal in 2018, which held that the wording of the Act did not grant INDECOM those powers.

Reforms to the INDECOM Act are necessary and overdue

The lack of clarity regarding INDECOM's statutory power has been an issue for the Commission since inception. In fact, in 2015, a Joint Select Committee of Parliament recommended an amendment to the INDECOM Act which would give INDECOM the power to charge, arrest, and prosecute members of the security forces. In reviewing the INDECOM Act, the Committee determined that "INDECOM's entitlement to prosecute" needed to be clarified in law and it drafted new subsections 4(1)(d) and (e) to the INDECOM Act that would explicitly give INDECOM power to "institute and undertake criminal proceedings" or delegate that power to "any person qualified to practice as an Attorney-at-Law." The Committee also agreed to add a new subsection to section 20 of the INDECOM Act that would confirm INDECOM officers' "powers, authorities and privileges...including: (a) To arrest as is given by the law to a constable; (b) To lay criminal charges and to serve summonses as are given by law to a constable."

Why INDECOM should have the power to charge and prosecute

If INDECOM does not have basic powers to initiate proceedings akin to those of the police, how will charges against officers who commit unlawful acts be laid when there is evidence of criminal conduct? Without these basic powers, the police would have to agree to charge and arrest themselves, secure court dates for, and bring their own officers to court. Can we reasonably expect officers to execute these duties against their peers without favourable bias? This is the opposite of independent oversight. We must remember that prior to INDECOM, this type of procedure is what existed. It produced a widespread and well-documented culture of impunity. In fact, this is one of the very issues that INDECOM was established to correct in 2010. Regressing to this would render any notion of practical and independent police oversight meaningless. The result would be an impotent INDECOM that could only conduct investigations and provide recommendations, with enforcement left to those implicated in the wrongdoing. This would be, to put it bluntly, absurd.

Victims of violence by security forces are entitled to timely justice on equal terms.

In addition, INDECOM must defer to the Director of Public Prosecutions (DPP) for a ruling on a matter before charges can be laid. This strange procedural requirement does not exist when laying regular criminal charges. Ordinarily, the laying of criminal charges for offences are done by the police or other bodies, without any ruling from the DPP. However, under the current setup, if a member of the security forces is to be charged, a different standard is applied. At present, the police, the Major Organized Crime and Anti-Corruption Agency, and the Integrity Commission all have the power to initiate criminal proceedings independent of the ODPP. Why do cases from INDECOM require this strange procedural hurdle? Are victims of wrongdoing by security forces less entitled to timely justice? Why should the justice system treat accountability for police so differently? We remind all persons that under the Jamaican Constitution, the DPP still retains the power to take over or discontinue any prosecution. In that capacity, the ODPP retains the type of oversight most appropriate in these circumstances.

Moreover, the well-documented delays in actioning cases by the ODPP – in many cases for years – coupled with an apparent inconsistency and perceived reluctance in *certain cases* to prosecute members of the security forces has demonstrated that the situation is untenable. Judicial review proceedings have even had to be instituted to compel the ODPP to take action in some cases.

It is imperative, particularly at this time of heightened tension surrounding abuses by the security forces, that the Jamaican government enact these necessary reforms to safeguard and strengthen independent oversight mechanisms and demonstrate that it is serious about protecting fundamental human rights. (Copied from <https://www.jamaicansforjustice.org/reform-indecom-act/> on 24/7/2020)