CONFERENCE ON POLICE CIVILIAN OVERSIGHT IN AN ENVIRONMENT OF HIGH CRIME AND INSECURITY

24 AND 25 NOVEMBER 2009- ROODVALLEI COUNTRY LODGE KAMEELDRIFT PRETORIA

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Executive Summary

The Minister of Police, the Portfolio Committee on Police, civil society and the Independent Complaints Directorate (ICD) have consistently voiced their opinion that legislative provision and the capacity of police oversight agencies in the country, notably the Independent Complaints Directorate and the Secretariat for Police should be strengthened. That these calls are urgent is highlighted by the rapid pace of developments in the South African Police Services (SAPS). Yet the response from civilian police oversight agencies themselves has not been clearly articulated. This is partly because policing oversight is in itself multi-faceted. It takes place at multiple levels and speaks to many audiences. In light of this, APCOF, the ICD and the OSF-SA collaborated over two days on 24 and 25 November 2009 to encourage a sharing of views and explore cooperative and collaborative approaches to promote a democratic and accountable police service. The following is a brief summary of the points raised at the meeting. These are elaborated on more fully in the body of the report:

On Independence

- Independence of the ICD is a crucial issue – this has implications for the investigation of high profile cases.
- Parliament should appoint the Executive Director of the ICD.
- The ICD should report directly to Parliament.
- A new name should be given to the ICD to clearly capture its investigative mandate.

On Role

- Separate, dedicated legislation is needed to clarify the roles of the ICD and the Secretariat respectively.
- The ICD should have a mandate over all police deaths, criminality and torture. A programme that deals specifically with the corruption of police should also be included.
- The ICD should drive the process to ensure that torture is seen as a criminal offence in South Africa.
- The responsibility for monitoring the SAPS compliance with the Domestic Violence Act should reside with the Secretariat.
- The ICD needs to be proactive. This should include monitoring police custody, and undertaking announced and unannounced visits to police stations/cells.

On Powers

- Powers and processes of the ICD should be clearly spelled out in legislation and policy.

- The SAPS should be compelled in legislation to provide required documentation to the ICD.
- The SAPS should report serious complaints and cases, including those of deaths or rapes, in custody, immediately to the ICD. Legislation that gives effect to the latter should be enacted as it will allow for proper investigation. Compliance with the requirement to report serious complaints and cases *immediately* is essential and

legislation should therefore also provide sanctions to be applied in cases where the 'immediate reporting' requirement is not complied with.

- There should be a specific process on how the ICD should deal with issues of corruption. The ICD should focus on systemic corruption, but also be able to monitor performance of competencies within the SAPS that deal with corruption.
- Legislation should compel the SAPS to report back to the ICD on recommendations made by the ICD, and to articulate the link between the work of the ICD and the internal police discipline system. At minimum, recommendations should be acknowledged, and an indication should be given, whether responding or not, with reasons given for compliance or non-compliance.
- Data should be kept in terms of complaints lodged against the police.
- The ICD should be granted the power to subpoena.

On Structure

- Provision should be made for upgrading ranks within the ICD in order to align with those of SAPS senior management.
- The ICD should be appropriately resourced and capacitated at national and provincial levels.

Conference Opening *Sean Tait, Coordinator APCOF*

Introduction

The Minister of Police, the Portfolio Committee on Police, civil society and the Independent Complaints Directorate (ICD) have consistently voiced their opinion that legislative provision and the capacity of police oversight agencies in the country, notably the Independent Complaints Directorate and the Secretariat for Police should be strengthened.

That these calls are urgent is highlighted by the rapid pace of developments in the South African Police Services (SAPS). The recent past has seen senior leadership in the SAPS motivate for a reversion back to military ranks and from a service to a force. This follows closely on calls that use of force provisions in the Criminal Procedure Act be reviewed.

These are fundamental shifts in policing and are likely to have an impact on core areas of the ICD mandate. The introduction of crackdown-type policing strategies that marked the introduction of the police's Crime Combating Strategy in 2000 to 2003 saw an 88% increase in serious criminal charges against the police. The year 2009 saw a 15% increase in deaths compared to 2008, either as a result of police action or occurring in police custody, taking police death to 556, the highest figure since the ICD was established. Meanwhile corruption, misconduct, torture and excessive use of force continue to plague the SAPS.

Talk of militarisation and use of force has generated considerable debate in the public sphere, both in and outside of South Africa. Yet the response from civilian police oversight agencies themselves has not been clearly articulated. This is partly because policing oversight is in itself multi-faceted. It takes place at various levels and speaks to many audiences. South Africa's oversight architecture includes Parliamentary Oversight Committees, organisations of civilian oversight at state level (including the Secretariat for Police, the ICD and the Human Rights Commission), local level oversight via community police forums, as well as the judiciary and civil society organisations.

The oversight community needs to be mindful of the pressing demands to bring crime under control. Reform and the inculcation of democratic values in an environment of high crime and insecurity are among the more significant challenges to the vision of a democratic police service and cannot be approached lightly. Calls from the public for an increasingly punitive response to crime can elicit sympathetic political responses but can also encourage behaviour from the police that can compromise the very rights of the citizens it seeks to protect. The short-term gains of being tough on crime can soon be lost as the public response to repressive policing turns to hostility and distrust. Seen against the current wave of service delivery protests, such a scenario is particularly worrying and requires strong leadership from the oversight community.

At a time of possible far-reaching changes to policing, changes which include the possibility of legislation for the ICD and a review of the Police Act, it is important for the oversight community to share views and explore cooperative and collaborative approaches to promote a democratic and accountable police service. It is important that the institutions of police accountability can reflect on and share their responses. This will help to build trust between the various organisations and spheres, maximise resources and promote a debate in the public sphere that is consistent and unfolds in a manner that neither undermines the trust of the citizenry nor compromises the positive relations that have been built up with the police.

On behalf of APCOF and our partners in hosting this conference, the Executive Director of the ICD Mr Francois Beukman and of the OSF-SA, Ms Zohra Dawood, it is my pleasure to welcome you to this conference on police oversight in a climate of high crime and insecurity. It is the beginning of the 16 days of activism against violence against women and children, and I believe an accountable, ethical and professional police is an essential element in a holistic strategy to addressing violence against women.

Welcome

Allow me to acknowledge the presence of: Ms Jenni Irish Qhobosheane, Secretary of Police; Adv Enver Daniels, our state law adviser, who will join us tomorrow; our guests from Kenya, the vice chair of the Kenyan National Commission on Human Rights, Mr Hassan Omar, and the Coordinator of the Usalama Reform Forum, Mr Philip Onguje; our presenters Prof Monique Marks, Mr David Bruce, Ms Fadlah Adams and Mr Moses Dlamini. I would also like to acknowledge the presence of the Provincial Secretariats for Safety and Security, the members of SAPS and POPCRU, the South African Human Rights Commission, the Office of the Inspecting Judge of Prisons, the provincial head of the ICD, members of the civil society and the NGO community.

At this conference, we also have participation from a broad cross-section of the police oversight community.

As with all conferences of this nature, an important objective is to provide the opportunity to meet and network with colleagues, and I hope this venue and the programme we have developed lends itself to this.

Introducing APCOF

For many of you, APCOF is new, so please allow me to spend a few moments to introduce the African Policing Civilian Oversight Forum. APCOF is a network of police oversight practitioners drawn from state and civil society across the African Continent and with the mission to promote oversight of policing. I am pleased we have three of our members here, the ICD, the Kenyan National Commission on Human Rights (KNCHR) and the Centre of Criminology at UCT.

APCOF works on a number of levels. This conference meets a number of APCOF objectives, including promoting the building of stronger oversight mechanisms, encouraging cooperation, and facilitating opportunities to share knowledge and experience on police oversight across the continent

The present: significant for policing and police oversight

We are at a significant moment in the evolution of policing and police oversight in South Africa. This moment promises to be as defining as that which saw the transition of policing in South Africa from the Apartheid regime policing to democratic policing. Policing in South Africa today is different from that in 1994, since the policing in 1994 was compared to the Apartheid police that preceded it. Today, we have more police; we have new laws, and new threats. We have a large private security industry and a significant number of other role-players now involved in the business of policing. As our policing, as our policies, laws and strategies change, so police oversight should keep pace.

Overcoming oversight neglect: investment of political capital

Unfortunately police oversight in South Africa has been neglected in the recent past and, while not going into detail (this has been documented in, among other, the OSF-SA 2002 – 2004 project reports on police oversight), we are at a time when significant political capital has been invested in strengthening police oversight.

New legislation for both the Secretariat and the ICD

We have seen the first fruits of this investment, and in the next few months we will see new policy being tabled, policy on police oversight and legislation for both the Secretariat and the ICD.

Our duty here is to engage in this opportunity and collectively work to achieve the best outcome for South Africa.

Collective action

The importance of collective action is underlined in the title of this conference. Oversight itself is multi-faceted and works best in an environment where strong internal and external mechanisms collaborate and complement each other.

However, there is another imperative that drives us to collectively engage in the future of police oversight: As organisers to this conference we are appreciative of the difficult environment in which police work and the pressures placed on our leadership to bring down our high rates of crime.

Constitutional imperative

This, however, will not be addressed by sacrificing the rights and values enshrined in our Constitution – for the short-term benefits and, I would contend, fictitious benefit.. Rather, we need to work together, to protect these rights, and chart a course that will bring us real, tangible gains in the medium- to long-term.

Continental knowledge and resources: APCOF principle

Before taking you through the programme, I would like to reflect for a moment on the participation of our colleagues from Kenya. Their participation carries benefit both for the South African and the Kenyan debate. It represents a manifestation of a key APCOF principle: that, as a continent, we have knowledge and resources that we can share and employ to promote development in key challenge areas – not as one-way traffic, but by sharing and learning.

For Kenya, we hope the opportunity of this debate and the network that can be built can strengthen and support you in your path to police reform; for South Africa, the issues that you grapple with – while building and strengthening oversight, winning the trust of the police, and rebuilding relations between public and police – are as relevant to us as they are anywhere.

Overview of the conference programme

Our programme starts with inputs from the Secretary of Police on policing policy planned for introduction in 2010, specifically addressing issues of oversight. This will be followed by an input from the Executive Director of the ICD, on the proposed new ICD legislation. Prof Monique Marks will help us to contextualise recent developments against the backdrop of our police reform efforts over the past decade and a half. This will be followed with a panel discussion allowing us opportunity to engage with the speakers. After lunch we will hear two case studies, the input from Kenya and that of the Section 5 Committee, as an example of collaboration between the Office of the Inspecting Judge, the ICD, and the SAHRC and civil society on combating and preventing torture. These inputs are to prepare us for a group discussion on reflecting on the critical elements we would wish to see in policy on police oversight generally and the ICD legislation specifically.

Tomorrow we will turn our attention to an issue that has been at the centre of the policing debate in recent weeks: the use of force. Against the backdrop of today's discussion we will hear input from the State Law Adviser, civil society, and the ICD on issues around the use of force. As organisers we don't expect any consensus on the issue, but we hope the debate generated by the opportunity of having such a broad cross-section of police, state civilian oversight and civil society representatives will move us forward on this issue.

The re-militarisation of the police in South Africa? *Prof Monique Marks, Department of Sociology, University of KwaZulu-Natal*

Policing and governance – the undeniable link

In reflecting on the recent debates on a re-militarisation of the police and on the use of force, Prof Marks made the following observations:

- Police are agents of the state.
- Police activities have a profound influence on the realities of democratic political life (David Bayley).
- Police are a manifestation of the state's need to provide social control and security.
- The way the police operate symbolises and reflects the fundamental values of government structures.
- Democratic policing is complex and paradoxical, because contradictory operational styles co-exist.

Policing post-1994: a brief account

The 1994 transition to democracy identified the police as a key agency for change. The change imperatives were:

- a need to demilitarise;
- the change from a force to a service;
- a human rights focus;
- community policing as the guiding philosophy;
- accountability and legitimacy were central requirements.

In the late 1990s, a creeping concern with 'effectiveness' rather than rights and community participation set in. This was fuelled to a large extent by rising crime rates.

Failure of community policing?

Reflecting on these developments, Prof Marks posed the question as to whether the current debate on militarisation was rooted in a failure, perceived or otherwise, in community policing. Some observations worth noting in this regard were:

- Community policing was an imported philosophy and was questioned from the start;
- Community policing remained police-centred and controlled, and not focused on local problems. The term 'police bureaucratic inertia' could be used to illustrate a police service that responded more readily to nationally set priorities than understanding and responding to local safety and crime concerns;
- There was little real support and recognition for other actors;
- The reality of use of force has been on the increase since 2001;
- Inadequate oversight mechanisms and structures exist (within and outside of police).

The 'unaccountability' creep

Against the perceived failure of community policing, a second trend could be observed: that of a steady eroding of accountability. This was illustrated by:

- The downgrading of the Secretariat;
- The neglect of the ICD, which is poorly resourced and lacks police recognition;
- The disbanding of the anti-corruption unit.

During this time from around 1999 to 2009 crime combating had become the key agenda with the result that democratic-policing imperatives were on the decline.

Policing South Africa today: new government discourses

Since 2009 there has been a 'new' populist government in power and the discourse on policing has shifted. This discourse was characterised by:

- A renaming of the Department of Safety and Security as the Department of Police;
- The talk of moving from a police service to a police force and a remilitarising of ranks;
- An increasing mandate of the police to act 'decisively' – with a call to amend Section 49 of the Criminal Procedure Act which relates to the use of force to achieve this;
- A zero tolerance approach / war on crime approach.

Paradoxically there were also calls for community mobilisation to fight crime.

Understanding the new landscape – how did we get here?

These developments are not new and have been emerging for some time.

- Populism continues to call for harsher policing.
- This is fueled by what seems to be a lack of clarity as to the programme and vision of the police and public expectations of the police, which are sometimes perhaps unreasonable.
- Recently the desire to promote the Fifa World Cup and showcase South Africa as safe and secure has been an important driver in allowing a climate of harsher policing to flourish.
- All the while one could sense a feeling of desperation at the failure of not only 'community policing' but also of other government departments in dealing with crime prevention – failures that ended up compounding the policing problem.
- We have also witnessed the death of policy think tanks.

- Gung-ho and uninformed police leaders and politicians, who do not understand what policing is all about, continue to sow confusion.

Real and potential consequences of 'hardcore' policing

Reflecting on the real and potential consequences of this state of affairs, Marks observed:

- Confusion amongst the rank-and-file;
- Heightened concerns about potential and present human rights violations;
- Worries about randomised use of force by the police;
- Negative international attention on the regression to past police strategies;
- A public image of the police that saw them as either superheroes or brutes.

What questions should we be asking?

To develop a response to this situation, one could begin by posing the following questions:

- What kind of police do we want?
- How do the police see their role in a landscape where many groupings (agencies) are involved in policing?
- How do we ensure democratic policing outcomes while dealing effectively with crime?

An alternate vision – the police as minimal safety partners

In answering some of these questions one approach may be to articulate an alternative vision of the police as minimal safety partners.

- Police are not always the best people to deal with local safety problems (they lack resources, skills, and knowledge).
- We can't rely on the police to fix crime – in light of past experiences it is likely that police may resort to violence in situations where they view non-violent measures to be ineffective.
- Police need to be clear about their own role in the safety networks.
- The police should not be expected to perform duties that clearly fall outside their mandate. They should focus strictly on their duties as prescribed by law and policy.
- We need to find ways of supporting community initiatives (this happens to varying degrees already).

- The police need to find ways of supporting and partnering with other policing nodes/agencies (and this too happens to varying degrees already).

Delineated public police core functions

Linked to this, a clearly delineated role for the police was considered important and should take the following into account:

- Police with a clear role are better able to identify the roles that should be filled by other policing actors,
- A scenario in which the police themselves become 'minimalist' actors.
- National government should develop a clear framework of core police functions – crime combat, investigation, dealing with serious social disorder and conflict etc.
- Police cannot be the 'hub' of all policing activities.
- Police cannot be community activists and generalist problem-solvers.
- Bring the state closer to civil society, through recognising and supporting non-state contributions.
- The majority of police interventions should be initiated by communities.
- Work with local government to identify safety needs and what resources are available to fill security gaps.

Is it time for optimism?

In conclusion she remarked:

- There are deficits and dilemmas in the public arena.
- There is the potential for strengthening accountability structures such as the ICD
- Forums should be created to discuss
    - 'what kind of police the police want';
    - what kind of police civil society wants;
    - does existing legislation bind us?
- Rethink the term 'community policing' or find a replacement vision.
- Engage with police policy makers as well as leaders and politicians to reduce uncertainty. Identify the shared problem requiring a shared solution.
- Re-militarising is not an option for a democratic state.

- Rather we need a democratic police service that is accountable, efficient and effective, and has rectitude.

Realigning and reengineering the Secretariat of the police *Ms Jenni Irish-Qhobosheane, Secretary of Police*

The role of the Minister of Police

Ms Irish-Qhobosheane began her presentation by outlining the role of the Ministry as being to:

- Account to the President, Cabinet and Parliament for the management and delivery of peace and security;
- Promote the national policing policy, which directs the SAPS, and to be accountable for the implementation of this policy;
- Provide direction for the implementation of priorities and targets
- Appropriate from Parliament the single budget vote for the Department and to direct the use of the budget.

The existing situation

The institutional reforms and the delineation of roles and functions outlined in the 1998 White Paper on Safety and Security have not been fully implemented. Instead, since 1998 (when the White Paper was first accepted) there has been a whittling away of the role of both the Minister and the Secretariat.

The situation that exists is more reflective of the pre-1994 period when policing in South Africa was characterised by weak accountability and a lack of civilian and Ministerial input into policing policy. This resulted in the SAPS maintaining an extensive degree of autonomy.

The Minister's role in determining policy and priorities as well as oversight and monitoring of policies and priorities prior to April 2009 was, to a large extent, usurped by the police themselves.

Re-engineering the Secretariat of the Police

There is a need to reform the system in which policy, planning and monitoring occurs within the Department of Police.

In many other democratic states, this policy, planning and monitoring is carried out by civilian officials who – in conjunction with political representatives and the police – determine priority policy.

Comparative international experience shows that conflicts of interest, particularly between policy, monitoring and implementation functions, impact negatively on governments' ability to redirect delivery to priority areas. The Minister of Police is responsible for the development, monitoring and implementation of policy and is accountable for all three of these dimensions.

Therefore, the role of the Minister (supported by the Secretariat) is to set policy objectives and to measure the effectiveness and efficiency of the South African Police Service (SAPS) in meeting targets.

Principles relating to the functioning of the Department of Police

In implementing these reforms, certain key principles need to be followed and addressed. These include:

- The Minister is responsible for the development, monitoring and implementation of policy and is accountable for all three of these dimensions;
- The Secretariat of Police is capacitated and empowered to perform the following functions:

    - To provide the Minister with high level policy advice
    - To monitor and audit the police
    - To provide support services to the Minister
    - To mobilise role-players, stakeholders and partners outside the Department.

- The SAPS should focus on their core business, which is to prevent, combat and investigate crime, maintain public order and manage all operational functions of the service.

The role of the Secretariat

The role of the Secretariat is as follows:

- **Policy making and Strategising**: Strategic and indicative planning, research, and the formulation of departmental policy proposals, which when approved by the Minister would guide the activities of the SAPS. All legislation should be policy driven.

- **Auditing and Monitoring**: The monitoring of the Department's budget to ensure alignment with the policies approved by the Minister. Monitoring the effectiveness and efficiency of the implementation of these policies. Also to monitor and develop performance controls of the performance agreements, which direct the functions of the SAPS.

- **Providing Ministerial Support Services**: Including the management and control of departmental, international, media and stakeholder liaison, as well as legal services.

- **Communication:** The implementation of a communication strategy aimed at informing and mobilising role-players, stakeholders and partners outside the Department regarding the delivery of safety and security.

- **Accountability:** To account to the Minister and to Parliament on Departmental issues and activities from time to time or as requested.

Fulfilling these roles

For the Secretariat to be able to fulfil these roles, two key interventions are required:

- Institutional reform of the department, to ensure that the Secretariat is able to support the Minister in meeting his constitutional and legislative obligation.

- Restructuring of the current Secretariat to enable it to perform its role to the standard required.

Challenges facing the Secretariat

The challenges facing the Secretariat are as follows:

- Legacy of a lack of strategic direction and planning within the Secretariat.

- Historical lack of performance of the Secretariat and inability to meet their mandate.

- Legacy of a lack of capacity within the Secretariat.

- Legacy of a lack of leadership and absence of management controls in place.

- Legacy of a lack of quality assurance.

- Need to define relations between the SAPS and the Secretariat.

Addressing these challenges

The challenges faced by the Secretariat can be addressed as follows:

- A leadership team should be appointed in the Secretariat, consisting of:

    - The Secretary of Police
    - The Chief Director: Partnerships
    - The Chief Director: Policy and Research
    - The Chief Director: Monitoring and Evaluation.

- There needs to be upgrading of leadership positions with the Secretariat.
- Furthermore, there is a need to refine the role of the Secretariat in accordance with the White Paper.

There needs to be strengthening of the institutional capacity of the Secretariat. This is being done through a restructuring team consisting of:

- Deloitte and Touche (Pro bono)
- DPSA (Department of Public Service and Administration)
- Secretary of Police
- SAPS finance and procurement

Restructuring the team will address a migration plan linked to restructuring.

Furthermore,

- Policy should be developed to refocus the work of the Secretariat.
- There needs to be a development of legislation for the Secretariat.
- There needs to be alignment with the Provincial Departments.

Implementation of the institutional reform and restructuring

The institutional reform would need to be addressed through the implementation of legislation governing the role of the Secretariat. This legislation would address:

- Empowering the Secretariat to perform the functions defined;
- Aligning the role of the Provincial Departments of Safety with that of the National Secretariat; and
- Defining the different roles of the ICD and Secretariat.

The Secretariat would be structured into three dedicated units under the Secretary of Police:

- A Policy and Research Unit
- A Partnership Unit
- A Monitoring and Evaluation Unit

The relationship with the ICD

Key to strengthening the Secretariat is looking at the relationship between the Secretariat and the ICD, and the following needs arise:

- To align functions and define roles;
- To co-ordinate around information;
- To make greater utilisation of resources;
- Greater co-ordination and co-operation, particularly around the two key issues of monitoring and evaluation, and partnerships.

Strengthening the ICD *Mr Francois Beukman, Executive Director ICD*

Introduction

I want to thank the organisers for making this workshop a reality. The theme is appropriate and I want to thank the participants for their attendance and – hopefully – fruitful participation in the next two days.

We trust that we will have robust debate, the exchanging of frank and open views, critical analysis of the current state of affairs, and also possible solutions to deal with matters that confront us in the short- and medium-term.

On behalf of the ICD, I want to welcome each and every participant – we value your presence.

Minimum standards for Civilian Oversight

The basic minimum requirements for independent civilian oversight are set out in several international instruments.

The Code of Conduct for Law Enforcement Officials was adopted by the General Assembly of the United Nations on 17 December 1979 – nearly 30 years ago. In its preamble the Code[1] provides:

- 'That like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole.
- That the effective maintenance of ethical standards among law enforcement officials depends on the existence of a well-conceived popularly accepted and human system of laws.
- That every law enforcement official is part of the criminal justice system, the aim of which is to prevent and control crime, and that the conduct of every function has an impact on the entire system.
- That every law enforcement agency, in fulfilment of the first promise of every profession, shall be held to the duty of disciplining itself in complete conformity with the principles and standards herein provided and that the actions of law enforcement officials should be responsive to public scrutiny, whether exercised by a review board, a ministry, a private agency the judiciary, an ombudsman, a citizens committee or any combination thereof, or any other review agency.

The Paris Principles for National Human Rights Institutions[2] set out the minimum requirements for Human Rights Institutions. These apply equally to the civilian oversight institutions.

[1] Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly, Resolution 34/169 of 17 December 1979.

Commentators have also reflected on the nature development and minimum requirements for civilian oversight.

Stone and Bobb (2002) make the following observation:

> 'It is fundamental to democratic societies that police power, including the powers of arrest, to question, and to use lethal and non-lethal force, be closely regulated, often through the mechanism of an independent judiciary, and ultimately be subject to civilian control through democratic institutions. In such societies, a continuing challenge is to create practical mechanics for ongoing oversight that curb or correct the occasional abuses of police power'.[3]

The authors note that democratic governments are increasingly creating specialised, permanent structures to undertake this work.

Examples include the police ombudsman appointed in several states of Brazil as well as in Northern Ireland, the civilian complaint review boards, and inspectors general established in many cities in the United States of America, and the South African Independent Complaints Directorate established in terms of of the South African Constitution.

Burger and Adonis (2007) refer to the minimum requirements for effective civilian oversight[4].

The Commonwealth Human Rights Initiative CHRI (2005) notes that 'It is imperative, if there is to be any credible civilian oversight of the police, that the minimum requirements are met'. The minimum requirements are:[5]

- Independence from the police and executive influence;
- Protection of their status is in the country's legal architecture;
- Width and clarity of their mandate;
- The scope of their investigative powers; the composition and competence of their leadership and staff;
- The adequacy and sources of finance and their ability to compel obedience to their recommendations and the attention and clear support their reports and findings receive at the hands of the government and police.'

The minimum requirements for successful oversight bodies are summarised as follows:

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[2]. The **Paris Principles** were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris on 7-9 October 1991, and adopted by United Nations Human Rights Commission Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of December 1993. The Paris Principles relate to the status and functioning of national institutions for protection and promotion of human rights. The Paris Principles require NHRIs (National Human Rights Institutions) to be independent of government.

[3] Stone C and Bobb M, *Civilian Oversight of the Police in Democratic Societies*, 2002

[4] Burger J and Adonis C, SAPS compliance with recommendations by the ICD, 2007, ICD,

[5] Commonwealth Human Right's Initiative 2005 Report *Police Accountability: Too important to Neglect, too urgent to delay at pa 64.*

Independence:

Should be independent of the executive and the police and empowered to report directly to parliament.

Sufficient powers:

Should have the authority to independently investigate complaints and issue findings.

Adequate resources:

Should have sufficient funds to investigate at least the more serious complaints referred to it. Should have skilled human resources to investigate and otherwise deal with complaints.

Power to follow up on recommendations:

Should be empowered to report its findings and recommendations to the public and to follow up on actions taken by the police chief in response to its recommendations.

Strengthening the ICD

In debating the ways and means to strengthen the ICD, these important principles should be taken into consideration.

The topic 'Strengthening of the ICD' in itself presupposes a thesis that current weaknesses and areas of underperformance should be tackled head-on.

Strengthening cannot only be restricted to the legislative framework, but should also include: quality of management, operating procedures, and appropriate changes in the architecture of governance.

It is important for oversight and accountability purposes to consider the debate on the strengthening of the ICD in a wider context.

Minister Mthethwa raises an important question in his foreword to the 2008 / 2009 ICD annual report.[6]

Have we succeeded in realising the full potential of this institution? 'On many previous occasions, the ICD has highlighted the need for improved budget allocations. However, over and above this, our view is that we need a much deeper debate. It is clear that we need to engage in an effort of further strengthening this crucial institution. Because of the profound importance of the ICD, this process of engagement should tap into our nation's broader social wisdom. Such a process should again create an opportunity for a national conversation on the significance of the ICD within the context of our democratic framework, its performance thus far, strengths and weaknesses, the scope of its powers, its functions, as well as what needs to be done operationally to realise its full potential. To address effectively the issue of

[6]Independent Complaints Directorate *Annual Report 2008.2009* http://www.icd.gov.za/documents/2009/ICD%20Annual%20Report%20FINAL.pdf .

accessibility would indeed require a social contract, the involvement and participation of many important stakeholders, including the police, Justice and Constitutional Development, participating committees, NGOs, community-based organisations, local government, the media, faith-base communities and others.'[7]

My view is that this workshop creates an important opportunity to discuss these inter-related topics.

The ICD, therefore, needs to take a step back and critically evaluate its current modus operandi, systems, operating procedures and quality of performance.

The current debate regarding the strengthening of the ICD should also be considered in the context of broader environmental changes. They include, among others:

- The revamp of the criminal justice system (CJS);
- The SAPS increase from 183 180 to 204 860 members over the next three years;
- Legislative changes in the Criminal Procedure Act (CPA), including Section 49;
- A more focussed approach to combat priority crime;
- Trends in civil society, i.e. service delivery protest in certain provinces;
- Intense media focus and public scrutiny of Class 1 cases which include deaths in police custody and deaths as a result of police action ;
- Public advocacy and debate highlighting the need to strengthen civilian oversight over police conduct;
- The review of the effectiveness of institutions that should strengthen constitutional democracy and the values of a constitutional state.

The debate on the strengthening of the ICD, as you all may be well aware, is not a new debate. It is well documented in a wide range of articles, books, and reports of the Portfolio Committee of the National Assembly.

In 2005, the Portfolio Committee on Safety and Security made, among others, the following recommendations:

- Review the ICD mandate in terms of the Domestic Violence Act (DVA);
- Remove the monitoring of station audits from the responsibility of the ICD and ensure that the Secretariat is capacitated to fulfil this function;
- Review the necessity for the newly established research unit;
- Review the placement and function of the Anti-corruption Command in terms of national and provincial distribution of resources;
- Review the role of the ICD in terms of cell inspections.

The Portfolio Committee also restated the following:

'In addition, the Minister shall ensure that in his review, due consideration is given to the proper empowerment of the ICD to fulfil its mandated responsibilities effectively. In this restructuring, the Minister shall look at the feasibility of developing separate legislation to govern the functioning of the ICD instead of retaining this in the SAPS Act.'

[7]Independent Complaints Directorate *Annual Report 2008.2009 at p4.*

The report is more than four years old, but the issues listed are also relevant for today's discussion.

The window of opportunity created by the new administration to address these matters in the next few months should be fully utilised.

Since joining the ICD three months ago, I have embarked on an exercise to talk to every ICD employee on an individual basis, to obtain their views of the current functioning and performance of the ICD.

I have also spoken to a wide range of other role-players, government departments, Chapter Nine Institutions, civil society, trade unions and members of the Portfolio Committee.

This process is still ongoing and I am looking forward to engaging with you as participants around this topic today and tomorrow, in the workshop and informally.

There are, however, certain areas that came to the fore that will be addressed in the coming months:

- The relationship with the Portfolio Committee should be improved. The non-compliance by the ICD to requests by the Portfolio Committee in the past has led to an unnecessary tension in the relationship.
- Products and outputs should be improved; quality control is needed.
- Management in general, and specifically the National Office, should be strengthened.
- The matters related to the qualified audit of the ICD by the Auditor-General and which reflect on the integrity of the financial and control systems of the ICD should be addressed as a matter of urgency.
- The strategic objectives of Programme 2 namely investigations should be evaluated to ensure that we adapt to the new environment.
- Focus should be on the core business of the organisation, namely investigations.

There are a host of other matters – but those are more appropriate for internal discussion than for a forum such as this.

The ICD held strategic planning two weeks ago, in which we did a "Strengths, Weaknesses, Opportunities and Challenges (SWOT)" analysis of the organisation. There was general consensus that the ICD cannot be a 'general dealer' trying to deal with each and every complaint and issue.

We should focus on more serious crimes defined under class 1 and utilise our scarce resources accordingly.

Building civilian oversight: a challenge everywhere

Significantly, this is not only a South African phenomenon:

In the 2009 Annual Report of the UK Independent Police Complaints Commission, the Chief Executive, Jane Furniss, made the following remarks:[8]

'Our own internal reviews suggested that we needed a strategic change programme, which aims to:

- improve the internal processes of the IPCC, with a greater focus on consistent standards and quality;
- create a cost-effective organisation, shifting resources towards operational services to deliver an improving service to the public and police;
- ensure that our decisions are information- and intelligence-driven;
- build the capability to deal flexibly and responsibly with internal and external drivers for change, while maintaining our strong values base;
- strengthen our ability to act as guardians of the complaints system.

This may sound very familiar to some of us at the workshop today.

Political support for the ICD

In his address to the Police Station Commanders on 29 September 2009 in Pretoria, the President of the Republic of South Africa said the following:

'Our country respects the rights to life of all citizens. We expect our police officers to observe the law and respect the rights of innocent citizens at all times. Alongside the proposed amendment to section 49, we are also in the process of strengthening the Independent Complaints Directorate (ICD).

We view the strengthening of the ICD as an important measure so that changes to section 49 are not abused. Legislation to this effect will be introduced in due course.'

Addressing the National Press Club in Pretoria, last week, the Minister of Police, Mr Mthethwa, indicated the intention to strengthen the ICD.

'People have criticised the ICD as a toothless body, because they investigate criminal activities by the police, and come back to the police [with their findings].
So we are putting in place mechanisms whereby the ICD will report either to the ministry or to another higher authority.'

As we are looking forward to a new ICD – under possibly a new name and more defined focus and more precise mandate, it will be very important to consider the following matters:

- Independence of the institution;
- The structure – a department (in the full sense of the word), not a directorate;
- The capabilities of our present investigative staff;
- Effectiveness of training programmes;
- Responsiveness to new trends;
- Interaction with civil society;

[8] Independent Complaints Commission *Annual Report and Statement of Accounts 2008/9* http://www.ipcc.gov.uk/ipcc_annual_report_2008-09_-_full.pdf at p 17.

- Relationship with the public;
- Quality of investigations;
- Cooperation with other agencies / institutions;
- Bench-marking and adopting best practises utilised in the Commonwealth and other jurisdictions;
- Transparency and accountability to foster public confidence.

A way forward for the ICD

In debating a way forward for the ICD it is imperative to remain true to the Constitution. Section 206 (6) of the Constitution provides that, on receipt of a complaint lodged by a provincial executive, an independent complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

Further to that:

- The Directorate functions independently from the SAPS
- Each organ of state must assist the Directorate to maintain its independence and impartiality, and to perform its functions effectively.

Issues currently being considered in terms of ICD legislation related to the following:

1. The tasks of the National Office will be as follows:

    - To give strategic leadership to the Directorate;
    - To develop policy and implement it for the department;
    - To oversee and maintain performance at the provincial level;
    - To strengthen the cooperative relationship between the Directorate and the Secretariat.

2. The roles of provinces in the management structure of the ICD should be strengthened.

3. Appropriate forums to discuss trends and review the implementation of recommendations made by the ICD should be established.

4. Decisions must be taken on the type of matters to be investigated. These could include:

    - Any deaths in police custody or deaths as a result of police detention;
    - Rape by a police officer, whether the police officer is on or off duty;
    - Rape by another complainant while the complainant is in police custody;
    - Any matters that are referred to it, by the Minister or a MEC of the Executive Directorate;
    - Any complaint of torture;
    - Systematic corruption by the police;
    - Inefficiency of the police to carry out their duties.

The ICD is looking forward to the input and discussion in the next two days. We believe that the workshop will assist in a practical way to sharpen and define the future role of the ICD. It is in the interest of the constitutional state that we are successful. There is no alternative to an appropriate mechanism to ensure checks and balances for police conduct.

Plenary 1

Reassurance that the Secretariat will not decline again

Three areas were being addressed in order to prevent a reoccurrence of the decline of the Secretariat namely: the development of new legislation; the development of key performance measures; and reporting to parliament.

Protection of whistle blowers

The protection of whistle blowers would be considered.

Time-frame for new legislation

The draft legislation will be tabled in Parliament during the first term of 2010.

Structure of the Secretariat

The Secretariat is also working on ensuring that it is represented in the provinces. The preferred structure is a national structure with branches.

The need for a Think Tank

The Secretariat could bring together thinkers on policies to work with them. It would have a multiplying effect on capacity as well as improve communication.

Ranks in the Secretariat and the ICD

Upgrading of ranks will assist in the relationship with the SAPS because of the rank orientation within the police.

Who determines the policy?

Police will be engaged in the development of policy but will not determine the policy. Public participation in this process is critical.

Focus of the ICD

While an investigation of police shootings that do not result in death was important, the mandate of the ICD would be determined by prioritisation. Some sort of prioritisation was necessary because of limited budget.

Private security forces

The Secretariat will provide oversight of the conduct of the private security industry, Oversight of labour matters, could perhaps be best handled by the Department of Labour.

Statistical targets as a negative indicator

Negative indicators put the police under unnecessary pressure when they set crime reduction statistics. More focus should be given to those areas under police control such as detection and disposal of cases.

Sanctions imposed on errant officers

The ICD or the Secretariat will not be able to impose sanctions in internal SAPS Disciplinary processes.

The Secretariat will not investigate individual cases but will rather concentrate on major cases and overall processes. For example, should people with criminal charges be promoted? That is a policy issue that has to be addressed.

The ICD makes recommendations that a member be subjected to disciplinary process. While it does not make recommendations on the outcome it can query such with SAPS.

Corruption units

The issue of of whether anti-corruption units should be re-established in the police or whether an independent corruption investigation unit should be established was being considered within the context of the re-structuring of the Secretariat and the ICD.

Building cooperation between oversight agencies: A case study of the Section 5 Committee on Preventing and Combating Torture in South Africa *Adv Fadlah Adams, South African Human Rights Commission (SAHRC).*

Introduction

Adv Fadlah Adams provided an overview of the Section 5 Committee established in terms of the mandate of the South African Human Rights Commission to advise the Commission on issues relating to the prevention of torture in South Africa. The Committee represented a formal collaboration between various oversight bodies and civil society.

The South African Human Rights Commission (SAHRC)

The South African Constitution[9] (1996) enshrines the supremacy of the Constitution and the rule of law. The Constitution also contains the Bill of Rights, which it describes as the 'cornerstone of democracy in South Africa' and compels the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

Recognising that the protection and promotion of human rights cannot be left to individuals or the government, Chapter Nine of the Constitution creates independent national institutions, subject only to the Constitution and the law, to transform our society from its unjust past and to deliver the fundamental rights in the Constitution to all in South Africa.

The SAHRC is one such national institution, which derives its powers from the Constitution and the Human Rights Commission Act of 1994. It is also given additional powers and responsibilities by other national legislation.

Section 184 of the Constitution, specifies the functions of the South African Human Rights Commission as follows:

The Human Rights Commission must:

- Promote respect for human rights and a culture of human rights;
- Promote the protection, development and attainment of human rights; and
- Monitor and assess the observance of human rights in the Republic.

The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the following power:

- To investigate and to report on the observance of human rights;
- To take steps to secure appropriate redress where human rights have been violated;
- To carry out research; and
- To educate.

[9]The Constitution of the Republic of South Africa Act 108 of 1996

Each year, the Human Rights Commission must require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

Section 5 committees

Section 5 of the Human Rights Commission, Act 54 of 1994 provides for the establishment of an advisory committee to assist the Commission in carrying out its mandate. Specifically, the Act provides that:

(1) The Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission, and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it.

(2) The Commission may extend the period of an appointment made by it under subsection (1) or withdraw such appointment during the period referred to in that subsection.

(3) The Commission shall designate a chairperson for every committee and, if it deems it necessary, a vice-chairperson.

(4) A committee shall, subject to the directions of the Commission, exercise such powers and perform such duties and functions of the Commission as the Commission may confer on or assign to it and follow such procedure during such exercising of powers and performance of duties and functions as the Commission may direct.

(5) On completion of the duties and functions assigned to it in terms of subsection (4), a committee shall submit a report thereon to the Commission.

(6) The Commission may at any time dissolve any committee.

Although advisory in nature, the committee is afforded protection in law and has significant powers such as entering and searching premises and attachment and removal of articles.

Section 4 states that: No organ of state and no member or employee of an organ of state nor any other person shall interfere with, hinder or obstruct the Commission, any member thereof or a person appointed under section 5(1) in the exercise or performance of its, his or her powers, duties and functions.

Section 10 deals with the entering and searching of premises and attachment and removal of articles. According to section10 (1), any member of the Commission, or any member of the staff of the Commission or a police officer authorised thereto by a member of the Commission, may, subject to the provisions of this section, for the purposes of an investigation, enter any premises on or in which anything connected with that investigation is or is suspected to be.

The Section 5 Committee on Torture

The Torture Section 5 Committee was specifically set up to advise the Commission on placing torture on the agenda.

The members of the Torture Section 5 Committee comprise: the SAHRC, the Association for the Prevention of Torture, the Independent Complaints Directorate, the Judicial Inspectorate of Prisons, the Civil Society Prison Reform Initiative (CSPRI), Lawyers for Human Rights, the Centre for the Study of Violence and Reconciliation (CSVR), the South Africa No-torture Consortium (SANTOC), the Trauma Centre, and the Southern African Centre for the Survivors of Torture.

The Association for the Prevention of Torture (APT), based in Geneva, is a key role-player. APT is an international, independent, non-governmental organisation that has been leading the international campaign for the adoption, entry into force and effective implementation of the Optional Protocol to the UN Convention against Torture (OPCAT). APT has an agreement of co-operation with the South African Human Rights Commission with an overall objective to prevent torture and ill-treatment in South Africa through the development and implementation of national prevention measures and mechanisms.

Section 5 Committee on Torture Agenda

Regarding the agenda of the Section 5 Committee, it is worth noting the concerns and recommendations made in November 2006 when the South African government appeared before the UN Committee Against Torture.

Concern	**Recommendation**
The **absence of a specific offence of torture** and a definition of torture	**Criminal law legislation should be enacted with a specific offence of torture** and definition in-line with Art. 1 of CAT
Absence of clear legal provisions ensuring absolute prohibition of torture is not derogated in any circumstances	Adoption of appropriate legislation implementing the principle of absolute prohibition of torture;.
The return of persons by the State to States,(i.e. cases of extradition or deportation) where the individual may be in danger of being subjected to torture or sentenced to death	Reiteration that under no circumstances may the State expel, return or extradite a person to another State where there is a threat of torture. Should use Art. 3 '*non-refoulment'* principle. State to provide detailed information on all cases of extradition, return or removal to the CAT Committee in cases where assurances are given
Concern over the difficulties and allegations of ill-treatment of documented and undocumented non-citizens in repatriation centres and by law enforcement officials	Steps should be taken to prevent and combat ill-treatment of non-citizens detained at repatriation centres. Prompt, thorough and independent investigation of all allegations of ill-treatment of non-citizens

Concern over the high number of deaths in detention and the lack of investigation of alleged ill-treatment of detainees and the impunity of law enforcement personnel	State should promptly, thoroughly and impartially investigate all deaths in detention and allegations of torture/ill-treatment and bring perpetrators to justice so as to fulfil the obligations under Art. 12 of the CAT
Overcrowding in prisons and places of detention. Deep concern that there is no effective oversight mechanism to monitor the conditions for persons placed in police custody and pre-trial detention	State to adopt effective measures to improve the conditions in prison. Establish an effective monitoring mechanism for persons in police custody

SWOT analysis

A Section 5 meeting was held during October 2009 and follow-up meeting in November 2009. The Committee undertook a SWOT analysis and drafted a 2010 Action Plan. Included in this plan of action is a proposed workshop scheduled for early 2010, on 'promoting safe custody'.

The SWOT analysis noted:

Strengths

- Access to places of detention;
- More organisations getting involved – members are committed to the cause/objectives of the committee

Weaknesses

- Lack of political leadership;
- Lack of understanding of the implications of ratification of international covenants.

Opportunities

- Mock 'National Preventative Mechanism (NPM) project;
- Increasing public awareness/support of Section 5 Committee.

Threats / Challenges

- Other legislation is seen as having higher priority (2010 effect), for example, trafficking, personal information, prostitution etc.;
- The political environment and the clamp-down on crime – including the 'shoot to kill' statements by political leaders.

Immediate challenges

CAT provides for the criminalisation, prosecution and punishment of perpetrators of torture, as defined by the Convention. Legislation is needed. The Follow-up Report to the CAT

committee was overdue. The next report was due in December 2009. OPCAT needs to be ratified.

Champions need to be identified and SAHRC Section 5 Committee needs to begin engaging government on the establishment of a National Prevention Mechanism (NPM). NPM are provided for in the Optional Protocol for CAT, OPCAT as international and national visiting mechanisms to places of detention. The international mechanism is known as 'Sub-Committee on the Prevention of Torture (SPT)' and the national visiting mechanism is known as 'National Preventative Mechanism (NPM)'. OPCAT grants the SPT and NPM access to all places of detention, people detained there, and documentation at such places. State parties to the OPCAT are obliged to cooperate with SPT and NPM and ensure functional independence and resources for the fulfilment of the NPM mandate.

The powers of the NPM include the following:

- To regularly examine the treatment of persons deprived of their liberty, with a view, if necessary, to protect them from cruel, inhuman and degrading treatment or punishment;
- To make recommendations to the relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty; and
- To submit proposals and observations concerning existing or draft legislation.

According to Article 20, the NPM is granted the following rights by the government:

- Access to all information concerning persons deprived of their liberty;
- Access to all information referring to the treatment and conditions of persons deprived of their liberty;
- Access to all places of detention, their installations and facilities;
- The opportunity to have private and confidential interviews with persons deprived of their liberty;
- The liberty to choose the places it wants to visit and the persons to be interviewed;
- The right to have contact with SPT, meet with it and send information.

Only through proper implementation of the CAT and ratification of the OPCAT, and establishment of a NPM can we fully engage in a dialogue on preventing and combating of torture in South Africa.

Kenyan Case Study: Police use of force and its impact on community trust in Kenya and prospects for reform - *Mr Hassan Omar, Vice Chair of the Kenyan National Commission on Human Rights (KNCHR) and Mr Philip Onguje, Programme Officer, Human Security at PeaceNet, Kenya and Coordinator The Usalama Reform Forum*

Introduction

The history of policing in Kenya is characterised by militarisation and regime policing. The notion of regime policing implies a policing in the interests of the regime rather than a democratic police service that serves the people. In fact, post-independence policing in Kenya bore many of the similarities of the colonial era itself: the police force was used to protect the regime in power.

Not surprisingly there has been an ongoing demand for police reforms in Kenya.
The fact that this reform has been so contested was evident in the lack of will to reform. Reform requires political will and while the term implies a general political consensus, it is usually dependent on one or a few powerful individuals in government and the police. While there are strategies to address this, change is usually influenced by outside pressure that threatens political power.

The most recent reforms are being driven through a Task Team on Police Reform, set up in the wake of, among other challenges, a damming UN report on extrajudicial killing in Kenya, the violence following the disputed 2007 election, and the subsequent enquiry that severely criticised the response of the police and other security agencies.

While the South African and Kenyan context is very different there are opportunities to learn from each other. Three areas are particularly relevant. These are: the importance of popularising police reform within the police; that community trust is essential for successful policing; and that oversight and accountability are prerequisites for democratic policing.

The case study highlights the interconnection between police use of force and community trust in Kenya. The first part of the discussion is a reflection on the policing context in Kenya and how it has perpetuated a culture of 'force in policing'. The second part focuses on attempts to address this context, and the third part, which follows from the second, is a sharing on the activities of the 'Usalama Reform Forum', a civil society initiative focusing on police and the broader Security Sector Reform (SSR). The study concludes with observations on the Police Reform Task Team.

Context: What are the police, universally and specifically?

Firstly, it is important to define and acknowledge the police as all of the following: a state institution operating under national authority and within national sovereignty; the most visible representative of the state; always contingent upon the state and its inhabitants; reflecting the nation (or region or locality) in its political culture, history, people and economy. (If a society is corrupt, you don't expect police to be less corrupt. If society is brutal, you don't expect the police to be less brutal.) And lastly, as an institution operating under universal standards (rule of law, accountability, transparency, decision-making, etc.), but functioning within its respective economic realities, cultural limits and constraints.

Context: the Shifta war

In Kenya, the context within which the police service has been operating, and which impacts on its conduct, includes, among others, the following elements:

In 1961, a referendum was conducted to determine whether the people of the then Northern Frontier District (especially of Somali origin) wanted to secede and join Somalia or remain as part of Kenya at independence. The result of that referendum was never made public. Local people believed there was an overwhelming verdict to secede. As a result, Shifta war was declared. The war ended after about two years, but the region remained under emergency rule until about 1995.

Through this period, the region was considered an operational area. Travel to the region was under armed escort. Police, till this day, are in operation fatigue. Kenyans of Somali origin are subjected to unending, forceful screening every time they cross 'to Kenya'. An Indemnity Act was passed by Parliament in the early 1970s to put a lid on any inquiry, investigation or court process with respect to the atrocities committed by security agencies in the region. Due to this brutality, the people of the region view the police as violators of rights and freedoms and not as a service provider. No one has ever checked how the police exercised their duties in this era.

Clampdown on political opposition

From independence, Kenya has experienced a systematic clampdown on political opposition. The police force was weakened when the independent constitution was amended to abolish the 'Police Service Commission'. The police were then used by the ruling elite to detain political leaders without trial, and torture and brutalize Kenyans in specifically designed torture chambers. The political system moved from a multiparty system at independence, to a *de-facto* one party state period, and, between 1982 and 1991, to a *de-jure* one party state.

It was illegal to hold a different political opinion. Police used to enforce this law, the consequence of which was political partisanship. With the abolition of this clause in 1991, the political space was widened but police remained an appendage of the ruling elite. They still remained part of the civil service; the Commissioner served the pleasure of the President. The special branch, most responsible for torture, was abolished and replaced by the National State Intelligence Services (NSIS). This affected the trust between the police and the public. Police were used to impede enjoyment of freedoms accruing from that crucial amendment. They brutalised opposition leaders and their supporters. The opposition groups recruited their private security providers. These groups have transformed into a law unto themselves, posing serious threats to the nation's security. The post-election violence of 2008/9 was the most prominent manifestation of this misuse of police by the ruling elite.

Limited state presence

Limited state presence and an unresponsive, centralised, patronising and inaccessible system of governance has been another hallmark that has permeated Kenya's policing context. The police are present alongside the provincial administration services. A District Office is usually accompanied by a police station and court with the result that accessibility to service in deep rural areas is limited.

With people feeling orphaned by the state, they have devolved their own system of security provision (from acquiring illegal arms to organising vigilantes). With arms, they easily start to imagine how they can 'acquire additional income', and they consider how easily they can raid each other, for example, for cattle. State and police response has often been forceful disarmament. The Anti-stock-theft Act was enacted to give law enforcement agencies unlimited powers, including mass and communal criminalisation. Most often, what security agents do in the course of enforcing this law is not subject to scrutiny, resulting into impunity.

It's a crime to belong

Today in Kenya, it is highly possible that a person may be subjected to inhumane treatment by the mere fact of belonging to a particular group. An ethnic Somali in Nairobi or anywhere else is most likely vulnerable to police harassment for merely being Somali. A Kikuyu young man is at risk of being killed for being suspected as a member of the criminal gang 'mungiki'. A person living in Kibera is most likely a violent railway saboteur and politically intolerant. A Muslim feels more vulnerable to attacks and harassment by the Anti-terrorist Police.

A context of economic decline and stagnation

With the economy on a sustained path of decline through the 1980s and 1990s, the police was one of the most affected public institutions, as competition for resources across sectors intensified. The police have limited facilities, resources and capacity to undertake investigations on sophisticated crimes, and they are less likely to sustain a case in court. They are therefore more likely to use force to secure confessions, and in some instances, kill suspects, than risk embarrassment in court. Treatment of suspects in police custody, poor response to distress, amongst a host of other limitations, have all conspired to mute any sense of confidence Kenyans would have in the Police. Because police don't have the funding, they use inappropriate means.

Corruption

Corruption is arguably the cancer that is currently eating up Kenya, and the police have been trapped in this. Procurement of essential police facilities like the forensic investigation equipment has impacted on the ability of police to deliver on services. On the beat, police are more prone to stopping pedestrians, or erecting roadblocks *(toll stations)* to take bribes (however small). They often frame their victims with threats of arrest to have their way, further impeding on trust.

The existing complaints system

The Kenyan police recognise the importance of accountability through the complaints system. Chapter 20 of the Standing Orders, which deals with discipline, states the following:

'The investigation of complaints against the police by the members of the public is a matter of great importance and often of considerable difficulty. Such complaints will be the subject of careful and immediate investigation by the most senior officer available. The authority exercised by, and the good name of the Force must depend largely on the confidence of the public that any complaint will always receive full, unprejudiced and immediate hearing and that redress will follow a well-founded complaint.'

The police receive, investigate and resolve complaints themselves. Each complaint is about an individual incident, and there is no requirement for the police to consider whether the complaint denotes a broader problem or appears to be one of a pattern of problematic incidences.

The system works as follows: A complaint can be made to an officer in the street, but unless urgent, it should be made at the nearest police station or divisional headquarters. The most senior officer available should investigate the complaint immediately. A file will be opened for each investigation, which will paint as clear a picture as possible, with recommendations as to what action should follow. The file should include prescribed information, including witness statements and an investigation diary. *Anonymous letters of complaint are ignored.*

Complaints by police about police are not common; officers are unlikely to report misconduct by colleagues as it can lead to isolation within the workplace and even violent reprisal. Although the Standing Orders specify that the police can make complaints according to certain procedures, using wrong complaint procedure is itself a disciplinary offence, which is a disincentive to make a report at all. There is no provision that the complainant needs to be kept informed of the progress of the investigation. The Standing Orders state *'the complainant must invariably be informed of the result of the investigation without necessarily indicating the disciplinary action that has been taken'*. However, the Police Manual requires more, stating that *'the complainant must be informed of the investigating officer's finding'*. The Standing Orders go on to require that *'[W]here a fault or an offence by a police officer has been disclosed, a suitable apology will be made'*.

When the usual procedure is not sufficient, a Court of Inquiry composed of two or more officers can be established by the Commissioner or by a Provincial Officer to collect and record evidence into any matter pertaining to the police, conduct of an officer, or matters affecting public interest. The report is presented in specified format to the person who ordered the inquiry and this, along with their comments, is sent to the Commissioner. If it is suspected that a criminal offence was committed during the inquiry, the suspected officer will be cautioned. In practice, details regarding this kind of inquiry are not made public.

Commenting on the Kenya police force's systems of internal accountability, the government's own Standing Committee on Human Rights remarked, in 2002, that:

'Despite public statements from the Commissioner of Police on efforts to reform the Police Department and to deal firmly and effectively with police officers who have committed abuses, the disciplinary sanctions imposed on officers found guilty of brutality are frequently inadequate. Officers are rarely prosecuted for using excessive force. Investigations of numerous cases alleging torture … revealed that the "Code of Silence," in which officers fail

to report brutality, destroy evidence or threaten witnesses in an effort to cover up abuses, commands widespread loyalty, contributing to a climate of impunity.'

Dealing with context and improving police accountability

It is acknowledged and appreciated by practitioners, activists and scholars in the field of policing that police accountability to the law and the citizens is a critical pillar in boosting public confidence and trust in any police agency.

It is precisely for this reason that the Police have a complaints mechanism in their current system, however inadequate. Civil society has strong advocacy programmes targeting the area of accountability, and scholars continue to build on and generate knowledge.

However inadequate, the following attempts, among others, have been made to address policing concerns, especially the use of force:

- Launch and roll out of community policing;
- Establishment of the KNCHR with watchdog and advisory mandate;
- Establishment, through a gazette notice, of a Police Oversight Board;
- Establishment of a Police Reforms Task Force in 2003;
- Modernisation of the Police facilities and equipment;
- Establishment of the Governance, Justice, Law and Order Sectors Programme;
- Establishment of a National Police Reforms Task Force in 2009;
- Aconstitutional reform process (the current debate being on whether to retain or abolish dual policing);
- Establishment of a Police Reforms Community Policing Directorates within the Police.

What is in it for the Police

In popularising police reform, the task team has approached the challenges both from the position of the citizen demanding better policing and the police themselves needing improvement in resources, working conditions and remuneration in order to perform as expected.

The police have to realise that with successful reform, their conditions will improve. Reform will bring about improved morale in the organisation and a greater acceptance by the public, meaning increased job satisfaction.

Community Trust

The primary agent of security continues to be the people themselves. If police lose the trust of the people, safety and security are compromised.

To maintain this trust, the police need to respect the rule of law, the value of accountability (including internal accountability), efficiency, a code of ethics, and they should be alert to conflict of interests.

Oversight and Accountability

Policing in Kenya is characterised by a culture of harassment, human rights violation, and basic unfriendliness. The situation has deteriorated partly because the police also do not feel that there is any oversight.

Every police officer must be accountable, from the most junior rank to the most senior.

Accountability requires information. South Africa produces among the best statistics and analysis on the continent. While Kenya should seek to emulate this, it is equally important for South Africa to further develop this tradition, and the legislation and reforms being contemplated for the ICD and Secretariat provide this opportunity.

Police cooperation is needed for oversight to succeed, as well as political support and the power to enforce decisions. Internal checks build morale in the police force.

Finally, oversight bodies, like the ICD, must realise they too must work at gaining respect and public trust.

Civil society engagement: The Usalama Reform Forum (TURF)

What has the civil society (Usalama Reform Forum) been able to undertake in this whole process, considering that it is a security forum?

Police accountability, accessibility and responsiveness have been central themes in civil society. The Kenyan Human Rights Commission (KHRC) has been the most prominent human rights agency in Kenya pioneered work on police accountability and reform. The KNCHR has since strengthened its' police accountability' related programmes and is now playing a leading role in this area. The Usalama Reform Forum (TURF) is the latest entrant, taking the form of consolidating civil society action on Police Reform specifically and Security Sector Reform (SSR) generally.

TURF founders recognised, at its inception in the mid-2008, the critical need in Kenya for cutting edge analysis and policy recommendations in the field of SSR.

The broad aim is to achieve effective, accountable and sustainable security institutions operating under a framework of the rule of law, respect for human rights, and democratic governance in Kenya.

Objectives include to engage in constructive dialogue on various aspects of SSR; and to contribute to SSR policy processes through research and knowledge generation.

TURF is a civic space established with a view to promote effective citizen engagement with the ongoing SSR processes in Kenya.

To date, TURF has made the following contributions:

- Working with the Police Oversight Board to prepare a policy brief on police oversight and accountability mechanisms in Kenya;
- Revisiting Community Policing: making policing part of development and service provision, from supply to demand, and addressing a partnership approach;

- Preparing submission on Comprehensive Police Reform to the Police Reforms Task Force;
- Influencing preparation and drafting the Kenya National Small Arms and Light Weapons Policy;
- Lobbying for a 'multi-sectoral, layered' approach to disarmament in Kenya. (TURF has proposed a disarmament framework and presented a memo to the Minister on the need to suspend current effort to disarm until a proper framework is adopted);
- Continuing consolidation of the Forum by increasing partnerships and membership.

Current steering team of TURF

TURF has a steering team comprising:

- PeaceNet-Kenya (secretariat);
- Saferworld;
- Kenya Muslim Youth Alliance;
- Eastern Africa Institute of Security Studies;
- Eastern Africa Peace Institute;
- Africa Research Foundation;
- Kibera Community Policing Committee;
- Socio-Economic Rights Foundation;
- Amani-Parliamentary Forum;
- Nairobi Peace Forum;
- ChemChemi Ya Ukweli;
- Africa Policing Civilian Oversight Forum;
- Commonwealth Human Rights Initiative;
- Kenya National Commission on Human Rights (partner).

Prospects for police civilian oversight in Kenya

The new draft Kenyan Constitution proposes the Kenya National Commission on Human Rights be expanded and take on the police oversight role along with the roles currently played by the Gender Commission, the National Cohesion and Integration Commission and the Office of the Ombudsman.

There was, however, opinion in the Commission that, because of the history and the specialised nature of police oversight, this be performed by a separate entity.

In whatever form, police oversight needs to be adequately resourced, it requires
Police cooperation, and it needs political support.

Day 2

Small group discussions

Summary of small group discussions

The workshop divided into groups, which were asked to identify critical elements to consider in the proposed ICD legislation. The groups identified:

Independence

- Independence of the ICD is a crucial issue – this has implications for the investigation of high profile cases.
- The ICD needs to be an independent body, not a political body, and it needs to have stature.
- Parliament should appoint the Executive Director of the ICD.
- The ICD should report directly to Parliament.
- A new name should be given to the ICD.

Role

- Legislation is needed to clarify the roles of both the ICD and the Secretariat. It should be clearly spelt out and clearly separated.
- The ICD should have a mandate over all police deaths, criminality and torture.
- Criminal matters should be included. A fourth programme that deals specifically with the corruption of police should be included.
- The ICD should drive the process to ensure that torture is seen as a criminal offence in South Africa.
- Monitoring the Domestic Violence Act should reside with the Secretariat
- The ICD needs to be proactive. This includes monitoring police custody, and undertaking announced and unannounced visits, so that you are able to deal with issues proactively.

Powers

- Powers and processes of the ICD should be clearly spelt out.

- The SAPS should be compelled in legislation to provide required documentation to the ICD. Legislation should be passed that will compel the SAPS to comply with the ICD's requests for documentation.

- The SAPS should report serious complaints and cases, including those of deaths or rapes, in custody, immediately to the ICD. Legislation that gives effect to the latter should be enacted as it will allow for proper investigation. Compliance with the requirement to report serious complaints and cases *immediately* is essential and legislation should therefore also provide sanctions to be applied in cases where the 'immediate reporting' requirement is not complied with.

- There should be a specific process on how the ICD should deal with issues of corruption. The ICD should focus on systematic corruption, but also be able to monitor performance of competencies within the SAPS that deal with corruption.

- Legislation should compel the SAPS to report back to the ICD on recommendations made by the ICD, and to articulate the link between the work of the ICD and internal police discipline system. At minimum, recommendations should be acknowledged, and an indication should be given, whether you're responding or not, with reasons given for compliance or non-compliance.

- Data should be kept in terms of complaints lodged against the police.

- The ICD should be granted the power to subpoena.

Structure

- Provision should be made for upgrading ranks in order to align with those of SAPS senior management.

- The ICD should be appropriately resourced and capacitated at national and provincial levels.

Use of Force Provision in the Criminal Procedure Act (CPA)
Advocate Enver Daniels, State Law Adviser

Introduction

Adv Daniels presented on the proposed amendments to Section 49 of the Criminal Procedure Act (CPA), the provisions that deal with use of force by police officers. He indicated that he was unable to provide a preview of the proposed changes but would reflect on what has prompted the review and issues currently being considered by the State Law Advisors (SLA) who were working on the draft to be presented before the Minister.

The role of the SLA is to advise government on how to improve their regulations to fulfil their constitutional obligations and, as such, the SLA was currently examining whether it is necessary to amend section 49 and, if so, how can it be amended without further eroding the rights of South Africans. In this process the SLA is also considering whether there are not other approaches to addressing concerns raised around the ambiguity of section 49, for example, is SAPS training on section 49 effective?

The debate on section 49

The approach to section 49, like all matters touching on life and death, involves careful and extensive ethical, moral and constitutional considerations. This is important especially in light of South Africa's history of apartheid marked by inequality and human rights violations.

Due to the high crime rate and communities' demands for drastic action to combat crime, the debates around Section 49 are at times clouded in emotion. This is unfortunate, but perhaps understandable. South Africans from all walks of life feel increasingly unsafe and are concerned about crime. These fears and concerns exist despite the protections afforded by our Constitution.

This notwithstanding, there is clear evidence that the state gives support to the criminal justice system and has prioritised the fight against crime. Legislative reform and fiscal support are indicators of the state's efforts. Since 1994, the state has responded to the concerns of its citizens by introducing minimum sentences for certain crimes, implementing stricter bail laws to make it more difficult for persons charged with serious crimes to obtain bail.

The state's efforts are not yielding the desired crime prevention results. Disgruntled communities are as a result demanding that even more stringent regulations be introduced to deal with crime, especially violent crime. While such calls are understandable, submitting to it could result in grave violations of fundamental rights and is likely to have a limited effect in reducing crime. Punitive responses to crime may even exacerbate the levels of crime.

The causes of crime are complex and require holistic responses. It is thus unhelpful to take a purely retributive approach to crime. Such approaches will undermine the protection afforded by the Constitution and offenders in particular, regardless of the reasons underlying

their involvement in crime, are likely to be exposed to human rights abuses. The right to life may be comprised in such circumstances.

Suggestions that the police are above the law, is not helpful in the debate on the proposed amendments to Section 49. Ultimately then it is the duty of the state to decide the best course and what steps should be taken to make South Africa safer and more secure. In this it must be mindful to balance the imperative to improve safety with protecting fundamental human rights.

The Bill of Rights

Any discussion of the use of deadly force must be located within the context of the Bill of Rights[10] and the country's efforts to build national unity and reconciliation.

Section 7 of the Bill of Rights proclaims that a Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and confirms the democratic values of human dignity, equality and freedom. It also provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 11 states that everyone has the right to life.

In terms of Section 9, everyone is equal before the law and has the right to equal protection and benefit before the law, and section 10 affirms that everyone has inherent dignity and the right to have their dignity protected and respected.

Section 12 guarantees that everyone has the right to security, which includes the right to not be deprived of freedom arbitrarily or to be detained without just cause, the right to not be deprived of a freedom, to be free of all forms of violence, from either public or private sources, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman or degrading way. Everyone has the right to bodily and psychological integrity, which includes the right to security of the body.

The Constitutional Court is the gaurdian of the Constitution. The right to life provision in the Bill of Rights was eloquently explained in the *S v. Makwanyane* case, in which the Court held that the death penalty constitutes an unconstitutional sentence. The Court held that the right to life was not included in the Constitution simply to guarantee the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity.

Use of force – Constitutional Court

The Constitutional Court in *S v Walters* considered the use of force as it was provided for in terms of the old section 49:[11]

> 'Arresting a suspect, in terms of Section 49 of the CPA, is a police duty. The purpose of an arrest is to take the person into custody, and for that person to come before the

[10] Chapter 2 of the Final Constitution of the Republic of South Africa Act 108 of 1996.
[11] S v Walters and Another 2002 (2) SACR 105 (CC).

court as soon as possible on a criminal charge. It does not necessarily involve the use of force; on the contrary, any degree of force to effect an arrest is allowed only if necessary to overcome resistance.'

Even when the suspect flees, force may only be used when it is necessary and then only the minimum degree of force may be used. The arrest of a suspect is not an objective in itself; it is merely *a* means of ensuring that a suspect appears in court. Resistance to arrest does not always have to be overcome immediately, especially not in circumstances where the suspect can be traced later or where his identity is known.

Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used. When deciding whether the force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence, and the nature and circumstances of the offence.

The Constitutional Court confirmed in the Walters case that deadly force may be used in cases where there is a threat to life or limb. In other words deadly force in circumstances covered by private defence of oneself or a third party is permissible

Amendment to Section 49

The Minster of Police, in explaining the reason for the proposed amendment to Section 49 of the Criminal Procedure Act, has clearly stated that the purpose is merely to clarify certain ambiguities about how the police must use deadly force. The amendments will not expand or limit the current powers of the police.

As it stands, Section 49 does allow the police to use deadly force, in order to make an arrest in certain circumstances or to protect themselves or others, or to prevent the future harm. In practice, however, it is alleged that the lack of a clear directive compels policemen to err on the side of caution.

This has prompted the need for the circumstances under which deadly force may be used to be clarified for the police.

In considering possible amendments, the SLA has looked at the pronouncements of the Constitutional Court, judgements of courts of law in other countries, and writings both locally and abroad.

The SLA has considered whether to define deadly force more carefully. Deadly force does often result in deaths. The SLA believes that deadly force can be defined to make it clear that such force is intended to or is likely to cause death or grievous bodily harm. This means that the person using these powers must fully understand the consequences of using deadly force.

By defining 'deadly force' clearly, those invoking the powers under section 49 may refrain from using it indiscriminately. The potential users of deadly force must also be reminded that they will be prosecuted if the circumstances of an arrest are not justified in terms of section 49. Therefore, it must be used with extreme caution.

Attempts must be made in legislation to illustrate in *what* circumstances or scenarios force can be used. This will take into account, for example, whether the suspect is armed and

whether the arrester needs to be protected or protect the rights of innocent members of the public, or whether the suspect is suspected on reasonable grounds of a crime that involves serious bodily harm, or that there is no other reasonable means to carry out the arrest, and that the suspect must be trying to resist the arrest or attempting to flee.

Ultimately, the SLA will be seeking to draft changes, which will not necessarily expand the powers to use deadly force but will provide the police with a clear understanding of when deadly force maybe be used, prevent the indiscriminate use of deadly force, thereby reducing the risk of innocent people being killed, improve arrest rates, especially in cases of serious violent crime, and instil greater confidence in the police's ability, not only to fulfil their duties, but also to respect and promote the fundamental human rights outlined in our Constitution, particularly the rights to life and dignity.

The impact of proposed changes to the use of force provisions in the CPA

David Bruce, CSVR

Introduction

David Bruce presented on the amendment to Section 49 and policy on the use of 'lethal force' from a civil society perspective.

In his presentation, he outlined the interpretation of the use of force in defence and arrest situations. In doing so, he sketched examples from the old, current, and proposed Section 49, and Canadian Criminal Code. He summarised by raising questions around issues of future danger.

The questions of using lethal force generally pertain to:

- An immediate threat that needs to be defended and the lethal force that is needed to protect the person under attack; on this point, there is no controversy in the law – if people are being faced with a threat, then they are justified in defending themselves;
- The use of force in an arrest situation in which a person is *fleeing* from the police.

Assuming these are distinct types of situations, one can distinguish between the two situations as follows:

- The defence situation (self-defence or defence of another – private defence); and
- *The arrest* situation – a suspect is *fleeing* from the police and poses no immediate threat to anyone (the arrestor can also be a civilian).

Civil society organisations were concerned with arrest situations: the debate about Section 49 is essentially concerned with these questions:

1. Are there any situations where it should be justified to shoot at a fleeing suspect?
2. If yes, what should these situations be?

Original Section 49

The old Section 49 encompassed an arrest provision.

It stated that:

> '[1] if any person authorised under this act to arrest or to assist in arresting another attempts to arrest such person and such person –
>
> [a] resists the attempt and cannot be arrested without the use of force; or
> [b] flees when it is clear that an attempt to arrest him is being made, or resists such attempts and flees, the person so authorised may, in order to effect the arrest, use such

force as may in the circumstance so be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

[2] where the person concerned is to be arrested for an offence referred to in schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.'

Current Section 49

The current Section 49 considers a private defence or arrest provision.

It states that:

'the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds –
(a) that the force is immediately necessary for the purposes of protecting the arrestor, or any person lawfully assisting the arrestor or any other person from imminent *or future* death or grievous bodily harm;
(b) that there is a substantial risk that the suspect will cause imminent *or future* death or grievous bodily harm if the arrest is delayed; or
(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm [presenter's italics and underlining].

Canadian Criminal Code

As an example of use of force in other jurisdictions, the Canadian Criminal Code Section 25 is clearer than Section 49, and reads as follows:

Private defence

(3) Subject to subsections (4) … a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

Arrest

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
(c) the person to be arrested takes flight to avoid arrest;
(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer, or any other person from imminent *or future* death or grievous bodily harm; and
(e) the flight cannot be prevented by reasonable means in a less violent manner.'

According to this code:

- Section 3 is the defence situation.
- Section 4 is the future danger principle.

Walters judgment

The Star on 28 September 2009 reported that the police want the law amended to reflect the following paragraph from the Constitutional Court's Walters judgment:
'Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others *or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest*, whether at that time or later.' (Tennessee v Garner (1985), S v Govender, S V Walters)

Comparing the arrest provisions

Old Section 49 and proposed new Section 49 are based on:

- The offence committed (variations of the fleeing felon rule);
- An evaluation in terms of knowledge, which is a concrete test.

Current Section 49 and Section 25 of the Canadian criminal code are based on:

- 'Reasonable belief' about future dangerousness; and
- Extension in time of 'private defence'.

The moral justification for the use of lethal force

In terms of principles of criminal justice, suspects are 'presumed innocent' until found to be guilty by a court of law.
So:

- Use of lethal force, which may cause death, to arrest someone who is presumed to be innocent because of the offence that they are alleged to have committed is a contradiction in terms;

In terms of the future-danger-principle basis for use of lethal force, it is not 'in order to arrest' but to protect people against 'future danger'. Therefore, this would appear to be a morally more sound approach to the issue.

There have to be the two kinds of approaches:

- Firstly, has the person committed such an offence in the past? But, on its own, that approach is not enough, so
- The second approach, that of future danger, has to be applied too.

The point is that in terms of the current amendment, the amendment is merely technical.

The current law is ambiguous in terms of its interpretation. The amendment will settle on one way of interpreting the law.

How do you evaluate future dangerousness?

Broadly, there are two possible approaches:

1. Restrictive interpretation (protection of life; due process orientated):

    - Has committed an offence involving the infliction or threatened infliction of grievous bodily harm (Tennessee v Garner principle);

    - There are additional factors indicating that s/he is likely to commit such offences in the future,

    for example, aggravated robbery and knowledge that suspect has committed more than one such robbery.

2. Permissive interpretation (crime control orientated):

    - Has committed an offence involving the infliction or threatened infliction of grievous bodily harm (Tennessee v Garner principle);

    - No additional factors required.

    for example, aggravated robbery only.

In his opinion, the amendment is therefore not merely 'technical' – it 'clarifies' the law in a manner consistent with permissive interpretation.

The future danger principle is, however, inherently ambiguous. If interpreted narrowly (restrictively), the proposed section 49 expands the powers of the police.

If interpreted broadly (permissively), the proposed section 49 can be understood to restate the principles of the current law in more concrete terms i.e. to clarify them.

Because we have not had clarification of the current section 49 from the Supreme Court of Appeal or Constitutional Court we cannot say whether the current law should be understood

in ‘restrictive’ or ‘permissive’ terms. However, the proposed Section 49 can be said to be consistent with the current Section 49 as interpreted ‘permissively’.

Debates on amendment to Section 49

Presently, we have two debates:

Debate 1

The future danger principle (current Section 49) is more consistent morally. A law relating to the use of lethal force should be based on the highest principles, because we can only justify the taking of life on this basis. However, it is difficult to interpret, since it is speculative.

So, it can provide the moral foundation for law but is not adequate as a legal principle (which needs to be concrete and easily understood). The future danger principle places the police in legal jeopardy if they interpret it differently to how a judge would interpret it. There is no reason to believe that there is a common understanding amongst relevant bodies (courts, ICD, SAPS) about what the provision means.

The principle is nonetheless endorsed in UN standards.

Debate 2

The second debate rests on the *Tennessee v Garner* Principle, which is based on the *Walters* judgment (proposed Section 49).

This basis is more concrete and therefore easier to communicate to people. It is more realistic to expect that police can be ‘properly trained’ in this. Furthermore, it may support greater police accountability – if the standards that police are supposed to uphold are clearer then it may be easier to enforce them. If you have a law that is clear, it supports greater police accountability, because it’s easier to hold police to that law.

But it is based on a moral contradiction in terms unless it is clarified that the justification for the use of force is to protect people against future danger. In other words, the *Tennessee v Garner* principle is applied as a test of future dangerousness.

The preference is pragmatic, taking into account contextual factors (high violence environment), as much as one can be pragmatic about taking someone’s life. However, the police, by necessity, have to apply pragmatic considerations.

Skills and capacity issues can be used to argue either way, because we have to work from the existing levels of skills in the police. Arguably, the police can be more easily trained in this second approach.

The suggestion, therefore, is as follows:

- Accept that Tennessee v Garner is the best way of giving concrete expression to the future danger principle (even though it does not fully capture its meaning);

- Realise that the best way to strengthen the law is instead to focus on minimising the risk of error.

Risk of error

The risk of error is a consistent feature of human life.

With regard to the debate at hand, there are three typical errors:

- Error 1: Self-defence situations
  - The Amadou Diallo shooting in New York, Feb 1999, serves as example. (A situation of apparent defence, in which a suspect reached inside his jacket for his ID and was thought to be reaching for a fire-arm).
  - This error includes error in judgement as to suspect's intentions.
- Error 2: Arrest situations ('fleeing suspect')
  - Information in the press suggests that the Olga Kekana case is of this kind.
  - This error includes error of identification, in which someone is thought to be the suspect but is not. This can happen in a situation of fleeing vehicles.
- Error 3: 'Innocent bystander'
  - In some cases, harm or fatality to innocent bystanders is unavoidable, for example, when the situation takes place on a busy street. However, many situations can be avoided (private defence situations).
  - The key issue is whether priority is given to avoiding loss of life of innocent people or to 'arrest'.
  - The error resides in the error in judgement as to priorities or risks to teh innocent.

Minimising risks of error

Overall, a high premium needs to be placed on professionalism and on the need to protect human life.

The error of identification is a special category of error. It is important to distinguish 'fleeing suspect' situations from other situations where use of lethal force is justified. In these situations, there is an additional obligations on police regarding soundness of belief that person has been properly identified.

Other than for 'fleeing suspect' type situations, provision similar to (3) in Canadian code is acceptable.

Limitations of the Section 49 amendment: need for an overall statement of policy

These safeguards against risk of error are especially necessary in the current climate of confusion and/or disregard for the following measures taken by the police:

- Warning shots
- Verbal warnings
- Lethal force against a moving vehicle
- Idea that police are on duty 24 hours (off duty too), and implied obligation to make armed interventions. What is implied is that if police encounter a crime, then they need to use their firearms too. Most of the police officers killed are killed off duty
- Obligation to notify the ICD – witnesses must notify the ICD
- Obligation to cooperate with the ICD
- SAPS obligation to investigate shooting incidents. In the majority of incidents, when police use arms, people are not killed
- SO 251 (Standing Order 251) – detailing accountability for use of fire-arms, is ignored as much as it is adhered to. The SAPS is not able to account for the use of lethal force by its members. The use of legal force should be more fully accounted for.

Our law currently provides for the measures to be exercised equally by police and civilians.

A model provided by the *Use of force policies* in some US police departments could provide helpful guidelines.

Conclusion

In conclusion, he noted the following:

- Measures that promote clarity (Section 49 amendment, statement of policy) are part of strengthening support and accountability.
- Other support measures are also needed: equipment, training, debriefing, managerial engagement, and other support measures.
- Accountability is needed in the form of hands-on management, monitoring, investigation.
- At the centre of this is the need for clear and unequivocal commitment by SAPS and political leadership to the need for police use of force to be guided by principles of respect for the law and the need to protect human life.

How can deaths as a result of police action or in police custody be reduced *Moses Dlamini, National Spokesperson ICD*

Introduction

Moses Dlamini addressed the meeting on recent ICD research into deaths as a result of police action or in police custody in KwaZulu-Natal, the Eastern Cape and Gauteng, which were the highest for the country.

Deaths in police custody	KwaZulu	Gauteng	Eastern Cape	Remaining
Natural causes	21	12	26	62
Suicide	2	24	15	34
Injuries sustained in custody	12	4	2	10
Injuries sustained prior to detention	26	23	5	17
TOTAL	**61**	**63**	**48**	**123**
Deaths as a result of police action				
A suspect shot during the course of a crime	42	10	10	24
A suspect shot during the course of an escape	4	6	3	112
A suspect shot during the course of an investigation	0	1	1	7
A suspect shot during the course of an arrest	14	37	22	44
An innocent bystander shot by police	1	1	4	4
Assault by police	0	1	4	9
Negligent use of firearms	14	40	8	8
Other intentional shooting	0	2	2	5
Vehicle accident involving police	3	3	3	21
TOTAL	**78**	**101**	**57**	**234**
GRAND TOTAL	**139**	**164**	**105**	**357**

Methodology

The research objectives were to:

- Identify factors contributing to deaths as a result of police action in these provinces;
- Clarify existing measures that are used to minimise the number of deaths that occur due to police action;
- Identify the characteristics of perpetrators;
- Recommend measures that could be introduced to minimise or prevent the high incidence of deaths as a result of police action in KwaZulu-Natal, Gauteng, and the Eastern Cape.

Research was conducted by examining ICD case dockets in the three provinces for 2005/06. Random sampling was not possible due to case dockets being taken by investigators for investigation, therefore convenience sampling was used.

Interviews were conducted with the ICD Provincial Head and Deputy Head and an investigator in each of the three provinces. Pathologists involved in the investigation of death as a result of police action during 2005/2006 in each of the three provinces were interviewed. Interviews were also conducted with two police officers at each of the 10 police stations (Hillbrow, Kempton Park, Moroka, and Tembisa in Gauteng; Durban Central, Empangeni,

Esikhawini and Inanda in KwaZulu-Natal; Mdantsane and Mthatha in the Eastern Cape) where more than four deaths had been recorded.

Findings

The majority of victims (79,6%) were killed either during the course of an arrest (40,8) or during the course of a crime. In addition to this, 11 victims (10,7%) were killed under circumstances of intentional shooting.

In the majority of the cases, the victim was killed either on a public road (39,6%) or at their own house or that of someone else (23,9%), open fields (8,2%) and commercial premises (8,2%).

In more than half the cases the victim was armed.

The race profile of the officers followed the demographics of the SAPS. In terms of the ranks, 69,4% police officers were in the lower ranks. The rank of Captain was the highest rank of police officer involved in the death of a victim. In 76,9% the officers were on duty and in 6% of cases under the influence of alcohol.

SAPS members identified common circumstances to deaths as a result of police action as being:

- Suspects resist arrest by fleeing or escaping;
- Suspects shoot at police first;
- Failure of suspects to heed warning shots;
- Negligence on the part of the police.

Qualitative research also raised a number of challenge areas. These included:

- Late arrival of ICD Investigators on the scene;
- Little correlation between what the police reports and the evidence on the deceased;
- Most deaths in detention were due to police negligence;
- Lack of cooperation from police was a problem;
- The tendency of SAPS members to protect each other.

Recommendations

Measures to minimise deaths as a result of police action identified in the research included:

- Police should use warning shots.
- Police should improve shooting skill and judgement.
- A legislative framework should be put in place to hold the police accountable for failure to notify the ICD of a scene. There should be legislative mechanisms to compel compliance.
- There should be adequate human resources and other resources available to the ICD for quick response.
- Pathologists should have immediate access before evidence could be tampered with
- Ongoing police training interventions were needed in:

  - Oversight and the ICD (there is a need for case studies of various situations);
  - The rights of detained or arrested persons;
  - Tactical or SWAT courses, to minimise shooting of innocent bystanders.

- The issue of perceived police racism should be addressed through cultural awareness training and workshops.
- Clarity is needed on the current legislation and a clear policy framework governing the use of force was required.
- A system was needed to identify and treat at-risk officers, as well as conduction of trauma debriefing. Furthermore, there is a need to see to employee wellness, as well as deal with substance and alcohol abuse.

Plenary 2

Focus on perpetrators and the socio-political situation needed

Discussion highlighted the importance of support to victims and the importance of long-term solutions to South Africa's crime problems in addition to debates on strengthening and clarifying the police's ability to use force. It is important not to lose sight of possible erosion of rights of innocent citizens due to an often false pay-off between increased effectiveness and a limitation of rights. In situations such as this it is often the poor and marginalised that bear the costs.

Clarification of Section 49 and situational training

The importance of situational training for police members was stressed.

Time-frames for amendments to Section 49

Amending Section 49 required careful research and reflection and could not be rushed. This affected time frames.

Police record-keeping

The importance of proper record-keeping and being able to fully account for the use of force by their members was stressed. This should be expanded to include the discharge of firearms when no one is killed or injured in addition to the current recording of deaths as a result of police action.

Close and word of thanks *Francois Beukman, ICD*

Francois Beukman closed the workshop, thanking everyone for their participation.

In his opinion, the workshop came at the right time. The submission of the draft ICD legislation was imminent and a similar event should be considered to reflect on the draft bill once tabled. The three or four months after the conference will influence the next 5 or 10 years, so it's an important opportunity to use our collective wisdom to contribute to that process. The workshop was seen as a valuable networking opportunity and it is important that the relationships forged over the two days are nurtured.

End