Our prisons are grossly overcrowded. Currently 184,806 prisoners are crammed into cells designed to hold 114,747 – which means the prisons are 70,000 above capacity. This leads to awful conditions in numerous prisons. Human rights deprivations are commonplace, and instead of functioning as rehabilitation centres, the overcrowding turns our prisons into institutions that promote crime.

Overcrowding is due to the huge prison population: four out of every 1,000 South Africans are in prison. When it comes to our use of incarceration, we are one of the worst countries in the world, and the worst in Africa.2

Less prisoners essential
Our immediate aim must be to reduce our total prison population from its current level of 184,806 prisoners to about 120,000. That will still keep us at almost double the world average, but will bring some relief.

During the period 1995 to 2000 the growth in the number of prisoners was caused mainly by the explosion in the number of awaiting-trial prisoners which increased from 24,265 in January 1995 to 63,964 in April 2000. The number awaiting trial has decreased since 2000 (Figure 1), owing to the concerted efforts of inter alia the police, prosecutors, magistrates, judges, legal aid lawyers, heads of prison and the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) with its diversion programmes.

The decline in the number of awaiting-trial prisoners from its level of 63,964 in 2000 to the latest figure of 48,345 in July 2004, has brought some relief in prison conditions. The praiseworthy efforts to reduce the number of awaiting-trial prisoners are however nullified by the increase in the sentenced prisoner population.

The growth in sentenced prisoners is being fuelled by a dramatic increase in the length of prison terms. The effects of the minimum sentence legislation are now the main contributor to the continued increase of prisoner numbers.
The Criminal Law Amendment Act 105 of 1997 introduced minimum sentences of 5, 7, 10, 15, 20, 25 years and life for a range of offences including categories of theft, corruption, drug dealing, assault, rape and murder. It obliged a magistrate and judge to impose not less than the prescribed minimum sentence unless substantial and compelling circumstances justified a lesser sentence.

Because it was regarded as an emergency measure to combat high crime levels, the minimum sentence provisions ceased to have effect two years after their commencement on 1 May 1998 unless extended by the president with the concurrence of parliament. The provisions have since been extended to 30 April 2005.

The effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences. It has resulted in a major shift in the length of prison terms as indicated in Figures 2 and 3. In January 1998 (prior to the implementation of minimum sentencing) only 24% of the sentenced prison population was serving a prison term of longer than ten years. This has since increased to 48%.
Previous release policies
The Correctional Services Act 8 of 1959 provided that a prisoner could be placed on parole after serving half his sentence, less credits earned. The general rule was that prisoners could be released on parole after serving one third of their sentences. The decision would be made by the commissioner of correctional services on recommendation of a parole board.

In the case of prisoners serving life sentences, parole could be considered after they had served ten years. A parole board would report to the National Advisory Council who would make a recommendation to the minister of correctional services whether to place the prisoner on parole. In 1996/97 the policy changed and life prisoners, although they could still be released after 15 years, were generally considered for parole only after serving 20 years.

The Correctional Services Act 111 of 1998
The Correctional Services Act 111 of 1998 (the Act) was passed by parliament in November 1998 but its date of commencement still had to be proclaimed (s138 of the Act). On 19 February 1999, sections 1, 83–95, 97, 103–130, 134–136 and 138 were put into operation. Sections 83 and 84 established the National Council for Correctional Services. Sections 85–94 established the Judicial Inspectorate. Sections 103–112 dealt with Joint Venture Prisons. Sections 113–129 dealt with offences.

Not retrospective
Section 136 provides that the release of prisoners already serving sentences shall not be affected by the Act, and would be dealt with in terms of the Correctional Services Act 8 of 1959 and the policy and guidelines formerly applied. Prisoners already serving life sentences are to be considered for parole after 20 years.

Sections 5 and 3 came into operation on 1 July 1999 and 25 February 2000 respectively. In 2001 the Act was amended. On 31 July 2004 sections 2, 4, 6–49, 96–102 and 131–133 came into operation. They set out in detail the manner in which prisoners should be held and treated. Further detail is contained in the regulations which also took effect on 31 July 2004.

New release provisions
On 1 October 2004 the remaining sections of the Act, i.e. sections 50–82 came into operation. They deal with community corrections (ss50–72) and release from prison and placement under correctional supervision and on day parole and parole (ss73–82).

According to these provisions, a prisoner will have to serve half of his sentence before consideration for parole (s73(6)(a)). A life prisoner will have to serve 25 years and may then be granted parole by the court on the recommendation of the Correctional Supervision and Parole Board (ss73(6)(b)(iv),75(1)(c),78(1)).

A prisoner sentenced in terms of the minimum sentence legislation will have to serve four fifths of his sentence or 25 years before consideration for parole (s 73(6)(b)(v)).

Accordingly, the earliest that parole can be considered has moved from one third to one half, and for many prisoners to four fifths of their sentences. For those serving life, the length of time before a parole hearing went up from ten to 20 years, and now 25 years. In addition, the court must now make the decision to grant parole rather than the National Council for Correctional Services.

An impossible state of overcrowding
Implementation of the new release provisions will lead to an even more intolerable overcrowding situation. The relevant sections of the Act mean that most prisoners will now need to serve half rather than a third of their sentences. For those convicted to life, the time that they must spend behind bars before being considered for parole has increased from ten to 20 and now 25 years. And by requiring the courts to decide on releases – which means further delays – these provisions will inevitably lead to many more prisoners in our already overcrowded prisons.

Already the trend for sentenced prisoners shows a worrying increase. The latest available figures
(31 July 2004) indicate that there are 5,334 prisoners serving life sentences compared to an average of about 4,250 in 2003. Those serving terms of longer than ten years now stands at 46,743 compared to an average of about 35,250 in 2003 (Figure 4).

The vengeful attitude implied by these provisions is disturbing. The perception in 1997 that crime was out of control and that harsh punishments were called for to deter would-be offenders, led to the minimum sentence legislation and these provisions in the Act. With the incidence of crime considerably down and government’s present emphasis on rehabilitation of offenders, several changes could ease prison overcrowding. These are outlined below.

Minimum sentence legislation should not be extended
The minimum sentence legislation should not be extended beyond 30 April 2005 for the following reasons:
• The legislation was brought in as a temporary measure because of the perception that crime was getting out of hand and the belief that the remedy lay in harsh sentencing. The latest figures produced by the South African Police Service (SAPS) indicate a considerable reduction in crime and there is accordingly no justification for extending the legislation.
• The increase in the number of prisoners due to the minimum sentence legislation has made our prisons terribly overcrowded and the situation is worsening by the day. In numerous prisons the conditions of detention are truly awful and in clear breach of our Constitution and the requirements of Act 111 of 1998 and the regulations.
• The harsh sentences display a vengeful, uncaring and unforgiving attitude completely contrary to our famed national trait of understanding and forgiveness.
• There is no evidence that the increase in length of sentences has had a deterrent effect on would-be offenders. It is the certainty of detection and punishment, not the severity of the punishment that is the real deterrent.a
• Long sentences are not only failing to reduce crime, but are also causing more crime. The overcrowding precludes proper rehabilitation and turns prisons instead into places where criminality is nurtured.
• Long sentences also make reintegration back into the community more difficult as contact with families tends to be lost.
• Our huge prison population has turned us into one of the worst countries in the world when it

![Figure 4: Growth in prison population](Source: DCS, 2004)
comes to incarceration of offenders.

- Prescribing minimum sentences has the effect of
generalising punishment instead of
individualising it as is proper.
- The effect of minimum sentences is to
undermine the discretion of the courts and to
create the perception that judges and magistrates
lack the ability to arrive at appropriate sentences
on their own.
- The legislation is creating inordinate delays in
the completion of cases including lengthy
periods between conviction in regional courts
and sentence in high courts.
- It is preferable for the same court to conduct the
trial and impose the sentence as it is already
conversant with the facts concerning the offence
which might affect sentence.
- The cost of imprisoning more and more young
men (60% of our prisoners are men under the
age of 30) is tremendous. Such monies can
surely be better spent on uplifting communities
and preventing crime.

Amend Correctional Services Act 111 of 1998

The Act should be amended by:

- Deleting the provision for the serving of half the
sentence before consideration for parole
(preferably leaving it to the department of
correctional services to regulate as before).
- Deleting the 25 year period before consideration
for parole of those serving life imprisonment
(preferably leaving it to the National Council for
Correctional Services to regulate as before).
- Deleting the requirement that a court should
consider parole for life prisoners and restoring
the National Council for Correctional Services
as the appropriate body to do so.
- Deleting the four fifths requirement for those
sentenced in terms of the minimum sentence
legislation.

Endnotes

1 Figures as at 31 July 2004 from the department of
correctional services (DCS).
2 South Africa has 184,806 prisoners in a total population
of 46.59m (mid 2004 estimates from Stats SA/SAIRR).
See also International Centre for Prison Studies, World
Prison Brief – Highest Prison Population Rates –
September 2003.
3 Section 65(4)(a).
4 D Van Zyl Smit, SA Prison Law and Practice, 1992,
p 362.
5 Ibid, p 379.
6 Section 65(5).
7 The minister appoints the National Council which
consists of two judges, a regional magistrate, a director
of public prosecutions, two members of DCS, a
member of SAPS, a member of the department of social
development, two persons with special knowledge of
the correctional system and four or more
representatives of the public.
8 “While punishment does have a deterrent effect, it is
the certainty of punishment rather than the severity of
the sentence that is likely to have the greatest deterrent
impact. There is certainly no evidence, empirical or
even anecdotal, to suggest that increasing sentences
from, say, six to 11 years for rape or robbery deters
rapists or robbers generally, or even discourages them
individually from committing a crime that otherwise
they would not have risked.” Prof D van Zyl Smit in
Justice gained? Crime and Crime Control in South
Africa’s Transition, Crime and Crime Control in South
Africa’s Transition, UCT Press, Cape Town, 2004,
p 248.
The transformation of the South African public sector, the criminal justice system, and specifically the police, is critical to the consolidation of democracy in the country. Good governance demands that a sound judicial system operates in an environment where services are delivered in a manner that is transparent, accountable and responsive to citizen’s needs, while at the same time ensuring equal treatment and attention. To this end, the bodies responsible for civilian oversight of the police have an important contribution to make.

In an effort to promote transformation and strengthen democracy, the Open Society Foundation South Africa (OSF SA) and the Open Society Justice Initiative (OSJI) initiated a study into civilian oversight of policing in South Africa during 2003. The aim of the project was to find ways to strengthen civilian oversight. A lengthy consultation process resulted in five focus areas of police oversight being identified for research and evaluation:

• oversight of municipal policing;
• the role of community police forums (CPFIs) in civilian oversight;
• developing a set of indicators for democratic policing;
• establishing a website focusing on police oversight issues; and
• evaluating the secretariats for safety and security at both national and provincial levels.¹

Mechanisms for police oversight
In the early 1990s, the role of the police in a democratic South Africa was debated and reconstructed. A number of innovations were introduced to contribute to police transformation in the country. These included the formation of one South African Police Service (SAPS) from the 11 previously existing police agencies, and the establishment of mechanisms for civilian oversight of the police.

The three primary mechanisms of civilian oversight are community police forums at local level,
secretariats for safety and security at provincial and national levels, and the Independent Complaints Directorate (ICD) which also operates at provincial and national levels. All of these mechanisms are provided for in relevant pieces of legislation and/or the Constitution.

In addition to the provision of civilian oversight at local, provincial and national level, the legislation allows for oversight over policy, strategy and operations. The legislative provisions relating to CPFs permit them to encourage members of the public to work with the police to ensure improved relationships and trust between the police and the community. Similarly, the ICD was established as an independent body that would investigate cases of abuse of force and misconduct in relation to the public, and make policy recommendations in this regard. The role of the secretariats has been more focused on monitoring the SAPS and conducting oversight at the policy and strategic levels.

How necessary is civilian oversight?

In the tenth year of our democracy, it is apparent that civilian oversight is as necessary as ever. Recent high profile incidents of deaths resulting from police action include those of 17 year old Teboho Mkhonza in Harrismith,2 and Optel Rooi in the Northern Cape.3 The problem of police corruption was also recently highlighted on television in SABC’s Special Assignment, which exposed Johannesburg SAPS officers taking bribes from sex workers and their clients.4

According to the ICD statistics for 2003/04, recorded cases of deaths in police custody or as a result of police action increased by 35% when compared to the same period in 2002/03.5 In addition, there was a 47% increase in reports of serious criminal offences allegedly committed by SAPS members. Incidents of misconduct reported to the ICD also increased by 28% compared to the same period in 2002/03.6

The high profile cases noted above, as well as the many civil claims for damages awarded against the SAPS and increasing deaths in custody, highlight the importance of effective civilian oversight over the SAPS and the various municipal police departments. The question that needs to be posed is: has the SAPS transformed itself adequately and, by implication, has civilian oversight succeeded in its mandate to transform the SAPS?

A recent ISS evaluation of the national and provincial secretariats for safety and security indicates that these civilian oversight mechanisms have had, at best, mixed success and have made a limited contribution to police transformation. The findings of this research are presented below. However, in order to understand the issues, it is necessary to consider the changing context within which oversight has taken place.

The rationale behind establishing civilian oversight institutions was primarily to ensure that the police would never again be a law unto themselves as they were prior to 1994. Oversight structures would hold the police accountable for their actions, among other things, and instil good practices within the service generally. Initially, as far as the secretariats were concerned, civilian oversight centred on the appointment of civilians rather than people from the security apparatus. Many of the people staffing the secretariats had histories in non-governmental and community based organisations, which influenced the nature of the secretariats and how they went about their business.

The first national secretary for safety and security was appointed in 1995, and the national and provincial secretariats were established thereafter. The Constitution directs that a civilian secretariat for the police must be established under the cabinet member responsible for policing.7

The mandate of the secretariats is spelt out in the South African Police Services Act 68 of 1995 (‘the SAPS Act’).8 This includes advising the minister for safety and security in the exercise of his powers, and promoting democratic accountability and transparency in the police service. The secretariats were to ensure police compliance with transformation, and to do this they needed to overcome resistance from senior and lower ranking police members to change, and place transformation at the centre of the police service.
Essentially the task was to transform the police from a security force to a legitimate public-oriented police service. As a result, expectations about the secretariats’ role and impact on the police were high. These expectations were tempered by the realisation that transforming the SAPS was to be a long term project. Indeed, there was an assumption that civilian oversight would always be high on the agenda of the SAPS, the minister for safety and security, and the relevant provincial members of the executive council (MECs).

**Changing shape of the national secretariat**

The context within which civilian oversight bodies were established shaped their structure. The secretary for safety and security and the executive director of the ICD report to the minister for safety and security, as does the national commissioner of the SAPS. Therefore, the minister deals with diverse but competing interests, which has often resulted in the national secretariat being sidelined.

A major difference between the oversight bodies lies in the financial autonomy of the national secretariat and the ICD. Although both structures report to the minister, they are significantly different in terms of who controls the purse strings. The national commissioner of police is the accounting officer for the secretariat as stated in both the Public Service Act and the Public Finance Management Act. By contrast, the executive director of the ICD is the accounting officer for that organisation, giving it greater independence. The ICD is therefore believed to have, and indeed does have, a greater degree of autonomy and impact in the execution of its functions than the secretariat.

The functions of the national secretariat are listed in s3(1) and s3(2) of the SAPS Act. In the first five years of the national secretariat’s existence, it played a prominent role in formulating policy and overseeing its implementation. The national secretariat was then well staffed, equally well resourced and politically supported. Moreover, regular meetings took place between the leadership at the time: the minister for safety and security, Sydney Mufamadi, the national police commissioner, George Fivaz and Azhar Cachalia, the secretary for safety and security.

Civilian oversight could be said to have taken its rightful place in shaping safety and security issues. It was during this period that important policy documents such as the National Crime Prevention Strategy (NCPS) and the White Paper on Safety and Security were developed and adopted.

This state of affairs was dramatically overturned after the national elections in 1999 when a new minister for safety and security, Steve Tshwete, was appointed. A few months later, Azhar Cachalia vacated his post and slowly but surely the capacity and influence of the national secretariat diminished. The reduced status was reflected in the downgrading of the national secretary’s post from director general to deputy director general. Moreover, the secretariat’s role in respect of formulating policing policy was substantially weakened.

Other important developments included naming the SAPS national commissioner as the secretariat’s accounting officer, thereby effectively placing the secretariat in a subservient position. The social crime prevention capacity of the secretariat was also taken away and placed under the auspices of the SAPS.

**Structure of the provincial secretariats**

In contrast to the national secretariat, the provincial secretariats are autonomous bodies answerable to the provincial executive and independent of the national secretariat. Some of the provincial structures are well funded, with budgets and staff complements varying from one province to another. The Western Cape Department of Community Safety, for example, has a budget of R151,436,000 for 2004/05, while the Northern Cape’s budget is R11,997,000.

Although the White Paper for Safety and Security has had a great deal of influence over their structure - in particular by suggesting the establishment of directorates dedicated to social crime prevention - each of the provincial secretariats has a different configuration. They nevertheless broadly carry out the same type of work, including policy monitoring, responding to service delivery complaints, and conducting crime awareness campaigns in their provinces.
While a hierarchy is evident between the SAPS and the secretariat at national level, the same does not apply at provincial level. Relationships vary widely at provincial level and the unevenness in how the provincial secretariats are structured is also apparent in their relationship with the SAPS.

In Gauteng, for example, the secretariat has entrenched a system of quarterly reviews with the SAPS. These review sessions are organised by the provincial secretariat and attended by its senior managers, the MEC, the SAPS provincial and area commissioners as well as the regional director of the ICD. The reviews take place over two days during which SAPS’ progress is measured against set objectives. Practices such as these seem to be dependent on the personalities of the MECs, and the relationships that exist or are developed between MECs and SAPS provincial leadership.

In contrast to the Gauteng example, the Northern Cape secretariat only recently managed to have the SAPS accompany them when they reported to the provincial legislature. The Constitution requires the SAPS to report annually to the provincial legislature on policing in the province. In short, the evaluation highlighted the divergent experiences of civilian oversight, and the rapidity of change in what constitutes civilian oversight of the police. The research found that despite the legislative requirements and policy frameworks, the outputs of these agencies vary from location to location. Nevertheless, respondents from each of the secretariats felt that they played a key role in monitoring police service delivery and transformation, as well as issues of representivity, resource allocation, and performance.

Apart from their monitoring activities, the provincial secretariats also coordinated various crime prevention meetings and projects at provincial and, in some cases, local level. However, the research found that these practices were largely uneven and dependent on the personalities of the MECs and the heads of the departments involved.

All the secretariats appear to suffer from a lack of national coordination and vision. The relationships between the national and provincial secretariats, between the secretariats in each province, and with the SAPS and ICD, remain unstructured. Furthermore, the lack of secretariat influence at police station level was a particular concern to the respondents. The difficulties experienced by provincial secretariats in trying to exert influence over police counterparts in their province who take direction and orders from their national leadership, should not be underestimated.

In sum, the evaluation concluded that the secretariats have functioned less as civilian oversight mechanisms than as structures providing ad hoc monitoring of various aspects of policing, policy advice, and coordination for crime prevention projects. This was tacitly acknowledged by the respondents, who clearly indicated that the current policing priorities and context should form the backdrop to a strategic review of the secretariat’s raison d’etre, as well as a possible realignment of the secretariats’ role and function. This process would also allow for the position and powers of the national secretary to be assessed and amended if necessary.

How have the secretariat’s fared?
The evaluation of the secretariats was conducted over a five-month period during 2004. The research was qualitative in nature, using face-to-face interviews and focus group discussions with individuals in the provincial secretariats. Those in the secretariats’ monitoring and evaluation directorates were singled out for interviews because theirs is the core business of the secretariat.

In sum, 32 individuals were interviewed and four focus groups with a total of 15 individuals per group, were conducted. Unfortunately a request to interview SAPS provincial commissioners was turned down, as were repeated requests to interview the national secretary and his staff. The reluctance of the SAPS and national secretary to contribute to the study, although unfortunate, largely confirms what the available respondents indicated with regard to problems of transparency and inclusiveness on the part of SAPS.

In contrast to the Gauteng example, the Northern Cape secretariat only recently managed to have the SAPS accompany them when they reported to the provincial legislature. The Constitution requires the SAPS to report annually to the provincial legislature on policing in the province.
Recommendations
The study’s recommendations relate to both the role and functioning of the secretariats at national and provincial levels. These include the following:

Existing provisions in legislation must be exploited Currently, the secretariats are not using the opportunities provided for in legislation to place civilian oversight firmly on the SAPS’ agenda. A process should be undertaken as soon as possible to identify gaps in existing practice, so as to give direction to the legislative review process.

The current role, function and structure of the secretariats should be revisited
The policing priorities and context should inform a strategic process which would include a reassessment of the secretariat’s raison d’etre, as well as a possible realignment of the secretariats’ role and function. This process should also allow for the position and powers of the national secretary to be assessed and amended if necessary.

Sharpening the national secretariat’s role
The national secretariat should remain a small but effective policy advice think tank for the minister of safety and security and for the provincial secretariats. The national secretariat needs to regain its former strategic role in policy advice to the minister.

The same training on policy analysis and implementation is needed for all secretariats
It is apparent that the capacity for policy analysis, monitoring and evaluation is severely lacking in some secretariats. In addition, the interpretation of these roles varies in some instances.

Collaborative planning and strategising between the secretariats and with the ICD
The national and provincial secretariats should have collaborative strategic planning sessions which include the ICD when appropriate. This will assist to create a common understanding of needs and priorities, and to ensure uniformity in approach where necessary and appropriate.

Sharing of good practice between the secretariats
Currently there is little formal or structured collaboration between the secretariats as far as the sharing of good practice is concerned.

Formalising of processes to ensure good working relations
There is currently a reliance on personal goodwill and interpersonal relationships for the creation of good working relationships between each of the secretariats, and between the secretariats and the ICD and SAPS in the provinces. Structures need to be set in place to formalise and guarantee that cooperation occurs.

Contribute to policy and legislative review processes
While the secretariats have, to varying degrees, implemented the provisions in the White Paper and NCPS, the time is right to revisit the understanding of the term ‘civilian oversight’ in relation to the secretariats and their work.

A future for the secretariats?
Considering that relationships between the police and the communities they serve have improved since 1994, and that the SAPS has undergone significant transformation, the question is whether there remains a need for civilian oversight in the form of the secretariats. While the issue is debatable, the fact is that although the political environment has changed substantially since 1994, the policing and social environments still demand that clear and effective mechanisms for police oversight are in place.

The real and perceived high levels of crime in South Africa result in a great deal of pressure on the police to perform. The proliferation of firearms and the high levels of violent crime exacerbate the situation, adding to the risk of police misconduct or improper use of force. This may be one explanation for the increase in the recorded number of cases of police misconduct. The trend may also be attributed to improved knowledge among the public of their rights in this regard. What is certain is the need for more effective oversight processes to ensure that such incidents are reduced, and that transformation of the SAPS is assisted through amendments to policy and practice where necessary.
Endnotes


4 SABC 3, Good girls, Bad cops, 28 September 2004.


6 Ibid.

7 See s208 Constitution.


9 See s7(3)(a) of the Public Service Act 1994 which refers to Schedule 1 and the Public Finance Management Act 1 of 1999.

10 The budget for the secretariats is contained within the budget of the Departments of Community Safety and Safety and Liaison respectively. It is difficult to make adequate comparisons between the Departments because their structures differ and some, like the Western Cape, have traffic and security as components of the Department. The switch to the word department is for ease of reference. Strictly speaking, according to the SAPS Act they should be called secretariats, but the Public Service Act and the Public Finance Management Act refer to the secretariats as Departments of Safety and Security.

11 See s207(5) of the Constitution.
For over a decade the taxi industry has been heavily embroiled in conflicts that have claimed thousands of lives. At the heart of the problem is the persistent struggle over control of this multi-billion rand industry that carries over 60% of South Africa’s commuters. Given its troubled and often violent history, and its substantial share of the commuter market, clearer government commitment is needed in the form of adequate investment and implementation of a comprehensive and participatory recapitalisation programme.

One of the most pressing transport-related challenges facing government is to establish a taxi industry that is safe and reliable; an industry that will contribute to its own growth and to that of the country’s economy. To this end, the taxi recapitalisation programme initiated in 1999 was an important intervention. However, the process appears to have run aground.

Earlier this year, a Department of Transport official was quoted in the media as saying that government might scrap recapitalisation.1 Later during the year, the MEC for safety and transport in KwaZulu-Natal announced a proposal to scrap both the bidding process for the new vehicles and the electronic management system.2 In addition, the transport parliamentary portfolio committee has recently raised questions around the affordability of the proposed vehicles, and the committee chair believes the process must be revisited.3

Pitted against this apparent reticence to restructure the industry, the South African National Taxi Council (Santaco) has warned parliament about the risks of further delays in the recapitalisation process.4 Recently the Gauteng Taxi Council (Gataco) staged a protest raising its concerns about the ongoing delays.5

Indecisive policy directives and implementation delays are hazardous in this volatile industry, with its history of endemic violence and continuing instability. When the taxi industry emerged in the late 1980s it was viewed as the flagship of black entrepreneurship. But from the outset it was beset by violence. To create a niche, taxi operators initially had to defy apartheid machinations and political tensions. Then and now, operators have also had to deal with poor funding and chronic competition between operators. Indeed, taxi operators have battled for their “place in the sun”.6

At the heart of the problem is the persistent struggle over control of this multi-billion rand industry that carries over 60% of South Africa’s commuters. Given its troubled and often violent history, decisive policy direction from government in the form of a comprehensive regulatory framework

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A VIOLENT LEGACY
The taxi industry and government at loggerheads
(encompassing safety and security, as well as finance components) is necessary to prevent the taxi industry from degenerating further.

**Origins of the taxi industry**

The minibus taxi industry emerged in the wake of the apartheid government’s policy of economic deregulation, initiated in 1987. Prior to deregulation, black taxi operators had to defy apartheid laws and strict regulations that were prejudicial to blacks.

Transport regulations – chiefly embodied in the Motor Carrier Transportation Act of 1930 – stipulated that no transportation of goods or passengers was allowed without permission from a Local Road Transportation Board (LRTB). Obtaining a permit from the LRTB was all but impossible for black operators who, falling under the discriminatory influx control system, found it difficult to prove that they had a good formal employment record, had lived in the magisterial district as legally registered tenants for a number of years, and were in possession of a Daily Labourer’s Permit.

In effect, the system meant that over 90% of taxi permit applications by blacks were rejected. Under such circumstances, most black taxi operators operated illegally using private saloon vehicles as taxis.

Indeed, even when an applicant did manage to qualify for a taxi permit, the act only authorised the use of small cars (restricted to carrying four passengers) and there was a quota system allowing only a limited number of licences to be issued each year. As a result, and because alternative forms of public transport – mainly buses and trains – were inadequate and expensive, demand for taxis far outstripped supply.

For this reason, from the early 1980s onwards, taxi operators began using larger ‘kombi’ minibuses that could carry up to 15 passengers. Until formal deregulation in 1987, such taxis were illegal. Yet they were popular among black commuters because, unlike other public transport options, they:

- ran late-night services;
- travelled to out-of-the-way places;
- picked up commuters from, and dropped them back at, their homes;
- charged reasonable fares;
- made convenient stops on long distances; and
- cut down time spent in long queues at bus and train stations.

As the number of illegal kombi taxis began escalating, changes were occurring in the apartheid state that had a profound effect on the industry. As early as the 1970s, the government began to view its near-monopoly on public transportation, which had initially been utilised to protect and prop up the South African Transport Services (SATS), as an economic liability.

The 1977 Van Breda Commission of Inquiry into the Road Transportation Bill found that South Africa “had reached a stage of economic and industrial development which enabled it to move towards a freer competition in transportation”. The Commission’s findings reflected a neo-liberal shift in economic policy that resulted in generalised deregulation, commercialisation and privatisation, beginning in the late 1970s.

Within the commuter sector, the consumer and bus boycotts of the 1980s were viewed as further evidence of the imperative to deregulate transport. Such boycotts also had the unanticipated effect of increasing demand for alternative forms of transport. This was because during this period, buses and trains were frequently attacked by youths, forcing commuters to use taxis. At the same time, there were widespread retrenchments in various industries due to, inter alia, political activism and disinvestment.

The fledgling taxi industry became one of the few enterprises that could accommodate retrenched workers as well as aspiring black businessmen. Thus, by the mid 1980s, all that was needed for the industry to realise its potential was the formal deregulation of transport.

**Deregulation**

In 1985, the National Transport Study (NTPS) released its report, concluding that the highly
regulatory framework of existing transport policy was “contrary to the principles of national economic policy that emphasise the role of competition”. Based on the NTPS findings and the recommendations of the Competition Board, which proposed the immediate and blanket deregulation of the taxi industry, the White Paper on Transport Policy of 1987 along with the Transport Deregulation Act of 1988, effectively legalised the 16-seater minibus taxis.

Permit enforcement ceased to be a priority and the industry was soon flooded with aspirant drivers, resulting in heightened competition for passengers and routes as too many operators entered the domain too rapidly. This market ‘free-for-all’ was exacerbated by corrupt officials who turned a blind eye to traffic enforcement and vehicle roadworthiness, meaning that from the outset, issues of safety and security were sidelined.

Alongside a bid to ‘capitalise’ portions of the black community, the sudden deregulation of transport became a means of complementing the state’s broader destabilisation strategies in the run-up to negotiations by exacerbating socio-economic and political tensions within black communities. In the words of James Chapman, long-time consultant to the taxi industry, “they [taxi operators] were divided by the ... [apartheid] government and violence was encouraged”. Against the backdrop of escalating violence during apartheid’s final years, the stage was set for the violent taxi wars that came to dominate the deregulated industry.

Taxi wars
An almost immediate and far-reaching consequence of rapid deregulation was the rise of taxi associations, which have been directly associated with the violence that has shadowed the industry since 1987. As one of the first avenues for black capital accumulation, the taxi industry quickly became a contested terrain, swamped with operators hoping to become rich. While some were able to ‘strike it lucky’, for the most part the industry was characterised by exploitation and aggressive competition between operators attempting to poach passengers and ply the same routes.

In the absence of state regulation, groups of operators banded together to form local taxi associations, which intervened to regulate loading practices and prices. It was not long, however, before taxi associations began to use their organisational strength to extract income, commonly through the use of violence. Typical of this violent protection of spheres of interest is the following remark by a taxi operator in Johannesburg in 1988: “We will not succumb - they must operate in their own area. We will fight back and defend ourselves.”

Between 1987 and 1994 official efforts to deal with the taxi industry were almost non-existent. When violence erupted the government invariably became part of the problem instead of the solution. At best, police behaviour during the late-apartheid period was negligent. At worst, the police used their positions of authority to promote rifts between associations and to destabilise black communities. In many areas, the police were implicated in attacks or were in other ways partisan. More generally, by their calculated inaction – which included a failure to disarm attackers or to respond to warnings of imminent attacks – the police fanned the conflict.

However, contrary to many expectations, the cycles of taxi violence fomented during the late-apartheid period did not end with the demise of apartheid. Indeed, unlike other forms of political violence that diminished or disappeared after 1994, taxi violence actually escalated in the immediate post-1994 period.

In the years following the 1994 elections, the Human Rights Committee (a now defunct NGO that monitored political violence throughout the 1980s and 1990s) observed outbreaks of violent taxi wars around Johannesburg, Soweto, the East Rand and Pretoria in Gauteng, around Durban in KwaZulu Natal, in the Eastern Cape around Bisho and King Williams Town and Umtata, and in Limpopo and the North West Province.

Although widespread and seemingly random, it was notable that the most persistent conflicts occurred between associations using long distance routes.
Many of these conflicts were inter-provincial, involving long distance taxi associations such as the Lethlabile Taxi Organisation (LTO), the Federated Local and Long Distance Taxi Association (Feltdta) and the South African Local and Long Distance Taxi Association (Saldta).

Another defining feature of this increasingly sophisticated form of violence was the mutative nature of the associations and the tendency for smaller associations to change affiliates in favour of the more violent and financially stable ones. Between 1997 and 1999 some of the worst conflicts took place at the Rietgat Taxi Rank in Soshanguve and at the nearby Mapobane station. Such conflicts revealed that there was more to taxi violence than politics alone.

Attempts to restructure the taxi industry
The persistence of taxi wars after 1994 forced the post-apartheid government to intervene in the industry. In 1995 government established the National Taxi Task Team (NTTT) to deliberate over the causes of, and potential solutions to, the violence. In 1996 the NTTT released its first report, recommending the re-regulation of the taxi industry as a matter of urgency.

However, by the time of the finalisation of the NTTT process in 1998, it was apparent that powerful interests had become vested in the mafia-like use of violence as a means of suppressing competition. Many taxi associations – particularly a handful of key supra-associations (called ‘mother-bodies’, to which local associations were affiliated) – actively opposed the government’s attempts at re-regulation, sparking an escalation in taxi related violence between 1998 and 1999.

Mindful of the apparent failure of its re-regulation plans, in 1999 government changed its focus to restructuring the industry through the recapitalisation process. In essence, the recapitalisation strategy aims to recreate the taxi industry from scratch, phasing out the 16-seater minibus taxis in favour of new 18- and 35-seaters, and introducing smart card technology to eliminate cash from commuter transactions. However, both processes have run into problems and, seven years later, recapitalisation is still a pipedream. A number of problems have emerged both from the side of government and the industry.

From the government’s perspective, two issues continue to dog the proposed recapitalisation strategy. First, there is the question of who represents the taxi industry. Second, there are concerns over the cost implications of recapitalisation.

Santaco, which was formed in August 1998 as an industry-driven response to the government’s failed attempts to resolve taxi violence, has a democratically elected council and claims to represent the industry as a whole. However, shortly after it was formed, a rival association, the National Taxi Alliance (NTA), set up office and it, too, claimed to be the mouthpiece of the taxi industry.

Tensions between the two bodies erupted almost immediately and conflicts over representation continue to cause problems for the recapitalisation process. The existence of two associations both claiming to represent and speak on behalf of the taxi industry significantly complicates government’s efforts to consult with and enter into binding agreements with the industry.

Arguably of more concern to government are the cost implications of the recapitalisation process. As currently envisaged, to off-set the higher cost of the larger vehicles and to ‘sell’ recapitalisation to operators, government will contribute 20% of the cost of each new vehicle as a ‘scrapping allowance’ for trading in or scrapping an existing taxi. Government has set aside R4 billion for this purpose, but the taxi industry is not satisfied with this amount, proposing instead that government should provide a 20% up-front subsidy as well as a 30% scrapping allowance.

With over 100,000 taxis in the country, government is concerned that this level of spending will exert substantial pressure on the fiscus, leading recently to suggestions that the programme might be abandoned if there is an expectation of “an additional funding requirement above the R4 billion mark.”
From the industry's point of view, the proposed scrapping allowance is not enough incentive to convert to the new system. At a cost of more than R300,000 for a new taxi, meaning maintenance leases of around R15,000 per month per vehicle, operators are demanding an equitable subsidy system, which they calculate should amount to around R10 billion per year. However, the treasury believes that this sort of subsidy is unaffordable.18

Santaco is also opposed to the larger 35-seater vehicles being proposed by government, preferring a maximum number of 29 seats per taxi, and it does not see the need for every vehicle to have disabled access. At this stage it remains unclear whether the recapitalisation deadline of 2008 will be realised.

**What should be done?**

South Africa's taxi industry has come a long way since its inception as a result of deregulation in 1987. However, as the title of Colleen McCaul's book suggests, it has been *No Easy Ride* for taxi operators. Government investment and a reinvigorated, consultative, recapitalisation process are needed to prevent the industry from sliding into anarchy and disrepair.

**Government investment**

The contributions of the taxi industry to employment and to South Africa's economy are substantial and should be acknowledged by adequate government investment. At present, bus companies get an annual subsidy of R2.1 billion from the department of transport, and rail companies receive R2.4 billion. Yet taxis, which command at least 60% of the total commuter market, receive no subsidy at all.

Recapitalisation has the potential to stimulate further economic activity in the transport sector as well as in the “web of survivalist activity” that surrounds taxi operations, and to create the basis for a stable, safe industry that could stimulate new sources of government revenue as the industry is formalised and brought into the tax net. Failure to invest in this critical industry is a short term financial strategy that could cost the government dearly in the long run.

Consultation

A new process of consultation with taxi operators and their representatives, along the lines of the NTTT, is necessary to determine who represents the industry and what their needs are. In the first instance, Santaco’s dissatisfaction with the proposed 35-seater vehicle should be taken seriously. Not only does Santaco represent tens of thousands of taxi operators, but the international experience of jeeps and trotros in the Philippines, matatus in Kenya and trotros in Ghana suggests that smaller vehicles are optimum for informal public transport.21

The taxi industry is a key player in South Africa’s society and economy and should not be neglected. Government should acknowledge its vital role through adequate investment and by realising a comprehensive and participatory recapitalisation programme. In the final analysis, given its share of the commuter market, it is necessary that government engages meaningfully with taxi operators and makes sufficient funding available to properly formalise the taxi industry.

**Postscript**

Shortly before this publication was printed, government announced that the long delayed taxi recapitalisation programme will be implemented from the beginning of the 2005/6 financial year. This is a significant step and will hopefully assist to create a profitable, reliable and safe industry.

**Endnotes**

1 <http://www.busrep.co.za/index.php?fArticleId=2119962&fSectionId=556&fSetId=304>
2 <http://www.busrep.co.za/index.php?fSectionId=&fArticleId=2197482>
3 The Star, Business Report, 15/06/04.
4 Pretoria News, 16/08/04.
5 The Sowetan, 26/08/04.
6 Former director general of transport, Adriaan Eksteen, quoted in Financial Mail, 14/08/1987.
9 The NTPS was established in 1982 to bring transport policy in line with national economic reform policy.
11 The Competition Board was set up in 1986 to review the position of illegal taxis.
12 J Dugard, op cit, p 11.
13 Quoted in The Star, 22/05/1996.
14 J Dugard, op cit, p 12.
15 The Sowetan, 13/05/1988.
18 Financial Mail, 18/06/04.
19 C McCaul, op cit.
Domestic violence in South Africa is marked by high levels of physical violence accompanied, in many cases, by weapon use. In this article research conducted by the Consortium on Violence Against Women is used to illustrate the extent of the problem and consider available remedies in terms of existing legislation and regulations. If courts rigorously apply these legislative tools, they will go a long way in protecting women from the potentially lethal consequences that result from being trapped in an abusive relationship.

Use of physical violence and weapons
Proforma applications for a domestic violence protection order under the Domestic Violence Act (116 of 1998) require applicants to complete an affidavit setting out the details of all incidents of abuse experienced at the hands of the respondent, along with whether firearms or other dangerous weapons were used, and what injuries were sustained. In addition, applicants are required to specify the types of abuse from which they are seeking protection, and may request that any of a number of other conditions be attached to the court order. These include an order for seizure by a member of the South African Police Service (SAPS) of a specified firearm or dangerous weapon, which is in the possession of the respondent.

The Consortium on Violence Against Women analysed 616 of these applications for domestic violence protection orders filed at Cape Town, George and Mitchell’s Plain magistrates’ courts during 2001. The extent to which physical violence pervades abusive domestic relationships is reflected in this sample, which constitutes 10% of applications made during the research period, with well over 65% of supporting affidavits mentioning physical violence. An alarmingly high 77% of applications filed in George reflected incidents of physical assault (Table 1).

The use of a weapon in perpetrating the assault was noted in more than 40% of the files mentioning physical violence, with George magisterial district once again presenting the highest frequency at 48% (Table 2).
This means that over a quarter of all applications for domestic violence protection orders, including those in which physical violence was not noted (and 37% of all applications in George) mentioned the use of a weapon.

This is clearly one arena in which respondents who can be shown to have a propensity towards violence can be dealt with by the criminal justice system. Criminal justice officials are in a position to take precautionary measures to protect not only the respondent, but also potentially the broader public. The next section considers the legal obligations placed on criminal justice officials to act in these circumstances.

**What the DVA requires of officials**

The Domestic Violence Act (DVA) places an obligation on magistrates to order the seizure of weapons under certain circumstances. Mirroring the request that may be made by applicants in this respect, section 7(2)(a) of the DVA allows magistrates to order, as a specific condition of a domestic violence protection order, that a SAPS member should seize any firearm or dangerous weapon in the possession or under the control of the respondent, when “reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant”.

This provision cross-refers to s9 of the Act, which is far more specific in placing a responsibility on the court to order such a seizure. Thus s9(1) provides that the court must order seizure of a firearm or dangerous weapon, if the magistrate is satisfied that the following factors apply:

a) the respondent has threatened to kill or injure himself; or

b) has threatened to kill another person with whom he is in a domestic relationship (it is noteworthy in this respect that the person threatened need not necessarily be the applicant for a protection order, and that the threat need not necessarily have been made with reference to the weapon under consideration); or

C) that continued possession of the weapon is not in the respondent’s best interest or in the interests of any person with whom they are in a domestic relationship, because of the respondent’s: i) state of mind or mental condition; ii) inclination to violence; iii) use or dependence on drugs or alcohol.

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| Table 1: Frequency of physical violence mentioned in affidavit, by magisterial district |
|-----------------|----------------|----------------|
|                  | Cape Town | Mitchell’s Plain | George |
| Total number of files examined | 170 | 279 | 167 |
| Number of files mentioning physical violence | 117 | 184 | 129 |
| Frequency of physical violence in sample | 68.9% | 65.9% | 77.2% |

Source: Parenzee, Arzt and Moul

| Table 2: Frequency of weapons mentioned in affidavit, by magisterial district |
|-----------------|----------------|----------------|
|                  | Cape Town | Mitchell’s Plain | George |
| Number of affidavits mentioning physical violence | 117 | 184 | 129 |
| Number of affidavits mentioning use of weapons | 44 | 70 | 62 |
| Frequency of use of weapons | 37.6% | 38.0% | 48.0% |

Source: Adapted from Parenzee, Arzt and Moul
The DVA makes further provision that any firearm seized under such an order should be dealt with under s11 of the Arms and Ammunition Act (now repealed and replaced by s102 of the Firearms Control Act), in terms of which a person may be declared unfit to possess a firearm. The DVA specifically requires the court to have the clerk of the court refer a copy of the record of evidence concerned to the national commissioner of police for this purpose. There was no evidence in the files examined of this having been done.

Firearms Control Act
The Firearms Control Act (60 of 2000) came into full effect on 1 July 2004 and provides, as did its predecessor, the 1969 Arms and Ammunition Act, that the national commissioner of police (“the Registrar”) may declare certain persons unfit to possess a firearm. Topping the list of those against whom such an order may be made are respondents against whom a final protection order has been issued in terms of the Domestic Violence Act. This represents an important recognition of the lethality of violent domestic relationships, in which research suggests that over 40% of fatalities occur as a result of gunshots. If narrowly interpreted it will, however, deny protection to applicants with interim protection orders that have not yet been finalised under the DVA.

It is therefore important to note that application may be made to the Registrar to have a person declared unfit on other grounds, including that continued possession is not in the interests of the person possessing the firearm or any other person because of:
• threats made to kill or injure themselves or another person by means of a firearm or other dangerous weapon;
• their mental condition, inclination to violence, or dependence on drugs or alcohol.

In this respect it mirrors s9 of the DVA and means that an application under s102 of the FCA can, and indeed should, be made at the time that an interim protection order is issued. When a final protection order is issued applicants should be informed, regardless of whether seizure of a weapon has been ordered under the DVA, of the remedy available to them under the Firearms Control Act. When the court has ordered a weapon to be seized at any stage of the proceedings, this order must be conveyed to the Registrar for administrative action.

For the Registrar to determine that someone is unfit to possess a firearm, application must be made under oath setting out adequate reasons. Although at the time that an interim protection order is made, it is possible that the person against whom a s102 order is subsequently sought will not have had the opportunity to respond to the DVA application, the s102 hearing clearly constitutes an independent determination in which the respondent is provided with a reasonable opportunity to give reasons as to why a declaration should not be made. As such it cannot be seen as infringing on the respondent’s due process rights.

This does not mean that the courts are off the hook. Section 103 of the FCA requires the court to apply its mind to the question of whether a person should be declared unfit to possess a firearm, by creating a presumption of unfitness in respect of convictions for certain offences.

A number of these offences typically occur in domestic violence cases, and point to the importance of police laying ancillary charges when assisting a victim of domestic violence. These include:
• unlawful or negligent handling of a firearm;
• handling of a firearm while under the influence of drugs or alcohol;
• a crime or offence in the commission of which a firearm was used;
• any offence involving violence, sexual abuse or dishonesty for which the accused was sentenced to imprisonment without the option of a fine;
• any offence involving physical or sexual abuse occurring within a domestic relationship;
• any offence involving the abuse of alcohol or drugs; and
• any offence under the DVA where the accused is sentenced to imprisonment without option of a fine.
It is clear from the wording of this section that the court must apply its mind to these cases and must, whether it finds the person convicted to be unfit or not, forward that determination to the Registrar. Subsection (4) requires that unless the court determines that a person is fit to possess a firearm, the court must make an immediate order for the search and seizure of all authorising documentation (licences, competency certificates, etc), firearms and ammunition in that person’s possession.

Under s103(2) this duty becomes discretionary, with the court required to enquire and determine whether a person is unfit to possess a firearm upon conviction for a number of scheduled offences. While there is not the same presumption as that arising under s103(1), this section clearly places a positive duty on the court to make such an enquiry and come to a determination. Relevant Schedule 2 offences include:

- malicious damage to property;
- entering a premises with the intent to commit an offence;
- offences under the DVA for which the accused was not sentenced to imprisonment without the option of a fine; and
- offences involving violence, sexual abuse or dishonesty in respect of which the accused was not sentenced to imprisonment without the option of a fine.

It is not necessary that a firearm be used in the commission of any of these offences. As such these provisions have the potential to provide an important means of protection to those subject to domestic abuse. This requires, however, that appropriate charges are initially laid and that the accused/respondent’s possession of a weapon be brought to the attention of the court. It also requires that police, prosecutors and magistrates take the threat of firearms seriously.

Research has clearly illustrated that in ss11 and 12 hearings these roleplayers have tended not to adequately apply the relevant provisions and, where they have, to focus on cases where a firearm was used, rather than the potential for violence of someone who owns a firearm.4

What the DVA regulations require of SAPS

Specific obligations are placed on the SAPS in terms of the National Instructions regarding domestic violence, which were promulgated under the DVA. The emphasis of these guidelines is on executing a court order to seize a weapon or firearm which is in the possession or under the control of the respondent, with a view, again, to dealing with the matter in terms of s11 of the Arms and Ammunition Act.

However, these instructions go beyond the provisions contained in the DVA, by providing (in s6(7)) for a SAPS member to enter and search a premises at any time, without a warrant, as specified under s41(1) of the Arms and Ammunition Act, and to seize a firearm when that member has reason to believe that:

- a person has threatened or expressed the intention to kill or injure himself or herself or any other person (note that here a domestic relationship is not required) by means of a firearm;
- or is in possession of a firearm and continued possession is not in his or her interest or in the interest of any other person as a result of his or her mental condition, inclination to violence (regardless of whether a firearm was used in the violent act or not), or his or her dependence on intoxicating liquor or a drug which has a narcotic effect.

These provisions mirror those contained in s11 of the Arms and Ammunition Act, the DVA and now the FCA.

Interviews show that some police officers are using their powers under the Arms and Ammunition Act to confiscate firearms, even when there was no court order in place. As one police officer said:

I have confiscated weapons. Sometimes when there is a court order, but other times when we perceived it to be a threat because of the types of abuse the complainant has been subjected to. Rather safe than sorry. (P3X)

It would, however, seem that this is the exception rather than the rule. In the words of another police officer:
You do have to confiscate weapons, but not that often. Yes there are complaints that the husband has threatened to shoot her, or kill her, but he never does. It’s never serious. (P10bSF)

This approach is clearly at odds with the positive duty placed on police members through legislation and recognised by the Supreme Court of Appeal in the case of Minister of Safety and Security v Van Duivenboden. In that case the failure of police members to hold a s11 hearing on at least two occasions when Mr Brooks (a man described by the SCA as being both “fond of firearms” and “fond of alcohol, which he habitually consumed in excess”) had clearly shown a propensity for violence, was recognised as providing the basis for a delictual action by Mr Van Duivenboden against the police when he was subsequently shot by Mr Brooks (who, at the same time, shot and killed his own wife and daughter).

That is, the failure by police members to declare Brooks unfit to possess a firearm, when it could reasonably have been expected of them to do so, had in all likelihood given rise to the damages suffered by Van Duivenboden. It is quite feasible that this reasoning could be extended to magistrates who have – and refrain from using - similar powers.

The purpose of a seizure is to provide the basis for an administrative hearing. The National Instructions require that a SAPS member who has seized a firearm must ascertain whether that firearm is licensed and, if it is not, include the offence in the docket. In practice, no evidence has been found that this is occurring in domestic violence cases.

Despite the commotion engendered by the passage of the FCA, it seems that provisions for search and seizure have been somewhat narrowed in s110, which parallels Chapter 2 of the Criminal Procedure Act (51 of 1977) in requiring that a search be done only upon a warrant unless the person concerned consents or the police member has reasonable grounds for believing that a search warrant would have been issued and that a delay in obtaining a warrant would defeat the object of the search. This may require an amendment to the National Instructions, as there seems to be no analogy to s41 in the new Act.

Dangerous weapons
Both the DVA and FCA make reference to the use of “dangerous weapons”. The DVA defines it with reference to the definition given in s1 of the Dangerous Weapons Act (71 of 1968), in terms of which a dangerous weapon is any object, other than a firearm, which is likely to cause serious bodily injury if used to commit an assault. Any person who is in possession of such a weapon is guilty of an offence unless they can prove that they did not at any time have the intention of using the weapon or object for an unlawful purpose.

This is a very broad definition and particularly problematic when applied to domestic violence. As one police officer pointed out, in domestic violence cases “...just about anything can be a weapon”.

Docket analysis reflected the following types of ‘weapons’ as having been used in reported incidents of domestic violence: firearms, knives, sharp objects, bottles, iron pipes, hose pipes, spade, axe, belt, sticks, brooms, metal pot, chairs, sjamboks, irons, wooden plank, brick, cricket bat, knobkierries, chains, golf clubs, hammer, ashtray, shoe, and a coffee table. In this context, a ‘dangerous weapon’ includes many common household objects – the seizure of which is clearly problematic, if not impossible.

Seizable weapons
Given the plethora of potentially dangerous weapons reflected in the applications for domestic violence protection orders, the researchers decided to focus on four weapon types that were considered to be potentially susceptible to confiscation: knives, sjamboks, knobkierries and firearms. They tracked those cases in which these weapons had been used through the application process. When the affidavit stated that the complainant had been stabbed, but did not specify the object used, it was assumed, as the most likely scenario, that a knife had been used.

Knives were the weapons most often used in all three magisterial districts, with Mitchell’s Plain (19 incidents) and George (18 incidents) both
exhibiting usage that was significantly higher than Cape Town (8 incidents). Although firearms were relatively seldom used, it is important to note that guns were most often used to threaten the complainant, with Mitchell’s Plain having the most incidents of threats using a firearm (21 incidents) in comparison to Cape Town (8 incidents) and George (6 incidents), followed closely by knives (34 incidents across the three jurisdictions). Eight affidavits mentioned that the respondent carried a knife or firearm on their person or slept with that weapon.

For the court to order the seizure of a weapon on the basis of information supplied in the affidavit, evidence should be supplied that the respondent is in possession or in control of the weapon concerned. In the data therefore the distinction was drawn between instances where the complainant had written that “he said he would stab me”, where it was not stipulated that the respondent actually possessed or had access to a particular weapon, and instances where it was stated that “he chased me round the house with his knife and tried to stab me”. The number of requests made by applicants for the confiscation of these weapons, and the number of applications ultimately granted by the magistrate were tracked. The results, as they pertain to firearms and knives, are indicated in Table 3 below.

Applications for removal of a weapon
It is clear from this data that applicants for domestic violence protection orders, while mentioning the use of weapons in their supporting affidavits, and even averring ownership or possession of these weapons, are not requesting that the court order their seizure:

- In Mitchell’s Plain the total number of requests made by applicants for seizure of weapons represents 18% of the number of instances when there was confirmed possession, and a mere 8.5% of the total number of affidavits mentioning seizable weapons.
- In George the total number of requests made by applicants for seizure of weapons represented 10% of the number of instances of confirmed possession, and only 6.5% of the total number of affidavits mentioning seizable weapons.
- In Cape Town the picture looks better, with 88% of applicants averring possession or control of a weapon by the respondent requesting that it be seized, amounting to 47% of affidavits mentioning weapons that we would consider capable of being seized.

When broken down further, only two complainants of the eight in Mitchell’s Plain who confirmed a firearm as being in the possession of the respondent, actually requested that this be

<table>
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<th>Mitchell’s Plain</th>
<th>Mention in affidavit</th>
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<th>Request for seizure by applicant</th>
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Source: Adapted from Parenzee, Artz & Moul, Figures 24, 25, 26.
removed. In a further two cases magistrates also ordered the removal of firearms, so that in half of the cases mentioning firearms, an order was made that they be seized.

When guns were confirmed as being in possession of, or in the control of, the respondent in Cape Town, nine out of 11 complainants requested that these be removed, representing 82% of these cases. The magistrate failed to order the seizure of the weapon on one occasion when this was specifically requested, crossing out the request on the application form, and giving no reason for doing so.

Although firearms were mentioned in six affidavits filed in George, and confirmed as being in the possession of the respondent in four cases, only one request was made for seizure and no order was made in respect of this request. It is in fact notable that in George not one order was made for the seizure of a weapon.

When knives were confirmed as belonging to, or in control of, the respondent in nine Mitchell’s Plain applications, only one complainant requested that this be removed, a request that was granted. In the four cases where both guns and knives were confirmed, there were no requests for removal of either, and no orders were made. Although mention was made in one affidavit that the respondent owned a knobkierrie, the complainant did not request its seizure and no order was made.

In Cape Town five affidavits referred to the respondent’s control or ownership of knives, but only two requested seizure, with one request granted. Despite the fact that there were seven cases in which the applicant had been stabbed, only one of these applicants applied for and was granted an order for seizure of the knife.

Court orders for removal of a weapon
In Mitchell’s Plain the total number of orders by magistrates for seizure of weapons represents 27% of the number of instances of confirmed possession or control, and 13% of the total number of affidavits mentioning seizable weapons. In one case, when mention was made of the respondent owning a “sword, knife and bullets”, only the sword was ordered to be confiscated.

In Cape Town the total number of orders by magistrates for seizure of weapons represented 65% of the instances of confirmed control/possession, and 34% of the total number of affidavits mentioning seizable weapons.

In George only two applications were made out of 20 affidavits in which control/possession was established, and 32 cases in which the use of a seizable weapon was mentioned in the affidavit. None were granted. One applicant requested the removal of keys to a safe containing firearms which were in the possession of the respondent, but this was not ordered by the magistrate.

Confiscation by the police
The fact that applicants are not required to specify the type of weapon used against them in the application form may result in a further barrier to enforceability, as police are not provided with the relevant detail to make confiscation possible. This may lead to further vulnerability for complainants. As one police officer explained:

The other day there was also an interdict … informing us that we must go take a gun … That is difficult. Maybe he has a safe with a lot of guns, so which one must we take? So I let the guy come and say listen, this is the interdict … and I want your gun. So he says he doesn’t have a gun. (P11aK)

The best way around this conundrum is for the respondent to be declared unfit to possess a firearm, which one assumes is what the magistrate in this instance was in effect trying to achieve. In the case of other weapons, further assistance by clerks and volunteers would help to ensure that complainants make applications for seizure that will be effective in restricting the respondent’s access to a dangerous weapon. An explanation of what constitutes a dangerous weapon in the application form would also provide clarity for applicants and further detail for police officers.

When an order for seizure is made there is no indication in the court file as to whether it has been
carried out and to what effect, which makes follow up difficult. There is also no indication that any case in this sample was referred for a s11 hearing under the Arms and Ammunition Act.

Conclusion

In many domestic violence cases, magistrates are not ordering the removal of weapons, despite their use being mentioned in the affidavit and despite there being evidence to suggest that the weapon is owned by, in the possession of, or under the control of the respondent.

Although it is unclear why so few applicants request the removal of weapons, it is likely that the lack of clarity in the application form is a factor, along with cultural and conceptual problems around the definition of a dangerous weapon. It is nonetheless of considerable concern that magistrates, reading these affidavits, are not using their powers under the DVA to order the confiscation of weapons.

It is similarly of concern that police officers who are receiving reports of weapon use in cases of domestic violence are not charging this as a separate offence nor initiating hearings to have the respondent declared unfit.

The SCA’s reasoning in Van Duivenboden, recognising that but for the failure to remove Mr Brooks’ lawful means of access to a weapon, Van Duivenboden would not have been shot, applies in its entirety to the life of Mrs Brooks, another victim of intimate femicide in a country where one in five intimate femicides is perpetrated with a licensed firearm. With the Firearms Control Act, criminal justice personnel have an explicit mandate to remove firearms from the arsenal of weapons available to perpetrators of domestic violence.

Acknowledgement

The docket analysis and interview data contained in this study was drawn from aspects of a more comprehensive study into the implementation of the Domestic Violence Act. See P Parenzee, L Artz and K Moult, Monitoring the Implementation of the Domestic Violence Act: First Research Report, Institute of Criminology, University of Cape Town, 2001.

Endnotes

1 The Consortium consisted of the Gender, Law and Development Project at the University of Cape Town, the Gender Project at the University of the Western Cape, Rape Crisis (Cape Town) and a public health consultant.
3 Personal correspondence with Kelley Moult.
4 D Mistry and A Minnaar, Declared unfit to own a firearm: Are the courts playing a role? in SA Crime Quarterly No 6, 2003, p 27.
6 S Mathews et al, Every six hours a woman is killed by her intimate partner: A National Study of Female Homicide in South Africa, South Africa Medical Research Council Policy Brief No 5, June 2004.
The Firearms Control Act (2000) came into force on 1 July 2004. During preparations for the Act’s implementation, the South African Police Service (SAPS) developed a five-pillar strategy for combating the proliferation of firearms in South Africa (see box). Between 2003 and 2004, efforts were focused on pillars 2 and 3 of the strategy. Pillar 2 targets control processes and procedures, which includes the training of 640 Designated Firearms Officers during the 2003/04 financial year. Pillar 3 centres on reducing illegal firearms and the criminal use of firearms.

OPERATION SETHUNYA

Proactive policing can solve the illicit firearms problem

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In 2003 the South African Police Service intensified its efforts to confiscate illegal firearms and check legal owners’ compliance with the firearms legislation. The initiative with the highest profile was Operation Sethunya (‘firearm’) run from April to September 2003. Sethunya was the largest ever police effort in the country focused exclusively on stemming the proliferation of firearms. The amount of weapons and ammunition collected during the operation is impressive, but what impact has it had on the number of illicit firearms in circulation?

The Firearms Control Act (2000) came into force on 1 July 2004. During preparations for the Act’s implementation, the South African Police Service (SAPS) developed a five-pillar strategy for combating the proliferation of firearms in South Africa (see box). Between 2003 and 2004, efforts were focused on pillars 2 and 3 of the strategy. Pillar 2 targets control processes and procedures, which includes the training of 640 Designated Firearms Officers during the 2003/04 financial year. Pillar 3 centres on reducing illegal firearms and the criminal use of firearms.

Five pillars of the SAPS strategy to stem the proliferation of firearms in South Africa:

Pillar 1: Develop and maintain appropriate firearm-related regulators
This pillar focuses on domestic legislation and regulations, national instructions and standing orders issued to manage the flow and possession of firearms in South Africa.

Pillar 2: Develop and maintain effective control processes and procedures regarding firearms
This pillar supports the implementation of the new Firearms Control Act within the Central Firearms Register and Registrar of Firearms.

Pillar 3: Reduce and eradicate the illegal pool and the criminal use of firearms
This pillar focuses on the control, detection of illegal origins, tracing, clearance of SAP 13 stores, audit transfer of firearms, and the reduction and management of state-owned firearms.

Pillar 4: Prevent crime and violence through awareness and social crime prevention partnerships, including campaigns to educate and raise awareness among the public
This pillar also includes encouraging responsible ownership and use of legal firearms.

Pillar 5: Develop regional and sector cooperation
This pillar involves the coordinated planning, implementation, monitoring and evaluation of firearms initiatives in the region.
Figure 1: Recorded cases of illegal possession of firearms and ammunition in SA, 1994/95-2003/04


Figure 2: Recorded cases of illegal possession of firearms and ammunition by province, 2003/04

The recording of firearm related offences depends largely on police action because in most cases, there is no ‘victim’ to report the crime. Statistics provided in the SAPS annual report for 2003/04 show that police interventions focused on firearms seem to be yielding results. Between 1994/95 and 2003/04, recorded cases of illegal possession of firearms and ammunition increased from 10,999 to 16,839 – an acceleration of 53% (Figure 1). In the most recent financial year, cases involving illegal firearms increased by 6% from their levels in 2002/03.

An analysis of geographic trends shows that in 2003/04 the greatest number of cases was recorded in KwaZulu-Natal (4,908), followed by Gauteng (4,621) and the Eastern Cape (2,278) (Figure 2). The provinces that have benefited the most from increased policing of illegal firearms between March 1994 and March 2004 are the Eastern Cape (168% increase in recorded cases), North West (90% increase) and Gauteng (87% increase).

Circulation of firearms in South Africa

South Africans own more firearms than citizens of neighbouring countries. Moreover, the volume of firearms in this country places South Africa among the highest in the world for gun ownership calculated on a per capita basis. There are currently more than two million legal firearm owners in South Africa, with a total of 3,969,200 firearms registered to them.¹ According to the Central Firearms Register, approximately 157,850 applications for firearms are received each year by the SAPS.

The loss and theft of legal firearms is recognised as one source for illegal weapons in the country. An analysis by the Small Arms Survey of annual gun theft ratios shows that South Africa has one of the highest rates of stolen firearms. When guns reported stolen are calculated as a ratio of those legally owned, South Africa has a theft ratio of 1:150. This means that for every 150 licenced firearms, one is stolen. The comparison between South Africa and countries such as Canada, Finland, Australia and the USA, which also have high numbers of legal firearms, is illustrated in Table 1.

More recent data shows that in 2003/04 of the 3,969,200 firearms registered nationally in South Africa, 20,164 were reported lost or stolen.² This represents a theft ratio of 1:197 – an improvement on the 2001 ratio shown in Table 1. Nevertheless, the latest theft ratio is still significantly higher than the other countries analysed.

This indicates that the SAPS’ focus on encouraging greater responsibility for the safe storage of firearms

<table>
<thead>
<tr>
<th>Table 1: Selected annual gun theft rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
</tr>
<tr>
<td>--------------------------</td>
</tr>
<tr>
<td>South Africa</td>
</tr>
<tr>
<td>Spain</td>
</tr>
<tr>
<td>Australia</td>
</tr>
<tr>
<td>Canada</td>
</tr>
<tr>
<td>Philippines</td>
</tr>
<tr>
<td>England and Wales</td>
</tr>
<tr>
<td>Sweden</td>
</tr>
<tr>
<td>Finland</td>
</tr>
<tr>
<td>Norway</td>
</tr>
</tbody>
</table>

Note: Theft refers to weapons reported lost or stolen to the SAPS.
by licensed owners makes sense. As part of this approach, the police checked 128,376 licensed firearms to verify that the weapon matched the license, and that regulatory requirements for possessing the firearm were met by the owner.⁴

Each year, a sizeable number of lost and stolen firearms are recovered by the police. In 2003/04 35,481 guns were recovered nationally.⁵ Some of these weapons were collected during crime prevention actions that formed part of Operation Sethunya. A comparison of the number of lost or stolen firearms with those recovered by police, shows an improvement in the recovery rate over the past year. Although more guns were lost or stolen than were recovered in 2002/03, this trend was reversed in the last financial year (Figure 3).

It should however be noted that the firearms reported lost or stolen in one year are not necessarily the same ones that the police recover in that same year. It is nevertheless positive when the number of firearms recovered in a 12-month period

![Figure 3: Firearms reported lost or stolen, and recovered, 2002/03 and 2003/04](image)

![Figure 4: Number of firearms reported lost or stolen by province, 2002/03-2003/04](image)

<table>
<thead>
<tr>
<th>Province</th>
<th>2002/03</th>
<th>2003/04</th>
</tr>
</thead>
<tbody>
<tr>
<td>KwaZulu-Natal</td>
<td>6,789</td>
<td>4,174</td>
</tr>
<tr>
<td>Gauteng</td>
<td>5,273</td>
<td>8,034</td>
</tr>
<tr>
<td>Limpopo</td>
<td>2,992</td>
<td>738</td>
</tr>
<tr>
<td>Western Cape</td>
<td>2,409</td>
<td>2,383</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>1,778</td>
<td>1,431</td>
</tr>
<tr>
<td>North West</td>
<td>1,498</td>
<td>1,228</td>
</tr>
<tr>
<td>Free State</td>
<td>700</td>
<td>856</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>584</td>
<td>1,170</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>97</td>
<td>150</td>
</tr>
</tbody>
</table>

Source: SAPS Annual Reports 2002/03 and 2003/04
is greater than the number lost and stolen. These figures should be monitored to establish whether the trend can be sustained.

In its latest annual report, the SAPS committed itself to a 75% recovery rate for lost and stolen firearms in 2004/05. Considering that each recovered firearm will need to be traced back to its legal source, this will be a time and labour intensive effort. If successful, the results will be significant.

An analysis of provincial trends shows that between 2002/03 and 2003/04, most firearms were reported lost or stolen in Gauteng and KwaZulu-Natal (Figure 4). Most of the recoveries made by police were also recorded in these two provinces (Figure 5). This may correlate with the prevalence of gun ownership and the use of firearms in crime in these provinces, although further research would be needed to verify this.

**Operation Sethunya as the catalyst**

Although reducing illegal firearms has been a SAPS priority for several years, efforts intensified in 2003 with the launch of Operation Sethunya. The operation indicates that SAPS has adopted a zero tolerance attitude towards illegal guns and the negligent use of firearms and ammunition, focusing on the object of crime rather than the crime itself.

According to Selby Bokaba, spokesperson for SAPS national commissioner Jackie Selebi, “in view of the unacceptable levels of crime in the country, police top management went back to the drawing board after perusing statistical data indicating the majority of violent crimes are committed with firearms. Operation Sethunya was conceptualised to give impetus to the SAPS firearms strategy.”

The aim of Operation Sethunya was to reduce the use of firearms – which are easily available in South Africa - in incidents of crime and violence. Specific objectives were to trace and confiscate illegal firearms, and test whether or not citizens were complying with the Arms and Ammunition Act (No 75 of 1969) and its various amendments as
Table 2: Comparison of Operation Sethunya and follow-on period

<table>
<thead>
<tr>
<th></th>
<th>Operation Sethunya:</th>
<th>Normalisation phase:</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal firearms confiscated</td>
<td>13,859</td>
<td>12,116</td>
<td>25,975</td>
</tr>
<tr>
<td>Ammunition</td>
<td>1,562,873</td>
<td>117,067</td>
<td>1,679,940</td>
</tr>
<tr>
<td>Arrests for illegal possession of firearms/ammunition</td>
<td>3,082</td>
<td>2,908</td>
<td>5,990</td>
</tr>
</tbody>
</table>

Source: SAPS Annual Report 2003/04

Table 3: Number of firearms destroyed

<table>
<thead>
<tr>
<th></th>
<th>1999/00</th>
<th>2001</th>
<th>2002 (through August)</th>
<th>2003/04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obsolete state stocks</td>
<td>3,346</td>
<td>26,695</td>
<td>33,473</td>
<td>11,568</td>
</tr>
<tr>
<td>Confiscated firearms</td>
<td>9,070</td>
<td>3,328</td>
<td>Figure not available</td>
<td>75,529</td>
</tr>
</tbody>
</table>

Source: SAPS Annual Reports, 2001/02, 2002/03 and 2003/04 and S Meek and N Stott, Destroying Surplus Weapons.
Note: Periods of data collection vary and are reproduced as presented in the sources used.

well as the new provisions of the Firearms Control Act (No 60 of 2000).

Operation Sethunya was a nationally driven campaign, implemented in all nine provinces. Based on intelligence, it included roadblocks, inspection of premises and ‘stop and search’ actions, many of which were carried out in crime hotspot areas such as taxi ranks. When necessary and appropriate, the operation was run in conjunction with municipal police officers and the South African National Defence Force (SANDF).

The results of Sethunya are compared with the period following Sethunya in Table 2. The Sethunya results include the confiscation of more than 1.5 million rounds of ammunition and 13,800 illegal firearms. This resulted in more than 3,000 arrests for illegal possession of firearms and/or ammunition.

It is interesting to note that during the normalisation phase that followed Sethunya from October 2003 to the end of the financial year in March 2004, a fairly high level of firearms confiscation and arrests was sustained (Table 2).

Another important aspect of Operation Sethunya was the destruction of confiscated firearms. The SAPS has an ongoing policy to destroy obsolete and redundant arms as well as illegal or confiscated weapons. With respect to the latter, the aim is to reduce the number of firearms in circulation. In terms of scale and duration, these efforts have been among the most comprehensive undertaken worldwide.7

Destruction of confiscated firearms formed an important aspect of Operation Sethunya. Table 3 provides the numbers of firearms destroyed between the financial years 1999/00 and 2003/04. In the past, all destruction of firearms by the SAPS took place in Gauteng. However since August 2003, this process has been decentralised to the provinces.

Operation Sethunya was also used to examine the public’s awareness of, and adherence to, the new
Firearms Control Act. Those known to have up to five firearms in their possession were specifically targeted as part of these efforts.

This aspect of the operation involved checking that legal firearm owners have the required facilities for the safe-keeping of their weapons. In particular, safes were checked for compliance the legal requirements and institutions such as arms dealerships were assessed in terms of whether they are registered and complying with the requirements of the Act.

Security companies as well as state institutions also came under the spotlight as the SAPS audited their stocks of weapons. The audit found that at present there are 14,789 firearms in various government departments in South Africa, including 68 provincial institutions, 22 national institutions and 31 museums, excluding state security agencies. In addition, it was established that there were 3,252 registered security businesses, of which 1,643 were in possession of firearms, totalling 58,981 firearms.8

Those weapons that were considered prohibited or excess were confiscated. This aspect of the operation also resulted in a number of cases being investigated against institutions and security companies for not complying with the Act with respect to, for example, leaving firearms unattended or not storing them in a safe.

Proactive policing makes a difference

A review of trends regarding illegal firearms and ammunition in South Africa using data on confiscations and reported cases for the past ten years, suggests that police efforts are showing results. The increase in confiscations of illegal firearms between 1994 and 2004 shows the impact of focused policing efforts, as this crime requires active police engagement for detection.

Likewise, the decrease in the number of lost and stolen firearms together with a simultaneous increase in confiscations, shows a clear reversal of the earlier trend. If this can be sustained, real reductions in the use of firearms in criminal acts may result. Effective monitoring of key indicators such as negligent loss, theft, recovery rates, the use of firearms in crime, compliance with the legislation, arrest rates for firearm related crimes, and the number of firearms that are destroyed, should provide further evidence about whether the approaches adopted by the SAPS are working.

According to a SAPS assistant police commissioner, “the impact of Operation Sethunya on crime and violence has seen murder cases reported decrease by 8.3%, and attempted murder decrease by 12.6.”9 While the decrease in the murder rate may not be directly attributable to Operation Sethunya, targeted campaigns do result in a high level of police visibility and increased community awareness. Moreover, the police themselves benefit through more focused training, skills development and allocation of resources.

Operation Sethunya provides clear evidence that South Africa does indeed have a problem with illegal firearms, that the SAPS is capable of addressing the problem especially when it takes a targeted and focused approach, and that the police are serious about implementing the Firearms Control Act.

Endnotes
3 SAPS Annual Report, op cit, p 12  
4 SAPS Annual Report, op cit, p 11.  
5 Ibid, p 12. Calculated based on provincial numbers, not total presented in report.  
6 S Bokaba, Crime stats were not ‘sexed up’, City Press, 27 September 2003.  
9 Ibid.