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- › The Auditor General's role in SAPS performance assessments
- › Current debates in the policing of public order in South Africa
- › Re-imagining private security in South Africa
- › The need for hate crime legislation
- › The first year of implementation of the Child Justice Act



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Cover photograph

Residents of Boiketlong informal settlement burn tyres 1 Sept 2007. Residents of informal settlements that dot the Sebokeng/Evaton area south of Johannesburg had been taking to the streets to protest the lack of service delivery, or inadequate services. Photo Greg Marinovich.

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EDITORIAL

I am pleased to be able to offer you a very full edition of *SA Crime Quarterly* with which to end the year. In fact, we have had to drop our regular On the Record interview feature in order to allow additional space for the articles. The articles in this edition are concerned with a range of pressing issues for South Africa and the criminal justice sector. Three contributions are based on work conducted on behalf of the African Policing Civilian Oversight Forum (APCOF) and we are pleased to have been able to partner with APCOF to bring these to SACQ readers.

The first article, by David Bruce, offers a reflection on the measurement of performance set by the SAPS. Bruce develops arguments that were initially presented in two articles carried in SACQ 31 (March 2010) in which he and Andrew Faull identified the perverse incentives created by the adoption of inappropriate indicators of police performance, and their effect on crime statistics.

Developing indicators of performance in order to assess whether government departments reach their delivery targets has become increasingly important since the passing of the Public Finance Administration Act. However, the identification of appropriate indicators and suitable measures is somewhat of an art, and for many departments it is a tremendous challenge. Identifying the wrong measures of performance can have devastating consequences. Lisa Vetten, director of the Tshwaranang Legal Advocacy Centre to End Violence Against Women, spoke at a seminar hosted by the Crime and Justice Programme in October about how the SAPS target to reduce contact crime created a disincentive for SAPS officials to record cases of rape or sexual assault. In this article, Bruce argues that 'the emphasis placed on... targets ...carries with it substantial dangers such as that the work of government departments becomes pre-occupied with presenting a satisfactory set of numbers which may result in the production of perverse incentives, and a reduced emphasis on other factors that are important, but do not directly affect, the performance targets. In so doing performance measurement may potentially reduce police responsiveness to the actual concerns of communities.'

In their contribution, Monique Marks and Sean Tait consider the changes that have taken place over the past ten years in policing public events. They argue that the gains that were made to democratise and improve public order policing after 1996 have been reversed, leading to an increase in human rights abuses by the police during public gatherings. They consider the context of increased demonstrations to protest against poor services, and suggest remedies for public order policing.

In African and even global terms the South African private security industry is substantial in size and enormously diverse. The private security industry has increasingly begun to play a role in policing. In their article Julie Berg and Jean-Pierre Nouveau offer some new thinking about how the regulation of the industry might be approached.

The South African government has stated its commitment to creating a new law to criminalise hate crimes. Duncan Breen was a founding leader of the Hate Crimes Working Group, and Juan Nel is the current deputy head of this group that is advocating for the criminalisation of hate crimes. In their article Nel and Breen provide an overview of the context in which the development of this legislation will take place, and make suggestions about what the law should cover. Whether a new law will in fact bring relief to the victims of hate crimes, or have an effect on the number of hate crimes perpetrated, is a matter of much international debate and deliberation. This article is the first of what I hope will be a series that considers these issues.

The Child Justice Act was an important addition to South African criminal justice legislation, in that it sought to provide the legal basis for the protection and diversion of children in conflict with the law. The Act has now been in operation for just over 12 months and the first report on the implementation of the Act was presented to Parliament in September 2011. When a costing was undertaken before the Act was passed, it was estimated that implementation would cost over R600m per annum. It should come as no surprise therefore that when only a fifth of that amount was allocated for implementation during the first year, only a fifth of children who were arrested appear to have received the services they should have. These and other matters are dealt with in the article by Lorenzo Wakefield, with which we conclude this edition of SACQ.

I wish those in the southern hemisphere a happy holiday season and look forward to the first edition of 2012, which will focus on the establishment of a new, independent anti-corruption unit to replace the Hawks.

Chandré Gould (Editor)

MEASURING OUTPUTS, NEGLECTING OUTCOMES

The Auditor General's role in SAPS performance assessments

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Performance monitoring, often based on the use of performance indicators, has become a central aspect of the work of government departments in South Africa. Even though the South African Police Service (SAPS) is regarded as one of the leading government departments in the use of performance monitoring systems, it does not use performance information in a critical enough manner, particularly given the risk that the introduction of performance measures will lead to perverse incentives. Given that the SAPS is one of the largest police services in the world, the centralised reporting on organisational performance in the annual report is ineffective. It obscures much more than it reveals about what is being achieved by the organisation. Since 2005 the Auditor General of South Africa has been phasing in a 'predetermined objectives' audit that involves checking on the reliability of the performance information presented by the SAPS. Though he has limited capacity to do so, the AG also carries out what are called 'performance audits', that involve deeper and more focused scrutiny of the functioning of government departments. A 2008-09 performance audit on service delivery at police stations and 10111 call centres highlights the type of scrutiny that the SAPS needs to be subjected to if information on its performance is to become more meaningful.

Since the early 1980s an increasing number of governments have invested in systems of performance management, incorporating the use of performance indicators and the implementation of systems of performance assessment. Behind the drive towards improving performance management has been a concern with the efficiency and effectiveness of government expenditure. Governments increasingly want

answers to the question: Is our money being used productively?

Considering the massive investments of public money into public sector organisation it is hard to argue that this is not a necessity. Nevertheless, performance measurement is in some ways a mixed blessing. This is partly because, unless the government agency in question is involved in an activity that is fairly simple (the provision of water perhaps), it is often extremely difficult to find indicators or measures that adequately capture or do justice to the activities that the agency is supposed to be engaged in. Good performance

* David Bruce is an independent researcher. This paper was written on behalf of the African Policing Civilian Oversight Forum (APCOF). Thanks are due to Sean Tait of APCOF, Chandré Gould of the ISS and an anonymous reviewer for assistance and direction with this article.

measures should reflect the key goals that organisations hope to achieve. Assuming these are clearly enough defined it may be difficult to find meaningful ways of measuring what an organisation *achieves* (the outcomes), rather than just what it *does* (the outputs). In the field of policing this is a notorious difficulty. Speaking about the use of indicators internationally, Bayley¹ says:

Most performance indicators focus, unfortunately, on outputs rather than outcomes, with the result that police officers give more attention to reporting what they do rather than what they achieve. This causes them to become pre-occupied with meeting norms of activity rather than adapting their activity to produce desired results, which in turn discourages innovation and reduces operational flexibility.

The construction of appropriate measures is therefore something of a high art. One of the inherent risks of indicators is that they have unintended consequences such as ‘promoting inappropriate behaviour or malicious compliance.’² This has been illustrated in South Africa with evidence of performance management related targets and systems contributing to a pattern of non-recording of cases reported at police stations.³ Performance measures are also necessarily quantitative, with the consequence that the business of government and the work of public servants become dominated by a pre-occupation with meeting certain numeric targets. This has the potential of compromising the overall quality of the service provided. Another factor is that the implementation of performance management systems is expensive and involves a massive investment of resources and time by government personnel, particularly those in managerial positions.

In South Africa, no less than in other countries, government has emphasised performance monitoring and performance management. The emphasis on performance management systems may be understood as derived, at the end of the day, from the principles of accountability embodied in the Constitution. Legislative

provisions that form the basis for the implementation of performance measurement systems include Section 38(1)(b) of the Public Finance Management Act.⁴ This Act requires that ‘accounting officers’ for government departments or other government entities are ‘responsible for the effective, efficient, economical and transparent use of the resources of the department...’ Performance management and, more importantly, measurement, is intended to be a way of evaluating whether departments are delivering on their obligations effectively, efficiently and economically.

More specific provisions such as Section 27(4) of the Public Finance Management Act (of 1999) require accounting officers to submit ‘measurable objectives’ to Parliament with their draft budgets. Treasury regulations also require that the strategic plan include ‘the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution’s programmes.’⁵

PERFORMANCE MEASUREMENT WITHIN THE SOUTH AFRICAN POLICE SERVICE (SAPS)

The SAPS has used systems of performance measurement, in compliance with government policies, from at least the late 1990s. An annual performance plan is published each year.⁶ This provides indicators and related measures for assessing the performance of each programme and sub-programme of the department. As with other departments, the mechanism for reporting on performance is the annual report. A report for the immediately preceding financial year (to end March) is presented to Parliament and published in September or October of each year.⁷ Over the years the SAPS use of indicators and measures has steadily become more sophisticated and the SAPS is regarded as one of the leading government departments in terms of its use of performance measures.⁸

Since 2003, as part of its drive to improve its ability to assess performance, the SAPS has also introduced what is known as the ‘performance

management chart'. This is an information technology-based system for monitoring and comparing the performance of police stations. The performance chart partly relies on information recorded on the Crime Administration System regarding levels of recorded crime (as measures of crime prevention) and on detection rates and the percentage of cases that go to court (as measures of crime investigation). The system compares the performance of a station against its own previous performance. Stations are then ranked against each other according to the level of improvement in performance that they have achieved (relative to their past performance). The aim is to encourage police leaders and members to focus on continuously improving their activities and operations in line with the strategy of the SAPS.

Not unexpectedly, several of the performance indicators that tend to be the focus of attention by politicians, media, the public and the police themselves, relate to crime reduction targets. In the 2011/12 performance plan, for instance, the SAPS established targets to reduce the number of 'reported serious crimes' and 'reported serious crimes within the rural environment' by two per cent each and to reduce the number of contact crimes⁹ and trio crimes¹⁰ by between four and seven per cent each. Yet within the criminal justice field, as well as amongst the police themselves, there is ambivalence as to whether levels of crime should be used as a measure of police performance. Many argue that levels of violent crime are driven by factors over which the police themselves have no control.¹¹ The SAPS itself has consistently argued that certain categories of violent crime (amongst them murder, assault and rape) should be seen as 'less policeable crime' on which they cannot be expected to have a significant impact.¹²

What is important is that the link between changes in the crime rate in South Africa and police action or strategies is never apparent. The SAPS is a 'policing behemoth',¹³ one of the largest police services in the world, with close to 200 000 employees. A national level figure indicating that 'recorded contact crime' has gone down by a certain percentage, in many ways mystifies the

issue rather than actually answering any questions. The key question is 'Can the police demonstrate that their primary crime prevention strategies are making a difference?'¹⁴ This would require a more systematic evaluation of the strategic and operational practice of police stations and other SAPS units. It may indeed be true that the SAPS is having a substantial impact on levels of crime. But the way in which indicators are currently used does not really tell us whether or not this is so.

A second problem with these types of indicators is that they can create perverse incentives. Over recent years concerns have been raised that a major contributor to reductions in recorded violent crime has been a systematic pattern of non-recording of crime. Between 2008 and 2010 allegations relating to such manipulation were made in relation to eleven police stations in the Western Cape and four in Gauteng, as well as stations in KwaZulu-Natal and Limpopo,¹⁵ though no formal investigation was conducted into the matter. The reliability of crime statistics as an accurate record of reported crime depends on the integrity of police practice in the recording of crime statistics. But this suggests that in recent years the pre-occupation with indicators of performance has taken a toll on this type of integrity. These issues are consistently not acknowledged in the annual report or performance plan, even though they have a profound impact on the credibility of the information presented.

It needs to be acknowledged that the emphasis on crime reduction targets is in many ways politically driven. The SAPS has been under enormous pressure not only to reduce crime, but also to *show* that crime is going down. What is important to recognise, however, is that the crime figures that are presented in the crime statistics each year are not simply a representation of the work of the SAPS. Potentially they represent the impact of a number of factors, including socio-economic factors, the work of the SAPS, the impact of other security role players (other components of the criminal justice system and the private security industry), trends in public reporting, and SAPS practice in recording reports or allegations of crime.

The issue of the opacity of performance information does not only apply to performance indicators relating to recorded crime. The detective component of the SAPS alone, for instance, numbers over 28 000 people.¹⁶ One of the dilemmas that the SAPS faced in constructing its performance indicators was whether to identify itself as responsible for conviction rates. The way in which the SAPS has resolved this in recent performance plans has been to focus primarily on two types of indicators, measured independently for various sub-categories of crime. These indicators are the 'detection rates', described as:

the total number of charges referred to court plus charges withdrawn before court and charges closed as unfounded ... divided by the total number of charges investigated¹⁷

and the 'percentage of court ready case dockets', described as:

the provision of a fully investigated case docket, whether it includes one or more charges (investigations finalised), which can be utilized by the National Prosecuting Agency (NPA) for the prosecution of an offender/s on the charges linked to the docket. Fully investigated entails that there is no outstanding information which requires further investigation by a detective, and that all evidence (e.g. statements, DNA, toxicology) has been obtained.¹⁸

Again, however, the presentation of single figures on 'detection rates' or dockets that are said to be 'court ready' obscures far more than it reveals. Undoubtedly there are major variations in the quality of these 'detections' and 'court ready' dockets. The pressure to improve detection rates potentially has its own set of unintended consequences and perverse incentives. The performance plan indicates that detection rates are calculated partly on the basis of cases that are withdrawn by complainants.¹⁹ This increases the possibility that police officers may play an active role in encouraging complainants, for instance in domestic violence cases, to withdraw cases. The

pressure to improve detection rates and the number of court ready dockets also increases the possibility that detectives will be motivated to take 'short cuts', such as using coercive measures²⁰ or fabricating evidence when investigating cases, and increases the risk of wrongful convictions.

This is not to say that the police should not use performance indicators, but to raise questions about their design and implementation. One question here concerns the degree to which current performance measures actually tell us anything about the contribution that the SAPS is making towards achieving its key goals. The use of performance measurement systems also needs to be accompanied by a parallel process that seeks to ensure that the performance is not only achieved against measures of quantity but also against measures of quality. But whilst the SAPS can speak with some pride of its framework of performance indicators and measures it cannot do the same in relation to its mechanisms for ensuring the quality of its work. For instance, one of its principle mechanisms for doing so, the SAPS National Inspectorate, has for some years failed to execute its mandate 'owing to poor leadership and unwarranted reorganisations'.²¹

Though the framework of performance indicators is, by many standards, of good quality there are also important dimensions of policing that are not addressed. The SAPS in its annual or other reports, for instance, does not monitor, and therefore cannot provide, information on the use of force, including lethal force, by its members. Though statistics on killings by police are presented in the ICD annual report, the SAPS makes no mention of these figures in its own reports. The performance plan does include an indicator relating to the investigation of cases of corruption²² but the plan makes no mention of the issue of the use of force, or for that matter, police safety. There are also profoundly important aspects of democratic policing which are not, and potentially cannot be, represented by this type of performance information, such as the necessity that police should not serve specific party political interests.²³

THE AUDITOR GENERAL'S ROLE IN ASSESSING POLICE PERFORMANCE

Regularity audits

The key auditing function performed by the Auditor General²⁴ is often seen to be the audit of financial statements. In this respect the SAPS audit history has fared well. In a presentation to the Portfolio Committee on Police in August 2009, the AG identified a number of good practice benchmarks that the SAPS had met, including:

- A clear trail of supporting documentation that is easily available and provided timeously
- The quality of financial statements and management information
- The timeliness of financial statements and management information
- Availability of key officials during audits
- Compliance with risk management and good internal control and governance practices²⁵

Related to this, the significance of the AG's report is often seen to be the 'opinion' or 'conclusion' that is reached on whether the statements reliably reflect the financial position of the department. However, the role of the AG is in fact more broadly defined. In line with Section 20 of the Public Audit Act²⁶ the audit of financial statements is merely part of a broader process of 'regularity' auditing that includes two other important facets. The first of these examines compliance with key legislation, including legislation pertaining to 'financial matters, financial management, and other related matters'.²⁷ The second is known as the 'predetermined objectives' audit (until quite recently this was referred to by the AG as the audit of performance information, abbreviated as 'AoPI'). This involves scrutiny of performance measurement systems and data.

Predetermined objectives

The audit of 'programme performance against predetermined objectives' is referred to in Section 20(2)(c) of the Public Audit Act²⁸ as well as

Section 40(3)(a) of the Public Finance Management Act.²⁹ Essentially this component of the audit can be seen as an assessment of whether the government department is using performance indicators and measures in the prescribed way.³⁰ It therefore involves an assessment of systems and controls relating to the management, collecting, monitoring and reporting of performance information. This includes checking on the consistency of performance information between the strategic/annual performance plan, quarterly reports and annual performance report. It also involves comparing reported performance information to relevant source documentation and conducting procedures to ensure the validity, accuracy and completeness of reported performance information.³¹

Since 2005-06 the AG, in cooperation with the National Treasury, 'phased in' the predetermined objectives component of the audit.³² In 2008 the AG announced that the 'phasing in approach to compliance' would continue 'until such time as the environment shows a state of readiness to provide reasonable assurance in the form of an audit opinion or conclusion'. The phasing in period would involve a 'review of the policies, systems, processes and procedures for the managing of and reporting on performance against predetermined objectives'. During the phasing in period the AG would not provide a formal 'opinion' or 'conclusion' relative to the audit of predetermined objectives. Nevertheless, the AG does report on 'material shortcomings in the process, systems and procedures of reporting against predetermined objectives'. These are reported under the 'Other reporting responsibilities' (or for instance 'Other legal and regulatory requirements') section of the audit report.³³ (A similar approach is followed in relation to the 'compliance' component of the audit).

The AG's findings in relation to the SAPS

In 2007 and 2008 the AG's report indicated that there were 'no matters observed that require inclusion in the report' or 'no significant findings'

in relation to the audit of predetermined objectives. However, in subsequent reports a number of issues were raised. For instance, both the 2009 and 2010 report of the AG raised concerns about compliance with regulatory requirements,³⁴ stating that:

The Department of Police did not in all instances maintain an effective, efficient and transparent system and internal controls regarding performance management, which describe and represent how the institution's processes of performance planning, monitoring, measurement, review and reporting will be conducted, organised and managed, as required in terms of section 38(1)(a)(i) and (b) of the PFMA.

Another issue that was raised in the 2009 report concerned the 'usefulness' of reported performance information. This is essentially an assessment of the performance measures used by the department.³⁵ The report indicated that certain key targets used by the department were not 'specific', 'measurable' or 'time bound'. The issue was not raised in the 2009-10 report, however, perhaps indicating that in the view of the AG, there had been an improvement in the usefulness of the targets.

The AG's reports from 2009, 2010 and 2011 also questioned the 'reliability' of the performance information. For instance, in the 2009 report the AG stated that:

The accuracy and completeness of reported performance information could not be verified for programme 2: Visible policing and programme 3: Detective services. This was as a result of performance information that has either been captured inaccurately or incomplete from source documentation such as case dockets.³⁶

In a presentation made in October 2011 the AG identified these questions about the reliability of SAPS performance information as being related, amongst other things, to the unavailability of supporting documentation at stations/units,

systems for collating information not being updated, inaccurate information being sent through, and inconsistencies between data in supporting documentation or data systems.³⁷

As indicated, due to the 'phasing in' approach these issues that have been raised do not have the weight of formal 'opinions' or 'conclusions'.³⁸ However, they do indicate that there continue to be matters of substantial concern to the AG in the use by the SAPS of performance information, notwithstanding the fact that this is regarded as being of a relatively high standard.

In the words of a framework document from the Presidency, the AG's focus, by means of the audit of predetermined objectives, is 'mainly on validating the credibility of performance information'.³⁹ In other words, it looks at the robustness of the relationship between indicators, performance information and supporting documentation so that there can be some level of confidence that the performance information that is reported on is correlated with actual performance. The predetermined objectives component of the audit therefore provides some indication as to whether the SAPS can actually back up some of its performance claims with supporting information.

Performance audits

The predetermined objectives component of the audit was previously referred to as the 'audit of performance information' (AoPI). There is therefore a high risk that people who are unfamiliar with the framework to which the AG adheres will confuse this with what are termed 'performance audits'. But the two are substantially different.

As opposed to the audit of predetermined objectives that is referred to in Section 20(2)(c) of the Public Audit Act, performance audits are carried out in terms of Section 20(3), which provides that 'the Auditor-General may report on whether the auditee's resources were procured economically and utilised efficiently and effectively'.⁴⁰ One feature that both audits have in common is that they include a focus on questions

of compliance with laws and regulations.⁴¹ Performance audits are however not linked to the financial year ‘and can cover more than one financial year.’⁴²

Performance audits are therefore audits of a different kind. They are not part of the ‘regularity audit’ or necessarily linked to indicators, but an ‘independent auditing process to evaluate measures instituted by management to ensure resources are procured economically and are used efficiently and effectively.’⁴³ ‘The primary objective of performance auditing is to confirm independently that these measures do exist and are effective; and to provide management, Parliament and other legislative bodies with information ... on shortcomings in management measures and examples of the effects thereof.’⁴⁴ In line with the general role of the AG these audits are not intended to question policy⁴⁵ but are concerned with how resources that are procured with public money, are being used in practice.

An example that illustrates the distinction between the two types of audits is that the regularity audit may, for instance, examine whether the paper trail indicates that proper tender procedures were followed when vehicles were acquired. A performance audit on vehicle acquisition might question: Was the acquisition of vehicles necessary? Was it the most economic acquisition? Are the vehicles in fact being utilised for the purpose that they were intended for? Performance audits are therefore a mechanism enabling the AG to carry out examinations of the functioning of governmental agencies that are more focused and deeper than is generally possible by means of the audit of predetermined objectives.

However, the performance audit unit is very small and the AG’s capacity to perform these audits is therefore limited. As a result these audits are undertaken selectively. The current approach of the AG to resolving the issue of limited capacity is to focus on ‘transversal audits’. These focus on a specific issue across a number of key government departments. For instance, during 2011 a transversal audit was being conducted in relation

to the use of consultants by a number of departments, including the SAPS.

Audit of SAPS service delivery

One example of the type of assessment of the police that can be obtained through performance auditing was an audit on service delivery at police stations and the functioning of the 10111 call centres, carried out in 2008-2009. (A ‘limited performance audit’ on border management by the SAPS was also carried out in 2007.⁴⁶) The audit was carried out by the AG at the request of the Portfolio Committee on Police. The audit was carried out at five police stations and one 10111 call centre per province, with some effort made to select a sample that represented the diversity of stations in terms of ‘nature of operations, risk profiles, size and location.’⁴⁷ The table below gives examples of issues that were the focus of the audit as well as questions that were addressed in relation to each focus area.

Table 1: Performance audit of service delivery at police stations and 10111 call centres

Focus of audit	Key questions addressed
Sector policing	- Is there an approved policy for sector policing? - Is there a sector commander profile? - Are minutes of sector crime forum meetings compiled?
Vehicle management	- Do operational members have drivers’ licences? - Do operational members have authority to drive a state vehicle? - Do stations have the capacity to make full use of vehicles that are available? - Does management have accurate statistics on members with/without licences? - How consistent is the SAPS in implementing systems for controlling the use of vehicles? - Are vehicles repaired efficiently?
Training	- Can management accurately assess what number or proportion of operational members have attended training? - What proportion of members have received specific in-service training?

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Focus of audit	Key questions addressed
Community service centres (CSC)	• Does the design of CSCs cater for physically disabled people? • Are basic services such as water, electricity and sanitation functioning? • Are there proper identification parade rooms? • Is information for the public ('service charters') displayed as required? • What is the condition of holding cells?
Domestic violence	• Is there adherence to procedures provided for in national instructions?
Bullet proof vests	• Is there adherence to procedures? • Is safety equipment (bullet proof vests) provided as required?
10111 call centres	• Do all areas have 10111 call centres? • Is equipment adequate and in proper working order? • Is sophisticated call centre technology (including technology for locating police vehicles) being utilised? • What is the level of service (such as the time taken to respond to calls) provided by the call centres? • Are reaction times (i.e. the time taken from when a call is received to when a vehicle is dispatched) in line with prescribed SAPS standards? • What oversight is there by management on adherence to standards?

Despite the small sample, the report on the performance audit is informative. While presented as an audit of service delivery, in practice much of the audit is focused on questions of resourcing and systems that have been put in place in order to enable the police to achieve their service delivery objectives, including:

- *The quality of management information and of management oversight.* For instance, under the training section the audit indicated that 'the PERSAP⁴⁸ was not accurately updated to reflect all training courses attended by members, thereby compromising the accuracy of management information' on the number of members who had attended specific training modules.⁴⁹
- *The availability and implementation of policies.* For instance, in examining how

stations were dealing with domestic violence the audit 'revealed various instances' where the requirements of the relevant National Instruction regarding the police response to domestic violence cases were not adhered to. At one police station, it was noted that in 15 (75%) of the cases examined, 'the SAPS 508(a) (reports of domestic violence incidents) was not completed by officers in the CSC and the OB [Occurrence book] number was not recorded in the domestic violence register'. The report concluded that this is likely to contribute to 'a risk of a lower percentage of incidents being recorded and culminating in criminal charges'.⁵⁰

- *The adequacy and utilisation of resources.* For instance, in Gauteng a sophisticated 10111 call centre was opened in 2007. However, the audit found that state of the art AVL (automated vehicle location) technology that was installed at the centre and in over 4 000 vehicles was not in fact being used.⁵¹
- *Whether SAPS members have the skills or qualifications* to carry out certain key functions. For instance, at one police station the audit found that 74% of operational members did not have a valid driver's licence.⁵²

Though the focus is not primarily on service delivery, where the resourcing or systems do not appear to be adequate the audit sometimes spells out the implications. For instance, in relation to SAPS members without drivers' licences it not only implicitly raises questions about the recruitment and training systems but also points out that:

Operational members without drivers' licences increase the risk of shifts not being manned by trained drivers, resulting in service delivery inefficiencies in, inter alia, sector policing and reaction time to crimes reported.⁵³

The report is not focused on issues of policy and therefore reflects issues of 'implementation' rather than 'design'. This particular performance audit also does not tackle some of the questions that might be seen to be relevant to an assessment of

service delivery at police stations. For instance, the consideration of sector policing and domestic violence only deals partially with questions about the deployment of visible policing units and the nature of their role in crime prevention. It does not question the quality of investigations carried out by detective units. The report also does not ask, or answer, important questions about the nature of police-community relationships, or, for that matter, measures to ensure adherence by police at station level to standards of integrity and human rights.

Despite these shortcomings, the performance audit is a deep audit that provides an illuminating picture of the operation of the SAPS. It provides a compelling illustration of the kind of scrutiny that is necessary if one is to be able to develop an appropriately nuanced picture of the operation of the SAPS in practice.

CONCLUSIONS

In a democratic society the central task of the police is to serve and protect members of the public. In the words of policing scholar David Bayley:

The most dramatic contribution police can make to democracy is to become responsive to individual citizens' needs. [...] A police force whose primary business is serving the disaggregate public [...] [demonstrates] daily and practically that the authority of the state will be used in the interests of the people.⁵⁴

The existence of police stations, of which there are currently 1 122, is then in itself apparent evidence of the intention to ensure that police are deployed in locations that will enable them to be accessible to and serve the public. One question that the AG could assess is whether police stations in South Africa are in fact located and resourced in such a manner as to ensure a reasonable level of equity in access to policing services. In assessing more directly the service that is provided by police stations, and the police more generally, to members of the public, some of the key questions that might be asked would include:

- Do they in fact reduce crime, disorder and fear, and promote public safety?
- What is their effectiveness in bringing offenders to justice?
- How promptly do they respond to emergency calls?
- Do they communicate with and serve members of the public in a professional manner?
- Are they responsive to vulnerable groups?
- Do they cooperate with other agencies and groups in order to enhance broader crime prevention activities?
- Do they follow professional standards in recording and reporting information on crime?

The use of performance indicators and measures by the SAPS is regarded as being of a high standard when compared to that of most government departments in South Africa, and perhaps even by international standards. But the information that the SAPS presents on its own performance by means of its annual report is in many ways highly opaque and at best represents a proxy for answers to some of these key questions. This is partly because of the size of the SAPS. A set of figures intended to represent the 'performance' of an organisation of close to 200 000 people invariably hides much more than it reveals.

The emphasis placed on these targets also carries with it substantial dangers, for example when government departments become preoccupied with presenting a satisfactory set of numbers, resulting in the production of perverse incentives and a reduced emphasis on other factors that are important, but do not directly affect, the performance targets. In so doing performance measurement may potentially reduce police responsiveness to the actual concerns of communities. Perhaps it is for these reasons that a new British government discussion paper proposes 'replacing bureaucratic accountability with democratic accountability',⁵⁶ *inter alia* by 'removing Government targets, excessive centralized performance management and reviewing the data burden that is placed on forces

– but ensuring that data are still available to local people⁵⁷ and restoring ‘professional judgement and discretion to the police’.⁵⁸

Performance data have value. But our ability to interpret data can only be enhanced by more detailed information about what is actually taking place at police stations. The process of holding police accountable requires mechanisms that can produce a deeper level of scrutiny. Performance audits carried out by the AG at this point represent something of a model in terms of the type of scrutiny that can provide meaningful information about the police. At the same time the unit of the AG’s office responsible for these audits does not have the capacity to carry out audits focused on the SAPS itself on a sustained basis. But it is not only the office of the Auditor General that has an interest in carrying out these types of assessments. Other agencies, including the national Civilian Secretariat for Police, the provincial secretariats, and potentially also the SAPS National Inspectorate have comparable mandates. Subjecting the police to meaningful scrutiny will require a greater investment in developing the capacity within government to carry out this type of information-gathering exercise.



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NOTES

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14. Bayley, *Changing the guard*, 79.
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32. Ibid, 13.
33. Auditor General, Public Audit Act (25/2004): General directive, General Notice 616 of 2008, 5.
34. By implication questions of 'compliance' are not only addressed as a separate component of the 'regularity audit' but may also be addressed within one of the other components.
35. One set of criteria for selecting performance targets is the SMART criteria. This addresses whether the criteria are: Specific: the nature and the required level of performance can be clearly identified; Measurable: the required performance can be measured; Achievable: the target is realistic given existing capacity; Relevant: the required performance is linked to the achievement of a goal; Time-bound: the time period or deadline for delivery is specified. (National Treasury, 2007, 10).
36. Report of the Auditor General as presented in South African Police Service (2009), *Annual report of the South African Police Service for 2008/2009*, Pretoria: SAPS Strategic Management (Head Office), 149.
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46. Ibid.
47. Auditor General, Report of the auditor general to parliament on a performance audit of service delivery at police stations and 10111 call centres at the South African Police Service, 2.
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50. Ibid, 18.
51. Ibid, 21
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53. Ibid.
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YOU STRIKE A GATHERING, YOU STRIKE A ROCK

Current debates in the policing of public order in South Africa

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This article aims to reopen the debate about public order policing in South Africa. Rising levels of violent localised protest and increased brutality in policing such events, as well as recent draft policy guidelines on restructuring public order policing by the Ministry of Police, necessitates informed debate. Protest events, in particular violent and localised protests, are likely to increase in the years to come; it is thus an appropriate time to engage in a serious reconsideration of the best approaches to policing these events. This article offers recommendations for a model of public order policing in South Africa that is more effective and respectful of human rights.

The right to freedom of assembly was one of the earliest and among the most significant victories of the democratic transition in South Africa. This right holds an important space in the psyche of South Africans and is protected by the Bill of Rights and the South African Constitution. Like all rights it is subject to limitation, most notably that it must not infringe on the rights of others. The Regulation of Gatherings Act (205 of 1993) balances these demands.

In recent years, there has been a noticeable increase in community protests.¹ The protests and xenophobic violence that swept across South Africa between 2008 and 2009, preparations for

the FIFA World Cup, and the widespread service delivery-related protest action in 2010 and 2011 have shifted our attention back to how we police public order. This refocused attention comes at a time when the policing of gatherings and protests has taken on an increasingly violent and seemingly uncoordinated form, and is in need of review.

While in the mid-1990s it seemed that South Africa was headed toward internationally acceptable modes of policing public order, the ugly face of past methods of 'crowd control' have again come to the fore in recent years. According to the Independent Complaints Directorate (ICD) there has been an upsurge in cases of police brutality since 2006, reaching its zenith in 2009.² The ICD recorded a year-on-year increase of alleged cases of brutality in relation to public order policing from five cases in 2006, 16 in 2007 and 25 in 2008,

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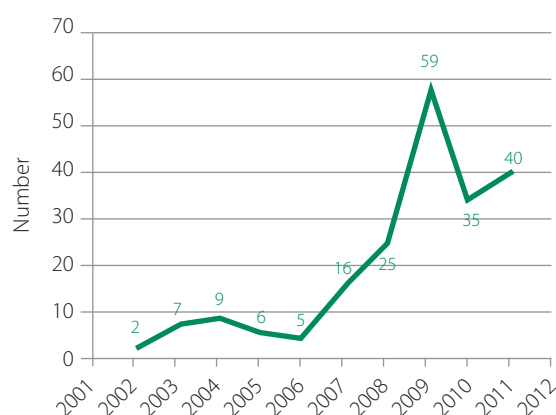
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to 59 cases in 2009 (see Figure 1).³ The overwhelming majority of cases were assault with intent to do grievous bodily harm, attempted murder and murder.

The Public Order Policing (POP) Unit is a specialised competency largely located in the Crime Combating Units and Tactical Response Team established within the South African Police Services (SAPS) to deal with crowd management situations. Police stations are expected to deal with localised crowd management situations and to call for the assistance of the POP should the situation become difficult to manage. All station members who engage in crowd management activities are supposed to be trained in this specialised form of policing, but this is generally not the case.⁴

Most police members accused of brutality while responding to public protests were from 68 stations, followed by allegations of 45 incidents that involved both POP and station members.⁵ Forty per cent of the victims were not involved in the protest marches or demonstrations taking place at the time, but were bystanders or onlookers. This is an indication of poor public order policing, as both protesters and onlookers should be protected by the police according to legislation governing the policing of gatherings, and in accordance with international standards of such policing.

Figure 1: Allegations of police brutality per year



Source: Independent Complaints Directorate, Briefing on crowd management. Presentation to the Portfolio Committee on Police, 30 August 2011, Cape Town.

As Figure 1 shows, the radical shifts that took place in public order policing in the mid-1990s, the effects of which were felt up until 2006, seem to have been reversed.⁶ The policing of public order is again in the front pages of the media with widespread condemnation of the slide back to the use of ‘unnecessary and provocative violence.’⁷ In many instances when the police have responded to public disorder and protest, police action has led to an escalation of confrontation, and even to street battles.⁸

Concomitantly, there has also been criticism of the police for neglecting their duty to create spaces for public order and social harmony, as required by the Regulation of Gatherings Act (205 of 1993). The Centre for the Study of Violence and Reconciliation (CSVR) conducted research that indicated that there was a noticeable absence of policing of violent protests.⁹ This has also been noted by community organisations and community policing forums, as well as political and corporate entities.¹⁰

Meanwhile, the principles and processes outlined in the Gatherings Act are no longer consistently being adhered to, which has serious negative consequences for police legitimacy and support. The strong-arm approach of the police to such events, as well as the relatively high levels of arrests of ‘instigators’ of protest action¹¹ lend credence to allegations that the democratic right to peaceful protest no longer appears to be guaranteed, and that demonstrations and protest have been criminalised.

The pressures on the provisions of the Gathering Act are complex. Recent research reveals that much of the protest action, while cast within a veneer of citizens’ access to rights and as protest against corruption, is actually far more ambiguous and contradictory, often pitting factions of the ruling elite against each other in violent political struggles for dominance and access with subaltern masses, such as shack dwellers.¹²

It is important to understand why protest action has increased and why the policing of public order has reverted to brutality. In this article we

examine what has happened to public order policing, and suggest some potential remedies. Many of the observations and comments made in this article are based on informal discussions or email conversations with high ranking police officers who have been involved with public order policing over many years. The authors also draw on information gleaned from participating in meetings held by government about public order policing. Lastly, one of the authors (Marks) has conducted an extensive ethnography of the Public Order Police over a period of three years. She maintains contact with individuals from this unit and has regular discussions about what has occurred within the arena of public order policing over the past 17 years.

UNDERSTANDING THE RECENT RESURGENCE IN PROTEST ACTION

There has been a dramatic increase in public protest in South Africa in the post-apartheid period, particularly in the last ten years. Most of these protests and demonstrations are a response to particular manifestations of exclusion, poverty and marginality. The protests are pragmatic responses to everyday hardships and are likely to escalate further with the continued absence of concrete measures to address problems of service delivery, inequality and poor governance.¹³

The majority of service delivery protests are localised and contained in rural townships and informal settlements on the margins of towns and cities, with unrest rarely spilling into the city centres.¹⁴ The form that mobilisation has taken is described by Ballard *et al*, drawing on the work of Raymond Williams, as ‘militant particularisms’, aimed at opening up new terrains of political and social struggle. Having said this, there are also frequent protests and demonstrations organised by trade unions in city centres. Many of these are poorly planned and managed, and have led to battles between police and union supporters.

Given the militarism of these largely localised, collective actions, protest action has become more violent and is marked by confrontation between police and protesters.¹⁵ In 2010-11, for example, the

police responded to 11 681 gatherings. Of these 972 resulted in some form of violence and 629 were classified by the police as unplanned.¹⁶ In a dynamic unnervingly similar to the apartheid days, ‘the arrival of police from outside the local precinct signalled a shift to violent repertoires usually in response to police violence.’¹⁷ This point is made clearly by Karamoko and Jain who document the frequency and nature of service delivery protests in South Africa in the past five years, using newspaper reports.¹⁸

Deaths of protesters have become a feature of public protest, with the violent death of Andries Tatane at the hands of the police in Meqheleng outside Ficksburg in April 2011 becoming a symbol of problematic public order policing.¹⁹ The Tatane incident is not isolated, but received more public attention than other similar instances as it was recorded live, and carried by all major newspapers and television channels. The extreme use of force by the police in this case led to condemnation of the police by the press, human rights groupings and politicians. Tatane’s death was widely viewed as a symbol of injustice, poor policing and the lack of responsiveness by government.

It is important to reflect on why public protests and demonstrations have become so disorderly. We would like to suggest three reasons:

- Firstly, service delivery failures have led to widespread discontent, especially within very poor communities, at the local level²⁰
- Secondly, many protests are characterised by groupings mobilised in a fairly *ad hoc* way around issues, often in opposition to authorities²¹
- Thirdly, local civil society groups lack the support of established entities such as political parties or unions, which in earlier times provided various forms of ‘capital’ for these groups to function effectively.²²

The seeming incapacity of state and public institutions to respond proactively to public concerns and needs, and government’s reluctance to take decisive action, has diminished the public’s faith in government and state institutions. This

leads to rising levels of dissatisfaction and anger among those receiving poor services and observing corruption (whether real or perceived). As a result, as Malaquais puts it, 'for many average citizens, the sense is that the only way to get attention of government is by burning tires, barricading roads and engaging in other forceful displays of frustration'.²³

In addition, many 'organic' community groups fail to apply for permission to protest in accordance with the Regulation of Gatherings Act 205 of 1993 (RGA). Public protest thus takes on a spontaneous form that the police consider to be 'illegal' as it does not conform to the requirements of the law.

As protests have become increasingly violent and haphazard, so too has the policing of these events.²⁴ Police often no longer adhere to the principles or procedures of the Regulations of Gathering Act (RGA). The RGA was drafted to give effect to the right to protected and democratic policing of demonstrations and protest, making a clean break from the draconian apartheid jurisprudence which severely limited the rights to protest, demonstrate and gather collectively. According to the RGA, local authorities, police and the convenors of gatherings should work together to plan and manage public gatherings.

The role of local authorities (usually municipalities), according to the RGA, is to confirm the parameters of time and place within which demonstrations will take place in exchange for guarantees by the organisers that measures have been put in place to ensure the demonstrations are peaceful and orderly. Such permission should only be denied in exceptional circumstances. The police are expected, according to the RGA, to protect the rights of protesters and demonstrators. The police may disperse a gathering if they have reasonable grounds to believe injury to persons or damage to property is likely or has occurred. Proportional and reasonable force may be used after sufficient time has passed following an order to disperse, and after negotiations between the police and the organisers. For a number of years

after the Act was promulgated, violence associated with mass demonstrations was reduced to virtually nil. Yet this is no longer the case.²⁵

There are many explanations for why this shift has occurred. These include the way in which gatherings are managed; deficits in the system of notification; the role played by the police; the lack of capacity of local authorities; the way intelligence is monitored; and the lack of capacity of the police responsible for public order policing to negotiate with protestors.

THE POLICE IN PUBLIC ORDER POLICING

Soon after the democratic elections in 1994 the SAPS began to address the need to ensure democratic policing of public order. The tarnished Internal Stability Division that was created in 1992 was renamed the Public Order Police (POP) unit in late 1994, and all members of this 'new' unit were retrained and instructed to follow new policy guidelines. Their training, largely designed by the Belgian police, was geared toward the policing of protest in line with international standards.²⁶ POP training focused on a shift from the 'control of crowds' to the 'management of crowds'. POP members were required to think about ways of policing crowds that resulted in minimal use of force, to negotiate with convenors and authorisers about policing plans and outcomes, to employ policing tactics that demonstrated tolerance, and to make use of weapons and equipment that fitted the new framework for crowd management. The primary function of the highly centralised POP unit was public order policing. The secondary function was crime prevention and combat.²⁷

However, even whilst this unit was being restructured, there was a longer term plan in the mind of police leaders to decentralise public order policing. In a second round of 'restructuring' most of the newly retrained POP members were deployed to stations where they were meant to guide local visible police in the policing of public order events. However, the required in-service training did not occur, leaving the stations ill-prepared as first responders to crowd events.²⁸

In addition, the significantly reduced POP unit itself was also restructured and renamed the Crime Combating Unit (CCU) in 2006. This unit's primary function was no longer crowd management, but crime control. Its original core mandate was watered down, while ongoing training in crowd management philosophy and strategy fell away.

These restructuring processes have proven very disruptive of public order policing capacity.²⁹ The result has been a loss of capacity, morale and the *esprit de corps* that once existed. This restructuring process shifted focus away from the specialist skills developed so painstakingly in the mid-1990s and is reason for concern given the increases in (volatile) protest action.

An additional problem confronting those police responsible for public order policing has been the introduction of additional layers of 'paramilitary' police, such as the Tactical Response Units (TRU), into public order management. Many of the members of these units lack training and skills in the democratic policing of public order events.³⁰ This has led to problems with co-ordination during public order events. The CCU was mandated to co-ordinate the actions of the stations and the Tactical Response Unit at protests. Members from the stations who are deployed to public order events are generally not provided with appropriate briefing, equipment or training. The result is that they tend to resort to heavy-handed tactics very rapidly. They do not display commitment to the principles of minimal or proportional use of force, tolerance or negotiated arrangements. Lines of accountability have also become blurred and it has become difficult to identify which units and individuals have been unnecessarily violent or rough with protesters.³¹

In 2011 the CCU's name was changed to the Public Order Police, signifying an attempt to once again assert the primary function of the unit as the management of crowds. The POP carries with it the same limitations of the CCU, and as a result this new phase of restructuring requires careful attention.

THE NEXT STEP IN PUBLIC ORDER POLICING

The organisation and structuring of public order policing in South Africa is in a state of flux. The Minister of Police publicly acknowledged this at a recent conference on public order policing in South Africa hosted by the Defence Web at Gallagher Estate in October 2011. In his presentation he stated that public order policing has been under review since August 2011.

The Ministry is now proposing to revert to having a sizeable specialised public order unit whose primary function is crowd management. In September 2011, the Ministry of Police devised a (draft) policy document aimed at re-establishing a dedicated and well-trained national public order police capacity.³² According to this document, the Ministry seeks to organise such a dedicated unit along the lines of the 'French Model' of public order policing that was used during the preparation for the FIFA World Cup.

The French model is preferred because it allows for 'closer contact' between police and protesters, thus providing the 'opportunity to restrain forward movement of the crowd and the possibility for snatchers to pick on certain individuals who are thought to be the most provocative within the crowd'.³³

In rethinking the organisation and strengthening of public order policing, the Ministry recognises the need to develop enhanced and on-going training; deepen an appreciation of the legislative and rights-based framework within which protests occur; and strengthen command and control. Such a public order police unit, the document posits, must be prepared for both planned and spontaneous public protests and must adhere to the procedures laid out in the RGA at all protest events. Contingency plans must be developed for spontaneous protests so that confrontation does not escalate between the police and protestors, and public order is restored as quickly as possible.

The authors of this article welcome the openness with which the Minister and his policy advisors have approached the the debate on the restructuring of

public order management. We would like to offer a few observations in this regard. In the authors' view, South Africa should be wary of adopting the French model in its entirety. While the French Gendarmerie is viewed as highly professional they have also been the subject of serious criticism. The Gendarmerie police who are involved in public order and riot control operations are geared to intervene rapidly, ensuring physical control of any urban territory. They rely heavily on space saturation techniques, employing the symbolic use of force. When public disorder occurs, they make use of a massive and intimidating police presence in order to confine protesters or rioters to a particular urban zone.³⁴ While they are no doubt effective, they are criticised as being 'paramilitary' and very distant from the communities they serve.³⁵ They operate on a strict system of command and control and apply quasi-military training, equipment, philosophy and organisation to difficult public order policing situations. They tend to prepare for the worst possible circumstances/outcomes, frequently resorting to strong-arm tactics.

These tactics are simple and effective in the short term, but have resulted in an uneasy relationship, in France, between the Gendarmerie and marginalised communities.³⁶ Tensions at the local level have been aggravated by saturation and targeted police tactics. The achievement of order maintenance objectives has created a 'smoke-screen' for hiding deeper, underlying social and political problems.³⁷

While paramilitary units are effective in controlling crowds and restoring 'order', the dangers of a paramilitary approach to demonstrations and protests is that 'group tactics, automatic weapons, and infrared scopes all displace and preclude the social skills, forbearance, and individual discretion essential to accountable and effective civilian policing'.³⁸ Strong-arm tactics by the police, while effective at stopping physical disorder in the short-term, are likely to reinforce the alienation and mistrust that certain more marginalised sectors of the public feel toward the police.

In choosing to move forward with a unitary, specialised, paramilitary public order police unit,

we need to be cautious of the effective containment of public protest being weighted more heavily than socially just outcomes.³⁹ A paramilitary approach is, for the most part, more interested in state protection than in upholding the rights and civil liberties of citizens. The SAPS needs to identify useful techniques and tactics from a range of international models that have proven to be effective, while bearing in mind the longer term principles of democratic policing.

The model that is developed for public order policing in South Africa should be determined by a careful consideration of the relevant legal framework and local social context. This uniquely South African model must be underpinned by respect for human rights and an acknowledgment of the dire circumstances that the majority of South African residents find themselves in. Police engaged in the policing of gatherings or public disorder need to be trained (or retrained) in crowd management, in much the same way that the Public Order Police Unit was trained after 1995. New training should be interactive and geared toward producing professional police officers who are familiar with relevant legislation and policy geared toward the democratic and peaceful policing of gatherings and protest.

A clear line of command needs to be outlined, agreed upon, and set in place so that the management of public order is smooth and efficient. Those that do not adhere to procedures, policies, principles and command structures need to be monitored and disciplined by the relevant police monitoring bodies. All members involved in the policing of public order must be issued with appropriate, non-lethal equipment. A small back-up unit should be available to the POP units when crowds become uncontrollable and dangerous. Drawing from the French model, this unit would be trained in more interventionist models and techniques. Systems for proper and effective reviews, debriefings and monitoring of performance need to be established and commanders need to ensure that they can account for the planning and outcomes of all public order events. This requires commanders, particularly at the middle management levels, to be present during public

order operations. At present, this is not the case.

In taking the next step in recreating public order policing in South Africa, the SAPS management needs to recognise that protests and demonstrations are likely to increase and that SAPS resources should be allocated to (re)training courses, facilities, and policy making.

CONCLUSION

A clear understanding by the police of the tasks and challenges they face will have a strong influence on when or even whether to resort to strong-arm tactics in complex public order situations. Appropriate training of the relevant police, however structured, is essential, as are ways of shifting the mind-set of police with regard to the right to protest and demonstrate. Heavy-handed responses to gatherings and protest need to be carefully monitored. In order for there to be a positive shift police members and units involved in public order policing need to feel safe and secure. This requires an effective management and accountability structure, and action to ensure that all members engaged in such policing are appropriately equipped. During the actual protest, a preoccupation with law and order should, as far as possible, give way to the narrower focus of preserving the peace, and protecting people and property against harm.⁴⁰

In addition, it is imperative that the existing Regulation of Gatherings Act be reviewed in the light of the current manifestations of protest and assembly. At the same time a national campaign is needed to inform citizens about the legal framework and acceptable procedures for conducting protests and demonstrations. Citizens and civil society groupings need to be aware of their own rights and responsibilities with regard to protest and demonstration, as well as the rights, mandate and responsibilities of the police in public order situations.

In making choices about how public order policing is structured, and in particular in evaluating the French model, we need to take heed of the warning given by Alice Hills.⁴¹ Para-military

solutions do assist with dealing with 'security gaps'. However, Hills warns, in post-conflict and newly democratising countries, the presence of paramilitary forces may be seen as reminders of political repression, thus creating more problems than they solve.⁴²

Before engaging in yet another restructuring process, it would be wise for the police's political masters and managers to engage in public discussions about the relative merits of the different models and techniques that are available to them. The scholarly community should be called upon to provide a theoretical framework for such deliberations. Ultimately what we want are public order police officers who are deeply conscious of citizens' constitutional and other rights, are firm and impartial, and operate in ways that are professional. The best that we can hope for is a contextually and situationally appropriate South African model of public order policing. We suggest that police should be informed (in their ongoing training and in briefing meetings) about the motivation behind protests and why they are (at times) violent in nature. Such an understanding would assist to make police members sympathetic representatives of a democratic state. In so doing, police may become advocates for social justice who are concerned with creating a society based on the principles of equality and solidarity, underpinned by the values of human rights, and recognising the dignity of all human beings.

This in turn is likely to reduce the potential for violent protest, thus rendering the job of the police less delicate and controversial. Such an approach fits well with a more community-oriented approach to policing and it provides police commanders with a framework for devising a range of tactical options available to them in developing operational plans.

The police cannot 'fix' the underlying problems that result in public protest and demonstration. But, as Peter Manning reminds us, the police can put in place a 'set of routines intended to produce a degree of certainty in managing fundamentally problematic yet recurrent situations'.⁴³ At the very

least, in a democracy, the strategies and techniques of the police need to be in line with the constitution and with legislation that upholds basic rights to protest and demonstrate without infringing on the rights of those who are not involved. Police engaged in public order policing must adhere to the 'rules' of democratic policing, which include embodying values respectful of human dignity, adhering to due process, intervening in the life of citizens only under limited and carefully controlled circumstances, operating in equitable ways, and being publicly accountable. As Jean-Paul Brodeur puts it, the police need to demonstrate to society that there are systems for dealing with conflict in a systematic, reasonable and transparent manner.⁴⁴



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TOWARDS A THIRD PHASE OF REGULATION

Re-imagining private security in South Africa*

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With the legislative review of police oversight currently taking place in South Africa, now is a good time to reflect on the regulation of the private security industry. This article does so by focusing on three challenges to the current private security regulatory systems: the increased pluralisation of policing within public spaces; the operation of hidden sectors within the industry; and the nature of criminal abuses perpetuated by the industry. We do this to demonstrate the need for a re-imagining of what regulation, especially state regulation, of this industry should entail. The aim of the article is not to review the current legislation or to identify gaps and propose means of filling those gaps, but rather to reflect on the underlying premises informing the legislation and propose a shift in thinking. We do this by briefly identifying two phases of state regulation in South Africa, implemented before and after the change to a new democratic dispensation, and suggest that we are now entering a third phase of regulation. We conclude with suggestions as to what this third phase may entail.

THE NATURE OF PRIVATE SECURITY IN SOUTH AFRICA

The private security industry in South Africa is of interest to academics and policy-makers the world over, for a variety of reasons. It is believed to be the largest in the world in terms of its contrib-

ution to the country's GDP (Gross Domestic Product) – approximately 2% of the total GDP of the country – and had an estimated annual turnover of approximately R40 billion in 2007 and R50 billion in 2008.¹ The industry has grown exponentially for the past few decades, both in terms of numbers of guards and numbers of companies (Figures 1 and 2).²

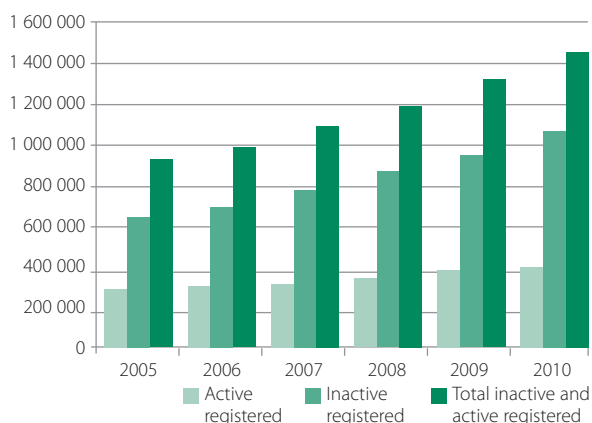
A significant proportion of the industry is armed – which is not necessarily the case in other countries (for instance Sierra Leone and Nigeria).³ Arguably, the guarding staff of private security companies in South Africa are confronted with violent situations that private security guards in many other countries would never have to confront, at least not on a regular basis. The

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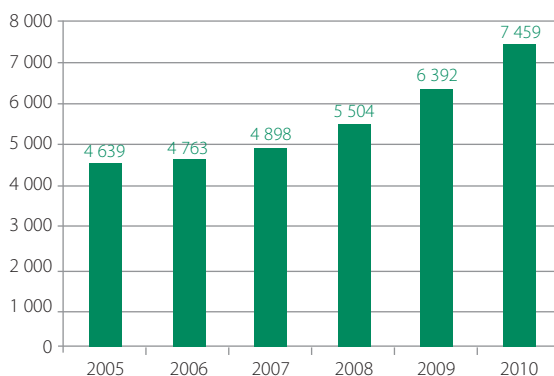
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Figure 1: Number of active and inactive registered security offices in South Africa 2005-2010



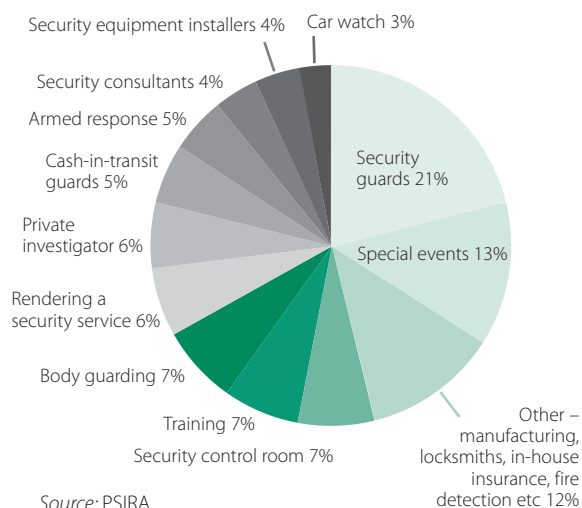
Source: PSIRA

Figure 2: Number of active registered security businesses in South Africa 2005-2010



Source: PSIRA

Figure 3: Security services offered in South Africa as at 2005



Source: PSIRA

industry also undertakes a range of sometimes overlapping activities, and performs functions both within and outside the purview of the state, as set out in Figure 3.

In light of this, South Africa may be a natural site for issues of regulation to be both challenged and developed.

South Africa has a very comprehensive set of laws for regulating the industry;⁴ so much so that countries like Kenya and Uganda are modelling their regulatory framework on the South African laws – at least on paper.⁵ Yet there are still challenges to ensuring that the industry operates professionally, constitutionally and to a high standard.⁶ These challenges include, but are not limited to, ineffective implementation of the legislation. This leads us to challenge the underlying ways of thinking or ‘mentalities’ that have informed private security regulation in South Africa.⁷ In doing so we firstly explore what is meant by regulation; we secondly outline what we think of as the first two phases of state regulation in South Africa; and then propose a third phase through highlighting three developments that challenge prevailing mentalities and practices. In conclusion we reflect on how these developments force one to re-think or re-imagine how some aspects of regulation could work in South Africa.

REGULATING WHAT? TWO PHASES OF STATE REGULATION

When speaking of regulation one is actually speaking of systems of control and accountability.⁸ Regulation is something usually requiring norms or rules that are enforced by some party in an attempt to shape the behaviour of others, and then to hold them to account (or to be answerable) for that behaviour.⁹ In this article we conceive of regulation as including non-state regulation. We use Julia Black’s definition of regulation as something that can come from a variety of directions and sources, it ‘occurs in many locations, in many fora’, and it is a ‘product of interactions’ rather than exclusively formal, top-down or legal (state) control.¹⁰ In other words,

regulation can be undertaken by both state and non-state actors (such as clients, the public, private businesses, private security companies and so forth).¹¹ However, a great deal can be learnt about the underlying theory, rationale or goal by reviewing systems of state regulation, as set out below. We argue that there have been two (overlapping) phases of state regulation of the industry since the 1980s.¹²

First phase

The first phase – apartheid-era regulation – reflected the nature of the relationship that the state had with the industry at the time. The first law, the Security Officers Act, was passed in October 1987 and was enacted primarily to create a Security Officers' Board. The Board was essentially created to ensure that security companies, employers and employees would register with it (with certificates issued to that effect), and it decided who could qualify to be registered or not.¹³ The state sought to involve the industry both directly and indirectly in policing activities. For instance, the National Key Points Act granted security personnel guarding key points (such as fuel plants and military bases) powers of arrest and search and seizure.¹⁴ In many instances, the security of strategic facilities was undertaken by private security companies, and thus the industry was forced to professionalise.¹⁵ The system of regulation created during this time was aimed at achieving professionalisation through 'state-enforced self-regulation'.¹⁶

In distinguishing between the first phase of regulation and the second, it could be argued that the 1987 law was intended to protect the interests of the industry, whereas laws that were passed later, during phase two, were intended to protect the interests of the public. That would explain why newer legislation takes a more punitive and exclusionary stance with respect to the treatment of the industry by the government.¹⁷

Second phase

The second phase of security regulation corresponded with political change. There was also a need to

address loopholes in the Security Officers Act (1987), such as, for instance, the exclusion of the in-house sector in its regulatory mandate; and the presence of industry representatives on the Security Officers' Board, which rendered the Board subject to vested interests. This resulted in the Security Officers Amendment Acts of 1992, 1996 and 1997 and the Private Security Industry Regulation Act of 2001 and other supporting legislation.¹⁸ With the change to a democracy, the changed nature of relations between the state and the industry resulted in different regulatory goals, i.e. the protection of labour rights and of the public. This shift reflected the changed nature of the relationship between the state and the industry, from industry being viewed as an ally of the state to a potential threat.

This article argues that the time is ripe to enter a third phase of regulation.¹⁹ We support this contention by outlining three challenges we believe are not adequately addressed by current systems of state regulation: the increasing pluralisation of policing; the operations of hidden sectors of the industry; and the actual (and potential) criminal abuses arising from the industry.²⁰

THREE CHALLENGES TO STATE REGULATION

Pluralisation

A claim often made when talking about private security is the fact that 'it is now almost impossible to identify any function or responsibility of the public police that is not, somewhere and under some circumstances, assumed and performed by private police in democratic societies'.²¹ This is especially true for South Africa. Of the many activities the private security industry performs, the movement into public spaces and the policing thereof is surely one of the most controversial. In recent years there has been an increased pluralisation of policing in what are considered to be public spaces. Pluralisation entails the increasing involvement and diversity of non-state (and state) entities in conventional policing activities. There are a number of causes and

drivers for this development that are not discussed here. However, it is important to note the changing nature of spaces and the power afforded to private security in these spaces. In relation to the changing nature of spaces, a blurring of public and private space is observable, such that private spaces take on aspects of public-ness through being open to the public and having a public feel (mass private property such as sports stadia, shopping malls and so forth). On the other hand certain public spaces increasingly adopt a private feel, as, although accessible to the public, a private system of ordering operates alongside the state system (City Improvement Districts, gated communities and so forth).²²

Private security operating in private space derives considerable power through contract and property law. Private security operating in public space derives considerable power (both symbolic and legal) through, for instance, laws such as the Criminal Procedure Act and/or through sheer numbers, resources and technologies at its disposal), which enables it to work alongside the state police and do very similar things to the state police. This movement into public space necessarily means that at various points state and private security share the same spaces. Research has shown that one of three things happen: cooperation, hostility or co-existence.²³

Where it results in cooperation (which has been the case in many settings in South Africa), complex state and non-state relationships may develop, and interesting questions begin to form,²⁴ such as who is responsible for what? Who is to be held accountable should something go wrong? Who is meant to ensure an alignment to constitutionality, human rights and professional practice? Thus increasing pluralisation of policing may result in the 'problem of many hands... where so many people contribute that no one contribution can be identified; and if no one person can be held accountable after the event, then no one needs to behave responsibly beforehand.'²⁵

The more complex the network becomes, and where authority, resources, knowledge and skills

are shared, the more difficult it is to hold individual policing organisations to account. Currently there is no normative framework through which all those groupings and institutions involved in policing can be guided in their engagement with each other, especially with respect to the types of functions that the private sector is legally permitted to perform.²⁶ In addition, existing regulatory bodies responsible for oversight of the private security industry on the one hand and the police on the other, tend to operate in silos and thus may not be able to address challenges arising from collaboration between state and non-state policing institutions.²⁷

Hidden sectors

In addition to the abovementioned shortcomings, existing legislation does not refer to what we refer to as 'in-house' security. In-house security consists of a company making use of its own security operations, personnel and equipment to protect its interests.²⁸ Nowhere does existing legislation provide a framework for regulating the activities of 'contract security' companies.²⁹ Contract security companies provide a range of services: they may head a client's risk management operations; offer human resources services; consult on matters such as security policies and procedures; identify weaknesses in security; provide security technologies such as surveillance systems and access control; introduce undercover agents into the workforce; be responsible for conducting an investigation when an offence takes place; and act as a liaison between the client and state law enforcement. They thus offer a security package to their clients, fulfilling all of their security needs, allowing clients to focus on their core business. This sector has emerged because it is more cost-effective and efficient for a company (e.g. a retailer) to employ a contract security company to head in-house operations and provide the knowledge and technology required, than to employ their own staff to perform this function. These service providers have specialised skills, knowledge of the industry, and contacts that are desired by clients.

In 2010 Jean-Pierre Nouveau conducted field research for the purpose of completing a Masters

dissertation. The study involved the observation of and participation in an investigation into the theft of a number of valuable products held within the client's warehouse by a syndicate consisting of staff members of the client. This investigation was conducted by contract security providers, and involved polygraphers. The investigation resulted in a disciplinary hearing by the client company, and the crime was only later reported to the police, once the investigation was completed. Once the crime had been reported to the police the security company also acted as liaison between the client and the police and prosecutor, briefing them on the investigation that took place as well as providing them with the evidence that they had accumulated, such as the results of polygraph tests and formal statements. In addition to the researcher's observation during the investigation, over the period of a year he also analysed the core business functions of the client, and spent a semester interning at the contract security company that was employed by the client.

Research has shown that 'in-house security' still largely remains outside of the purview of the state.³⁰ The same is true for contract security; yet, contract security companies increasingly act as if they were part of the businesses they are contracted to provide services to. This has contributed to a blurring of the functions of the *in-house* security sector and the *contract* security sector.

While in the past a client's in-house security unit/branch would have been responsible for internal investigations, companies now contract private security providers to conduct the investigations for them.³¹ In addition, undercover agents employed and governed by contract security companies are contracted to the client to provide in-house security. In such cases the contract security company is responsible for training and vetting the agents and paying them a set basic salary for their work under cover. In addition the client pays them for the specific work they are doing while they are under cover, as per the normal wages of employees in their position. They are therefore both agents of the contract security company and the client company.

As a result of this blurring, the functions associated with contract security exist in the very private, insulated sphere of in-house security. Contract security, which has been the focus of regulation, is concealed within the space/s of in-house security, which, as mentioned, is largely outside of the purview of the state, despite the normative frameworks in place. This means that a large part of the industry in practice operates outside of state regulation or control and natural (i.e. public) surveillance.

Through missing a large part of the industry, the current regulatory system does not reflect the reality of the private security industry. However, Nouveau's research has shown that while the state may be absent, the industry is not entirely unregulated. We have used the concept of *regulation through association* to describe this form of regulation.³² Simply put, regulation through association refers to the fact that future business prospects are determined by the relationships, resources and the reputation that private security companies possess.

Relationships exist between clients and security companies, between different security companies, and between police agents and security companies, to name a few. Resources include the services and technology available to a contract security company as well as the contacts they have that provide services and expertise such as truth verification (for example, polygraph tests). As for reputation, good relations with associates will determine future employment. Ultimately, a company has to consistently prove itself and maintain a positive reputation with its clients. In so doing it will become more attractive to potential clients. These three factors in combination determine a company's associative value. Companies associate themselves with the strategic partners in order to secure business opportunities for one another. Clients are often known to one another, as well as to security providers. The decision to align oneself with a particular security provider is a crucial one, and is linked to the services they provide and how they conduct their activities. An intimate association (for instance by means of a retainer)

with key clients lends desirability to particular security providers; that is, they have a high associative value. In this way private security companies are held accountable by other players within the industry. This is a mutually beneficial act of symbiosis. Crucially, this has the consequence of keeping out the fly-by-night security providers, by starving them of work. Thus the novelty and advantage of regulation through association is its capacity to introduce social, moral, and personal dynamics into the arena of regulation.

Nouveau's research has also shown that security providers form selective associations according to their interests and are free from external regulatory tools, such as codes of conduct. The problem is that these networks of associations are not necessarily legitimate, nor do they necessarily operate within the confines of the law. Some clients may require that security providers act within the law, while others turn a blind eye to unlawful activities, as these may be what they require. This may include the use of 'old boy' networks to acquire privileged information.³³ Moreover, these associations may exist in the absence of a contract. As such, behaviour is regulated by the requirements of the association rather than through contracts, laws or codes of conduct.

Association seems to be an important element of regulating the industry, and in one respect the network of associations acts as a regulatory body. Yet, this is not sufficient to ensure that these companies comply with the law, or act in a way that benefits society. It may be concluded that the idea of a single entity that can act as an overarching regulator is untenable.

Criminal abuses

So far we have shown that the pluralisation of policing and the complexity of the industry present both challenges and opportunities for conceiving of a new form of regulation. A third issue, criminal abuse, needs to be considered before we can move on to suggesting a new approach.

The private security industry (or at least sections of it) can, in theory, threaten the security of individuals – as demonstrated by the types of incidents appearing in recent media reports and high-profile court cases.³⁴ This may be due to, for instance:

- the fact that private security guards are often the first line of defence for their clients and may thus be confronted with potentially violent situations
- a large part of the industry is (heavily) armed – particularly armed response dealing with emergency calls
- the increased movement of private security into public spaces, as mentioned, means greater interaction with the public
- a large part of the activities of private security guards may take place outside the purview of transparent, state oversight.

This is compounded by the fact that very little is known about the deaths and injuries caused by people within the industry, except through a review of court cases.³⁵ Coupled with this is the absence of analytical capacity. In other words, there is no body or institution which regularly and routinely analyses the nature of criminal abuses in the industry to ascertain whether there are any systemic problems within the industry itself that need to be resolved.³⁶ Incidents of criminality are dealt with either internally or through court cases (but not necessarily so), on an *ad hoc* basis.

The root of the problem is the fact that the current regulatory system, and specifically PSIRA, is, in practice, 'a business regulation model rather than a model of public service governance'.³⁷ Although the legislation provides for peace officer status and confers a number of powers on inspectors, the reality is that inspections focus on the business aspects of regulation, while criminal cases are referred to the SAPS.

...what we [PSIRA] do is we randomly select companies where we go do inspections or we go specifically in terms of a plan. We check the name list to see whether the people are registered, trained, whether they are paid the

correct allowances like [...] Sunday time, etc. Those types of normal things. ... but we don't really get involved in criminal issues as such.³⁸

In other words, PSIRA deals with such things as licensing, certification and minimum standard setting, but is not equipped to deal with criminality, episodes of violence, human rights violations and the illicit use of firearms. Where these incidents are identified, PSIRA's powers are limited to the issuing of a warning, suspension or withdrawal of registration of the offending private security company. In other words, PSIRA relies on the SAPS to prosecute cases of abuse.³⁹

CONCLUSION: TOWARDS A THIRD PHASE OF REGULATION

The above three challenges – the increased pluralisation of policing, the operation of hidden sectors of the industry, and criminal abuses – indicate the need to re-examine our current (state) regulatory systems if we are to enter a third phase of regulation that addresses these problems. This requires innovation, recognising these and other problems and conceiving of a system of regulation that is a mix of regulatory techniques and practices from both state and non-state sources. A one-size-fits-all approach is not sufficient.

A business model of regulation, if implemented well, can resolve a number of issues (with respect to the rights of employees for instance), but falls short if not supplemented by other techniques. Regulation through association, as discussed above, demonstrates that the private security industry is an organic network of associations that is constantly changing and evolving in unpredictable ways. A centralised, hierarchical approach to regulation cannot succeed if the aim is to enter the regulatory space of the hidden sector. If the state wished to make inroads into regulating the hidden sector, it could enter into the field of regulation, not as commanders, but as an associate within the network of associations. It would then need to form flexible and purposeful associations with other consenting actors, in a mutually beneficial and symbiotic manner. This

would be a form of circular regulation, which could be supplemented by a vertical approach (that is, a top-down legislative system of regulation).⁴⁰

The current state regulatory system also lacks a system of accountability. That is not to say that the industry is not accountable at all, since private security can be 'governed by and accountable to different people/bodies for different aspects of their work, at different times, and in different ways.'⁴¹ In some ways private security may in actual fact be more accountable than the state police, but in other respects less accountable, depending on who one is required to be accountable to. A company may, for instance, be accountable to its client but still operate on the fringes of legality.

What is lacking is a way to ensure that private security companies and their employees are held accountable to the Constitution and to principles of human rights. In order to do this it is necessary to ask what accountability should entail. This raises a number of important questions: For what reasons should companies have to account for their actions? For example, is it because of their impact on public safety, or because of their potential to hamper freedom of movement and privacy? To whom should the company account? Is it the state, the client, the public, parliament, or all of these? For what actions should the company have to account, and when? Before, during or after an action for which they should be accountable? How should they account? Through the submission of information or written reports? And to which level should they report: local, national, regional – or all three?⁴²

Not all sectors of the industry need to be subject to the same systems of accountability, since some sectors are involved in activities that may pose no immediate threat to human rights or public safety. This suggests the need for multiple levels or sites of accountability, aimed primarily at the sectors that have the potential for abuse. For this to happen, both state and non-state players have to be involved. The state may not necessarily have the knowledge, power and capacity to fully and

effectively regulate all and every aspect of the industry, nor is it necessary that it does, if a multi-faceted approach to regulation is adopted.⁴³ This is a conclusion that the state has at various stages probably also reached, given the nature of the regulatory system in place in the past and present.⁴⁴ So perhaps the path to a third phase is already being paved. What remains is to find a way to link state and non-state systems and/or meta-regulate systems (to regulate the regulators) already in place, and align them with the Constitution.⁴⁵

We would like to conclude with a proposal for a different approach to regulating the private security industry, which may also be relevant to the regulation of policing in general. Given the plurality of policing of public spaces, and in fact in the private realm as well, perhaps there should be a focus on the *functions* of policing rather than only the *institutions* of policing. In this way, instead of having discrete regulatory bodies for each institution, one could have regulatory bodies or even one overarching regulatory body with representation from state and non-state institutions, aimed at specific functions, no matter who is engaged in this function.

This is not a new idea. It stems from recommendations made by the Independent Commission on Policing in Northern Ireland (known as the Patten Commission) on ways to reform policing in Northern Ireland. One of the recommendations was to create a Policing Board responsible, amongst other things, for the democratic accountability of all policing and which would therefore go 'beyond supervision of the police service itself, extending to the wider issues of policing and the contributions that people and organizations other than the police can make towards public safety.'⁴⁶

It was proposed that this Board should consist of state representatives but also representatives from 'business, trade unions, voluntary individuals, community groups and the legal profession.'⁴⁷ It is not difficult to imagine similar principles of regulation and accountability finding expression in the South African context. However, we need

to know more about the nature of policing, such as the hidden sectors for instance, to be able to move into a third phase. We thus agree with Clifford Shearing that one possible way to a third phase of regulation would be to establish a Policing Commission to fully investigate the nature of policing in its entirety in South Africa and propose a practical way forward for effective, innovative regulation.⁴⁸



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NOTES

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SOUTH AFRICA – A HOME FOR ALL?

The need for hate crime legislation

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The South African government is currently developing legislation on hate crimes. This follows repeated calls by civil society for an appropriate response to the apparent scourge of hate and bias-motivated crimes that tarnish the image of South Africa as a 'rainbow nation'. This article is aimed at informing related policy debates and provides discussion of violence targeted at foreign nationals and at those who are (or perceived to be) sexual minorities and/or gender non-conforming. This will give an indication of the trends and challenges that the proposed legislation and policy frameworks will need to address.

South Africa's Constitution outlines the vision of an equality-based society and in the preamble notes that 'South Africa belongs to all who live in it, united in our diversity'.¹ Despite these provisions, a range of civil society organisations (CSOs), human rights actors and academics have observed ongoing patterns of crimes specifically targeting people on the basis of their race, nationality, religion, sexual orientation or other such factors.² Such crimes, known internationally as hate crimes,³ undermine social cohesion⁴ and have been shown to have an especially traumatic impact on victims.⁵ South Africa has a number of laws that deal with discrimination, such as the

Equality Act, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) as well as section 9 of the Constitution, yet none of these is specifically tailored to address the issue of hate crime. An analysis by legal practitioners has demonstrated that the existing legal framework does not provide sufficient tools to address hate crime.⁶

The Department of Justice and Constitutional Development (DOJCD) is currently developing legislation on hate crimes as a means to strengthen the role of police and justice officials in holding perpetrators accountable and as a result send a clear message to society that such crimes will not be tolerated.⁷ This article provides some international context, two case studies of types of hate crime, and then discusses key policy issues related to the impending legislation.

HATE CRIMES AND THEIR IMPACT

A hate crime has been defined by the Organisation for Security and Cooperation in

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Europe (OSCE) as ‘a criminal act committed with a bias motive’.⁸ A ‘hate crime’ is thus an act which constitutes a criminal offence that is motivated in part or whole by bias or hate. There are two key components of ‘hate crimes’. The first is that the incident (even without the bias motive) comprises of a criminal offence under other existing laws (such as arson, assault, rape or murder). In this way, hate crimes differ from hate speech and discrimination where proving bias is central to determining whether or not an incident comprises a criminal offence. The second element of hate crimes is that some form of specific bias was involved in the selection of the victim. ‘Hate crimes’ can involve mixed motives, including criminal incentives, such as robbery, but incorporate a range of crimes where the victim’s actual or perceived identity such as race, nationality or sexual orientation was a factor.⁹

There are several reasons why hate crimes require specialised services and prioritisation, as well as legislative and policy responses. Hate crimes are treated differently in many countries, not because of their prevalence, but because the severe emotional and psychological impact of such crimes potentially extends beyond the individual victim to the group to which the individual belongs, or is perceived to belong.¹⁰ However, treating hate crimes as a separate category of crime is not universally agreed.¹¹

Whilst violent crime victimisation in general carries the risk of psychological distress, studies have indicated that victims of hate crimes have distinct needs and may suffer from consistently higher levels of psychological distress (e.g. intrusive thoughts, feelings of helplessness, depression, stress, anxiety, and anger) than victims of other comparable crimes.¹² Survivors of violent crimes, including hate crimes, are also at risk for developing a variety of mental health problems including post-traumatic stress disorder (PTSD).¹³

Prejudice renders victims of hate crime frequent targets of further victimisation when they turn to service providers for assistance after a hate-based incident – a phenomenon known as secondary

victimisation.¹⁴ Negative attitudes and prejudice on the part of criminal justice officials and health service providers play a role in secondary victimisation; that is, decision-makers deprioritising hate victimisation, and service providers neglecting, and sometimes even overtly discriminating against, survivors of hate crimes within the criminal justice system and health care.¹⁵

Another example of such secondary victimisation is when community members display more support for the accused during a trial than for the victims of a hate crime and/or their families.¹⁶ The impact of these factors is compounded by self-stigmatisation and the hesitancy, as a result of fear, of survivors of hate victimisation to approach service providers for support or redress. Because victims of hate crimes are aware that there is a likelihood of secondary victimisation, they often delay or completely avoid approaching the criminal justice system or accessing health care.

In a 2003 community-based study (n=487) conducted by OUT LGBT Well-Being (OUT)¹⁷ in collaboration with the University of South Africa Centre for Applied Psychology (UCAP), it was found that 62% of the self-identified lesbian, gay and bisexual survivors of hate victimisation did not report their experience to the police and that approximately 33% of the respondents experienced the police as ‘not interested’ in assisting them when they had reported discrimination. A significant proportion of the respondents in this OUT/UCAP study also confirmed that the victimisation had embarrassed them, and they feared that reporting it would make their sexual orientation public knowledge.¹⁸ Such secondary victimisation has the effect of exacerbating, rather than addressing, the vulnerability of survivors of hate victimisation, and constitutes another reason why unique responses and prioritisation are required in the aftermath of a hate crime.

LEGAL MODELS

Internationally there are generally two models of hate crimes legislation.¹⁹ The ‘hostility model’

regards hate crimes as crimes motivated by hatred or hostility based on factors such as race, nationality, religion or sexual orientation (known as 'protected characteristics'). Convicting a person of a hate crime requires evidence of this hatred or hostility based on the victim's protected characteristic.²⁰

The second model is known as the 'discriminatory selection model' and provides a more expanded definition whereby a perpetrator's deliberate selection of a victim based on the victim's race, nationality or other protected characteristic would constitute a hate crime. This legal model therefore also allows for mixed motivation by perpetrators and so cases such as armed robbery that deliberately target the victims on the basis of their protected characteristic could constitute hate crimes.²¹

Deciding on the appropriate legal model requires a careful consideration of past, current and possible future trends of hate crime in South Africa. This article next presents an examination of the nature of violence against foreign nationals as well as violence targeting people on the basis of their sexual orientation as a means of illustrating the types of crimes that hate crime legislation would need to address.

VIOLENCE AGAINST FOREIGN NATIONALS

Violence against foreign nationals, popularly known as xenophobic violence, was noted as a major social challenge in South Africa as far back as 1998.²² Some recent trends of violence against foreign nationals are:

- Indiscriminate mob violence against all foreign nationals in a particular area
- Attacks, intimidation or specific looting campaigns targeting foreign-owned businesses
- Individual attacks on foreign nationals.

In the first category, local residents typically instigate the forceful removal of foreign nationals from the area, blaming them for a range of social ills. This was the case in many of the areas

affected by the country-wide May 2008 violence, De Doorns in November 2009 and Sasolburg in May 2010, where individuals with economic or political incentives mobilised other residents to attack or remove all foreign nationals from the area.²³

In the second category, local residents have protested publicly including about a lack of service delivery and some have taken the opportunity to attack and loot foreign-owned shops in the area. Whilst the protests have usually not been targeted at foreign nationals, the resulting looting has usually specifically targeted foreign-owned shops and left shops owned by South Africans untouched.²⁴ In 2011, local business owners started a campaign of intimidation against foreign-owned businesses with one group calling itself the Greater Gauteng Business Forum issuing threats with apparent impunity in areas including Freedom Park, Ramaphosa, Diepsloot and Tembisa.²⁵

Finally, there continues to be a number of seemingly isolated incidents where a foreign national, or small groups of foreign nationals, are attacked. Whilst high levels of crime in the country suggests that any person can be a victim, there have been a number of instances where it has been clear that people have been attacked deliberately because they are foreign.²⁶ These are some of the trends that new legislation on hate crimes needs to address.

Further challenges for foreign nationals include improving access to police protection and justice on an equal basis to citizens. In the past, police have been accused of intentionally protecting only South African-owned businesses during looting, ignoring requests for an urgent intervention following a threat of mob violence, being complicit in attacks on foreign nationals, and refusing to assist foreign nationals who wish to open a case at a police station.²⁷ Various national surveys have illustrated negative sentiments by the public towards foreign nationals and some police officers appear to share such sentiments.²⁸ Victims of xenophobic violence have often struggled to access justice. The low number of

arrests and lower number of successful convictions in the wake of the 2008 violence is one case in point.²⁹

There has been some progress in both policing and the justice response, including improved cooperation between national police, civil society and United Nations agencies with the appointment of a national coordinator for xenophobia in Visible Policing.³⁰ This has improved communication and has led to a number of instances where police have been able to respond quickly to outbreaks of violence. The National Prosecuting Authority (NPA) has also indicated that it has developed its own definition of xenophobia-related cases and has focal points in all the provinces responsible for collecting information on these.³¹

A final area of concern is access to compensation and restitution for foreign victims of hate crime.³² Obtaining a compensation order against the perpetrator is difficult, given the low number of arrests and successful convictions, but also within a context where there is often tacit support for crimes against foreign nationals.³³ Access to restitution where perpetrators return stolen goods or restore property is difficult for the same reasons.³⁴ These are some of the challenges that hate crimes legislation needs to address.

SEXUAL ORIENTATION AND GENDER-BASED VIOLENCE

Another type of hate crime is that which specifically targets lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Like many South Africans, LGBTI people are targets of general violence and crime. However, because they are stigmatised for their perceived sexual and/or gender 'deviance', LGBTI people are also frequently discriminated against, through criminal acts, because of their sexual orientation, gender identity and/or biological variance.³⁵ Often, hate speech (such as harassment, slurring, name-calling and other forms of verbal abuse) creates the breeding ground for hate-based attacks.³⁶

Nel and Judge report that, internationally, the vast majority of openly LGB³⁷ persons have experienced some form of victimisation, such as verbal abuse, threats, being chased or followed, or being spat on. In comparison, research findings suggest that South Africans were less likely to experience verbal abuse and threats of violence than their American counterparts, but they were more prone to be physically assaulted and substantially more often sexually assaulted. The authors also suggest that homophobic hate crime increases as lesbian and gay communities become more visible.³⁸

Anecdotal evidence of sexual orientation-related hate crime, such as assault, malicious damage to property, rape and murder, abound.³⁹ The phenomenon of 'corrective rape'⁴⁰ has received considerable media attention. It will seem that black lesbians, particularly in townships, where they are seen to challenge patriarchal gender norms, are increasingly targeted for rape and/or murder. Although not a separate and distinct phenomenon from the high incidence of gender-based violence in the country, it has also been reported that highly visibly gay, lesbian or transgender people are more often the targets of homophobic violence. The fatal shooting of a gender non-conforming 'drag queen' in Yeoville, Johannesburg, in 2008 is a case in point.⁴¹ The connection between hate speech, hate crimes, gender-based violence and sexual orientation more generally seems to be too evident to ignore in considering appropriate responses to related victimisation within a South African context.

In 2010, the US-based site www.change.org started an online petition against 'corrective rape' directed at the government in partnership with Luleki Sizwe (a Cape Town township-based CSO), which received several thousand signatures. In response, in May 2011, the DOJCD declared that they would set up a multi-sectoral task team to address the issue. The proposal for this task team came after more than ten years of multi-sectoral advocacy aimed at raising awareness of gender-based violence against black lesbians in particular and LGBTI communities more broadly, and calling for a response from government and broader society.

A DOJCD spokesperson however, publicly stated that this was the first time they were hearing about the problem of violence against lesbians.⁴² The DOJCD-led national task team officially started meeting in July 2011.⁴³ Going forward, similarities and differences in respect of other prejudice-motivated crimes, such as xenophobic attacks and race-based incidents, will also be considered.⁴⁴

POLICY DEBATES

While not ignoring that there are some critics, internationally, of hate crime legislation,⁴⁵ there do seem to be many more voices calling for the South African criminal justice system to recognise such crimes. Hate crime legislation will, however, need to respond to the particular social context in South Africa and therefore some debate is required on which characteristics should be specifically protected. Characteristics generally protected by hate crimes legislation internationally are those that are fundamental or immutable – that is, those that a person cannot change and that tend to identify people as members of a social group. Internationally, race, national origin and ethnicity are frequently protected characteristics as are religion, gender, age, mental or physical disability, and sexual orientation.⁴⁶

Section 9(3) and the Equality Act referred to in Section 9(4) of South Africa's Constitution prohibit discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁴⁷ Subsequent jurisprudence also established nationality as a prohibited basis for discrimination. The Constitution could therefore be used as a starting point in determining which characteristics to protect, based on which of these characteristics have been or are reasonably likely to be a causal factor in crimes, as well as whether any additional characteristics, such as gender identity and gender expression, should be included. Given the types of crimes hate crimes legislation tries to protect against, there may also be merit in exploring how

best to protect people who are targeted for crime on the basis of their HIV status, as was the case for Gugu Dlamini in 1998.⁴⁸

Another important policy choice is determining the appropriate legal model for South Africa, as it is critical to avoid developing legislation that becomes difficult to implement. With the 'hostility model' proving subjective *hate* on the part of the perpetrator towards the victim, based on a protected characteristic, can be very challenging.

While some may argue that the discriminatory selection model with its lower threshold 'dilutes' the concept of a hate crime, this model requires police and prosecutors to simply show that the victim was selected *because* of a protected characteristic such as race, nationality, religion, sexual orientation or gender identity and/or expression. The discriminatory selection model also allows for mixed motives such as criminal incentives alongside bias. This broader applicability of the law can go beyond 'hate' to include stereotypes about particular social groups. This model of legislation thus aims to protect against prejudice as well as protect groups that may be targeted by criminals on the basis of perceived vulnerability. Countries with this model of legislation tend to require a causal link between a victim's protected characteristic and the crime.⁴⁹

Determining an appropriate punishment for hate crimes offenders is another matter that needs careful consideration. Internationally, hate crimes legislation usually either introduces hate crimes as substantive new offences (such as racially-aggravated assault) or introduces aggravating circumstances to argue for enhanced sentencing. Some have even introduced a combination of the two approaches as a means of providing prosecutors with a greater range of tools with which to address the offence.⁵⁰ Determining how best to aid prosecutors and equip them to ensure convictions of hate crimes perpetrators is an area where leadership by the NPA would be valuable.

In South Africa, there is some debate as to whether mandatory minimum sentences are

effective in deterring would-be offenders from the commission of a particular type of crime. Mandatory minimum sentencing, which prescribed severe prison terms, was introduced in 1998 and is currently in place for crimes such as gang rape and premeditated murder. It has been argued that minimum sentencing has not had the effect of deterring crime (as many offenders do not expect to be caught), and has instead had a negative impact by contributing to overcrowding in correctional facilities.⁵¹ Determining appropriate punishments for hate crimes offences is an area where further input from criminal justice experts would be welcome, to ensure that the provisions of hate crimes legislation respond to the specific challenges in South Africa. There may also be scope to explore the use of alternative dispute resolution mechanisms in non-violent hate crimes cases.⁵²

Once hate crimes legislation is developed there is an opportunity for police and the NPA to develop guidelines for the police and prosecutors on how to utilise the legal provisions. A number of countries with hate crimes legislation have developed guidelines for prosecutors and investigators to assist them in collecting and demonstrating evidence of prejudice or deliberate selection of the victim on the basis of their identity.⁵³

In addition, the police in several countries have developed guidance manuals on policing hate crimes. For example, the Association of Chiefs of Police in Scotland 2010 manual provides information on the legislation, key definitions, recording and reporting of hate crimes offences, supporting witnesses and victims (and avoiding secondary victimisation), as well as other related considerations.⁵⁴ The existence and availability of such manuals represents a valuable opportunity for South Africa to ensure its police are well trained and have the knowledge to effectively address and collect evidence of hate crimes.

The perception of the victims or the victims' community is often used to determine whether to investigate a crime as a possible hate crime. This is specifically important to demonstrate that

police and prosecutors are sensitive to community perceptions of the nature of the case. Whilst in some cases there may be immediate suggestions pointing towards an incident being a hate crime, further investigation by police may reveal otherwise. If police are transparent and share this information with concerned communities, this can allay fears that 'people like us' are 'under attack'. In South Africa, media reports on a number of crimes indicate that victims or other concerned groups have reported their perceptions that a crime constituted a hate crime.⁵⁵

Because of the traumatic impact of hate crimes on their victims and because these crimes can seriously disrupt social cohesion, one possible approach is to fast track hate crimes cases through the criminal justice system in order to demonstrate that such crimes are taken seriously. Whilst the attempts at fast tracking xenophobia-related cases following the 2008 violence met many challenges, the FIFA World Cup 2010 special courts demonstrated that it can be possible to try cases rapidly, provided that there is political will, effective cooperation between police and prosecutors, and sufficient budget to support these courts.

To support the implementation of the law, training will be required for police, prosecutors, magistrates and judges, as well as service providers, such as health care providers, as a means to ensure that law enforcement and justice officials are able to make use of the legislative provisions effectively and that service providers are able to assist victims without secondary victimisation. Of course, as recognised by the National Victim Empowerment Programme, such service provider guidelines have a crucial contribution to make, even in the absence of hate crime legislation.⁵⁶ At least one international organisation has expressed an interest in supporting South Africa by providing experts for related training.⁵⁷

Regardless of whether hate crime legislation is adopted in South Africa or not, a further important intervention is the need to collect

accurate data on hate crimes across the country. Enhanced recording practices will translate into data that can be used to determine trends of hate crimes and where they are most likely to occur, as well as track the progress in holding perpetrators accountable by observing the number of cases lodged with police and assessing how many of these were successfully prosecuted. Such analysis will guide interventions to address any barriers that may emerge, either by police not producing sufficient evidence, or by obstacles occurring in the prosecution process.

Civil society is currently in the process of developing its own monitoring system to record cases of hate crimes and assess the quality of support offered by service providers and police, the traumatic impact on the victim and whether the victim intends to report the matter. In addition to providing information on the levels of service provision and the psychological impact, this monitoring will also provide one mechanism to examine levels of under-reporting of hate crimes. The monitoring system is being developed by the UCAP in collaboration with members of the Hate Crimes Working Group.⁵⁸

Finally, legislation on hate crimes is only likely to be effective if there is sufficient political and public support to implement it. This requires senior leaders to speak out on a regular basis against all types of hate crimes. A number of leaders have spoken out on racism and xenophobia, but this needs to be consistent and extend to other forms of hate crimes.⁵⁹ At the core, related experiences of discrimination and victimisation are more similar than different, and a 'prejudice hierarchy', where some experiences are valued over others, ought to be avoided.⁶⁰

CONCLUSION

Hate crimes occur more often in South Africa than the government may wish to acknowledge. Whilst this article primarily highlights those crimes that specifically target people on the basis of their nationality, sexual orientation and/or gender expression, sufficient anecdotal evidence and early research findings suggest that the

problem is more widespread than these occurrences. Hate crimes are not reconcilable with the democratic principles of equality and human rights for all and do not serve the international image of this 'rainbow nation' well. Current legislation and policy frameworks are insufficient to appropriately respond to related incidences or to effectively minimise and/or prevent hate crimes from happening. To address the social causes underlying hate crimes, multi-level responses are required, including interventions aimed at increased diversity awareness in communities, and education and training programmes for service providers. However, the 'symbolism' of law reform is of the utmost importance, as is the platform provided by the legal system from which to condemn violating behaviours. It is therefore, in our view, in the South African government's interest to fast track the development of hate crime legislation and related service provider guidelines, in which hate crimes are acknowledged as priority crimes. Introducing hate crime legislation will send a clear message that hate will not be tolerated. As indicated, various international examples exist to assist in this important process. The time is now to clearly signal that South Africa belongs to all who live in it.



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NOTES

1. Constitution of the Republic of South Africa (Act 136 of 1996), Pretoria: Government Gazette.
2. Some of those who have spoken out on the need to address hate crimes in South Africa include the United Nations Committee on the Elimination of Racial Discrimination, South African Human Rights Commission (SAHRC), a number of lesbian, gay, bisexual, transgender and intersex (LGBTI) CSOs, the Consortium for Refugees and Migrants in South Africa, the Special Rapporteur on the Human Rights of Migrants, and most recently, participants in an Institute for Security Studies and Human Sciences Research Council Seminar, *South Africa: The Country We Want To Live In: Policy, Practice, Legislation With Respect To Hate Crime* (See <http://www.issafrica.org/eventitem.php?EID=739>).
3. The term 'hate crimes' tends to be misleading as the crimes popularly referred to as such may not be fuelled by actual *hatred*. Such crimes are also referred to as bias crimes or bias-related crimes. For the sake of

clarity, we will use the popular term *hate crimes* in this article.

4. See for example Laws of New York, 2000, *Chapter 107, Hate Crimes Act of 2000*, http://criminaljustice.state.ny.us/legalservices/ch107_hate_crimes_2000.htm (accessed 14 October 2011) in which the nature and impact of hate crimes that extend beyond the individual are articulated. Also see P Iganski, *Hate Crimes Hurt More*, *American Behavioral Scientist*, 45(4) (2001), 626-638.
5. Iganski, *Hate Crimes Hurt More* and also J McDevitt, J Balbonic, L Garcia and J Gui, *Consequences for Victims, A Comparison of Bias and Non-Bias Motivated Assaults*, *American Behavioral Scientist*, 45(4) (2001), 697-711.
6. For a more extensive discussion around the gaps in the existing legal framework in South Africa, see K Williams, *Legal brief on hate crimes in South Africa*, 2010. <http://www.cormsa.org.za/wp-content/uploads/2010/07/cormsa-hate-crimes-legal-brief.pdf> (accessed 7 November 2011).
7. The DOJCD is also overseeing the development of a National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerances.
8. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*, Warsaw: Organisation for Security and Cooperation in Europe, 2009, 16.
9. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
10. See for example Laws of New York, 2000; B Harris, *Arranging prejudice: Exploring hate crime in post-apartheid South Africa*, *Race and citizenship in transition series*, 2004, <http://www.csvr.org.za/wits/papers/paprctpl.htm> (accessed 14 October 2011); Juan A Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*, unpublished doctoral thesis, Unisa, Pretoria, 2007; Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
11. Among others, see JB Jacobs and KA Potter, *Hate Crimes: Criminal Law & Identity Politics*, New York: Oxford University Press, 1998.
12. In McDevitt et al., *Consequences for Victims, A Comparison of Bias and Non-Bias Motivated Assaults*, 'comparable crimes' refer to the location of the incident (for example, victimisation in the area of the home, at work, etc), relationship between victim and perpetrator, and nature of the assault (i.e. whether medical treatment was required). Also see GM Herek, JR Gillis and JC Cogan, *Psychological sequelae of hate-crime victimization among lesbian, gay and bisexual adults*, *Journal of Consulting and Clinical Psychology*, 67(6) (1999), 945-951.
13. American Psychological Association, *The Psychology of Hate Crimes*, 2009. www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf (accessed 14 October 2011).
14. This is acknowledged in the South African national policy guidelines for victim empowerment. See Department of Social Development, *National Policy Guidelines for Victim Empowerment*, Pretoria: Department of Social Development, 2009.
15. Ministerial Advisory Committee on Gay and Lesbian Health, *Health and sexual diversity: A health and wellbeing action plan for gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians*, 2003, http://www.glhv.org.au/files/health_action_plan.pdf (accessed on 14 October 2011); Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*.
16. N Mkhize, J Bennett, V Reddy and R Moletsane, *The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans*, Cape Town: HSRC Press, 2010.
17. OUT is a CSO working towards the well-being and rights of LGBT persons in Pretoria, Gauteng and South Africa.
18. JA Nel and M Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*. *Acta Criminologica*, 21(3), (2008); L Polders and H Wells, *Overall research findings on levels of empowerment among LGBT people in Gauteng, South Africa*, Unpublished report, Pretoria: OUT LGBT Well-being, 2004.
19. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
20. This legal model appears consistent with what many people popularly understand a 'hate' crime to consist of.
21. An example of this model can be seen in section 422.55 of the California Penal Code, which states that "Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: The characteristics specifically protected in California are then listed as disability, gender, nationality, race or ethnicity, religion, sexual orientation, and association with a person or group with one or more of these actual or perceived characteristics. California Penal Code (amended 1987).
22. In 1998 the SAHRC, the United Nations High Commissioner for Refugees and the National Consortium for Refugee Affairs jointly launched the 'Roll Back Xenophobia' campaign. Despite efforts from a range of stakeholders, including hearings on xenophobia in 2004 held jointly by the SAHRC and the Portfolio Committee on Foreign Affairs, as well as concerns cited by the African Peer Review Mechanism 2007 report, there was little concerted effort by government departments to address violence against foreign nationals. This reluctance of government culminated in the widespread violence of 2008 which left at least 62 dead and an estimated 100 000 displaced. Since 2008, there has been increased awareness of the problem and this, as well as new partnerships between government, civil society and international agencies, has gone some way to preventing a repeat of the 2008 violence. Yet, small scale attacks deliberately targeting foreign nationals continue to occur. Threats of violence around the FIFA World Cup saw Cabinet reactivate an Inter-Ministerial Committee to coordinate government's response, which included pre-emptive and responsive deployment of

- police and the military in suspected hotspots. For examples of such attacks, see Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*, 2010, <http://www.cormsa.org.za/wp-content/uploads/2009/05/cormsa-database-of-violence-against-foreign-nationals.pdf> (accessed 16 October 2011).
23. See J-P Misago, T Monson, T Polzer and L Landau, *May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses*, Johannesburg: CoRMSA, 2010. There have also been numerous cases where residents have correctly or incorrectly suspected a foreign national of a particular crime and then formed vigilante groups to evict all foreign nationals from the area. This was the case in Imizamo Yethu in November 2009, Riviersonderend in January 2010 and Masiphumelele in October 2008. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 24. This has been the case in a number of incidents reported in Mpumalanga such as Siyathemba in July 2009 and February 2010, Sakhile in July 2009, Mhluzi in March 2010 and Ermelo in February 2011. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 25. Lawyers for Human Rights, *LHR calls on the police to protect foreign nationals and foreign-owned businesses in the pre-election intimidation and attacks in Gauteng*, press release issued 13 May 2011, <http://www.lhr.org.za/news/2011/lhr-calls-police-protect-foreign-nationals-and-foreign-owned-businesses-pre-elections-inti> (accessed 16 October 2011).
 26. Some examples include a Burundian national being attacked on a train near Claremont station in Cape Town in August 2010, allegedly by a group of people singing 'get out, foreigner', a Congolese woman being raped in Samora Machel by attackers who told her they will do the same to all other foreigners in the area, and a Zimbabwean national being thrown off a train allegedly after being threatened due to being foreign. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 27. See Consortium for Refugees and Migrants in South Africa, *CoRMSA Brief for the Independent Complaints Directorate: Police Harassment and Abuse of Foreign Nationals*, 2010, <http://www.cormsa.org.za/wp-content/uploads/2009/05/submission-to-the-independent-complaints-directorate-on-police-abuse-of-foreign-nationals.pdf> (accessed 16 October 2011).
 28. See the survey results described in Southern African Migration Project, *The Perfect Storm; The Realities of Xenophobia in Contemporary South Africa*, Cape Town: IDASA, 2008. For a discussion of police attitudes towards foreign nationals, see D Bruce, G Newham and T Masuku, *In Service of the People's Democracy: An assessment of the South African Police Service*, Johannesburg: Centre for the Study of Violence and Reconciliation, 2007.
 29. In response to an enquiry from the SAHRC regarding progress on cases related to the 2008 xenophobic violence, the DOJCD responded: "Of 597 cases, only 159 had been finalised with a verdict (98 guilty; 61 not guilty), while 218 had been withdrawn by October 2009". The SAHRC observed that this amounted to a withdrawal rate of almost four times that of typical violent crime. South African Human Rights Commission, *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals*, Johannesburg: South African Human Rights Commission, 2010: 68.
 30. T Polzer and K Takabwirwa, 'Just Crime? Violence, Xenophobia and Crime: Discourse and Practice, SACQ 33, September 2010.
 31. National Prosecuting Authority, personal communication, 21 April 2011.
 32. The Victim Empowerment Programme (VEP) integrated policy guidelines prescribe that victims of hate victimisation should be one of the ten priority groups. Assistance listed in the guidelines includes access to compensation and restitution. See Department of Social Development, *National policy guidelines for victim empowerment*.
 33. There have been a number of instances where, following displacement due to xenophobic violence, foreign nationals have been intimidated or encouraged to drop the criminal charges against residents. One example of this was in Siyathemba in July 2009 where a group of residents approached displaced foreign nationals and forced them into dropping charges. This and other cases are listed in Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*. In this social and political context it is very difficult for foreign nationals to seek and enforce a compensation order, especially if they intend returning to the area.
 34. Following the May 2008 violence, victims spoke about the difficulties of returning to an area where perpetrators who had stolen goods were known but the victim was unable to do anything about it. Group of displaced foreign nationals, Rand Airport shelter, personal communication, September 2008.
 35. Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*.
 36. For example, homophobic speech is often shaped by so-called religious and cultural narratives: "Homosexuality is un-African" taken to its logical conclusion, may be used to 'justify' a hate crime and "homosexuality is a sin", may also be used in the same manner (Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*, 22). Hate crimes can therefore be understood as representing the extreme side of a continuum that starts with it being socially acceptable to name call and demean specific social groups.
 37. Where T and I are not in references to research findings, transgender and intersex persons were not included in the research.
 38. Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*.
 39. Vernon Gibbs and Tony Halls, the first same-sex couple to be married under the Civil Union Act, had previously made news headlines as targets of a hate crime. In 2005, this white male couple had pressed criminal charges after their guest lodge in Riversdal, Eastern Cape, was vandalised five times by local Dutch Reformed Church members who objected to their

opening the lodge to gay tourists. During the 2005 Lesbian and Gay Pride march in Braamfontein, Johannesburg, the float of the CSO, Forum for the Empowerment of Women, or FEW, was targeted by spectators throwing bottles, seriously injuring a lesbian volunteer. In light of the general hostility to same-sex marriage, it is precisely for fear of victimisation that the two Johannesburg-based black men who were the first couple to legally marry in a religious ceremony chose to remain anonymous. In 2006, a 19 year-old black lesbian, Zoliswa Nkonyana, was murdered by a mob in Khayelitsha, Cape Town, because of her sexual orientation. On 7 July 2007, two black lesbian women, Salome Masooa and Sizakele Sigasa, were brutally raped and murdered in Soweto and in response, Campaign 07-07-07 was initiated, among others, calling for hate crime legislation. Only 15 days later, a black lesbian woman, Thokozane Qwabe (23), was found murdered in Ladysmith, KwaZulu-Natal. For full references, see Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*. In addition, also see Mkhize et. al., *The country we want to live in: hate crimes and homo-phobia in the lives of black lesbian South Africans*.

40. 'Corrective rape' is the prejudiced notion that a lesbian woman can be raped to 'make her straight': i.e., to 'correct' her lesbian sexuality. 'Corrective rape' seeks to justify the rape of those people who are perceived to not conform - or to disrupt - expected gender roles, behaviour and/or presentation. Misogyny and homophobia underpin the prejudice associated with 'corrective rape' (OUT, 2008, cited in Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*, 24). Also see www.actionaid.org.uk/doc_lib/correctiverape_rep_final.pdf.
41. Lesbian and Gay Equality Project, *South Africa: LGBTI People in Yeoville Mourn the Killing of Daisy Dube, an Open Drag Queen*. Press release on 12 June 2008, <http://www.anarkismo.net/article/9125> (accessed 15 August 2008). Also see Mkhize et. al., *The country we want to live in: hate crimes and homo-phobia in the lives of black lesbian South Africans*.
42. FEW initiated the 'Rose has Thorns' campaign as far back as 2003, and the earlier mentioned 'Campaign 07-07-07' was launched in 2007. Other initiatives include submissions made to government, such as UCAP and OUT, *Hate crime in South Africa: Issues, challenges and strategies for action*, submission to the National Prosecuting Authority, June 2008, Pretoria: UCAP & OUT; and *Hate Crimes Working Group. Memo for the Department of Justice and Constitutional Development on Hate Crimes in South Africa*, June 2010, Johannesburg: Hate Crimes Working Group in which among others, reference is made to South Africa's VEP integrated policy guidelines and 10th anniversary conference resolution that recognise those subjected to hate victimisation as priority target groups for assistance, as well as the need to develop comprehensive legislative and policy frameworks for hate crimes, including xenophobia and for LGBTI people.
43. Following concerns raised by civil society representatives about both such narrow focus and the language that is being used to frame violence against lesbians, a suggestion was provisionally accepted to stop using the term 'corrective rape' altogether and instead refer to gender-based violence targeted at LGBTI persons in order to capture both homophobic and gender discrimination, and to cover the various forms of violence against LGBTI people (e.g. harassment, assault, rape, murder).
44. Civil society update on task team to address gender-based violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) people, September 2011.
45. See Jacobs and Potter, *Hate Crimes. Criminal Law & Identity Politics*. In Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*, some of the controversies related to hate crime laws is also outlined.
46. Department of Social Development, *National policy guidelines for victim empowerment*, Pretoria: Department of Social Development, 2009.
47. Constitution of the Republic of South Africa, 1996.
48. See for example, Partnership against AIDS, *Press Release issued by the Department of Health on the Killing of Ms Gugu Dlamini (AIDS Campaign Worker)*, 1998, <http://www.info.gov.za/speeches/1998/990428438p1006.htm> (accessed 16 October 2011).
49. An example of this is a case from New York where robbers targeted a gay man because they thought he would be less likely to resist and to report the crime. In court the defendants argued that they could not be found guilty of a hate crime as they had no anti-gay hostility towards the victim. The court disagreed on the basis that they had deliberately selected the victim on the basis of a protected characteristic. See Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
50. In the United Kingdom, for example, the Crime and Disorder Act of 1998 created new 'racially-aggravated' and 'religiously-aggravated' offences. In addition, the Powers of Criminal Courts (Sentencing) Act of 2000 prescribes that if an offence was racially aggravated, this shall be treated as an aggravating circumstance during sentencing and it shall be noted on the court record that the offence was such.
51. M O'Donovan and J Redpath, *The Impact of Minimum Sentencing in South Africa*, Cape Town: Open Society Foundation for South Africa, 2006.
52. For example, the Jewish Board of Deputies has facilitated visits to the Holocaust Museum by children who have been accused of using anti-Semitic speech. Feedback from this suggests that such types of interventions may be most appropriate in less serious cases. Jewish Board of Deputies, Johannesburg, personal communication, 23 April 2011.
53. The United Kingdom's Crown Prosecution Service has developed a policy on prosecuting racist and religious crime as well as hate crimes based on disability. This covers matters such as the legislative background, ensuring full recognition of evidence of bias in a crime, support for victims and witnesses, as well as guidance for the sentencing phase. See Crown Prosecution Service, *Racist and religious crime – CPS prosecution policy*, <http://www.cps.gov.uk/publications/prosecution/rpbcbrbook.html> (accessed 16.10.2011)

- and Crown Prosecution Service, *Policy for Prosecuting Cases of Disability Hate Crime*, http://www.cps.gov.uk/publications/docs/disability_hate_crime_policy.pdf (accessed 16 October 2011).
54. Association of Chiefs Police Officers in Scotland, *Hate Crime Guidance Manual*, 2010, http://www.acpos.police.uk/Documents/Policies/ED_ACPOS_HateCrimeManual_Sept2010.pdf (accessed 16 October 2011).
 55. See, for example, N Joseph, *We think it was Xenophobic*, 2009, <http://www.iol.co.za/news/south-africa/we-think-it-was-xenophobic-1.444551?ot=inmsa.ArticlePrintPageLayout.ot> (accessed 16 October 2011). Cases of attacks on black lesbians have often been immediately suggested to be hate crimes - see for example A Kelly, *Raped and Killed for being a Lesbian: South Africa ignores 'corrective attacks'*, *Guardian.co.uk*, 12 March 2009, <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> (accessed 16 October 2011).
 56. Department of Social Development. *National policy guidelines for victim empowerment*.
 57. Personal communication with a representation of the Organisation for Security and Cooperation in Europe, 1 July 2010.
 58. The Hate Crimes Working Group comprises of a multi-sectoral group of CSOs working to address crimes motivated by different forms of prejudice. The Working Group can be contacted via CoRMSA.
 59. For example, President Zuma included comments on racism and xenophobia in his Reconciliation Day address in 2009. President Jacob Zuma, *Address by His Excellency, President JG Zuma on National Reconciliation Day; Amphitheatre, Freedom Park, Salvokop, Tshwane*, 16 December 2009, <http://www.info.gov.za/speeches/2009/09121708351001.htm> (accessed 16 October 2011).
 60. Harris, *Arranging prejudice: Exploring hate crime in post-apartheid South Africa*.

IS THE ACT WORKING FOR CHILDREN?

The first year of implementation of the Child Justice Act¹

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The Child Justice Act 75 of 2008 mandates the Minister of Justice and Constitutional Development to report annually on the implementation of the Child Justice Act to the Parliamentary Portfolio Committee on Justice and Constitutional Development. On 1 April 2011 a year had passed since the implementation of the Child Justice Act. This article interrogates the annual report presented to parliament on the first year of implementation of the Act, and concludes that it is not possible to accurately assess whether the Child Justice Act was implemented fully during the year, as the statistics provided in the annual report by different departments are unclear and incomparable. The article also reflects those aspects of the Act that have been implemented.

The Child Justice Act (referred to hereafter as the Act)² came into operation on 1 April 2010 after an official launch at the Walter Sisulu Child and Youth Care Centre in Soweto. The objectives of the Act are to protect the rights of children; promote the spirit of *ubuntu* in the child justice system; provide special treatment for children in the justice system with the aim of breaking the cycle of crime; as well as to promote the co-operation between government departments and civil society.³ In order to achieve these objectives, the Act sets out a different procedure for children that come into contact with the criminal justice system, compared to the procedure in place for adults, as found in the Criminal Procedure Act.⁴

The implementation of the Act is dependent on the close collaboration between the following departments and government institutions:

- Department of Justice and Constitutional Development (DJCD)
- Legal Aid South Africa
- National Prosecuting Authority (NPA)
- South African Police Service (SAPS)
- Department of Correctional Services
- Department of Social Development
- Department of Basic Education
- Department of Health

REPORTING TO PARLIAMENT⁵

Parliament has an important oversight function with regard to the Act, which is to assess whether the responsible departments implement the Act correctly. Section 96(3) of the Act stipulates that

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the Minister of Justice and Constitutional Development must, within one year after the implementation of the Act and every year thereafter, submit reports to Parliament on the implementation of the Act. In order to comply with this provision, DJCD submitted and presented the first report on the implementation of the Act to the Portfolio Committees on Justice and Constitutional Development, and Correctional Services, on 22 June 2011. This article interrogates this report in an attempt to understand whether the Act is working after one year in operation.

KEY ISSUES FOR IMPLEMENTATION

Budgets

While the annual report covers a wide range of topics, including the number of new staff appointments and the number of officials trained, it does not provide a clear assessment of the problems caused due to insufficient funds being allocated for the implementation of the Act. This was discussed during the parliamentary hearing.⁶ A costing report on the implementation of the Child Justice Bill found that it would require approximately R606,7m per annum.⁷ Yet an amount of only R30m was allocated to the justice cluster for the implementation of the Act, despite indications that a budget of at least R52m would be needed to implement the Act.⁸ The shortfall could thus be one of the reasons why the first year of implementation of the Act has not gone smoothly.

Training of officials

According to the report, 111 new Child Justice Court clerks were appointed during 2010-11;⁹ however, the report does not reflect the number of new probation officers. This information would have been helpful in assessing progress, since probation officers have an important role in ensuring that the objectives of the Act are met. The report also notes that, in total, 19 842 officials were trained to understand and implement the Act,¹⁰ and that during this period

75 435 children were charged with committing offences.

The annual report also recorded that that 15 891 SAPS members had been trained on the Act.¹¹ The SAPS representative at the parliamentary hearing assured members of parliament that 'at every single police station there are police members trained on the Act'. The Portfolio Committee members, however, raised concerns about the extent of the training, based on their experience of conducting constituency visits to police stations. During these visits some members had come across instances where SAPS officials at the Community Service Centres were not trained in the provisions of the Act or the SAPS National Instruction on the Act.

In her analysis of the implementation of the Act, Charmain Badenhorst found that SAPS training is being rolled out in three phases, of which phase one constitutes a one-day information session, phase two is based on two days of in-service training, while phase three comprises a one-week training course.¹² As of 30 July 2010 only 6 279 out of 150 319 SAPS members had been trained in the Act, and only 151 members had received phase three training.¹³ One can thus conclude that there are currently an insufficient number of police members who have received detailed training on the provisions of the Act and the National Instruction.

The training of SAPS members is, however, not the only aspect of the implementation process. Also important is the content of SAPS training materials. In this regard the report falls short, since it fails to provide details of the content and nature of training, again making the implementation process difficult to assess.

Arrest and detention of children

To prevent children from being exposed to the adverse consequences of the formal criminal justice system, section 2(d) of the Act requires that children's constitutional rights be afforded protection. The Constitution of South Africa

requires that children should not be detained, and if they are, it should only be as a measure of last resort.¹⁵ During 2008, an average of 10 000 children were arrested per month; while for the period of April 2010 to June 2010 this had declined to an average of 6 495 children arrested each month.¹⁶ According to the annual report, an average of 6 286 children were charged each month during the first year of implementation. Not all of these children were arrested. There was therefore a marked decline in the number of children arrested for committing offences.

The number of children awaiting trial in prison, and the number of children sentenced to prison also decreased.¹⁷ This was identified as one of the primary successes during the first year of the implementation of the Act.¹⁸ Yet, this may not be solely a consequence of the implementation of the Act, since, as Muntingh has pointed out, there has been a steady decrease in the prison population over the past five years.¹⁹ Nevertheless, there was an immediate sharp decline in 2010/11 in the number of children in prison, which suggests that the Act had a positive impact on the number of children who are incarcerated.²⁰

SHORTCOMINGS OF THE ANNUAL REPORT

While the annual report provides a number of statistics, insufficient data are provided to properly assess whether the objectives of the Act are being met. This section provides a discussion of the statistics and their shortcomings.

The annual report states that 75 435 children were charged by the SAPS during the first year of implementation of the Act.²¹ The annual report also notes that the Department of Social Development (DSD) assessed 32 494 children during the same period.²² This implies that some 42 941 children were not assessed. In terms of the Act, every child who is charged with committing an offence has to be assessed (even a child below the age of ten years), unless a prosecutor dispenses with the assessment in order to divert a child who committed a schedule 1 offence (minor offence) out of the court-based criminal justice

process.²³ The prosecutor can only dispense with such an assessment if s/he is of the view that it is in the best interest of the child.²⁴ It is reasonable to presume that a decision not to assess a child would be a rare occurrence, as it would be unlikely that it is in the best interest of a child not to be assessed. If the figures provided in the annual report are correct, 42 941 children should have been diverted without an assessment. The report however states that the NPA only diverted 15 588 children, of whom 2 444 were diverted by the prosecutor before a preliminary inquiry took place.²⁵ This seems to suggest that approximately 40 497 children 'fell through the cracks' before a preliminary inquiry. Whether this is a statistical anomaly, or a key indicator of the failure of the implementation of the Act, is unclear.

Additional inconsistencies in the numbers suggest further problems. Of the 32 494 children assessed by DSD, 14 471 appeared at a preliminary inquiry during this reporting period.²⁶ In terms of the Act, all children who have been assessed should appear at a preliminary inquiry, except children diverted by the prosecutor for schedule 1 offences and children below the age of ten years who do not have criminal capacity. It would thus be reasonable to presume that children who did not appear at the preliminary inquiry have been diverted for a schedule 1 offence by the prosecutor or were sent for a section 9 referral (for those children who do not possess criminal capacity).²⁷ As noted above, the annual report stipulates that 2 444 children were diverted before the preliminary inquiry for schedule 1 offences, while 795 received section 9 referrals. Once again, these figures do not balance in relation to the number of children who were assessed, but did not attend a preliminary inquiry. This suggests that 14 784 children were not accounted for in the annual report.

These are two examples of many instances in which the statistics provided in the annual report appear to raise more questions than they answer. This may be due to the fact that different departments (e.g. SAPS and NPA) collect data and report on it in different ways. The next section considers how and why this problem has arisen.

ANALYSIS OF STATISTICS

While the annual report offers statistics, no analysis of these figures is provided. This is a shortcoming that becomes clear in the following example. The Act recommends particular procedures that depend on a child's age and the crime that s/he allegedly committed. If a child who is 11 years old commits a schedule 1 offence, s/he may be diverted by a prosecutor before the preliminary inquiry, subject to the prosecutor being satisfied that the child has criminal capacity. However, a 16-year old child who committed a schedule 3 offence cannot be diverted before a preliminary inquiry. Therefore, such a child would have to attend a preliminary inquiry, at which point it is possible to divert him or her, subject to permission from the Director of Public Prosecutions.

The annual report fails to provide details of the crimes or ages of the children who were diverted. It only mentions at what stage of the procedure a child was diverted. Yet, this information is essential to enable a determination of whether the diversion ordered would achieve the objectives of diversion as found within section 51 of the Act.²⁸

Another example relates to the offences allegedly committed by children who were either arrested, given a written notice to appear in court, or summoned. The annual report only distinguishes between boys and girls, but does not provide an overview of the ages or the offences these children committed. Such an overview would not only assist with a future criminal capacity review (as required in terms of section 96(4) of the Act), but would also provide parliament with better information to effectively oversee and assess the implementation of the Act.

THE IMPORTANCE OF STATISTICS

Getting the statistical reporting correct is important for a number of reasons. Firstly, when parliament monitors the implementation of the Act, the Portfolio Committees need to be sure

that children do not fall between the gaps of the system. This would happen when children are not processed through the entire child justice system, as envisaged by the Act. For example, every child charged with committing an offence has to be assessed by a probation officer, unless the prosecutor decides that it is not in the best interest of the child to be assessed. But if children are not assessed and not provided with an alternative by the prosecutor, they could fall through a gap of the system. The same would apply when children are assessed and not brought before a preliminary inquiry, or diverted.

When children fall between the gaps and are not held responsible for their actions, it is feared that the recidivism rate of children might increase, as they thus escape accountability for their actions. One of the objectives of the Act is to prevent future re-offending.

Secondly, accurate statistics are important in order to review the minimum age of criminal capacity. Such a review is required to take place within five years after the implementation of the Act.²⁹ Currently Section 7 of the Act stipulates that the minimum age of criminal capacity is ten years. The United Nations Convention on the Rights of the Child does not stipulate a minimum age for criminal capacity.³⁰ However, it does recommend in 'General Comment Number 10 on Children's Rights' in juvenile justice that the minimum age of criminal capacity should be set at 12 years.³¹ Thus the minimum age in South Africa is currently not in line with the recommendation by the United Nations Committee on the Rights of the Child, and needs to be assessed. This can only happen if there are sufficient case data on which to base such an assessment. Section 96(4) of the Act requires that parliament consider a number of statistics when reviewing the age of criminal capacity. This includes the number of children between 10 and 14 years who allegedly committed an offence, the sentences imposed on them, and the number of children whose cases did not end up in trial, because the prosecutor decided that these children did not possess criminal capacity. This information is not in the annual report.

SOLVING THE NUMBERS PROBLEM

The primary reason for the inconsistencies in the statistics relates to the fact that the Inter-Sectoral Committee on Child Justice (ISCCJ)³² does not (yet) possess an integrated management system, which is required in terms of section 96(1)(e) of the Act. The key aim of an integrated management system is to ensure that all the departments communicate effectively through a central location or server so as to track children through the child justice system. Since the establishment of this system is a legislative requirement, failure to do so amounts to a failure to implement the Act, and gives rise to the kind of problems discussed above.

It is current practice that the responsible departments collect statistics physically (by way of registers) and report them using Microsoft Excel sheets. Each department does this as and when children come into contact with the child justice system in their department. For example, the DJCD starts recording the details of children once they appear before a preliminary inquiry, while the Department of Social Development only keeps records of children who have been assessed. This creates room for inaccuracies and discrepancies to creep into the reporting process. Departments are aware of the problem, as it is an issue that has been on the agenda of the ISCCJ for some time. It appears that the only long-term solution to solve this problem would be to prioritise the implementation of an integrated management system.

In the meantime, in the absence of an integrated management system, greater collaboration between departments and government institutions at provincial and magisterial district levels could go some way to addressing the problem. The provincial Child Justice Forums should consider the creation of case review panels at magisterial district level to track every child through the child justice system. These case review panels should consist of dedicated staff of each department and government institution, together with the necessary service providers. Such case review

panels would be better equipped (than the current system of collecting statistics) to record every child that enters the system, and to report findings to the provincial Child Justice Forums. The provincial forums could then provide the data to the ISCCJ. This would ensure a higher level of accuracy in the statistics and perhaps also offer more detail about the treatment of children in the justice system.

CONCLUSION

To return to the question posed in the title of this article: 'Is the Act working for children?' The answer is ambiguous. On the basis of the data provided in the annual report it is impossible to reach a definitive conclusion. While a year may be too short a time to expect full implementation of the Act, a great deal can be done to improve on reporting. The one objective of the Act that appears to be achieved is the promotion of detention as a last resort.

With regard to oversight, the Act mandates Parliament to monitor and oversee the implementation of the Act by the responsible departments.³³ Based on the response of Parliament to the first annual report it would appear that Portfolio Committees are taking this responsibility seriously. However, querying a bad report is not enough. The impact of their oversight will have to be seen in improvements of the implementation of the Act. Ensuring that sufficient funds are made available to the DJCD may be parliament's first obligation.



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NOTES

1. The author wishes to thank Prof Jacqui Gallinetti and Dr Chandré Gould for useful comments on previous drafts. The author also wishes to acknowledge the financial support from the European Union funded this article. The views expressed in this article are solely those of the author and do not reflect the official views of the European Union.
2. Act 75 of 2008.
3. The objects of the Act are stipulated in section 2.
4. It is not within the scope of this article to explain the details of the new child justice procedure. See: J

- Gallinetti, *Getting to know the Child Justice Act*, 2009, 65, for a diagram of the child justice system.
<http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf>. (Accessed 19 October 2011).
5. For a more comprehensive account of the proceedings in parliament, please download the minutes at <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
 6. See <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
 7. C Barberton and S Wilson, *Recosting the Child Justice Bill*, 2001, page 21. This report can be downloaded at <http://www.childjustice.org.za/downloads/RecostingReport.pdf>. (Accessed 19 October 2011).
 8. See <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
 9. Inter-sectoral Committee on Child Justice, *Annual Report on the Implementation of the Child Justice Act, 2008* (Act No 75 of 2008), 2011, 21.
 10. *Ibid*, 24.
 11. *Ibid*.
 12. See C Badenhorst, Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes, *OSF Criminal Justice Initiative Occasional Paper Series* 10, 2011, 15, <http://www.childjustice.org.za/publications/ImplementationCJA.pdf>. (Accessed 26 September 2011).
 13. *Ibid*.
 14. Act 108 of 1996.
 15. See section 28(1)(g).
 16. Badenhorst, Overview of the Implementation of the Child Justice Act, 16.
 17. C Ballard, The situation of children in prison after the implementation of the Child Justice Act: Has Anything Changed? *Article 40*, 13(1) (2011), 2, 3 and 4.
 18. S Waterhouse, Parliament reviews the implementation of the Child Justice Act, 13(2) *Article 40* (2011) 4.
 19. L Muntingh, Punishment and Deterrence: Don't expect prisons to reduce crime, *SACQ* 26, 2008, 3.
 20. Badenhorst, Overview of the Implementation of the Child Justice Act, 34.
 21. Inter-sectoral Committee on Child Justice, *Annual Report*, 46.
 22. *Ibid*, 25.
 23. See sections 34(1) and 41(3) of the Act. The Act divides offences into three schedules, of which schedule 1 consists of minor offences.
 24. A probation officer is better placed to decide whether a child should be diverted, based on the information divulged at an assessment. Therefore prosecutors would rather wait for such assessment and then divert in schedule 1 offences. An example of where it would not be in the best interest of the child to wait for an assessment, would be where the delay in ensuring that a child be assessed would take extremely long, which would amount to the charges still pending against a child for a long time.
 25. Inter-sectoral Committee on Child Justice, *Annual Report*, 33.
 26. *Ibid*, 27.
 27. In terms of section 9 of the Act, if a child is below the age of 10 years, the probation officer has to assess the child and make a referral of counselling, therapy or programme for such child to attend.
 28. Section 51 stipulates that the objectives of diversion are to: '(a) deal with a child outside the formal criminal justice system in appropriate cases; (b) encourage the child to be accountable for the harm caused by him or her; (c) meet the particular needs of the individual child; (d) promote the reintegration of the child into his or her family and community; (e) provide an opportunity to those affected by the harm to express their views on its impact on them; (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; (g) promote reconciliation between the child and the person or community affected by the harm caused by the child; (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system; (i) reduce the potential for re-offending; (j) prevent the child from having a criminal record; and (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.'
 29. This is a function of parliament mandated by section 8 of the Act. See also A Skelton and C Badenhorst, *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a review*, Child Justice Alliance, 2011, 21-26.
 30. See L Wakefield, The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's rights instruments? *Northern Ireland Legal Quarterly* 62(2) (2011), 171-3.
 31. United Nations Committee on the Rights of the Child General Comment No 10: Children's Rights in juvenile justice (2007) para. 32.
 32. The ISSCJ is a statutory body created in terms of section 94 with a purpose of ensuring inter-departmental collaboration on the implementation of the Act. Considering this body includes directors-general and national heads of the NPA and SAPS, an 'operational' ISSCJ was created to ensure that the departments communicate with each other. A mandate for this body was set up in the National Policy Framework to the Act. The operational ISSCJ meets monthly, instead of twice a year as required by section 95 of the Act, and also consists of NGOs.
 33. Section 96(3) of the Act.

PREVIOUS ISSUES



In SACQ 37 Leon Holtzhausen argues for a clearer definition of criminal justice-related social work so that social workers in this field can receive the necessary specialised skills and knowledge; Jameelah Omar claims that prisoners have a realisable right to rehabilitation in South African prisons; and Patrick Mutahi presents an innovative view of the role of criminal gangs in Kenya. This edition concludes with an interview by Chris Botha with Peter Tinsley, who offers an international perspective on police oversight.



In SACQ 36 David Bruce presents evidence that ordinary police members have, over the last few years, resorted to an ever more brutal style of policing. Johan Burger considers the effect that media coverage of police brutality and corruption has had on public faith in the institution, and calls for an urgent remedy. In addition, Andrew Faull interviews Francois Beukman, a lawyer and politician who has made his way to the head of the police oversight body responsible, at least in the minds of the public, 'for cleaning up' behind the police. Also in this edition, Sonja Loots and Dap Louw present the findings of research to establish the extent of anti-social psychological disorders amongst adult male offenders in South African prisons; and Clifford Shearing and Julie Berg ponder the on-going challenge of preventing crime.

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