



AFRICAN POLICING CIVILIAN OVERSIGHT FORUM



**independent
complaints directorate**

Department:
Independent Complaints Directorate
REPUBLIC OF SOUTH AFRICA

**The New Legislative Framework and Mandate of
the Independent Complaints Directorate:
Rape by a police officer and rape while in police custody
irrespective of whether a police officer is involved**

**Tuesday 11 and Wednesday 12 May 2010,
Southern Sun Hotel, Pretoria**

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1. WELCOME

Mr. Sean Tait of the African Policing Civilian Oversight Forum (APCOF) welcomed everyone present and thanked them for attending.

The workshop was being co-hosted by APCOF and the ICD to discuss the issues, challenges and implications of the possible expansion of the ICD mandate. It was anticipated that the new mandate would include the mandatory reporting and investigation of all rapes where a police officer is alleged to have been involved both on- and off-duty, as well as all rapes in police custody irrespective of the alleged involvement or not of a police officer.

The workshop provided excellent opportunity for the stakeholders and parties interested in the independent oversight of police to engage on these issues, which are ahead of legislation on the ICD and the Secretariat of Police, and are currently being tabled for comment, discussion and eventual promulgation in parliament.

2. EXPANDING THE ICD MANADATE

Francois Beukman, Executive Director of the ICD, said that the debate on strengthening the mandate of the ICD had been ongoing for more than six years. In June 2009, the Minister of Police, Honourable Nathi Mthethwa, appointed a Task Team to consider legislative amendments to the ICD-enabling legislation, currently contained in the Police Act. The idea of a dedicated Act for the ICD was mooted and endorsed. At the time of the workshop this was being drafted, and would be submitted to Cabinet shortly for approval before being submitted as a Bill before Parliament.

Mr. Beukman then went on to discuss the underlining objectives informing the new legislation, which were that:

- The ICD should investigate those matters that will have a lasting impact on transforming the police;
- The mandate of the ICD should be extended to focus on more serious and priority crimes committed by members of the SAPS;
- The new legislation should address current lacunas in legislation;
- The reorganised ICD should provide for an improved management structure;
- The ICD needed to improve reporting and accountability practices; and
- The ICD needed to establish a formal liaison mechanism between itself and the Secretariat of Police.

The new focus was designed to give effect to the Constitution and address criticism that the ICD's mandate is too broad, does not have sufficient powers in certain cases such as torture and rape, and has limited resources.

The proposed new focus areas of the draft bill were:

- Rape by a police officer, whether the police officer is on- or off-duty;
- Rape of a complainant by other detainees while the complainant is in police custody;

- Any complaint of torture which is referred to the ICD by a station commissioner, magistrate, judge, legal representative or the complainant in the case where the complaint is unrepresented;
- Any matter that is referred to the ICD by the minister or MEC through the executive director; and
- Systemic corruption involving the police.

The new focus of the ICD will be on serious and priority crimes committed by the SAPS members. Service delivery complaints attended to by the ICD will be limited, and in the future these cases will be addressed through the Secretariat. The Secretariat will also monitor the implementation of recommendations made by the ICD and will report to Parliament.

In conclusion, Mr. Beukman said that there are many issues with the new legislation and its implicated associations, which he hoped would be debated and discussed at the workshop. These included:

- Legal definitions;
- Regulations and the processing of complaints;
- Capacity/expertise of the ICD;
- The role of civil society and the legal community;
- Cooperation with other institutions and/or departments; and
- The promotion of human rights culture, integrity and proper conduct in the police.

In the discussion, participants welcomed the opportunity to participate in the engagements of the workshop. The participants noted it is difficult to prove rape by police. It was therefore also important to look at the role of the ICD and other role players in the prevention of rape. This could be achieved through regular inspection visits and complaint mechanisms. It was therefore suggested that proactive oversight is an important intervention which must address facilitating factors and trends. The mandate of the ICD could also potentially be expanded to include sexual harassment.

Issues of resourcing and capacity were critical to the proper functioning of the ICD, and any amendment to the legislation or expansion of the scope of the ICD should be costed and adequately budgeted for.

Participants noted that one of the intended objectives of the legislation was to increase the power of the ICD. The police often fail to report cases of rape in custody or involving their own members to the ICD. The new legislation needed to be clear, that rape cases by the SAPS and Metro Police should be referred to the ICD for investigation.

The role of the internal SAPS disciplinary process should be considered in this discussion. Many participants felt that this process needed to be improved. However, it was also noted that innovative strategies to improve the disciplinary system, including measures to take the role of implementing discipline outside of the police station, were also being tested by the SAPS themselves.

3. THE SAPS INTERNAL DISCIPLINARY PROCESS - LESSONS FROM PRACTICE

Ms. Anneke Meerkotter of Tshwaranang Legal Advocacy Centre discussed issues regarding the SAPS Internal Discipline process drawn from the practical experiences of Tshwaranang Legal Advocacy Centre.

She began by reflecting on the legal environment pertaining to sexual offences. This included:

- Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007
 - Effective from 16 December 2007, Chapter 5 from 21 March 2008 and Chapter 6 from 16 June 2008;
- Regulations to Act on Chapters 5 & 6
 - Effective from 22 May 2008;
- National Instruction 3/2008 Sexual Offences
 - Effective from 15 August 2008; and
- SAPS Anti-Rape Strategy.

However, the effectiveness of this legislation was debatable. There was a significant attrition of rape cases, and perpetrators seemingly raped with impunity and a disregard for the law.

Turning to rapes perpetrated or facilitated by the SAPS members, she noted that problems of impunity were often worse. They occur both on- and off-duty and are often committed against sex workers. The issue of negligence by the SAPS members, which then results in rape, is also a problem. This is both in relation to issues such as the release of or failure to arrest perpetrators, leading to re-offending and particularly rape in police custody.

Ms. Meerkotter then went on to discuss specific cases of rape by police members.

1). K v Minister of Safety and Security 2005 (9) BCLR 835 (CC); 2005 (6) SA 419 (CC)

In this case, the complainant was raped by three on-duty uniformed police officers.

The case is important as it illustrates the application of the test for vicarious liability. To prove vicarious liability, two questions must be posed:

- Whether the wrongful acts were done solely for the purposes of the employee (subjective consideration, factual), or
- Whether there was nevertheless a sufficiently close link between the conduct and the employer's business and purposes to render employer vicariously liable?

The Constitutional Court held that although policemen's conduct constituted clear deviation from duty, there nevertheless existed a sufficiently close relationship between their employment and the wrongful conduct. The Constitution mandates police to protect community members, and for this mandate to be performed efficiently, reasonable trust must be placed in a member of the police service by members of the public. The Court held the Minister vicariously liable and awarded damages for wrongful conduct of policemen.

2). *F v Minister of Safety and Security 2009 JDR 0697, 4194/2006 (WCC)*

In this case the complainant was raped by a plain-clothed detective who was on stand-by duty and who had offered the complainant a lift in an unmarked police vehicle. The policeman had previous convictions for assault GBH.

The Court held that the employer of a police officer does not necessarily escape vicarious liability simply because the policeman is formally off-duty, dressed in private clothes or commits delict for purely private reasons. The duty to protect, instill trust, and be accountable to continuing duties as a police officer is not suspended if off-duty.

The Court held that where the State appoints, as a guardian and enforcer of law, a police officer who has a record of serious criminal misconduct, this is a consideration which may be taken into account in determining the employer's vicarious liability for the officer's subsequent wrongful conduct. This view is supported in other judgements, such as the *Minister of Safety and Security v Luiters*, where the Court ruled on the responsibility of Minister to ensure police officers are properly trained and carefully screened to avoid the risk that they will behave in improper manner.

The Courts can thus hold the SAPS and the Minister vicariously liable for rape by a SAPS member. The impact of this precedent on the SAPS has been to increase accountability and improve control over the SAPS members, through inter alia:

- Conducting regular evaluations,
- Monitoring,
- Psychological assessments,
- Applying sanction through criminal convictions, suspensions and withholding issuing of weapons.

However, the SAPS members often attempt to avoid accountability at various levels through:

- Cover up , misplacing and destroying evidence;
- Avoiding opening a criminal case;
- Delaying and avoiding internal disciplinary processes;
- Superficially applying the internal disciplinary processes; and
- Defending civil cases.

The solution to these recognised challenges was to invest more oversight power with an external body, such as the ICD.

Turning to the SAPS Discipline Regulations, Ms. Meerkotter noted that Annexure A of the regulations recognises rape as a serious offence for which immediate suspension pending disciplinary process is warranted.

However, there were challenges inherent in the SAPS disciplinary system in that:-

- In most of the TLAC cases of abuse or rape at the hands of a police officer, the criminal charges 'disappear.' Complainants report that they do not receive assistance from the SAPS to open cases. When cases are opened, investigations are limited, and cases are withdrawn.

- If criminal cases rarely proceed, the question can be asked as to what oversight mechanisms are in place to ensure internal disciplinary processes take place. Even in cases of domestic violence perpetrated by the SAPS members, where the ICD has oversight, it is likely fewer cases are documented and reported to the ICD by the SAPS than actually take place.
- There is lack of awareness, transparency and access by the complainants to the disciplinary process.

Meerkotter then discussed the Volksrust case, the details of which are as follows:

On 16 February 2007 a woman was allegedly raped by 6 men in the cells of Volksrust Police Station after she was arrested for drinking in public. The case received much media attention and 2 police officers were suspended.

In the criminal case against the suspects, one suspect had pleaded guilty and was sentenced to 10 years. The others were withdrawn. A civil case was opened against the then Minister of Safety and Security.

On 24 April and 9 May 2007 a disciplinary hearing for Constables Mphosula and Nthuli was held at the SAPS.

The TLAC requested information about the disciplinary proceedings, but had to submit a formal Promotion of Access to Information Act (PAIA) application, and the SAPS first obtained consent from defendants.

In the record of the enquiry, when finally obtained, it was noted the lights in cells were not functioning properly and had been reported on prior occasions. This was in contravention of the both the Standing Order and the National Instruction, which demand that the Station Commissioner must ensure all police cells have adequate light and ventilation. Further, the SAPS did not check the cell in which the woman was placed, and only visited the outside cells for night-time inspection.

The finding was that negligence and non-compliance of orders caused the incident. The sanction was dismissal, which meant suspension for 6 months on the condition that if he was found guilty of Standing Order 361, he would be dismissed. The Provincial Commissioner's office acknowledged the Station Commissioner should also have been charged¹.

The case raised the following questions:

- Was the sanction of a suspended discharge sufficient given the gravity of the misconduct?
- Does the public have the right to access the records of disciplinary proceedings where the misconduct is related to a matter of public interest?
- Does the public have the right to request reasons for the decision where the disciplinary officer fails to make such a request?

Regulation 16 of the SAPS Discipline Regulations, the Procedure after a finding of misconduct states;

- Should interested parties have a right to appeal the decision of a disciplinary hearing since the disciplinary officer would not necessarily represent the public interest?

In conclusion, Ms. Meerkotter emphasized

- the importance of training;
- increasing awareness of the oversight mechanisms in place;
- making sure the actions of reservists are also subject to the provision of the new legislation; and
- that monitoring should be improved and those officers with psychological and behavioral problems should be identified and the issues addressed before they result in criminal conduct.

The problems of gatekeepers preventing information from reaching the Provincial Commissioners needs to be recognised. Access to disciplinary hearings and proceedings should be opened. The reasons for sanctions need to be provided, and senior managers should be held liable.

In the discussion to follow, the access to the SAPS disciplinary process was debated. There was tension between the disciplinary process as a mechanism between employer and employee to address job performance, and its role in promoting the public interest, for which it was not suited.

4. TRACKING JUSTICE – Attrition of rape cases through the criminal justice system, lessons learnt and the challenges of addressing rape in the police

Ms. Lisa Vetten, from Tshwaranang Legal Advocacy Centre to End Violence Against Women discussed the attrition of rape cases through the criminal justice system, lessons learnt, and the challenges of addressing rape in the police from a recent study by Tshwaranang and the Centre for the Study of Violence and Reconciliation (CSVR).

The objectives of the study were:

- To describe the characteristics of reported rape cases in the Gauteng province; and
- To describe the processing of rape cases by the police and courts at selected courts and police stations.

The methodology used included a random sample of 70 police stations from the Gauteng province. Probability was proportional to the size of the police station, and 30 rape dockets were selected using systematic sampling of all closed rape dockets that are available in the station. Cases resulting in arrest were tracked to 30 Regional Courts and two High Courts in the province. Charge sheets and court books were analysed. Overall, a total of 2068 dockets were used in the analysis.

Ms. Vetten then spoke about three cases identified by the study in Sophiatown, Booyens and Yeoville.

- *Case 1:* The victim was 19 years old. She was sitting on the stairs outside her house when a police vehicle drew up. One officer asked to see her identity document. When she could not produce it, the police officer demanded to go inside her house to search.

The officer then went into her bedroom to search for drugs under the carpets, after which he demanded that she undress so that he could body-search her. When she took off her top, he then pushed her on the bed and raped her. After he left, the victim told her roommate and boyfriend about what happened. They then went to report the case. A J88 was completed and specimens collected. No report was ever received from the Forensic Science Laboratory. The Investigating Officer attempted to obtain information from the SAPS Head Quarters, but this was not forthcoming. The victim was taken to Brixton for an Identity Parade, but this did not take place. Two months later, the Investigating Officer took the victim to Johannesburg Central to draw up the ID kit. The victim's memory of the perpetrator was vague at this point. The case was closed.

- *Case 2:* A 20-year old victim was hitch-hiking and was offered a ride by two police officers. They drove past her destination. When they stopped, one demanded oral sex from her while the other raped her but put on a condom first. The two officers then dropped her at her home. The case was reported the same day. The victim took the perpetrators' names and they were arrested five days later following an Identity Parade. The victim's T-shirt had semen stains and was handed in as evidence. No Forensic Science Laboratory report was produced. The case was withdrawn by the prosecutor. One suspect argued this was a set-up and wrote a 2-page letter to the Commissioner outlining other false allegations levelled against him. During investigation, it emerged that the same suspect was once arrested on another unknown charge.
- *Case 3:* A SAPS officer knocked at the door of a 26-year old sex worker, asking if she worked for anyone. She let him in and asked to be paid up front. He took out his badge and said he had to arrest her. The officer then said he would do her a favour by not arresting her and in exchange she must do him a favour. He then raped her. The rape case was reported the same day. There was no indication that any investigation took place at all. No J88 was completed. The National Prosecuting Authority (NPA) declared it was unable to prosecute -"Nolle Prosequi" two and a half months later on the basis the victim withdrew.

An Overview of the study findings revealed the disposal of cases as 17% going to trial, 22% withdrawn by the court, 16% nolle prosequi by the Prosecutor and 45% not making it past police investigation.

Up to 53 % of the cases resulted in arrest, 42.8 % in a charge, 17.3% went to trial and 6.2% resulted in conviction.

Most police withdrawals were noted as a result of the perpetrator not being detected. This was followed by the victim being untraceable, no medical evidence, false accusation, the parties resolved the matter, and the victim discontinued. Crime involving adult women and teenagers had the highest proportion of withdrawals as a result of the perpetrator not being detected. Young girls had the highest proportion of withdrawals as a result of the victim being untraceable or no medical evidence. Teenagers had the highest proportion of withdrawals as a result of false accusation.

Discussing the quality of police work, Ms Vetten noted that:-

- There was no first witness statement for 45.8% of the cases. There was a greater likelihood of a first witness statement not being taken when the victim was an adult (53.6%), compared to teenagers (38.1%) and young girls (26.0%).
- Some victims' statements made reference to others who had either witnessed some part of the rape or had knowledge of the events. No statements were taken from these other potential witnesses in 41.6% of the cases.
- Up to 22% of victims became untraceable, due to:
 - No residential address was recorded in 2.5% of cases;
 - No work address was recorded in 75.2% of dockets;
 - No details of another contact person were recorded in 82.8% of dockets; and
 - The median number of attempts made to contact untraceable victims was three, ranging from no effort whatsoever, to a maximum number of 15 attempts. In 25% of cases where the victim disappeared, as few as four days had passed between the investigating officer's first and last attempt to trace her.
- Arrests:-
 - Some untraceable suspects were known or related to victims;
 - Timeous arrests: in 41.2% of cases, instructions were issued to arrest. In 52.7%, instruction were issued twice or more before the investigating officer complied with it;
 - In 30.2% of the cases where an instruction was issued on two or more occasions to arrest the suspect, the suspect had disappeared; and
 - There was no description of perpetrator in more than three-quarters of victims' statements (78.4%).

The most common reason given for Nolle Prosequi by the Prosecutor was insufficient evidence, followed by the reason that the complainant disappeared, the complainant or guardian discontinued, the parties resolved the matter, or other reasons. In the case of young girls, insufficient evidence was the most common reason given, whereas adult and teenage women accounted for the highest proportion in the response categories that the complainant disappeared, the complainant or guardian discontinued, the parties resolved the matter, or other reasons.

Inability to trace the victim was the most common reason for court withdrawals. This was followed by victim withdrew and loss of evidence, witnesses became untraceable, diversion and the accused disappeared or died.

When reflecting on medico-legal evidence, the Evidence Kit was completed in 67% of the cases. In 51% of cases it was sent for forensic testing, in 16.4% of cases blood samples were taken. In 2.1% of cases a written report was received from the forensic sciences laboratory.

Reflecting on the quality of forensic reporting, the research found that:

- Up to 39% of young children had SAECK completed, compared to 61% of teenagers and 77% of adults. SAECKs of girls were significantly more likely to be analysed and a report made available after being sent to the Forensic Science Laboratory than adults.

- There was no concluding statement related to the gynaecological examination in 16.2% of J88s;
- The concluding statement was missing in the general examination section in 41.5% of cases. Clinicians often wrote “Alleged Rape” in the conclusion section of either the general examination or gynaecological examination.
- The presence of injuries, severe or otherwise, made no difference to the likelihood of a suspect being arrested. Following an arrest, cases involving children were twice as likely to go to trial if there was a genital injury with a skin or mucosal tear.
- A conviction for a sexual offence in adults was three times more likely if there was a bodily injury and more than four times more likely if there was a genital injury. The availability of a report on DNA made no difference to the likelihood of conviction (although DNA reports were available in very few cases).

Reflecting on the trial outcomes, of the 6.2% found guilty, the majority were in cases of young girls, followed by teenage girls and adult women. Adult women were featured more predominantly in a conviction of rape whereas sex with a minor was more predominantly in cases involving teenagers.

The median sentence imposed upon those who raped women 16 years and older was 10 years. For girls under 16 the median sentence was 16.5 years, well below the minimum of life imprisonment. Only 3 life sentences were handed down (none for gang rape, assault GBH and disability).

In the discussion that follows, it was noted that police needed training in crime scene management, reconstructing scenes, and collecting evidence. Specialist skills were required and the FCS units needed to be re-established. Doctors and health professionals were important stakeholders, and their professionalism in this environment needed to be improved. The protection of rape victims, particularly in the face of delays and withdrawals of cases, need to be developed. The police need specialisation when dealing with victims of rape. If the ICD mandate was extended, similar specialist skills would be required. Resourcing was also identified as a challenge. Often, rape kits were not available.

5. THE KERR CASE AND THE NEED FOR REFORM

Ms. Mushahida Adhikari of the Women’s Legal Centre discussed the Kerr Case and the need for Reform.

She began her discussion by noting that it is accepted in our law that before a wrongdoer can be held liable for damages caused, it must be shown that he or she was at fault – whether in the form of negligence or intent. Our law does however recognise certain circumstances where liability without fault is justified. Our common law, for instance, allows a person to claim damages from the owner of a domestic animal that has caused damage to another without proving fault. In addition, the common law principles of vicarious liability hold an employer liable for the wrongful acts committed by its employees where the employees are acting within the course and scope of their duty as employees.

The criteria applied by the Courts have had to keep pace with the various means and opportunities provided by technological and other advances which allow employees to deviate from their duties. Notwithstanding the ever evolving test, there was little consistency.

Whilst one court regarded an employee's actions as mismanagement in the performance of work, thus finding that the employer could be held vicariously liable, another court viewed the same actions as independent actions for which the employer is not liable.

Many vicarious liability cases are straightforward. Difficulties however, arise when the wrongful act is committed in the course of a deviation from the normal performance of an employee's duties. This difficulty is particularly pronounced where the deviation itself is intentional, and even more so where the deviation constitutes an intentional wrongdoing, such as sexual harassment or sexual assault in the workplace.

During the past few years there has been a dramatic increase in sexual harassment cases where not only the perpetrator but also the perpetrator's employer faced litigation and were ordered to compensate the victim for damages suffered.

Previously, employers frequently escaped being held liable for the sexual misconduct or harassment by one of their employees due to the strict application of the "standard test" applied by our Courts. As long as the employee's conduct fell "outside the scope of employment", the employer could not be held vicariously liable. The Constitutional Court has now, however, determined that employers may not hide behind a strict test for vicarious liability and that our Courts should openly confront the question of whether liability should lie against the employer rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

The message from the Constitutional Court is clear: common sense must prevail. The principles of vicarious liability as set out in the Rabie Case must be understood and applied within the framework of our Constitution and the social and economic purposes which it seeks to pursue. It is clear from this judgment that in a country plagued by high levels of sexual abuse and violence, the application of the principles of vicarious liability need to accord with the right to equality, dignity and freedom from fear and discrimination entrenched in the Constitution.

6. PROTECTION OF WOMEN AND CHILDREN BY THE SAPS

Major General Mekute of the SAPS gave an input on KwaZulu-Natal (KZN) Provincial SAPS strategies to address crime against women and children. She began by noting that in all societies to a greater or lesser degree, women and children, particularly a girl child, are subject to physical, emotional, sexual, economic and psychological abuse that cuts across the line of income, class and culture. They often face rape, economical and sexual abuse at home and sexual harassment and intimidation in the workplace. All such forms and acts of violence violate and impair or nullify women and children's enjoyment of Human Rights and Fundamental Freedom.

The vision "Defending the Weak," introduced in 2004 by former MEC for Dept of Community Safety and Liaison in KZN and the current National Commissioner Bheki Cele, became the driving force in KZN as SAPS developed new ways of utilising our law enforcement resources in the fight against crime- in particular crimes against women and children.

A number of both preventative and protective laws were promulgated in South Africa to improve the overall quality of lives of women and children by eradicating violence and any form of discrimination against them, such as the Domestic Violence Act and the Sexual

Offence Act. The enactment of these laws made various forms of violence against women clearly defined crimes and enabled law enforcement agencies to take appropriate measures to impose penalties, punishment, and other enforcement mechanisms for the prevention and eradication of violence against women and children.

The police work actively to implement these laws. Strategies were developed to ensure monitoring and effective enforcement of these laws. A Provincial Domestic Violence and Sexual Offences Monitoring System was developed. Therefore, incidents are reported monthly. The system monitors incidents of Domestic Violence (DV) reported and criminal cases reported, as well as members trained to deal with Domestic Violence. It is equipped to deal with different categories of gender-based violence cases, such as:

- Incidents of DV reported
- Criminal cases related to DV reported
- Domestic Violence statistics reported to the ICD to ensure compliance and determine whether police actions were justified or not.

The Provincial Coordinating Committee is a multidisciplinary committee to facilitate an integrated approach by the SAPS, the National Prosecuting Authority, the Department of Correctional Services, the Department Health, the Department of Social Welfare, Non-Governmental Organisations (NGOs), and other relevant stakeholders. These stakeholders are also responsible for ensuring that Protection Orders are properly served, and they provide legal aids and other services to children and women at risk.

The strategies developed to protect women and children at risk include the following:

- Provincial anti-rape strategy;
- Sexual offences task team;
- Victim empowerment forum (dealing with human trafficking, prostitution and child pornography);
- Minimum standard victim charter;
- Child justice center;
- Project Car (children at risk) developed by the SAPS women's network. Thirteen children who were living in the streets in Pietermaritzburg were re-integrated into their families, placed in schools and are being monitored; and
- Adopt an orphanage: Babanango, Utrecht; St Antony's Blaaubush and Thembelihle Home in Newcastle.

In 2008 the KZN Province established 24 Victim Support Centers in 24 police stations. In 2009 a total of 64 Victim Support Centers were established. The SAPS, the Department of Health and the NPA have taken an initiative in the establishment of two (2) Duduzela (one-stop) Centers at Prince Mshiyeni Hospital, Umlazi and Mahatma Gandhi Hospital in Phoenix. The Centers are managed 24 hours seven days a week by female police officers. There are always doctors on standby, nurses, and social welfare officials to ensure that victims of sexual offences are provided with the necessary speedy service they deserve.

Finally, from 25 November to 10 December 2009 the SAPS women undertook a 600 kilometer Walk Against Violence Campaign from Estcourt to Port Shepstone, intended to motivate women to break the silence.

7. LINKING THE ICD TO VICTIMS SUPPORT SERVICES

Ms. Nomfundo Mogapi of the Centre for the Study of Violence and Reconciliation discussed the importance of any efforts by the ICD to investigate rape to include knowledge of and the ability to refer survivors to appropriate support services, while at the same time minimising secondary victimisation.

It was important for investigators to understand the likely reactions of survivors, including the peri-trauma reactions of flight, fight, and freeze, as well as the post-trauma reactions. The impact of rape surviving was likely to be multifaceted and impact the family as a whole. The implications for investigation were the following:

- Delayed and under-reporting;
- Examination may be traumatic;
- Questioning was also likely to be traumatic;
- Misinterpretation of victim's reactions;
- Timing of investigations; and
- Secondary victimisation.

If the ICD was to take on this mandate in respect of alleged rape by police officers or in police custody, it was important to take the following into consideration:

- The use of one-stop centers;
- The importance of dedicated training on sensitivity to rape victims;
- Establishing victim support centers; and
- Considering a special sexual offences unit.

Some of the tools the ICD had and would need to become familiar with included:

- Victim Empowerment Programme;
- Victim's Charter;
- Minimum standards; and
- VEP policy.

8. LESSONS FOR THE ICD – THE DVA EXPERIENCE

Ms. Noluthando Mbuli, Head of the Information Management and Research programme discussed the lessons for the ICD learnt from their experiences in overseeing the SAPS compliance with the Domestic Violence Act (DVA).

The mandate of the ICD in terms of monitoring non-compliance of the DVA was derived from the Domestic Violence Act 116 of 1998. According to the Act, failure by a member of the SAPS to comply with an obligation imposed in terms of the Act or the National Instructions constitutes misconduct, and the ICD had to be informed accordingly. Specifically the SAPS are to:-

- notify the ICD of non-compliance;
- submit monthly returns to the ICD;
- Keep proper records of cases on non-compliance; and

- Request exemption from the ICD for non-compliance, which the ICD may or may not grant.

The ICD had to submit a report to Parliament every six months regarding the number and particulars of matters reported to it setting out the recommendations made in respect of such matters.

Fifty-eight allegations of non-compliance were received between January and June 2009. A further sixty-five allegations of non-compliance with DVA were received between July and December 2009. Twenty-four applications for exemptions were received between January and June 2009 and thirteen applications for exemptions were received between July and December 2009.

The types of non-compliance by SAPS to the DVA and reported to the ICD included the following:

- Failure to advise the complainant of options, such as applying for a Protection Order, laying a criminal charge or both;
- Failure to effect a warrant of arrest;
- Failure to assist the complainant to open a case;
- Failure to issue or furnish a subpoena;
- Failure to seize a firearm (if there is a potential threat); and
- Failure to serve a Protection Order.

Various ICD Provincial Offices conduct inspections at police stations to determine the level of compliance with the Domestic Violence Act and the National Instructions.

The inspections include the inspection of the following:

- SAP 508(a) and (b) registers;
- Whether the Community Service Centre had copies of DVA and the National Instruction;
- Whether a list of service providers is available in the event that a victim of domestic violence need service;
- Whether the facility was victim friendly and equipped to deal with the matters of domestic violence; and
- Whether a female member is available on each shift.

Between January and June 2009, the ICD audited 283 police stations and found that:

- 50 stations were non-compliant (0-49%);
- A further 95 stations were fairly compliant (50-79%);
- 104 stations were substantially compliant (80-99%); and
- Only 34 stations were fully compliant with Domestic Violence prescripts.

Between July and December 2009, the ICD audited a further 241 police stations and found that:-

- 29 stations were non-compliant (0-49%);
- A further 96 stations were fairly compliant (50-79%);
- 96 stations were substantially compliant (80-99%); and
- 20 stations were fully compliant with Domestic Violence prescripts.

Among the challenges encountered by the ICD were:-

- Breaking the barriers of the culture of silence around domestic violence;
- The police's lack of understanding of their obligations in as far as assisting the public with domestic violence;
- Increased number of perpetrators of domestic violence;
- Applications of exemption not forthcoming from the police in terms of the DVA, and the ICD cannot ensure that recommendations to the SAPS are implemented;
- The SAPS's management reluctance to take disciplinary steps against their own members;
- Lack of proper records management (registers, and documentation); and
- The need to foster better and coordinated relationships with Social Crime Prevention Stakeholders with the purpose of strengthening cooperation around the ICD's DVA mandate.

9. LESSONS FOR THE ICD – INVESTIGATING RAPE

Ms. Noluthando Mbuli, Head of the Information Management and Research programme discussed the lessons for the ICD learnt from their experiences in investigating rape in the SAPS.

She began by referring to cases studies, such as the following:

- Two police officers raped a female in the police cell. The matter was reported to the ICD. At court the victim changed her statement, and indicated that sex was consensual.
- An ex-wife reported that the police officer (her ex-husband) raped her. The ICD investigated the matter, the ex-wife withdrew, and the Directorate for Public Prosecutions (DPP) did not prosecute.

Three rape cases investigated by the ICD in 2009 resulted in dismissal and a further three in sentencing.

Cell inspections that were used by the ICD to prevent death in police custody could assist in preventing rape in custody as well. Cell inspections usually examined the physical conditions of custody and facilities according to standards set by the relevant SAPS Standing Order, relating to:

- due regard for the human dignity of the detainee;
- that police cells must have adequate light and ventilation;
- that the cells and their surroundings must at all times kept clean and sanitary, and the doors and windows of cells that are unoccupied are left open at all times, weather permitting; and
- that female cells must be separate and should be visited hourly.

The ICD had recommended that since there is a shortage of cells, the adding and upgrading of cells is recommended. Where more cells are added, it will be advisable for those police stations to have a Cell Unit, with a Cell Commander. It will then be the duty of the Commander concerned to conduct the daily inspections, rather than the Station

Commissioners, whose duties and obligations are currently wide. Female members should be assigned on each shift.

10. RESULTS FROM THE EU/SAPS DVA COMPLIANCE STUDY.

10.1 Introduction

Dr. Lilly Artz of the Gender Health and Justice Research Unit presented on a survey monitoring compliance of the Domestic Violence Act undertaken by the Universities of Cape Town and the Western Cape.

The research question posed was to what extent the SAPS at 29 priority stations were complying with the Domestic Violence Act and relevant provisions of the Child Care Act? The research made a number of assumptions, including assumptions that:

- There is general compliance;
- There are ‘model’ methods and strategies in applying the Act;
- The SAPS experiences some difficulties with certain procedural aspects of the Act; and
- There may be some instances in which the Act is not being utilised (e.g. regarding children).

The research principles included:

- It was not a study that aimed at ‘catching members out’ for non-compliance;
- Participative elements (interviews);
- Equal emphasis on service excellence and lack of compliance; and
- Quality of implementation can only be defined by the compliance with procedures prescribed by the Act and the National Instructions.

Research methods followed included:-

- Development of monitoring indicators;
- Indicators based solely on procedures set out in the Act, Regulations & Instructions;
- Indicators are translated into ‘research templates’ such as templates for:
 - the analysis of police & court dockets,
 - the analysis of SAPS 508 (a) (Report of DV Incident),
 - the analysis of SAPS 508 (b) (DV Register),
 - interview schedules,
- Triangulation of data for an integrated analysis of results.

The research design involved

- Station Audit (n=29)
- Docket Analysis (n=1457)
- Analysis of SAPS 508(a)’s: random sample (n=1207)
- Analysis of SAPS 508(b)’s for 2004/5 (n=29)
- Interviews with SAPS members (n=150)
- Interviews with Station Commissioners (n=27)
- Interview(s) with the ICD

- Analysis of Court Dockets at Children’s Court (n=100)
- Interviews with Children’s Court Commissioners (n=4)
- Interviews with FCVS’s/FCS’s (n=4).

10.2 Station Audit

Station Audits were conducted on:-

- Existence of SAPS 508’s;
- Station Orders for DVA & Children;
- Certified copies of Protection Orders & Warrants of Arrest;
- Copies of Act, Regulations and National Instructions; and
- Contact lists of relevant organisations.

The result sought to ascertain

- whether Station Orders have been issued;
- availability of –
 - list of service providers,
 - DVA & Instruction,
 - Form 1 & 2,
 - copies of Protection Orders and
 - Warrants of Arrest
- whether incidents of domestic violence are being recorded on SAPS 508(a) and (b);
- Complaints against the police (for DV or contravention of the DVA).

With regard to approaches to complaints against members in the 27 cases, 25 would institute disciplinary proceedings, 8 would apply to the ICD for exemption, 13 would forward a report to the area commissioner and 10 sent monthly progress reports. From the sampled police stations, 18 stations kept a record of complaints, 17 kept records of particulars, 15 kept records of proceedings, 9 kept records of the steps taken on recommendations from the ICD and 4 kept record on the SAPS 508 form.

Overall, the most frequent responses to Domestic Violence committed by the SAPS members was

- Disciplinary action: 11
- Withdraw firearm: 7
- Treat the same as other DV cases: 7
- Report to the ICD/Area Commissioner: 3
- Call in the SAPS Social Work Services: 3

Responses indicated no standard approach being followed, especially regarding disciplinary action and withdrawal of firearm.

10.3 Docket Analysis

A total of 1457 dockets were analysed. The following informed the docket analysis:

- Finalised dockets only (prescribed period);
- No identifiers of victim or suspect;
- Approximately 40 dockets per station; and
- Assault Common, Assault GBH, Attempted Murder, Rape, s.17 cases.

Subsequent to the analysis, there an examination of the following:

- General contents of statements;
- Case reporting, management, and outcome of cases;
- Management of s.17 cases;
- Offences involving children; and
- Weapons (seizure).

General information sought include:-

- the nature of the charges (contravention of DVA s17/other offence);
- the nature of the domestic relationship; and
- whether the complainant /accused was a child.

More detailed analysis was conducted, which included:-

- 's 17' dockets: whether additional charges were laid where the act of breach also constituted a criminal offence;
- 'other offences': whether there was a Protection Order in place at the time of commission (indices charges incomplete); and
- whether the suspect was arrested.

The most common cases were Assault GBH (36%), followed by Section 17 (18%) and unspecified (18%), Common Assault (15%) and Rape (8%).

With regard to Section 17 Dockets

- Copies of Protection Order were present in 75% of dockets (n=213);
- Arrests were made in approximately 80% of cases;
- Additional charges were laid in 30% of s17 dockets, with charges including:
 - Rape (n=1),
 - Assault GBH (n=19),
 - Assault Common (n=26),
 - Attempted Murder (n=1).

In non-Section 17 dockets, a Protection Order was present in 2.4% of dockets (n=28) where No s17 charge was laid.

Regarding the outcome, most dockets were closed by the SAPS, followed by a withdrawal in court and nolle prosequi. Only 215 of the 1410 dockets reviewed resulted in conviction.

Reasons given for the withdrawal of cases by the police and prosecutors were:

- Complainant's request - reasons given include:
 - Matter settled *inter partes* (often with family involvement),
 - Intimidation,
 - Financial dependence on defendant;
- Non-availability of witnesses (including complainant);
- Insufficient evidence; and
- “De Minimis Non Curat Lex” [The law does not trouble itself with trivialities].

Regarding the details contained in the dockets, 16% of cases provided a history of abuse, 96% had details of the incident, 81% detailed the nature of the injuries, 10% indicated previous reports to the SAPS, 5% showed previous charges laid, 50% pointed to the use of a weapon, while 2% related to other suspects and 50% provided information on witnesses. The Complainant was injured in 73% of cases (n=1038). A J88 was obtained in only 36% of cases (n=513).

Knives were the most common weapon in 36% of cases, followed by firearms in 20% of cases and blunt object in 17 %, stick in 12% and bottle in 11%.

Weapons were SEIZED in only 5% of cases (n=34), not all of which are firearm related. There are a number of cases involving firearms where no seizure is being made.

Regarding access to the DVA, interviews with police members revealed that:

- 78% say they have access;
- 7% unsure; and
- 15% no access.

Related to the access to National Instructions on Domestic Violence:

- 79% say they have access;
- 7% unsure; and
- 13% no access.

When asked to describe the necessary steps for rendering assistance when called to a domestic violence scene, members responded that, inter alia, they would:

- Take statement: 87%
- Hand notice: 27%
- Explain contents of notice: 47%
- Explain Protection Order: 85%
- Explain criminal charge: 70%
- Assist to obtain shelter: 77%
- Assist to obtain medical treatment: 69%
- Provide information on support organisations: 23%
- Gather evidence: 14%.

In conclusion, full knowledge of the Act was relatively low, especially of the National Instructions and related legislation (CCA and FCA) related to:

- ‘in-service learning’ (ad hoc);

- visual aids vs memos;
- continuity of arrest, investigation/case management & complaints procedures; and
- docket review/assessment (standardised re: ‘essential elements’).

11. VIOLENCE IN CUSTODIAL INSTITUTIONS

Ms. Lala Mabaso of the Office of Inspecting Judge discussed rape in places of custody and the challenges faced by the Inspecting Judge. One of the major challenges in dealing with this issue was non-reporting. It is not uncommon that correctional officers are involved in the rape of persons in custody. Together with the threat of intimidation from fellow inmates, it was understandable that survivors were reluctant to communicate openly with the Office of the Inspecting Judge. They usually approached them confidentially and only when they had opportunity to do so.

As a result, rape cases in custodial institutions are, as with rape generally, under-reported, which makes it very difficult to measure actual occurrence.

12. THE NEW MANDATE IMPLICATIONS FOR OPERATING PROCEDURES, REGULATION AND TRAINING - THE NATIONAL PROSECUTING AUTHORITY

Adv. Brandon Lawrence from the National Prosecuting Authority’s (NPA) Sexual Offences and Community Affairs (SOCA) presented on the implications of the new ICD mandate on operating procedures, regulations, and training from the perspective of the NPA.

He spoke briefly about the current levels of rape in South Africa and the fact that only 1 in 9 is reported. Roughly 20% of cases stayed on the roll for longer than 9 months.

Overall, the challenges included:

- Case Flow Management;
- Skills Shortage and Skills exodus;
- Attitudes to Sexual Offences;
- In the model: Stakeholder engagement and commitments not consistent
 - Health, Department of Social Development, Civil Society; and
- Quality of investigations.

Challenges specific to investigations included

- Lack of resources,
- Incomplete statements,
- Forensic evidences delays,
- Obtaining evidence from child witnesses,
- Missing/lost dockets,
- Insensitivity,
- Transportation of victims
 - Too lengthy and evidence lost
 - Victims being transported with perpetrators in back of vehicle.

Court-directed challenges included

- Lengthy process,
- Victims and witnesses unavailable,
- Consultations inadequate,

Some important considerations for the ICD are

- SAPS FCS: Reintegration of FCS,
 - Establish linkages with existing resources : psychologists, social workers and other relevant stakeholders.
- NPA:
 - The NPA does not prioritise cases in terms of which organisation or unit is investigating the case but rather the actual nature of the case itself;
 - The NPA is supportive of legislative developments;
 - The NPA will provide inputs to law reform.
- These cases require immense attention and requisite skills regarding:-
 - All training programmes in terms of the Criminal Law Sexual Offences and Related Matters Act: Social Context training;
 - How the ICD will deal with cases of delayed reporting;
 - What skills are needed to ensure that victims (especially children) are not further victimised/traumatised; and
 - Links to integrated service delivery models.
- Alignment of service provisions: between existing government stakeholders, civil society & others.
- Participation on existing forums:
 - Victim Empowerment forums: not only to strengthen the alignment of services regarding rape but victims of crime in general;
 - Inter-sectoral committee on sexual offences: NPF process [Act calls for integrated service delivery].
- Evidence required in rape cases.
- Disciplinary versus Criminal matters
 - Availability of Dockets;
 - Evidence of Victim in the disciplinary process;
 - Victims' Charter does not extend to administrative proceedings; and
 - Legal protection afforded to victims.

In conclusion Brandon noted that in relation to sexual offences, the following must be proved:

- Proof of penetration (J88, Victims evidence),
- Identity (victims evidence, DNA),
- Psycho-social evidence,
- Need to continue with investigation: SAPS have the requisite skills to do so,
- Disciplinary proceedings were required only if previous inconsistent statement,
- Disciplinary proceedings, which should be mindful of the following:
 - Victims charter does not apply to administrative proceedings (not recommended to call the victim in evidence),
 - Prosecution strategy: giving away the state's case: exposing the state's case in such a manner that the perpetrator may mould his evidence, develop strategy for cross examination.

13. DRAFTING THE ICD BILL - THE STATE LAW ADVISOR

Ms. Yolanda van Aswegen from the Office of the Chief Law Advisor at the Department of Justice and Constitutional Development opened her presentation by giving a brief introduction to the State Law Advisor.

The Office of the Chief Law Advisor is located in Cape Town and Pretoria. It is headed by the Chief State Law Adviser assisted by Deputy State Law Advisers, Principal State Law Advisers; and Senior State Law Advisers.

Services included legislative drafting, which includes:-

- Initial draft from departmental instructions;
- Certification;
- Draft amendments in Parliamentary committees;
- Advise Parliament's committees;
- Drafting municipal by-laws.

Their mandate is derived from Rule 243 (1A) of the Rules of National Assembly:

A Bill introduced by a Cabinet Member or Deputy Minister must be certified by the Chief State Law Advisor or a state law adviser designated by him or her as being-

- (a) Consistent with the Constitution
- (b) Properly drafted in the form and style which conforms to legal practice.

State Law Advisors are entrusted with the final scrutiny and certification of Bills initiated by Members of Cabinet prior to introduction in Parliament.

The drafting process follows a number of steps. The Department in question develops policy in terms of policy directive given by a Minister. A policy is developed into legislation by in-house legislative drafters or consultants. Occasionally, as in the case of the ICD Bill, State Law Advisors draft Bills from policy documents for consideration by a Cabinet Minister.

The relevant department submits a draft Bill to Cabinet for approval. After Cabinet approval, the Bill, with a Memorandum on its Objects, is submitted to State Law Advisors for certification.

It is paramount that Government policy be reflected in legislation. Cabinet approval for Bills is required to ensure alignment of Bills with Government policy.

State Law Advisors have to ensure that final draft complies with:

- government policy;
- requirements of the Cabinet; and
- requirements of Minister who will introduce the Bill.

The State Law Advisor's scrutiny of Bills in this regard is often hampered by the Departments' refusal to provide the Office of the Chief Law Advisor with Cabinet's decision on what is approved for incorporation in the Bill, citing secrecy classification. However, this concern should not arise. As Government's lawyers, State Law Advisors are bound by ethics

and confidentiality of client communications and documents; and undergo security clearance relating to the work they do.

Certification is a complex legal process. It involves various factors that State Law Advisors take into account before certifying a Bill. State Law Advisors constantly conduct research, analyse policy, and keep abreast of legal developments nationally and internationally in order to render the best legal services to the State.

When carrying out the certification process, State Law Advisors check the following:

- Whether a Bill complies with the Constitution;
- whether a Bill is in line with accepted legal principles;
- whether a Bill is integrated within the existing legal framework;
- whether government policy is correctly captured in a Bill and capable of being properly implemented (whether it is logical, effective and workable in practice);
- whether a Bill adheres to legislative drafting principles and practices; and
- whether a Bill is correct in every respect.

State Law Advisors test a Bill against:

- the Constitution of the Republic of South Africa specifically;
- domestic jurisprudence generally;
- international instruments, jurisprudence and best practices;
- South African Law Commission reports and opinions;
- Constitutional Acts; and
- any other relevant information.

After certification the Bill is submitted together with Memorandum on the Objects to Parliament's Legislation and Proceedings Section for scrutiny and printing. Often Bills are discussed by State Law Advisors and the Legislation and Proceedings Section.

Constitution s6(2) enjoins us to take practical and positive measures to elevate the status and advance the use of indigenous languages. In this regard Office of the Chief Law Advisor now offers translation services. The office currently performs simultaneous translation of Bills drafted in English to isiXhosa, siSwati, isiZulu and Afrikaans, which we certify. More official languages will be added as the new unit's capacity increases.

Subordinate legislation submitted to the State Law Advisors is scrutinized to check:

- drafting form and style;
- validity with reference to the empowering Act;
- possible conflict with other laws; and
- Constitutionality.

14. PLENARY DISCUSSION

A facilitated plenary discussion followed. Key questions and the issues raised in the discussion were:

a. Issues relating to the ICD investigating rape.

- It is problematic requesting a complainant to make two statements (one to the SAPS and one to the ICD). The prosecutor then has 2 statements to 'work with' or to contest.
- The role of the Sexual Offences Act (SOA). This is a complex issue: complex legislation, legal mechanisms and legislative prescripts. How will the ICD manage this? Are they sufficiently skilled, knowledgeable and capable?
- There are no positive legal duties on the ICD in the SOA to perform any functions in relation to the implementation of the Sexual Offences Act; only on the SAPS. The SOA would have to be amended.
- Regulations should ensure the minimising of secondary victimisation.
- To what extent will the ICD ensure that complainants get medico-legal examination or medical attention, are informed of their rights, will apply for or assist in the application of compulsory HIV testing, etc.?
- Is the community aware of the ICD and the complaints they investigate? It is important to 'advertise' this widely.
- The ICD is not specialised in this area, even though a few people have experience. Investigations should remain with the SAPS (very senior investigating officers or with FCS). The *domain* of the FCS is specialised investigations of sexual offences. The ICD should monitor these cases or enter cooperative arrangements with the FCS detectives.

b. Issues relating to capacity

- The challenge is implementation. Regulations should be assessed for feasibility of implementation (financial and operational considerations).
- Integrate training across relevant role-players (SAPS, FCS, ICD, NPA, etc).
- The ICD is not in every corner of the country. Cooperative arrangements with clear MOUs with the SAPS may be necessary.
- The police *must* inform complainants of their right to lay a complaint and to contact the ICD when police members are accused of a sexual offence or the facilitation of sexual offence.
- The ICD needs trained staff and other operational resources. The ICD needs to cost this to be realistic about the extent of their involvement in these cases.
- The ICD needs to be able to enforce rights and remedies available under the SOA.
- The ICD is woefully understaffed, so they should be *part* of the process of investigating sexual offences cases, but not be fully responsible for them.
- For the ICD to be able to do its work, it needs capacity. The ICD has had successful rape convictions (case cited: Commissioner accused of rape – the SAPS closed inquiry because the complainant died – the ICD picked it up again – evidence of corruption and maladministration of the case – the Commissioner was sentenced to 12 years).

c. **SAPS Disciplinary Process**

- Internal SAPS disciplinary hearings are not successful. They are flawed and problematic and inconsistent. Procedures are applied inconsistently. Some internal SAPS disciplinary inquiries are ‘corrupt’.
- Discipline is the SAPS management function. The process must be swift and corrective and must also involve relevant unions.
- Militarisation of the SAPS will create a different culture. Resistance will be high, especially with high-ranking officers.
- Labour cannot postpone disciplinary process based on other investigations running.
- Although administrative and criminal justice processes are separate, they do involve the same set of witnesses.
- The SAPS can suspend members for up to 90 days without pay, but the action must conclude in that time.
- Sanctions are difficult to “set” and are open to discretion. If sanctions are inappropriate, there are means of addressing it. Sanctions are also a result of negotiated settlements with unions, and shifting these established terms would by necessity involve the unions.
- The ICD Bill cannot be viewed in isolation of other law reforms. The SAPS disciplinary process should be considered in the review of the SA Police Act. The current police code of conduct and sanctions have surpassed their time. This needs review and updating to be relevant. If the Police Act is being reviewed, so should code of conduct.
- The role of civil society organisations and the public in disciplinary proceedings needs to be considered. These can be as representatives, observers or support persons. The findings of disciplinary proceedings should be published.

15 Closure

Mr. Elias Valoyi, Head of Corporate Services in the ICD, thanked the participants for attending the workshop. He mentioned that the workshop confirmed that the ICD needs to be strengthened and that the space occupied by the ICD in our democracy cannot be over-emphasized. He also mentioned that all comments and recommendations from the floor were noted and will be recognised.