The 2003 ISS National Victims of Crime survey concluded that South Africans are much more fearful of crime today than they were in 1998 (see article by D Mistry in this issue). This growing panic has prompted a wide range of self-protective measures, including many people arming themselves in anticipation of a criminal encounter. There have been a number of recent, well-publicised incidents of the use of lethal force in defending property. These have been accompanied by media statements to the effect that killing in defence of property is acceptable under South African law.

This situation poses dangers of its own. Ever since the debate surrounding the changing law on use of force in effecting an arrest hit the headlines, South Africans have been confused about when they can and cannot use their guns to defend themselves. If they err on the side of caution, they could lose their lives. If they err on the side of violence, they could lose their liberty.

This article focuses on just one aspect of this debate: the use of lethal force to defend property. While the case law remains unclear, the guiding principles today suggest that killing another person in order to retain property is unlikely to be deemed lawful by the courts.

The right to defend yourself
In common law, the controlling principle on the right to use force to defend one's self or one's property is proportionality: the defensive act may not be more harmful than necessary to ward off the attack. Although there are no hard and fast rules, courts weigh up the interests protected by the defensive act against the interests infringed by the unlawful attack.

In determining whether a crime victim acted reasonably, the courts judge each case on its own merits. Certainly, an owner who is confronted by a robber is not expected to abandon his property. He is entitled to protect it, and the court will consider all the circumstances when deciding whether the means of defending the property were reasonable.

This right to self-protection can provide a defence to a charge of assault or even, in some cases, murder. Our law allows you to defend yourself, another person, your property or the property of another against a current or imminent unlawful attack. When a person pleads private defence, his claim is that the injury he caused was, in the circumstances, lawful and permissible.

This common law defence is often confused with the statutory provision contained in Section 49 of the Criminal Procedure Act as amended, which allows for the use of force when effecting an arrest. Despite certain similarities, these defences should not be conflated with each other as they are used for different purposes and have different requirements.
Various requirements must be met before the defensive act will be considered lawful. The attack must be:

- commenced or imminent;
- against a legally recognised interest; and
- unlawful.

The action made in defence must be:

- necessary to avert the attack;
- reasonable in terms of the amount of force used; and
- directed against the attacker.

Thus, the action taken must be in response to a currently pending aggressive action, and the law specifically rules out any action being taken, on the one hand, pre-emptively or, on the other, in ‘revenge’.

**What does the case law say?**

The first authoritative decision that dealt with the use of lethal force to protect property was Ex Parte Minister of Justice: In re S v Van Wyk. In this case, a shopkeeper whose shop had been repeatedly broken into took desperate measures to protect his belongings and rigged a shotgun in such a way that the intruder would trigger the device upon breaking into the store. One night an intruder broke in, set off the device and received a fatal wound. On a charge of murder, the shopkeeper invoked private defence and the court upheld his defence, acquitting him on all charges. The court reasoned that a person may, in exceptional circumstances, use lethal force to protect his property when there is no other way in which the goods can be retained. The only limit the court imposed was that the value of the goods should not be of a trivial nature. This decision was later followed in S v Mogohlwane.

In terms of these two decisions, killing in defence of property could be justified in situations where valuable property was being stolen. However, these judgements were handed down almost 40 years ago - long before South Africa’s shift to a human rights democracy. If faced with similar facts today, the courts would undoubtedly arrive at a different decision.

**Changes under the new constitution**

South Africa’s new constitutional democracy turned our legal system on its head. The Bill of Rights protects various fundamental human rights, including the right to life and the right to property. In cases of private defence, it is inevitable that these rights will need to be weighed against each other. The court’s balancing act would have to comply with the requirements as set out in section 36 of the Bill of Rights: was the infringement reasonable and justifiable in an open and democratic society based on principles on human dignity, equality and freedom? Applying this test, it is unlikely that any reasonable court would consider it justifiable to take another person’s life in defence of property.

Consider the following scenario. You are woken in the middle of the night by the sound of breaking glass. You look out of your bedroom window and see a thief stealthily driving your new sports car down the driveway. You shout at the thief to get away from your car, but he ignores you and continues to drive away. In desperation, you grab your gun and fire at the thief, killing him.

Your defence is that you were protecting your valuable property and that there was no other way of preventing the thief from stealing the vehicle. Also, the theft was still in progress, so your defence would comply with the requirements that the defensive act should be aimed at an attack that is not yet completed.

In terms of the Van Wyk decision, you would almost certainly succeed with this defence. However, in light of the constitutional changes noted above, it is very possible that you would find yourself in danger of being convicted of murder.

On the other hand, you could argue that the Bill of Rights also protects your right to your property, and that the constitution does not provide for a hierarchy of rights. This is perhaps so, but recent decisions have indicated that the right to life cannot be arbitrarily infringed, allowing for lethal force only in situations where lives of innocent persons require protection.

The landmark decision in S v Makwanyane entrenched the right to human life by abolishing the imposition of the death penalty in South Africa. The court also made passing reference to the need to bring other aspects of South African law in line with the
constitutional emphasis on the sanctity of human life. With reference to section 49 of the Criminal Procedure Act, the court warned that if the state was no longer permitted to take a life in punishment of a convicted criminal, then how could the law allow anyone to take the life of a person they are trying to arrest.

The same reasoning would surely apply to someone who takes the life of the thief who steals his property. Evading lawful arrest is equally, if not more, serious than theft.

Similarly, the more recent decision of Govender v the Minister of Safety and Security followed the Makwanyane reasoning in respect of using deadly force. The court held that the use of lethal force in effecting an arrest may only be used if the fleeing suspect poses an immediate threat of bodily harm to members of the public. This decision was later followed in the constitutional court case of Ex Parte Minister of Safety and Security and other: In re S v Walters and Another. In short, these cases confirm that use of deadly force can only be justified when the suspect poses a threat to the lives and safety of others.

If we apply this to the car theft scenario above, then it is clear that you would not be able to use lethal force to prevent the theft of your vehicle. You would have to resort to other non-lethal methods of trying to prevent the crime. If during your lawful attempts to prevent the theft, the thief retaliates and poses a threat to your life or anyone else, only then would you legally be entitled to use necessary force to defend yourself or others.

It is important to remember that before you can act in self-defence, the attack against you should have commenced, or at least be imminent. For example, if the thief pulls out a firearm and aims in your direction, then you would be justified in using lethal force to protect your life. However, you cannot shoot the unsuspecting thief on the premise that if you confront him, he would place your life in danger. The pre-emptive strike principle is not applicable in private defence cases.

Consider another set of circumstances. You wake up one night and discover that an intruder has broken into your living room. The thief is armed with a firearm and is sneaking through the house, gathering valuable items as he proceeds.

You know that if he is startled he might shoot you or your family. Can you lawfully shoot him? Do you have to take your family and flee from your home? Do you have to wait for him to attack you or your family?

Unlike the scenario with the car thief, this time the intruder is in your home. However, the same legal principles apply. You cannot use lethal force to prevent him from walking out with your TV. Instead, you or your family would have to be in immediate danger. It could be argued that the mere fact that the intruder is in your home is sufficient threat to justify your using lethal force against him. Again, each case could be judged separately, but the legally safe option would be to avoid using lethal force until you have no other option. Rather avoid confronting intruders. It could save your life and keep you out of jail.

In short

The principle is simple: the life of the attacker can only be taken in order to protect your or someone else's life or to prevent serious bodily harm. It is unlawful to use lethal force in any other circumstances. In other words, your property is not worth the life of the person that is stealing it from you!

Endnotes
1 News24, 26th of May 2004.
2 These include: the value of the property, nature and extent of the danger, the time and place of the occurrence, etc.
3 Self-defence is commonly referred to as private defence. Private defence captures the broader scope of legally recognised interests.
4 Act 57 of 1977.
5 Most legal systems have approached the question of what interests may be protected by private defence in a casuistic way, with the result that not all potentially recognisable interests have been recognised as the subject of self-defence. Examples of legally recognised interests include: life, limb, property, dignity, personal freedom, chastity and sexual integrity.
6 1967 (1) SA 488 (A).
7 1982 (2) SA 587 (T).
8 Section 11 of the Constitution.
9 Section 25 of the Constitution.
10 This approach is supported by CR Snyman, Criminal Law sixth edition 2003 at 108, who argues that lethal force may be used when it is your last available alternative to defend your property.
11 Lethal force would also be justified to prevent serious bodily harm and to prevent rape.
12 1995 (3) SA 391 (CC).
13 2001 (2) SACR 197 (SCA).
14 Case unreported.
15 When judging whether or not the defence was reasonable in the circumstances, the court will avoid assuming the role of an armchair critic and will take the traumatic and emergency nature of the incident into account.
An important aspect of police accountability that the South African Police Service (SAPS) needs to address relates to systems for recording information about the conduct of police officials. The police are the most public manifestation of government authority and have legal power to use lethal force when necessary. They also represent the front-line in combating crime and enforcing the law, which makes holding them accountable even more important.

All government departments are required by law to present their annual report to parliament. The SAPS’ 2000/01 annual report was criticised by the Public Service Commission for its lack of information on important aspects of what the police do, such as administrative or human resources practices.\(^1\)

Although the 2002/03 annual report shows improvements in these areas, similar concerns have been raised about SAPS reporting systems on police misconduct and the use of force.

In 2002, the Independent Complaints Directorate (ICD) indicated to parliament that “it had found that cases of misconduct were grossly under-reported by the South African Police Service and Municipal Police Services (MPS)… probably because there is no obligation on them to do so”.\(^2\) The ICD does not, however, have a mandate to tackle structural issues in the police or any authority to enforce its recommendations.

Data on misconduct is important for transparency and public accountability, but also for police managers who need to exercise internal control and monitor their staff. If internal systems on police conduct are neglected, other efforts to produce an efficient and professional police force will be undermined.

Use of lethal force
It has long been recognised that because police carry lethal weapons – in the form of guns – the force they may use could have lethal consequences. Adams points out that “the capacity of the police to use coercive and deadly force is so central to understanding their functions, one could say that it characterises a key element of their role”.\(^3\) The ICD has noted that for the transformation of the SAPS to be successful, a thorough understanding of the extent of police use of force is necessary.\(^4\)
Given that the ability to effectively use firearms is an important component of police work, their use and abuse should be of key concern to police management. Furthermore, abuse of firearms can undermine civil liberties, human rights and ultimately, democracy.

This means that the police service should have systems to record and analyse all usage of firearms by their members. This would enable problematic trends to be identified and addressed through focused interventions such as training or increased supervision. The success of such interventions could easily be demonstrated by changes in key indicators such as those relating to civil claims or police safety. The benefit would be that over time, all police members would become competent and therefore confident in the use of their firearms.

The only publicly available data on police use of lethal force is published by the ICD. However, the ICD data on police shootings is largely limited to those that result in deaths “caused, or reasonably believed to have been caused, by a member of the SAPS while [on duty] or in his or her capacity as a member of the Service...”. The ICD has discretionary powers to investigate shooting incidents that do not end in death, but this has to be as a result of a formal request, and only a relatively small number are investigated.

The ICD’s 2002/03 annual report shows that of the 311 deaths as a result of police action, 294 were caused by shootings. The report does not, however, indicate how many of those shootings were illegal and how many were legitimate.

Questions have been raised about the capacity of SAPS systems to provide a coherent picture of members’ use of their firearms and of lethal force. Research published in 2001 indicated a lack of credible systems or the non-existence of such systems in many provinces in South Africa. Incidents of shooting were not always entered on the centralised database, and six of the nine provinces did not have the relevant records. This was despite the existence of SAPS Standing Order 251, which requires a “full factual report” to be recorded immediately in the centralised system following any incident in which a member “fires a weapon, allows a weapon to be fired or orders the firing of a weapon”.

The police still face challenges in the administration of this data. While some improvements have been made, in general, problems remain around ensuring that the data is collected and managed properly. Part of the problem is that there are no serious consequences for not recording the relevant information.

The responsibility for monitoring shooting incidents and improving the use of firearms is that of the SAPS. Parliament, via the Minister of Safety and Security, should insist that effective systems are in place and are properly managed. The results should be published in the SAPS annual report.

Use of non-lethal force
The use of a firearm constitutes ‘lethal force’ while the use of weapons such as batons, pepper spray, dogs and flashlights is regarded as non-lethal force, although in some cases there can be fatal consequences. Non-lethal force is the most common type of force used by police in the course of their duties. And without adequate monitoring mechanisms, the opportunities are many for this type of force to be used for purposes other than fighting crime. When this happens, police brutality is the result.

The SAPS is obliged, through the commitments of the South African government, to ensure that police brutality does not occur. South Africa acknowledged the obligation to prevent and protect its people against police brutality or torture with the signing in 1994 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By signing the Convention, the government undertook to work towards its ratification, thus binding the state to the Convention. The right not to be tortured is also entrenched in the constitution of the country.

Despite these commitments there are no known credible data sources on the use of non-lethal force by the police. As a result, the extent of the problem is not known. ICD records, for example, do not
distinguish between police use of non-lethal force during an arrest, and police criminality. In 2002/03, the ICD recorded 1,002 allegations of criminal offences against the police which included cases of assault with intent to cause grievous bodily harm, common assault and attempted murder. It is unclear whether these acts took place while members were on duty (presumably during the course of an arrest) or while they were off duty.

It is crucial that the types of force used when arresting a suspect are documented, especially considering that most fatalities at the hands of the police (58%) happen during arrests. The ICD cannot, however, be expected to be the main source for this kind of information. Given that it depends on the public to lodge complaints about police use of non-lethal force, ICD records can only ever reflect part of the problem.

Sources other than the ICD on non-lethal force have proved equally limited. Research has shown that inquest reports – given the lack of detail in the J56 form – do not provide much insight on the nature and type of force used by police either.

Torture

How torture is defined will obviously have a direct bearing on how levels of torture are determined. The SAPS Prevention of Torture Policy includes an even more expansive definition of torture than that contained in the United Nations Convention Against Torture (CAT). However, SAPS complaints records do not distinguish complaints of torture from any other complaints, making it difficult to identify and monitor this practice within police.

Once again, the ICD provides figures on only those cases that are reported to them. Although it adopted the SAPS definition of torture, “[the ICD] does not have, by its own admittance an accurate picture of torture, and available statistics provide little insight into rates of prevalence”. Indeed, the Directorate has thus far utilised a very narrow definition of torture in which certain methods (such as electric shocks, suffocation, and suspension) govern whether an act is regarded as torture or not. As such, ICD data does not necessarily correspond with either the CAT or SAPS definitions of torture, which means many cases falling within these definitions would be excluded.

ICD statistics are further limited by the fact that, like cases of non-lethal violence, there is no legal obligation on the police to refer cases of torture or assault to the ICD. The Directorate thus relies on the public to bring such abuses to its attention. Many more cases of assault are reported to the SAPS itself every year, some of which are likely to fall into the category of torture, as defined by the SAPS policy. However, because no distinction is made between torture and other kinds of assault, the extent of the problem is not known.

Deaths in police custody

Deaths in police custody have been a major human rights issue in South Africa since the days of apartheid. It is not surprising then that the treatment of people in police custody is regulated in terms of the constitution, the SAPS Act, and numerous SAPS regulations that govern the handling of suspects from the time of their arrest to when they are handed over to the Department of Correctional Services.

The SAPS Act imposes a statutory obligation on the police to notify the ICD in all cases of deaths in police custody. This is done to ensure that deaths are accounted for and investigated by an external oversight body. The ICD distinguishes between deaths in police custody and ‘police-action’ related deaths. Deaths in custody are limited to those that occur inside the police holding cells, while deaths as a result of police action refers to fatalities that result from the actions (or non-actions) of the police. This distinction is not, however, reflected in the ICD’s published data, making it difficult to establish the numbers of either type.

Nevertheless, a study on custody-related deaths found that some deaths could have been avoided if the police had acted, by for example, providing immediate medical attention. Similar issues are raised by the fact that 50% of deaths in police custody during 2002/03 were as a result of natural causes, implying that “the deceased either became ill or was already ill when they were taken to police custody”. The ICD needs to establish whether
these deaths could have been prevented and whether appropriate steps were taken to ensure the well-being of inmates.

Although the ICD investigates all incidents brought to its attention, it should be the SAPS that examines the incidents and trends with a view to preventing further deaths. Stringent action should be taken against police officials when deaths in custody occur, if it is found that procedures were not followed. Police management must send a clear message that contraventions of regulations and guidelines that lead to deaths in custody will be severely dealt with.

Civilian complaints
The SAPS policy on civilian complaints is contained in Standing Order 101, which obligates members to register complaints immediately in the Occurrence Book and to issue a reference number to the complainant. The Standing Order also obliges the station commissioner or senior officers at the station to immediately investigate any reported civilian complaint and report the results to the relevant Area level office.

Research has, however, shown that these procedures are not always followed. A study conducted by the ICD in 2001 highlighted that the SAPS system for handling complaints was not being implemented uniformly.19 The study revealed that complaints – both verbal and telephonic – were handled in a haphazard manner. Police stations had their own unique ways of handling civilian complaints, and some did not even have a complaints registry.

The ICD is mandated to investigate public complaints of police misconduct or alleged criminal offences by the police. It can receive complaints directly from individuals or from the police, although the SAPS is not obliged to report such complaints to the ICD. The Directorate has recommended that all complaints be registered, in line with the relevant Standing Order.

To this end, stations need to establish a user-friendly system that formally records all complaints whether they are written, verbal or anonymous. These should be analysed, and the trends reported on. The 2002/03 SAPS annual report only covers the numbers of complaints received through the National Complaints line.20 No analysis of these complaints is included in the report.

Complaints data from stations, as well as the area and provincial offices, will enable police managers to analyse trends of civilian complaints and deal with them. Apart from keeping managers informed about public dissatisfaction with particular members, units or stations, it also offers a real possibility of improving police–community relations and service delivery to the public.

Police corruption
The United Nations Office on Drugs and Crime’s recent Country Assessment Report concludes that in terms of public perception, the SAPS is regarded as the most corrupt public service in the country.21 While this is a perception, it is backed by the fact that the SAPS recognises the impact of corruption within its ranks:

…corruption among police members severely compromises the functioning and credibility of the SAPS. Internal corruption is detrimental to the morale of police members and causes the public to perceive the police as being unable to provide an effective policing service.22

Although the problem has been acknowledged by the SAPS,23 the closure of the Anti-Corruption Unit in 2002 undermined public confidence in the police’s commitment to fighting corruption. Between 1996 and 2001 the SAPS’ Anti-Corruption Unit (ACU) handled 20,779 allegations of police corruption, 3,045 of which resulted in arrests, followed by 576 convictions.24

While the 2002/03 SAPS annual report provides data related to corruption, the information is unclear and does not indicate whether efforts to deal with the problem are succeeding or not. The report states that for the years 2001 and 2002 combined, there were 2,370 cases of corruption investigated, of which 1,332 resulted in criminal prosecution and 641 in internal disciplinary hearings.25 The report does not say what happened
to the remaining 397 cases. In the text, it states that 872 police members were suspended as a result of their involvement in corruption, but the accompanying graph shows that only 188 were suspended under the category ‘corruption’.26

Furthermore, the SAPS annual report does not define what constitutes corruption. It separates a range of categories such as “assisting escapes”, “defeating the ends of justice”, “bribery” and “fraud” from the category “corruption”.27 Given the confusing categorisation, the report is not entirely clear on the number of members convicted or dismissed as a result of their involvement in corruption. What is worrying is that the available data reflecting the outcomes of disciplinary hearings into corruption shows that only 18 members were dismissed out of the 143 that were found guilty.28

While the SAPS annual report has improved with regard to the amount of information provided, the way it is presented is unclear. This makes it difficult to assess whether or not the initiatives to tackle corruption in the SAPS are working.

Better oversight of police conduct

The SAPS annual report is an important document for parliament in particular and the public in general. It presents the key priorities and activities of the police, and during a period of organisational reform, should demonstrate improvements on preceding years.

While the latest annual report is a significant improvement on previous years, there are still shortcomings. When it comes to key indicators and information on police conduct and abuse of power as discussed in this article, substantial improvements are still necessary.

It seems logical that departments will generally want to report on their good performance rather than on issues that might cause embarrassment. However, the SAPS’ ability to report adequately on these indicators will promote public confidence in the police. It will demonstrate that police management takes these issues seriously and is able to effectively tackle them. Moreover, ensuring that police members are able to use appropriate force when necessary, and that abuse of power can be quickly identified and effectively dealt with, will improve the performance of, and public support for, the police.

Parliament, as the representative body of all South African citizens, has the duty to ensure that the SAPS improve their internal systems of recording, monitoring, managing and reporting on aspects of policing that are fundamental to the constitutional democracy.

Endnotes
1 Public Service Commission, Annual reports as an accountability mechanism, in Review of Department’s Annual Reports as an Accountability mechanism, 2002.
2 SAPS misconduct ‘under-reported’, statement made by ICD to Parliament’s Safety and Security Portfolio Committee, Dispatch Online, 25 April 2002.
5 See D Bruce and O’Malley, In the line of duty? Shooting incidents reports and other indicators of the police use of force and abuse of force by members of the SAPS, compiled for the ICD, 2001.
6 Ibid.
7 Chapter 2 of the Constitution of South Africa, 1996.
8 Bruce and O’Malley, op cit.
10 Ibid.
11 See D Mistry et al, op cit.
12 The SAPS anti-torture policy states that “No member may torture any person, permit anyone else to do so, or tolerate the torture of another by anyone. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. No exception, such as a state of war or a threat of war, state of emergency, internal political instability or any other public emergency will serve as justification for torture”.

16 Visit <http://www.icd.gov.za/about/brochure.htm> for ICD categorisation of cases.


23 The SAPS has introduced several reporting systems for its members and the public. Corruption can be reported via the SAPS Complaints Line (0860 11 12 13), Community Service Line (0860 13 0860), Emergency Line (10111), through SAPS management structures (National, Provincial and Area Commissioners), or in the case of SAPS members, via the Crime Intelligence Corruption Information Management System.


26 Ibid.

27 Ibid.

28 Ibid, p 11, see graph 5 "Outcome of departmental hearings".
The problems with this approach are manifold. There is little reason to believe that the social services departments have any better insight into why people commit crime, or how to change their attitudes and behaviour, than do the police. Since crime prevention does not explicitly lie within social service departmental agendas, performance indicators are not geared to encourage their participation in interdepartmental efforts. In the end, this approach blurs the line between crime prevention interventions and the eternally receding horizon of ‘social regeneration’.

This has meant that crime prevention often falls between the cracks. It is seen as a long term project in an area where there is a blaring demand for short term results. When resources are allocated to dealing with the problem of crime in society, the concrete requirements of the police are generally more compelling to lawmakers than ‘pie-in-the-sky’ social development projects.

Chief among these police demands are funds for salaries; salaries needed so they can do more of what they know how to do. On the one hand, this encompasses their vital reactive function – responding to calls and reports from the public, and investigating crime. On the other is what the police
call ‘crime prevention’, which seems to be any ‘proactive’ work that is not motivated by a specific call for assistance from the public. This generally includes visible patrols, raids of suspect buildings, roadblocks on routes used for getaways by criminals, and cordon and search operations in high crime areas.

The thinking behind this is that crooks can be scared into behaving by the sight of a blue uniform. Those who aren’t, can be incapacitated by locking them behind bars for long periods of time. This will scare their friends into behaving too, because they will see that government is serious about crime. No matter how poorly raised or economically needy, everyone can be expected to respond to fear.

While the above portrayal verges on caricature, it does set out a live dilemma. On the one hand, we trust the police to protect us from crime. On the other, we recognise that they are ill equipped to deal with its social causes. This article suggests a way around this impasse – a way of changing social conditions in the short term. Since most crime problems are local problems, the key is the kind of local law designed to regulate social conditions: the by-laws.

Crime prevention in South Africa

The 1998 White Paper on Safety and Security defines “crime prevention” as:

All activities which reduce, deter, or prevent the occurrence of specific crimes, firstly, by altering the environment in which they occur, secondly by changing the conditions that are thought to cause them, and thirdly by providing a strong deterrent in the form of an effective Criminal Justice System.¹

The document goes on to differentiate between the types of activities described in the first two points and that of the third, drawing the distinction between “social crime prevention” on the one hand and “crime prevention through effective criminal justice” on the other. This dichotomy has persisted throughout the discourse on crime prevention in South Africa, with social crime prevention being described as a long term process, and law enforcement-based crime prevention as a short term option.

For example, the National Crime Combating Strategy (NCCS), the present operational strategy of the police, is broken into two phases. Phase one, which was to have been conducted between 2000 and 2003, has been nicknamed “Operation Crackdown”.² In an attempt to ‘stabilise’ escalating crime levels in the 145 station areas that produce 50% of the crime in the country, joint police and military operations were launched, involving saturation patrols, building searches, roadblocks, and cordon and search operations. In these operations, a ‘zero tolerance’ approach was taken, and a massive number of arrests were made for a wide range of charges.

In contrast, phase two, which is supposed to run from 2004 to 2009, is designed to ‘normalise’ crime levels through interventions aimed at addressing the causes of crime. It would appear that the SAPS’ primary mechanism for accomplishing this will be sector policing, a geographically-focused form of community policing in which the police engage with community members to identify and solve persistent crime problems.

Thus, the first phase was intended to have a quick impact on the crime figures through law enforcement, while the second is intended to address the causes of crime over a longer period of time. What is actually going to be done to stop crime in phase two has not yet been determined: it is hoped that together, the police and the community will be able to come up with solutions appropriate for the particular localities in which the sectors are established.

The two-phase approach has allowed the police to apply their existing skills for three years and put off dealing with the issue they know is actually beyond their scope: addressing the social causes of crime.

An alternative approach

Is it possible to change social circumstances in the short term? One aspect of social reality can be changed immediately: the law. Some would argue that legal change is irrelevant without
commensurate enforcement capacity, but South Africa provides many examples to the contrary.

Anti-smoking laws, which many believed would be 'unenforceable', resulted in major renovations among many restaurant chains. While the police may be too busy to arrest incorrigible tobacco addicts, the law has provided the basis for more informal types of social coercion to be employed. Non-smokers now have a legal basis on which to challenge those violating the law, although this is more likely to be done with a glare than with a trip to the courthouse. The net result is a world less friendly to cigarettes, which is likely to be a healthier world.

Looking at another example, employment equity inspectors may be few in number, but the consequences of being caught out are just too terrible for most major concerns to contemplate. The law provides the moral authority for the previously disadvantaged to challenge unfair hiring decisions and to demand corrective action. With the dash of a pen in Cape Town, work circumstances countrywide were changed forever.

Similarly, the law requiring that domestic workers be registered for unemployment insurance has seen widespread compliance by thousands of private individuals motivated more by a genuine desire to comply with the law than by fear of prosecution. Domestic workers, who are the consummate example of workforce members with little coercive bargaining power, have been alerted to their rights through the media and word of mouth, despite the fact that many are illiterate.

What these examples have in common is the challenging of people who cannot afford to be, or do not desire to be, on the wrong side of the law. There may be crime problems that can be dispatched just as expeditiously if similar players can be identified whose decisions resonate at street level.

The biggest problem with deterrence theory is that many, if not most, people who engage in criminal acts are, in fact, undeterrable. Most acts of violent crime are committed in the heat of the moment, when the possibility of incarceration is utterly irrelevant. This 'heat' is turned up when alcohol or drugs are involved. And there are people in any society whose lives are lived 'in the heat of the moment'. What would deter the legislators who craft our criminal codes becomes just another part of the drama of lives lived under an entirely different set of values.

The trick, then, is to find a way of changing the choices faced by these undeterrables by targeting the actions of those with something to lose.

Targeting those with something to lose
South Africa is different from many developed countries in that it is possible to live almost entirely outside the ambit of the law. People can and do build un-inspected homes on property they do not own, draw free water from untreated sources, eat un-regulated food, and dispose of their waste in unauthorised ways. It is very difficult to touch these people by changing the law, since they owe their way of life to ignoring it.

But there are large groups of people who defy the law while simultaneously enjoying its protection. This is most obvious in urban contexts, which comprise some of the most notorious crime hotspots in the country. These people owe their lifestyle not to the absence of the law, but to the fact that it is not enforced. They rely on unregulated environments.

It is not a coincidence that crime and grime go together, but neither causes the other. Crime can only thrive when people don't give a damn anymore, a sentiment that is most pungently manifest in neglect of basic hygiene. Squalor doesn't generate crime. Rather, the two are both symptomatic of the same disregard for the value of public order that permeates localities the state neglects.

Inner-city areas pose many lifestyle advantages to the urban criminal – advantages most would be loathe to give up. The desire to make a crooked buck does not automatically imply an ignorance of the advantages of indoor plumbing. And especially for criminal businesses, it can be difficult to attract
a moneyed clientele to locations without access to paved roads and other amenities the buying public tends to take for granted.

The high-rise environments that characterise inner-city areas do not spring up on their own accord. They are comprised of buildings owned by people. These people have something to lose: their buildings. So while the criminals on the city streets may not have much law enforcers can threaten, the people who control their living environments do.

These people do control the little bit the criminals have to lose: their relatively comfortable inner-city living arrangements, and the indoor component of their playing field. Building owners control their crooked tenants' access to indoor plumbing. And while the threat of prison may loom too remotely for some to take notice, there are few things more immediate than needing a place to relieve oneself.

**Accountable environments**
Inner city crime can only ferment in dimly lit places. Criminal enterprises require housing where nobody asks too many questions. If these environments were to suddenly become regulated, criminals could literally face eviction from their cosy, if somewhat dingy, cocoons.

Several basic tools are found in the by-laws. Municipalities are allowed to regulate in the areas of health and safety. They can set down basic business and licensing requirements. They can collect rates and taxes. They can zone.

Let's apply these to your basic inner-city area. Imagine a by-law that requires all owners of rental property (including hotels) to keep copies of the identity documents of residents. This would ensure that all foreign residents keep their visas up to date, that all runaway sex workers can be traced by their families, and that the next time there is a shoot-out in the hallway, the host can match the photocopies to the bodies. They might even be able to point out those who hastily relocate after the incident.

Failure to maintain these records should result in a frightening and escalating series of fines – fines that can pay the salaries of inspectors and may, in the case of repeat offences, exceed the value of the building. If this is the case, the building can be attached in settlement.

Municipalities may presently be loath to take ownership of crumbling tracts of residential real estate, but there are law-abiding South Africans who need roofs over their heads. These South Africans have land-reallocation grants that can be used to refurbish the buildings. As proud owners of new homes, they comprise a class of people who most definitely do give a damn, and this is the strongest bulwark against backsliding into the anarchy that prevailed before.

Suddenly, criminal fugitives may have a hard time finding a place to hang their hat in the slums they once called their own. They may have to invest in a tin roof, plastic sheeting, and cardboard. They may even have to commute. Whatever their response, there will be new points of vulnerability to exploit, new environments ripe to be regulated.

**Guns and booze**
While having a gun might not make you a killer, it does make you a lot more dangerous when you lose your temper. And if you have had a few before taking aim, chances are a simple kneecapping could turn into something far more serious. Guns and booze may not cause crime, but their proliferation does aggravate the situation.

Firearms and alcohol are two legal commodities, and are thus subject to regulation. In theory, this is done at national or provincial level, but clearly it could use some local tweaking. For example, just because it is legal to own a firearm does not mean that the city needs to allow people to carry their weapons on their persons. ‘Check your guns at the city lines’ has a Wild West sound to it, but it could result in lives being saved in scuffles that accidentally become slayings.

All this is legally contentious, of course. National legislation and constitutional rights to property and movement will be invoked. But there are creative ways around the problem. A municipal tax could be instituted, with rebates or exceptions for those who declare their buildings firearm free zones, for
example. With dedication and perhaps a little litigation, municipalities should be able to take extra measures to ensure the safety of their streets. Moral authority is on their side.

Similarly, the right to a liquor license seems to have become second only to the right to vote in the new South Africa. But just because you have the piece of paper does not give you the right to open shop wherever you choose. Zoning is a powerful tool for municipalities to use in relegating undesirable activities to a well-watched basket. Like with the smoking regulations, this is unlikely to reform many alcoholics, but it may make bar-hopping inconvenient enough to interrupt a few binges.

In the short term, this is likely to result in the further proliferation of unlicensed premises, but a similar approach must be taken. Most shebeens are housed inside buildings with owners. If nothing else, by-laws could require confiscation of liquor stocks, which can be sold to further fund enforcement, such as rewards for those who provide evidence against unlicensed vendors.

In the United States, owners of bars have been subject to various state ‘dram shop laws’ that hold them accountable for any damage done by people they have served while visibly intoxicated. The primary witness for the state in these cases is often the drunk himself. This follows the same principle of deterring those who have something to lose.

Of course, drunk drivers have vehicles and municipalities have the right to enforce traffic regulations. As with inner city buildings, this property could be made directly forfeit on conviction, or the fines could be stiff enough that they exceed the value of the car. If applied aggressively, the city police should never suffer for lack of transport.

Follow the money
Police in Hillbrow think that one major factor behind the remarkably high rate of robbery in the area1 is that many of the residents are foreign nationals whose permits for being inside the country might not be entirely in order. Many of these foreigners engage in street trading or other informal enterprises, which means they often carry a lot of cash, but they lack the identification documents with which to open a bank account. Their homes are even more insecure than their pockets, and the local crooks know this.

As the police in the area have suggested, one rapid way of regulating the finances of these quintessentially unregulated people would be to provide keys for secure rental strongboxes at a nominal fee, with no identification required. Until such time as residential control makes the inner city a less attractive destination for illegal immigrants, these devices could allow a safe stash for one’s life savings. The demand for such boxes may quickly give us an idea of the scale of foreign commercial activity in our inner city areas.

Increasingly drawing marginalised people into more regulated lifestyles – whether they be illegal immigrants or local street sex workers – could provide a possible bridge into the mainstream, while simultaneously minimising the harms suffered both by the individuals and by the society at large. These people, who are not malicious criminals, are best addressed with a carrot instead of a stick, as the hardships they face daily are often heftier than the stoutest knobkerrie.

Not about zero tolerance
Proponents of the crime and grime link boast an array of macho-sounding approaches to ‘taking back the streets’, many of which are ostensibly rooted in New York’s zero tolerance experience. Most of these have to do with enforcement of laws rooted in social norms, such as the prohibition of public drunkenness or lewdness, drinking in public, and even jaywalking. The idea is to ‘send a signal’ that people do give a damn and that deviance will not be tolerated. It is rooted in the notion that moral decay can be rolled back by enforcing decent conduct and respect for the laws, however trivial.

While this approach may have some utility in areas where the majority of the people still subscribe to a common set of norms, it is most emphatically not what is being argued here. The potential of by-law enforcement lies in the realm of market disruption far more than that of moral regeneration. It is about
functionally disabling the infrastructure on which urban criminals rely - not scaring skid row alcoholics into keeping their zippers up and crossing at the robot.

The so-called ‘zero tolerance’ school of thought posits massive criminal justice resources to ensure blanket police coverage and plentiful jailhouse accommodation to receive their work product. What is being suggested here requires neither.

The enforcers
Given the case loads endured by the police in this country, along with the endless stream of serious crimes like murder, rape and robbery, is there the capacity to enforce these minor local laws? Surprisingly, most people forget that this is actually the primary responsibility of the municipal police.

At present, the municipal police in many areas seem to be focusing either on acting as a force multiplier for the SAPS or on ‘business as usual’ - traffic enforcement. This should change, and would if city management got a sense of the potential of by-law enforcement.

But while the municipal police are likely to do most of the heavy lifting, who should be driving the process? There are many possible options. Since the process may involve the drafting and passage of new laws, it makes sense that someone in the local legislature be involved. But it is also important that someone with clout over a range of executive departments be included. The city manager is an obvious choice, but there are many others. The local deputy director of public prosecutions is a possibility, as is the local municipal police chief.

Since no single individual is likely to have direct control over all the forces that must be marshalled, we are likely to find ourselves squarely back in the ‘crime prevention by committee’ dilemma. But this can be avoided by a single, well-placed individual taking the reigns and cultivating a series of bi-lateral relationships with the pivotal people. In the end, the types of interventions available may be limited by local personalities, but this simply means that the champion of the cause may need to be a little more creative.

Changing the rules
Our inner cities suffer for our neglect. The people who live there are victims, even if some are also perpetrators. It is time these unregulated environments be shown the light of day. Many more interventions could be added to the suggestions above, but they would all conform to the same central idea: social circumstances can be changed, locally, today.

It is possible that similar measures could be taken in areas other than the inner city, like peri-urban informal, and even rural, areas. Although the environment and types of crime problems may differ, the principles should be the same. Regulate those areas that have been forgotten. Deter those who have something to lose. Lead those who have become marginalised back into the mainstream.

Endnotes
2 In fact, this term only applies to one component of the overall strategy.
3 My 2002 survey of 1,100 households in the Hillbrow and Johannesburg Central station areas found that 30% of the respondents said they had been robbed in the last year alone. See ISS Monograph 78 Rainbow Tenement: Crime and policing in Inner Johannesburg.
4 The work of the Hatfield Magistrate’s Court may provide a good example of the potential this route contains.
FALLING CRIME, RISING FEAR

2003 National Victims of Crime Survey

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For several years, the police have maintained that crime levels in South Africa are ‘stabilising’. Without alternative sources of crime statistics, it is impossible to test these claims. The most reliable supplements to police data are national victim surveys, which are now conducted regularly in several countries for precisely this purpose. The 2003 National Victims of Crime Survey shows that crime levels, as measured by the surveys, have indeed declined since 1998. Public sentiment does not reflect this good news however - feelings of safety are much worse now than they were five years ago.

In 2003, the Institute for Security Studies (ISS) conducted a national victim survey with the aim of measuring crime trends in the country, public perceptions about crime and safety, as well as confidence in the criminal justice system. The study was planned and carried out to allow direct comparisons with the national survey conducted in 1998 by Statistics SA for the Department of Safety and Security and the United Nations Interregional Crime and Justice Research Institute (UNICRI).

The survey was conducted between September and October 2003. Households were randomly selected across the country based on the 2001 Census, and a national sample of 4,860 people, over the age of 16 years, was realised. The sample was stratified by province and urban/rural areas, and the data was weighted to reflect the actual composition of the population.

In a nutshell, the findings revealed a drop in crime levels since 1998, although accompanied by rising, and high, levels of public insecurity. In particular, people were most afraid of violent crimes such as murder and sexual assault. This article provides an overview of some of the results, and explores the relationship between fear of crime and actual experiences of victimisation.¹

Why the need for a national victim survey?
National victim surveys provide invaluable information on victimisation rates and vulnerable groups, because they focus on the victims of crime (rather than the perpetrators as is the case with police and court data), and cover a representative sample of the population in a specific geographic area. The surveys also provide an understanding of public perceptions of crime and safety, and the fear of crime, as well as victims’ actual experiences of specific types of crime. They also offer insight into the underreporting of crime, or the so-called ‘dark figure’ that describes the incidents that do not make it into police records. As such, victim surveys complement police statistics by adding to the information that is already on the official database.

Victim surveys have a distinct advantage in that they show the extent of multiple victimisation and whether crimes are concentrated in a small number of people who are frequent victims, or are spread out among the general population. Disadvantages of victim surveys are that respondents do not always
recall precise details of their experiences, the results are subject to sample error, and the surveys are a poor means of collecting data on crimes such as rape, domestic violence, fraud and corruption, because members of the public are often reluctant to discuss such matters with survey fieldworkers. General victim surveys also do not record crimes against businesses, crimes against children, and drug and firearm related offences.

Nevertheless, the value of these studies has been recognised by governments in several developed countries such as the United Kingdom and the United States, where victim surveys are now conducted annually to supplement police statistics. Together with the official crime data, the survey results are key for crime prevention, policing and justice policy formulation, for identifying gaps in resource allocation, as well as improving victim support services.

The good news: crime rates down since 1998

In order to gain the maximum benefit from national victim surveys, similar studies must be conducted at regular intervals. A comparison between the 2003 and 1998 surveys shows whether or not victimisation rates have increased, and how levels of fear of crime may have changed over time.

In the latest survey, just more than one fifth (22.9%) of all South Africans had been a victim of crime in the 12 months preceding the survey. This is slightly less than the overall victimisation rate recorded by the 1998 survey, in which one quarter (24.5%) of South Africans had experienced crime over the preceding year. This means that overall, the victimisation rate dropped by 1.6% over the past five years.

It follows that most of the crime types measured in the surveys would also show a decrease between 1998 and 2003. The one exception to this trend is housebreaking, which is the only category of crime in the survey that increased, albeit fractionally, since 1998 (Table 1). Rates of theft out of motor vehicles and deliberate damage to motor vehicles remained the same, while other offences such as theft of personal property, car theft, deliberate damage to buildings and robbery have decreased to some extent. A more dramatic decrease is evident for crimes like stock theft, assault, and fraud.

The levels of sexual offences/rape as measured in both surveys should be treated with caution as these crimes are underreported in victim surveys as well as official police statistics. The apparent decline in sexual offences from 0.4% in 1998 to 0.1% in 2003 is therefore unlikely to reflect the real trend, as data on these crimes is not considered reliable in the survey context.

### Table 1: % of South Africans, over the age of 16 years, who were victims of crime in 1998 and 2003

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any crime</td>
<td>24.5</td>
<td>22.9</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>7.2</td>
<td>7.5</td>
</tr>
<tr>
<td>Corruption*</td>
<td>-</td>
<td>5.6</td>
</tr>
<tr>
<td>Theft of personal property</td>
<td>4.8</td>
<td>4.7</td>
</tr>
<tr>
<td>Stock theft</td>
<td>4.9</td>
<td>2.5</td>
</tr>
<tr>
<td>Theft out of vehicle</td>
<td>2.5</td>
<td>2.5</td>
</tr>
<tr>
<td>Assault</td>
<td>4.2</td>
<td>2.2</td>
</tr>
<tr>
<td>Robbery</td>
<td>2.4</td>
<td>2.0</td>
</tr>
<tr>
<td>Deliberate damage to vehicle</td>
<td>1.3</td>
<td>1.3</td>
</tr>
<tr>
<td>Bicycle theft*</td>
<td>-</td>
<td>1.2</td>
</tr>
<tr>
<td>Car theft</td>
<td>1.2</td>
<td>1.0</td>
</tr>
<tr>
<td>Deliberate damage to buildings</td>
<td>1.1</td>
<td>0.9</td>
</tr>
<tr>
<td>Fraud</td>
<td>3.0</td>
<td>0.8</td>
</tr>
<tr>
<td>Crop theft*</td>
<td>-</td>
<td>0.7</td>
</tr>
<tr>
<td>Car hijacking**</td>
<td>1.4</td>
<td>0.5</td>
</tr>
<tr>
<td>Other crime</td>
<td>1.6</td>
<td>0.2</td>
</tr>
<tr>
<td>Murder</td>
<td>0.5</td>
<td>0.2</td>
</tr>
<tr>
<td>Theft of motorbike</td>
<td>0.0</td>
<td>0.1</td>
</tr>
<tr>
<td>Sexual assault/rape</td>
<td>0.4</td>
<td>0.1</td>
</tr>
</tbody>
</table>

* crime types not covered in the 1998 survey
** In the 1998 survey the category ‘car hijackings’ included attempted and ‘successful’ hijackings, while in the 2003 survey only successful hijackings were recorded. This could account for the decrease in the hijacking rate between 1998 and 2003 reflected here.
In terms of the ordering of crime types by their prevalence, little has changed since 1998. The most prevalent crimes five years ago were housebreaking, theft of livestock, theft of personal property, assault, fraud, theft out of motor vehicle and robbery. In 2003, the same crimes were among the top seven most prevalent offences, with the exception of fraud. In both years, property crimes occurred more frequently than violent crimes.

A notable finding in the 2003 survey was that a significant proportion of South Africans (5.6%) reported being asked by a government official for a bribe in the form of money, a favour or a present in return for a service that the official was legally required to perform. This suggests that petty corruption was the second most prevalent crime type in the country.

The bad news: less people feel safe
Despite the decline in crime rates indicated by the victim surveys and the official crime statistics, South Africans feel less safe in 2003 than they did in 1998. Perceptions of safety can be measured in various ways, one of which is used internationally, and asks survey respondents how safe they feel when walking alone in their area during the day and after dark.

In 2003, 85% of South Africans said they feel safe walking alone in their area during the day, while only 23% felt safe walking alone at night. On the positive side, the percentage feeling safe at night is higher than that recorded in other comparable site-based victim surveys in the country, including Cato Manor, Hillbrow/Inner Johannesburg, Cato Crest or Meadowlands. However, significantly less South Africans felt safe walking in their area at night than those surveyed in other developing countries. The ICVS found that on average, 60% of those surveyed in African countries, 56% in Latin American countries and 55% in Asian countries said they felt safe walking in their areas after dark. In South Africa only 23% said the same.

Of more concern than the international comparisons, is that South Africans are much more fearful now than they were five years ago. During the day, the public felt generally as safe in 2003 as they did in 1998, if the “very safe” and “fairly safe” categories are added together (Figure 1). However, significantly more felt only fairly safe in 2003 as opposed to very safe in 1998. The tendency towards feeling less safe becomes a clear trend when the night-time results are considered. South Africans felt significantly less safe when walking alone after dark in 2003 than they did five years ago (Figure 2). In fact, more than double the number of people in 2003 than in 1998 felt very unsafe walking in their area after dark (58% in 2003 as opposed to 25% in 1998).

Another indicator of public concern about crime relates to views about how the crime level has changed. Despite the decline in the crime rate, more than half of South Africans (53%) felt that crime has increased over the past three years in the areas where they live. These views were particularly prevalent among people in metropolitan and urban areas, and among Indian and white South Africans. In general, more people believed that property crime had increased (55%) than those who thought violent crime had gone up (47%).
The survey results show that the risk of becoming a victim of property crime was greater than violent crime, and that people were more inclined to think property crime had increased than violent crime. Despite this, five of the top six crimes that South Africans were most afraid of, were violent, with murder topping the list even though it was among the least prevalent of the crimes investigated (Figure 3).

It is possible that more sensational crimes such as murder and rape have a greater impact on perceptions, and are more intensely covered in the media. Moreover, how the police are believed to deal with particular crimes could contribute to public concerns about them. In general, these views indicate the types of crime that respondents thought they were most susceptible to, as well as their concerns about the impact of the offences. Although crime has levelled off since 1998, the results indicate that violence remains the key challenge as far as the public is concerned.

Although fears about certain crimes did not match the risk of actually becoming a victim, public views about which crimes are most common were a closer match to reality. When asked “what one type of crime occurs most in your area?”, respondents were most likely to say housebreaking (38%), followed by robbery (14%), theft of property (10%), murder (7%), stock theft, bag snatching, and assault (all 6%), rape (4%), car theft (3%) and hijacking (2%). The order of crimes believed to be most common was fairly similar to the actual victimisation rates (Table 1), with the exception of murder and robbery, whose prevalence was overestimated by respondents.

Impressions of police performance

Respondents were asked about their physical access to the police, whether they had actually been to the nearest police station, and how they rated the performance of the police in their area.

Access to the police was generally good: almost all South Africans (97%) knew where their nearest police station is, and two thirds were able to reach the police station within 30 minutes or less using their usual mode of transport. This should improve
the chances that victims will report crime to the police. Unsurprisingly, those living in the highly urbanised Gauteng and Western Cape provinces were closest to police stations, while those in rural Limpopo and Eastern Cape had to travel the furthest to reach their local station.

Just under half (46%) of the respondents indicated that they had visited their nearest police station in the last three years. Given that those with first hand experience of dealing with the police are better placed to articulate their views on police performance, the opinions of these respondents are important. Of those who had been in contact with the police, more than half (56%) said it had changed their opinion of the police, and of these, 54% said their opinion had improved. A little more than one tenth (12%) claimed their opinion remained unchanged, while just over one third (35%) said it had made their opinion worse.

Perceptions of police performance were also tested in a question to all respondents about how they think the police are doing in their area of residence. Just over half (52%) of South Africans said the police were doing a good job in their area, while more than two out of five (45%) thought they were doing a bad job. The main reasons cited for why the police are doing a good job were their commitment (25%), that they arrest criminals (24%), respond on time (23%) and come to the scene of a crime (15%). The main reasons for saying the police are doing a bad job included that they do not respond on time (35%), are corrupt (13%), don’t come into the respondent’s area (12%) and are lazy (11%). The importance of police response times in both sets of reasons indicates an area that is directly within the control of the police that could be worked on to improve public perceptions.

Police visibility is also an important factor regarding perceptions of safety. When asked how often they see the police on duty and in uniform in their area, respondents were most likely (29%) to say they see a police officer at least once a day. Just more than a quarter (25%) said they see the police at least once a week. A major cause for concern is that one fifth (21%) reported that they “never” saw a police officer on duty in their area of residence. This no doubt informs people’s opinions on the fear of crime and their reliance on the police for assistance.

An important issue related to police visibility and performance is the level of reporting of crime by victims. High reporting rates reflect, among other things, levels of public confidence in the police. The reporting rate also gives an indication of how many crimes are never registered in the police’s official database. Generally, serious property and violent crimes are reported, while offences regarded as petty (such as pick-pocketing), that may cause embarrassment to victims when reporting (such as rape), or are believed to be a matter for the parties concerned and not the state (such as domestic violence) are often not reported to the police.

This pattern of reporting was found to be true for the most prevalent crimes recorded in the 2003 survey, with the exception of robbery. The vast majority of car theft victims reported the crime to the police, no doubt for insurance purposes (Figure 4). Similarly, a smaller majority reported theft out of vehicles, and housebreaking. The reporting rate for

![Figure 4: Reporting to the police for crimes with rates >1%](image)

assault is fairly high, considering that this is a crime that is often regarded as not important enough to bother reporting, or not a matter for the police to resolve. In the case of robbery however, the fact that only 29% of victims reported the offence is worrying, particularly considering that most of the robberies recorded in the survey were armed robberies and thus of a serious nature.

Reporting rates have nevertheless improved since 1998 for several of the more prevalent crimes, again with the exception of robbery (Figure 5). The results suggest that confidence in the police as measured by reporting rates has grown in the past five years. It is however important to bear in mind that victims’ decisions about whether or not to report are based on a range of factors, some of which are not directly related to policing, such as the view that it is unnecessary to report, or the fear that the perpetrator will take revenge on the victim if he or she reports.

**Views of the courts**

Respondents were asked a similar set of questions about their physical access to the courts, as well as their views of court performance. As in the case of the police, access to the courts was generally good: more than two thirds (84%) of South Africans knew where the nearest magistrate’s court is located and just over half (51%) said they can get to the court within 30 minutes or less using their usual mode of transport. Access was better in the more urbanised provinces. Respondents living in the Eastern Cape and Limpopo were most likely to have to travel long distances, while those in Gauteng and Western Cape travelled for the shortest time.

On the whole, slightly more South Africans (59%) felt the courts were performing their duties adequately than the 52% who said the police were doing a good job. Levels of satisfaction with the courts were even higher among those who had direct experience with the court system: of the one fifth (22%) who had been to court in the last three years, most (70%) were happy with the service provided by the state prosecutor/state advocate. A similar majority (71%) was happy with the magistrate or judge that presided over the case.

All respondents, regardless of whether they had been to court or not, were asked whether they were satisfied with the way courts generally deal with perpetrators of crime. Just over half (51%) said they were, with almost as many (45%) expressing their dissatisfaction. The main reasons given for being satisfied were that the courts pass appropriate sentences (60%), have high conviction rates (22%) and are not corrupt (17%). Dissatisfaction centred on the courts being too lenient (34%), releasing perpetrators unconditionally (32%), not enough convictions (16%), and matters dragging on for too long (14%).

These results indicate that sentencing was the main issue about which the public formed their opinions, both positive and negative, of the way courts deal with suspects. It is also revealing that the second most common reason for criticising court performance was that perpetrators are released “unconditionally”. This suggests that the public do not understand the bail and sentencing processes.

**Views about perpetrators of crime**

The above results suggest that the public favour stiff sentences for perpetrators. But who do South
Africans think is responsible for committing most crime, and what are the motivations of these criminals believed to be? Public opinion on the issue is likely to be informed, considering the high number of people who know someone in their area who makes a living from crime: 29% of respondents admitted to this, which is not that surprising given that crime rates are relatively high. Respondents were further asked about the residency and origin of the perpetrators. The responses clearly indicate that contrary to popular opinion, the vast majority of South Africans believe that people born in South Africa are responsible for most crime. Only 4% thought that most crime was committed by foreigners. Respondents were also of the view that most violent and property crime is carried out by people who live in their area, rather than by ‘outsiders’.

When asked about perpetrators’ motivation for committing crime, the most frequent answers for both property and violent crimes were “greed” and “non-financial motives” as opposed to “real need”. Real need was however almost as common an explanation for property crime as the other reasons (Figure 6). Although a common perception is that crime is caused by poverty, these results suggest that the public think otherwise.

No matter what the motives for crime were believed to be, most South Africans said developmental solutions are most important for solving the problem. When asked which one of three options (crime prevention and law enforcement including more police; the judiciary and courts including harsher sentences, punishment and prisons; and social development including job creation) government should spend money on to reduce crime in their area, most South Africans opted for social development. A further one quarter said money should be spent on crime prevention and law enforcement, with the remainder identifying the judiciary and courts as important (Figure 7).

**Conclusion**
The results of South Africa’s second national victim survey, as well as the police statistics, show that crime rates have either decreased or levelled off over the last five years. However, according to the
victim survey the public’s fear of crime has simultaneously increased. This counter intuitive trend may be explained by a number of factors such as increasing public awareness of other people’s victimisation and the high level of violence that typifies some criminality. However, more research is required in order to understand the complex dynamic between the increasing fear of crime and decreasing crime rates.6

Endnotes
2 This question is asked in the International Crime Victim Surveys (ICVS) conducted by the United Nations Interregional Crime and Justice Research Institute (UNICRI) over the past 15 years in 24 industrialised countries and 46 ‘countries in transition’.
4 The ICVS results are reported in A A del Frate and van Kesteren, The ICVS in the developing world, International Journal of Comparative Criminology, 2(1), de Sitter Publications, 2003, pp 57-76.
5 Since the 1997/1998 financial year 28 police stations, 13 satellite stations and 9 contact points have been established (figures obtained from SAPS Efficiency Services, March 2004).
6 A series of focus group discussions will be undertaken in due course by the ISS.
TOUGH CHOICES

Difficulties facing magistrates in applying Protection Orders

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The second in a series of articles on the Domestic Violence Act considers some of the most difficult issues that magistrates must decide on. These include the temporary removal of the ‘abuser’ from the common home, emergency monetary relief for ‘victims’, and orders specifying the terms of contact with children. Magistrates’ opinions on these controversial issues vary greatly, with the result that victims get uneven assistance from the courts. Magistrates, however, argue that the variation of opinion reflects their independence and discretion, as well as the various capacities of the lower courts to implement the Act.

In the first part of the series on magistrates and the Domestic Violence Act (DVA), magistrates’ opinions about the general substance and workability of the Act were discussed (see SA Crime Quarterly No. 7, March 2004). The second part of the series considers magistrates’ interpretation of more controversial issues such as the temporary removal of the abusers (‘respondents’) from the common home, emergency monetary relief, and orders specifying the terms of contact with children.

These issues have been described as the most difficult ones for magistrates to decide upon. The complexity of granting orders that prohibit an abuser’s access to his or her residence and/or children, and the obvious problems associated with forcing the respondent to pay for the victim’s (‘complainants’) expenses, is not to be underestimated for lower court magistrates. The variation of opinion does not necessarily imply ‘division within the ranks’, however. It may instead reflect the variety of cases brought before individual courts, and the varying capacities of the lower courts to implement the Act.

Prohibiting ‘abusers’ from entering the common home

Although section 7(1)(c) and 7(2)(a) of the DVA provides that magistrates may grant an order that prohibits the respondent from entering his/her residence that is shared with the complainant – or a part of that residence – magistrates are reluctant to enforce this provision. Many believe that this decision, when the respondent is legally entitled by ownership or tenancy to occupy the home, is an extremely sensitive one. Some magistrates argue that it is tantamount to eviction, which is the jurisdiction of the High Court.

Although the Act refers specifically to “prohibiting entry into a shared residence”, there is some debate as to whether this prohibition results in the actual removal of the respondent or a temporary restriction from entering the residence. Opinions about removal vary greatly among magistrates, who raise the following important questions about the enforcement of this provision:

- Does section 7 of the DVA specifically intend to give the right to remove or temporarily evict the respondent from the shared residence?
period between the granting of the interim order and the finalisation of the final order can be a highly dangerous one for complainants.

Respondents are generally only prohibited from entering the shared residence for a temporary period, until the complainant and respondent agree on the living conditions or until the complainant applies for a formal order to remove the respondent through the High Court.

An exception to this approach is when the court establishes that the violence was of a ‘serious nature’ and thus warrants the immediate removal of the respondent. Factors that help the application for immediate removal of the respondent include evidence of acts of domestic violence against children and other vulnerable family members, and the existence of criminal charges against the respondent.

Magistrates, however, are cautious about granting restrictive conditions prohibiting respondents from entering areas surrounding the home and other ‘common’ sites frequented by both parties. Such sites may include places of employment, schools and other family homes. They argue that it is difficult to enforce, particularly in communities where living conditions are crowded. Magistrates do nevertheless acknowledge that concerns about depriving respondents of their right to occupy the shared residence, except under “extreme circumstances”, also deny the right of complainants and their children to live in their own homes without violence.

Emergency monetary relief
The Act makes provision for the granting of emergency monetary relief (EMR) which is defined as:

<table>
<thead>
<tr>
<th>the compensation for monetary losses suffered by the complainant at the time of the issue of a protection order as a result of domestic violence, including:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) loss of earnings;</td>
</tr>
<tr>
<td>b) medical and dental expenses;</td>
</tr>
<tr>
<td>c) relocation and accommodation expenses; or</td>
</tr>
<tr>
<td>d) household necessities.</td>
</tr>
</tbody>
</table>

Some magistrates argue that they will only grant this remedy when the respondent is present to argue his or her side of the case. Others say this approach is incorrect as the Act does not specify at which stage the prohibition may be granted.

The general approach to section 7, however, is to prohibit the respondent from entering the shared residence only at the final stage of the protection order. However, when magistrates believe that complainants are in serious danger of further abuse, the condition will be granted at the interim stage.

But what constitutes ‘serious danger’ may not be compatible with the complainant’s real or perceived vulnerability to further violence. Indeed, the consequences of not thoroughly examining the extent of vulnerability to further violence can have harmful effects on the complainant and her dependents. If Return Dates are set months away, or are postponed due to the fact that the notice to the respondent to appear on the Return Date is not properly served, the
The intention of the Act is to allow complainants access to emergency funds to ensure that they can provide for their immediate safety and well-being, and that of their dependents. Magistrates stated that some complainants have interpreted this relief as a substitute for maintenance payments, and found some of the requests “unreasonable”. The Act, however, is careful not to use the term maintenance to describe this remedy.

Magistrates suggested that some complainants use the Domestic Violence Act when the maintenance system fails them – either when they have been unsuccessful in securing a maintenance order or when they have waited a long time for the maintenance order to be served, granted or varied. As expected, there were a range of opinions surrounding both the purpose and application of EMR.

On the one end of the continuum are magistrates who believe that respondents who are not maintaining their families or the shared residence – as required by the law – are committing what the Act refers to as economic abuse. Referring to sections 1(ix)(a) and (b) of the Act, it would follow that defaulting on maintenance, not paying monthly rent or mortgage payments, and not providing for basic family necessities would all constitute ‘economic abuse’ and therefore warrant EMR.

Some magistrates suggested that it was perfectly acceptable for the court to provide the complainant with EMR for a temporary period, while the lengthy waiting periods for the appearance of maintenance defaulters in maintenance courts were pending. The Act is clear that a protection order may be granted if there is evidence of any act of domestic violence, including economic abuse. One magistrate defended this position:

We are all well aware of the huge delays experienced by maintenance courts. Maintenance hearings are set down months in advance and the courts sometimes have to send the sheriff out three or four times before he receives his summons to appear. This is the case for both new applications, defaulting respondents and for variations of maintenance orders. Some women wait for over a year to get their first maintenance payment. How long do their children have to go without proper food, without school because fees are not paid, without medical care? The maintenance system is a mess and fathers know it. They use the delays to avoid supporting their families. The DVA is clear, it is an immediate and effective remedy. The one part of justice can help the other. If the defaulter ends up double-paying because of back payments, that’s his problem. He should have obeyed the maintenance order in the first place. Really, the maintenance court can take the amount of EMR off the payments of maintenance. I would consider that a fair judgment. It provides the applicant with immediate funds and it means he doesn’t have to pay twice.

This view, however, was not shared by other magistrates who considered maintenance a completely separate issue that should be contemplated in the maintenance courts. The idea that EMR could potentially provide the complainant with ‘bridging’ funds until the maintenance matters were settled, was not viewed favourably.

Instead, the allocation of EMR, it was suggested, should only cover expenses that are a “direct result of domestic violence”. This, however, implies that economic abuse is not a ‘real’ form of domestic violence and that provision for EMR should only be made when other more ‘serious’ forms of violence are committed by the respondent.

It was further suggested that EMR should cover very specific costs associated with domestic violence, such as relocation expenses, payments for rental or bond, medical costs incurred due to the acts of physical domestic violence and other immediate living costs incurred by the complainant as a result of violence. The latter was not adequately defined in the discussions with magistrates.

There was very little consensus about what to provide complainants in terms of EMR. However, magistrates were in agreement that the amount granted should be fixed – in one lump sum or for a limited monthly period – and that the courts should
inform the complainant that they may apply for maintenance at the maintenance court.

Contact orders with children
In terms of section 7(6) of the Domestic Violence Act, if the court is satisfied that it is in the best interests of the child, it may:

a) refuse the respondent contact with such a child; or
b) order contact with such child on such conditions as it may consider appropriate.

Contact orders for children were raised as another serious issue facing magistrates. The ambiguity and the variety of approaches used by magistrates in relation to orders which specify extent of contact that the respondent has with children, was notable during all phases of this study. The First Report found that between 10-50% of requests for supervised contact with children (in the research sample) were refused by magistrates. When conditions of contact were granted (in s. 3.1.2.8 of Form 4 of the application), the following conditions were ordered:

- that the respondent not remove the child without the complainant’s consent;
- that the respondent not come within a certain distance of the child;
- that the respondent not visit the child at school/ crèche/day mother; or
- that the respondent not contact the child in any way, including telephonically.

Granting both interim and final protection orders that limit the respondent’s contact with his/her children is a complex and contentious issue for the magistracy. The approach to non-contact or supervised contact orders has been a cautious one but some courts are more willing to entertain contact orders than others.

Magistrates are acutely aware that the decision to limit contact with children is serious, and that the manner in which application forms are currently filled out does not provide the court with sufficient information to make such a weighty decision. As a result, magistrates tend not to use the Domestic Violence Act to establish temporary ‘custody’ of, or ‘access’ to children, and feel that the more favourable approach is to refer these matters to the Children’s Court or the High Court.

One argument was that granting a no-contact or a supervised-contact order at the interim protection order stage was unfair to the responding party. The interim order, being an ex parte order, takes away the respondent’s fundamental right to have access to his/her children – an issue that should be the purview of the Children’s Court or the High Court. It was suggested that contact orders with children should only be granted at the finalisation of the protection order, when the respondent could argue his or her position.

It was further suggested that when a High Court order is in place, the Magistrate’s Court must not grant an order that contradicts the order already in place. When a High Court order has granted particular custodial or access rights to the children, the Magistrate’s Court is not in a position to vary the conditions of the order, even though the DVA makes provision for the protection of children either by the removal of the respondent or a regulated ‘contact’ agreement between the parties.

It was counter-argued, however, that the purpose of the interim protection order was to provide immediate relief to the complainant until the return date. When the magistrate is convinced that an “act of domestic violence” has taken place, his or her duty is to ensure the protection of the complainant and her dependants. Limiting the granting of contact orders to the finalisation stage therefore defeats the objective of protecting complainants from imminent danger.

It was widely accepted that approaching the police or the courts for protection was one of the most dangerous periods for the escalation of domestic violence and, on this basis, every available remedy provided for in the Act should be made available. It was also forcefully argued that the act of domestic violence does not have to be committed solely on the complainant, but that the court should also protect children from the damaging effects of this violence.

When there are existing High Court orders, it was recommended that magistrates should have the
power to grant immediate relief to a complainant until such time that an alteration is made to the High Court order. Magistrates felt strongly that even though, in principle, High Court orders should be varied at the High Court, the Domestic Violence Act should provide a victim of domestic violence with some temporary relief.

Some insisted that when the original High Court order was issued, domestic violence may not have featured in the decision to grant the order. The Domestic Violence Act specifically provides for immediate relief to victims of domestic violence, and on this basis, magistrates argued that they should have the power to intervene in cases in which violence is present and to provide relief to applicants until such orders can be varied in High Court.

The court records that were analysed for the First Report showed that violence against women had considerable effects on children. Some of the effects of witnessing domestic violence on children included:

- insomnia/restlessness;
- acute anxiety;
- diarrhoea and vomiting;
- abdominal pain;
- eating problems (such as not eating or excessive eating);
- notable problems at school when violence intensified (i.e. poor performance or troubles with teachers or peers);
- depression/sadness;
- bed-wetting;
- running away from home/staying with other family members/refusing to come home;
- poor general health (chronic cold or flu symptoms; exhaustion); and
- increasingly aggressive behaviour/discipline problems.

The report also argued that the magistrates presiding over domestic violence cases should request a report from a social worker on the child. One magistrate suggested that with respect to children as applicants or dependents of the protection order:

We need permanent social workers at court dealing with domestic violence cases. In fact, we need a special domestic violence court, or at minimum we need to legislate a social workers report, which must be attached to the application. High court won’t deal with access/custody issues regarding children without a social worker’s report; surely the same should happen in the case of lower courts who are also expected to address these issues through this legislation.

### Recommendations regarding the child (as an applicant for a protection order) and in terms of the placement of children:

- If a child applies to the court for a protection order, the court must consider the application, and if it deems fit, grant an interim protection order. The court must then, if it finds the child to be in need of care, refer the child to the Children’s Court in terms of section 11(1)(c) of the Child Care Act.

- When adult applicants request, as part of the protection order, an order for the placement of children (i.e. structured or specific visits), the magistrate should inform the applicant that the arrangement is a temporary one. When making provision for the placement of children, magistrates must consider:
  - the safety, health and well-being of the applicant, child/children or any other person affected by the domestic violence;
  - the applicant’s perceived risk of further harm or violence;
  - the personal and material interests of the applicant; and
  - the best interests of the child/children.

Like the concerns surrounding the prohibition of respondents from entering the shared residence, magistrates are cautious about making decisions that may appear to be the purview of the High Courts. The development of guidelines for presiding over cases that involve contact orders with children must be compatible with a number of other legal
instruments, namely the Child Care Act, remedies available through the High Court for the custody and access of children, and the forthcoming Children’s Bill. Since the latter has not been finalised, magistrates felt that decisions relating to contact with children can only be decided on the facts presented before them, and what is currently set out in the Act itself.

Endnotes
1 Sections of this article were originally published as L Artz, Magistrates and the Domestic Violence Act: Issues of Interpretation, Institute of Criminology, Faculty of Law, University of Cape Town, 2003.
2 The results of this research are based on the opinions of magistrates themselves and not the author. This study was conducted to investigate the various approaches by magistrates in implementing the Act. Broadly, the study involved the re-examination of our monitoring database on the DVA (see P Parenzee, L Artz & K Moul, Monitoring the Domestic Violence Act: First Report, Institute of Criminology, Faculty of Law, University of Cape Town, 2001), in-depth interviews with magistrates from each of the nine provinces, the analysis of the outcomes of two major conferences (including over 350 magistrates and High Court judges, facilitated by this author and her associates) as well as the outcomes of monthly meetings with the ‘Domestic Violence Working Group’; a group consisting of magistrates representing each province, the Justice Training College, the Gender Directorate of the Department of Justice and the author.
3 7(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from:
   (c) entering a residence shared by the complainant and the respondent: provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant.
7(2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant ...
4 Ex parte, refers to court proceedings where the respondent is not in attendance and decisions are made in absence of the respondent. Decisions made at ex parte hearings are only enforceable until the Return Date, when both the applicant and the respondent appear before the magistrate.
5 Return Date is the date set by court, once an interim protection order has been granted, when both the applicant and respondent appear before the magistrate. The magistrate may finalise the protection order on the return date, or should the respondent provide reasons for why the protection order should not be finalised, in whole or in part, the order may be set aside (cancelled) or varied (changed).
6 Section 1(ii)(a).
7 Sections 1(ii)(a) and (b) define economic abuse as:
   (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage or bond repayments or payment of rent in respect of the shared residence; or
   (b) the unreasonable disposal of household effects or other property in which the complainant has an interest.
Tough questions for the Scorpions

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The ‘Scorpions’ are probably the most recognised law enforcement body in South Africa. Yet their existence appeared to be under threat during 2003 when highly placed figures suggested that they ‘cherry-pick’ their cases, and are open to political manipulation. There was even talk of disbandment or restructuring under the police on the grounds of unconstitutionality. While the Scorpions appear to have weathered that particular storm, the issues remain. Is there any substance to the accusations?

The launch of the Scorpions was announced in September 1999, and the organisation became formally known as the Directorate of Special Operations (DSO) in January 2001 when its founding legislation was promulgated. The DSO is the investigative arm of South Africa’s National Prosecuting Authority, falling under the authority of the National Director of Public Prosecutions, Bulelani Ngcuka (referred to below as the ‘National Director’).

High-profile since its inception, the organisation is generally viewed by the South African public as embodying the ultimate crime fighters. The DSO investigation into the arms deal concluded by the South African government in 1999, and its investigation into the role of the deputy president in this deal, upped this public profile considerably – and highlighted the unresolved issues that have dogged the DSO since inception.

The cherry-picking accusation
Almost as soon as successful DSO cases began to be publicised, accusations of DSO ‘cherry-picking’ arose. Specifically, the DSO is accused of choosing to investigate and prosecute only matters which they are sure to win. Sometimes this accusation went further, to suggest the DSO had a tendency to take over cases already substantially investigated, taking all the credit for the subsequent successful conclusion of the matter. More generally, there is discomfort as to which cases become DSO ‘matters’ – in law enforcement language, uncertainty as to the DSO’s mandate.

It is easy to dismiss the accusations as ‘sour grapes’, but the very real uncertainty remains as to how a matter comes to be pursued by the DSO. What then, is the DSO’s mandate? Given the complexity of the answer to this question, it is unsurprising that uncertainty exists.

The legislation creating the DSO describes a legislative mandate encompassing a broad concept of organised crime – any crime committed in an “organised fashion” - which is so wide that just about any matter could be argued to fall under the DSO mandate. The legislation furthermore specifically retains all of the police’s powers of investigation, so that this mandate is not exclusive to the DSO. The legislation furthermore would emerge, and that a Ministerial Committee, consisting solely of Cabinet members, created by
the legislation would confirm procedures for the transferral of matters to the DSO.3

However, acrimony between the SAPS and DSO arose soon after the launch of the organisation. With the appointment in 2000 of Jackie Selebi as SAPS National Commissioner, a man who was keen to defend the reputation of the police and who clashed with the National Director, a negotiated mandate became unlikely. The Ministerial Committee never sat. As a result, the DSO was forced to carry out an internal case review, in which it considered whether the matters it had already taken on were appropriate or not. In doing so, the DSO came up with its own operational mandate – more in the nature of internal terms of reference – which outlines the requirements a case must meet before being taken on. This was dubbed “Circular One”.4

In terms of Circular One, the first criterion is that the matter concerned must fall within the strategic focus areas of the DSO. These have been refined to include: drug trafficking, organised violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption.

There are a further 14 general criteria or factors that must be considered, covering such questions as ‘Is the criminal activity involved complex, and does it comprise at least five persons?’ There are also financial thresholds that must be met. For example, a corruption matter has a threshold of R500,000, while serious economic offences must involve actual loss of R5m to meet threshold requirements.

All of these requirements must be met and considerations canvassed before the head of the DSO will authorise an investigation or ‘declare a matter in terms of s28’. Prior to such an authorisation, no DSO members are designated to a case and DSO members do not, until designation, enjoy the DSO special powers of investigation, which include somewhat expanded powers of search and seizure.

This, then is the mandate of the DSO. While it does to some extent put to rest the cherry-picking accusation – no case which meets all of these requirements can by any stretch of the imagination be considered ‘easy’ to prosecute – it does provide many loopholes for the DSO to justifiably turn down the investigation of a case. Indeed, the major concern of the DSO head office does appear to have been to avoid being overloaded with trivial matters.

However, one of the main flaws from which this mandate suffers – arguably due to political circumstances beyond the control of the DSO – is that it has been drawn up without any outside input. The question of whether a case is taken on or not remains one which is settled internally, by the DSO alone. Furthermore, there seems to be no oversight body which on a regular basis reviews case selection. Outside accountability of the DSO as a whole rests entirely with the Minister of Justice and Constitutional Development, and with the justice portfolio committee of parliament.

The constitutional question
During 2003, some in government suggested that the DSO in its current form might be ‘unconstitutional’. Again, it is tempting to dismiss such accusers as having ulterior motives. Nevertheless, the basis for this claim appeared to be the constitutional provision which states that South Africa must have only one police force (the suggested cure for the defect is the removal of the DSO from the NPA to fall under the control of the SAPS).3

The first thing to note is that if the DSO were to be located anywhere other than under the NPA, it would no longer be the DSO as conceived – that is, a unit comprising prosecutors and investigators working together as a team on a daily basis, carrying investigations through to prosecutions seamlessly. Nevertheless, some kind of secondment arrangement with prosecutors working with SAPS investigators could be set up to approximate DSO operation.

Yet the question remains a moot point – is the DSO, as conceived, constitutional? While an expert constitutional opinion cannot be offered, some relevant constitutional provisions can be discussed. The provision in question prohibits any other entity from operating as a police force – from having the
"objective powers and functions" of the police. Only in the matter of investigation of crime does the DSO overlap with the SAPS.

Yet each of the objectives, powers and functions of the police on their own are manifestly not exclusive to the police – for example, the object of "securing the inhabitants of the Republic" would also be shared by the SANDF. It could therefore be argued that the 'investigation of crime' on its own is similarly not the exclusive preserve of the SAPS. This would tend to suggest that the DSO within the NPA is not excluded from investigating crime. But is it empowered to investigate crime?

The constitution provides that the National Director has the power to carry out any "necessary functions incidental to instituting criminal proceedings". It could be argued that this includes the further investigation of certain crimes to ensure successful prosecution. Many institutions other than the DSO carry out investigations incidental to their functions – such as the Auditor-General, or the South African Revenue Service.

Furthermore, Parliament itself considered the question and took the unusual step of making its opinion clear: the preamble to the NPA amendment act creating the DSO says, "the constitution does not provide that the prevention, combating or investigating of crime is the exclusive function of any single institution".

But the constitutional provision regarding a single police force is a distraction from a more deep-seated question of constitutional theory, which is relevant not only to the DSO alone but to the NPA as a whole – the question of the immense power of the National Director, and its impact on the principle of the separation of powers. That power - which resides largely in prosecutorial veto - was greatly increased once the DSO was created, effectively providing the National Director with authority also over a powerful investigative tool.

Separation of powers
‘Separation of powers’ refers to the principle of democratic constitutional theory that the business of government should be divided along natural lines into the power to make law (legislative), the power to enforce law (executive), and the power to resolve disputes arising under law, including deciding on whether actions undertaken by the other two branches fall within the law (judicial). The idea is that each branch of government must have the power and the incentive to guard its own sphere and to counter the abuses of the other two.

In 1998 legislation was passed that gave South Africa a single, national prosecuting authority, in terms of which the National Director could veto the prosecutorial decisions of provincial directors – and indeed of any prosecutor. These powers were almost immediately subjected to constitutional scrutiny, but in 1996 the Constitutional Court held that this provision did not unjustifiably infringe the doctrine of separation of powers and that there were sufficient safeguards against the abuse of power by the National Director.

However, in the modern state, a prosecutor, particularly a national prosecutor, plays a role that to some extent impinges on the principle of separation of powers. The DSO, as an entity of the NPA, falls directly under the National Director, and its decisions to prosecute are also subject to his veto. (Even were the DSO to fall under the SAPS, the National Director would still have a veto power over any prosecution).

The position of the prosecution service in any country is interesting in that close analysis reveals that it runs the risk of straddling both the executive and judicial spheres. The prosecution in reality has a quasi-judicial function (only those crimes it chooses are prosecuted, and only those it prosecutes run the risk of being convicted) yet it is firmly positioned under the executive branch of government.

The decision to prosecute a matter is not unduly problematic because whether a conviction is obtained depends in the final analysis on the judiciary; in theory, even a malicious prosecution will not succeed if the judiciary finds there is not enough evidence to prove the charge. However, a decision not to prosecute is more problematic, as there is no input into the outcome of such a decision from another branch of government.
In theory, the failure on the part of the prosecution to carry out its obligations, in particular, by declining to pursue allegations of wrongdoing by members of the executive, leaves only recourse to the legislature, to whom the prosecution is accountable. Parliament can therefore call the prosecution to account for the decisions it takes, particularly decisions to prosecute or not to prosecute. Although this is theoretically possible, an academic paper has argued that in political systems where the president is elected by the legislature and therefore by the majority party in Parliament, the probability of Parliament calling the prosecution to account for its failure to prosecute is low. This thesis appears to hold true in South Africa, where the majority party in parliament effectively elects the president.

A person who feels aggrieved by the prosecuting authority’s decision not to prosecute may also opt to institute a private prosecution. However, this could become particularly complex and expensive for an unsuccessful private prosecutor.

The political manipulation accusation
Closely allied to the question of separation of powers are the accusations levelled against the DSO that it is open to political manipulation. Such accusers would say that given the reputation for excellence of the DSO, the mere fact that an investigation is carried out against a particular person suggests guilt and could be used to tarnish that person in the public mind. On the other hand, the DSO could also decline to investigate or prosecute a matter when it should indeed do so, in order to protect particular individuals.

In essence, these concerns can be reduced to the question of whether the DSO is at the same time independent (acts against the executive or legislature when necessary) impartial (refrains from acting maliciously against political opponents of the executive) and accountable (answerable for its actions). These traits are neither mutually exclusive nor mutually compatible. For example, consider the situation in which the Minister of Justice and Constitutional Development, to whom the DSO is accountable, is implicated in an investigation.

This balancing of independence, impartiality and accountability is an extremely difficult one. In considering whether the DSO has succeeded in maintaining the balance, there are two questions: first, whether the DSO has in fact far behaved independently, impartially and accountably, and second, whether the DSO is structured such that at any stage in the future, it is unlikely to fail on any of these points.

Without access to detailed information on the matters with which the DSO has engaged, it is extremely difficult to judge the first question of actual independence, impartiality, and accountability. The mere fact of the existence of a DSO investigation into the arms deal – which is likely to implicate members of the executive – is cited as evidence of the DSO’s independence. However, similarly, the refusal to prosecute the Deputy President, combined with the public tarnishing of his name, is cited by others as evidence of partiality. Again, without more in-depth knowledge, these questions are almost impossible to judge.

But in an unknown future with unforeseen facts and unknown players, how prone would the DSO be to fail to be independent, impartial, or accountable? After all, President Mbeki has only one more term, and Ngcuka’s tenure ends in 2008.

The DSO as it is structured is overshadowed by the fact that the National Director, its de facto head, is dependent on the President’s continued good opinion that he is a fit and proper person, to avoid being removed from office. It could, however, be argued that this requirement protects the National Director from outside interference. He is appointed for a non-renewable term of ten years at the salary of at least a High Court judge, and the grounds under which the president can remove or suspend him are limited. Also, such a decision by the president is subject to ratification by parliament.

Furthermore, while the DSO is accountable to the Minister of Justice and Constitutional Development, and to parliament, this form of accountability is insufficient and perhaps even counter-productive (on the independence front) when decisions on
whether to investigate (not to mention prosecute) members of the executive and legislative arms of government are at issue, if the executive and legislature are closely intertwined as they are in South Africa. The Ministerial Committee created by the DSO legislation, which inter alia may determine “where necessary the responsibility of the DSO in respect of specific matters” is fundamentally flawed in that it consists solely of Cabinet Ministers. By contrast, the United Kingdom’s National Crime Squad (NCS) is directed by an NCS Service Authority consisting of 11 members, none of whom are high-ranking members of the executive, five of whom are entirely independent, and four of whom are elected by associations of police officers.

Consider that Italian Prime Minister Silvio Berlusconi in 2003 succeeded in getting his parliament to pass legislation immunising him from prosecution while he remained in office. (Italy’s Constitutional Court subsequently declared the law unconstitutional.) How much easier for him if he could have got a committee consisting of his Cabinet to instruct investigators not to pursue the corruption matter which implicated him?

Lastly, there is no provision for misconduct by individual members of the DSO to be investigated by an independent body. Alleged misconduct of SAPS members as well as those of municipal police forces fall under the mandate of the Independent Complaints Directorate.

Recommendations
What is clear is that the current legislative structure of the DSO makes its independence, accountability and impartiality almost entirely dependent on the integrity of its officers and of the National Director. While the incumbents may indeed thus far have acted blamelessly, what could improve the situation (and safeguard the future) while not interfering with the ability of the DSO to do its job?

• An independent committee consisting partially of persons outside of the executive and legislature should exercise (post facto) oversight in respect of DSO case selection (the exercise of its mandate), and review the general conduct of investigations and prosecutions after their conclusion.

• A decision not to prosecute should be reported to the committee after the conclusion of a DSO investigation, and should be reviewable by the Supreme Court of Appeal at the instance of the committee.

• Removal of the National Director by the President should only be possible after confirmation by the Supreme Court of Appeal.

• Alleged misconduct by individual DSO members should fall under the mandate of the Independent Complaints Directorate.

The DSO is an innovation in South African law enforcement which has had a profound impact on the investigation of complicated cases. While allegations of cherry-picking, at least since the adoption of Circular One, do not appear to be founded, DSO case selection is a laborious and opaque process. The legal infrastructure within which the DSO is situated is not without problems, especially in respect of ensuring a balance of the DSO’s independence, accountability and impartiality.

Endnotes
1 National Prosecuting Authority Amendment Act 61 of 2000.
2 ‘Organised fashion’ includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.
3 See s31(1) National Prosecuting Authority Act 61 of 1998 as amended.
5 See for example, Skerpioene word dalk deel van polisie, sê Mbeki, Die Burger, 30 July 2003.
8 See s35(1) of the National Prosecuting Authority Act 61 of 1998. However, the Minister of Justice and Constitutional Development exercises final responsibility over the prosecution; in terms of s 179(7) of the Constitution of the Republic of South Africa Act 108 of 1996.

10 The president may remove the National Director on the grounds of the National Director's continued ill-health, misconduct, incapacity to carry out his duties efficiently, or on the grounds that the National Director is no longer a fit and proper person to hold office. See s12(6)(a) National Prosecuting Authority Act 32 of 1998.
