



OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

**REPORT ON THE OSF-SA ROUNDTABLE DISCUSSION ON THE HUMAN RIGHTS
AND PRACTICAL IMPLICATIONS OF THE PROPOSED AMENDMENTS TO
SECTION 49 OF THE CRIMINAL PROCEDURE ACT**

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Introduction

Preventing and combating crime, whether violent or not, requires proper conceptualisation and implementation of tested and effective policies. This being said, the challenges faced by law enforcement officers in combating violent crime are enormous. In many instances, they lose their lives or sustain life-threatening injuries while attempting to arrest suspects. The 2008/2009 Annual Report of the South African Police Service (SAPS) shows that between 1 April 2008 and 31 March 2009 109 SAPS members died while on duty.

Against this backdrop, in 2009 senior government officials including the President, the National Police Commissioner and the Deputy Minister of Police made public statements that appeared to encourage the use of lethal force in fighting crime. They also made clear their intention to amend section 49 of the Criminal Procedure Act to clarify the legal position on the use of deadly force in arresting suspects. Denying that this was an attempt to broaden the set of circumstances in which such force might be used, President Jacob Zuma, while addressing Parliament in November 2009 said that ‘no one can refute the fact that our law enforcement forces are confronted by perilous situations as they seek to ensure the safety of the nation.’ He, however, added that ‘at no point in [his] address to the Station Commissioners did [he] give police licence to shoot suspects in circumstances other than those provided for by law.’ The President added that ‘it is the duty of the police to protect all people against injury or loss of life. The Criminal Procedure Act deals with the use of force in effecting arrest. In our view, where the law still exhibits

gaps that negatively impact on the ability of the police to perform their work effectively, then such gaps in the law must be addressed without delay.’¹

In March 2010, Parliament published the Criminal Procedure Amendment Bill (2010) and called for comments on its content. The Bill, amongst other things, inserts the definition of deadly force as ‘force that is intended or likely to cause death or serious bodily harm’; excludes the fact that deadly force can only be used when it is immediately necessary for the purpose of protecting the arrestor; allows deadly force to be used when the ‘suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.’ The Memorandum to the Bill states that the proposed amendments were inspired by the 2002 *Walter’s* judgement of the Constitutional Court.

In the aftermath of the publication of the Bill, some experts questioned the constitutionality of the proposed amendments and others argued that if enacted, the amendments will have far reaching human rights implications. Others argued that the proposed amendments clarify the circumstances in which the police are allowed to use deadly force. Others took the opposite view arguing that the proposed amendments are less clear and leave many loopholes that will sanction the police to use force where it would otherwise not be warranted.

In light of the above, the CJI hosted a roundtable discussion and debated a range of issues around the human rights and practical implications of the proposed amendments. It is hoped that these deliberations will be helpful in informing the oral and written submissions to Parliament on the proposed amendments.

Below are highlights of the presentations and discussions on the issues:

¹ See Questions for Oral Reply by President Jacob Zuma, 12 November 2009 available at <http://www.pmg.org.za/node/19382> (last visited 9 July 2010).

**The (un)constitutionality of the proposed amendments: Professor Pierre de Vos,
Faculty of Law, University of Cape Town**

Prof de Vos based his discussion on his written submission to the Portfolio Committee on Justice and Constitutional Development early in 2010. He discussed the history of section 49 of the Criminal Procedure Act since 1955. He argued that the proposed amendments are unconstitutional because they are inconsistent with the principles laid down by the Constitutional Court in the *Walters* judgment. These principles are: (i) One may not shoot a fleeing suspect merely because he or she might get away; (ii) One may shoot and even kill a suspect (in other words, use deadly force) when one has reasonable grounds for believing that the suspect poses an immediate threat of serious bodily harm to anyone; (iii) One may shoot a suspect reasonably believed to have committed a crime involving the infliction or threatened infliction of bodily harm even where such a suspect do not pose an immediate threat of serious bodily harm to anyone, but only if it will be impossible to arrest the suspect at a later stage and then one can use only the least degree of force necessary to affect the arrest; and (iv) Legislation that provides a blanket power to arrestors to use deadly force against anyone suspected of committing a crime involving serious threat of bodily harm where suspects flee or resist arrest would thus not pass constitutional muster.

He added that the proposed removal of the word *immediately* in section 49(1)² is likely to sanction the killing of a suspect to address a future menace. In his opinion, this would weaken the common law principle on self-defence and would create a conducive environment for vigilantism by all arrestors – including private persons. The proposed insertion of a new section 49(2)³ would allow for the use of deadly force if someone is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. Even if the suspect poses no threat to anyone (now or in the future) and even where it would be possible to arrest the suspect at

² See introduction above.

³ See introduction above.

a future time, deadly force may be used to affect the arrest immediately. This is not in line with the general principles enunciated by the Constitutional Court in the Walters judgment as it fails to strike the constitutional balance between the rights of the individual and the interests of the community as required by the Court. He concluded that the proposed amendments infringe on the following rights: the right to dignity; the right to life; and the right to bodily integrity. He also argued that these violations do not constitute a justifiable limitation as required under section 36 of the Constitution as they fail to balance these rights of a suspect against the interest of the community as required by the Constitutional Court.

The human rights implications of the proposed amendments (Judge Johann Kriegler, Former justice of the Constitutional Court)

Judge Kriegler⁴ discussed the human rights implications of the proposed amendments. He highlighted the fact that in practice there is a close relationship between the human rights implications of the proposed amendments on one hand and the constitutional implications of the proposed amendments on the other. He said that section 49 of the CPA has to be read in conjunction with Chapter 5 of the CPA which deals with arresting a suspect. He was in agreement with Prof. De Vos that the proposed amendments sanctioned the violation of the rights to dignity, to life and to bodily integrity. He said that expecting an ordinary police officer to understand the 'reasonableness' test in the proposed amendment was unrealistic. This is because the test shifts depending on characteristics of each individual (arrestor) and the situation in which he/she used deadly force. The proposed amendments broaden the circumstances under which the police and private individuals will be allowed to use lethal force. Section 49 allows the police to use force even in cases where the individual has not committed or is not suspected of committing a violent or serious crime. He concluded that the proposed amendments conflate the issue of the use of force with self-defence yet these two situations should be and are governed by different legal regimes with the former governed by the Criminal Procedure Act and the latter by common law.

⁴ Judge Kriegler was the author of the unanimous *Walter* judgement.

The participants while commenting on both Prof de Vos and Judge Kriegler's presentations suggested and/or discussed the following:

- The need was identified for the Criminal Procedure Act to have different sections, one dealing with the use of force and another with self-defence. It was generally agreed that section 49 law in its present form does not clearly differentiate the circumstances under which a police officer is justified to use deadly force to effect an arrest on the one hand and the circumstances under which he/she is allowed to resort to lethal force to defend himself. According to many participants that lacuna in the law could explain why some officers use lethal force unnecessarily.
- Society has a legitimate expectation that the government will arrest and bring to book those who break the law but the arrest and prosecution should be done in a manner consistent with the Constitution. This requires, amongst other things, SAPS and civil society to work together to inculcate a culture of respect for human rights among all SAPS members.
- South Africa is a violent society but laws should not be enacted to perpetuate violence. Broadening the circumstances under which the police are allowed to use lethal force risks being interpreted by some trigger-happy SAPS members as a licence to use such force even in situations where they would have resorted to other means to effect an arrest or defend themselves.
- Police officers who use deadly force are often traumatised after the incident and SAPS lacks efficient and effective counselling services for such officers; and
- Section 49 of the Criminal Procedure Act is silent on the issue of whether lethal force could also be used in arresting children. Oral submissions to Parliament should also highlight this issue.

The place for the use of lethal force in democratic policing: Mr. Gareth Newham, Programme Head, Crime and Justice Programme, Institute for Security Studies

Mr Newham started his presentation by highlighting the fact that one of the characteristics of statehood is the government's ability, whether the government is democratic or not, to use force, deadly or otherwise, to maintain law and order. This, according to him, is the background against which the proposed amendments to section 49 should be viewed. He said that the use of force is a defining characteristic of the police although the police in normal circumstances use force as a measure of last resort. Although the police are empowered to use force, the key issue is that the use of force has to be justifiable, reasonable and proportional. These principles should come into play when establishing the limitations to its use in a democracy. One of the issues that police officers have to consider is whether the suspect cannot be arrested without using deadly force. Another issue is whether the arrestor's life would be in danger should he/she not resort to the use of force to arrest the suspect.

In a democracy, the government should have laws and policies that clearly stipulate the circumstances under which the police can use deadly force. Such laws and policies should be enacted in consultation with civil society. Decisions on the use of force need to be taken through a consultative and transparent process, ideally where as much information about the possible consequences of the decision is made known to both society and the decision-makers. Civil society organisations that are involved in defending and promoting human rights and freedoms, the Constitution, and the rule of law, have a duty to engage with this process – of ensuring that laws and policies that regulate the use of force are implemented in a manner that promotes not only the purpose and spirit of the Constitution but in a manner that is not contrary to South Africa's regional and international human rights obligations.

Newham added that the proposed amendments to section 49 could be indicative of the government's determination to reassure South Africans that it is doing whatever it can to

fight crime. According to him, statistics show that most people think that crime has increased (53% 2003 and 57% in 2007); most people feel that they are not safe (1998 – 25% felt very unsafe, 2007 62% felt very unsafe); people’s satisfaction with the police has declined (in 2003 52% said policing were doing a “good job” and 2007 49% said so). Those who did not know increased from 3 to 13%. He also indicated that surveys have concluded that most South Africans also support the death penalty. He recommended that apart from the human rights and practical implications of the proposed amendments, civil society should also be looking at the issues of policy making, police leadership and management and external systems of accountability and how they are likely to affect the circumstances under which the police use force.

The use of lethal force: what statistics tell us? (Mr. David Bruce, Senior Researcher, Criminal Justice Programme, Centre for the Study of Violence and Reconciliation)

David Bruce’s presentation was based on the Independent Complaints Directorate’s (ICD) statistics on death as a result of police action (use of lethal force) since the ICD opened in 1997. Statistics show that deaths as a result of police action include shootings (90+%), vehicle accidents (9%); and fatal assaults/torture (1%). The year 2008 – 2009 saw the number of deaths as a result of police action reaching 568. This was the highest number since 1997 and the fourth highest ever recorded in South African history. Statistics show that the South African Police Service is responsible for 97.7% of the deaths as a result of police action and the metropolitan police for 2.3%. The circumstances under which those deaths have occurred reveal that 82% were crime suspects, 10% died in domestic violence and other related cases, 5% as a result of firearm accidents (such as negligent handling), and 3% were innocent bystanders. However, it is not clear whether the ICD applies a consistent formula in categorising the victims. In the last two years, 92% of the victims have been male. KwaZulu-Natal has recorded the highest number of figures of deaths as a result of police custody in the since 1997.

In Bruce’s opinion, the proposed amendments to section 49 are unclear and likely to result in the increased use of lethal force. He suggested the following as some of the

measures that could be adopted to ensure that the use of lethal force is properly monitored:

- Legislation relating to the use of lethal force should be as clear as possible to minimise the possibility of being misconstrued as allowing the use of force in circumstances where it does not; police leadership should desist from making rhetorical and inflammatory statements that could be interpreted as allowing the police to use lethal force even when such force should not be used;
- The ICD should intensify its investigations of cases in which the police have used lethal force; and
- SAPS should implement ICD recommendations on the measures, including disciplinary measures that should be taken against the police officers that used force unjustifiably.

The practical implications for the proposed amendments (Dr. Johan Burger, Senior Researcher, Crime and Justice Programme, Institute for Security Studies)

Dr. Burger expressed the view that the intended amendments will have a number of practical implications for the police. These include: the need for good communication and the need for additional training. He argued that given the fact that very few police officers understand the current legal position relating to the use of force and that training capacity within SAPS is inadequate, there are concerns about the police's ability to equip all its functional members with the necessary critical understanding of the proposed amendments. He added that the proposed amendments will broaden the circumstances under which the police will be allowed to use force and that it is important that the knowledge base of the police force is broadened so that they know exactly when such force can be used. Internal and external oversight structures should be strengthened to ensure that the police are accountable. In order to contextualise the presentation, he briefly outlined the following relevant information about SAPS: the current capacity is about 193 000 (of which approximately 160 000 are functional members); there are 1116

police stations countrywide; SAPS has four training colleges equipped for firearm training (he however said that there could be more). He argued that should the proposed amendments be passed, the training of station-based members on the broadened circumstances under which lethal force could be used will be time consuming and unlikely to be effective because there is no training capacity at the station level. In his opinion, the manner in which SAPS headquarters communicates policies and decisions to stations, through circulars, standing orders and operational instructions, is very unlikely to address all the important issues raised in the proposed amendments. Additionally, many officers will find it difficult to comprehend the changes brought about by the amendments.

Dr Burger recommended the following as some of the measures that could be implemented to minimise cases in which the police could use force unjustifiably:

- Capacitating the SAPS Training Division, especially in the provinces, to enable adequate training to police officials at station level;
- Ensuring that proper command and control systems are in place at police stations and at other offices and units within the police;
- Strengthening the police's internal inspectorate (at national and provincial levels) to be able to conduct regular inspections to ensure that circulars, standing orders and operational instructions are adhered to; and
- Enabling the ICD to effectively perform its oversight functions to ensure that every incident of the use of deadly force and all forms of serious misconduct by the police are properly investigated and where appropriate that the necessary steps, including criminal prosecution, are taken.

Some of the issues discussed or highlighted after the above three presentations are:

- Civil society should establish the likely financial implications of the proposed amendments and bring the same to the attention of Parliament during the oral submissions on the Bill.

- The fact that the Department of Justice and Constitutional Development did not sufficiently consult civil society during the drafting process of the proposed amendments should be highlighted during the oral parliamentary submissions.
- The use of deadly force does not mean that in all cases the victims will die. It is thus wrong for people to suggest that the proposed amendments authorise police officers to ‘shoot to kill.’