PANEL OF EXPERTS ON POLICING AND CROWD MANAGEMENT

ESTABLISHED BY THE MINISTER OF POLICE IN TERMS OF THE RECOMMENDATIONS OF THE MARIKANA COMMISSION OF INQUIRY

FINAL REPORT

27 May 2018

The members of the Panel honour the memory of the late

Judge David Sakelene Vusumuzi Ntshangase

who chaired and steered the Panel during the compilation of this report.

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Abbreviations

CCPR – International Covenant on Civil and Political Rights (1966)

COGTA – Department of Cooperative Governance and Traditional Affairs

CSPS – Civilian Secretariat for Police Service

DPSA – Department of Public Service and Administration

FPUs – Formed Police Units

HRD – Human Resource Development division of the SAPS

HRM – Human Resource Management division of the SAPS

IPID – Independent Police Investigative Directorate

IRIS – Incident Reporting Information System

ISU – Internal Stability Unit

JOCCOM – Joint Operational Coordinating Committee

JOC – Joint Operational Centre

LLW – Less-Lethal-Weapons

LSO – Large and Special Operations

MPS – Municipal Police Service

NDP – National Development Plan

NDM – National Decision Model

NI – National Instruction

NIU – National Intervention Unit

NPA – National Prosecuting Authority

NPB – National Policing Board

OCC – (Cluster) Operational Command Centre

OCT – Operational Commanders Training

ORS – Operational Response Service

OSCE/ODHIR – Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights

POP units – Public Order Policing units

PCT – Platoon Commander Training Programme

PIM – Post-Incident Management

PMT – Platoon Member Training Programme

PSIRA – Private Security Industry Regulatory Authority

RGA – Regulation of Gatherings Act (Act 205 of 1993)

SAHRC – South African Human Rights Commission

SALGA – South African Local Government Association

SAPS – South African Police Service

SASREA – The Safety at Sports and Recreational Events Act (Act 2 of 2010)

SCRU – Social Change Research Unit (University of Johannesburg)

SERI – Socio-Economic Rights Institute

SMS – Senior Management Service

SO – Standing Order

STF – Special Task Force

TMS – Technology Management Services of the SAPS

TRT – Tactical Response Team

UNODC – United Nations Office on Drugs and Crime

Important note on the focus of this report and terminology

This report, primarily in chapter 3, focuses on the policing of collective protest. The term collective protest here refers to protests carried out by people assembled in groups or crowds. Protests can also be carried out by individuals and by groups of people who are not assembled together in a crowd. In discussing the policing of collective protest this report uses the term **protest.** The terms '**assembly**' and '**crowds**' are more general terms (assemblies and crowds are not necessarily protests) but in this report the 'assemblies' and 'crowds' that are discussed are those associated with protest.

In South Africa **protest** is protected in terms of the right to peaceful assembly provided for in section 17 of the Constitution of the Republic of South Africa, 1996 and is regulated by the Regulation of Gatherings Act, No. 205 of 1993 (RGA). Other types of crowd events are regulated by the Safety at Sports and Recreational Events Act, No. 2 of 2010 (SASREA) which is intended to "provide for measures to safeguard the physical well-being and safety of persons and property at sports, recreational, religious, cultural, exhibitional, organisational or similar events held at stadiums, venues or along a route."

Definitions for other terms that are used are provided in the terminology section at the end of the report (pages 454-456).

Executive Summary

Introduction

The killing of 34 striking miners by members of the South African Police Service (SAPS) at the Lonmin mine at Marikana on the 16th August 2012 caused immeasurable trauma to the families of those who were killed, the communities from which they came, and many others. It was also a profound shock for the South African nation. In turn it also raised major questions about policing and the extent to which the SAPS was adhering to its constitutional duty to act, teach, and require its members to act, in accordance with the Constitution and the law.[1] The subsequent Marikana Commission of Inquiry highlighted a range of systemic problems in the functioning of the SAPS, in particular at senior management level, and in its ability to handle complex crowd management operations. In line with the recommendations of the Marikana Commission, Cabinet established the Panel of Experts (hereafter referred to as the Panel) in April 2016.

The Panel's terms of reference and the structure of the Panel's report

The terms of reference of the Panel are defined by Sections B to G of Chapter 25 of the report of the Marikana Commission (attached as Annexure A1 to this report). In line with these terms of reference the report of the Panel addresses both:

- The broad issue of professionalising and demilitarising the SAPS — the focus of Chapter Two of the report; and
- The more specific issue of protest, the law and crowd management - addressed in Chapter Three of the report.

In order to identify solutions to the challenges facing the SAPS, the Panel engaged with and reflected on the recommendations of the Marikana Commission, international and local policing experience, the views of SAPS Commanders and operational members, and inputs from civil society. The Panel also considered the National Development Plan 2030, the White Paper on Policing 2016, and the White Paper on Safety and Security 2016. At all times the work of the Panel was guided by the Constitution and international human rights standards.

[1] Section 199(5) of the Constitution, 1996.

The Panel's recommendations are reflected in the body of Chapter Two and Chapter Three. Chapter Four presents a comprehensive list of all the recommendations that are provided in the two previous chapters and identifies the key governmental agencies and role-players whom, the Panel suggest, should be responsible for implementing each recommendation.

The Panel advocates for a professional, demilitarised and accountable police service lead by experienced, competent and credible leadership of unassailable integrity and for a system of crowd management that has as its foundation the responsibility to give full effect to the right to freedom of assembly embodied in section 17 of the Constitution, 1996.

What went wrong at Marikana?

The establishment of the Panel arose from the events at Marikana in August 2012. It has therefore been necessary for the work of the Panel to be informed by an understanding of what went wrong in the police operation at Marikana. This understanding is based on the report of the Marikana Commission and the evidence presented to it.

The Panel's analysis in this report is that the key factors that resulted in the killing, by SAPS members, of 34 strikers at Marikana on the 16th of August 2012 are as follows:

1. The situation was a complex one, starting with a wage dispute that resulted in a strike outside of the collective bargaining system. By the morning of Monday the 13th of August 2012, there had been a number of violent clashes and four people had already been killed. The fact that some of strikers were armed with, mainly with traditional weapons, was an additional factor that warranted serious concern. A SAPS commander, with appropriate training and experience in crowd management, should have been appointed to exercise command and control of the operation guided by the principles and procedures laid out in SAPS Standing Order 262. Priority should have been given to ensuring that there was no further loss of life. Instead:
    a. A SAPS Major-General with no recent training or experience in crowd management was tasked with intercepting and engaging with a group of armed strikers on the afternoon of Monday the 13th of August 2012.

His lack of experience is likely to have contributed to the fact that a violent clash took place between police and strikers. This left two SAPS members and three strikers dead and another SAPS member seriously injured. The same Major-General remained, at least nominally, in command of the SAPS operation over the following days.

b. Over the 14th and 15th of August the SAPS tried to resolve the matter through negotiations. But SAPS members involved in negotiating were undermined by their own provincial commissioner who discouraged Lonmin from negotiating, thereby reinforcing Lonmin's intransigence in refusing to speak to the strikers. As a result of this intransigence the efforts at securing a negotiated resolution were unsuccessful.

c. On the night of Wednesday the 15th August the SAPS operational commanders at Marikana received an instruction from the SAPS top leadership, communicated to them by the Provincial Commissioner. The instruction was that if the strikers did not voluntarily disarm the following day, the police should forcibly disarm them. It is not clear what considerations gave rise to this instruction but the Marikana Commission emphasised the possibility that political influence may have played a role.

d. The consequence was that the authority to make decisions was removed from the operational personnel at Marikana. The decision to launch the operation was not based on the assessment of police commanders at Marikana, in terms of events on the ground, on how best to manage the situation.

e. The potential for disaster was then compounded by the hurried planning for the operation and briefing of SAPS members on the 16th of August. The plan that was used was rudimentary in nature and the briefing extremely cursory. Moreover, a prior plan that would have more likely been successful, but needed more time to be put into operation was ditched due to the sudden unexplained urgency.

f. Planning for the operation on Thursday the 16th of August was carried out without the involvement of any commander with recent Public Order Policing (POP) training and experience in the command team.

g. The SAPS standing orders governing the conduct of crowd management operations were disregarded.

h. The SAPS should have prioritised protecting life. Instead, on the instructions of the Provincial Commissioner, the commanders went ahead with launching the operation being fully aware that it was likely to lead to the loss of life.

2. Additional factors that contributed to the tragic outcome once the operation was launched included:

a. During preparation for the operation, the failure to clarify issues of command was a major shortcoming. During the operation there was no clearly identified overall commander exercising command of the operation. In addition, the SAPS member identified as the main operational commander largely neglected his responsibilities.

b. The deployment of POP members was poorly planned and commanded. As a result the use of less-lethal-weapons was ineffective and counterproductive. Rather than preventing the strikers from moving towards the police, the use of rubber bullets, teargas and stun grenades propelled the strikers towards the line of armed Tactical Response Team (TRT) members.

c. The operation primarily relied on members of the TRT, and other tactical units. Most members of these units were armed with R5s, a high-velocity rifle capable of automatic fire. Along with the use of the R5, the base-line formation in which these members were deployed, the lack of discipline by members of some of these units in their use of firearms, and the absence of command and control were all major contributing factors to the high loss of life at the small kraal (Scene 1) with 17 strikers being killed.

d. As a result of the poor planning and briefing as well as the absence of overall command and control, there were problems in communications between different police units. After the first shooting at the small kraal different groups of police approached the small koppie (Scene 2) where strikers were hiding. The groups of police were not aware that there were other police groups approaching the koppie on the other sides. One consequence was that it was not clear to them that the gunfire coming towards them was likely to be from other police units rather than from the strikers within the koppie. Another 17 strikers were killed at this location.

e. Problems with the provision of first aid included that paramedics were diverted from going to Scene 1 by one of the SAPS commanders. In addition, few SAPS members had any first aid training. Those that were trained in first aid did not regard themselves as having any duty to provide first aid to injured persons.

Immediately after the killings at Scene 2, SAPS members tampered with the scene placing weapons next to the bodies of some of the deceased miners. In a press statement released the next day, and in an address to SAPS members, the SAPS national commissioner began to promote a strategy in terms of which the SAPS would deny that it had done anything wrong at Marikana, and provide misleading information about what had happened. The manner in which the SAPS engaged in the Marikana Commission of Inquiry highlighted the existence of a culture, permeating to the very highest levels of the SAPS, which supports SAPS members in evading accountability for wrongdoing. The lack of accountability also highlights questions about the effectiveness of both the internal and external systems for holding SAPS members accountable.

Systemic problems in the SAPS, in the regulation of protest, and in crowd management by Public Order Policing Units (POP)

The events at Marikana, and conclusions by the Marikana Commission about systemic problems in the SAPS, formed the basis for the establishment of the Panel. However, it has also been necessary for the Panel to ground its work in the current policing and crowd management environment in order to ensure that its work is

relevant to addressing the present-day challenges facing the SAPS and the POP units. The Panel's report is therefore a response not only to the problems highlighted by the events at Marikana and the proceedings of the Marikana Commission, but also to the current challenges facing the SAPS including both at a broad organisational level, and within the crowd management environment.

Key focus areas and recommendations of the Panel

The following sections of this executive summary highlight key focus areas of the report and a selection of the associated recommendations.

Professionalisation, Accountability and the Demilitarisation of the SAPS

A focus on the professionalisation of the South African Police Service as an organisation is contained in Chapter Two of the Panel's report. This is in line with the recommendations provided by the National Development Plan for the professionalisation and demilitarisation of the SAPS. The Marikana Commission report motivates that these "must be implemented as a matter of priority."[2] In Chapter Two, the Panel's report puts forward an overall framework for professionalisation of the SAPS. This includes an emphasis on:

- Policing that is competency based and principle based;
- Greater accountability both within the governance of the police and within the SAPS itself;
- Measures to ensure that personnel at the leadership level are experienced, competent, credible and of unassailable integrity;
- Ensuring that the use of force by police complies with human rights principles;
- The provision of first aid to injured person in terms of a duty of care; and
- Re-affirming the commitment to a service orientation and other measures to consolidate demilitarisation.

Though there are many highly skilled women and men of integrity in the SAPS there are also far too many SAPS members, including senior officers, who do not adhere

[2] Marikana Commission, Report, 551.

to the professional standards required from them. These challenges do not only undermine the ability of the SAPS to uphold appropriate standards in the policing of crowds but also have negative consequences for its ability to improve public safety and security more generally. The Panel therefore strongly advocates for a professional, demilitarised and accountable police service.

Competency-based policing

Professional policing requires the appointment of suitable leadership as well as a human resources management approach that ensures that functions and roles are performed by individuals with the required knowledge, skill, and experience. For a member of the SAPS to be promoted in rank, appropriate competency should clearly be required. However a competency-based approach recognises that it is the level of competence at which a member functions, and not just the member's rank, that define the role and authority of the individual within an organisation. The current SAPS approach prioritises rank over an individual's skills, knowledge and experience. But the authority of an individual in a specific situation should not only be determined by rank but also by their expertise. Competency-based policing emphasises that personnel with relevant knowledge and skills also have authority. Rank does not necessarily confer expertise on all issues and cannot substitute for it or take precedence over it in all situations. In specific situations the most senior officer may need to defer to others, who have more appropriate skills, to provide guidance and leadership.

In line with its emphasis on a competency-based approach and in order to strengthen the ability of the SAPS to retain critical skills, and utilise personnel with these skills in the optimum way, the Panel has motivated for formalisation of a two-stream promotion system (Panel Recommendation 3).

Principle-based policing

Principles are an essential element of police professionalism. A principle-based approach to policing implies that the SAPS respects the dictates of the rule of law, democracy and human rights and the need for ethical decision making. Principle-based policing is necessary to earn public trust and confidence in SAPS members and in the SAPS as an institution. Consequently, it is important that the Code of Conduct and the Code of Ethics not just be known by every SAPS member, but also guide

behaviour and decision-making in each police officer's encounter with members of the public. Principles of professional policing that should be embedded in these codes should, amongst others, include: Integrity; Service orientation; Transparency; Accountability; Community engagement and consultation; Impartiality; Respect for human rights; Protection of life.

Recommendations of the Panel orientated towards entrenching a principle-based approach more firmly within the SAPS include:

- The two separate codes should be consolidated into a contemporary and relevant Code of Conduct and Ethics and include practical examples of what is required to guide the decision-making and conduct of all police officials (Panel Recommendation 5).
- Key Performance Areas (KPAs) for performance review of senior managers should include how they have taken responsibility for promoting the principles embodied in the Codes of Conduct and Ethics and in supporting members in understanding and applying them (Panel Recommendation 6).
- The SAPS should make use of a decision-making model that supports police officials in integrating ethical awareness into their decision-making (Panel Recommendation 7).

Panel recommendations relating to consistent standards of leadership and strengthening accountability are also orientated towards ensuring that a principle-based approach is more firmly embedded within the SAPS.

Police governance

The manner in which political direction and influence is exercised is such that there is often no record of it. The Marikana Commission emphasised that the instruction to police at Marikana to disarm the strikers could not readily be explained and made note of the likelihood that the instruction had emanated from political directions given to the National Commissioner. Accordingly, the Marikana Commission emphasised the need for accountability by political officer bearers in relation to any directives given to police.

The governance of the SAPS is a critical factor in determining whether the SAPS is able to operate as a professional organisation or not. The Constitution, 1996, provides

both the President and the Minister of Police with authority over the SAPS. In the case of the President this takes the form of the authority to appoint and dismiss the SAPS National Commissioner (section 207(1) of the Constitution). The Constitution authorises the Minister of Police to determine national policing policy (section 206(1)) and give 'directions' to the SAPS National Commissioner (section 207(2)). The Minister is therefore empowered to ensure that policing is conducted in a manner that is responsive to the most important and urgent public safety concerns as well as to hold the police accountable to established laws and policies. However, the authority of the Minister to issue directions should not affect the operational independence of the SAPS. As highlighted by Marikana, there is a need for the authority of the Minister to issue direction to also be subject to principles of accountability and transparency. In line with the recommendations of the Marikana Commission[3] the Panel therefore recommends that:

- The SAPS Act (No. 68 of 1995) should be amended to ensure that all directions issued by the Minister are formally recorded. The Minister should ensure that a record of all directions is presented to the Portfolio Committee on Police on an annual basis (Panel Recommendation 12).

The risk of interference with the operational independence of the police is not restricted to the executive level. Politicians and others at the provincial and local level may also put pressure on SAPS officials to act in a biased or otherwise inappropriate way. The Panel has also made recommendations regarding amendments to the SAPS Act to address this issue (see Panel Recommendation 13).

Police leadership

Marikana was a product of a series of failings at the senior leadership level. At Marikana, SAPS leadership were faced with a complex and challenging situation. Its response needed to be based on recognition of these complexities and firmly grounded in a principled approach. Instead, overall direction was provided by SAPS leaders who were not present at Marikana and put into effect by the North West Provincial Commissioner, who had no operational experience, in the face of

[3] Marikana Commission, Report, 551, paragraph D1.

warnings from her senior commanders that the operation was likely to lead to the loss of life. Prior to this the Provincial Commissioner also undermined the efforts of SAPS commanders to resolve the situation through negotiations. After the SAPS actions resulted in a human and policing disaster the SAPS National Commissioner began to promote a strategy of denial of responsibility and misrepresentation of the events at Marikana.

However, the shortcomings demonstrated by senior leadership at Marikana were not a new development. As highlighted by the 2012 National Development Plan, released in the same week as the events at Marikana, the SAPS had been undergoing "serial crises of top management" for a considerable time prior to this. [4]

Ensuring that there is consistent quality in police leadership is clearly necessary for creating an ethical, capable and accountable SAPS. Given the hierarchical nature of the SAPS, the conduct and integrity of top police commanders will impact directly on the dominant police organisational culture, thereby directly influencing the behaviour of lower-ranking police officials. Indeed, the NDP and the White Paper on Police explicitly recognise the need for an overhaul of the top management of the SAPS as fundamental to improving policing. The issue is also implicit to the Marikana Commission's endorsement of the NDP proposals.

As proposed in the National Development Plan, one of the steps that is critical in this regard is the establishment of an independent National Policing Board (Panel Recommendation 15) tasked with setting standards for recruitment, selection, appointment, and promotion of SAPS members. In addition, a key function of the proposed Board will be to manage a transparent, competitive and merit-based recruitment process to assist the President with the appointment of the SAPS National Commissioner when this post becomes vacant (Panel Recommendation 16). It is also recommended that the NPB would be responsible for assessing candidates for the position of Provincial Commissioner (Panel Recommendation 17).

The application of inconsistent standards in recruitment and promotions, including at the highest level of the SAPS, is one set of factors that contributes to the unevenness of the SAPS management echelon. Inconsistencies are partly a

[4] NDP 2030, p 391.

consequence of provisions in the regulations governing the SAPS (notably regulation 11 of the 1964 regulations and regulation 45(9) of the Employment Regulations) that allow for deviations by the National Commissioner in promotion and appointment processes. Panel Recommendations 18 and 19 address the need for regulations to be amended to require that consistent processes are followed in creating and filling all posts.

In addition, new regulations (currently being revised) require the concurrence of the Minister of Police in relation to appointments and promotions at the senior management service level (rank of Brigadier and above). This creates the potential for inappropriate political or other considerations to influence senior management promotions and appointments. Panel Recommendation 20 motivates that the powers of the Minister should be limited to approving the criteria for appointments, promotions, and the creation of posts, but should not extend to influence decisions on the individual candidates who are appointed or promoted to specific posts.

Partly as a result of the inappropriate use of the provisions that authorise deviation from formal human resource procedures there is a legacy of inappropriate appointments. This includes appointments at senior management level. The Panel therefore supports the NDP recommendation that priority be given to a competency assessment of senior management (Panel Recommendation 21). The competency assessment should be undertaken independently under the auspices of the Civilian Secretariat for Police Service (CSPS). Members who have been improperly appointed, have a record of inappropriate conduct, or who are unable to fulfil the demands of their critically important posts, should be redeployed, or if necessary, removed from the SAPS. The competency assessments should be commenced as soon as practicable as an effective top leadership component is a precondition for the SAPS to be able to address the various challenges it faces and become respected and trusted as a professional organisation.

Accountability

Lack of accountability permeated the entire Marikana episode. The Provincial Commissioner had secret meetings with Lonmin at which she discouraged them from negotiating with the strikers, thereby undermining the efforts of the SAPS members involved in trying to resolve the situation through negotiation. Similarly the

circumstances in which the high-level decision was taken to disarm the strikers remain shrouded in secrecy. After the launch of the operation the SAPS also did not retain any formal video recordings of the events or any recordings of its own radio communications. After the shootings SAPS members tampered with the evidence at Scene 2. Thereafter, the manner in which the SAPS participated in the Marikana Commission was characterised by an obstructive approach that included providing evidence that was not truthful and withholding information from the Commission.

As highlighted by the events at Marikana and their aftermath, the shortcomings of accountability in the SAPS include shortcomings at the leadership and management level as well as at the rank and file level. At the rank and file level, problems in this regard include the 'blue code of silence'— a culture of internal solidarity in terms of which SAPS members are expected to protect each other against being held accountable for wrongdoing. Management culture also tends to prioritise presenting the organisation's performance in terms of key performance indicators in a positive light, rather than ensuring that the information on which performance assessment is based, is reliable and accurate. SAPS organisational culture appears not to encourage or support critical reflection. For example, in operations that do not go according to plan and where things go wrong, the SAPS is more likely to be defensive rather than assess the facts objectively. As a result, there is little room for organisational learning from experience. Overall the culture of the SAPS is not one in which honesty and truthfulness is highly valued.

Recommendations of the Panel are therefore intended to embed accountability more fully within the workings of the SAPS by addressing various aspects of the problem. This includes measures intended to support an emphasis on truth-telling (Panel Recommendations 23 and 24), and a range of measures to strengthen the functioning of the internal and external accountability mechanisms (Panel Recommendations 26, 27 and 28). In line with the emphasis on the conduct and integrity of police leadership, the Panel also recommends a rigorous approach to addressing disciplinary matters relating to members of the senior management service (Panel Recommendation 32). The Civilian Secretariat for Police Service and Independent Police Investigative Directorate are intended to be a key mechanism for oversight and accountability of the SAPS but are currently inadequately capacitated. The Panel recommends that steps should be taken to address this (Panel Recommendations 14 and 33).

A specific concern raised by the Marikana Commission is where briefings or statements by police commanders, in the aftermath of police shootings, make premature determinations about the facts of an incident when these are still subject to investigation, thus inhibiting the potential for accountability. Panel Recommendation 22 proposes guidelines regarding public briefings by SAPS commanders in the aftermath of shooting incidents.

In order for accountability to be clearly established as a necessary component of a professional SAPS it is imperative that unaddressed issues of accountability, relating to Marikana, be resolved. Recommendations motivate for unresolved Marikana related disciplinary questions to be fully addressed (Panel Recommendations 29 and 30) and for funding for the reconstruction of the events at Marikana Scene 2, as motivated for by the Marikana Commission, to be provided (Panel Recommendation 31).

A further recommendation relevant to the theme of accountability is that, in dealing with civil claims, the manner in which state protection for members is being applied should be critically reviewed. In instances of gross negligence, *mala fide* actions, and other clearly blameworthy conduct, the SAPS should recover damages that it has incurred from the member (Panel Recommendation 1).

The use of force – the duty to protect life

At Marikana there had been a number of instances of violence over the previous days in which some of the strikers had been directly involved. But at the time when the Marikana operation was launched on the 16th of August there had not been any violence for close to 48 hours. Though some of the participants were armed, the gathering was largely peaceful. A clear priority of the SAPS should have been to ensure that no further lives were lost. Being aware that the operation was likely to lead to the loss of life, the SAPS should have identified another way of dealing with the situation.

One of the key focuses of Chapter Three is on the use of force in crowd management. This includes ensuring that firearms capable of automatic fire are not used at all in crowd management and that clearer standards are developed for, and greater control is exercised over, the use of less-lethal-weapons. However, there are

certain issues that cut across all situations where force, and particularly lethal force, may be used by members of the SAPS. The current framework for providing guidance to SAPS members with regard to the use force is inadequate in various ways. One is that it does not clearly articulate the protection of life — understood to include the lives of SAPS members, suspects and other civilians—as a broad guiding principle governing the use of lethal force by SAPS members. Recognition of the protection of life as a key principle is a hallmark of professional policing. Due to the need for more detailed guidance to be provided to police in relation to the use of force and particularly lethal force, the Panel has motivated for the use of force policy developed by the Civilian Secretariat for Police Service, with input from the Panel, to be adopted as an official policy (Panel Recommendation 34).

Provision of first aid in terms of a duty of care

Another issue highlighted by Marikana is that first aid should be provided to injured persons. Panel Recommendations motivate for the number of SAPS members with first aid training to be increased, for SAPS members to have clear directives that clarify their responsibility to provide first aid, and for SAPS members to be appropriately equipped to assist in this regard. The Panel also recommends that first aid teams should be deployed in crowd management situations (Panel Recommendations 36 - 42).

Demilitarisation

The need for demilitarisation of the SAPS is one of the key issues foregrounded by the National Development Plan. Broadly the Panel's view was that many of the recommendations that it has made in order to advance the process of professionalisation will also contribute to addressing aspects of militarism that are inappropriate for community-orientated policing; this will include changing the militarised characteristic of the SAPS management and training culture to one that supports a professional policing ethos. The Panel discussion on the issue of demilitarisation also included the issue of rank and rank authority, noting that the current disproportionate emphasis on rank authority should shift to a greater recognition of competencies, skills and expertise. Recommendations specifically related to the issue of demilitarisation include the recommendation that the SAPS should renew its commitment to a service ethos that is community-policing oriented

(Panel Recommendation 44), and that there should be an assessment of the structure and functioning of all of the units that were involved at Marikana with a particular focus on the NIU and TRT, both of which were heavily implicated in the killings at Marikana (Panel Recommendation 45).

Protest, the law and crowd management

Chapter Three of the Panel's report focuses on protest in South Africa, related legal provisions and the policing of protest by means of Public Order Policing (POP) units. Throughout the report the Panel uses the term crowd management to refer to the policing of protest by POP units, whether such protest is peaceful or of a violent nature. After an introductory section (Part A) the Chapter provides an analysis of the protest environment (Part B) followed by a critical analysis of the principal legislative instrument regarding protest, the Regulation of Gatherings Act (Part C) and an in depth discussion of various aspects of crowd management (Part D).

A major theme running through this section is the need for the legislation governing protest, the administration of this legislation by municipalities, and the policing of protest to more consistently be implemented in a manner consistent with the right to peaceful assembly provided for in Section 17 of the Constitution. Other key aspects of Chapter Three include:

- Ensuring that POP units are maintained as a specialised crowd management capability;
- Addressing the problem of the use of violence in protest not only through improving POP units capacities in this regard but through other mechanisms aimed at supporting pro-active conflict resolution and a culture of peaceful protest;
- The prohibition on the use of the R5, or other weapons capable of automatic fire, in crowd management, and the related issue of ensuring that POP units are adequately capacitated to respond to violent protest;
- The procurement and use of less-lethal weapons;
- Transparency and accountability in the context of crowd management; and
- Clarifying the role to be performed by other role players in crowd management and ensuring that consistent standards are observed by them.

The right to assemble peacefully

Marikana reminded many South Africans of some of the most traumatic events of the apartheid era such as the killing of 69 protestors by police at Sharpeville on the 21st of March 1960, the police shooting of school students in Soweto during the protests of June 16, 1976, and others. But notwithstanding Marikana, there are clearly profound differences in the manner in which the policing of protest is carried out in post-apartheid South Africa, as compared to during apartheid.

One reason for this is that section 17 of the Constitution now clearly provides the right to peaceful protest.[5] Most protests in South Africa are peaceful. In addressing the regulation and policing of protest the Panel consistently emphasises that the right to peaceful assembly should be the foundation for all engagement with this issue.

The Regulation of Gatherings Act (205 of 1993) is currently the key legislative instrument governing the regulation of protest. National Instruction 4 of 2014[6] is the key SAPS internal directive in this regard. Neither of these instruments is grounded clearly enough in the right to peaceful assembly that is provided in Section 17. The Panel makes numerous recommendations towards the review of the Regulation of Gatherings Act, 1993, and National Instruction 4 in support of an improved regulatory framework for crowd management. Neither of these instruments clarifies critical questions such as what is a peaceful protest, or how the situation should be categorised where some, but not all participants in a protest are armed.

A key point in this regard, addressed in a 2012 Constitutional Court judgement is that peaceful protestors are not deprived of their right to protest by the conduct of others who are violent.[7] In line with this, the Panel's approach is that if some individuals are involved in violence (understood as harm to persons or damage to property) this should not necessarily mean that the protest as a whole is classified as not peaceful. Whether or not a protest is regarded as peaceful should therefore be determined in

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[5] The full wording of section 17 is that: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."
[6] Standing Order 262 which was in force at the time of Marikana has now been replaced by SAPS National Instruction 4 of 2014.
[7] *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13, para 53.

relation to the overall conduct of participants rather than by the conduct of an isolated number of individuals. The Panel proposes that a definition of 'peaceful assembly' should be adopted that clarifies this point (See Panel Recommendation 64 and paragraph 440 and following).

As the report argues, "facilitating the right to peaceful assembly should be the pillar of crowd management policing and be the primary basis for the existence of POP units" (paragraph 598 of the report). An important recommendation in this regard is that the SAPS should have a clearly articulated crowd management doctrine that guides the SAPS in supporting and respecting the right to peaceful assembly (Panel Recommendation 68). Compliance with the doctrine motivated for by the Panel would require the SAPS to develop a more coherent framework to support negotiated management of protest (Panel Recommendation 65). Wherever possible the potential for violence should be minimised through negotiation and de-escalation measures. In addition, the SAPS should respect the principle of 'differentiation'. In situations where there is violence, police should avoid indiscriminate use of force. Where force is necessary it should be targeted only against those involved in violence. This is not only consistent with respect for peaceful protest, but can also work in favour of the police. In situations where force is used indiscriminately this creates a relationship of antagonism between police and all of those involved in a protest, making it more difficult to manage the overall situation (In addition to Panel Recommendation 68, recommendations 66, 67, 69 and 70 also support implementation of the proposed doctrine).

Upholding the right to peaceful assembly is not only about strengthening the relevant laws and SAPS internal directives. Key role players in relation to the regulation of protest are the responsible officers appointed by municipalities. In terms of the RGA they are provided with important powers that should be used to facilitate the right to peaceful assembly. Panel recommendations motivate for steps to be taken to improve the quality of the administration of the RGA by these officials. This should ensure that these powers are consistently exercised in a manner that supports the right to assemble peacefully as well as require these officials to take steps to facilitate the resolution of conflict where this is agreed to by protesting groups (Panel Recommendations 50, 51, 52 and 61).

Maintaining a specialised crowd management capability

In order to fulfil its responsibilities, both in supporting the exercise of the right to peaceful protest, but also in addressing protest related or other collective violence, the POP units need to be maintained as a specialist capability. This means that crowd management should clearly be defined as their primary mandate (Panel Recommendation 71). A further important recommendation in this regard is that POP should be centralised under one component or division within the SAPS (Panel Recommendation 72). Currently most POP units are provincial policing resources falling under the command of one of the provincial commissioners. This results in POP units being used extensively as a 'stop gap' to supplement the crime combatting capacity of the SAPS, with the consequence being that POP personnel are frequently deployed to crowd management situations in very small numbers. This is one of the key problems currently in crowd management contributing to the tendency for POP members to rely on rubber bullets, tear gas and stun grenades, in dealing with crowds. Panel Recommendation 72 is therefore that all POP units should fall under one command at a national level so that they all form part of the national Public Order Policing unit that is provided for in section 17 of the SAPS Act (No. 68 of 1995). This would mean that they would generally be deployed at the request and in support of' a Provincial Commissioner, but that the head of POP, acting on behalf of the National Commissioner, would be able to ensure that their operational readiness as a specialised unit is maintained in a consistent manner in line with section 17(2) of the Act.

Throughout the events at Marikana the SAPS followed an approach that undermined its own ability to manage the situation effectively. Despite the fact that it was dealing with a crowd situation the SAPS gave control of leading, and planning for, the operation to SAPS members who had no recent experience in crowd management and were not familiar with the relevant organisational directive (at that time this was Standing Order 262). Many of these officers had no public order training or at best had received some POP training many years ago. But even the authority of these commanders was undermined. Major decisions about management of the situation were dictated by the national leadership. Finally, when the operation was launched, the SAPS failed to ensure that there was a properly constituted command structure with the consequence that there was no-one ultimately in charge.

Recognition of crowd management as a specialised capability implies that crowd management operations must be lead only by commanders with recent and relevant training and Public Order Policing experience (Panel Recommendations 88, 80 and 90). The complexity of control and management over large crowd management and other complex, operations also requires a specialised command structure (see paragraph 721 and following).

A number of the other Panel's recommendations are also based on recognition of the need to maintain POP as a specialised capability. These include that:

- POP deployments must at a minimum involve the deployment of a full section (8 members) and not less than that in order to ensure that POP units are able to address crowd management situations in a manner consistent with their specialised training (Panel Recommendations 83 and 84).
- There is a need to improve SAPS information collection on the protest environment in order to better support the SAPS and POP units in understanding the challenges and in developing measures to address them (Panel Recommendations 47, 48, 56 and 57).
- POP training should be aligned to operational realities and involve a consistent training cycle including periodic assessments (Panel Recommendations 78 and 80).
- There should be a dedicated training facility for training of POP members in crowd management (Panel Recommendation 81).
- The provision of psychological and wellness support services to POP personnel should be mandatory and routine and police members who are severely traumatised and unable to effectively perform their policing duties should be withdrawn from an operation and provided with the necessary psycho-social support (Panel Recommendations 77).
- Revisions to National Instruction 4 and to crowd management training, and other measures to ensure effective inter-police communications (Panel Recommendations 112, 113, 114 and 115).

The use of violence in protest

As highlighted by Marikana, the situations that POP units face may often be of a complex character, partly because of the conflicts that underpin them, but also because of the nature of the crowds involved. While most protest is peaceful, the issue of the use of violence in protest is of concern in South Africa. The Panel has responded to this issue in a variety of ways. On the first level the emphasis on supporting and facilitating the right to peaceful protest is intended to ensure that neither the RGA, nor the manner in which the RGA is administered by municipalities, nor the conduct of crowd management by POP units, serve to narrow the space for peaceful protest or foment conflict and antagonism between police and protesting members of the public. It is necessary for POP units to ensure that situations of tension and confrontation are managed without unnecessarily exacerbating the potential for violence and that where violence takes place the response of the police serves to de-escalate rather than exacerbate it.

A number of other recommendations of the Panel are also intended to enable the SAPS to better respond to protest related violence:

- As indicated, the proposed doctrine (Panel Recommendation 68) that is referred to above not only emphasises negotiation and de-escalation but also foregrounds the principle of differentiation. In part this is to ensure that, even where force is used against individuals, POP units do not unnecessarily create antagonism between themselves and non-violent crowd members. This is intended to reduce the potential for escalation of conflict.
- A general recommendation is that POP units need to be able to develop greater flexibility and agility in order for them to respond in an appropriate manner to the specific challenges of each situation (Panel Recommendation 55). To support this objective, the Panel has recommended that each POP unit should include a public order restoration capability consisting of one section for each platoon. These sections should be highly trained in line with the crowd management doctrine and fundamental principles on the use of force in crowd management, with particular emphasis on protection of life (Panel Recommendation 74; the fundamental principles on the use of force in crowd management are referred to in Panel Recommendation 132).

- Panel Recommendation 66 motivates for measures to be taken to improve the ability of POP units to carry out arrests in order to be able to arrest individuals involved in violence.
- To ensure that POP members are able to manage situations that they face in line with principles of de-escalation and minimum force they must be provided with adequate protective equipment. Linked to the fact that petrol bombs and burning barricades are not uncommon in crowd management situations Panel Recommendation 109 motivates that POP unit members should be provided with fire retardant overalls.
- Panel Recommendation 49 motivates for the SAPS to explore preventive and proactive measures to address the problem of the carrying of weapons by protestors. The danger to POP members and others may be far greater where crowd members are armed.

Prohibition of use of rifles capable of automatic fire and the need for specialist firearms officers

One of the major reasons for the large number of fatalities at Marikana was the use of high velocity rifles capable of automatic fire. SAPS members of the Panel have repeatedly indicated that they fully agree that weapons capable of automatic fire have no place in crowd management and will not be used during crowd management situations. The Panel has recommended that this should be taken one step further and that a prohibition against the use of the R5 rifle, and other weapons capable of automatic fire, in crowd management should be formalised in regulations issued by the Minister of Police. Such a prohibition should apply not only to POP units but to other units who may be deployed in support of POP for crowd management purposes (Panel Recommendation 105).

In addition to engaging with questions to do with automatic weapons the Panel's terms of reference also require the Panel to make recommendations regarding practices and measures that police should resort to if faced with crowds armed with firearms and bladed weapons. The Panel has therefore recommended that specialist firearms officer should form part of the restoration section established within each POP platoon in order to provide the capability for targeted intervention during a

crowd management operation where there is an imminent threat to the lives of police, or members of the public (Panel Recommendation 106, 107 and 108).

Less-lethal-weapons

Most of the violence that occurs during crowd management incidents does not involve the threat of bladed weapons or firearms but rather involves throwing of stones or other projectiles, often from behind a barricade. Petrol bombs and arson are also not infrequent. While POP units need to be in a position to protect themselves against lethal threats the less-lethal-weapons that they mainly use are teargas, rubber bullets, stun grenades and water cannons. These weapons are sometimes referred to as non-lethal. But experience in South Africa and elsewhere clearly shows that they may potentially have lethal consequences even though this is less likely than it is with the use of firearms and live ammunition. In order to promote recognition of their lethal potential the SAPS should consistently use the term less-lethal-weapon when referring to the class of weapons used in crowd management situations, recognising that all weapons including less-lethal have the potential to cause injury and death (Panel Recommendation 91). A related recommendation emphasises that it is often vulnerable people, such as young children and the elderly, who are most at risk for injury from these weapons, and calls for awareness of this risk to be promoted through training (Panel Recommendation 58).

The report also makes a number of other recommendations intended to ensure that sufficient scrutiny is exercised over the types of weapons that are procured and that they are used in such a manner as to minimise the potential for them to cause death or serious injury (Panel Recommendations 92 to 104). As indicated, the report motivates for National Instruction 4 of 2014 to be amended to put forward a set of fundamental principles for the use of force in crowd management and these should form the basis for police understanding in any situation where the use of force is considered (paragraphs 898 and following and Panel Recommendation 132). The section of National Instruction 4 dealing with the use of weapons should also be enhanced to promote greater clarity (Panel Recommendation 130).

Transparency and accountability in the context of crowd management

One of the consistent obstacles to accountability in the crowd management context is that, when POP members are dressed in their full protective equipment, it is

impossible to identify any of the individual members. As a result it is often difficult to hold individuals who are suspected of abuses accountable. Panel Recommendation 111 motivates that each POP member has a clearly identifiable number on his/her helmet (111). Other recommendations that are intended to enhance accountability in crowd management relate to the recording and preservation of radio communications and video material (Panel Recommendation 125). However the preservation of video recordings also raises questions to do with the rights of civilians. Panel Recommendation 116 therefore motivates for the RGA to be amended to set standards that police must comply with in information and data gathering, including the making of photographic, video or other recording, relating to assemblies (see also Panel Recommendation 122).

Panel Recommendation 119 also motivates that the SAPS should adopt an approach to audio visual and other recording of protests that emphasises transparency and visibility. For example, this would mean that the SAPS videographer would be identifiable as a SAPS member unless the risk assessment clearly motivates that this would expose them to danger (see also Panel Recommendation 120 and 121).

Other role players in crowd management

POP units are currently not the only role-players in crowd management. Within the SAPS other role-players include visible policing personnel, who are frequently the first SAPS personnel at the scene of a protest for which no notification has been given. SAPS internal directives for the National Intervention Unit and Tactical Response Teams, also include crowd management as part of their mandates. Apart from divisions or units of the SAPS, other role-players include municipal police, traffic police and private security. Some metropolitan governments have invested in special crowd management equipment for their municipal police departments (metro police) and metro police officials are often appointed as the metro's responsible officer responsible for management of the Regulation of Gatherings Act procedures. Private security companies are also used, not only by the private sector, but also by municipalities, universities and others, in response to crowd events.

In addressing the role of these different entities the Panel's approach has been motivated by the understanding that crowd management is a specialised capability. Panel Recommendations include that:

- The crowd management training of SAPS visible policing personnel and municipal police should at least be at the level of first responder with their role being to intervene during crowd management situations by containing the situation, pending the arrival of the more specialised, equipped and trained POP units. In this regard, the South African Police Service Act, 1995, should be amended to provide for a mandate for municipal police services in respect of crowd management. (Panel Recommendation 85).
- In order to enhance co-ordination and co-operation during crowd management operations, joint training exercises should be held involving SAPS personnel who may be involved in crowd management. (Panel Recommendation 86:
- SAPS should not deploy tactical units to support POP in crowd management situations unless their specialist capabilities are requested by the responsible POP commander and that they remain under the overall command of the POP commander throughout the operation (Panel Recommendation 87).

The Panel believes that all role-players in crowd management should be subject to the same guiding principles and restrictions as well as subject to public accountability and principles of transparency.

A holistic approach to addressing social conflict

It is not possible for the Panel to predict what the trends in protest are likely to be. But the Panel's recommendations are nevertheless based on recognition of the reality that, as efforts intensify to address the profound racialised inequalities that are the legacy of apartheid, South African society may very well face increased levels of social conflict in coming years. Though the Panel motivates for much greater investment in the SAPS's crowd management capability, the Panel also recognises that South Africa's response to the problem of violent protests cannot rely exclusively on POP units. In the face of evidence that more and more people regard peaceful protest as ineffective[8] this means that there needs to be a broader government lead

[8] Narnia Bohler-Muller, Benjamin James Roberts, Jarè Struwig, Steven Lawrence Gordon, Thobeka Radebe and Peter Alexander, Minding the Protest - Attitudes towards different forms of protest action

programme to support and strengthen the culture of peaceful protest in South Africa. One way in which this can be done is by strengthening local-level mechanisms for problem solving, and the management of conflict. Communities should know that peaceful protest is an instrument that they can use, without facing unnecessary impediments to make themselves heard. Existing mechanisms should be strengthened, or a new mechanism should be established, so that where possible, and where this is desired by protestors, the grievances and disputes that give rise to protest, and sometimes to violence, can be mediated and resolved without requiring the involvement of the police (Panel Recommendation 52).

in contemporary South Africa, South African Crime Quarterly, ISS: Pretoria and Centre of Criminology: Cape Town, 62, 2017, 81-92.

CHAPTER ONE: BACKGROUND

Introduction

1. The Marikana Panel of Experts (hereafter referred to as the Panel) was established in terms of the recommendations of Section B of Chapter 25 of the Marikana Commission report. This recommended that, "A panel of experts be appointed, comprising senior officers of the Legal Department of the South African Police Service (SAPS) together with senior officers with extensive experience in Public Order Policing (POP) and specifically including independent experts in Public Order Policing, both local and international."[9] The mandate of the Panel is defined by Sections B to G of Chapter 25 of the Marikana Commission report.

Marikana and policing in South Africa

2. The killing of 34 striking miners by members of the South African Police Service at the Lonmin mine at Marikana on the16th August 2012 was an event that caused great trauma to the families of those who were killed, the communities from which they came, and many others. It was also a profound shock for the South African nation raising questions about policing and the extent to which the SAPS was adhering to its constitutional duty to act, teach, and require its members to act, in accordance with the Constitution and the law as provided for in section 199(5) of the Constitution.[10]

3. In recognition of the scale of the tragedy, and the negative impact it had on the people of South Africa and international perceptions of the country, President Jacob Zuma established the Marikana Commission of Inquiry under the Chairpersonship of Judge Ian Farlam.[11] The report of the Marikana Commission was submitted to President Zuma in March 2015 and released to the public in June of that year.

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[9] Marikana Commission Report, 549.
[10] Section 199(5) of the Constitution of the Republic of South Africa, 1996 provides that, "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."
[11] Proclamation No. 50 of 2012 published in Government Gazette No. 35680 of 12 September 2012.

4. In talking about the Marikana incident one cannot omit to mention the fact that ten people, including two SAPS members, two Lonmin security guards, four of the strikers, and two other Lonmin employees, had been killed during the preceding days.[12] A number of others had also been injured. These events clearly contributed to shaping the police response, and are critical to understanding the events of the 16th of August 2012. Nevertheless, it appears reasonable to state that the bloodshed of the preceding days should have motivated the police to ensure that no further lives were lost. They do not justify or explain the killings by police on the 16th of August 2012.

5. One of the issues that the Marikana Commission received evidence on related to the way the SAPS carried out the operation at Marikana and how this contributed to the killings on the 16th of August 2012. The Marikana Commission concluded that this reflected a systemic problem in the functioning of the SAPS and in its conduct of crowd management and public order policing. On the basis of analysis reflected in the body of the Marikana Commission report,[13] it made a number of recommendations that are to be found in Sections B to G of Chapter 25 of the report.

6. This report of the Panel is therefore a response to the report of the Marikana Commission and in particular to the issues raised in Sections B to G of Chapter 25 of the report. In responding to these issues, the Panel has endeavoured to ground itself not only in the events of August 2012 at Marikana, but also in the current context of policing more broadly, and the policing of protest specifically, in South Africa. This report aims to combine examining the issues raised by the Marikana incident, that are addressed in the report of the Marikana Commission, with responding more broadly to the key challenges facing the SAPS in current day South Africa. In line with the report of the Marikana Commission this has involved looking at the overall functioning of the SAPS, as well as paying particular attention to Public Order Policing and the challenge of crowd management, and aligned with the principles of the Constitution and international human rights standards.

[12] Marikana Commission report, 110-175.
[13] Marikana Commission report: see in particular pages 329-387.

Establishment and composition of the Panel

7. The intention to establish the Panel of Experts was announced to Parliament by the Honourable Minister of Police, Mr Nathi Nhleko, on the 26th August 2015. The first meeting of the formally constituted Panel was held on the 29th of April 2016.

8. The Chairperson of the Panel, appointed by the President, Jacob Zuma, is Judge David Sakelene Vusumuzi Ntshangase (retired).

9. Members of the Panel include:

   9.1. South African Police Service

      9.1.1. Lieutenant General GJ Kruser, Deputy National Commissioner, Management Intervention[14]

      9.1.2. Lieutenant General NS Mkhwanazi, Divisional Commissioner, Human Resource Development

      9.1.3. Major General PC Jacobs, Legal and Policy Services (retired)

      9.1.4. Major General ZM Mkhwanazi, Head of Public Order Policing

      9.1.5. Brigadier F Ally, Section Head, Public Order Policing

   9.2. Other members of the Panel include:

      9.2.1. Ms Adèle Kirsten, small arms control analyst

      9.2.2. Mr Cees de Rover, Equity International

      9.2.3. Mr David Bruce, independent researcher

      9.2.4. Mr Eldred de Klerk, Africa Analysis

      9.2.5. Mr Gareth Newham, Institute for Security Studies

      9.2.6. Mr Ilya Levitan (appointed by the Russian Federation)[15]

      9.2.7. Dr Liza Grobler, criminologist

      9.2.8. Supt Nkululeko Dube, Zimbabwe Republic Police (proposed by the Republic of Zimbabwe)

[14] Lieutenant General Kruser resigned from the SAPS in January 2018, prior to finalisation of the report.
[15] Mr Levitan's engagement with the activities of the Panel ended in September 2017.

9.2.9. Prof Dr Sven Peterke, Federal University of Paraiba (proposed by the Federative Republic of Brazil)

9.2.10. Mr Thabo Matsose, South African Police Union

9.2.11. Mr Themba Masuku, independent researcher

9.2.12. Mr Thulani Nsele, Police and Prisons Civil Rights Union

10. Ms Bilkis Omar, Chief Director, Policy and Research at the Civilian Secretariat for Police Service has provided ongoing policy advice to the Panel.

Mandate of the Panel

11. Following the recommendation of the Marikana Commission the establishment of the Panel was motivated for in a memo submitted to Cabinet by the Minister of Police, Mr Nathi Nhleko (Memo Number 12 of 2015). Cabinet approved the process to implement the recommendations of the Marikana Commission on the 26th August 2015.

Terms of Reference of the Panel

12. The core terms of reference of the Panel are defined by Sections B to G of Chapter 25 of the Marikana Commission report. The full recommendations provided in Sections B to G of Chapter 25 are attached as Annexure B1 to this report. In summary the issues raised in these sections of the Marikana Commission report are:

12.1. Concerns regarding the use of automatic rifles by police in crowd management.

12.2. Public Order Policing units may be faced, as was the case at Marikana, with hostile crowds armed with sharp weapons and firearms. There may be situations where less-lethal-weapons are ineffective in responding to such crowds.

12.3. POP capabilities are mainly reactive. This includes being static, set piece[16], aimed at containment, and preferring a distance between them and

[16] The Panel understands this to mean that POP has an established range of 'formations' that it uses. This therefore expresses a concern about lack of flexibility and adaptability.

the crowd. These configurations offer very limited options to deal with situations where a crowd is confrontational, organised, mobile, armed, violent, and volatile. SAPS members are not trained for situations of this kind.

12.4. There is uncertainty as to the exact roles to be played when tactical units are deployed together with POP units in instances of crowd management.

12.5. The need for the 2012 National Planning Commission recommendations on demilitarisation and professionalisation of the police to be implemented.

12.6. Control over operational decisions in public order and other large and special operations.

12.7. Questions of police equipment, *inter alia,* for communication between members of the police and for the audio-visual recording of police operations.

12.8. The provision of first aid to people injured during police operations.

12.9. Various issues concerning police accountability and post-incident management.

13. In addition to the above, in terms of paragraphs 8(d) and 9 of Section B, the Panel is also required to 'investigate and determine the suitability' of a number of written recommendations submitted to the Marikana Commission. These include recommendations received by the Commission from the following:

13.1. Cees de Rover (See Annexure B2)

13.2. Eddie Hendrickx (Annexure B3)

13.3. Gary White MBE (Annexure B4)

13.4. David Bruce (Annexure B5)

13.5. Amnesty International (Annexure B6).

14. There is a high degree of overlap between many of the issues raised in these written submissions and the issues raised by the Marikana Commission in sections B to G of Chapter 25. Nevertheless, the consequence of the inclusion of these written submissions into the terms of reference of the Panel is to significantly expand the range of issues that the Panel has had to consider. These recommendations are referred to in the relevant sections of this report in which they are discussed.

Submissions received by the Panel

15. The Panel's deliberations were also informed by oral or written submissions received from:

    15.1. The African Policing Civilian Oversight Forum (APCOF)

    15.2. The Centre for Applied Legal Studies (CALS)

    15.3. The Council for Scientific and Industrial Research (CSIR)

    15.4. African Criminal Justice Initiative (ACJI), Dullah Omar Institute

    15.5. The Legal Resources Centre (LRC)

    15.6. The Right2Know Campaign (R2K)

    15.7. The Socio-Economic Rights Institute of South Africa (SERI)

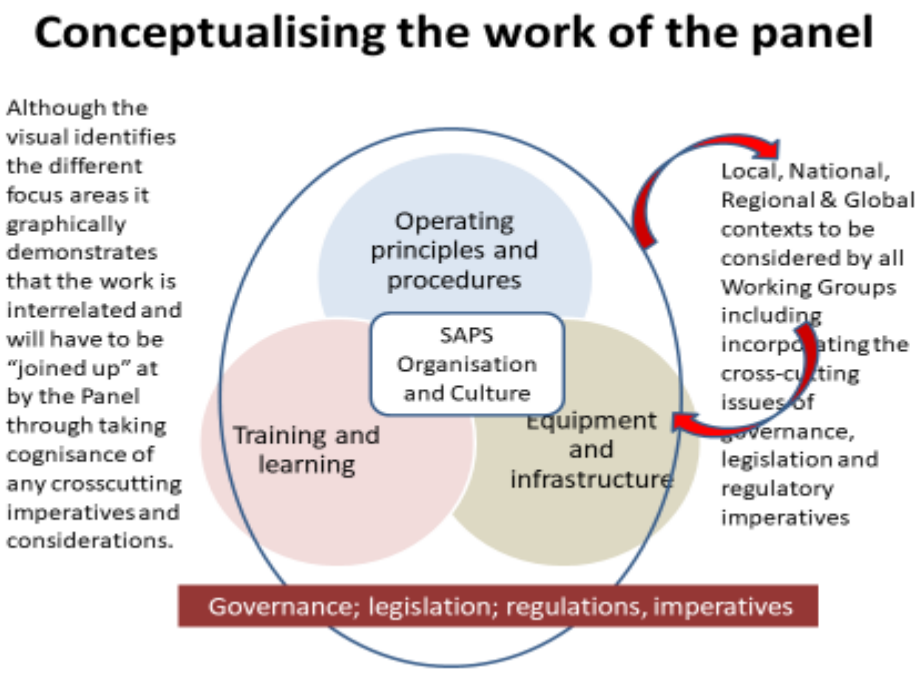
    15.8. Dr Andrew Faull, independent researcher and research associate, University of Cape Town.

Conceptualising the work of the Panel and framing of the report

16. The Panel's approach to addressing the Marikana Commission report recommendations has been shaped by the recognition that police reform in South Africa, including the reform of Public Order Policing, cannot be undertaken in a piecemeal manner. Whether analysing the Marikana incident, or the challenges facing public order policing, it is evident that there are systemic issues in the SAPS which, if not addressed, will defeat any attempt to address specific challenges facing the organisation.

17. At a preliminary stage, the Panel agreed that its work could be roughly conceptualised in terms of four overlapping areas of work (see Diagram 1 below) that identify the pivotal issue as the 'Organisation and Culture' of the SAPS. In line with the recommendations of the National Development Plan 2030 (hereafter referred to as the NDP), the Panel has identified the critical issues of organisation and culture as those of the professionalisation and demilitarisation of the SAPS, and related issues of leadership, policing ethics, and accountability. These issues are discussed in Chapter 2 of the Panel's report.

Diagram 1: Conceptualising the work of the Panel



Source: Panel members

18. The Panel's approach is informed by the recognition of the distinction between strategic, operational and tactical levels of organising within the SAPS as well as the need to properly anchor recommendations in the SAPS organisational context. The Panel's view is that transformation of the SAPS at a strategic level is necessary if transformation in Public Order Policing (at the operational and tactical level) is to be successful. Strategic issues are the high-level systems that the SAPS has in place to ensure that it achieves its objects as referred to in section 205(3) of the Constitution, 1996.[17] In this report therefore, strategic issues are issues that have organisation wide implications for the SAPS and that assist the organisation with issues of direction, prioritisation, and governance. In the report of the Marikana Commission, the critical strategic level recommendations are those relating to the need for demilitarisation and professionalisation of the SAPS in line with the recommendations of the NDP (Marikana Commission Recommendation C), and

[17] Section 205(3) provides that, "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

those relating to governance and accountability (Marikana Commission report Chapter 25 Sections D and G).

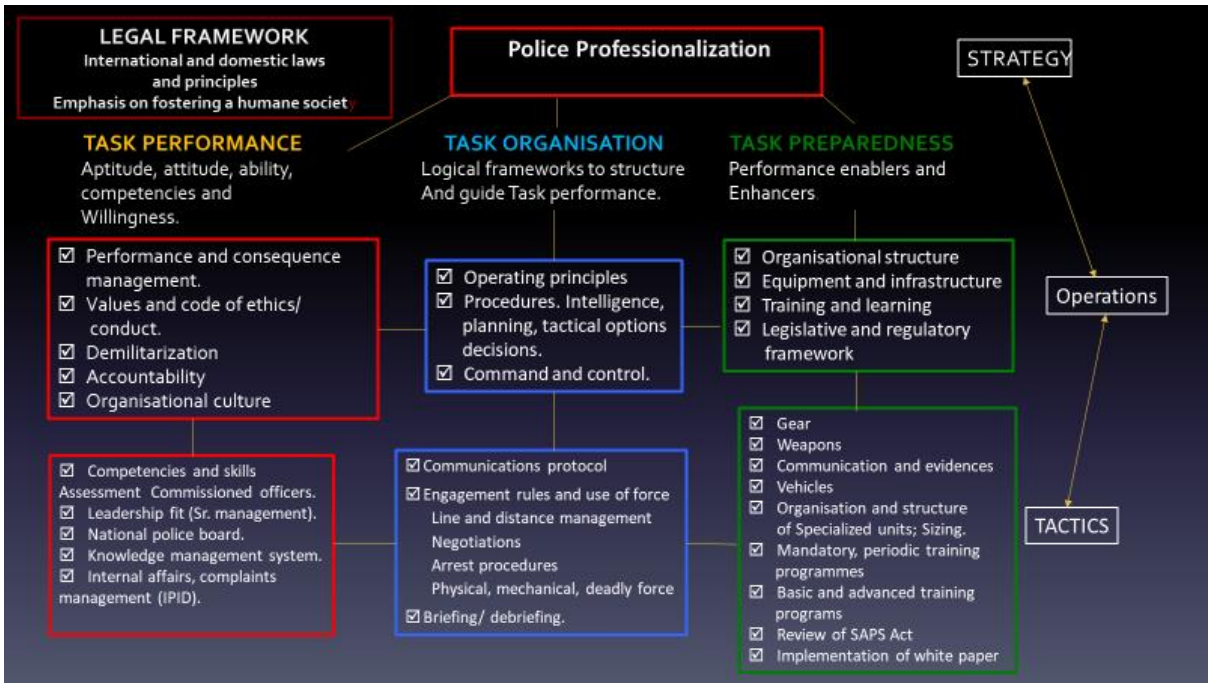
19. In line with this understanding, Chapter 3 of the Panel's report focuses on the issue of protest, the legal framework pertaining to the regulation of protest, and the role of SAPS Public Order Policing units in this regard. In this Chapter the key concern is to fully and firmly ground discussion of the issue of protest in an understanding of the right to peaceful assembly provided for by section 17 of the Constitution, 1996. The recommendations of the Marikana Commission, and other recommendations that the Panel was mandated to engage with, point to the need for systemic reform of POP and crowd management in South Africa and the Panel has therefore taken a holistic approach to discussing them. Chapter 3 therefore starts with a discussion of the context of protest in which crowd management takes place, as well as the legal framework as defined by the Regulation of Gatherings Act No.200 of 1993 (RGA). Thereafter, the report focuses specifically on various issues relating to the policing of protest with a focus on the role of POP units therein.

    19.1. One issue that the Panel believes is important to clarify at an early stage is the relation between the terms 'public order policing' and 'crowd management'. The key focus of Chapter 3 is on the policing of protest. The approach followed by the Panel is that the policing of these events, whether these are peaceful assemblies, or assemblies characterised in one way or another by the use of violence, is what the Panel terms 'crowd management'.

    19.2. In terms of section 205(3) of the Constitution, 1996, one of the 'objects' of the SAPS is to 'maintain public order'. The units primarily tasked with 'crowd management' in South Africa are referred to as Public Order Policing units or POP units. The Panel understands that the policing of 'public order' is a broad role that is performed by the SAPS and should not be equated with 'crowd management' or the work performed by POP units. As indicated, the Panel's focus is on 'crowd management' as it applies to the policing of protest (see in particular Chapter Three, Part D). The responsibility of the SAPS in this regard is not simply to 'maintain public order' but critically to support the right of people in South Africa to exercise their rights, notably the right to assemble peacefully.

20. Numerous recommendations are made in the course of Chapters 2 and 3 of this report. The purpose of Chapter 4 is to organise these recommendations in order to facilitate their implementation. This is intended to contribute to ensuring that the work of the Panel can be translated into a clearly defined process for reform of the SAPS and Public Order Policing in South Africa. While many of the recommendations of the Panel would need to be implemented by the SAPS, there are also recommendations that will need to be implemented by other components of government. In addition, recommendations applicable to the SAPS are organised in terms of questions to do with their implementation, as illustrated in the diagram below.

Diagram 2: Strategic, Operational and Tactical levels in SAPS



Source: C de Rover

Approach of the Panel to achieving its mandate

21. The Panel has met monthly since it was appointed in April 2016. In line with the 'Conceptualising the work of the Panel' diagram, the Panel divided itself into four working groups dealing respectively with:

    21.1. SAPS organisation and culture

    21.2. Operating principles and procedures

21.3. Equipment and infrastructure

21.4. Training and learning.

22. To deepen its engagement with each of the Marikana Commission recommendations, papers or presentations were developed by Panel members, circulated for comment, and presented for discussion to the Panel during its meetings. This process, as well as the process of producing the final report has enabled Panel members to share their views and engage on issues of potential difference. The report of the Panel therefore represents an attempt to achieve consensus between all members of the Panel.

23. The Panel also visited a number of POP units including in Cape Town, Durban, Johannesburg, Paarl, Port Elizabeth, and Rustenburg. In addition, members of the Panel also went to the SAPS training facility at Mankwe while training for POP members was in progress. During these visits the Panel had the opportunity to receive inputs from POP personnel and other members of the SAPS (See Acknowledgments for list of SAPS members).

24. The Panel also conducted a study tour to the Russian Federation in October 2017 where it was hosted and had the opportunity to meet with representatives of the Ministry of the Interior and Police in Moscow and St Petersburg. The Panel study tour formed part of a delegation led by the Honourable Deputy Minister of Police, Mr Bongani Mkongi. The Panel would like to express its gratitude to the Ministry of the Interior for engaging with the Panel and facilitating meetings with representatives of police units and the Saint-Petersburg University of the Ministry of Internal Affairs.

CHAPTER TWO: PROFESSIONALISATION, ACCOUNTABILITY AND DEMILITARISATION OF THE SAPS

The Panel's mandate to address the issue of professionalisation, accountability and demilitarisation

25. The Panel's point of departure for addressing the issue of professionalisation of the South African Police Service is Marikana Commission recommendation C. This states that, "The National Planning Commission in its report which has been accepted as Government policy, has made a number of important recommendations regarding the need to demilitarise the SAPS and to professionalise the police. These recommendations must be implemented as a matter of priority."

26. The reference to the National Planning Commission report is a reference to the NDP launched on the 15th of August 2012.[18] Measures that are motivated for to strengthen professionalisation and demilitarisation are discussed in Chapter 12 of the NDP report and include:

    26.1. Professionalisation is underpinned by a focus on police ethics. The NDP emphasises the code of conduct as a tool to foster ethical conduct and professionalism within the police service. There are a number of proposals relating to the code of conduct including linking the SAPS Code of Conduct to performance appraisal and discipline.[19] The NDP proposes that the current code be replaced by a code of professional and ethical police practice which should form part of the compulsory training programme of all recruits with members required to pass a test on the code.[20]

    26.2. Various measures are proposed to ensure that policing is carried out by suitably skilled personnel with a special focus on the higher ranks. Some of the measures proposed in this regard include that:

[18] See for instance https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning.
[19] NDP 2030, 389.
[20] NDP 2030, 390.

26.2.1. The National Commissioner […] should be appointed by the President on a competitive basis. A selection Panel should select and interview candidates against objective criteria.[21]

26.2.2. A National Policing Board (NPB) with multi-sectoral and multi-disciplinary expertise should be established to set standards for recruitment, selection, appointment and promotion.[22]

26.2.3. In order to ensure that minimum standards of competency are upheld 'all officers should undergo a competency assessment and be rated accordingly'[23]

26.2.4. A two-tier[24] system for recruitment should be developed 'to create a high calibre of officers and recruits who are capable of being trained for effective professional policing.'[25]

26.3. The culture of the police should be demilitarised to build an 'ethos associated with a professional police service' so that the community see the police as 'a resource that protects them and responds to people's needs.'[26] This service orientated approach is more compatible with the need to address the "challenges of developing greater competence and skills in the police to respond to growing complexity and changing patterns of crime."[27]

27. This section of the Panel's report is aligned with the National Planning Commission's recommendations.[28] It also responds to other relevant recommendations of the Marikana Commission that are linked to the goal of

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[21] NDP 2030, 391. Note that the NDP also recommends that the Deputy National Commissioners should be appointed by the President on the same basis. However the Deputies are appointed by the National Commissioner. Their appointment does not fall under the authority of the President.
[22] NDP 2030 390.
[23] NDP 2030, 390.
[24] It should be noted that the NDP 2030 uses the term 'two-stream' and two-track (page 387) but the system that it describes is more appropriately described as 'two-tier'. The fact that what is being recommended is a 'two-tier' system is reflected in references to these recommendations in the report of the Khayelitsha Commission which consistently uses the term 'two-tier' in discussing them (The Commission of Inquiry into Policing in Khayelitsha. "Towards a Safer Khayelitsha - Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha." August 2014, pp 54, 255 and 366, http://www.saflii.org/khayelitshacommissionreport.pdf).
[25] NDP 2030, 390.
[26] NDP 2030, 387.
[27] NDP 2030, 392.
[28] Where there are variances – primarily in relation to terminology - these are highlighted.

professionalisation. In responding to these recommendations the Panel has aimed to set out in some detail some of the key implications for the SAPS, of a commitment to professionalisation. What distinguishes this chapter from Chapter 3, which focuses on POP and crowd management, is that the issues addressed are cross-cutting issues that affect the whole SAPS. As indicated in Chapter 1, the Panel's interpretation of its mandate is grounded in the belief that reform of Public Order Policing and crowd management cannot be undertaken piecemeal. Meaningful reform of POP and crowd management will only be possible if there is systemic professionalisation of the SAPS. In its absence, the Panel's recommendations regarding POP will be 'going against the flow' of the broader organisational culture of the SAPS.

28. Other recommendations that are relevant to the theme of professionalisation and addressed in this chapter include:

28.1. **Marikana Commission Recommendation D1**: While it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be appropriately and securely recorded.

28.2. **Marikana Commission Recommendation G1**: Where a police operation and its consequences have been controversial requiring further investigation, the Minister and the National Commissioner should take care when making public statements or addressing members of the SAPS not to say anything which might have the effect of 'closing ranks' or discouraging members who are aware of inappropriate actions from disclosing what they know.

28.3. **Marikana Commission Recommendation G3**: The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.

28.4. Marikana Commission Recommendation Section F (First Aid):

28.4.1. In operations where there is a high likelihood of the use of force, the plan should include the provision of adequate and speedy first aid to those who are injured (F1);

28.4.2. There should be a clear protocol which states that SAPS members with first aid training, who are on the scene of an incident where first aid is required, should administer first aid (F2);

28.4.3. All police officers should be trained in basic first aid (F3); and

28.4.4. Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds (F4).

29. In addition to the above recommendations pertaining to the SAPS the Marikana Commission also made two recommendations specific to the Independent Police Investigative Directorate (IPID). Due to the fact that these speak directly to the concern with police accountability, they are also addressed in this chapter.

29.1. **Marikana Commission Recommendation G4**: The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.

29.2. **Marikana Commission Recommendation G5**: The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act No. 1 of 2011, and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves.[29]

The basis for the concern regarding lack of professionalism: introductory comments

30. Chapter 3 of the Panel's report engages extensively with the implications of the Marikana incident for crowd management, as well as addressing some of the shortcomings of the SAPS's response to the events at Marikana. The police

[29] Section 24 (5) of the IPID Act deals with self-incriminating answer given or statement made by any person to an investigator exercising powers in terms of the IPID Act.

operation at Marikana and the conduct of the SAPS during the subsequent Marikana Commission of Inquiry also highlighted a number of systemic weaknesses that need to be addressed if the organisation is to improve its level of professionalism as required by the NDP. These include:

30.1. Poor appointments to the top leadership;

30.2. The risk of inappropriate political interference in policing operations;

30.3. A lack of awareness of issues of principle in relation to operational decisions;

30.4. Adherence to the Code of Ethics particularly in relation to the duty of truth telling; and

30.5. The lack of commitment to the principle of accountability and the absence of accountability for wrong doing.

31. Concerns about the lack of professionalism in the South African Police Service are not confined to events related to Marikana and that there are far too many police officials who routinely do not adhere to the SAPS Code of Conduct.

31.1. One illustration of this is provided by the increasing amount in civil claims paid out by the Minister of Police as a result of misconduct committed by SAPS members in their dealings with members of the public. The vast number of civil claims against the organisation every year are reflected in the R335 485 616.61 paid out following court orders against the SAPS during 2016/17. This represents 216% increase since 2011/12.

31.2. The SAPS believe that the main causes of this is the fact that the public became more aware of their rights, a lack of accountability in the SAPS, a lack of discipline, the assessment of anti-crime operations based on numbers of arrest only, lack of operational leadership, and the non-compliance with National Instructions, directives and orders.

31.3. In addition, the lack of proper and effective consequence management linked to the manner in which state protection is being applied is also of extreme importance. It is important that members enjoy state protection in the bona fide exercise of their powers. However, where they flagrantly disobey

instructions and prescripts or acted in their own interest only, they should not enjoy such protection.

32. Other indicators are complaints against the SAPS received by the IPID[30] and public perception of high levels of police corruption.[31] Arguably these shortcomings have contributed to the *Victims of Crime Survey* finding that the public's level of satisfaction with the police deteriorated consistently between 2011 and 2016/17.[32]

33. In the SAPS 2015/16 annual report it is acknowledged that there is a persistent problem of 'underperformance and non-compliance.' As the SAPS annual report states, the problems of non-compliance have been persistently identified by role players such as the Portfolio Committee on Police, the Auditor General, the Audit Committee, the Inspectorate, Internal Audit and SAPS. These problems are consistently attributed to an absence of command and control. "Management of the SAPS has also lamented the gradual but consistent eroding of levels of discipline in the organisation, attributing these declining levels to being an additional consequence of reduced command and control. … This poses the question whether or not the solution to the systemic non-compliance and underperformance is beyond the direct control of the SAPS management on all levels." [33]

34. It is clear that the fundamental challenge is not the lack of internal accountability capacity, but the failure of senior SAPS members to respond to the evidence of poor performance and misconduct made available to them. This suggests that one of the fundamental issues to address is to ensure that SAPS leadership is capable of managing the SAPS to support the objective of professionalisation.

35. **PANEL RECOMMENDATION 1:** In relation to the vicarious liability of the SAPS for the actions of its members, the manner in which state protection for members is being applied should be critically reviewed. Police officials require a high measure of protection for the lawful exercise of their powers; otherwise it might lead to reluctance to act where required. It must be ensured that gross negligence,

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[30] IPID Annual Reports.
[31] Statistics South Africa 2017: 64: Statistics South Africa 2017. Victims of Crime Survey 2015/2016 (Online). Available: www.statssa.gov.za/publications/PO3412015.pdf (Accessed 13 February 2017).
[32] *Ibid.*
[33] South African Police Service Annual Report 2015/16, p 262.

mala fide actions, including where a member acts purely in his or her own interest, ignorance of the law and instructions[34], and serious misconduct be addressed in all cases not only by means of disciplinary action, but also through recovering of damages incurred by the SAPS as a result of actions by the member.

Professionalisation and competency-based policing

36. Being a police officer is perhaps now, more than ever, one of the most demanding professions in the world. It is a complex job, that brings law enforcement personnel face-to-face with all sorts of challenges and dilemmas, many of which they cannot resolve. Police work can be a high-risk, often stressful and frustrating job. Many believe that it is not adequately remunerated and underappreciated by society and government. Sometimes, it may not be easy to be proud to be a member of the police and to keep alive the philosophy of *ubuntu* as well as the idea that, "South Africa belongs to all who live in it, united in our diversity."[35] Yet, a professional and competent police service is an essential prerequisite for the complex, dynamic, democratic society that is South Africa in the 21st century.

Defining professionalism

37. The term 'professionalisation' refers to a process whereby any trade or occupation transforms itself into a profession recognised as possessing a high level of integrity and competence. This process tends to result in establishing acceptable qualifications, a professional body or association to oversee the conduct of members of the profession and some degree of demarcation of the qualified from unqualified amateurs.[36] Ultimately, a culture of accountability needs to be fostered within the profession that is supported by effective internal and independent mechanisms.

38. The Panel's approach to the question of professionalism is informed by the *Royal Commission into the New South Wales Police Service* (hereafter referred to as *The*

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[34] Assessments of the whether ignorance of the law constitutes a serious dereliction of duty would be applied on a case by case basis. It is expected that a police official would not be ignorant about the law in respect of matters such as arrest, or search and seizure, which he or she is dealing with on a daily basis. Similarly a police pilot would be expected not to be ignorant on civil aviation matters.
[35] Preamble of the Constitution.
[36] Abbot, A.D. 1988. The System of Professions: Essay on the Division of Expert Labour. p.1.Online). Available: www.everything.explained.today/Professionalization/.

Royal Commission). The *Royal Commission* and its contributors agreed to the following as attributes of police professionalism:

38.1. "The community entrusts the police with great powers and responsibilities;

38.2. The police must reciprocate this trust by achieving and maintaining high standards of integrity, impartiality, performance, and professionalism; and

38.3. Police functions must be conducted in a manner that meets the diverse needs of the community and police need to ensure that standards of service, efficiency and good performance are not hampered by bureaucratic rules or outdated thinking." [37]

39. The *Royal Commission* noted that, "Adoption of the ideals encompassed by the concept of professionalism was central to the reform of the New South Wales Police. If the ideal of professionalism was used as a foundation, the *Commission* said, "the Service can work towards a culture which espouses high standards and in which there is no tolerance of conduct unworthy of a profession." [38]

Operationalising professionalism: a competency-based approach

40. The National Development Plan and the Marikana Commission report both strongly recommend that the SAPS take steps to improve professionalism as a means of improving public safety and trust in the police. The NDP 2030 states that, "the police will earn public respect if they are efficient and effective and display a professional approach to combating crime."[39] Professionalisation is a multifaceted process and as asserted by Punch: "Genuine reform and lasting change in a police organisation recovering from a scandal or wishing to reform, needs strong leadership, enhanced supervision, resources devoted to internal control, a structure of accountability and a culture of compliance, with a resilient determination to tackle problems. There has to be significant *cultural* and *organisational* change. It is then, not just a matter of simply cleaning out the stables

[37] *Wood, JRT 1997. Royal Commission into the New South Wales Police Service. Final Report. The Government of the State of New South Wales. p. 212.*
[38] *Ibid.*
[39] National Planning Commission. 2012. *Our future, make it work – National Development Plan 2030*. NDP 2030. pp. 392 & 393.

but of rebuilding them, placing them under new management and inspecting them rigorously; and of not relaxing the effort."[40]

41. One critical component is a competency-based approach. A competency-based approach places a premium on defining roles and emphasises the key skills, knowledge, aptitude and attitude required for a particular role. Also, a competency-based approach seeks to identify gaps in the key competencies of trainees and address these gaps. On completion of training, trainees should demonstrate understanding of and the ability to apply the skills and competencies required for their roles.

    41.1. Professional policing requires the appointment of suitable leadership as well as a human resources management approach that ensures that functions and roles are performed by individuals with the required knowledge, skill, and experience. A competency-based approach recognises that it is the level of competence at which a member functions, and associated levels of knowledge, skill, and experience, and not just the rank of the member that define the role and authority of the individual within an organisation. The SAPS elevates rank above other considerations. In terms of the current SAPS approach, an individual's rank is held as more important than their skills, knowledge, and experience. As a result it is not able to use its substantial resources strategically. People who are appointed to senior ranks need to be competent with rank clearly based on knowledge and skill. Consistent high standards in recruitment and promotion are integral to professionalism. But the authority of an individual in a specific situation is not only determined by rank but also by their expertise. Competency-based policing emphasises that personnel with relevant knowledge and skills also have authority. Therefore authority in specific situations is not only determined by rank.

42. The approach being discussed here is aligned with that adopted by *The Royal Commission* where it said that, in addition to reforming attitudes, "there is a need to ensure that key positions throughout the Service are held by persons of proven

[40] Punch, 2009: 219.

ability who become proper role models." In order to achieve this, 'objective processes' are needed to ensure that:

42.1. "The best available officers are selected;

42.2. Those not able to perform effectively in their present positions are replaced, and, where practicable, given a chance to improve their skills; and

42.3. Those not committed to the new standards of professionalism and competence depart the Service." [41]

43. The NDP 2030 motivates for the development and implementation of a two-tier[42] system for recruitment by 2017, in order, "to create a high calibre of officers and recruits who are capable of being trained for effective professional policing."[43] The key purpose is to ensure that there is an ongoing corps of trained police managers who could take up top positions as they become available. Specifically the recommendations are:

43.1. The 'basic' level to allow for the recruitment and selection of non-commissioned officers, who could progress through training and experience to the positions of warrant officer or inspector, or any level below a commissioned officer. Non-commissioned members should be supported and mentored by commissioned officers.[44]

43.2. Direct recruitment to officer level should be based on set criteria, followed by further training and testing for candidate officers. Officers should be commissioned when all criteria are met. There should be some flexibility, allowing aspiring officers at the basic level to work towards meeting the criteria

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[41] *Wood, JRT 1997. Royal Commission into the New South Wales Police Service. Final Report. The Government of the State of New South Wales. p.212.*

[42] It should be noted that the NDP 2030 uses the term 'two-stream' and two-track (page 387) but the system that it describes is more appropriately described as 'two-tier'. The fact that what is being recommended is in fact a 'two-tier' system is reflected in references to these recommendations in the report of the Khayelitsha Commission. The Khayelitsha Commission consistently uses the term 'two-tier' in discussing them (The Commission of Inquiry into Policing in Khayelitsha. "Towards a Safer Khayelitsha - Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha", August 2014, pp 54, 255 and 366, http://www.saflii.org/khayelitshacommissionreport.pdf).

[43] NDP 2030. p. 390.

[44] NDP 2030. pp. 390-391.

for appointment to the officers' corps. Similarly, officers should lose their commissions if they fail to meet the standards.[45]

44. The Panel supports the NDP recommendation that there is an appropriately skilled corps of trained police managers in the SAPS. A further issue that concerned the Panel was the need for implementation of *a two-stream* system which allows for some personnel to improve their remuneration and benefits without increased management responsibilities. The current situation is that the only way SAPS members can improve their remuneration is through appointment to a higher rank. This results in highly experienced operational officers applying for posts where their specialised knowledge and skills are no longer required and that involve more administrative work. In addition, personnel performing specialist functions such as ballistics or forensics have to be promoted to higher ranks and take on managerial responsibility if they are to improve their conditions of service. As a result, the SAPS may not be an attractive employment option for people with specialist skills.

45. In Australia, the 1997 *Royal Commission* for instance recommended that salary level should be determined by the responsibility and skill of an officer in a certain position and not by rank or length of service. [46] The implication is that career development, for instance greater qualification, and improvements in remuneration, should be possible within a rank so that police personnel can 'grow within ranks'[47] instead of being forced to change the nature of their work by applying for a higher rank to obtain a better wage. Work streams involving different types of expertise (managerial, operational, specialist) should be identified. Depending on their skills, SAPS members should therefore be eligible for promotion within their rank and within their work stream. Alternatively, they should be promoted into the command and management work stream in which case promotion involves the possibility of an increase in rank.

    45.1. This issue came up frequently in the Panel's interaction with POP members. POP members with vast experience also lamented the lack of promotion prospects as one of the demotivating factors within the POP working

[45] NDP 2030. p. 391.
[46] Wood, JRT 1997. Royal Commission into the New South Wales Police Service. Final Report. The Government of the State of New South Wales.p. 265.
[47] *Ibid.*

environment. In some platoons there were more supervisory elements of the rank of warrant officers which was not proportional with corresponding strength of their subordinates. A better way of skills retention without recourse to unnecessary promotions which ultimately distort the structure of POP units is called for.

46. During the period 2003 to 2012 the SAPS underwent a process of *en masse* recruitment, with more than 123 000 new personnel recruited into the SAPS.[48] Processes of *en masse* recruitment inevitably emphasise numbers at the expense of the quality of personnel. In the Russian Federation one of the elements of police reform was reducing the number of police personnel with a greater focus on ensuring the quality of personnel.

47. During the Panel's study tour to the Russian Federation, members of the Panel visited the Saint-Petersburg University of the Ministry of Internal Affairs. The University is one of three universities in the Russian Federation dedicated to ensuring that members of the police service have appropriate qualifications.[49] It is clear that the policing of modern societies requires police services that are able to rely on the expertise of personnel with a diversity of appropriate tertiary qualifications. In South Africa tertiary qualifications for police are provided by a range of universities. There is a need to strengthen the contribution of the tertiary education sector in order to optimise its role in promoting professional policing that is appropriate to the South African context.

48. Professionalisation also requires succession planning. The Panel was for instance informed of a SAPS member with critical ballistic skills who intends to retire; and with no succession plan in place.

49. **PANEL RECOMMENDATION 2:** SAPS recruitment criteria and the selection system should be strengthened to support competency-based policing, including a greater focus on the quality of personnel. This should be informed by the work of the National Policing Board (see Panel Recommendation 15). The long-term view

[48] At the same time there was attrition (from retirement, service terminations, resignations and deaths) of 35 000 personnel so that the nett gain was 88 000 new personnel.
[49] The University has a student body of roughly 6000 (3000 full time and 3000 correspondence). While the curriculum is developed internally it is aligned with the broader tertiary accreditation system.

should allow for the possibility that the SAPS can fulfil its responsibilities more effectively with a smaller number of better qualified and better compensated personnel; integral to this approach is a two-tier recruitment system as recommended by the NDP.

50. **PANEL RECOMMENDATION 3:** In addition to a two-tier system, SAPS should introduce a two-stream system to support retention of skilled personnel in roles that are aligned to their skills. This could motivate personnel with specialised or scarce skills to remain in the SAPS and continue to perform these specialised functions.

51. **PANEL RECOMMENDATION 4:** The CSPS should commission a review of relevant policing qualifications provided at the tertiary level, including internally by the SAPS, and by the tertiary education sector. The review should focus on to what degree current qualifications that are available are aligned with the objective of professionalising the police and how the contribution of the tertiary education sector to the objective of strengthening competency-based policing can be improved.

Other key facets of professionalism

52. In addition to a competency-based approach other key facets of professionalism discussed in this report include:

    52.1. A principle-based approach;

    52.2. Recognition of the role of governance in creating an environment supportive of professionalism;

    52.3. Professional leadership;

    52.4. Accountability;

    52.5. A professional orientation towards the use of force;

    52.6. Acceptance by police of a duty of care—notably in relation to the provision of first aid; and

    52.7. A service orientation, rather than one that is militaristic.

Professionalism and community policing

53. In some countries the focus on professionalising the police has been seen as contrary to the emphasis on community policing.[50] The Panel's view is that strengthening professionalism is a necessary step towards strengthening the SAPS's ability to carry out effective community orientated policing.

Principle-based policing (police ethics)

54. Members of the SAPS are aware that their profession is invested with a great deal of power and responsibility and that they are routinely exposed to opportunities for malpractice and abuse of their powers. If malpractice happens on a frequent basis, it is a sign of the institution's disengagement with its ethics. "Even though they are perfectly aware of the legality or illegality of a specific act, officers may start to view the 'other side' negatively, that is, as 'criminals' who do not ultimately deserve to be treated humanely and in accordance with the law, since they have placed themselves outside the law."[51] Problems like this pose challenges to almost all police organisations once in a while. While accountability and discipline can play an important role in preventing and correcting such erosive practices, a professional police organisation does not primarily rely on these mechanisms to address these problems. The organisation's resilience against misconduct is grounded on a strong professional culture that foregrounds professional ethics.

The normative framework provided by the Constitution

55. The ethical principles of policing can be found in the Constitution, 1996, in particular in sections 199(5), 199(6), and 199(7), as well as in international law and other domestic legislation. They are flanked by four common law legal principles, namely, the legality, necessity, proportionality, and accountability of the exercise of police powers.

56. The primacy and role of human rights must be stressed. The promotion and protection of rights are not only the most important justification for all acts of the

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[50] Sklansky, DA. 2011. New Perspectives in Policing. The Persistent Pull of Police Professionalism. Harvard Kennedy School Program in Criminal Justice Policy and Management. National Institute of Justice, 6. Available: https://www-ncjrs-gov/pdffiles1/nij/232676.pdf (Accessed 12 March 2017).
[51] C. de Rover/A. Bienert, To Serve And To Protect. Human Rights and Humanitarian Law for Police and Security Fordes, 2nd ed., 2014, p. 140.

State, but also the most important limitation of its interventions into the freedoms and rights of individuals and collectives.

56.1. Of particular significance is section 7(2) of the Constitution, 1996, which states that, “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” For example, the right to life and the freedom of assembly not only demand respect on behalf of the police as an organ of the state, but also their active protection and facilitation without discrimination.

56.2. The Constitution, 1996, emphasises the salience of international law. Of particular relevance in this respect is section 199(5) of the said Constitution which states that, “The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”

56.3. Although every state has the primary responsibility to guarantee rights to citizens and non-citizens within its jurisdiction, upholding and protecting the human rights of every person is not only a constitutional but also an international obligation. It is now accepted that their violation can no longer be excused by reference to sovereignty. Governments whose executive, legislative or judiciary organs have violated human rights, even if they manage to escape their formal condemnation, for example, by refusing to submit themselves to certain supervisory organs, infringe objective values of the international community. They not only risk their reputation and good relations with other democratic countries, but, above all, their internal and external legitimacy.

The Code of Conduct and Code of Ethics

57. The Code of Conduct of the South African Police Service binds all police members. According to the SAPS disciplinary regulations of 2016 the contravention of the Code of Conduct is a disciplinary offence.[52] *Inter alia,* the Code of Conduct commits SAPS members to:

[52] Regulation 5(3)(u) .

57.1. “Act with integrity in rendering an effective service of a high standard which is accessible to everybody, and continuously strives towards improving this service;

57.2. Act in a manner that is impartial, courteous, honest, respectful, transparent and accountable;

57.3. Exercise the powers conferred upon them in a responsible and controlled manner;

57.4. Uphold and protect the fundamental rights of every person; and

57.5. Work towards preventing any form of corruption and bringing the perpetrators to justice.”[53]

58. The SAPS also has a Code of Ethics which commits SAPS members to perform their duties in terms of a number of principles.

58.1. One of the principles is the principle of integrity. The Code of Ethics explains the principle of integrity in the following way:

58.1.1. “Application: Employees of the SAPS regard the truth as being of the utmost importance; and

58.1.2. Explanation: We, as the employees of the SAPS, continually strive to uphold the mission, values, ethical principles, and ethical standards of the SAPS. We will behave in a manner that is consistent with these values. We will act honestly and responsibly in all situations. We will always tell the truth, perform our duties with noble motives and set an example in the communities we serve.”

58.2. Other principles are ‘respect for diversity’, ‘obedience of the law’, ‘service excellence’, and ‘public approval’. As with ‘integrity’ each of them is accompanied by information on ‘Application’ and ‘Explanation’.[54]

59. Codes of Conduct and Ethics are important in policing and law enforcement, broadly supporting and motivating personnel to perform their duties in an ethical

[53] South African Police Service, Code of Conduct, https://www.saps.gov.za/about/conduct.php.
[54] https://www.saps.gov.za/about/conduct.php.

manner and to enforce specific standards of conduct.[55] Principles are an essential element of police professionalism. Consequently, it is important that the Code of Conduct not just be known by every SAPS member, but also be implemented and respected in every encounter with members of the public.

60. The current SAPS Code of Conduct was developed in the mid-1990s. While it continues to have some utility it is slightly outdated.[56] In order to reflect on the utility of the SAPS Code of Conduct a comparison was conducted with a number of other police codes of conduct. The most common indicators and standards listed in the SARPCCO Code of Conduct, the Policing Profession of England and Wales Code of Conduct, and the New South Wales Police Force Code of Conduct and Ethics[57] include the following:

    60.1. Integrity, honesty and trustworthiness

    60.2. Respect for human rights

    60.3. Respect for the rule of law and codes of conduct and ethics

    60.4. Behave professionally and follow reasonable orders only

    60.5. Understand and comply with policies, procedures and guidelines

    60.6. Treat everyone equally, fairly, respectfully, courteously, and in a non-discriminatory manner

    60.7. Use of Force – only as absolutely necessary and within legal prescripts

    60.8. Report and challenge misconduct and corrupt behaviour

    60.9. Confidentiality, that is treat information with respect and disclose information only when this is relevant to duties and consistent with legal obligations.

61. One feature of these codes of conduct is that they explain each indicator in their codes as opposed to just listing them and expecting adherents to interpret and

[55] Grant, JK. 2002. Ethics and law enforcement. FBI Law Enforcement Bulletin, 71 (12): 11-14.
[56] For instance the Code of Conduct refers to the Reconstruction and Development programme (RDP) which was a government programme at the time when the Code was adopted. The RDP is no longer in existence.
[57] NSW Police Force 2008. Standards of Professional Conduct. (Online). Available: www.police.nsw.gov.au/_data/.../SPC.conduct_2008_Intranet (Accessed 02 March 2017).

understand them. While this is done in the SAPS Code of Ethics it is not done in the SAPS Code of Conduct. It is therefore essential that there is a document which is constantly available to all members of the SAPS to refresh their understanding of the code rather than just a once-off lecture during training. In order to understand their official duties and how to behave professionally, SAPS members are provided with the Codes of Conduct and Ethics in the *IQABANE* booklet.

62. The Panel was not only concerned about the content of the Code of Conduct but also how to ensure that the principles embodied in it are internalised by SAPS members as well as the procedures or mechanisms for ensuring this. Society will judge law enforcements' ethical behaviour not only by their words but by their actions. For codes of conduct to be effective, managers and police personnel must adhere to the code in practice. The key issue in this regard is that senior managers of the SAPS are invested in professional policing that is carried out in terms of the Codes of Conduct and Ethics. They must actively promote the principles embodied in these Codes and support members in understanding and applying them.

63. As has been emphasised by many writers on the subject, police work is not just morally complex but morally hazardous. For instance, while the Code of Ethics emphasises 'public approval', sometimes SAPS members have to take actions which may not elicit such approval. One example is where members of the SAPS intervene to protect someone who is being assaulted by vigilantes. Clearly in such a case, upholding constitutional principles should take precedence over the need to obtain public approval. Similarly, sometimes it may appear to SAPS members that complying with human rights principles is obstructing them in promoting safety. Police managers must be diligent in supporting members of the police service in navigating these hazards in a manner that is consistent with the Constitution and Codes of Conduct and Ethics.

Integrating questions of principle into operational decision-making

64. Police in England and Wales are trained in a primary decision-making model to support principle-based decision-making and evaluate decisions that have already been made. This model is referred to as the *National Decision Model* (NDM) and the Code of Ethics promotes its use to help embed ethical reasoning in accordance

with principles and standards of behaviour. The model permits individuals to be more questioning of the situations confronting them, more challenging of themselves, and better able to make ethical and effective decisions. This model places the Code of Ethics at the centre of all decision-making.

65. The model is flexible, and it can be applied to spontaneous incidents or planned operations by an individual or team of people, and to operational and non-operational situations alike. It can also be extended to specialist and other areas of policing and is applicable to reviewing decisions and debriefing on action taken.

66. The elements of the NDM stay the same but decision makers decide for themselves which questions and considerations they apply at each stage. For example, in a fast-moving incident, the critical role of the NDM is to support decision makers in keeping in mind the principles and standards set out in the Code of Ethics. Adherents are not expected to know the Code verbatim but they are expected to apply the intent of the Code to their decision-making.[58]

Diagram 3: Proposed Decision Making Model (National Decision Model)

Source: College of Policing 2014: 8

[58] College of Policing. Code of Ethics - A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing profession of England and Wales. 2014. p.18: http://www.college.police.uk/What-we-do/Ethics/Documents/Code_of_Ethics.pdf.

67. **PANEL RECOMMENDATION 5:** In line with the NDP recommendation that a code of professional and ethical police practice should be developed and prescribed through regulations,[59] the present SAPS Code of Conduct and Code of Ethics should be amalgamated and referred to as the *South African Police Service Code of Conduct and Ethics.* The most applicable and enforceable indicators from the existing codes should be used.

68. **PANEL RECOMMENDATION 6:** Key Performance Areas (KPAs) for performance review of senior managers should include how they have taken responsibility for promoting the principles embodied in the Code of Conduct and Ethics and in supporting members in understanding and applying them.

69. **PANEL RECOMMENDATION 7:** In order to support the integration of the awareness of police ethics into decision-making, the SAPS should adopt the *National Decision Model*, or a model that resembles it.[60] The model should be integrated into training (including in-service training) on professional conduct and operational decisions.

70. **PANEL RECOMMENDATION 8:** The SAPS should develop training material (including audio-visual) to ensure that the *Code of Conduct and Ethics* is internalised as part of police practice. This should be translated into all official South African languages.

71. **PANEL RECOMMENDATION 9:** In line with the NDP recommendation, police members should be trained and tested in the *Code of Conduct and Ethics* and its application, as part of the Professional Conduct module; and the SAPS should continue with the practice which requires SAPS members to sign a copy of the Code each year, with the signed copy kept in their file.

Additional recommendations

72. **PANEL RECOMMENDATION 10:** On an annual basis the SAPS should provide a report to the Portfolio Committee on Police on the outcomes of disciplinary

[59] NDP, p. 390.
[60] Another version of the model may be found on page 37 of the OSCE publication 'Human Rights Handbook on Policing Assemblies'.

investigations and hearings against SMS officers. To monitor against undue delays in the finalisation of disciplinary cases, provision should be made for the rendering of monthly returns showing cases outstanding for longer than six months with reasons for the delay. This will enable the SAPS to publicly affirm its commitment to ethical conduct amongst its senior commanders and demonstrate that SAPS members, irrespective of rank, are accountable for their conduct (see also Panel Recommendation 32).

73. **PANEL RECOMMENDATION 11:** The CSPS should monitor and audit progress made by the SAPS in resolving disciplinary matters against SMS officers, and report to the Portfolio Committee on Police on matters finalised and on cases outstanding for over six months.[61]

Professionalism and governance of the police

The role of the Minister of Police

74. Marikana Commission recommendation D1 states that, "[w]hile it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be appropriately and securely recorded."[62]

75. In addition, the Panel also considered the recommendation that:

    75.1. "Government should adopt legislation to regulate and introduce greater transparency in relation to directions issued by the Minister of the Police in terms of section 207(2) of the Constitution, 1996."[63]

76. Constitutional provisions that govern political responsibility for and control over the police include:

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[61] The practice is never to produce a publicly available list of suspects in any criminal case or cases. This principle would fly in the face thereof and would also be to the detriment of persons who are investigated but never prosecuted.
[62] Marikana Commission report. 2015, 551.
[63] Bruce, David. Recommendation 6. p. 19.

76.1. Section 206(1) of the Constitution, 1996, provides that the Minister of Police (a member of Cabinet) is "responsible for policing and must determine national policing policy after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executive responsible for policing."[64]

76.2. Section 207(1) provides that the National Commissioner 'must exercise control over and manage the police service' though this must be in accordance with the national policing policy and the directions of the Minister of Police.[65]

77. Read together, sections 206(1) and 207(2) of the Constitution, 1996, provide the Minister with the authority to issue 'national policing policy' as well as 'directions' to the National Commissioner. Nevertheless, the National Commissioner is the person who 'must exercise control over and manage the police service' though this must be 'in accordance with the national policing policy and the directions' of the Minister.[66]

78. The Minister of Police therefore has extensive authority to intervene in policing matters and it is necessary that the Minister should do so in order to ensure that policing is conducted in a manner that is responsive to the most important and urgent public security concerns. In addition, the Minister of Police should hold the police accountable to established laws and policies.

79. The Marikana Commission accepted the possibility that the then Minister of Police played a direct role in influencing the decision to launch the police operation against the strikers that resulted in the deaths of 34 of them.[67] In this respect the Commission made note of the highly evasive nature of the responses by the then National Commissioner to questions about the influence of the Minister on the decision to launch the operation.[68] The Commission stated that it wished "to emphasise that it is not finding that such 'guidance' was given" But it said that "[i]t

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[64] In full, section 206(1) provides that: "A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives."
[65] Section 207(1)states that: "The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing."
[66] *Ibid.*
[67] Marikana Commission report. p. 444-449 and at p. 453 paragraph 74.
[68] Marikana Commission report. pp. 443-444; 449.

is unable in the light of what has been said above to find positively in Minister Mthethwa's favour on the point."[69]

80. The Marikana Commission recommendation D1 is a response to the probability that the Minister of Police influenced the decision to launch the operation. Furthermore, the Marikana Commission recommendation makes clear that the probability that the Minister engaged with the National Commissioner about the operation was not in itself problematic. In this regard the Commission quotes the statement of the evidence leaders that:

    80.1. "It would therefore not be correct to assert that it would be improper or inappropriate for the Minister to intervene in policing matters by making contact with the National Commissioner … expressing concerns about a particular situation which has come to his or her notice, and instructing that the matter must be attended to. It would be improper and inappropriate for the Minister to issue directions as to how a particular operation is to be carried out. This does not fall within the Minister's function, and it is likely to be a matter in respect of which the Minister has no experience or skill."[70]

81. Therefore, the Minister 'has political responsibility, must determine national policing policy and may issue directions', but operational and managerial control of the police 'falls within the functions of the National Commissioner'[71] and it is 'improper and inappropriate for the Minister to issue directions as to how a particular operation is to be carried out'.[72]

82. The manner in which the Minister exercises his or her responsibilities will have a direct and notable impact on the extent to which the police are able to professionalise. As is suggested by the Marikana Commission report, political influence may serve as a key factor in motivating police leaders to depart from professional judgement that is informed by appropriate principles. This problem is

[69] Marikana Commission report. p. 453.
[70] Evidence Leaders 531 quoted in Marikana Commission report. p. 440.
[71] Marikana Commission report. p. 440.
[72] *Ibid*.

likely to be one that continues to exist and has a negative impact on the SAPS with occasional examples appearing in the media.[73]

83. The issue of police accountability is discussed in more detail below. However, for professionalisation to succeed, it is not only the police who should be accountable for their decisions and actions. As the Marikana Commission notes, the Minister of Police must also be accountable for directions that are issued to the National Commissioner. Governance of the police that is consistent with democratic principles therefore requires the legal formalisation of the relationship between the responsible Cabinet Minister, in the form of the Minister of Police, and the SAPS. In particular, legal provisions should provide that directions that are issued by the Minister to the National Commissioner are recorded in writing and subject to review by Parliament.[74]

84. **PANEL RECOMMENDATION 12:** The SAPS Act should be amended to ensure that all directions issued by the Minister are formally recorded. The Minister should ensure that a record of all directions is presented to the Portfolio Committee on Police on an annual basis.

85. The Panel wishes to note that there was disagreement on the motivation for this recommendation. In the opinion of the Chairperson "the proffered assumption that the National Commissioner's evasiveness before the Marikana Commission sought to conceal the Minister's political intervention to influence operational decisions is bad as there is no evidence which reveals that there was political influence on the part of the Minister. Marikana Commission recommendation D1 recognises that in large and special operations there is a role for consultation with the Executive but that 'the Executive should only give policy guidance' which should be 'appropriately and securely recorded'. Motivation for the need for policy guidance to be provided in writing was provided by SAPS members at Rustenburg

[73] For example, on 25 July 2017 it was reported that eight POP officers and an armoured Nyala were being used to provide 24 hour protection to the private residence of a Cabinet minister who happened to be a former Minister of Police. This can only happen when political office bearers issue unlawful instructions or place inappropriate pressure on operational police commanders. See https://www.businesslive.co.za/bd/national/2017-07-25-public-order-policing-unit-and-nyala-removed-from-nathi-nhlekos-house/ .

[74] This has been done in some Australian jurisdictions. For example see Section 4.6 of the Queensland, Police Service Administration Act, 1990 and Sections 6 and 7 of the South Australia, Police Act, 1998.

who indicated that changes of (unwritten) policy when a new Minister takes over contributed to uncertainty. To overcome uncertainty, and for that reason alone, I agree to the advocated retention of the recommendation for formal recording of all 'directions'."

Other political influence on police

86. The possibility of inappropriate influence on the police is not only related to the influence of the Minister on the National Commissioner. Political interference with policing is also an issue of concern at other levels of government. Such influence is of concern partly because it may undermine the obligation of police not to act in a politically partisan way[75] and it may place other pressures on the police to act in ways that are inconsistent with the law and Constitutional principles such as the right to freedom of assembly. Members of POP units for instance, "Indicated that political interference in policing is negatively impacting on command and control of POP as they are required to act against their operational doctrines to comply with the political request."[76]

87. As with the issue of influence by the Minister, it would not be reasonable to prohibit provincial or local politicians from engaging with police officials in their area of jurisdiction as engagement at this level is a necessity for police responsiveness and community policing: what needs to be much clearer is that such engagement needs to be subject to both specific limits and to principles of transparency and accountability.

    87.1. Section 47 of the SAPS Act (68 of 1985) provides that members may refuse to obey a patently unlawful order or instruction 'given to him or her by a

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[75] Section 199 (7) of the Constitution, 1996, states that none of the country's security services, nor any of their members, '… may in the performance of their functions (a) prejudice a political party interest that is legitimate in terms of the Constitution; or (b) Further in a partisan manner any interest of a political party.' Section 46(1) of the SAPS Act, 1995, provides that, "No member shall-
(a) publicly display or express support for or associate himself or herself with a political party, organisation, movement or body;
(b) hold any post or office in a political party, organisation, movement or body;
(c) wear any insignia or identification mark in respect of any political party, organisation, movement or body; or
(d) in any other manner further or prejudice party-political interests.

[76] Civilian Secretariat for Police Service. 2016., *Demilitarisation and the policing of public protests and events – Are our POP and TRT units militarised?* Unpublished report.p. 42.

superior or a person who is competent to do so'.[77] It also authorises SAPS members to request that instructions be reduced to writing.[78] However, the Act should also clarify the legal duties of members in responding to concerns raised by politicians, public officials and other members of the public.

88. **PANEL RECOMMENDATION 13:** The SAPS Act should be amended to affirm that SAPS commanders or other members:

88.1. Should, wherever possible, consider and try to take into account reasonable concerns that are expressed by public officials, or others, if they can do so in a manner that is consistent with the principles of policing;

88.2. Are obliged to exercise independent judgement in relation to the operational implications of such concerns; and

88.3. May request that such concerns be provided in written form.

The Civilian Secretariat for Police Service

89. The SAPS is a highly complex organisation. Its complex nature and the complex role that it performs make meaningful accountability a challenge. As a result, oversight of the SAPS remains relatively superficial. There is therefore a need for oversight bodies to subject the SAPS to a deeper level of accountability. The critical component of the architecture of police accountability in this regard is the Civilian Secretariat for Police Service, the body provided for in section 208 of the Constitution, 1996. According to section 208 this body (referred to as 'A civilian secretariat for the police service'), "must be established by national legislation to function under the direction of the Cabinet member responsible for policing." In line with this provision, the Civilian Secretariat for Police Act was passed in 2011.[79] It is clear that in order for the Minister to be adequately supported in performing his or her functions of providing policy direction to the SAPS and holding it accountable, there is a need for a stable, well-capacitated civilian secretariat.

[77] Section 47(1).
[78] Sections 47(2) and (3).
[79] Act 2 of 2011.

Staffing should ensure a balance between civilians with appropriate skills and suitable former SAPS members who have insight into the workings of the SAPS.

90. **PANEL RECOMMENDATION 14:** A plan should be developed and work study conducted to support the capacitation of the CSPS. This should enable the CSPS to better fulfil its Constitutional duty of supporting the Minister of Police in order to fulfil its oversight mandate and ensure the professionalisation of the police. The plan should ensure a balance between civilian personnel with appropriate skills and personnel with policing experience who have insight into the workings of the SAPS and are committed to oversight and the professionalisation of the SAPS.

Professional Police Leadership

Appointment of the SAPS National Commissioner and Provincial Commissioners

91. The NDP 2030 states that the 'serial crises of top management' in the SAPS poses a fundamental challenge to police performance and conduct. The consequence of inappropriate appointments at the level of National Commissioner are reflected in the Marikana Commission, the conviction on charges of corruption of Commissioner Selebi, and others who have been removed from the role of National Commissioner with a shadow hanging over them.

92. The recommendation of the NDP to address these 'serial crises' is as follows:

    92.1. "The National Commissioner of Police […] should be appointed by the President on a competitive basis. A selection panel, established by the President, should select and interview candidates for [this post] against objective criteria. The President should appoint the National Commissioner […] from recommendations and reports received from this selection panel. This would enhance the incumbents' standing in the eyes of the community and increase the respect accorded them by their peers and subordinates."[80]

[80] NDP 2030. 2012. p. 391: In this paragraph the NDP refers to both the National Commissioner 'and Deputies'. However, responsibility for the appointment of Deputies lies with the National Commissioner. Other recommendations contained in this report motivate that consistent use of merit-based appointment processes within the SAPS should apply to Deputies.

93. The Panel supports this recommendation. The Constitution, 1996, concentrates considerable power and responsibilities in the hands of the National Commissioner. According to section 207 (2) the National Commissioner "must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing."

94. In terms of the Constitution, 1996, the appointment of the National Commissioner is the prerogative of the President. According to section 207(1) of the said Constitution: "The President, as head of the national executive, must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service." The appointment process in respect of the National Commissioner will be dealt with in detail in this Report.

95. It should be noted that the NDP proposal is consistent with the Constitution and does not usurp executive authority as it will be the President who will make the appointment in line with the Constitutional mandate. A transparent and competitive process will ensure that the President is assisted in appointing a woman or man that has the skills, expertise, experience, qualifications and integrity required for the particular rigours of leading a large police agency that operates within a complex environment. In particular, the process will also enable possible controversies or concerns about the candidate's integrity to be ventilated prior to appointment. This will reduce the chances that the SAPS National Commissioner will later be tainted by past allegations or controversies and thereby become distracted from the task at hand.

96. Concerning precedent, South Africa has precedent for Presidential appointments to key institutions that are undertaken in a transparent and competitive manner. Good examples include the appointment of judges following recommendations by the Judicial Services Commission and the appointment of the Public Protector following recommendations by parliamentary portfolio committees.

97. The Panel believes that the National Policing Board, to be established, would be the competent body to serve as the selection Panel and to lead this process and provide the requisite recommendation of suitable candidate(s) to the President for appointment. A new SAPS national commissioner was appointed in November

2017 and the recommendations relating to the appointment process that should apply will therefore be relevant to the appointment of future national commissioners. For the purposes of future appointments, it is important that the criteria for selection and the process for the appointment of that official, in keeping with the recommendations of the NDP 2030, be established first. The selection and appointment process must reflect a competency-based approach and must be conducted in a transparent and inclusive manner.

98. In addressing this issue, the Panel has reached the conclusion that it would be appropriate for the concern to be with appointments to the position of National Commissioner as well of those of Provincial Commissioner. As with the appointment of the National Commissioner the appointment of the Provincial Commissioner is also addressed by the Constitution, 1996. Section 207(3) thereof provides that, "The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties."

99. It is important that the appointment of Provincial Commissioners should also be subject to a process that is competitive and merit-based. In the case of candidates for the position of Provincial Commissioner the proposal would therefore be that the National Policing Board submits its recommendations to the National Commissioner and provincial executive.

100. **PANEL RECOMMENDATION 15:** A National Policing Board should be established by means of legislation. The NPB should have multi-sectoral and multi-disciplinary expertise to set objective standards for recruitment, selection, appointment, and promotion of SAPS members. The Board should be tasked with reviewing and further improving the criteria for all commissioned officers starting with the post of the SAPS National Commissioner which at this time does not have adequate minimum criteria from which to assess potential candidates. The NPB should be composed of between seven and nine individuals who are widely recognised as professionals who understand the demands of executive management and ethical decision-making in large public-sector organisations

generally and the SAPS in particular. Ideally, the chair will be a Judge or a Senior Advocate to promote the independence of its recommendations to the Minister of Police and the SAPS.

100.1. The Panel recommends that as the NPB will be performing a technical function it should only consist of individuals who bring specific expertise and skills to the work of the board. The NPB could therefore consist of:

100.1.1. A retired police commissioner who has served with distinction to assess knowledge of policing policy and practice;

100.1.2. An expert in the laws and regulations governing the SAPS, and ideally criminal law, to provide capacity with regards to the legal principles within which policing should operate;

100.1.3. A representative from the Treasury to provide capacity in relation to the Public Finance Management Act and relevant regulations governing public sector procurement;

100.1.4. A representative from the Public Service Commission to provide capacity with respect to executive public administration prescripts, legislation, planning and reporting obligations;

100.1.5. An expert in executive decision-making and ethics in the public sector; and

100.1.6. Any other individuals who possess the necessary expertise to assist in assessing candidates against relevant criteria developed by the board

101. **PANEL RECOMMENDATION 16:** The SAPS National Commissioner should be appointed by the President only on recommendation by the National Policing Board. The NPB should present the President with a shortlist of candidates who performed the best against the assessment criteria used and the scores obtained. The recruitment process should be transparent and competitive with the *curriculae vitae* of the applicants being made public, and interviews taking place in public.

101.1. For purposes of appointing future SAPS National Commissioners and Provincial Commissioners, the NPB should develop clear merit-based criteria for these posts. These criteria must be benchmarked internationally on the

necessary skills, expertise, experience, integrity, and characteristics required for effectively leading a professional police agency.

101.2. Where vacancies occur the CSPS should:

101.2.1. Over a month-long period, publicly advertise the posts for the SAPS National Commissioner and Deputies and present the responsibilities and functions of each post along with the minimum criteria required to be shortlisted.

101.2.2. Receive applications and supply the NPB with a shortlist of candidates who meet the minimum criteria. To be shortlisted, the candidates must not only possess the necessary expertise, experience, and qualifications, but must first be vetted for top security clearance and subjected to an appropriate psychometric evaluation.

101.3. The board should then interview the shortlisted candidates against the criteria in a public forum. The board should also be able to receive submissions from the public on the shortlisted candidates.

101.3.1. The NPB should provide scores for each shortlisted candidate against the key criteria weighted by the most important functions of the post and assessments of integrity;

101.3.2. The board should agree on a shortlist of no more than five candidates for each post, comprising those who achieved the highest scores from the assessment processes; and

101.3.3. The shortlist of appropriate candidates for the post of SAPS National Commissioner will then be presented to the president who in terms of the constitutional mandate will appoint the new commissioner.

102. **PANEL RECOMMENDATION 17:** The appointment of Provincial Commissioners should follow a similar process to that recommended for the National Commissioner. The shortlist of recommended candidates for each Provincial Commissioner position should be submitted to the National Commissioner and provincial executive, with a copy being sent to the Minister of Police.

The role of leadership in promoting a professional police culture

103. In addition to the Marikana Commission recommendation C, the Panel was also requested to consider the recommendation which observed that:

> 103.1. Police leadership is crucial to every aspect of the organisation—from strategic management to its operational conduct—and to public perception and trust. In most modern democracies the appointment of police leadership is an executive function, ensuring an appropriate separation from the political process. Most modern democracies also require that police leaders are experienced law and justice practitioners. There has also been a clear departure, in recent years, from the paramilitary style of police organisation, which is characterised by military ranks and hierarchical, centralised decision-making. On all these matters South Africa has taken a rather different approach: senior police appointments are highly politicised; non-experts are appointed to senior positions; and the organisation is paramilitary both in structure and function. As a minimum, SAPS requires consummate professionals in key strategic positions to provide the organisation with the effective leadership it desperately needs. [81]

104. Establishing a professional culture within a police organisation starts with the characteristics and conduct of the top leadership. It is at the top ranks that the tone and approach of the organisation is role-modelled for those at the lower ranks. Police supervisors at all levels need to be aware that their behaviour has a strong impact on the organisational culture, which in turn contributes to police behaviour. Police leadership must take the lead in enhancing integrity and encouraging a culture of openness, a professional ethos in which awareness of and respect for accountability during police actions is fully internalised. As the United Nations Office on Drugs and Crime (UNODC) highlights, changing the conduct of the police first requires a change in culture which is guided and lead by police leadership, as shown in the diagram below.

[81] See de Rover Recommendation 1 and Bruce Recommendation 7 (21).

Diagram 4: Police leadership, culture and conduct

Source UNODC 2011: 75

105. The NDP 2030 highlights the importance of leadership for promoting an organisational culture that supports the professionalisation of the SAPS. It states that, "The South African Police Service has been under strain as a result of serial management crises over the past few years. Coupled with organisational rank changes to military ranks without any or further training in judgement, discretion and professional conduct, these crises have had a detrimental effect on police culture and sub-cultures."[82]

Concerns regarding current and former Ministerial regulations

106. The NDP 2030 emphasises that, "A professional police service conforms to minimum standards for recruitment, selection, appointment, and promotion." It is clear that there are major inconsistencies in the manner in which SAPS members conduct themselves and carry out their work, not least of all at the level of top management. This is a reflection of the fact that promotions in the SAPS are not always conducted on the basis of minimum standards. One of the contributing factors to the inconsistencies in performance has been the large scale use of regulation 45(9) of the SAPS Employment Regulations of 2008. This regulation (which has now been replaced by paragraphs (l), (m) and (n) of sub-regulation 45(1)) provided that the National Commissioner may promote an employee into a post without advertising it and without following a selection process, on the

[82] NDP 2030. 2012. p. 393.

condition that the National Commissioner was satisfied the employee qualified in all respects for the post; there were exceptional circumstances that warranted the deviation; and such a deviation was in the interest of the Service. The SAPS Annual Report for 2016/17 reveals that of the 83 promotions made by the National Commissioner using Regulation 45, a total of 66 per cent (55 promotions) were made to the SMS level (Brigadier and above). Regulation 45 (9) was prone to being abused and used to promote individuals who would not necessarily qualify for the promotion if their suitability for the post was assessed using objective criteria. Over the years, large numbers of people have been promoted by SAPS National Commissioners (whom in most cases were not trained or experienced police officials and therefore were not likely in a position to make such an assessment) to the SMS level without being properly assessed for their skills and ability. The consequence has been a large number of appointments to the SMS structure of individuals whom it later turns out are not able to fulfil the functions of the posts that they are appointed to. This has fed into the 'serial crises' of top management that the NDP refers to.

107. Revised Employment Regulations (Regulation No. 10 772) were gazetted by the Minister on the 27th October 2017.[83] These revised Regulations are under a process of review to rectify a number of mistakes made, and a new set of the further amended Regulations is expected to be published soon.

108. In terms of the Constitution, 1996, the South African Police Service Act (No. 68 of 1995) and the South African Police Service Employment Regulations (2008), the National Commissioner is mandated to appoint a person up to the level of Lieutenant General (equivalent to a Deputy Director General - DDG), which includes Deputy National Commissioners, Provincial Commissioners (also in accordance with above prescribed procedures in respect of Provincial Commissioners), and Divisional Commissioners. Until 2009, appointments on the level of DDG were submitted via the Minister for Public Service and Administration (DPSA), in terms of a Cabinet decision for its concurrence. After 2009, following discussions between the Departments of Police and the DPSA, as well as legal

[83] Available at: https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-628-no-41203-regulation-gazette-dated-2017-10-27.pdf.

advice from the Chief State Law Adviser, it was decided that appointments by the National Commissioner may not be subject to Cabinet's concurrences as there is no such legal requirement. This became the status quo until the 27th of October 2017, when the new Gazette with new employment regulations was published.

109. It appears that certain deficiencies have been identified in the 2017 employment regulations and that these are being revised. Nevertheless, the Panel is concerned with certain provisions of these regulations and feels that it is appropriate to express its concern about them.

110. In terms of the 2017 regulation, several provisions have been revised to provide that decisions taken by the National Commissioner must be with the concurrence of the Minister.[84] The expressed intention appears to do away with the sole prerogative of the National Commissioner in the above matters and to require the Minister's concurrence in these matters. The Panel is concerned with regulation 45 as well as with regulations 40 (re-appointment of former employees) and 42 (acting in higher posts).

110.1. As indicated above, in its previous form, this regulation (specifically regulation 45(9)), allowed for the National Commissioner to deviate from promotion processes provided certain conditions were fulfilled. The 2017 regulation is divided into two main parts with sub-regulation 45(1) dealing with the appointment or promotion to posts in the senior management service, and sub-regulation 45(2) dealing with promotions below this level. The Panel's concerns in this regard are with various provisions of section 45(1): the regulation both continues to allow for deviations from promotion processes involving a selection panel; and the provisions authorise the Minister to interfere inappropriately in appointments. Key provisions in this regard include:

110.1.1. Sub-regulation 45(1)(d) which provides that the chair of a selection committee for the SMS must be appointed by the National Commissioner with the concurrence of the Minister;

[84] Examples are Regulation 20(2) (which says that the Minister's concurrence is required, *inter alia*, in relation to the structuring of the police service), Regulations 21 (Human Resource Planning), 29 (Job evaluation), 30 (Grading of posts and determination of salaries) and 43 (Determination of requirements for employment).

110.1.2. Sub-regulation 45(1)(k) and (m) which requires that the appointment recommended by the committee may only be approved by the National Commissioner with the concurrence of the Minister and provide that the National Commissioner may promote an employee to a vacant post in the fixed establishment of the Service under certain conditions, subject to the concurrence of the Minister;

110.1.3. Sub-regulation 45(1)(n) allows for appointments to be made without formal appointment processes, though in the 2017 regulations this now has to be done with the concurrence of the Minister; and

110.1.4. As indicated above, the Panel has similar concerns in relation to regulation 40 (re-appointment of former employees) and regulation 42 (acting in higher posts).

111. In summary then, the Panel is concerned with any provisions within employment regulations that allow for deviations from formalised appointment processes and regards these as being incompatible with the professionalisation of the SAPS.

112. In addition, while the Panel recognises that it is appropriate for the Minister to be consulted in relation to decisions about the criteria that are applied in appointing or promoting people, the Panel believes that the concurrence of the Minister should not be required in relation to decisions about who is appointed to specific posts. In so far as candidates for appointment or promotion meet the criteria for these posts the Minister should not be able to veto such appointments. Such provisions are of concern as they compromise the authority of the National Commissioner to 'exercise control over and manage the police service' against efforts to depoliticise and professionalise the SAPS.

113. As with regulation 45 of the Employment Regulations (in both the 2008 and 2017 versions) the Panel is concerned with regulation 11 of the amended Regulations of the South African Police of 1964.[85] In a similar manner to regulation

[85] Regulations of the South African Police: Published in Gazette No. R 203 in GN 719 of 14 February 1964. These Regulations have been amended numerous times (the last time was in GN R563 in GG 40008 of 24 May 2016). The Regulations are in force as a result of the transitional provisions of the South African Police Service and regulation 11 is still in force. Regulation 11 does not deal with appointments per se but with applications for appointment.

45 of the employment regulations, regulation 11 also allows for the National Commissioner, at his or her own discretion, to deviate from appointment processes, by allowing applications that do not comply with the general requirements. In addition, the regulation sets inappropriate restrictions relating to the employment of former members of the Service who are applying for re-appointment, by specifying that they may not be older than 30 years. In so doing it may prevent the SAPS from re-appointing personnel who are suited for posts in terms of competency-based criteria.

114. **PANEL RECOMMENDATION 18:** The South African Police Service Act (No. 68 of 1995) as well as the Employment Regulations (2017) need to be amended to ensure that:

114.1. There can be no deviation from the prescribed processes for:

114.1.1. properly defining the scope and requirements of a post;

114.1.2. the need to advertise a post;

114.1.3. the requirements for applications for a post; and

114.1.4. the requirement of having an independent and properly constituted panel for assessing the candidates applying for the post.

114.2. No appointments or promotions in the SAPS should occur without the suitability of the person for the post being rigorously evaluated against objective criteria. All posts in the SAPS should only be filled following a transparent, competitive, and merit-based process to ensure that only the best suited person is appointed.

115. **PANEL RECOMMENDATION 19:** Regulation 11 of the SAPS Act,1995, should be amended as follows:

115.1. Sub-regulation (1) should be amended to stipulate that there can be no appointment to any post without proper procedures being followed. There will never be a situation where professionalism of the organisation can be enhanced by failing to follow established processes for filling posts or effecting promotions.

115.2. There should be no prohibition on the re-appointment of a former member of the Service who meets other employment criteria, purely because they are older than 30 years of age. Former members of any age prior to that of retirement should be able to be appointed if they possess the necessary skills, qualifications, integrity, and expertise to add value to the SAPS. Former members who have obtained additional skills and experience in other sectors but prefer to work as police officers should be welcomed back to the SAPS if they can contribute to achieving the professionalisation of the organisation.

116. **PANEL RECOMMENDATION 20:** The authority of the Minister, as provided for in Regulations, should be limited to approving the criteria for appointments and promotions, and for the creation of posts, but should not in any way extend to influence senior management decisions on the individual candidates who are appointed or promoted to specific posts.

Competency assessments of senior management officials

117. Partly as a result of the inappropriate use of the provisions of regulation 11 of the 1964 Regulations and regulation 45 (9) of the Employment Regulations, there is a legacy of inappropriate appointments including appointments at senior management level. In order to address the legacy of inconsistent appointment processes and standards, the NDP 2030 recommends that, "As soon as possible, all officers should undergo a competency assessment and be rated accordingly." The NDP 2030 motivates that the assessment should differ for each rank: "For example, a captain remains a captain, but the competency test determines if she/he meets the competency standard for a captain. Officers who do not meet the standard should not be promoted or appointed to a higher level until they attain the required level of competence for that rank."[86]

118. On this point the Panel was also required to consider with regard to 'competency assessments' that 'commissioned officers should lose commissions if they do not meet standards'.[87]

[86] NDP 2030. 2012. p. 390.
[87] Hendrickx. p. 18.

119. The Panel believes that to undertake an assessment for all 25 049 commissioned officers[88] may be an onerous task that will require substantial resources and time. The Panel has therefore formulated recommendations on this issue on a more modest scale focusing on the senior management service. The Panel recognises that the consequence of such assessment may be that some senior managers will be assessed to be not fit to continue serving at the rank at which they have been appointed. This may mean that they are demoted if they cannot qualify for the rank by further training, and if found not to be gainfully employed in the ranks they hold.

119.1. In relation to this type of possibility *The Royal Commission* stated that, "This may mean that some senior staff will find it necessary to move on or to be retrained. Those who elect to leave should be allowed to depart with dignity, and with the help of adequate retirement or redundancy arrangements, in recognition of the fact that they played their part at a time when different structures, rules and attitudes prevailed."[89]

120. **PANEL RECOMMENDATION 21:** The competency assessment recommended by the NDP should be implemented. The competency assessment should focus firstly on the top management, or SMS level (Brigadier and above) of the SAPS.

120.1. The overall focus of such an assessment should seek to assess the following:

120.1.1. Firstly, the suitability of a person to remain a member of the SAPS needs to be assessed against clear criteria of knowledge, skill, aptitude, attitude, experience, and personal conduct;

120.1.2. Secondly, the suitability of that person to function at a strategic level in the SAPS needs to be assessed against the general SMS criteria; and

[88] SAPS Annual Report. 2016/17. p. 9.
[89] Royal Commission. p. 213.

120.1.3. Thirdly, the suitability of that person to occupy a particular post at a strategic level needs to be assessed against job specific criteria for that post.

120.2. The competency assessment must include a focus on issues of personal integrity and professionalism and should therefore include a focus on:

120.2.1. Procedures and processes utilised for appointment;

120.2.2. Whether security clearance is current;

120.2.3. Whether experience, expertise, and skills are adequate for the post;

120.2.4. Whether there is any evidence or allegations that the individual has transgressed the SAPS Code of Conduct and Ethics;

120.2.5. Independent performance assessment in the post over the previous two years; and

120.2.6. Recommend any necessary amendments to the criteria for appointment to strategic operational posts (e.g. Crime Intelligence).

120.3. The competency assessment needs to be organised and conducted in an independent, open, and transparent manner under the auspices of the National Policing Board or CSPS. In the absence of the proposed NPB, the audit process could be facilitated and managed by the CSPS. This option would necessitate that the capability and capacity of the CSPS be appropriately augmented or that an appropriate independent organisation is contracted to undertake the assessment.

120.4. It is important that this be commenced as soon as practicable, as a highly professional and functional top management capability is a key foundation for the establishment and maintenance of a professional and strong SAPS.

120.5. Where officers fail to meet the required standards, the following steps should be undertaken:

120.5.1. In the case of inadequate skills or skills-based performance, provided with a specific and reasonable time frame in which to reach the required level of ability.

120.5.2. In cases where appointments were irregular but they meet the requirements of the post they should remain in their posts.

120.5.3. If there are allegations of any kind of misconduct against the officer, these should be thoroughly investigated within the prescribed time frame. Where there is evidence of misconduct, individuals must be subjected to a disciplinary hearing and suspended where appropriate. Consideration should be given to rank reductions as an option for sanctions.

120.5.4. Where officers are not performing to standard and the skills gap is too large for a reasonable change in performance within one year, these officers must be re-deployed to posts where they can meet the requirements of the post.

The accountability of SAPS members

121. Under the heading 'Accountability' the Marikana Commission made the following five recommendations:

121.1. **Marikana Commission Recommendation G1**: Where a police operation and its consequences have been controversial requiring further investigation, the Minister and the National Commissioner should take care when making public statements or addressing members of the SAPS not to say anything which might have the effect of 'closing the ranks' or discouraging members who are aware of inappropriate actions from disclosing what they know.

121.2. **Marikana Commission Recommendation G2**: The standing orders should more clearly require a full audit trail and adequate recording of police operations.

121.3. **Marikana Commission Recommendation G3:** The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.

121.4. **Marikana Commission Recommendation G4:** The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.

121.5. **Marikana Commission Recommendation G5:** The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves.

122. This section of the report responds to the above recommendations. The approach of the Panel is that accountability is one of the pillars of democratic and professional policing. The discussion of accountability in this section is therefore not confined to these recommendations but is also concerned with SAPS accountability more broadly.

122.1. On the issue of accountability the Panel was also asked to consider the broad recommendation that, 'Leadership to set transparency and accountability as priorities'.[90]

123. The Marikana Commission faced a substantial problem of dishonest and misleading evidence from members of the SAPS. The Marikana Commission found that, "The leadership of the police, on the highest level, appears to have taken the decision not to give the true version of how it came about that the 'tactical option' was implemented on the afternoon of 16 August and to conceal the fact that the plan to be implemented was hastily put together without POP inputs or evaluation."[91] Issues to do with deceptive practices, and dishonest evidence provided by SAPS members before the Commission, are not addressed comprehensively in the Marikana Commission report. However, various aspects of the issue are highlighted. For example:

[90] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3 para 17.
[91] Marikana Commission report. pp. 515 (and more generally 513-515).

123.1. Systematic attempts by the SAPS to deceive the Commission about the 'extraordinary session' of the National Management Forum meeting of the 15th of August 2012 and the decisions taken there;[92]

123.2. Police tampering with the evidence at Scene 2 by placing weapons on or near the bodies of deceased miners;[93] and

123.3. Where the SAPS leadership sought to deliberately construct false evidence and withhold compromising information from the Marikana incident on a number of occasions.[94]

124. The lack of accountability by the SAPS is addressed far more extensively in the heads of argument of the evidence leaders[95] as well as the heads of argument of the South African Human Rights Commission.[96]

125. In a discussion of accountability under the heading 'SAPS accountability and lessons learned: a reluctance to admit error' the evidence leaders[97] draw together the following issues:

125.1. The duty of public accountability and truth telling and the need for police to be 'witnesses of truth' who 'speak freely and frankly';

125.2. The defensive approach adopted by the SAPS and statements by leaders which encouraged police to close ranks;

125.3. The absence of a serious attempt to identify 'lessons learned' related to a reluctance to admit that there had been mistakes; and

125.4. The impact of IPID investigations in which members are treated as 'suspects' in discouraging truth telling.

126. The Marikana incident highlights the SAPS ability to avoid accountability and its apparent lack of investment in the principle. To date, more than five years after the Marikana incident, no officers have been held accountable for the incidents of

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[92] Marikana Commission report. pp. 184 - 189.
[93] Marikana Commission report. pp. 322 – 324.
[94] Marikana Commission report. pp. 402 – 406.
[95] Heads of argument of Evidence Leaders, Marikana Commission of Inquiry, pp. 601-607, 608, 625-633 and 689-691.
[96] SAHRC (see pages 59-119).
[97] The passage is quoted in full by the Marikana Commission report. pp. 380-387; Evidence Leaders, pp.590-596 & pp.1094 – 1106.

dishonesty in attempting to construct evidence or mislead the Commission, nor for that matter, any other incident of misconduct committed at Marikana.

127. The issue of dishonesty by senior SAPS commanders is not limited to the events of Marikana. When senior commanders are not held accountable in any way after clear findings of dishonesty before judicial boards of inquiry, it sets the tone for a culture of cover-up and dishonesty to permeate throughout the entire organisation. Indeed, recent research has found that dishonest conduct has become part of the prevailing organisational culture at police station level.[98]

The principle of accountability

128. Accountability is directly connected to governance and is crucial for good police-public relationships. The quality, transparency, and veracity of accountability will directly impact on questions of image and reputation as well as on public trust and confidence in the SAPS as an institution, and in its individual officers. Accountability is indivisible from 'principle-based policing' because it can only exist if policing is based on principles of integrity, professionalism, and truth telling. In many ways, this principle stands at the heart of a professional police service. Without adequate accountability, police corruption, misconduct, and poor service delivery will remain key characteristics of the policing experience of large numbers of people. One policing expert argues that, "… accountability is not something an organisation can simply claim to possess; it is something the [police] organisation satisfactorily delivers when called upon to account."[99]

129. Police accountability has different dimensions (though these are not mutually exclusive).

129.1. ***Organisational accountability refers*** to the rendering of public account by the SAPS as an organisation for its compliance with Constitutional and legal provisions and for its performance.

[98] Faull, Andrew. 2017. *Police Work and Identity.* Harvard. This ethnography cites a number of instances where deceit and dishonesty is a routine part of police conduct at different police stations.
[99] Punch. 2009. p. 202.

129.2. ***Internal accountability of members and units*** refers to internal accountability of individual SAPS members and SAPS commanders. This may relate to issues of performance as well as a specific case or incident (in which case it also falls into the third category).

129.3. ***Incident focused accountability*** is concerned with police accountability in relation to specific incidents following police intervention. This is the main focus of the discussion in this section of the report.

130. The UNODC explains that accountability includes responsibility for giving directions and preparing police officers for their work; therefore, accountability cannot be limited to the actions of individual officers but applies to supervisors as well as the agency as a whole.[100] Elements of the policing system that are identified by UNODC as necessary to ensure accountability for specific incidents include:

130.1. Proper reporting procedures and facilities;

130.2. Adequate supervision that supports officers in carrying out their duties professionally and reporting these correctly;

130.3. A working culture that promotes transparency and evaluation;

130.4. Monitoring of police actions and operations by both police leadership and external organs (in the South African context the latter term would refer to IPID);

130.5. Complaints procedures, both for making complaints to the police directly and to independent bodies; and

130.6. Fair and effective procedures and policies on how to deal with misconduct, including both disciplinary and criminal codes, adequate investigative capacity, procedures for punishment and appeal procedures. [101]

Official statements in the aftermath of shooting incidents

131. As indicated **Marikana Commission Recommendation G1** states that, "Where a police operation and its consequences have been controversial requiring further investigation, the Minister and the National Commissioner should take care

[100] UNODC. 2011. p 11.
[101] UNODC. 2011. p. iv.

when making public statements or addressing members of the SAPS not to say anything which might have the effect of 'closing the ranks' or discouraging members who are aware of inappropriate actions from disclosing what they know."

132. The recommendation implicitly refers to statements that were made by the National Commissioner and the Minister,[102] as well as one of the senior commanders involved in the Marikana operation,[103] in speeches to SAPS members at Marikana in the days after the 34 strikers were killed by SAPS members on the 16th of August 2012. According to the Commission, these speeches were 'calculated to bring about a closing of the ranks.'[104] Furthermore, the National Commissioner issued a press statement on the 17th of August. The Commission said that this deliberately obscured "the fact that there had been two shooting incidents, separate in time and space. This resulted in a deliberate misleading of the public, who were brought under the impression that all of the deaths had been caused at the confrontation at scene 1 which they had seen on television."[105]

133. A related recommendation that the Panel was requested to consider motivated that:

133.1. [SAPS] must have 'good procedures' which manage and draw together all the key [post-incident management] threads: operational, evidential, and therapeutic, including psychological debriefing (individual and group). This must also include media, organisational and political briefings and agreed process with any external independent police oversight/ complaints investigation.[106]

134. As highlighted by the latter recommendation, in the aftermath of an incident in which there is a possibility that excessive force has been used, there are a number of different, potentially conflicting, issues that require attention. One of these is the responsibility to provide public information.

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[102] Marikana Commission report. pp. 388-391.
[103] Marikana Commission report. pp. 398-401.
[104] Marikana Commission report. pp. 390-391.
[105] Marikana Commission report. p. 397 and more generally pp. 392-397. Also see the Claassen Board of Inquiry. *Report of the Board of Inquiry* into allegations of misconduct against the National Commissioner: Mangwashi Victoria Phiyega. October 2016. pp.62-68.
[106] Hendrickx. p. 14.

134.1. It may be that, in the incident in question, police had put themselves in great danger and acted with bravery and discipline. Nevertheless, all members of the SAPS need to recognise that accountability is fundamental to professionalism. The importance of accountability is at its highest in incidents where people are injured or killed by police. The work of a SAPS member may involve facing danger and the possibility of death, injury and trauma, but it also involves the responsibility of accountability for the use of force. SAPS management in these situations need to recognise that they need to be willing to engage with the media partly to re-assure the public that the SAPS is committed to upholding high standards and is committed to accountability.

135. Police commanders managing public information in these situations are faced with a tension between support for police members and supporting accountability and public trust in the police. However, under no circumstances should any statement by a senior commander compromise the potential for accountability by providing conclusions or opinions on the facts.

136. **PANEL RECOMMENDATION 22:** Guidelines to police managers on dealing with the aftermath of shooting incidents should note that any public statements:

136.1. Should emphasise that the SAPS aims to uphold the principles of professionalism and accountability;

136.2. Should emphasise that the SAPS is in favour of thorough and impartial investigations in order to support accountability;

136.3. May give a summary of information that has been received but should not under any circumstances imply that management has reached final conclusions on what occurred during the incident (information provided should not undermine the potential for the incident to be investigated thoroughly); and

136.4. May note that the SAPS is committed to the principle of protection of life. In addition to the safety of members of the public it is also concerned about the safety and well-being of SAPS members and the potential for them to be harmed or traumatised in confrontations.

Truth telling and professional culture

137. **Marikana Commission Recommendation G3** states that, "'The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans."

138. The recommendation speaks to the conduct of individual officers and their duty to speak the truth and to report promptly, thoroughly, and impartially on any act or omission to which they were part, be it as actor or as a witness.

139. Recommendations submitted to the Marikana Commission also motivated that:

139.1. "SAPS members should be properly trained in their obligations to provide evidence."[107]

140. The Marikana Commission also quotes a passage referring to one of the expert witnesses who "questioned whether the SAPS leadership and/or unit commanders made any serious attempt to encourage their members to provide full, detailed, and frank accounts of what happened."[108]

141. A feature of many police organisations is the 'blue wall of silence' or 'blue curtain of silence' sometimes just referred to as the 'blue code'. These terms refer to an informal rule common in many police organisations whereby police officials tacitly agree not to report the mistakes or misconduct of their colleagues. This dynamic is driven by the need of police to 'trust one another and co-operate closely'.[109] If this cultural dynamic becomes the norm it results in police officials generally involving themselves in various levels of dishonesty. This can involve police officials claiming ignorance of a colleague's wrongdoing during an investigation for petty misconduct. It can also involve outright perjury whereby a police official will testify untruthfully while under oath during a criminal investigation or prosecution of a colleague. This cultural dynamic can become so entrenched that breaking the 'blue code of silence' can result in various informal and formal sanctions from colleagues and commanders. These can range from ostracism,

[107] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraph 16(i).
[108] Evidence Leaders (in passage quoted in full by Commission). p. 590 & p. 1094 quoting White Exhibit JJJ178, para 4.2.14.
[109] Khayelitsha Commission of Inquiry report. p. 421 (para 67).

damage to personal property, malicious rumours, intimidation, and sometimes direct violence.

141.1. Research has found that the 'blue code of silence' exists in the SAPS.[110] This is consistent with the experience at the Marikana Commission where there was widespread dishonesty practised by the SAPS in its evidence before the Commission. The tone set by the SAPS top leadership has clear implications for the power and influence of the 'code' on SAPS officers. They are likely to reinforce the code, and undermine accountability, if they send out the message that the SAPS needs to protect itself from criticism more than it needs to work towards improving its professionalism and performance.

141.2. Police culture is not a fixed entity. Though it cannot be changed overnight it can be changed. According to the Khayelitsha Commission, reforming police culture is particularly difficult where the required changes conflict "with the beliefs and assumptions of rank and file members of a policing agency. Managers of change need to acknowledge this and take steps to ensure that all members of the policing agency understand and accept reforms. …. [C]hanging the culture of an institution needs to start at the top, with leaders and managers accepting the need for change in institutional culture and then adopting a variety of strategies to implement the desired change."[111] Values cannot simply be imposed as it is impossible to implement major institutional changes without the active support of a substantial proportion of personnel.

142. One of the challenges in the SAPS is not simply the 'code of silence', but also an internal culture in which the benefits of critical reflection in order to improve police responses are not valued or appreciated. The professional model emphasises that police should have the skills and knowledge to make ethical decisions in complex policing situations as well as that skills and knowledge need

[110] Sauerman, A and S. Kutnjak Ivković. 2015. *Police Integrity in South Africa* in "Measuring Police Integrity across the World" (eds. Sanja Kutnjak Ivković and M.R. Haberfeld). Springer. pp 213-239.
[111] Khayelitsha Commission of Inquiry report. pp. 420-421 with reference to Bacon, M. 2014. *"Policing Culture and the New Policing Context"* in Jennifer Brown (ed.) The Future of Policing. London: Routledge. pp. 103- 119 contains extensive references.

to be continually improved.[112] Professionalisation does not expect the impossible of police and recognises that in certain instances, particularly where situations are complex or unfamiliar, there may be negative outcomes despite the best intentions of the police involved. Professional police culture is not based on the assumption that errors cannot occur. Rather, it emphasises the need to analyse incidents and operations in an objective manner in order to identify the reason for shortcomings and thereby improve responses and the management of operations.

142.1. One of the expert witnesses at the Marikana Commission stated that, "his experience of his meetings with the SAPS, where he pressed them to identify the lessons learned from what happened at Marikana, was that there was a genuine reticence to do so, because of the fear that identifying lessons learned would amount to an acknowledgement that mistakes had been made: 'I felt there was that equation of a lesson learned is a mistake made and not a more positive approach that when you conduct any operation of any kind, whether successful or not, you try and draw from that operation the positive and negative points that facilitate the learning organisation experience so that you retain what was good and that you seek to remedy what went wrong.'" [113]

142.2. Similarly another expert witness to the Marikana Commission "concluded that there did not appear to have been any serious attempt by the SAPS, through debriefing or otherwise, to identify mistakes made and lessons learned in the events of 9–16 August. …. The evidence of the senior police officers who were involved in the operation revealed a distinct unwillingness to engage with the tragic consequences of the police action, and a failure to acknowledge errors or accept responsibility for the deaths which occurred. Such evidence as that of the internal review of the events showed only a very limited internal review focused predominantly on technical inadequacies rather than the key strategic and tactical errors which led to the tragedy." [114]

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[112] Sklansky, DA. 2011. *New Perspectives in Policing. The Persistent Pull of Police Professionalism*. Harvard Kennedy School Program in Criminal Justice Policy and Management. National Institute of Justice. 6. Available: https://www-ncjrs-gov/pdffiles1/nij/232676.pdf (Accessed 12 March 2017).
[113] Marikana Commission report. p. 384, quoting the evidence of Cees de Rover (see also evidence leaders, pp. 593-594).
[114] Marikana Commission report. pp. 380-381, quoting the evidence of Gary White (see also evidence leaders, pp.590-591).

142.3. Ethnographic research on the SAPS also indicates that the SAPS has a very strong internal emphasis on ensuring that the SAPS is able to present information indicating that it is meeting performance targets. The emphasis by oversight and other state structures on meeting performance targets, and the likelihood that SAPS managers will be censured if they fail to meet these targets, is also another factor which discourages honesty.[115] This indicates that there is a need for a profound shift in the SAPS away from the current emphasis on meeting performance targets towards an emphasis on professional policing based on transparency and accountability. Current SAPS culture not only obstructs accountability but also undermines the ability of the SAPS to analyse incidents in order to draw lessons from them. This can only be done if there is a culture that emphasises that these events need to be assessed in an honest manner.

143. **PANEL RECOMMENDATION 23:** Professional policing requires that the SAPS as an organisation give much greater value to honesty. The assessment of operations and efforts to improve organisational performance must emphasise the need for honesty and for accurate and truthful information. Compliance with principles of accountability and transparency is meaningless unless grounded on accurate and truthful information.

143.1. In order to better support lesson learning SAPS leadership should facilitate the creation of an organisational environment in which post-operational debriefing provides opportunity for members to express their views honestly. Processes should be used that create an environment that encourages members to express their views honestly about the strengths and weaknesses of an operation.

143.2. SAPS leadership across the organisation needs to ensure that statistics gathered against performance indicators are accurate, regardless of whether they meet the targets or not. In addition, more attention should be paid to

[115] Faull, Andrew. 2014. *Performance Measurement in Police Agencies*. A report written for the Commission of Inquiry into allegations of police inefficiency in Khayelitsha and a breakdown in relations between the community and the police in Khayelitsha, 10 May 2014. Expert report to the Khayelitsha Commission. Record Bundle 12(1), Item 9. See also Andrew Faull, South African police need more than social media savvy to polish their image, https://theconversation.com/south-african-police-need-more-than-social-media-savvy-to-polish-their-image-52873.

evidence that properly considered strategies have been put in place and are being properly implemented rather than focusing primarily on 'outcomes' as measured by performance indicators.

143.3. The selection of performance targets needs to be more carefully assessed in terms of their utility and likely contribution towards promoting public trust and improved levels of safety. Attention must be paid to the potential that targets will result in perverse incentives such as reducing the recording of crime or directing police resources away from addressing serious violent crime.

143.4. In order to support reliable and accurate recording of crime, crime statistics should not be the primary measure of police performance but rather be seen as a measure of public safety and the crime burden facing the police.

The duty of truth telling and post-incident investigations

Protection against self-incrimination

144. One of the key problems that the Marikana Commission confronted was the poor quality of information provided by SAPS members regarding the shootings in which they and their colleagues had been involved on the 16th of August 2012. In practice, the Commission was confronted with the fact that there was very little accountability by SAPS members for the shootings in which they had been involved, even though these had resulted in the death of 34 people.

145. Marikana Commission Recommendation G5 is relevant to this issue. It states that, "The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves."

145.1. Some of the background to the recommendation is provided in Chapter 23 of the Marikana Commission report. The Commission was frustrated by the

lack of detail provided by SAPS members in their statements about the shootings on the 16th of August 2012.[116]

146. In order to understand section 24(5) of the Independent Police Investigative Directorate Act (No. 1 of 2011), one needs to read it with section 24(3)(b) and 24(4):

146.1. Section 24(3)(b) provides that: “An investigator or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated.”

146.2. Section 24 (4) provides that: “A person questioned by an investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but (a) a person is not obliged to answer any question if the answer is self-incriminating; and (b) the person asking the questions must inform that person of the right set out in paragraph (a).”

146.3. Section 24 (5) provides that: “No self-incriminating answer given or statement made by any person to an investigator exercising powers in terms of this Act will be admissible as evidence against that person in criminal proceedings instituted against that person in any court, except in criminal proceedings for perjury.”

147. Sections 24(3)(b), 24(4), and 24(5) of the IPID Act all apply to any person who the IPID investigator wishes to obtain information from. The exact purpose of section 24(5) is not spelt out in the IPID Act and the reason why it was inserted is therefore unclear. The IPID’s role is distinct from that of other investigative agencies in that its function is to investigate police. Furthermore, in cases where police are suspected of law violations, the alleged victim of such a violation, or a witness to it, may in many cases be a person who is suspected of a crime. Section 24(5) may therefore function in at least two ways:

147.1. A criminal suspect (who is not a police member) who alleges that s/he was the victim of an assault, or other alleged criminal act, committed by police, or that s/he witnessed a corrupt transaction, may be asked to provide

[116] Marikana Commission report. pp. 516-517, paragraphs 1-4.

information on an incident at which they were present on the understanding that the statement cannot be used in evidence against him/her. Taking into account that the alleged criminal action(s) of the police member may have taken place in circumstances where the criminal suspect was him/herself involved in a crime, section 24(5) would therefore serve as an incentive to the suspect to give truthful evidence. Otherwise they might be motivated to provide the IPID investigator with dishonest evidence about the circumstances in which the alleged violation took place. This would then undermine IPID in its attempts to obtain truthful evidence about the circumstances in which SAPS or the Municipal Police Service (MPS) members were alleged to have violated the law.

147.2. On the other hand, a SAPS or MPS member, who was involved in the use of force (or other exercise of police powers), could provide a full statement to the IPID about the use of force incident. The police member may have acted with lawful intentions but nevertheless be concerned that a full and frank statement will expose him or her to the risk of criminal prosecution. This concern might for instance, be grounded on the belief that, even though they acted with lawful intentions, they might inadvertently say something that provided grounds for suspicion that they had not acted lawfully. Section 24(5) would in these circumstances enable the police member to talk freely about the incident with a sense of confidence, without having to be 'on guard' that something that they might say will expose them to the risk of prosecution. In this case section 24(5) would enable the IPID to obtain statements from police who have acted with lawful intentions more easily, as police would not have to guard themselves against the risk that the statement could be used against them.

148. The latter issue was referred to in evidence by one of the expert witnesses before the Marikana Commission. One of the expert witnesses had engaged with SAPS members about why so many of the SAPS statements were lacking in detail regarding 'the imminent threat to life or serious injury'.[117] The witness said that:

[117] de Rover quoted in Marikana Commission report. p. 386.

148.1. “The explanation I was given for that is IPID’s involvement, where people are no longer witnesses of truth that because of their public office can help you and assist you and should assist you to piece together in detail what happened. But now they are suspects, because these warning statements basically … tell them you’re a suspect of murder now and you are advised to avail yourself of legal support. You are advised of the fact that you do not have to say anything if you do not wish to do so.”[118]

149. Though it is subject to specific limitations,[119] the general principle is that members of the police enjoy all of the rights provided for in the Bill of Rights. It would clearly be inappropriate to discriminate against police in this regard. SAPS members and municipal police are supposed to be at the forefront of protecting human rights. They are less likely to invest in this role if they do not enjoy the same human rights that others enjoy.

150. Section 35(1) of the Constitution, 1996, states, in part, that, “Everyone who is arrested for allegedly committing an offence has the right:

150.1. (a) to remain silent

150.2. (b) to be informed promptly:

150.2.1. (i) of the right to remain silent

150.2.2. (ii) of the consequences of not remaining silent

150.3. (c) not to be compelled to make any confession or admission that could be used in evidence against that person.”

151. In criminal law these principles are generally understood to mean that:

151.1. People who are suspected of criminal offences have the right to remain silent.

151.2. In addition they have the right to be informed that they are allowed to remain silent and of the consequences if they do not do so.

[118] de Rover quoted in Marikana Commission report. p. 386.
[119] Note on right to strike: see top of page 167 of SAPS assessment.

151.3. If they voluntarily waive the right to remain silent, anything that they say can be used in evidence against them.

152. Section 24 of the IPID Act provides people who are interviewed by the IPID with a right that goes beyond those provided for in the Constitution.

152.1. As with the Constitution, 1996, section 24(4)(a) provides police, or other persons, with the right to remain silent if they fear self-incrimination.

152.2. Section 24(4)(a) also provides them with the right to be informed that they are allowed to remain silent.

152.3. Section 24(5) of the IPID Act provides that if they voluntarily waive the right to remain silent, anything that they say that is self-incriminating *cannot* be used in evidence in criminal proceedings against them.

153. Section 24(5) of the IPID Act therefore confers an additional right on people who are questioned by the IPID: to voluntarily provide self-incriminating answers to questions in the knowledge that they are protected by section 24(5) against these being used against them in criminal proceedings.

154. Section 24(5) is comparable to certain provisions of the Criminal Procedure Act (No.51 of 1977), such as section 204(4) in terms of which self-incriminating evidence provided by a witness for the prosecution may not be used in evidence against her or him, if s/he subsequently faces criminal prosecution. The same principle can also be found in section 28(8)(b) of the National Prosecuting Authority Act (No. 32 of 1998).

155. Marikana Commission Recommendation G5 appears to be motivated by the concern that SAPS members are not taking advantage of the opportunities provided by section 24(5). If they were to take advantage of it, the Commission suggests, this would ensure that there is greater accountability by SAPS members. This would have better served the fact-finding purposes of the Commission.

156. As indicated above, the people who are most likely to benefit from the section 24(5) would be either (i) criminal suspects who are not police but who are making allegations against a police officer; or (ii) police who have used force with lawful intentions but who, but for the existence of section 24(5), would be inhibited against giving a frank account of their actions.

157. On the other hand, police who are aware that they are likely to have violated the law are unlikely to see section 24(5) as potentially advantageous, unless they have a specific reason for regarding it as advantageous to incriminate themselves. Even though it protects them in criminal proceedings, self-incriminating answers can still be used in disciplinary proceedings against them.

158. Section 24(5) of the IPID Act may therefore have some benefits for IPID if used more actively. However, Marikana Commission Recommendation G5 appears to only conceive of section 24(5) as applicable to SAPS members and other police as it says that, "The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of *the members* concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves" (emphasis added).

158.1. Marikana Commission Recommendation G5 should rather refer to 'police or other persons interviewed by IPID' and not just to 'the members concerned'.

159. As indicated therefore, one of the benefits of section 24(5) of the IPID Act is that it provides police who have acted with lawful intentions with greater freedom to cooperate with IPID investigations. It is reasonable that SAPS members should not be denied rights that are enjoyed by other people. SAPS members not only have the power and authority to use lethal force but sometimes are under an obligation to use it. It would be wrong for them to be exposed to greater risk of being held criminally liable whilst, in some situations, having a duty to use force to protect others.

160. **PANEL RECOMMENDATION 24:** The IPID should implement Marikana Commission Recommendation G5.[120] The provision should be understood as

[120] The recommendation is that: "The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves."

referring to ‘police or other persons interviewed by IPID’ and not just to ‘the members concerned’.

Accountability in the aftermath of shooting incidents

161. The Panel was requested to consider the following three recommendations:[121]

161.1. “Consideration should be given to introducing a Post-Incident Management (PIM) regime. This would assist in resolving disputes and contradictions in the roles of the SAPS and IPID following an operation, ensuring that officers’ rights are protected, but equally providing for the earliest possible securing of evidence. Officers, like any other person who might be suspected of being responsible for a crime, have rights and as police officers they have a professional duty to provide timely explanations of their actions. A PIM regime, on the basis of an agreed operating procedure between the two organisations, can help avoid some of the difficulties and seeming conflicts as to the sequence in which each organisation undertakes investigation of, and establishes accountability for, an operation—as was highlighted between the SAPS and IPID during the Marikana Commission.”[122] “The apparently conflicting/incompatible mandates of SAPS and IPID following shooting incidents involving police are of grave concern. It is recommended that steps be taken to resolve the mandates in a manner that serves justice and ensures prompt, thorough and impartial investigations, as well as protecting the rights of victims. Public accountability on incidents of use of force and firearms should be part of SAPS’ organisational ethos. “[123]

161.2. ”Questions to do with the accountability of police in relation to the use of force, including the possibility that there should be some form of mandatory statement should be investigated.”[124]

162. A professional police culture is one in which high value is placed on the ethics of policing. Professionalisation implies that reliance is not placed on investigative

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[121] In terms of the Marikana Commission report recommendations, see Chapter 25, section B, paragraphs B8(d 9.
[122] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraph 16(h).
[123] de Rover. Recommendation 8.
[124] Bruce. Recommendation 13 (36).

and disciplinary mechanisms to ensure that there is discipline. In the words of the NDP, “discipline in a modern police organisation is based on self-discipline and leadership.”[125] The basis of discipline in a professional police organisation is capable and respected leadership that promotes and supports a culture within the organisation of commitment to high ethical standards. Because members of the police service identify with these values they conduct themselves in a manner consistent with them. However, within the SAPS, while there are many committed and diligent members, there is evidence of misconduct and abuse of power.

163. It is generally recognised that to ensure that police are held adequately accountable to recognised professional standards, there is a need for both internal and external accountability mechanisms. Both internal and external mechanisms have strengths and limitations. External mechanisms may be less vulnerable to becoming compromised by the ‘code of silence’ The findings of external bodies are also more likely to inspire public trust, whereas internal accountability mechanisms may also have advantages including:

163.1. Police management takes responsibility for the integrity of the organisation;

163.2. Internal mechanisms better understand the organisational culture, why police misconduct happens, and the ways in which such misconduct is covered up; and

163.3. Better investigative skills are often available within police organisations with regards to obtaining evidence of police wrong doing. [126]

164. In relation to the SAPS the principal internal and external mechanisms are as follows:

164.1. The internal mechanisms consist of the SAPS disciplinary system as well as internal systems for investigating complaints against SAPS members. This includes the Hawks Integrity Management Unit, whose investigative mandate includes “investigation of corruption allegations against members of the

[125] NDP 2030. 2012. p. 393.
[126] UNODC. 2011. p. 14.

Hawks, and of other SAPS members only if they occupy the rank of colonel and above."[127] Other internal investigations are conducted at station level.[128]

164.2. The external mechanism is the IPID whose task is to provide for the independent and impartial investigation of identified categories of alleged or possible criminal offences by SAPS members.[129] IPID is also responsible for investigations into municipal police services in relation to these offences. Following an investigation, evidence of criminal offences must be submitted to the National Prosecuting Authority[130] while evidence of disciplinary offences must be submitted to the SAPS.[131] It should be noted that IPID is also tasked with enhancing accountability and transparency by the SAPS and MPS in accordance with the principles of the Constitution.[132]

165. As indicated above, recommendations refer to the 'conflicting mandates' of the IPID and SAPS in the aftermath of shooting incidents. The current system is that:

165.1. SAPS Standing Order 251 requires the investigation by an officer of all incidents in which a firearm is discharged by a member of the SAPS.

165.2. The IPID Act provides for the investigation of 'deaths as a result of police action'.[133] This includes all incidents in which police fatally shoot a person. (There are also other, non-shooting related, types of deaths as a result of

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[127] Burger, Johan and S Grobler., 2017. pp. 2-3: https://www.corruptionwatch.org.za/wp-content/uploads/2017/05/policybrief101.pdf.
[128] Ibid. p.3.
[129] The investigative mandate of IPID is set out in section 28 of the IPID Act. According to section 28 (1) of the Act, the Directorate must investigate –
a) any deaths in police custody;
b) deaths as a result of police actions;
c) any complaint relating to the discharge of an official firearm by any police officer;
d) rape by a police officer, whether the police officer is on or off duty;
e) rape by any person while that person is in police custody;
f) any complaint of torture or assault against a police officer in the execution of his or her duties; and
g) corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary as the case may be; in the prescribed manner.
According to section 28 (2) the Directorate 'may investigate matters relating to systemic corruption involving the police.'
[130] IPID Act, No.1 of 2011, section 7(4).
[131] See sections 7(6), 7(7) and 30. The Act appears to make no provision in respect of disciplinary offences by MPS members.
[132] IPID Act. Section 2(g).
[133] IPID Act. Section 28(1)(b).

police action). IPID is also responsible for investigating 'any complaint relating to the discharge of an official firearm by any police officer'.[134]

166. The SAPS and IPID therefore have overlapping mandates in respect of shooting incidents. Both SAPS internal investigations and IPID investigations focusing on the use of force are treated as 'hybrid investigations' which may lead to disciplinary or criminal outcomes. In practice the potential for criminal or disciplinary outcomes takes precedence over the question of accountability.

Table 1: The 'hybrid' character of IPID and SAPS investigations into shooting investigations.

	Disciplinary cases	**Criminal cases**
SAPS internal investigation	If they reveal evidence of a disciplinary offence: should be referred for a disciplinary hearing once the investigation is completed.	If they reveal evidence of a criminal offence: should be brought to court in the same way as other criminal offences.
IPID	Are referred to the SAPS in terms of sections 7(6), 7(7), & 30 of the IPID Act	Are referred to the NPA in terms of section 7(4) of the IPID Act

167. As the Marikana Commission report observes, "the manner in which the system operates appears to be counterproductive."[135] In practice it is very rare for investigation to lead to either a criminal or a disciplinary outcome but it also does not support accountability (i.e. truth telling). This is partly related to the use of the standard criminal investigation warning statements by the IPID, as referred to in Marikana Commission Recommendation G5. However, there is a deeper

[134] IPID Act. Section 28(1)(d).
[135] Marikana Commission report. p. 387 quoting evidence of Cees de Rover.

underlying issue which is that the principle of accountability is not adequately recognised or emphasised in these situations.

168. In principle, the position should be that police members should be under an obligation to give a full and truthful account of incidents at which they are present in which force is used by police. This principle should apply whether the police member concerned was responsible for the use of force, or was merely a witness to the incident. Many shootings by police are carried out in performance of police duties. In most cases there is no evidence that the police members acted unlawfully. Above all, in incidents where people are killed or injured as a result of the use of force, SAPS members should be required to provide a full statement and answer all questions from investigators relating to the incident. There should be an absolute obligation on police officers who have been involved in the use of force, particularly where this has involved the loss of life, to provide statements for accountability purposes when required or requested to do so. Accountability is one of the primary values embodied in the Constitution.

169. At the same time police should not be denied rights that are enjoyed by others. As provided for in section 24(5) of the IPID Act, they should be protected against having these accounts used against them in criminal proceedings. Nevertheless, as suggested by the recommendations received by the Marikana Commission, there is a need to clarify the role performed by investigations in the aftermath of shooting incidents. A critical point that needs to be emphasised in this process is the need to firmly entrench the duty of accountability in a manner that is compatible with respect for the constitutional rights of people in South Africa.

170. **PANEL RECOMMENDATION 25:** A legislative framework should be considered in respect of incidents where members have used lethal force as part of their official duties. The legislative framework should better support truth telling and accountability by SAPS and municipal police services members and also be consistent with the rights provided in the Bill of Rights including the right against self-incrimination. It may be assumed that such a legal framework would protect a member against having a statement that the member has been required to make, used to incriminate him or her in any criminal prosecution or disciplinary action. The member would also need to be protected against negative consequences in

applying for state representation. The fact that the incriminatory statement may not be used against the member would not mean that the member cannot be prosecuted or acted against through the use of other evidence. The need to obtain statements is a real one: Without such information the SAPS cannot account to the public in an informed manner in respect of shooting incidents; it will also enable the SAPS to make informed decisions about civil claims that are lodged against it. If a member has incriminated her/himself s/he faces a number of serious consequences and therefore would first obtain legal advice.

Overall functioning of the accountability mechanisms

171. Police accountability broadly involves two types of accountability functions. On the one hand there are agencies that focus on accountability at an organisational level. On the other hand there are mechanisms that focus on the accountability of individual police, or small groups of police, especially where there are allegations of wrongdoing.[136] The function of holding the SAPS accountable at an organisational level is performed by the Minister of Police, the Civilian Secretariat for Police Services, the provincial executives and the Auditor-General. On the other hand investigation of allegations of wrongdoing, or other situations where it is necessary to hold individual police accountable for their actions, is a function performed by internal and external accountability mechanisms.

172. As indicated above it is generally recognised that to ensure that police are held adequately accountable to recognised professional standards, there is a need for both internal and external mechanisms. Both internal and external mechanisms have strengths and limitations.

173. The internal mechanisms (the SAPS disciplinary system and the Hawks Integrity Management Unit)) and the external system (IPID) should be mutually reinforcing in supporting a culture of accountability in the SAPS. However, they are

[136] Jones, Trevor. 2003. "The governance and accountability of policing", in Tim Newburn (ed.). *Handbook of Policing.* Cullompton, Devon, UK: Willan Publishing. p. 605.

not successfully achieving this objective. For example, for a disciplinary hearing to take place, the following must first be achieved:

173.1. An allegation of misconduct against a particular police official (the official who is the subject of investigation or 'subject official') must be recorded by his or her commander.

173.2. A Standing Order 101 investigation must be initiated by a police official of a higher rank than 'subject official'.

173.3. There must be *prima facie* evidence that the 'subject official' has committed an act of misconduct as per regulation 18.

173.4. In the case of less serious misconduct, the official may be given performance counselling or opt to accept a verbal or written warning.

173.5. If the misconduct is serious or the 'subject official' refuses to accept the above options in the case of less serious misconduct, a decision must then be taken to hold a disciplinary hearing against the 'subject official'.

173.6. The 'subject official' must be served with a formal notification of the charges that they are facing and the date of the hearing.

173.7. A presiding officer and a 'prosecuting' officer must be appointed to run the disciplinary process.

173.8. The 'subject official' must be notified that they are facing a disciplinary hearing and be given an opportunity to obtain representation to defend themselves against the charges.

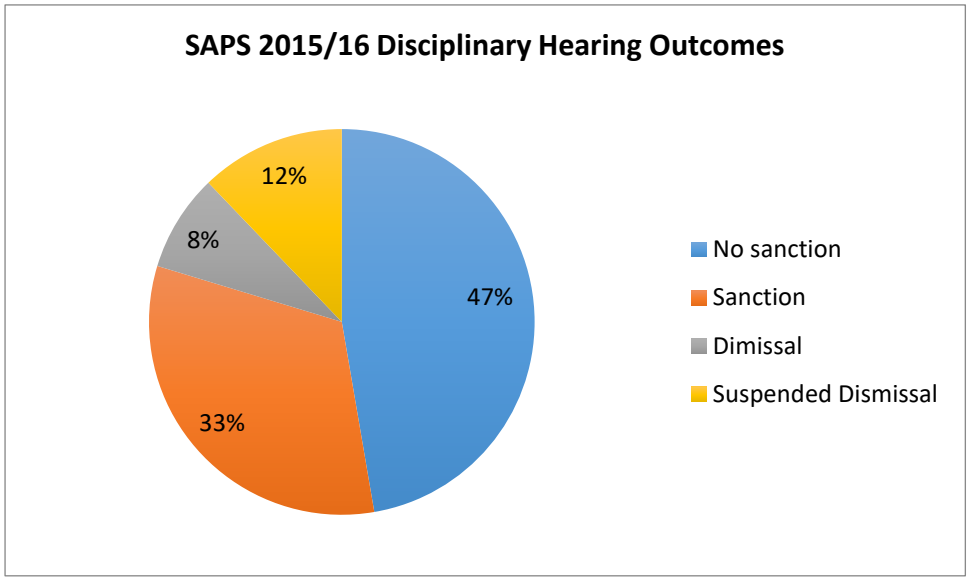
173.9. The logistics for a disciplinary hearing (such as the venue and recording equipment) must be made available.

174. As can be seen from the above, the process of holding a disciplinary hearing is a resource and time intensive exercise and is only undertaken when evidence of misconduct is available. Typically, the SAPS holds between 4000 and 5000 disciplinary hearings annually. It is notable that the most likely outcome of these hearings is that the officer who is the subject of a disciplinary hearing will receive no sanction, meaning that there is no real consequence for misconduct. In

numerous cases this is as a result of a lack of experience of the presiding officers and the poor manner in which evidence is lead at the enquiries.

174.1. The pie chart below presents data from the 2015/16 SAPS Annual Report on the outcomes of 4 431 SAPS disciplinary hearings held in that year.[137] It reveals that almost half (47%) of the hearings ended without any sanction against the subject official. Of the 2 096 cases that resulted in no sanction, 1 378 (66%) ended in a not guilty verdict and in 718 (34%) the case was withdrawn. Given that the decision to hold a disciplinary hearing against an accused police member follows an investigation which yields evidence of misconduct in terms of the SAPS disciplinary regulations, questions need to be asked as to why so many cases end in this way.

Diagram 5: Disciplinary Hearing Outcomes



Source: SAPS Annual Report 2015/16

175. While these figures show that 361 hearings ended in a recommended dismissal, in fact only 145 SAPS employees were dismissed.[138] Disciplinary findings are then not translated into commensurate disciplinary action. As a result the SAPS disciplinary system is not effective in holding those who are involved in

[137] SAPS Annual Report. 2016/16. p. 279.
[138] SAPS Annual Report. 2015/16. p. 274.

misconduct accountable, nor does it serve as a deterrent. It is also not clear why so many cases, a total of 664 (12%), ended in 'suspended dismissal'. If a hearing finds that the conduct of a member warrants dismissal, it seems counter-productive to then suspend that outcome. The incompetent handling of cases defeats efforts to develop and enforce accountability.

176. This data on the disciplinary system is reflected in the findings of the Khayelitsha Commission which focused on the functioning of the SAPS at three police stations in Khayelitsha, Cape Town. The Commission came to the conclusion that 'there are a large number of disciplinary procedures at the three police stations, which means that senior managers are not ignoring disciplinary infringements.'[139] However:

176.1. Evidence from two of the stations was that the disciplinary process was 'not being conducted efficiently' with 'disciplinary proceedings characterised by long delays'.[140] Some cases that had arisen in 2008 were still outstanding, more than three years later.[141]

176.2. An internal SAPS Task Team report 'revealed that a large number of members are subjected to disciplinary steps, some members even repeatedly.' However, "notwithstanding steps taken against employees, it does not seem to have a positive effect on the discipline as the non-compliance to departmental directives and procedures seems to continue." It therefore "does not serve as a deterrent or remedial measure to address poor discipline and incidents of misconduct."[142]

176.3. Two human resource practitioners noted that there seemed to be a large number of disciplinary proceedings but that many of the disciplinary sanctions appear to be very lenient which suggested, they said, that, 'there are no real consequences for misconduct', with dismissal being 'a very rare consequence of disciplinary proceedings'. They also queried whether aggravating

[139] Khayelitsha Commission of Inquiry report. p. 399.
[140] Khayelitsha Commission of Inquiry report. p. 197.
[141] Khayelitsha Commission of Inquiry report. p. 208.
[142] Khayelitsha Commission of Inquiry report. p. 205.

considerations, such as seniority, or the nature of the offence, are given sufficient weight.[143]

176.4. In relation to the investigation of complaints received from members of the public the witnesses commented that, “the system of the investigation of complaints of police misconduct made by members of the public was ‘fraught with difficulties’ and seemed beset by ’bureaucratic delays’.” They said that, “they found it difficult to assess the quality of the investigations but that the high number of ‘unsubstantiated’ findings seemed ‘questionable’ to them.”[144]

177. The challenges with the SAPS internal investigative and disciplinary system are not resolved by the existence of the IPID. The only recommendation made by the Marikana Commission in respect of any of these accountability mechanisms are recommendation G5 (discussed above) and recommendation G4.

177.1. **Marikana Commission Recommendation G4** is that, “The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.”

178. During a presentation to the Panel by IPID, it was argued that the resources provided to the oversight agency were insufficient for it to achieve its mandate due to the large number of complaints it receives. Moreover, its request for additional funds to carry out the investigations recommended by the Marikana Commission has been denied.

179. The incident at Marikana was widely covered by the media. Despite this wide publicity and the high profile nature of the killing of 34 people and the public outcry which followed, the Panel finds it difficult to understand why, in over five years, the provision of funds to IPID has not been prioritised to enable it to undertake forensic reconstruction of events at Marikana and conduct related investigations. This requires urgent attention.

180. The Panel is deeply concerned at the failure (for whatever reason) to decide on criminal liability of any of the SAPS members involved in the Marikana incident as well as the fact that many of the claimants have not been fully compensated.

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[143] Khayelitsha Commission of Inquiry report. pp. 318-9 and 399.
[144] Khayelitsha Commission of Inquiry report. p. 318.

181. The Panel supports Recommendation G5. In order to strengthen SAPS accountability there is a need to address the overall functioning of the accountability architecture. This includes improving the relationship between these bodies, and their mandates and functions, to become mutually supportive in promoting accountability. There are various reasons why the SAPS disciplinary system is not functioning effectively:

181.1. The fact that investigations are approached as 'hybrid investigations' is counterproductive.

181.2. Currently the SAPS use a system whereby commissioned officers may serve as presiding officers or prosecutors at disciplinary hearings on a rotational basis. Brigadiers and above, are empowered to apply an expeditious process which may lead to imposing any of the sanctions provided for in the SAPS Discipline Regulations 2016, including counselling, warning, suspension and dismissal. The expeditious process may be applied in a variety of misconduct, amongst others, corruption, murder, rape or actions which detrimentally affect the image of the SAPS or brings the SAPS into disrepute. These cases must be addressed within 60 days. Despite the expeditious process the need for adequately trained skilled or experienced officers to deal with disciplinary matters remains valid. This results in inconsistent standards and sanctions as not all officers are adequately trained, skilled or experienced to undertake these tasks.

181.3. The debates and dilemmas regarding internal and external mechanisms are reflected in questions about the investigation of corruption. While the IPID has a corruption investigation mandate it does not have overall responsibility for investigating police corruption. As indicated the Directorate for Priority Crime Investigation (DPCI) (the Hawks) also play a role in this regard, but it is limited to investigation of corruption allegations against senior managers and involving amounts in excess of R100 000 (section 34 of the Prevention and Combating of Corrupt Activities Act, 2004). There is therefore currently no dedicated mechanism for addressing police corruption throughout the organisation.

182. The overall accountability system is not showing signs of improvement and is therefore not currently able to promote accountability and support professional conduct by SAPS officers.

183. In this regard the Panel makes specific reference to the case of Lieutenant General Mdluli as an example of what occurs in practice with the intent of providing an opportunity for the SAPS to examine where systems of accountability need to be strengthened.

184. Lieutenant General Mdluli is suspended by the National Commissioner Cele on the 29th of April 2011 on allegations of the murder of Oupa Ramogibe.

185. The National Prosecuting Authority (NPA) requests a stay of departmental hearing on murder allegations as it would adversely affect the criminal investigation process. The hearing is stayed. The suspension is lifted. The institution of the disciplinary process is delayed.

186. Mdluli appears before a commercial crimes court on the 22nd of September 2011 on allegations of fraud. He is served with a notice of suspension dated the 6th of December 2011 by acting National Commissioner, Lieutenant General NS Mkhwanazi. An external investigator for the disciplinary hearing, Mtshali, is appointed.

187. In February 2012 in response to the Acting National Commissioner Mkhwanazi's request for an opinion, Inspector-General of Intelligence recommends withdrawal of the disciplinary charges against Mdluli and that he resume duty. The suspension is lifted. Lieutenant General Mdluli resumes duty on the 31st of March 2012. The departmental charges are withdrawn on the 4th of April 2012. Both the opinion and the decision to withdraw the charges are unjustified. The matter is unprocedurally taken out of the hands of the investigator.

188. An urgent application is brought by Freedom Under Law for review and setting aside of the decision to withdraw the criminal and the disciplinary charges against Mdluli. The Supreme Court of Appeal orders for re-instatement of the charges.

189. On the 13th of May 2012 the then Acting National Commissioner issues a notice of intention to suspend Mdluli. The hearing is subsequently set down for the 2nd of July 2012. Mdluli's legal representative requests a postponement pending a decision on his application for legal assistance. On the 23rd of October 2012 Mdluli is notified of the National Commissioner's dismissal of the application for legal assistance.

190. On the 23rd of November 2012, certain documents required as evidential material are de-classified with the disciplinary hearing expected to proceed early in 2013. In December 2012 the chairperson is "double- booked". He informs SAPS that he is no longer available for the disciplinary hearing and the National Commissioner Riah Phiyega is requested to appoint another chairperson. She does not do so until her suspension from office in October 2016.

191. On the 11th of April 2017, Acting National Commissioner Phahlane appoints two senior Advocates as chairperson and representative of the employer respectively. The latter delivers a memorandum after receipt of the docket on the 22nd of July 2017 advising against proceeding with the disciplinary charges by reason of undue delay and other factors. His brief is terminated. A substitute representative of the employer is appointed and Mdluli appears at a disciplinary hearing on the 25th of July 2017.

192. At the disciplinary hearing it is agreed that the hearing be postponed and that the employee will request further particulars and raise points in *limine*. SAPS subsequently furnish further particulars and answers on points *in limine*. It would appear that on the date of the 2017 hearing no proceedings take place. The parties then await a date from the chairperson on which the points in *limine* will be argued. The hearing is set to proceed in January 2018 — a delay of six months ensues from the initial trial date.

193. **PANEL RECOMMENDATION 26:** A separate SAPS Anti-Corruption or Internal Investigation Unit should be established to investigate all cases of alleged corruption and police criminality that fall outside of the mandate of the DPCI and

IPID.[145] This unit should report directly to the SAPS National Commissioner and only upon the completion of an investigation of a case and not before. All attempts by other SAPS officers to influence or interfere in the investigations by these units to be viewed as an act of serious misconduct and immediately acted on once reported. This unit should be adequately resourced, for example by having its own budget, buildings, vehicles, internal database and procurement capacity. It should be staffed only with SAPS investigators who are known for high levels of skill, expertise and integrity. Appropriate incentives must be developed for serving in these units. This unit should have no fewer resources and capabilities than the SAPS Anti-Corruption Unit that existed between 1996 and 2000. [146]

194. **PANEL RECOMMENDATION 27:** The SAPS National Commissioner must establish a dedicated capacity of personnel, namely disciplinary officers, employer representatives and chairpersons to conduct SAPS disciplinary hearings. This capacity should consist of commissioned officers who are properly selected, trained, and experienced to conduct SAPS disciplinary hearings. This would entail the following:

194.1. Chairpersons with no less than five year's judicial experience to be appointed to preside over disciplinary cases.

194.2. Chairpersons and representatives of the employer must be in permanent employment or on contract

194.3. Representatives of the employer must be legally qualified and experienced in representing the interests of the SAPS member.

194.4. Timelines by which various processes be carried out be rigidly enforced.

195. **PANEL RECOMMENDATION 28:** There is a need for an overall review of the functioning of the internal and external accountability mechanisms, in order to identify how their functioning can be improved to ensure that they operate in a mutually reinforcing manner. The review should be carried out under the auspices

[145] Burger, J and Grobler, S. 2017. *Why the SAPS Needs an Internal Anti-Corruption Unit*. Institute for Security Studies. Pretoria. https://issafrica.org/research/policy-brief/why-the-saps-needs-an-internal-anti-corruption-unit
[146] Ibid. p.3.

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of the CSPS and its outcomes reported to the Minister of Police, IPID, the SAPS National Commissioner and the Portfolio Committee on Police.

Accountability of commanders and supervisors: the audit trail

196. **Marikana Commission Recommendation G2** provides that, "The standing orders should more clearly require a full audit trail and adequate recording of police operations."

197. The Panel was also requested to consider the recommendation that:

197.1. "The SAPS should introduce or amend existing disciplinary codes to include the 'duty of supervisors', which creates a vicarious liability for the actions of those who are under the command of supervisory and officer ranks. Such an approach extends accountability for actions beyond the officer themselves and places additional responsibility on those in supervisory or command positions for the actions of their subordinates."[147]

198. The UNODC states that the essence of an effective police accountability system is the integrity of the internal police hierarchy—from strategic management to day-to-day supervision. A clear unambiguous line of command is essential to ensure lawful orders and professional instructions are complied with. Police accountability requires an effective reporting system that enables management and other oversight bodies to review the trail left by officers' actions and inactions and assess the appropriateness of these.[148] The UNODC states that accountability includes responsibility for the direction, control or diligence exercised before and during operations in order to ensure observance of the law, politics, and human rights.[149]

199. The *White Paper on Policing*[150] re-iterates the importance of institutional support for professionalism as well as the importance of discipline and effective

[147] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraph 16(d).
[148] United Nations Office on Drugs and Crime .2011. Handbook on police accountability, oversight and integrity. Criminal Justice Handbook Series. New York: United Nations. p.75. Warning Statement example.
[149] UNODC. 2011. p.10.
[150] Civilian Secretariat for Police Service. 2016. White Paper on Policing. p. 26.

management in an accountable and democratic police service. Effective management and control are predicated on various principles including:

199.1. Supervisors and managers must be directly held accountable for clearly and regularly communicating and ensuring compliance with Standard Operating Procedures, National Instructions, and Operational Policies and Protocols to all levels of their command.

200. The accountability of commanders and supervisors requires that there be a reliable 'audit trail' in terms of which commands and decisions are consistently recorded. The reliability of such a system depends on the methods of interactions as well as protocols and procedures for the safe and proper recording of those interactions and therefore need to be strictly adhered to. As the UNODC[151] mentions, in order to maintain the integrity of the reporting system, it is essential to establish a working culture where integrity and transparency are valued. Primarily, this is the responsibility of those in charge of the police.

201. In the crowd management context the issue of the 'audit trail' is discussed in the section on 'Reporting on the policing of crowd management events and monitoring of trends' (See paragraph 823 and following).

Accountability of SAPS members with respect to the Marikana shootings

202. The Panel made a sustained attempt to obtain clarity from the SAPS regarding the internal processes that had been followed in relation to SAPS members who were involved in the shootings at Marikana. The Panel's inquiries in this regard were partly motivated by a SAPS report to the Portfolio Committee on Police that indicated that 87 SAPS members had been cleared by the SAPS in respect of the shootings at Marikana.[152]

203. The Panel received a memorandum and a related set of eight documents from the SAPS relating to these cases. The eight documents are reports, completed in

[151] UNODC. 2011. p. 75.
[152] Parliamentary Monitoring Group; Portfolio Committee on Police; Marikana Commission report; SAPS & IPID progress report; Firearms Amnesty: Minister of Police briefing. 15 March 2017.

May or June 2016, on the investigations that the SAPS referred to, in its briefing to the Portfolio Committee on Police on the 15th March 2017.[153]

203.1. Four of the reports deal with cases arising from assaults that allegedly took place on the 21st of August 2012 at Mogwase, Phokeng, Bethanie, and Jericho police stations. These were all police stations where strikers who had been arrested at Marikana on the 16th of August (most of them after the 34 strikers had been killed) were being held. If read together, the reports suggest that on the 21st of August 2012, a group of police (or more than one group) went to each of these police stations and assaulted a large number of the strikers who were being held at these police stations. At each police station there are roughly 40 complainants. In each case the report concludes that the investigation provides no *prima facie* evidence against any police officer and therefore that there is no basis for taking any disciplinary action.

203.2. The other four cases are cases from October 2012. Three of them each involve a single complainant and one involves three complainants. In all of these cases the allegations revolve around the alleged torture (including electric shocks, suffocation, and other methods) of people who had been arrested. The arrests appear to have been connected to police suspicion that these individuals had been responsible for some of the killings at Marikana in the days prior to the 16th of August 2012 (12-14th August). These reports also all have conclusions to the effect that the evidence does not constitute *prima facie* evidence against any SAPS member or that 'the case is not strong' and the SAPS member 'is unlikely to be convicted departmentally'.

204. The investigations are referred to in the three page memorandum which includes information that the number 87 is an error and the number who were cleared was in fact 77. However, the information provided on the 'number of members involved' for each case is not supported by the eight reports that were received. The information received does not clearly indicate what the total number of members was that was the focus of investigation and suggests that in some of

[153] There appears to be one document missing relating to IPID case 2013010464. This is the only 2013 case. The other eight all have 2012 case numbers.

the cases there were no members who were clearly identified as possible suspects.[154]

205. In summary the information received by the Panel is that:

205.1. The cases referred to by the SAPS in Parliament in March 2017 are not cases relating to the events at Marikana on the 16th of August 2012. They are cases that arise from allegations made against the SAPS relating to the alleged assaults or torture of people who were arrested at Marikana either on the 16th of August 2012 or in the subsequent months.

205.2. The information provided in the documents on how the total number of members who were allegedly cleared (whether it is 77 or 87) do not support the conclusion that either figure is accurate.

206. The information provided in these reports would appear to provide strong support for the contention made in the Panel's report that the current system for holding SAPS members accountable is to a significant degree ineffectual.

207. In addition, the information on these cases that was presented to the Portfolio Committee was very vague. It is reasonable to ask why the SAPS did not inform the Portfolio Committee about the substance of the cases when it referred to them at the Portfolio Committee meeting in March 2017.

208. The current position is that no disciplinary steps, or action of any kind, has been taken against SAPS members relating to the shootings of the strikers on the 16th of August, despite the SAPS having had access to the findings of the Marikana Commission. While no firm findings were made against any SAPS members in relation to the shootings the Marikana Commission report clearly provides a basis for serious concern about the actions of SAPS members at Marikana. Notably in relation to Scene 2 the finding of the Commission is that the SAPS 'provided no details of what happened with regard to the deaths of most of the deceased at Scene 2' and that 'where it does provide evidence pertaining to the deaths of some of the deceased, their versions do not bear scrutiny when weighed up against the

[154] Notably the SAPS report relating to IPID case CNN 2012080678 makes no clear reference to any number of members who were under investigation. Elsewhere it is reported that the number investigated was 10 but this is inconsistent with the case report.

objective evidence.'[155] In addition, as indicated above, there are detailed submissions that were made to the Marikana Commission that make allegations about dishonesty by SAPS members before the Marikana Commission.[156] There are also specific individuals named in the Marikana Commission report whose actions are identified as specifically worthy of investigation.[157]

209. The fact that the SAPS has done nothing to address concerns about the accountability of SAPS members for the shootings at Marikana is cause for serious concern. Aside from the question of whether negative disciplinary steps should or should not have been taken, the conclusions of the Marikana Commission should have been seen to motivate for investigations to be conducted internally as to the fitness of the members involved to carry a firearm.

210. The events at Marikana clearly pointed to the possibility that SAPS members had committed serious misconduct. If there is a suspicion of misconduct against a member of the SAPS, her or his commander has the obligation to initiate disciplinary steps. In terms of sub-regulation 12(1) of the 2006 SAPS disciplinary regulations[158] "a supervisor who is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, must ensure that the investigation into the alleged misconduct is completed as soon as reasonably possible and refer the documentation to the employer representative to initiate a disciplinary enquiry." If such steps are not taken the divisional commissioner or provincial commissioner who has overall responsibility for the unit that the member is attached to, is responsible for ensuring that these disciplinary steps are implemented. Where there is the possibility of serious misconduct the obligation to carry out these investigations is one that remains even if the IPID are involved in their own investigations into the same matter

211. **PANEL RECOMMENDATION 29**: The SAPS should implement disciplinary steps against all SAPS members against whom there is *prima facie* evidence of misconduct relating to the events at Marikana on 16th August 2012. The outcome

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[155] Marikana Commission report. p.316.
[156] Heads of argument of Evidence Leaders, Marikana Commission of Inquiry, pp. 601-607, 608, 625-633 and 689-691; SAHRC, Heads of Argument, pp. 59-119.
[157] Marikana Commission report. pp. 319 and 321.
[158] The South African Police Service Discipline Regulations. No R. 643. Published in Government Gazette No. 28983 on 3 July 2006. These were the disciplinary regulations in force in August 2012.

of all such investigations and all resulting disciplinary processes should be reported to the Portfolio Committee on Police and IPID.

212. **PANEL RECOMMENDATION 30:** Disciplinary steps should be taken against the senior managers who bear ultimate responsibility for the fact that no disciplinary steps were taken against any member of the SAPS relating to the events at Marikana on the 16th August 2012. The outcome of all such investigations and all resulting disciplinary processes should be reported to the Portfolio Committee on Police and IPID.

213. The Marikana Commission has motivated for a 'full investigation' including reconstruction of the scene, to be carried out in relation to the events at Scene 2 at Marikana with the assistance of independent forensic and ballistic experts.[159] The IPID has indicated that it has not been able to carry out this reconstruction as its funding has been inadequate for this purpose. According to information provided by IPID to the Panel the current situation is that IPID has agreed with the NPA that all dockets pertaining to the events at Marikana will be handed over to the NPA and that, "The NPA will decide based on the available evidence whether any member should be prosecuted and whether there will still be a need to reconstruct scene two."[160] Establishing the truth about what happened at Marikana Scene 2 will continue to be a critical issue in South Africa and there should not be a question about whether or not a reconstruction of Scene 2 should be conducted.

214. **PANEL RECOMMENDATION 31**. The required funds should be provided in order for a full reconstruction of the events at Marikana Scene 2 to be carried out, as recommended by the Marikana Commission.

Additional recommendations

215. **PANEL RECOMMENDATION 32:** Professionalisation requires that SAPS commanders who are alleged to have committed crimes or misconduct are held to account. In addition to the competency assessments (see Recommendation 21)

[159] Marikana Commission report. pp. 327-8.
[160] IPID Memorandum. 2018. Response to the enquiry by the Panel of Experts with regard to the Marikana matter. 21 February 2018.

there must be a purposeful focus on addressing unresolved allegations or disciplinary matters, particularly against members of the SMS.

215.1. All allegations of criminality or serious misconduct, whether by commission or omission, against any member of the Senior Management Structure (Brigadiers, Major-Generals, and Lieutenant-Generals) must be given priority for investigation.

215.2. All credible allegations of criminality or serious misconduct against top managers (Brigadiers and above) to result in immediate suspension.

215.3. All disciplinary hearings against SMS members must be chaired by an experienced independent chairperson who is not part of the SAPS. Currently, presiding officers in hearings of mid-level managers such as Captains and Colonels are usually higher-ranking officers.

215.4. Evidence of unreliable or dishonest evidence being provided under oath should be classified as a case of serious misconduct that may warrant dismissal from the SAPS.

215.5. The senior SAPS commanders named in the Heads of Argument by the Marikana Commission Evidence Leaders as having attempted to mislead the Commission, or who lied under oath should not only face disciplinary steps but also should be charged criminally for perjury.

215.6. SAPS commanders who are facing allegations of serious wrong doing should be subject to independent disciplinary investigations and hearings overseen by senior advocates within the prescribed time periods.

216. **PANEL RECOMMENDATION 33:** IPID's budget should be increased in order for it to fulfil its mandate of investigating SAPS and MPS crime and misconduct complaints. This is a decision that must be taken by the Parliamentary Portfolio Committee of Police in consultation with IPID and presented to the Minister of Police for implementation.

217. Panel Recommendations 1, 10 and 11 are also directly relevant to strengthening accountability.

Professional police use of force

218. The Panel was requested to consider the recommendations that:[161]

218.1. The SAPS should introduce a system to monitor the use of force by its members.[162]

218.2. The SAPS should develop a use of force policy that, *inter alia*, sets out the principles governing the approach that SAPS members should apply in relation to operations or actions in which it is likely that force may be used, especially if this is likely to involve the risk of death or injury to police members or others. The policy should be publicised and promoted to ensure its visibility and accessibility to SAPS members.[163]

218.3. The SAPS should review its existing mechanisms for reviewing the use of force, in particular the provision for shooting incident investigations in terms of SO 251,[164] with a view to supporting the implementation of the above policy and establishing a professional orientation towards the use of force within the SAPS.[165]

219. In addition to these recommendations, the Panel took note of one of the critical conclusions reached by the Marikana Commission: that the McCann principle is part of South African law.[166]

219.1. The McCann principle provides that, "Where a police operation is initiated on the basis of advance planning, the commanders and planners of the operation must, where possible, plan and command the operations in such

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[161] In terms of the Marikana Commission report recommendations Chapter 25, section B, paragraphs B8(d 9.
[162] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraphs 13-16.
[163] Bruce. Recommendation 9 (27).
[164] As indicated Standing Order 251 requires the investigation by an officer of all incidents in which a firearm is discharged.
[165] Bruce. Recommendation 10 (28).
[166] Marikana Commission report. pp. 36-41 & 520-521. The McCann principle derives its names from a 1996 European Court of Human Rights judgement in the matter of McCann and Others v United Kingdom (1996) 21
EHRR 97. The European Court of Human Rights was concerned with the interpretation of Article 2 of the
European Convention on Human Rights.

a way as to carry out the operation effectively whilst minimising the risk that lethal force will be used."[167]

219.2. The McCann principle is a general principle applicable to the planning of any police operation and not simply a crowd management operation. Even if the Marikana operation was not a crowd management operation (as was argued by the SAPS at certain points during the Marikana Commission),[168] it should still not have been acceptable to launch the operation against the strikers if there was no imminent threat, and if it was likely that people would be killed or seriously injured.

220. The McCann principle is presently embodied in common law. While section 13(3)(a) of the SAPS Act supports the McCann principle it is not fully articulated.[169] It was apparent during the Marikana Commission proceedings that the SAPS commanders did not take account of this principle.[170] There is therefore a need to ensure that all SAPS members, and particularly SAPS commanders, are aware of the principle. By implication it should be integrated into the framework of the use of force in crowd management and more generally.

221. The legal authority to use force is sometimes identified as the defining feature of policing. The use of force has been described as 'law-preserving violence' to which some 'law-making character' is inherent.[171] In various contexts, including the policing of protest action, police officers may have to use force against those engaged in the use of violence in order to bring the situation under control. Indeed, the dividing line between the lawful use of force and unlawful violence is often very slim. In terms of South African and international law the use of force is subject to principles notably those of reasonableness, proportionality, and necessity. Professional policing is defined by an emphasis on seeking to minimise and avoid the unnecessary use of force.

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[167] Marikana Commission report. pp. 34-41 & p. 521.
[168] Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 29 October 2014, 164-170.
[169] Marikana Commission report. pp. 36-41 & 520-521.
[170] Marikana Commission report. pp. 520-521.
[171] To speak with W. Benjamin, "Critique of Violence." In P. Demetz (ed.). Reflections: Essays, Aphorisms, Autobiographical Writings. pp. 277 & 283.

222. The fact that members of the SAPS have the authority to use force to protect the public, and are also accountable for this use of force, places an obligation on government and the SAPS to provide guidance to members in order to support them in meeting the best possible standards. This is important because of the danger that police face in the performance of their duties, including the risk of being injured or killed. There is some concern that efforts to control the use of force by police will place police in a position where they are unable to use force effectively to defend themselves or others. Police safety must clearly be one of the foundations of any framework for the use of force by police in South Africa and is a key concern of this policy. Police who are not able to defend themselves properly cannot be expected to carry out their functions effectively. Improvements in police safety are likely to be one of the benefits of professionalising police use of force.

Civilian Secretariat for Police Service Use of Force Policy (general policing)

223. Issues to do with the use of force during crowd management are discussed in Chapter 3 of this report. However, as indicated, the Panel also considered recommendations motivating for a general use of force policy. This was partly motivated for by the fact that the police units responsible for the killings on 16th of August 2012 were mainly units other than POP units.

224. The work of the Panel coincided with the development of a use of force policy, for the SAPS, by the CSPS. The Panel commented on a draft of this policy and made changes to the policy. The fact that members of the SAPS have the authority to use force to protect the public, but are also accountable for this use of force, places an obligation on government and the SAPS to provide guidance to them in order to support them in meeting the best possible standards.

225. This draft policy framework is intended for application in the general policing environment involving crime prevention and law enforcement. This is what might be called ‘day-to-day’ policing and includes the vast majority of situations where force is used by police in South Africa. Examples of this include: during crime prevention operations, carrying out arrests, intervening in domestic violence incidents, and/or other violent interpersonal disputes.

225.1. The policy framework is not intended to be the main policy framework governing the use of force in crowd management. This is currently dealt with in the instruction dealing with crowd management (currently National Instruction 4 of 2014). This policy is intended to be applicable in the general policing environment including in public order situations that do not constitute crowd management.

226. The objectives of the current draft use of force policy are to:

226.1. Institutionalise the commitment to the professional use of force as one of the foundations of policing in South Africa.

226.2. Provide the basis for strengthening measures within the SAPS so as to better support the professional use of force.

226.3. Provide an integrated framework to be used by the SAPS to inform SAPS members about the standards that they should adhere to in using force. This framework sets out legal standards, principles, and other guidelines for SAPS members on the use of force.

227. The 'integrated framework' referred to is contained in an Annex to the CSPS policy titled '*Use of force by members of the SAPS: legal standards and professional guidelines.*' In addition to providing a set of general principles relating to the use of force, the Annex also sets out specific principles relating to the use of lethal force. Consistent with the principles of the Constitution and international law this foregrounds the 'protect life' principle as the key principle governing the use of lethal force. The policy states in part that, "In carrying out their duties, members of the South African Police Service must recognise and respect the value of human life. This means that SAPS members may only use lethal force in order to protect themselves and other persons against a person posing a threat of death or serious bodily harm, when there are no other reasonable alternatives." The policy therefore endorses the right of police to defend themselves in situations where this is necessary. But it also emphasises that reducing levels of unnecessary force, and strengthening the use of de-escalation tactics, are also ways of ensuring that police are involved less frequently in potentially lethal confrontations, and this is also likely to have benefits for police safety.

228. Adoption of this policy will support the process of professionalising the SAPS and serve as a means for ensuring that the McCann principle is integrated into the framework governing the use of force by SAPS members.

229. The policy also requires the establishment of a system for monitoring the use of force by SAPS members in line with the recommendation from the Marikana Commission expert witness, Gary White that is referred to above.[172]

230. **PANEL RECOMMENDATION 34:** The use of force policy developed by the CSPS should urgently be adopted as an official policy. The Annex to the CSPS policy '*Use of force by members of the SAPS: legal standards and professional guidelines*' should be adopted as an internal directive by the SAPS and other relevant SAPS directives aligned with this.

Proposed Model Bill on the use of force by police

231. The Panel received a presentation on the '*Model Bill for Use of Force by Police and other Law Enforcement Agencies in South Africa'*, prepared by the Institute for International and Comparative Law in Africa, and headed by Professor Christof Heyns in collaboration with the African Policing Civilian Oversight Forum. The *Model Bill*, building on international standards and best practice, contains various provisions of immediate relevance. The *Model Bill* addresses the use of force in general policing as well as the policing of gatherings. The Bill not only includes primary rules on the use of force (with lethal or less-lethal-weapons), but also on medical assistance, oversight, accountability, and remedies for unlawful use of force. If adopted, such a comprehensive piece of legislation would potentially solve a lot of the controversies concerning the interpretation and application of the legislation that deals with the competencies of the police to use force.

232. **PANEL RECOMMENDATION 35:** Parliament should consider the *'Model Bill for Use of Force by Police and other Law Enforcement Agencies in South Africa'* as a suitable starting point for introducing an integrated law on the use of force by police and others in South Africa.

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[172] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraphs 13-16.

The duty of care and provision of first aid

233. Current standing orders make it clear that SAPS members are supposed to call for medical assistance (i.e. paramedics, ambulance, etc) and try to ensure that any injured or sick person receives such assistance as soon as possible. Notably, Standing Order (G) 341: Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander, states that, "Should the arrested person show any signs that he or she is seriously ill or is seriously injured, irrespective of whether the injury was sustained during the arrest or not, the member must follow the instructions as set out in Standing Order 349.2."[173] Provisions of SO 349.2 include, amongst others, that:

233.1. "Once a person has been arrested, the arresting member has a legal duty to take care of the arrested person and to ensure that medical treatment is provided to the arrested person whenever necessary; and

233.2. [I]f the arrested person, in the opinion of the member concerned, needs urgent medical treatment, [the member] must decide whether the person is fit to be transported by police vehicle or should rather be transported by ambulance, and act accordingly."

234. These provisions are therefore in line with Principle 5 (c) of the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990) which states that, "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment."

235. At Marikana, arrangements had been made for medical personnel to be on standby in the event that people might be injured. However, the commander who was responsible for leading medical personnel to Scene 1 diverted them from this purpose. As a result there was eventually a delay of an hour before any medical personnel reached Scene 1.[174] At least one of the victims of the Scene 1 shooting

[173] Section 8(3) deals with injuries sustained prior to or during arrest. See also Standing Order (General) 349: Medical treatment and hospitalisation of a person in custody.
[174] Marikana Commission report. p. 319.

is highly likely to have survived if first aid, in the form of the application of a tourniquet, had been provided to him prior to this.

236. It was not only this delay that concerned members of the Marikana Commission. Television footage also showed that members of the Tactical Response Team at Scene 1 stood by in close proximity to the scene where the injured and dead lay. This raised the question of whether these members should not have been obliged to provide first aid to injured persons and, related to this, whether any of them had first aid training. On this issue, the Marikana Commission therefore recommended that:

236.1. There should be a clear protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is required, should administer first aid (Marikana Commission Recommendation F2);

236.2. All police officers should be trained in basic first aid (Marikana Commission Recommendation F3); and

236.3. Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds (Marikana Commission Recommendation F4).

237. Currently there is a SAPS policy that requires SAPS members to, "assist the injured within the limitations of his or her training as a matter of priority."[175] This aspect of this policy appears to be relatively obscure with evidence at the Marikana Commission indicating that many police are unfamiliar with it.[176] The main national instruction dealing with the use of force for arrest makes no reference to the provision of first aid.[177]

238. The issue of the provision of first aid to injured suspects has also been the subject of debate in other countries. Notably in the USA, the issue has become the focus of public attention in connection with persons injured as a result of the use of lethal force by police.[178] As in the Marikana Commission report, the provision of

[175] Section 12(2)(a)(vi)(aa) of the Policy on Crime Scene Management (Policy 2 of 2005 on page 9).
[176] Evidence Leaders. pp. 572-573.
[177] National Instruction 1 of 2016: The use of force in effecting an arrest.
[178] See for instance New York Times. 2016. Why First Aid Is Often Lacking in the Moments After a Police Shooting. 22 September 2016; Wesley Lowery. Should police officers be required to provide medical aid to people they've shot? Washington Post. 21 September 2016,

first aid is often motivated for in relation to persons (suspects) who have been wounded in shootings by police.

239. It should be noted that it is not only suspects who may benefit from the provision of urgent first aid in situations that are attended by police. Injured persons may include victims of a crime, police or suspects, as well as victims of road accidents, or persons who have attempted suicide. Rather than grounding the motivation for first aid training and equipment to be provided to SAPS members in relation to the possibility that they may inflict potentially fatal injuries, the Panel concluded that the motivation for provision of first aid by police should rather be grounded in a broadly understood duty of care. This duty of care should ideally be understood as a fundamental underlying motivation for the work of police. The *UN Code of Conduct for Law Enforcement Officials* for instance motivates that police have a general duty of 'service to the community' which includes "the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid."[179]

240. Understood in these terms the obligation to provide first aid should be understood as one aspect of a broad duty 'to provide protection and assistance to people in need' in situations of urgency.[180] There are many cases where police provide assistance of this kind such as when there are injured persons at a crime or accident scene. It is reasonable to argue that such a police official can be expected to render assistance though the official cannot be expected to render assistance that involves more expertise than the level to which the member is trained.

241. In terms of first aid training the current position is that:

241.1. First Aid Level I, II and III are part of the STF and NIU training curriculum;[181] and

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https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/should-police-officers-be-required-to-provide-medical-aid-to-people-theyve-shot/?utm_term=.85615609c004.

[179] UN Code of Conduct for Law Enforcement Officials. Paragraph (c) of Commentary to Article 1.

[180] ICRC. *To serve and protect*. p.197.

[181] According to a press report in September 2017 'Only 270 officers are set to be trained in first aid levels one and two in the current financial year and less than 1,000 were trained in first aid levels one to three in the previous year.' https://www.timeslive.co.za/politics/2017-09-05-police-dragging-their-feet-on-marikana-says-mps/.

241.2. First Aid has now been integrated into the Basic Training curriculum.

242. It must be noted that it will inevitably be inadequate to provide first aid training to SAPS members on a ‘once-off’ basis during basic training (or at another stage of their police careers). First aid training certificates are only valid for a limited period of time (typically two or three years) and first aid training therefore needs to be updated if it is to remain current. In addition, SAPS members will not be empowered to provide first aid merely if they are trained but will need to be provided with first aid kits including protective gloves. In the short to medium term it will be more reasonable to aim to train and equip a certain proportion of SAPS members to be able to provide first aid. In so far as a proportion of SAPS members are able to maintain a good standard of first aid skills through routine renewal of their first aid certification and be confident of the availability of equipment, this will be preferable to having a large number of members whose certification is not maintained and who are poorly equipped.

243. One of the questions that the Panel discussed was whether it is reasonable to require that SAPS members should be obliged to provide first aid to someone that they have just been involved in an armed confrontation with. The approach taken by the Panel is that the obligation to provide first aid is grounded in the principle of protecting life as well as a general duty of care. The Panel also discussed whether it is reasonable to expect police to be able to switch suddenly from ‘confrontational’ to ‘caring’ mode. Many situations in which police use lethal force are situations of danger and fear in which it may be anticipated that some police officers will have a strong physical and emotional reaction linked to the adrenaline ‘fight or flight’ response. It may not be reasonable in all cases to expect that a police member who has been involved in a potentially lethal confrontation will be in a frame of mind that is suitable for providing first aid. It is therefore necessary to make some allowance for this fact in addressing this issue.

244. Another concern that has been articulated is that, in some situations, there may be a risk that attempts to provide first aid will aggravate the condition of the injured person rather than providing relief (such as where a person has a spinal injury). First aid training can try to address this issue but it cannot guarantee that this will not happen and this will remain a risk. Apart from the significant concern about

potential harm to the victim, another concern is that as a consequence of attempts to provide first aid, the SAPS may face civil claims. The Panel would motivate that the risk of claims of this kind should not be decisive in motivating against expanding the provision of first aid training to SAPS members and institutionalising the obligation that those who have such training should provide first aid to injured persons. It is preferable that the SAPS and government take on this risk as it is a risk that is aligned with the overall objective of building trust in and respect for the SAPS and for SAPS members as policing professionals.[182] The risk of causing unintended injuries is also something that is routinely addressed in first aid training so the provision of such training will also assist in reducing the risk that the SAPS will face such liability.

245. A further question concerns the provision of more specialised levels of first aid training, particularly training around the capability to attend to people with serious gunshot wounds. As indicated above, more advanced levels of first aid training (up to level III) are currently only provided to members of the Special Task Force and National Intervention Unit. These units may face a slightly higher probability of being involved in situations in which lethal force is used.

246. Currently, the primary motivation for providing first aid training to members of these units relates to the possibility that they may have to provide first aid to colleagues who are injured. This is regarded as a relatively high risk in some of the interventions in which these units are involved. The concern to provide assistance to colleagues who may be injured should be one of the key motivations for providing first aid training to SAPS members. Nevertheless, in line with the idea of a duty of care, the Panel believes that this should be expanded to a broader concern that applies to people who require first aid, irrespective of who they are.

247. **PANEL RECOMMENDATION 36:** The SAPS should introduce an internal directive to establish the principle that SAPS members who have first aid training are required to provide first aid 'within the limits of their training' in situations where they encounter people requiring medical attention. A specific directive should be

[182]A concern was also expressed that individual SAPS members would face civil liability. However in so far as they are acting in a manner that is consistent with formal SAPS instructions there is no basis for such concern as members who act in good faith within the course and scope of their duties face no risk of being held individually liable.

developed on this issue as it is a general principle based on the duty of care and it will not be adequate to address it in directives on crime scene management or on arrested persons. The directive should make allowance for the fact that members who have been involved in a violent confrontation may not immediately be in a suitable frame of mind for providing first aid.

248. **PANEL RECOMMENDATION 37:** The SAPS should develop a strategy and framework for expanding the provision of first aid training to operational SAPS members. This would better enable SAPS members to assist injured colleagues and others. The SAPS should identify achievable targets for this, subject to the principle that members who receive such training should also have access to appropriate equipment and receive routine refresher training.

249. **PANEL RECOMMENDATION 38:** The SAPS to develop a resourcing plan to support the implementation of this recommendation including ensuring that members with first aid training have first aid kits.

250. **PANEL RECOMMENDATION 39:** In so far as reasonably possible first aid training should be aligned with types of injuries or medical conditions that SAPS members are likely to encounter. SAPS members who are most likely to be involved in the use of lethal force should be trained to deal with gunshot injuries and other puncture wounds.

Operations where there is a likelihood of the use of force

251. A further recommendation regarding the provision of first aid training to SAPS members is that:

251.1. In operations where there is a high likelihood of the use of force, the plan should include the provision of adequate and speedy first aid to those who are injured (Marikana Commission Recommendation F1).

252. As noted above there was in fact compliance with this recommendation at Marikana. The problem was that the medics who were available were not brought to Scene 1 when they were needed. As indicated, the recommendations relating to first aid have been precipitated by the use of lethal force. However, the Panel believes that the principle should apply not only to operations where lethal force is

anticipated, but also to other police operations where there is a likelihood of less-lethal force being used, notably in crowd management operations.

253. Though there is often a strong likelihood of injuries during crowd management operations, the overwhelming majority of such injuries are not fatal. Furthermore, in so far as there is a risk of fatality, the cause of these fatalities (such as asphyxiation from teargas) is in general different from that resulting from the use of lethal force. Therefore, in relation to crowd management operations, the standard should be that in operations where there is a likelihood of force being used, the operations are supported by a POP first aid team who have appropriate training and first aid equipment. In the absence of such teams, the operation should be supported by the attendance of paramedics where possible.

254. On the issue of planning for crowd management situations where force may be used, the Panel also received submissions from a number of organisations concerned, in particular, with issues arising from the *Fees Must Fall* protests at the University of the Witwatersrand in 2016. One issue highlighted in these submissions was that there may be various role-players involved in providing first aid. At the university for instance, the Campus Clinic became involved in the provision of first aid to people injured during the protests. In addition, "a group of fifth and sixth year medical students at the University of the Witwatersrand established a medical response task team to assist with assessing and providing Level 1 first aid for protest-related injuries."[183] This highlights the need for police planning to recognise the potential to incorporate a broad range of groups in the planning for the provision of first aid. A substantial concern also raised by these groups concerned allegations that SAPS members at the Wits protests treated first aid providers in an adversarial manner, and that there was a disregard of the principle that the neutrality of medical personnel should be respected.[184]

255. **PANEL RECOMMENDATION 40:** In crowd management operations and other large operations or operations where the use of lethal force is likely, police should provide their own first aid teams of trained SAPS members.

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[183] SERI. 2017. *A Double Harm: Police Misuse of Force and Barriers to Necessary Health Care Services.* Responses to student protests at the University of the Witwatersrand. September to November 2016. p.54.
[184] *Ibid.* pp. 1-2.

256. **PANEL RECOMMENDATION 41:** First aid teams that are deployed in crowd management operations should be trained and equipped to deal with potentially fatal consequences of the use of less-lethal-weapons (such as risk of asphyxiation from teargas, especially to young children) as well as other types of injuries likely to arise in these situations.

257. **PANEL RECOMMENDATION 42:** The SAPS should also recognise and establish cooperative arrangements with other role-players involved in first aid provision at specific events. During crowd management events, SAPS members should respect the neutrality of 'third party' first aid providers and this should be incorporated into training and National Instructions.

Demilitarisation

Demilitarisation in the NDP

258. The NDP recommends that, "The South African police force be demilitarised."[185] The motivation provided in the NDP is that, "The remilitarisation of the police in recent years has not garnered greater community respect for police officers, nor has it secured higher conviction rates. Certainly, a paramilitary police force does not augur well for a modern democracy and a capable developmental state. The Commission believes that the police should be demilitarised and that the culture of the police should be reviewed to instil the best possible discipline and ethos associated with a professional police service. The police require capacity and skills to become more competent, professional and efficient. The community would then see them as a resource that protects them and responds to people's needs, based on the laws of the country."[186]

259. The NDP states that, "demilitarisation is a short term objective which should happen in the immediate term."[187] The idea that the demilitarisation of the SAPS is 'short term' appears to be linked to the idea that militarisation is primarily embodied in the military rank system. As described in the NDP the initial process of

[185] NDP 2030. 2012. p. 393.
[186] NDP 2030. 2012. p. 387.
[187] NDP 2030. 2012. p. 393.

demilitarisation was accomplished by “changes in police insignia, military ranks and force orders to create a civil police service as the first phase of community policing.”[188]

260. Elsewhere, the NDP indicates that the impact of militarisation extends beyond the issue of ranks, recommending that to support the process of demilitarisation, “The organisational culture and subcultures of the police should be reviewed to assess the effects of militarisation, demilitarisation, remilitarisation and the serial crises of top management.”[189]

261. When it was asked to comment on the NDP prior to its finalisation the SAPS made similar arguments, asserting that, “this should not be confined to police insignia, military ranks and force orders, but should also address the training and development curricula with a view to effecting the mental change required for policing today and in the future.”[190]

Aspects of the process of de-militarisation and re-militarisation

262. The period of the National Peace Accord of 1991 was a turning point in South African history also with respect to policing as it helped to overcome the idea of a society ‘at war’. As the NDP states, “The decision to demilitarise the police force, moving away from its history of brutality, was a goal of transformation after 1994.”[191] Since then there have been profound reforms in policing in South Africa. Many members of the SAPS continue to conduct themselves in a spirit that is consistent with these reforms.

263. The NDP dates the process of remilitarisation to 2000. It states that, “From 2000 however, the police service gradually started resembling a paramilitary force.”[192] The assertion that the beginning of the process of re-militarisation may be dated to 2000 is presumably linked to the emergence of a ‘crackdown’ style of policing in this year. These were large scale cordon and search operations that were carried out in townships, informal settlements and inner city areas. In evidence presented to the Khayelitsha Commission this style of policing of people as a

[188] NDP 2030. 2012. p. 392.
[189] NDP 2030. 2012. p. 393.
[190] Quoted in Marikana Commission report. p. 377.
[191] NDP 2030. 2012. p .387.
[192] NDP 203o. 2012. p.392.

group, by police acting in large groups, was presented as an adaptation to the difficulties of policing these kinds of 'hard to police' areas.[193]

264. A significant factor in creating a climate that was seen to motivate for a more overt orientation towards militarisation was a surge of cash-in-transit heists in the period between 2005 and 2010.[194] These crimes were high profile by nature and were frequently carried out by gangs whose members had military backgrounds and who were armed with AK47s.[195] These crimes contributed to a small fraction of overall crime levels.[196] However, their brazen character fed into a concern by political leaders that they represented a quasi-military threat to the state, and to its authority to govern, and that government should use the police to address the problem by 'meeting fire with fire'.

265. The phenomenon of cash-in-transit heists also highlights the fact that up until the late 1980s and early 1990s, South Africa and the Southern African region, was the location for a number of inter-related wars. As a result of these wars the region as a whole was heavily militarised with a proliferation of small arms as well as many people receiving military training. A legacy of these wars is that police continue to face the risk that they will come up against adversaries using weapons capable of automatic fire. As a result the SAPS has adopted the practice of ensuring that all police vehicles are equipped with an R5 rifle. The R5 is a weapon developed for military purposes by the South African arms industry during the apartheid era.

265.1. The use of the R5 in crowd management, as raised in the Marikana Commission report, is discussed in Chapter 3 of this report.

266. Tactical units like the TRT, NIU and STF are also routinely armed with these weapons. While the creation of the STF and NIU predates this, the TRT specifically was created during the period of intensified militarisation that was

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[193] Khayelitsha Commission of Inquiry report. p. 298-299.
[194] De Kock, Chris, Anine Kriegler and Mark Shaw. 2015. *A citizen's guide to SAPS crime statistics: 1994 to 2015*. Centre of Criminology. UCT: Cape Town. p. 32. http://www.criminology.uct.ac.za/sites/default/files/image_tool/images/225/CRI_pdf_Optimised-Citizen's%20guide%20to%20the%20SAPS%20stats.pdf.
[195] Irish-Qhobosheane, J. 2007. *"Gentlemen or villains, thugs or heroes? The social economy of organised crime in South Africa"*. South African Institute of International Affairs. Johannesburg.
[196] The highest number recorded in 2006-7, was 467.

associated with the reintroduction of the military rank system in April 2010. This was also the year in which South Africa hosted the FIFA World Cup and the concern to reassure others that South Africa was in control of crime was also a factor in the creation of the TRT.

267. Militarisation is not only embodied within the police service but in public pronouncements made by politicians that encourage a militaristic approach. There was a wave of pronouncements of this kind from politicians and senior police most notably during the 2008-2009 period.[197]

In what way is the SAPS militarised?

268. A police organisation with a military culture is essentially one in which police officials tend to view the public as consisting of potential criminals who are the 'enemy' that must be dealt with primarily by the use of force. In terms of a military culture the role of police involves imposing law and order on society. This militarised culture will place primacy on following orders unquestioningly and tends not to support critical or reflective thinking.

269. A militarised approach may be contrasted with a service orientated approach which is marked by cooperative relationships and the construction of partnerships between the people and the law enforcement agencies and is associated with community-orientated policing.[198]

270. The Panel accepted that, in terms of these definitions, it is not possible to say that the SAPS is either 'militarised' or 'not militarised'. Therefore it is not possible to generally describe the SAPS as 'militarised' in blanket terms. In recent years, questions about the militarisation of the SAPS have been prominent in public discussion on policing in South Africa. In some of these discussions the term 'militarisation' and 'demilitarisation' may have been used polemically and perhaps in an overly general way.

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[197] Council for the Advancement of the South African Constitution. Submission by CASAC to the Marikana Commission of Inquiry: The role of the South African Police Service in the Marikana massacre on 16 August 2012, 10-14, http://www.casac.org.za/wp-content/uploads/2016/11/CASAC-submission-to-Marikana-Commission.pdf .

[198] Compare Pelser, E. 1999. The Challenges of Community Policing in South Africa. Institute for Security Studies. Occasional Paper No. 42. ISS: Pretoria.

271. It is also widely accepted that all police forces are militarised to some degree, partly related to the need for clear lines of authority and command. One related issue is the drill protocols that are observed by the SAPS that regulate issues such as saluting of officers. Though they may be seen as evidence of militarism it was also argued that they are a key feature of the authority and command system within the SAPS. The Panel recognises that like other policing agencies worldwide, the SAPS is a hierarchical entity whose proper functioning depends on respect for authority and discipline.

272. The Panel therefore agreed that it was necessary to focus on questions to do with how militarisation may be seen to be embedded in the SAPS. The following parts of this report engage with this issue in relation to:

272.1. SAPS ranks

272.2. The issue of service orientation

272.3. Rank authority

272.4. The tactical units

272.5. The crowd management context.

Ranks

273. The issue of whether or not there is a need to change from the current military rank system to a non-military rank system provoked considerable discussion in the panel. As indicated the reintroduction of the military ranking system has been a central factor in contributing to the perception that the SAPS as a whole has become militarised. The Panel did not agree on whether or not to recommend the re-introduction of the non-military ranks.

274. Arguments against changing the rank system included:

274.1. That there is an absence of evidence that ranks are a significant factor affecting the relationship between police and citizens—some (or most) of whom do not even know the rank structure. The non-military ranks, such as those of superintendent, director, etc. are clothed with the same authority as is conferred by military ranks. The shedding of the rank of Brigadier or Lt.

General, etc will be largely unknown and irrelevant to citizens and how the police (largely constables and sergeants) relate to them.

274.2. That it is what police do, their actions, that is most significant — especially the actions of those on the 'front line' who tend to be constables and sergeants. The designation of ranks does not determine how police exercise command, engage with other police officers, or treat civilians.

274.3. That it is mistaken to think that those police who are prone to brutality will stop being prone to brutality because their ranks are changed. No magic wand will exorcise the spirit of brutality from a police member by simply divesting him or her of his/her rank. What needs to change as a matter of urgency is the mind-set of these police members. The key issue is developing a modus operandi to ensure development of a mind-set that supports professionalism.

274.4. That the issue of ranks is a highly sensitive one in the SAPS. Changing the rank system might create instability for many SAPS members given the many changes in the leadership of SAPS over the last few years. Unless it can be clearly shown that it will significantly improve police-community relations and service delivery it cannot be justified.

274.5. That the previous changes of this kind, from military ranks to non-military ranks and back again, were costly exercises; and further cost will be incurred to once again change to non-military ranks.

274.6. That the SAPS is a security service and functions closely with other security services where a uniform rank structure makes sense and has utility.

274.7. That changing ranks would be a highly visible measure but could be seen as a superficial measure. In the absence of a full commitment to organisational change it will be of little consequence whether the ranks change or not. Although the militarisation of the SAPS is one of the challenges facing the organisation, the focus should rather be on changing other aspects of how the SAPS works, for example, developing a strong professional ethos.

275. Arguments in favour of changing ranks included:

275.1. That the Panel was explicitly tasked to address the issue of the demilitarisation of the SAPS and this is clearly a facet of SAPS militarisation. If this is correct this implies that the Panel will not have fully achieved its purpose if it does not recommend changing the ranks back to non-military ranks. Symbols also contribute to defining how the SAPS understands itself and the attitudes of SAPS members. Though it is a symbolic measure its importance to changing police culture should not be downplayed. Military ranks are ultimately incompatible with the concept of a service orientated SAPS. It is anomalous that a policing agency can call itself a police service, focused on a community-orientated service but is identified by military ranks that signify a military force. Changing to civilian policing ranks will put to rest the dichotomy of a police service or a police force.

275.2. That the convention in democracies is for police to have non-military ranks with military type ranks reserved for quasi-military units. In countries where police are militarised there is a much greater tendency for police to adopt a repressive style of policing and there is a lack of trust in the police particularly amongst the poorer and more marginalised sections of the population.

275.3. That, in so far as the problem of police violence is a problem of police mind sets, replacing SAPS's military ranks with civilian ranks would be a significant contribution towards this change in mind-set.

275.4. That militarisation has contributed to negative public perceptions of the SAPS. The issue is not only about how the SAPS view these ranks but also how the public views the SAPS. There is a need to alter the behaviour and mind set of SAPS members in order to improve public experience and perceptions of the organisation. Reverting to non-military ranks would clearly show that the SAPS has changed its focus and contribute directly to an improved public image of the police as well as to changing police mind sets.

276. Despite the disagreement on this issue there were several points of agreement in this discussion. Key issues are that the SAPS is accountable to a civilian authorities, gives prominence to competence and key policing principles and complies with the law. Whether or not ranks are changed, much more therefore

depends on concrete action to professionalise the SAPS. Professionalisation needs to be based on real rather than just symbolic interventions. Furthermore, changing the rank on its own would not be enough to change problematic mind-sets. Other interventions will require time to have an effect. The main emphasis should be on the overall process of professionalisation.

277. In further considering the question of civilian versus military ranks the following questions should be considered:

277.1. Should the SAPS in principle always have military ranks or should there at some point be a change back to civilian ranks? What types of ranks would best suit a professional police agency that is orientated to protecting and serving the community?

277.2. If the approach that is taken is that the SAPS should revert to civilian ranks, then how should this be done and when? Should this happen at the outset to clearly signal both to the public and all police members that changes are going happen in the SAPS? What may the unintended consequences be on police morale and motivation? Or should the issue of ranks be addressed when other elements of the process of professionalisation are already in place?

278. **PANEL RECOMMENDATION 43:** To further support efforts at understanding SAPS culture and promoting demilitarisation, an entity with expertise in organisational culture should undertake an assessment of the management and organisational practices within the SAPS that may continue to undermine the professional orientation of the organisation and contribute to forms of militarisation, as well as exploring those practices that may strengthen a professional culture within the SAPS. The focus should be on:

278.1. To what extent the management culture exhibits militarised characteristics. For example, are commanders regardless of rank able to engage critically with the decisions by more senior ranks without fearing retribution?

278.2. To what extent does SAPS basic training promote a professional ethos and self-discipline as opposed to a militarised approach to discipline?

278.3. To what extent could drill protocols and militaristic ceremonies be substituted by more proper instruments and rituals?

278.4. The impact of the rank system on organisational culture.

278.5. Recommendations for changing the militarised characteristics of SAPS management and training culture to one that supports a professional policing ethos.

Service orientation

279. As highlighted above, the NDP motivates that the culture of the police should be demilitarised to build an 'ethos associated with a professional police service' so that the SAPS becomes a 'civilian professional service' and the community see the police as 'a resource that protects them and responds to people's needs'.[199] According to the NDP, "Police responsiveness to community needs should always be at the heart of policing outcomes. That is the main difference between a police force and a police service."[200] The NDP therefore sees a strong service orientation as synonymous both with demilitarisation and the development of a professional police service.

280. **PANEL RECOMMENDATION 44:** In line with previous efforts that have been made by the SAPS in this regard, the SAPS should re-affirm its commitment to an ethos that is service orientated and community policing orientated.

Rank authority

281. One manifestation of the military culture in the SAPS is the disproportionate emphasis on rank authority. This means that authority is primarily determined by the rank one holds, not the knowledge and expertise one possesses; and that those with the highest rank always have the last word and make decisions regardless of their expertise or experience or lack thereof. This was manifested at Marikana where the Provincial Commissioner who is said to have taken the

[199] NDP 2030. 012. p. 387.
[200] NDP 2030. 2012. p. 392.

decision to implement the 'tactical option'[201],"did not have the training, the skills or the experience to enable her to make decisions as to what should be done in the complex and difficult situation at Marikana."[202]

282. Professionalisation does not mean that rank is devalued. The UNODC for instance states that, "A clear unambiguous line of command is essential to ensure lawful orders and professional instructions are complied with."[203] Professionalism should mean that whoever holds the rank has the required competency for that rank. It also implies recognition and acceptance of the fact that rank does not necessarily confer expertise on all issues and cannot substitute for it or take precedence over it. One aspect of professionalisation that involves a departure from a militaristic ethos is the acceptance that authority and expertise are situation specific. In specific situations the most senior officer may need to refer, and even defer, to others who have more appropriate skills, to provide guidance and leadership.

283. One consequence of this disproportionate emphasis on rank authority is therefore excessive deference to rank. For instance, in terms of a professional ethos it can be helpful for operational planning to be subject to a challenge process in which the officers involved are invited to raise questions about the merits of an operational plan before it is finalised.[204] However, a police organisational environment where there is disproportionate emphasis on deference to rank is one where there is limited potential for this kind of process. As a result, in this type of situation, deference to rank takes precedence over concern with the quality of operational planning.

Tactical units

284. The Panel was requested to consider recommendations that:

[201] Marikana Commission report. p. 366.
[202] Marikana Commission report. p. 367.
[203] United Nations Office on Drugs and Crime 2011. Handbook on police accountability, oversight and integrity. Criminal Justice Handbook Series. New York: United Nations. p.75. Warning Statement example.
[204] Marikana Commission report. pp. 340 and 342.

284.1. The South African government should formalise, in law, the existence, role, tasks, deployment and armament of SAPS specialised units.[205]

284.2. Parliament should review the existing SAPS provisions for accountability of the 'tactical units' and make recommendations for more systemic oversight of their functioning.[206]

285. The issue of militarisation inevitably raises the issue of the tactical units. The key tactical units, namely the Special Task Force, National Intervention Unit and Tactical Response Team are located in the component Specialised Operations in the division Operational Response Services, the division in which POP is also located.

286. The Panel considered a report by the Civilian Secretariat for Police Service which found that:

286.1. "The Tactical Response Team are being normalised into general policing to supplement day-to-day policing. SAPS members interviewed for this report raised concerns that these deployments, coupled with the specialised lethal equipment provided to them is not supportive of this role and function, and has contributed largely to the perception of police militarisation."[207]

287. A militarised culture is not spread evenly throughout the SAPS. One of the facets of police militarisation is the elevated status given to 'tactical' units, which is often associated with a reduced level of accountability. Some units or structures are more militarised than others. Notable in this regard are the SAPS tactical units such as the STF, the NIU and the TRT. However, there were significant variations in the manner in which these units conducted themselves at Marikana. Though the STF was positioned close to Scene 2 where 17 of the strikers were killed, none of its members felt it necessary to discharge their weapons.[208] On the other hand, members of the NIU were heavily involved in the shootings at Scene 2 and were

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[205] de Rover. Recommendation 5.
[206] Bruce. Recommendation 14 (36). See also Bruce. Recommendation 8 (24).
[207] Civilian Secretariat for Police Service. 2016. Demilitarisation and the policing of public protests and events. Are our POP and TRT units militarised? Unpublished report. p. 45.
[208] Evidence Leaders. p. 491, paragraph 873. In February 2018 a press report appeared containing allegations that STF members had been involved in the shooting at Scene 2. However this is not consistent with the evidence presented before the Marikana Commission. https://www.news24.com/SouthAfrica/News/marikana-massacre-witnesses-to-slaughter-at-scene-2-20180211-2.

responsible for discharging 115 of the 295 live rounds that were discharged during the shooting at this location. Members of the TRT also discharged 55 live rounds at this location.[209] No review has been conducted of the functioning of these units since Marikana.

288. Apart from sometimes being prone to excessive force, 'elite units' of this kind may regard themselves as being above accountability. The Marikana incident not only raises a major question over the categorisation of the NIU and TRT as 'elite' or 'specialised' units, it also illustrates that they are able to use lethal force on a large scale without any accountability for it. Those units that are more militarised and may need more autonomy to effectively respond to high-risk situations as they unfold must be subject to a 'golden rule' ensuring that they must be subjected to high levels of accountability.[210]

289. **PANEL RECOMMENDATION 45**: An independent assessment commissioned by the CSPS should examine the functioning and structure of all units, including the STF, NIU, TRT and K9 unit that were involved at Marikana. The assessment should review any steps that have been taken to address the role performed by these tactical units, and the manner in which their members conducted themselves, at Marikana. In addition:

289.1. As the NIU and TRT were heavily implicated in the killings at Marikana, consideration should be given to these units being restructured, renamed and re-launched as a new unit that is founded on an ethos of protection of life, professionalism, and accountability.

289.2. A dedicated report on these tactical units, with detailed information on the use of firearms and any fatalities resulting from the use of force by these units, should be presented to parliament annually.

Crowd management context

290. The issue of militarisation is also a concern in the crowd management context. There is sufficient empirical evidence confirming the general perception that the

[209] The balance was made up of 67 rounds fired by K9 members and 55 fired by POP members.
[210] Punch, Maurice. 2009. Police Corruption. Deviance, accountability and reform in policing. Cullompton, Devon: Willan Publishing. p. 243: 'Clearly special units have to be well managed; and it has to be the golden rule, no autonomy without accountability.'

SAPS is too often and too rapidly shifting to the use of force in crowd management. However, engagements carried out with POP members suggested that this could not simply be attributed to militarisation. Rather, the Panel's conclusion was that there was a combination of factors contributing to this situation; this included the absence of a clear set of principles or doctrine governing the management of these situations. In addition, the Panel's conclusions were consistent with the findings of a report by the CSPS that:

290.1. "Proper policing strategies and tactics cannot be implemented by the POP Unit due to a lack of human and physical resources. Members are required to deploy to crowd management situations with minimal resources. The crowd management deployments are contrary to the tactics and techniques that POP members are trained to execute, resulting in increased use of force to compensate for the shortage of resources."

290.2. Another concern in this regard has been the deployment of tactical units in crowd management situations. The issue is raised in recommendation B10 of the Marikana Commission report to the effect that, "The Commission has heard evidence of uncertainty as to the exact roles to be played when tactical units are deployed together with Public Order Policing Units in instances of crowd control." Accordingly, the Marikana Commission recommended that the Panel "pay particular attention to the lacunae in the standing orders and prescripts and identify, revise and amend the relevant protocols with clearly defined roles for each tactical unit."

291. There appear to be grounds for concern about the tendency for POP units to rely on the use of force; the causes of and solutions to this problem are complex. These issues are discussed in more detail in Chapter 3 of this report. This includes discussion of the Marikana Commission recommendation regarding the use of R5s in crowd management situations.

CHAPTER THREE: PROTEST, THE LAW, AND CROWD MANAGEMENT IN SOUTH AFRICA

Part A: Introduction to Chapter Three

The Panel's mandate to address questions about protest, Public Order Policing and crowd management

292. The terms of reference of the Panel focus extensively on questions of crowd management. The Marikana Commission recommended that a Panel of Experts be appointed, *inter alia*, to:

292.1. "Revise and amend Standing Order 262 and all other prescripts relevant to Public Order Policing. (**Marikana Commission Recommendation B (8)(a)**)."[211] At the time of Marikana SO 262 was the main SAPS prescript governing crowd management. It has since been substituted by National Instruction 4 of 2014.

292.2. Investigate where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire. (**Marikana Commission Recommendation B(8)(b)**).[212]

293. The Commission also stated that there was evidence of "uncertainty as to the exact roles to be played when tactical units are deployed together with Public Order Policing units in instances of crowd control." In line with this the Commission recommended that the Panel should "pay particular attention to the *lacunae* in the standing orders and prescripts and identify, revise, and amend the relevant protocols with clearly defined roles for each tactical unit."[213]

294. Several of the formal recommendations, contained in sections D-G of Chapter 25 of the Marikana Commission report, also speak to the issue of Public Order Policing. The issues raised include:

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[211] Marikana Commission report. p. 549.
[212] Marikana Commission report. p. 549.
[213] Marikana Commission report. p. 550 paragraph B10.

294.1. Control over operational decisions in public order, and other large and special operations. (Marikana Commission Recommendation D2).

294.2. Questions of police equipment, *inter alia,* for communication between members of the police and for the audio-visual recording of police operations. (Marikana Commission Recommendations E1-E5).

294.3. The provision of first aid to people injured during police operations. (Marikana Commission Recommendations F1-4).

294.4. Various issues concerning police accountability and post-incident management. (Marikana Commission Recommendations G1-5).

295. Some of the issues (notably the issue of first aid, and questions of accountability) have been discussed in Chapter 2 of this report as they are relevant to the SAPS as a whole.

296. As noted, in terms of paragraphs B8(d) and B9 of Chapter 25 of the Marikana Commission report, the Panel was also directed to respond to various other submissions and recommendations received by the Marikana Commission. These submissions and recommendations are, to a significant degree, focused on issues relating to POP and crowd management. In broad terms the issues that they address include:

296.1. The need to assess the current capabilities and demand for POP

296.2. Standing orders and crowd management doctrine

296.3. The role of POP units and other units within the ORS division

296.4. Command and control, in particular of large scale crowd management or other large scale operations

296.5. Problem solving, situation assessment, and operational planning in crowd management operations

296.6. Briefing of operational personnel

296.7. Communication strategy which was inadequate or not in place at all

296.8. Training

296.9. Accountability

296.10. Debriefing and lessons learned.

297. As indicated, some of these issues, such as the issue of accountability, have been discussed in Chapter 2. Nevertheless, in so far as there are specific aspects of these issues that are relevant to crowd management, they are addressed in this Chapter.

Significance of Marikana for the work of the Panel on Public Order Policing and crowd management

298. One of the complexities that the Panel had to engage with in interpreting its terms of reference was the question: to what degree can Marikana be taken as a basis for evaluating crowd management and public order policing in South Africa? This is, *inter alia,* because:

298.1. The units that were primarily responsible for the deaths on the 16th of August 2012 were not POP units. The available evidence indicates that the SAPS members responsible for these deaths were mostly members of the SAPS tactical units including the TRT, the NIU and the K9 unit. Nevertheless, POP members may have been responsible for some of the fatalities.[214]

298.2. No POP commanders or members were involved in developing the plan for the intervention, were part of the final Joint Operational Coordinating Committee meeting shortly before the launch of the intervention, or were in command of the operation.

298.3. At the time of the incident, the internal SAPS directive applicable to crowd management was Standing Order 262 (crowd management during gatherings and demonstrations). The SO 262 was generally disregarded by the SAPS members in charge of the Marikana operation and this was reflected in the fact that there was no written operational plan for the intervention.

298.4. The Marikana police intervention represented a complete departure from the standard practice of SAPS Public Order Policing units in dealing with heavily armed crowds. POP units generally recognise that it is not possible to

[214] Along with 47 members of the TRT one member of POP also opened fire on the strikers with an R5 at Scene 1. (Marikana Commission report. pp. 248-249, paragraphs 28-29). See also heads of argument of Families regarding shooting of Mr Mkhonjwa at Scene 2.

disarm heavily armed crowds without exacerbating the likelihood of bloodshed and that this runs contrary to the principles that are supposed to govern crowd management.

299. Notwithstanding these issues, crowd management came under the spotlight during the Marikana Commission.[215] In Sections B of Chapter 25, the Marikana Commission report raises specific concerns regarding crowd management in South Africa. These included concerns regarding:

299.1. The use of automatic rifles by police in crowd management.[216]

299.2. The possibility that POP units may be faced, as was the case at Marikana, with crowds armed with sharp weapons and firearms and that POP use of less-lethal-weapons are ineffective in responding to such crowds. [217]

299.3. The nature of POP capabilities including that these are mainly reactive, static, lacking situational adaptability, aimed at containment, and preferring a distance between them and the crowd. These configurations offer very limited options to deal with situations where a crowd is confrontational, organised, mobile, armed, violent and volatile. SAPS members are not trained for situations of this kind.[218]

299.4. Uncertainty as to the exact roles to be played when tactical units are deployed together with Public Order Policing units in instances of crowd control.[219]

300. The Marikana Commission therefore acknowledged that SAPS crowd management prescripts had been disregarded at Marikana and that POP commanders had not been in command during the operation. But it also came to the conclusion that the situation at Marikana was one that exposed weaknesses in the SAPS crowd management framework and the capabilities of POP units. The key concern of the Commission was that POP units using less-lethal-weapons and

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[215] The Marikana Commission report referred to crowd management as Public Order Policing.
[216] Marikana Commission report. p. 547 paragraphs B1, B7 and 548. Note that paragraph B7 refers to the 'immediate withdrawal of R5 from POP operations.' However from the context of the recommendations it is understood that the focus of the Commission was on the use of R5s in crowd management operations.
[217] Marikana Commission report. p. 547 paragraph B2.
[218] Marikana Commission report. p. 548, paragraphs 3, 4, 5 and 6.
[219] Marikana Commission report. p. 550 &10.

ammunition such as teargas, rubber bullets, and water cannons, would not necessarily be able to defend themselves against, and effectively respond to, crowds that are armed, mobile and confrontational. Taking into account the fact that it was widely accepted that the use of the R5 (or other weapon capable of automatic fire) is unacceptable in the crowd management context, it is necessary for the SAPS and POP units to be able to have a clear approach to dealing with the possibility of confrontations with crowds of such a nature. This is not only a question of whether or not POP units have appropriate weapons but also that they need to have the flexibility and adaptability to be able to address such situations in the most appropriate manner. As will be discussed the need for adaptability and flexibility does not only apply to aggressive and confrontational crowds but is required more generally in relation to the complex nature of the South African crowd management environment. In addition, if there is the possibility that tactical units are going to be deployed in such situations, there needs to be a clear framework for command and control of these operations.

301. An important factor shaping the Marikana Commission's assessment of the SAPS response to the Marikana situation and SAPS crowd management capabilities was the testimony of the international policing experts at the Commission. Their criticisms of the way in which the SAPS intervened in the Marikana situation largely focused on the application of crowd management principles. As indicated above the SAPS's conduct of the operation was criticised in terms of a wide number of issues. The lack of an operational plan meant that the roles and responsibilities of different police personnel were not clarified; the command and control of the operation was not clearly defined; and the purpose and objectives of the operation was not clearly articulated. Overall there was poor planning, poor briefing, and poor decision-making.

302. Inevitably, the combination of the above factors impacted on the events that followed. As a result Marikana will remain a dark cloud in the history of policing in democratic South Africa.

A holistic approach

303. There are undoubtedly therefore numerous issues that are raised, and lessons that can be drawn from Marikana for crowd management. At the same time, as

indicated, the Panel has endeavoured to ground its work and its recommendations in the current realities of protest, crowd management, and public order policing in South Africa.

304. Taken together, these issues point to the need for systemic reform of POP and crowd management in South Africa and the Panel has therefore taken a holistic approach to discussing them.

Structure of this Chapter

305. The rest of this chapter is therefore structured as follows:

305.1. The next part of this chapter, part B, discusses the current protest environment in order to ground this chapter in the social, political, and physical environment in which crowd management takes place.

305.2. This is followed by a discussion of the legal context as defined in particular by the Regulation of Gatherings Act (No. 205 of 1993)(RGA).

305.3. Thereafter, part D, the major part of Chapter 3 focuses specifically on the role of the POP units in crowd management.

Terminology used

306. Readers of this report are reminded of the terminology section at the end of this report which is primarily relevant to this Chapter. Definitions for key terms that are used in this chapter include definitions for the terms ’assembly’, ’crowd management’, ’protest’, ’public order’, ’public order policing’, and others.

307. Readers should note in particular that the RGA uses the following terminology:

307.1. A ‘responsible officer’ is an official of a municipality who has responsibilities and exercises powers conferred on her or him by the RGA.[220]

[220] According to section 1 of the RGA: “’responsible officer' means a person appointed in terms of section 2 (4) (a) as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2 (4) (b) to be a responsible officer.”

307.2. An ‘authorised member’ is a SAPS member who is authorised to represent the SAPS and who also has specific responsibilities in terms of the RGA.[221]

307.3. The ‘responsible officer’ is therefore not necessarily a member of the SAPS, although some municipalities appoint municipal police or traffic police to perform this role.

Part B: The crowd management environment in respect of protest in South Africa

308. Chapter 3 is concerned with the exercise of the right to protest in South Africa. Section 17 of the Constitution, 1996, states that, “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.” Section 17 therefore confers a right to assemble in order to protest peacefully. A key question which this part of the report is concerned with is the manner in which protest is carried out in South Africa. This includes in what circumstances it may be regarded as falling within the parameters of the right to peaceful protest that is provided for by the Constitution.

Types of protest

‘Demonstrations’ and ‘gatherings’

309. The RGA distinguishes between ‘demonstrations’ (15 people or under) and ‘gatherings’ (more than 15 people).[222] Though the name of the Act suggests that it is only concerned with ‘gatherings’, many provisions of the Act are concerned both with the regulation of ‘demonstrations’ and ‘gatherings’. [223] However, certain provisions of the RGA are only concerned with the regulation of ‘gatherings’,[224] i.e. protests of more than 15 people—and the distinction between ‘demonstrations’ and

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[221] According to section 1 of the RGA: “'authorized member' means a member of the Police authorized in terms of section 2 (2) to represent the Police as contemplated in the said section.”
[222] Definitions are provided in section 1 of the Act.
[223] Not only ‘gatherings’ but also demonstrations are bound by the provisions of sections 6(6) and 7. Section 8 deals with the conduct of both ‘demonstrations’ and ‘gatherings’ while some provisions relating to police powers (section 9) and damages (section 11) also apply to ‘demonstrations’. In line with the fact that participants in a demonstration are subject to the same rules of conduct as those attending ‘gatherings’ they may also be convicted of an offence for violation of these provisions in terms of section 12(1)(c) and (d).
[224] For instance sections 2, 3, 4 and 5 are concerned with ’gatherings’ and not with ’demonstrations’.

'gatherings' is therefore an important distinction in analysing protests in South Africa.

309.1. The definitions of 'demonstrations' and 'gatherings' are discussed further in the discussion of the RGA below.

Formal and informal protest

310. In practice, protest action in South Africa takes place both within the procedures laid down in the RGA, as well as outside of this framework. It is reasonable to distinguish between 'formal' and 'informal' protest on this basis.

311. **Formal protest**—is protest that is carried out through the notification process (followed in some cases by a section 4 meeting) as provided for in sections 3 and 4 of the RGA (The process is discussed in more detail in the section dealing with the RGA below).

312. **Informal protest** takes place outside of the formal processes of the RGA. Informal protest may include:

312.1. Spontaneous protest of more than 15 people—the RGA does allow for the possibility that there may be spontaneous protest.[225] Though the term 'spontaneous protest' is not defined, it appears to refer to protests that take place 'on the spur of the moment' in response to an incident that has just occurred.[226] 'Spontaneous protests' are therefore informal protests but enjoy some level of protection in terms of the RGA.

312.2. Pre-planned informal protests of more than 15 people—these are non-notified protests that are not spontaneous. Section 12(1)(a) of the RGA provides that the convenors of a protest (or other 'gathering') in terms of which no notice is given in terms of section 3 of the RGA, are guilty of a criminal offence of not giving such notice.

312.2.1. It must be noted that section 12(1)(a) of the RGA was found to be unconstitutional in a High Court judgment delivered on the 24th of January

[225] See section 12(2) of the RGA.
[226] In Patricia Tsoaeli and Others v State [Unreported judgment (17 November 2016) Case No: A222/2015] at paragraph 43 the court quotes a police officer who says that "he considered a spontaneous gathering to be one that was 'not arranged or authorised.'"

2018. The judgment found that the provisions of section 12(1)(a) violate section 17 of the Constitution, 1996. However, the position remains that it is required by law to give notice of such a gathering except that the convenor would be guilty of a 'non-criminal' (administrative) offence for not doing so. The court left it to Parliament to decide on the types of penalties that may be imposed for a person who breaches this provision, subject to the requirement that they may not be criminal penalties.[227]

312.2.2. The January 2018 High Court judgement is subject to confirmation by the Constitutional Court in terms of section 172(2)(a) of the Constitution.

312.2.3. It should be noted that attendance at such a protest is not an offence of any kind[228] and therefore it is not correct to describe such a protest, as a whole, as unlawful. As indicated below, there are circumstances in which the RGA criminalises both convenors of a gathering and those attending it.

312.3. Protests of less than 15 people—as indicated these are classified as 'demonstrations' under the RGA and are exempt from notice provisions.[229] As they are not required to conform to notification processes they are therefore informal protests. Nevertheless, people planning a demonstration may notify the authorities of their intention to protest—if a notification process is followed such a protest would arguably better be described as 'formal'.

313. As will be discussed further below, there are limitations to current data on protest in South Africa. *Inter alia*, it is unclear whether there are more formal protests than informal protests. The available information suggests that:

313.1. A substantial number of protests that take place in South Africa each year are informal. It is not clear what proportion of these protests are 'spontaneous' and what proportion are pre-planned.

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[227] *Phumeza Mlungwana et al. 2018.* Case No: A431/15. Appeal Judgment. 24 January 2018.
[228] Patricia Tsoaeli and Others v State [Unreported judgment (17 November 2016) Case No: A222/2015].
[229] Note that in certain instances where a gathering or demonstration is held within 100 metres of a court room or within a certain area near Parliament or the Union buildings permission is required both for a demonstration or gathering.

313.2. It is clear that many informal protests start off as peaceful protests. Nevertheless it can be said that most violent protest is informal protest. Some may start violently while others become violent — sometimes only after the arrival of the police.

314. It must be emphasised that the fact that most violent protest is informal protest does not mean that most informal protests are violent. Many informal protests are peaceful protests.

315. The RGA appears to have envisaged a situation in which protest actions and gatherings will generally take place within its procedures, ensuring that protests are more organised, and enabling local authorities and police to prepare for them. The scenario envisaged by the RGA is therefore only partly in operation. The de facto situation is that protests frequently do not take place in terms of the framework laid down in the RGA. In these 'informal' protests there is most likely to be inadequate preparation for the event and a delay in attendance by Public Order Policing units. Related to this, and the fact that these protests are more likely to be violent, they are often the protests that are more difficult to police.

316. Possible explanations for the fact that informal protest are commonplace may include, amongst others:

316.1. Prevalence of spontaneous protest and semi-spontaneous protest. The Panel is not aware of data on what proportion of protest in South Africa is spontaneous. There may also be protests where there is some element of planning, but where the organisers/participants regard their concerns/grievances as urgent and decide to dispense with notification procedures due to the urgency of their concerns. The latter protests would not qualify as 'spontaneous' protests but might be seen as 'semi-spontaneous'.

316.2. Lack of information about notification procedures and absence of knowledge of the procedures laid down in the RGA. Informal protests frequently involve people from informal settlements or other more marginalised communities who may not have access to information about RGA procedures.

In addition, contact information for a municipality's responsible officer,[230] or the municipal official responsible for receiving protest notifications, is often not readily available and is difficult to find.[231]

316.3. The tendency for municipalities to impose conditions on the manner in which notification is provided, or conditions that must be adhered to in order for protest to be held, that are not authorised by the RGA. Examples of such conditions include requiring that a specific form be used to notify the municipality about the protest, or that a payment be made to the municipality in lieu of municipal resources that may be used to facilitate the gathering, or other conditions. Failure to meet these 'conditions' is then used to deny protestors 'permission' to protest, an authority that is not actually provided for in the RGA. In other cases gatherings are prohibited, sometimes on arbitrary grounds. [232]

317. The RGA recognises that there may be spontaneous protests and also allows for people to convene 'demonstrations' (of not more than 15 people) without requiring that notice be given in all cases. The position in terms of the RGA is therefore that notification is not always essential. The Panel's view is that even if protests are peaceful, it is preferable for notification to be given where protests are likely to result in significant disruption (such as the disruption of traffic) and it would be beneficial for the police and other authorities to be prepared to manage this. In so far as there is a risk of violence it would also be preferable for police to be notified in advance about this. (The issue of notification is discussed further in the section dealing with the RGA).

318. As the above points indicate, even if there is the wish to comply with the RGA procedures, this may be difficult and frustrating for some people who want to protest. People who wish to follow the procedures that are provided for, may find

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[230] A responsible officer is the key municipal official responsible for negotiating with the protest convenors. Municipalities are required to appoint responsible officers in terms of Section 2(4)(a) which states that: A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer in terms of this Act.

[231] Mukumba, Tsangadzaome Alexander and Imraan Abdullah. 2017. Enabling the enabler - Using access to information to ensure the right to peaceful protest. SACQ 62. p. 54. ISS: Pretoria and Centre of Criminology: Cape Town.

[232] *Ibid*. Also see Duncan, Jane. 2016. *Protest Nation.* University of KwaZulu-Natal Press. pp. 55-86.

this difficult to do or find that the notification process does not serve to facilitate the right to protest. This may feed into a lack of confidence in the procedures laid down in the RGA. The critical point is that the principal factor contributing to the prevalence of informal protest is not necessarily a disregard for the law on the part of protestors. Protestors may also:

318.1. Have pressing concerns, such as shortages of water, that motivate for urgent steps to be taken to address them;

318.2. Not be aware of the legal provisions;

318.3. Not readily be able to find information about how to comply with notification procedures; and

318.4. Have previously adhered to notification procedures, but found that their compliance with these procedures did not serve to facilitate their right to protest.

319. **PANEL RECOMMENDATION 46:** In order to support greater use of formal procedures, steps should be taken to ensure that they are easier to comply with. This should include:

319.1. Public information about the RGA and processes that are to be complied with should be more readily available. In particular, the RGA should be amended to state that it is mandatory for municipalities to provide contact information for the responsible officer, including hours of availability, in a readily accessible manner.

319.2. In the interim, COGTA should issue a directive requesting all municipalities to ensure that contact information for the responsible officer, including hours of availability, are made available in a readily accessible manner.

319.3. An amendment to the RGA should state explicitly that conditions on the submission of notifications, and the holding of assemblies that are not authorised by the Act, are prohibited. Establishing sanctions for deliberately violating this provision might also be considered.

319.4. The RGA should be amended to provide that the time frame for notification is linked to the envisaged scale and potential disruptive impact of a protest.

Prohibited (unlawful) protest

320. As noted above, section 12(1)(a) of the RGA provides that the convenors of a protest (or other 'gathering') in terms of which no notice is given in terms of section 3 of the RGA, are guilty of an offence (see paragraph 312.2.1 above regarding the implications of the Mlungwana judgment in this regard). However, attendance at such a protest is not an offence of any kind[233] and therefore it is not correct to describe such a protest as a whole, as contrary to law. Police action at such a protest should therefore not be premised on the fact that those attending it are prohibited from doing so.

321. The only provision of the RGA that provides for an offence of attending a gathering is section 12(1)(e). As confirmed by the High Court in the November 2016 Tsoaeli judgment, it is only where a protest has been prohibited by the municipality's responsible officer (in terms of either section 3(2) or section 5 of the RGA), or takes places at a location where gatherings and demonstrations are prohibited in terms of section 7 of the Act, that a person who attends a gathering may themselves be convicted of a criminal offence.[234]

321.1. In terms of section 3(2) of the RGA, gatherings that are vulnerable to prohibition by the responsible officer include gatherings in relation to which notification is given less than 48 hours before the gathering is due to commence. Questions to do with the power of the responsible officer to prohibit gatherings in terms of section 3(2) are discussed further below.

Peaceful protest

322. The right provided for in section 17 of the Constitution, 1196, is a right to assemble 'peacefully and unarmed'. The right to assemble may be limited (in terms

[233] Patricia Tsoaeli and Others v State [Unreported judgment (17 November 2016) Case No: A222/2015].
[234] Patricia Tsoaeli and Others v State [Unreported judgment (17 November 2016) Case No: A222/2015].

of section 36 of the Constitution) by law and this is currently dealt with through the RGA: Peaceful protest, whether 'formal or informal', should be very clearly differentiated from protest that is not peaceful. This report strongly emphasises that the principle distinction that the law and policing of protest should be based on should be that between peaceful protest—and protest that is not peaceful.

323. As discussed later in this report, the RGA was drafted prior to the Constitution. Related to this there is no clear focus on the issue of peaceful assembly or on its meaning. The Panel proposes that the following definition of 'peaceful assembly' should be incorporated into an amended RGA:

323.1. A **peaceful assembly** is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful.' In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly.

324. By implication 'peaceful protest' should be understood in terms of this definition.

Disruptive protest

325. To understand the current South African protest environment it is also necessary to make use of the concept of 'disruptive protest'.[235] 'Peaceful assembly' has generally been understood to mean free of acts of physical violence against persons and property[236] and the Panel proposes that there should be an assumption in favour of peaceful protest, so that the acts of individuals should not result in a protest being assessed as 'not peaceful' if a large majority of participants

[235] Stuart Wilson and Irene de Vos. 2016. Ex parte: Council for the Advancement of the South African Constitution: In re: Restraint of protest on or near university campuses. December 2016; Alexander, et al.
[236] *Constitutional Law of South Africa*, p 43-19 quoted in Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution, 9-10.

are conducting themselves peacefully. It is possible for protest to be ‘peaceful’ but also to be disruptive.

326. For purposes of analysing disruptive protest in South Africa it is necessary to also distinguish between:

326.1. Protest by its nature is often disruptive—the fact that a crowd of people is gathered in a certain place is frequently disruptive in one way or another. However, the fact that people are gathered in a place does not mean that their purpose it to disrupt. In these cases disruption is a ‘consequence’ of the protest and not necessarily a strategy of the protestors. In other words it is merely ‘incidental’. Police may for instance be able to approach the protestors and persuade them to change their location in order to allow the free flow of traffic along a road.

326.2. Some protests are ‘actively disruptive’—in these cases disruption is a deliberate strategy of protest. Active disruption may include erecting physical obstacles such as barricades or other forms of disruption such as where a group of university students sing loudly outside university classrooms in order to disrupt the lectures.

327. The construction of barricades may involve destruction of property —such as where road signs or safety barriers have been damaged in order to build a barricade. In these circumstances construction of the barricade has involved conduct that is unlawful (punishable by law as malicious damage to property). Due to the fact that the destruction of property is regarded as violence, this conduct is also violent. This example illustrates the point that there is not always a watertight distinction between ‘disruptive’ and ‘violent’ protest. In this case, property is destroyed unlawfully for the purpose of creating a barricade; the barricade itself may be established for the purpose of disrupting traffic. Building a barricade is an act intended to disrupt and does not, on its own, imply that a protest is violent.

328. The legal situation in relation to disruptive protest, and related questions about balancing the right to protest and the rights of other people, is discussed further below (paragraphs 483 to 506). Protests may be disruptive but may not involve violence and/or the destruction of property. Disruption may be unlawful in one way or another, and although there may be reasons for urgency (for instance there

is an urgent need for emergency vehicles to access a particular location), a disruptive protest can be treated differently from one where there is physical danger to people or ongoing destruction of property.

329. Whether peaceful or not, or whether formal or informal, protests may or may not be disruptive.

329.1. The key difference between formal protest and informal protest is that the RGA process allows for the possibility of disruption to be addressed. For example, the municipal official (responsible officer) may use the negotiation process to seek to ensure that the protest does not have a disruptive impact. Alternatively, the municipality can plan for the expected disruption such as by deploying traffic police to assist with re-routing traffic.

329.2. If informal protests are disruptive, it may not be possible to address this in advance (though if authorities receive advance information about a pre-planned protest they may be able to take steps to address its disruptive potential).[237]

Recommendation

330. **PANEL RECOMMENDATION 47:** The current police categorisation of protest is based on the distinction between 'peaceful' and 'unrest'. However, the protest environment is multi-facetted. In order to respond in an appropriate way to protest, the SAPS need to have a way of analysing, categorising, and responding to protests that more clearly distinguishes the critical differences between them. The SAPS should therefore adopt a more multi-facetted approach to understanding and classifying protest. In adopting a new approach the SAPS should consider the system of categorisation used in this report including the distinction between: Peaceful and non-peaceful protest; Formal and informal protest; Pre-planned and spontaneous; Disruptive and non-disruptive protest; Protest that is prohibited (unlawful) and which is not prohibited. (See also Panel Recommendation 56).

331. **PANEL RECOMMENDATION 48:** Police commanders and personnel responsible for data entry should be trained to apply the new categories that are

[237] See for instance section 5 of the RGA which would apply both in relation to formal and informal protests that are pre-planned.

adopted so that responses to protest are clearly linked to the characteristics of the protest and data on protest is based on the consistent criteria for classifying protest incidents. Protest is sometimes complex in nature and the characteristics of a protest may change; therefore, any system for recording data on protest needs to allow for these possibilities and provide guidelines to personnel responsible for data entry for recording, in order to address these realities.

The problem of the use of violence in protest

The scale and nature of the use of violence in protest

332. As implied by the above definition of peaceful assembly, the problem of violence in protest may take different forms. The fact that there is violence (understood as harm to persons or damage to property) should not necessarily mean that the protest as a whole is classified as not peaceful. In this respect the Constitutional Court has quoted with approval the European Court of Human Rights confirming that peaceful protestors are not deprived of their right to protest by the conduct of others who are violent.[238]

333. Most protest in South Africa is peaceful. Furthermore, violence in so far as it does take place, is often relatively 'small scale' possibly involving the throwing of stones, or building of barricades but involving little other damage to property.

334. Nevertheless, it must be noted that at times violence during protest is more large scale, and can involve substantial damage to property. Loss of life and injury is sometimes also a consequence. Examples of some recent protests of this kind include:

334.1. During violent protests in Thembisa, in March 2015 a clinic and 11 municipal vehicles were burned and shops looted.[239]

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[238] South African Transport and Allied Workers Union and Another v Garvas and Others (CCT 112/11) [2012] ZACC 13, para 53.

[239] Kempton Express, Clinic, vehicles torched during overnight protest action in Tembisa, *Kempton Express*, 18 March 2015. https://kemptonexpress.co.za/65444/clinics-vehicles-torched-during-overnight-protest-action-in-tembisa/ ; News24, Clinic burnt down, shops looted in electricity protest, *News 24*, 18 March 2015. https://www.news24.com/SouthAfrica/News/Clinic-burnt-down-shops-looted-in-electricity-protest-20150318.

334.2. During violent protests in Soshanguve in September 2015, 5 municipal vehicles, offices and a guardroom were burned.[240]

334.3. During protests in April and May 2016, in Vuwani, 28 schools were burned.[241] During further protest related violence in this area in April 2017, another school was burnt.[242]

334.4. During violent protests in March 2016 in Mandeni, KwaZulu Natal, a recycling factory and vehicles were set alight.[243]

334.5. In June 2016 several people were severely assaulted,[244] and at least 19 buses and other vehicles were burnt, and shops looted during protests in Atteridgeville and elsewhere in the Tshwane metropolitan area.[245]

334.6. During student protests in 2015 and 2016 there was damage to property at a number of universities. According to one report, by November 2016 the total cost of damage to property such as 'lecture halls, labs, libraries and books' at the various universities affected was estimated to have been upwards of R700 million.[246]

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[240] Adam Wakefield, Municipal vehicles set alight in Soshanguve protest, *News24*, 3 September 2015, https://www.news24.com/SouthAfrica/News/Municipal-vehicles-set-alight-in-Soshanguve-protest-20150903.

[241] eNCA, eNCA Map: Vuwani's damaged schools, *eNCA.com*, 16 May 2016, http://www.enca.com/south-africa/enca-map-vuwanis-damaged-schools.

[242] Chester Makana, Vuwani school burnt in fresh protest over boundary line, *News24*, 6 April 2017, https://www.news24.com/SouthAfrica/News/vuwani-school-burnt-in-fresh-protest-over-boundary-line-20170406.

[243] Jacqueline Herbst, VIDEO: KZN residents torch factory, cars in violent protest, *The Citizen*, 7 March 2016, https://citizen.co.za/news/1023728/video-kzn-residents-torch-factory-in-violent-protest/.

[244] GroundUp, Somalis fear for their lives after Tshwane riots, *Daily Maverick*, 30 June 2016, https://www.dailymaverick.co.za/article/2016-06-30-groundup-somalis-fear-for-their-lives-after-tshwane-riots/#.WjpHXkmWbcd.

[245] Daily Dispatch, Tshwane violence did start with ANC members, state security minister admits, *Daily Dispatch*, 22 June 2016, http://www.dispatchlive.co.za/news/2016/06/22/tshwane-violence-did-start-with-anc-members-state-security-minister-admits/ ;Karabo Ngoepe, Atteridgeville on lockdown, *News24*, 21 June 2016, https://www.news24.com/elections/news/atteridgeville-on-lock-down-20160621.

[246] Staff Reporters, High cost of destruction in #FeesMustFall protests, *The Sowetan*, 1 November 2016 https://www.sowetanlive.co.za/news/2016-11-01-high-cost-of-destruction-in-feesmustfall-protests/; Prega Govender, #FeesMustFall cost 18 varsities more than R460m in damage to property alone, *Mail & Guardian*, 29 September 2016, https://mg.co.za/article/2016-09-29-00-feesmustfall-cost-18-varsities-more-than-r460m-in-damage-to-property-alone.

334.7. During violent protests in April 2017 in the Lichtenburg, North West area 3 trucks were burned.[247] A few days later a truck carrying 38 000 birds was set alight killing all the birds, and a police Nyala was set alight.[248]

334.8. In July 2017 during violent protests in Durban a municipal bus was petrol bombed.[249]

334.9. During protests at the Cape Peninsula University of Technology's Cape Town campus in September 2017 a workshop in the engineering building was petrol bombed.[250] A historic 150 year old church building (St Mark's Anglican Church) was also badly damaged.[251]

334.10. During violent protests in Soshanguve in September 2017, two men were killed and two seriously injured.[252]

334.11. During violent protests in October 2017, a 15 year old boy was fatally shot by a motorist in Lichtenburg.[253]

334.12. In September 2017 in Lephalale, Limpopo, a bus and a truck were set alight during violent protests.[254]

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[247] ANA, Three trucks torched during violent protest in North West, *The Citizen*, 21 April 2017, https://citizen.co.za/news/south-africa/1494050/three-trucks-torched-during-violent-protest-in-north-west/.

[248] AP Reporter, #Lichtenburg protesters burn police vehicle, truck, *IOL*, 25 April 2017, https://www.iol.co.za/news/crime-courts/lichtenburg-protesters-burn-police-vehicle-truck-8809595.

[249] Zainul Dawood, WATCH, PICS: Protestors petrol bomb Durban municipal bus, *Daily News*, 7 July 2017, https://www.iol.co.za/dailynews/watch-pics-protestors-petrol-bomb-durban-municipal-bus-10175387.

[250] Jenna Etheridge, CPUT workshop petrol bombed, exams disrupted during protests, *News24*, 11 September 2017, https://www.news24.com/SouthAfrica/News/cput-workshop-petrol-bombed-exams-disrupted-during-protests-20170911.

[251] Petru Saal and Aron Hyman, CPUT student arrested for arson attack on historic church, *Times Live*, 28 September 2017, https://www.timeslive.co.za/news/south-africa/2017-09-28-cput-student-arrested-for-arson-attack-on-historic-church/.

[252] Alex Mitchley, Two men killed as protest turns violent in Soshanguve, *News24*, 13 September 2017, https://www.news24.com/SouthAfrica/News/two-men-killed-as-protest-turns-violent-in-soshanguve-20170913.

[253] The New Age, Teen killed in violent protest, *The New Age*, 11 October 2017, http://thenewage.co.za/teen-killed-in-violent-protest/; Iavan Pijoos, Man hands himself in after allegedly opening fire on Lichtenburg protesters, killing boy, *News24*, 11 October 2017, https://www.news24.com/SouthAfrica/News/man-hands-himself-in-after-allegedly-opening-fire-on-lichtenburg-protesters-killing-boy-20171011

[254] James de Villiers, Truck, bus torched in violent Lephalale protest, *News24*, 14 September 2017, https://www.news24.com/SouthAfrica/News/truck-bus-torched-in-violent-lephalale-protest-20170914.

334.13. In July 2017, protests in Atteridgeville included the burning of two buses and vandalising of another[255] as well as the burning of a municipal office. [256]

335. As some of the above instances illustrate, loss of life is sometimes a consequence of, or takes place in the context of, violent protest. In the September 2017 incident in Soshanguve, for instance, police suspected that the two men who were killed 'may have been trying to board a train and were stopped by protesters.'[257] On the other hand, in the October 2017 incident in Lichtenburg, it was reported that a motorist had opened fire on protestors. In addition to the boy who was killed, two others were also injured.[258] In another incident in Soweto in June 2017, a Prasa employee was stoned to death by protestors while a protestor was shot dead, allegedly by Prasa employees.[259]

335.1. As will be discussed further below, loss of life is sometimes also a consequence of police intervention or the actions of private security guards. Deaths during protests are therefore sometimes the result of action by the protestors. At other times, they are the result of actions by other members of the public, private security guards, or police.

336. Strikes, particularly on the mines, are sometimes also associated with violence.[260] This was clearly illustrated at Marikana. Some of the violence, including some of the killings, took place in crowd or group situations. At Marikana,

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[255] Pelane Phakgadi, Residents blame corruption for Atteridgeville protests, *EWN*, 12 July 2017, http://ewn.co.za/2017/07/12/residents-blame-corruption-for-atteridgeville-protests.

[256] Puseletso Nthate, Upgrading Informal Settlements: A burning need for houses sparks protests on the streets of Atteridgeville, *Daily Maverick*, 21 July 2017, https://www.dailymaverick.co.za/article/2017-07-21-upgrading-informal-settlements-a-burning-need-for-houses-sparks-protests-on-the-streets-of-atteridgeville/#.WjKUjbaWbcc.

[257] Alex Mitchley, Two men killed as protest turns violent in Soshanguve, *News24*, 13 September 2017, https://www.news24.com/SouthAfrica/News/two-men-killed-as-protest-turns-violent-in-soshanguve-20170913

[258] The New Age, Teen killed in violent protest, *The New Age*, 11 October 2017, http://www.thenewage.co.za/teen-killed-in-violent-protest/.

[259] eNCA, Families of two killed in Soweto protests demand answers, *eNCA.com*, 29 June 2017, http://www.enca.com/south-africa/families-of-two-killed-in-soweto-protest-want-answers.

[260] Bendile, D. 2016. Reports of intimidation as Pikitup strike continues. Eyewitness News, 22 March 2016, http:// ewn.co.za/2016/03/22/Reports-of-intimidation-as-Pikitup-strike-continues; Moodie, T. 2015. Ingenious Means: Fire from below the Tumultuous History of the National Union of Mineworkers on the South African Platinum Mines. *Review of African Political Economy. Vol.* 42:146; Bell, Terry. 2012. Confusing Roots of the Upheaval at Implats. February 19, 2012. http://terrybellwrites.com/2012/02/19/confusing-roots-of-the-upheaval-and-implats/.; and Marinovich, G. p. 57.

and in other strikes, incidents of violence often take place separately from any groups of people who may be gathered together as a form of protest. Thus for instance at Marikana some of the killings that took place appear to have been carried out by individuals or small groups who attacked mine employees who had not joined the strike and were on their way to work.

337. Violence directed at foreigners is also frequently associated with violent protest and often involves the looting and burning of their shops in the course of other protests.

338. Though most protest is peaceful, violence in protest is not uncommon.

338.1. Where it does take place it frequently involves the establishment of one or more barricades on public roads. As discussed above, the establishment of a barricade, in itself, is better understood as an act of disruption, rather than violence, with the barricade intended to block the flow of traffic along a particular road. However, (public) property is often damaged in the process of building a barricade. In addition, in order to 'enforce' the barricade, violence, such as the throwing of stones at approaching or passing vehicles, or at police, often takes place. In practice therefore, the establishment of barricades is frequently synonymous with violent protest.

338.2. The violence associated with protest most commonly involves the throwing of stones, rocks and other projectiles (such as iron bolts). Sometimes catapults are used for this purpose, increasing not only the potential range at which projectiles might be dangerous but also posing an increased risk for injury. Often the targets of this violence are the police, though it may also be targeted at other public officials or members of the public.

338.3. One aspect of protest related violence that is of particular concern to the police is the use of petrol bombs and other acts of arson. In some cases the barricades themselves are set alight while petrol bombs are also thrown at police and other vehicles.[261]

[261] A recent example: https://www.groundup.org.za/article/police-vehicle-petrol-bombed-hoerskool-overvaal-protests/.

339. Most protest in South Africa is peaceful. In addition, public understanding of protest related violence is heavily shaped by news coverage of such violence. This tends to focus on incidents where there is much greater damage to property as well as those where people are killed. The violent protest that tends to be the focus of media attention is therefore not representative of most protest in South Africa, but it is also not representative of most violent protest. Though they are a serious concern, the attacks on public and other buildings that are described above, and large scale damage to property, are not the most common type of protest related violence.

Motivations for violence

340. Analysis that has been conducted of protest related violence indicates that violence in protest is often 'instrumental'. This means that violence is used by protestors as a way of achieving another objective, typically trying to ensure that their grievances are addressed. In this respect it has been noted that violence during protest frequently follows a process of trying to have grievances addressed by peaceful means.

341. One factor that plays a significant role in the prevalence of violent protest is sometimes therefore a frustration with peaceful protest and a belief that violent protest is more likely to result in grievances being attended to. Of concern in this regard is evidence, reflected in recently published research, that point to decreasing public confidence in the effectiveness of peaceful protest and increasing confidence in the effectiveness of both disruptive and of violent protest.[262]

342. The Panel therefore emphasises that protest related violence may, at least in part, be understood as an expression of legitimate grievances, and as a way of trying to ensure that these grievances are addressed. At the same time, the Panel recognises that there are frequently other dynamics at play that also contribute to the prevalence of such violence. Some protest related violence or other illegal actions are clearly not solely unrelated to the attempt to have grievances

[262] Bohler-Muller, Narnia, Benjamin James Roberts, Jarè Struwig, Steven Lawrence Gordon, Thobeka Radebe and Peter Alexander. 2016. Minding the Protest : Attitudes towards different forms of protest action in contemporary South Africa. South African Crime Quarterly. ISS: Pretoria and Centre of Criminology: Cape Town, 62, 2017, 81-92.

addressed. Protest related violence and crime may also be 'expressive' (an expression of anger and excitement or of hostility to certain groups such as foreigners) and also opportunistic (such as when the circumstances of a protest is used to loot shops). Furthermore, the high degree of involvement by young men in violent protest can also be seen as a manifestation of the marginalisation of certain groups and dynamics to do with achieving recognition in local communities, often associated with ideas about masculinity.[263] Local political rivalries and other political factors often also play a very significant role in protest including violent protest.[264]

343. Related to this, the phenomenon of protest may extend into situations of generalised lawlessness that may be characterised as 'civil disturbance,' 'rioting' or 'looting' and to which the term 'unrest' that is used by the SAPS may also be seen as most applicable. The exact relationship of these situations with protest is not necessarily straightforward. Members of the SAPS often characterise these situations as involving a 'criminal element' that takes advantage of the opportunity provided by protest. Those engaging in these activities may not primarily be concerned with trying to advance efforts to address the grievances that are articulated by protestors with whom they are associated.

The link between violent protests and attacks on 'foreigners'

344. In 2008 over 60 people were killed in South Africa during a wave of public violence targeted at people identified as foreigners. There have been other episodes of violence of this kind including but not limited to the following:

344.1. In Soweto and elsewhere in January 2015, violence mainly involved looting of foreign shops.[265]

344.2. At various locations nationally in the early months of 2015.[266]

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[263] Malose Langa and Peace Kiguwa. 2013. Violent masculinities and service delivery protests in post-apartheid South Africa: A case study of two communities in Mpumalanga. Agenda, 27:1, 20-31.
[264] von Holdt, Karl et al. 2011. *The Smoke that Calls. Insurgent citizenship, collective violence and the struggle for a place in the new South Africa*. Centre for the Study of Violence and Reconciliation: Johannesburg and Society, Work and Development Institute, University of the Witwatersrand.
[265] City Press, Soweto riots: 90 expected in court, 26 January 2015. https://www.news24.com/Archives/City-Press/Soweto-riots-90-expected-in-court-20150429.
[266] Jenni Evans, Attacks on foreigners not xenophobia – committee, *News 24*, 10 July 2015, https://www.news24.com/SouthAfrica/News/Attacks-on-foreigners-not-xenophobia-committee-20150710

345. Far more frequent than episodes of this kind is that shops that are owned by, or run by, foreigners become a major focus of looting and other violence when violence erupts during other protests. In these incidents the managers or owners of the shops are themselves also frequently attacked. This was for instance a prominent aspect of the June 2016 protests in Tshwane,[267] but has also been a feature of protest in many other areas.

346. Research by the Social Change Research Unit at the University of Johannesburg indicates that there are relatively few protests that are focused on expressing anti-foreigner sentiments ('xenophobic protests'). In the SAPS data that they analysed, protests of this kind constituted 0.4 per cent of all protests.[268] However, this group of protests is not representative of the issue of xenophobia in protest as a whole as the percentage of protests where there was some evidence of xenophobia was greater than this.[269]

The danger to police during protests

347. Two SAPS members, Warrant Officer Sello Lepaaku of the Rustenburg POP unit and Warrant Officer Tsietsi Monene a POP member from Mpumalanga, were killed by strikers at Marikana on the 13th of August 2012, three days before the events of the 16th of August in which 34 strikers were killed.

348. Though the killing of police is a major cause of concern in South Africa, the killings of Warrant Officers Lepaaku and Monene appears to be the first incident in which SAPS members have been killed during the policing of protest since the transition to democracy in 1994.[270]

349. It is not the intention of the Panel to downplay the danger to police during protests. Police use of force during protests is often focused on ensuring that a distance is maintained between themselves and violent protestors. The concern to keep a distance is in part motivated by the fact that many police believe that they

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[267] https://www.dailymaverick.co.za/article/2016-06-30-groundup-somalis-fear-for-their-lives-after-tshwane-riots/#.Wldq-lSWbce.
[268] Runciman, Alexander, Ramphedi et al, 2016, 43-45.
[269] Runciman, Alexander, Ramphedi et al, 2016, 43-45.
[270] SAPS members who were asked about this referred to a couple of incidents from the pre-1994 period notably the killing of Warrant Officer Petrus Jooste in Sebokeng Hostel in July 1990. http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AK2672/AK2672-B9-1-001-jpeg.pdf .

would be in grave danger if they were to be overwhelmed by groups of violent protestors.

350. The danger to police in protests is most frequently from projectiles. As indicated, protests frequently involve the throwing of stones, rocks and other projectiles with catapults sometimes being used.

350.1. Police are sometimes physically assaulted by protestors. A widely publicised incident during the 2016 protests at Wits includes students physically attacking a SAPS member and also throwing rocks at him.

350.2. Another frequent source of danger to police is burns resulting from petrol bombs or other inflammable material.

350.3. As illustrated by the Marikana incident, bladed weapons are another potential source of danger to police.

350.4. At Marikana, video footage showed one of the strikers shooting at police on the 16th of August. Though the data available to the Panel was not comprehensive it appears to be uncommon for police to be fired at by protestors during protests. Nevertheless POP commanders both in KZN and the Eastern Cape informed Panel members that units in those provinces had encountered gunfire in some protests.

Carrying of weapons by protestors

351. In terms of section 17 of the Constitution, 1996, no person has a constitutionally protected right to carry arms during an assembly. Although the Constitution does not expressly forbid the carrying of arms during protests, the question of whether people should be forbidden to carry arms during protest is a question of public policy that is addressed by section 8(4) of the RGA.

352. Section 8 (4) of the RGA stipulates that, “No participant at a gathering or demonstration may have in his or her possession:

352.1. Any airgun, firearm, imitation firearm or any muzzle loading firearm, as defined in section 1 of the Firearms Control Act (No. 60 of 2000), or any object which resembles a firearm and that is likely to be mistaken for a firearm; or

352.2. Any dangerous weapon, as defined in the Dangerous Weapons Act (No. 15 of 2013) and the convener and marshals, if any, shall take reasonable steps to ensure that this section is complied with."

353. In practice, most notably in some rural and mining areas, it is not unusual for the police to be faced with protests, or other assemblies, of men armed with 'traditional weapons.' The understanding of the Panel is that, in terms of the RGA this is illegal, though others have queried whether this is so in all cases.[271] However, even where police believe this to be illegal, the general approach that the police take in these situations is pragmatic as this provision is difficult to enforce. Police may appeal to crowd leaders to request crowd members to disarm but no attempt will be made to compel the group to disarm on the basis that this is likely to lead to conflict and increase the risk or likelihood of violence. This is in line with the principle of situational appropriateness which forms part of current SAPS crowd management doctrine (discussed further below).

354. At Marikana, police were faced with an armed crowd. As indicated, in the incident on the 13th of August, two SAPS members were killed in a confrontation with a group of armed strikers. The incident is analysed in some detail in the report of the Marikana Commission. The fact that the incident resulted in the death of two SAPS members, as well as three of the strikers, is to some degree attributed to problems with the way in which the incident was dealt with by the SAPS. This possibly included errors of judgment by the commander, and a breakdown of discipline in SAPS ranks.[272] Nevertheless, this confrontation highlights the serious consequences that can result when things 'go wrong' in the interactions between SAPS members and armed crowds.

355. It is not clear if 'armed assemblies' are more likely to be violent than unarmed assemblies. While the carrying of weapons or objects which may potentially be used as weapons may indicate that members of the crowd have intentions that are 'non-peaceful' this is not necessarily the case. A crowd might therefore be armed,

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[271] See the remark that ,"However, it remains an open question whether culturally symbolic artefacts carried purely for display or with other non-violent intent, such as ceremonial weapons, or knobkerries, may be carried in a protest." Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution: In re: Restraint of protest on or near university campuses, December 2016, 10, para. 29.
[272] Marikana Commission report. pp. 132-147.

but still peacefully orientated. Most protests where there is violence are not protests where participants are armed with bladed weapons or firearms. But if armed assemblies do become violent, the consequences can be much more serious.

356. The carrying of arms during protests is in principle undesirable. This is partly because of the consequences that may result if armed protestors do become violent. Furthermore, the carrying of arms by protestors also has the potential to turn what should be a peaceful activity into one that is highly intimidatory and threatening, even if no violence is used.

357. In some countries police cordon off the area in which a protest is scheduled to take place. Mobile scanners are placed at access points to the area as a way of checking if anyone entering the area is carrying a weapon. This practice if of course only viable where there is advance information about the protest. As yet we do not have information about whether armed protests in South Africa generally involve advance notice but it is likely that this is not the case. It may be appropriate to use methods of this kind where there is advance information received about a protest by a group that has a history of carrying arms at protests. However, this kind of practice would not be desirable or useful as a general practise in the policing of protest in South Africa. The vast majority of protests in South Africa are unarmed and such measures would amount to excessive securitisation of the protest environment.

358. Marikana clearly illustrates the risks of launching an operation to disarm protestors during a protest and the potential for such an intervention to lead to bloodshed. The fact is that it is extremely difficult to disarm a huge crowd without seriously increasing the risk of an escalation of violence.

359. **PANEL RECOMMENDATION 49:** The SAPS should explore whether preventive and proactive measures can play a role in addressing the problem of armed protest. For this purpose:

359.1. The SAPS should carry out an information gathering exercise to better understand the scale and nature of the problem of armed protest.

359.2. A media plan should be drafted and implemented, involving relevant forms of communication to inform the public of their rights and obligations in

respect of unarmed protest as referred to in the SA Constitution. The focus must be on promoting unarmed protest and to emphasise the negative consequences of armed protest. Civil society and media organisations should be requested to support this initiative

359.3. In areas where armed protest is a problem it may be possible to engage with local leaders and in local public information campaigns about the issue.

359.4. Where there is advance information about a protest in which participants are likely to be armed preventive measures could be put in place to prevent people from bringing weapons to the protest.

359.5. Video recordings and photographs can also be used to identify persons who were armed during a protest, in order to prosecute them after the protest.

Reinforcing and building a culture of peaceful protest

360. The right embodied in section 17 of the Constitution is a right to peaceful protest. It clearly does not extend to a right to use violence in protest. Social acceptance of limitations on the type of conduct that is acceptable during protest is crucial for the responsible exercise of human rights. People must cherish democracy and the rule of law which also comprises respect for constitutionally imposed limitations on the right to protest and the role of the police.

361. As noted above, the Panel is aware of evidence that violence is sometimes a 'last resort' in the sense that:

361.1. In communities where there is protest related violence there is often a history of repeated attempts to raise grievances peacefully.[273]

361.2. The experience in many communities is that it is only when they raise their grievances through violent protest that government agencies take notice of their concerns and attempt to resolve them.[274]

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[273] von Holdt, Karl et al. 2011. *The Smoke that Calls. Insurgent citizenship, collective violence and the struggle for a place in the new South Africa*. Centre for the Study of Violence and Reconciliation: Johannesburg and Society, Work and Development Institute, University of the Witwatersrand;

[274] von Holdt, Karl et al. 2011. Op cit; Hannah Dawson. 2014. Youth Politics: Waiting and Envy in a South
African Informal Settlement, Journal of Southern African Studies, 40:4, 861-882, 873.

362. It is clear that there is a need for a holistic approach to engaging with issues of protest in South Africa. Changes in the framework for regulating protest and in the system of public order policing must be accompanied by broader efforts to address the problem of violent protest. The transformation of crowd management in South Africa will be particularly difficult to achieve if it is premised on continued widespread violent protest. The Panel therefore stresses the need for efforts to transform POP to be aligned with efforts to ensure protest is practised peacefully. Factors that obstruct peaceful protest, or undermine confidence in its utility as a way of raising concerns, need to be addressed.

363. As indicated above, one of the factors that appears to feed into the prevalence of violent protest is an absence of responsiveness on the part of the authorities, the fact that communities where protest is violent often have a history of repeated attempts to raise grievances peacefully and that it is only when they raise their grievances through violent protest, that government agencies take notice of their concerns and attempt to resolve them.[275]

363.1. There has been some attention to this issue. For instance, in 2012 the Department of Cooperative Governance and Traditional Affairs (COGTA) sent a circular to municipalities motivating for proactive measures to be taken to address the prevalence of protest. One of the suggested measures was for the speaker and public participation units 'to ensure ongoing engagement between councillors and communities and residents.' Jane Duncan found that municipalities used this as grounds for introducing a system "where protestors were required to show that they had met with, or attempted to meet with, the municipality or the councillor that they wished to march against."[276]

363.2. This example highlights the risk that well-intentioned responses to the issue of protest will be used to obstruct protest, rather than in a manner that supports the exercise of the right to peaceful protest, and seeks to ensure that there is responsiveness to the concerns of protestors.

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[275] von Holdt, Karl et al. 2011. Op cit; Hannah Dawson. 2014. Youth Politics: Waiting and Envy in a South
African Informal Settlement, Journal of Southern African Studies, 40:4, 861-882, 873.
[276] Duncan. Jane. 2016. *Protest Nation*. University of KwaZulu-Natal Press. Pietermaritzburg. pp. 62 and 76.

364. Though much informal protest is peaceful, violence in protest is more commonly associated with informal protest than with formal protest. Informal protest is frequently protest that involves people from the poorest communities who are in the most desperate circumstances. This suggests that there may be a link between the factors identified above (see paragraph 316 and 318 in the section on formal and informal protest), that feed into the prevalence of informal protest, and the prevalence of violence in protest.

365. As indicated, one of the contributing factors to the prevalence of informal protest is likely to be the tendency for municipalities to act in a manner that impedes protest rather than either assisting protestors in resolving their grievances, or supporting them in exercising their rights to protest. This is done by a variety of means including obstructing the notification process, imposing conditions on protests that are not authorised by the RGA, and prohibiting protests in an arbitrary manner.[277]

365.1. One of the factors that contribute to this kind of behaviour by municipalities is where a protest is convened by a group that is alleged to have previously been associated with violence. There may be a reasonable concern in some cases. However, this tendency also highlights the high level of unaccountable discretionary power that is exercised by the responsible officers who are appointed by municipalities. While the evidence indicates that they sometimes act in a manner that is not authorised by the RGA, the RGA itself provides them with wide-ranging powers, including the power to summarily prohibit gatherings. The pressure to exercise this power in a manner that is not consistent with the RGA is likely often to be greatest when protestors wish to protest against the municipality itself. Due to the fact that municipalities are frequently the target of protest, authority exercised by the responsible officer in the RGA process is often characterised by a conflict of interest as the municipalities, their senior officials, and political leaders, are often the target of protest. Even if the responsible officer would like to carry out his or her responsibilities in a manner that is consistent with the spirit envisaged by the

[277] *Ibid.* Mukumba, Tsangadzaome Alexander and Imraan Abdullah. 2017. Enabling the enabler: Using access to information to ensure the right to peaceful protest. SACQ, ISS: Pretoria and Centre of Criminology: Cape Town, 62, 54.

RGA s/he is likely to be vulnerable to pressure from more senior municipal officials.

366. **PANEL RECOMMENDATION 50:** The RGA provisions regarding administrative decision-making in relation to gatherings, including the roles and powers of the responsible officer and the overall function that they perform, need to be reviewed. The RGA should be amended, *inter alia*, to:

366.1. Subject the powers of the responsible officer to prohibit gatherings to clear limitations. Responsible officers should not have the authority to prohibit gatherings without substantive reasons for doing so (as is currently provided in section 3 (2) of the RGA).

366.2. Strengthen the independence of the responsible officer.

366.3. Provide for an alternative process so that, in cases where a protest is directed at a municipality, protestors are not vulnerable to abuse of the RGA process by responsible officers who are not performing their functions impartially.[278]

366.4. Authorise the responsible officer to refer any dispute or grievance that is the focus of the protest to mediation subject to the agreement of the group that is protesting.

367. **PANEL RECOMMENDATION 51:** Steps should be taken to develop understanding about good practice in the manner in which the RGA is administered, and in which responsible officers should perform their functions, in order to improve administration of the RGA.

367.1. Research should be conducted including interviews with responsible officers, with protest convenors, and with police, in order to understand more about the challenges of the responsible officer role.

[278] One proposal in this regard is that the following paragraph should be inserted in section 6 (1) "(c) Whenever the responsible officer is conflicted in his/her decisions related to a notice to hold a gathering where the protest is directed at the relevant local authority or any other reason, and the convenor is not in agreement with the conditions imposed by the responsible officer or a prohibition of the gathering, the authorised member may apply to an appropriate magistrate to set aside such condition or prohibition and the magistrate may refuse or grant that application." (This must be done within the same timeframes of other appeals or reviews provide for in this section).

367.2. A training course and/or handbook should be developed and provided to responsible officers in order to promote understanding of good practice.

368. Panel Recommendation 50 motivates that steps should be taken by the responsible officer to facilitate resolution of any dispute that has given rise to the motivation to protest. The failure of parties to a dispute to engage in meaningful negotiations is a major root cause of what eventually explodes as violent protests. POP units are presently largely engaged with "putting out fires" lit by long-standing unresolved labour disputes, service delivery problems, etc. It is a reactive engagement. While we enjoin the police to engage in negotiations with protesters, there is no mechanism which enjoins the parties to engage in meaningful negotiations to address grievances that give rise to protest. Quite often, fortified, (it is fair to think), by the knowledge that the police would intervene to defeat any acts of protest and attainment of the protesters' goal, the "masters" refuse (as with Lonmin at Marikana), to engage in meaningful negotiations.

369. There are various examples internationally and in South Africa of structures established to provide mediation services. In South Africa there is the Commission for Conciliation, Mediation and Arbitration (CCMA) established in terms of the Labour Relations Act (66 of 1995). In the USA there is a Community Relations Service, established in terms of the Civil Rights Act of 1964 to provide services of mediation, facilitation, training and consultation, in response to allegations of discrimination. It is a proactive mechanism which provides assistance to the State and local authorities in their efforts to prevent violence. It is staffed by members who have fixed term of office and headed up by a Director. [279] The model allows that:

369.1. "Mediation is conducted by impartial conflict resolution specialists and is not used to determine which side is right or wrong.

369.2. The Service may offer its services in cases of disputes, disagreements or difficulties whenever in its judgment peaceful relations among the citizens of the community involved are threatened thereby, and it may offer its services

[279] USA Civil Rights Act of 1964. SEC. 1001. (a) to SEC.1004.

either upon its own motion or upon the request of an appropriate State of local official or other interested person."[280]

370. It is therefore proposed that there should be a conflict resolution system that is dedicated to mediation and conflict resolution to address the grievances that give rise to protest. It may be appropriate to establish a new structure for this purpose or place it under the wing of an existing structure, provided it does not compromise execution of the existing structure's core function. The structure would be based in each province and, in each province, composed of a Director and support service personnel. The support personnel would operate from a single open space office and the Director from chambers which would provide for confidential interaction with parties. Appropriate government departments would be invited to participate in processes that are relevant to their administration.

371. In addition to creating an environment that supports the exercise of the right to protest within the formal framework there should also be a dedicated focus on strengthening proactive conflict resolution in relation to the disputes and grievances that contribute to protest, and potentially to violence. If participation within the formal framework strengthens the potential for resolution of disputes this will itself incentivise such participation.

372. There are also other steps that should be taken to strengthen the culture of peaceful protest. As the above points highlight, it is not only protesting groups that need to be encouraged to adhere to the principles governing the freedom of assembly. The Constitutional Court has said, the freedom of assembly and demonstration is, "a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count."[281] The institutions of state must take seriously the reasons for the existence of this right in relation to their obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights.'[282]

373. On the other hand there is clearly a need to build commitment to the principle that the right to protest needs to be exercised non-violently. Government should

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[280] *Ibid.*
[281] *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13, para 63.
[282] Constitution, 1996. Section 7(2).

therefore more actively address the freedom of peaceful assembly and why, when, and where restrictions are legitimate and reasonable with respect to the rights of third persons and public interests. Efforts in this regard should seek to stimulate the interaction of the police, human rights organisations and society generally so that a better understanding of practical issues as well as a real dialogue can take place. Such efforts must focus on the need to reduce violent protest as complementary to all efforts to re-civilianise SAPS and to preserve the doctrine of negotiated crowd management. As discussed below this doctrine can only effectively be practised if both the police and the protesters are willing to, and capable of, adequately communicating with each other, cooperating, and sharing responsibilities.

374. **PANEL RECOMMENDATION 52:** There should be a whole of government and cross-society initiative, convened by the most relevant ministry such as COGTA to support and strengthen the culture of peaceful protest and to strengthen local-level mechanisms for problem solving and the management of conflict. This should include:

374.1. A focus on the role of the responsible officers to ensure that high standards are applied by them in their administration of the RGA and in facilitating pro-active conflict resolution (see Panel Recommendations 50 and 51);

374.2. Establishing a new mechanism, or strengthening existing mechanisms, to ensure that protesting groups have access to a system for mediation and conflict resolution.

374.3. Ensuring that the various government departments adopt common strategies and share joint programming (including budgets), in realising the vision of the NDP 2030 as well as being aligned to the White Paper on Safety and Security in order to support and strengthen the culture of peaceful protest. The SAPS would have an important role in this regard given the existing avenues of engagement available within the SAPS for the prevention and resolution of community-based conflict. Other role-players might include the South African Local Government Association (SALGA), the South African Cities Network, the Department of Education, municipalities, the South African

Human Rights Commission (SAHRC), universities, civil society and media groups, and others.

Role of the police in supporting a culture of peaceful protest

375. The SAPS would undoubtedly support the efforts referred to above. Related to their responsibilities for policing protest SAPS clearly have an interest in the proactive resolution of conflict direct responsibility for supporting efforts to maintain the peaceful nature of protest.

376. This issue is discussed extensively below *inter alia,* in relation to:

376.1. The recommendation that the SAPS adopt a crowd management doctrine that guides the SAPS in supporting and respecting the right to peaceful assembly and recommendations that are made to support this doctrine including recommendations for strengthening negotiation capabilities.

376.2. Proposals made by the Panel in relation to the internal regulatory framework for crowd management (currently embodied in National Instruction 4 of 2014).

376.3. The SAPS should actively communicate about its framework for and approach to the policing of assemblies through a variety of means, including published material.

The role of the media

377. The media also needs to be recognised as part of the reality of protest—not only as a vehicle for transporting certain information on public protest, but also as influencing the dynamics of protest situations and subsequent responses to them. Media footage has for instance been one of the primary resources relied on for reconstructing the events at Marikana on the 16th of August 2012. Media footage may in some circumstances be a resource which assists in holding people accountable—it may help to identify violent or other criminal actions by protesters and police officers. It is also believed that the presence of the media sometimes serves to restrain police from using force inappropriately.

378. The presence of the media may in some situations enhance difficulties for police in managing the situation. In particular, the presence of photographers or television cameras sometimes apparently serves to stimulate more 'demonstrative' conduct by people involved in a gathering. Interpreting the ethical issues involved is not straightforward. Protest often serves as a voice for the marginalised and through covering protest, the media may be supporting marginalised communities in being heard. In May 2016 a ban was imposed by the South African Broadcasting Authority on broadcasting footage of violent protests.[283] However, the Independent Communications Authority of South Africa found this to be contrary to its licensing agreement and the Broadcasting Act. In July 2016 the North Gauteng High Court granted an interdict against the SABC's ban.[284] Notwithstanding the SABC ban the broader pattern is that there is an apparent bias in media coverage towards focusing on violent protest whilst largely ignoring much protest that is peaceful.[285] This type of bias feeds into the pattern referred to above, which is that protest is unlikely to have a public impact unless it is violent. It may also feed into the perception that protest must be violent if it is going to receive media attention. There is therefore a need for media organisations to recognise that they are also a role-player in shaping the protest environment.

Enforcing the law against violent protest

379. The Panel has put forward a broad framework for strengthening the culture of peaceful protest. At the same time the Panel recognises that violent actions that take place during protest, whether targeted at people, or involving the destruction of property, are criminal offences. In considering the role of law enforcement against violent protest, the Panel notes the above discussion. Sometimes violent protest is preceded by considerable effort to have concerns addressed. The consequence of prosecuting and convicting people, particularly where they are already poor and marginalised, is often to worsen the prospects for themselves and their families, while the concerns that gave rise to the protest remain

[283] https://www.iol.co.za/news/crime-courts/sabc-bans-broadcast-of-violent-protests-2026971.
[284] https://www.ecr.co.za/news/news/sabc-agrees-lift-violent-protest-ban/.
[285] https://www.dailymaverick.co.za/article/2017-11-27-op-ed-riot-porn-and-other-problems-with-political-debate-in-south-africa-today/#.Wjv02UmWb.

unaddressed. Marginalised young people are often prominent in violent protest and their motivations in this regard may reflect their sense of commitment to their community though it may also reflect a disposition towards violence and disrespect for the law.

380. Law enforcement against violent protestors has been a key part of the SAPS and government strategy for responding to the problem of violent protest. In his 2013 State of the Nation Address, President Zuma "instructed the Justice, Crime Prevention and Security Cluster (JCPS) to put measures in place at National, Provincial and Local level to ensure that any incidents of violent protest are acted upon, investigated and prosecuted."[286] Outcome 3 of the 2014-2019 Medium Term Strategic Framework (MTSF), Sub-outcome 5 (ensure domestic stability) indicates that one of the principal actions to be taken is to 'improve investigation and prosecution of criminal and violent conduct in public protest'.[287] According to a 2014 SAPS presentation, elements of the strategy were supposed to include:

380.1. Enhanced cooperation between the SAPS, NPA and DoJCD in terms of prosecutions;

380.2. The review of all dockets pertaining to public violence;

380.3. The imposition of prosecutions in all cases where a *prima facie* case is proved;

380.4. The allocation of a dedicated investigating capacity to each POP unit to investigate all case dockets that emanate from 'unrest related or protest action incidents'[288]; and

380.5. The procurement of video cameras to facilitate collection of evidence against persons involved in violence.

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[286] SAPS, Enhancing of the Public Order Policing Capacity Within the SAPS, Presentation to Portfolio Committee for Police, 3 September 2014, 4 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140903saps.pdf.

[287] See page 15 of the document available at http://www.dpme.gov.za/keyfocusareas/outcomesSite/Pages/the-Outcomes-Delivery-Agreements.aspx .

[288] SAPS. 2014. *Enhancing of the Public Order Policing Capacity Within the SAPS.*. Presentation to Portfolio Committee for Police, 3 September 2014. slides, 4 and 24. See http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140903saps.pdf.

381. The current SAPS Incident Reporting Information System (IRIS) statistics suggest that levels of violent protest are increasing. There is therefore no evidence that this strategy is working. The Panel was not in a position to assess the reasons for this. It is not clear whether the strategy has been implemented purposefully. Due to the fact that people who are arrested often enjoy public support there may be little enthusiasm for these prosecutions amongst the responsible state officials. The process of gathering and presenting evidence on these cases may also often be very time consuming.[289]

382. The Panel has proposed a range of measures that focus on strengthening the culture of peaceful protest, including conflict resolution mechanisms as well as a commitment to the principle of negotiated crowd management, and believes that the primary emphasis of government should be on these measures. However, the Panel recognises that law enforcement has a role to play in addressing the problem of violent protest.

383. The South African criminal justice system has a repertoire of different mechanisms for dealing with people who are responsible for criminal acts. In addition to formal criminal penalties, these include the mechanisms provided for in the Child Justice Act (No. 75 of 2008) and systems of diversion. In cases that come before the court concerning protest related violence it may be appropriate to give particular consideration to some of these 'alternative' remedies.

384. **PANEL RECOMMENDATION 53:** Law enforcement measures related to violent protest should be regarded as most applicable where:

384.1. Protest violence involves violence against members of the public or substantial damage to property; or

384.2. Groups are repeatedly involved in violent protests; or

384.3. In broad 'civil disturbances' in which there is widespread destruction of property.

[289] See also Skelton, Anne and Martin Nsibirwa. 2016.,*#Schools on Fire: Criminal justice responses to protests that impede the right to basic education*. SACQ, ISS: Pretoria and Centre of Criminology: Cape Town. 62, pp. 39 – 50.

385. During riots in England in 2011 arrangements were made for courts to sit over extended hours including over weekends, in order to process the high volume of cases arising from the fact that large numbers of people had been arrested.

386. PANEL RECOMMENDATION 54: In situations where there is a very high volume of criminal cases it may require that courts sit for additional hours, initially for purposes of addressing bail applications but also to expedite the hearing of cases.

387. The usefulness of such processes would ultimately depend on whether police are able to provide evidence that the people who have been arrested may reasonably be suspected of offences. If large scale arrests by police are not supported by an effective system for collecting and recording evidence, it should be acknowledged that there is little point in bringing these cases to court.

A complex protest environment

388. The framework for protest categorisation proposed earlier in the report (see the discussion on types of protest and Panel Recommendation 47) illustrates the point that protest situations faced by the police in South Africa are varied in nature. In discussing protest, and official responses to it, it is not helpful to use a binary distinction between either 'peaceful' or 'violent protest'. A key point of emphasis in this report is that because some individuals in a protest are violent, this should not necessarily result in classifying the entire protest as not peaceful.

389. The list of categories provided are a useful tool that can be used by the SAPS to analyse the current protest environment. However, on their own they are not adequate for analysis of the protest environment. Some of the other variables in this environment include:

389.1. Characteristics of the organising structure behind protests may vary: it may be necessary to understand a protest event as involving different networks of individuals rather than only in terms of a hierarchy. For instance, during the Fees Must Fall protests in 2016 there were a number of different 'factions' and leadership groups at some campuses.[290]

[290] Habib, Adam. 2016. The politics of spectacle: Reflections on the 2016 student protest. *Daily Maverick*, 5 December.

389.2. Ability of protestors to adapt and innovate, for instance, by using certain equipment (corrugated iron, mattresses) or wearing thick clothing and masks, to protect themselves against police weapons. There may be varying levels of tactical sophistication involved in protest. Protestors may have observed police methods and use specific techniques to outwit or outmanoeuvre them.

389.3. Carrying of arms by some protestors: at Marikana there was a gathering of up to 3000 people. A significant number of members of the crowd (sometimes numbered at about 300) were armed variously with sticks, assegais/spears, machetes, and in some cases firearms.

389.4. The nature of violence engaged in by protestors: some of the forms that this has been known to take in South Africa include:

389.4.1. Barricades and associated violence including throwing of rocks and stones at approaching vehicles, etc;

389.4.2. Violence against police of various kinds;

389.4.3. Opportunistic looting and attacks on traders;

389.4.4. Burning of buildings; and

389.4.5. In large scale civil disturbances, violence may be distributed over a large area with people, buildings or vehicles being attacked in a number of different locations.

389.5. Criminal acts apparently associated with some participants in the protest: at Marikana, for instance, seven people, including two SAPS members, had been killed by people known or believed to have been associated with the strike. Similarly, during student protests there have been acts of arson at various universities.

389.6. Static or mobile: the conventional image of protest is of a crowd gathered at a single location or moving in a single procession. However, one of the attributes of many protests is that crowds are mobile and that the crowd may become highly fragmented in the course of the event. After being dispersed by police in one place, they may move to another. Rather than being concentrated in one group, groups of individuals associated with the protest may be dispersed over a wide area.

389.6.1. This is also a feature of crowds internationally. For instance, a British government report on the riots of 2011 describes how, “simple dispersal was not always effective with highly mobile crowds forming (enabled by communications including the use of social media) and then dissipating rapidly. Indeed, in some areas dispersal tactics simply displaced looting to the fringes of main retail areas—in hindsight spreading the problem rather than resolving it.” Almost all of the commanders interviewed recognised that arresting suspects was the only possible response once the looting had started in earnest.[291]

389.7. They may also seek to engage with the police in a confrontational manner.

389.8. As illustrated by the above passage a common aspect of protests and similar crowd events is the use of social media as a tool for communication between crowd members.

389.9. Other variable features may include the duration, and the type of terrain (urban, informal settlements, rural etc.) in which the protest takes place.

389.10. Another variable is the involvement of other groups in responding to a protest, including private security groups, municipal or traffic police, or other SAPS units.

390. As indicated in this report, barricades are frequently a feature of protests in South Africa and Public Order Policing training is to some degree focused on tactics for responding to these. In this respect POP training is designed to respond to one of the principal features of protest. As discussed further below, a consistent problem is that, even in these cases, POP members are not deployed in sufficient numbers to be able to implement the techniques that they are trained in. At a very basic level there is a lack of alignment between the training that SAPS members receive and the reality of how they are deployed to respond to these situations.

391. This is only one of the challenges. The more general point is that protests are not necessarily static ‘set piece events’ in which police can simply apply

[291] HMIC. 2011b. p. 60.

established procedures to resolve them. Protest in South Africa is not a uniform phenomenon.

391.1. Protest may be peaceful but still be informal and/or disruptive and/or unlawful. Protest may also be characterised by violence, whether this is engaged in by a relatively isolated element within the crowd, or is more widespread. In some cases peaceful protests turn violent. In other cases protests start violently. Violence may involve a limited number of individuals or be a general feature of a protest or crowd event.

391.2. Police therefore have to be able to respond to a variety of protest and crowd situations including some where crowds are mobile and may be volatile, violent, confrontational, organised, violent and/or armed.

392. **PANEL RECOMMENDATION 55:** Taking into account the complex nature of the protest environment and the fluidity of protest situations, the ability of the SAPS to respond to protest in a manner which is consistent with Constitutional principles, will depend to a significant degree on SAPS being able to develop a much greater degree of flexibility and adaptability. Analysis of protest for the purposes of police planning has to be based on recognition of this complex character. The development of POP capabilities and systems for managing and responding to protest need to be based on a recognition of the diverse and fluid character of this environment.

Current SAPS data on protest

393. One of the recommendations that the Panel is requested to consider is the recommendation that:

393.1. “Government needs at all times to recognise the importance of maintaining a public order policing capacity that is appropriately staffed and equipped and is maintained in an appropriate state of readiness. The public order policing capacity of the SAPS needs to be brought up to a strength that is appropriate in terms of the scale of the public order policing problem. For this purpose government needs to be able to assess the demand for specialised public order policing and to adjust resource allocations in this

regard relative to reasonable projections of the scale at which this type of capacity needs to be maintained."[292]

394. In its annual reports the SAPS provides data on the number of 'peaceful' and 'unrest' crowd related incidents each year (see Table 2).

395. It should be noted that there are sometimes significant variations in the figures that are reported. For instance, the most recent (2016/17) annual report provides the same figures as those provided in the 2015/16 report. As indicated in Table 3, those provided in the latest annual report for the two years prior to 2015/16 are not consistent with figures in the 2013/14, 2014/15 and 2015/16 reports.

395.1. For the 2014/15 year there is a discrepancy of close to a thousand (914) between the figure provided in the latest annual report and that provided in earlier annual reports. In the earlier annual report the total number of crowd management events in 2014/15 was 14 740, a total greater than that recorded in any subsequent year. However, in the 2016/17 annual report the total number of crowd management events in the two most recent years (14 693 in both years) was greater than the figure of 13 826 provided for in 2014/15.

395.2. For the 2013/13 year there is a difference of 676 'in the number of peaceful incidents reported' in the reports released in 2014, 2015 and 2016 as compared to those reported in 2017, with a smaller number of peaceful incidents reported in 2017.

395.3. There may be a reasonable explanation for these differences. The Panel merely points this out in order to note that the question about 'trends' in crowd management is not straightforward even if SAPS data is taken at face value. The interpretation of 'trends' will depend on what data is used and how it is analysed.

[292] Bruce. Recommendation 2 (15).

Table 2: SAPS data on crowd incidents from 2001 to 2016-17.[293]

	Peaceful crowd related incidents	Unrest crowd related incidents	Total Incidents
2001-2002	6840	569	7409
2002-2003	6347	578	6925
2003-2004	7568	550	8118
2004-2005	7382	622	8004
2005-2006	9809	954	10763
2006-2007	8703	743	9446
2007-2008	6431	705	7136
2008-2009	6125	718	6843
2009-2010	7913	994	8907
2010-2011	11680	971	12651
2011-2012	10744	1194	11938
2012-2013	10517	1882	12399
2013-2014	10992	1998	12990
2014-2015	11169	2657	13826
2015-2016	11151	3542	14693
2016-2017	10978	3715	14693

[293] Data compiled from: P Alexander 'Protests and police statistics: some commentary' 23 March 2012, available at http://www.amandla.org.za/general-downloads/protests-and-police-statistics, accessed 11 August 2014; SAPS *Annual Report 2011-2012* (2012) 84, available at *http://www.saps.gov.za/about/stratframework/annual_report/2011_2012/visible_policing.*pdf, accessed 11 August 2014; SAPS *Annual Report 2012-2013* (2013) 101, available at http://www.saps.gov.za/about/stratframework/annual_report/2012_2013/ar2013_02_partb.pdf, accessed 11 August 2014; SAPS Annual Report 2013-2014 (2014) 142, available at https://www.saps.gov.za/about/stratframework/annual_report/2013_2014/ar2014_02_partb.pdf accessed 13 December 2017; SAPS Annual Report 2014-2015 (2015) 182, available at https://www.saps.gov.za/about/stratframework/annual_report/2014_2015/SAPS_AR_2014-15_for_viewing.pdf accessed 13 December 2017; SAPS Annual Report 2015-2016 (2016) 153, available at https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf accessed 13 December 2017; South African Police Service Annual Report 2016-2017 (2017) 142, available at https://www.saps.gov.za/about/stratframework/annual_report/2016_2017/part_b3.pdf; D Bruce, G Newham and T Masuku In Service of the People's Democracy - An Assessment of the SAPS (2007) 30.

Table 3: Inconsistencies in figures between different reports provided by the SAPS

	Earlier annual reports			2016-2017 Annual Report		
	Peaceful	**Unrest**	**Total**	**Peaceful**	**Unrest**	**Total**
2013-2014[294]	11668	1907	13575	10992	1998	12990
2014-2015[295]	12451	2289	14740	11169	2657	13826

396. The IRIS system is a complex system and all aspects of it are not discussed in this report. The critical issue that this report focuses on is whether the IRIS system supports the SAPS in analysing the protest environment.

397. Some insight into the nature of the data on the IRIS system was provided in research by the Social Change Research Unit (SCRU) at University of Johannesburg (UJ). The research analysed a random sample from IRIS data covering all incidents in the crowd management 'peaceful' and 'unrest' categories over the 17 calendar years from 1997 to 2013. As a result of this analysis the SCRU has been able to make findings on the number of protests reflected in the IRIS data for 'peaceful' and 'unrest' crowd incidents. This indicates that during the period 1997 to 2013:

397.1. 41 per cent of incidents recorded in the 'crowd peaceful' category were incidents of protest.

397.2. 69 per cent of incidents in the 'crowd unrest' category were incidents of protest.

397.3. The classification of an incident as 'unrest' does not necessarily mean that it involved violence. Some of the incidents in the 'peaceful' category on the other hand, in fact involved some form of violence.

397.4. Of the total number of recorded incidents, 43 per cent were incidents of protest.

[294] Figures associated with the first total (13575) are provided in the SAPS Annual Reports 2013/14, 2014/15 and 2015/16.
[295] Figures associated with the first total (14470) are provided in the SAPS Annual Reports 2014/15 and 2015/16.

397.5. There are substantial variations in the percentage of protests amongst the total number of crowd incidents in each year.

398. One of the issues that is highlighted by this analysis is the basis for the distinction between the terms 'peaceful' and 'unrest'. The UJ research concluded that, rather than the presence or absence of violence, the main guideline that is applied in classifying incidents as incidents of 'unrest' is whether there has been some form of police intervention, though this is applied inconsistently. The classification of an incident as an incident of 'unrest' does not necessarily imply that the incident was characterised by violence.[296]

399. The SAPS data on 'crowd incidents' comes from a system known as the Incident Reporting Information System. Each POP unit has dedicated personnel who are responsible for recording information on the IRIS system for each crowd incident attended by POP units, as well as other incidents that they respond to or activities that they are engaged in. Some incidents attended by other SAPS units are also recorded on the IRIS system.

400. The SCRU analysis is based on data from the IRIS system. In order to generate the information the SCRU had to carry out a case by case analysis of a sample of incidents from the IRIS. Researchers examined the detailed notes that form part of each entry. Due to the manner in which the data system has been constructed protest incidents can only be distinguished from other incidents through analysis of the narrative account provided in the 'notes' section in this manner. The information on number of protests cannot be generated from the IRIS system itself through inputting a 'data request'.

401. As highlighted above, the crowd management environment is a complex one. The IRIS system currently has a large number of data entry categories and there is a lot of useful information on the system but the system has limited utility as a planning and risk assessment tool. The investment of resources in POP and management of protest in South Africa needs to be based on much better information. In order to improve its ability to respond to the crowd management

[296] Peter Alexander, Carin Runciman and Boitumelo Maruping, South African Police Service Data on Crowd Incidents: A preliminary analysis, Social Change Research Unit, University of Johannesburg, 2015, 19-20.

situation, the SAPS needs access to appropriate and timely information on trends in crowd management. In addition, resource allocation, planning, and risk assessment need to be based on more detailed and accurate information.

402. According to the SAPS, the IRIS system is primarily used in order to provide performance information to the Auditor General. In the view of the Panel it would be helpful to build on the IRIS system in order to provide a broad source of data that can inform planning. This would enable the SAPS to better understand trends and patterns in the crowd management environment and thereby enhance the ability of POP to respond in a timely and appropriate way to crowd management situations.

The report has also motivated that a strategy for addressing the problem of violence in protest should focus, in part, on 'informal protest'. In order to evaluate the effectiveness of this strategy it will be important to have information on levels of informal protest, and the relationship between informal protest and violence. Additional topics of interest that would inform efforts to manage protest effectively would include: factors contributing to protest and the characteristics of protest at protest 'hot spots'; reasons for adherence to or lack of adherence to Regulation of Gatherings Act processes by protest leaders; precipitators and characteristics of disorderly and violent protests.

403. **PANEL RECOMMENDATION 56:** Due to the scale of the phenomenon of protest and the challenge that it presents to the SAPS:

403.1. It is important for the SAPS to urgently improve the quality of its information on protests and to be able to map trends in protest over time. The SAPS should urgently evaluate if the IRIS system can be modified to meet this need or develop a new system for addressing this.

403.2. Changes in the system and improvements in the quality of information will also require focused attention on the quality of data entry including re-training of responsible personnel.

404. **PANEL RECOMMENDATION 57:** Research should also be used more proactively as a tool for planning to answer critical questions relevant to the challenges of policing protest and the demand for public order policing (see also Panel Recommendation 49).

Deaths as a result of police action during crowd management incidents

405. There are two fatal crowd management events that have established themselves as a prominent part of the history of policing in post-apartheid South Africa. One of these is the killing of Andries Tatane in Ficksburg in Free State province on the 13 April 2011. Seven POP unit members were charged for the killing but acquitted in March 2013. The basis for the acquittal was that none of the accused could be linked directly to the killing of Tatane, though the magistrate is reported to have said that, in his opinion, 'the violence used to stop Tatane was disproportionate to his actions.'[297]

406. The other crowd management incident that has a very prominent place in the recent history of South Africa is the incident on the 16th of August 2012 at Marikana in which 34 strikers were killed. As shown above, the available evidence indicates that the SAPS members responsible for these deaths were mostly members of the TRT, NIU and K9 units, though members of POP units may have been responsible for some of the fatalities.[298] The Marikana Commission concluded that there was the possibility that SAPS members had used unjustified force during these killings. [299] There is no prosecution that has been implemented as yet for any of them.

407. It may be noted that there have been some deaths in crowd management incidents for which SAPS members have been convicted in recent years:

407.1. In January 2016 a member of the SAPS was convicted on three counts of murder and two counts of attempted murder for three deaths and injuries to two people during a crowd management incidents at Mothutlung in Brits in January 2014[300] (The convicted SAPS member was not implicated in a fourth death that occurred during these protests).

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[297] Kristen van Schie, Riddle of crumbled Tatane case, 2 April 2013, The Star, http://www.iol.co.za/the-star/riddle-of-crumbled-tatane-case-1.1494349#.UVq5YheKo7o ; https://mg.co.za/article/2013-03-28-tatane-cops-acquitted-after-messy-case.

[298] Along with 47 members of the TRT one member of POP also opened fire on the strikers with an R5 at Scene 1 (Marikana Commission, 248-249, paragraphs 28-29). See also heads of argument of Families regarding shooting of Mr Mkhonjwa at Scene 2.

[299] Provide REFS for Scene 1 and Scene 2.

[300] https://www.news24.com/SouthAfrica/News/cop-guilty-of-murdering-protesters-20160121.

407.2. In July 2017 a SAPS member was convicted of murder for the killing of a 17-year-old during a housing protest in Cato Crest, Cato Manor in 2013.[301]

408. Deaths have continued to occur in crowd management incidents though the available evidence is that fatal incidents are less frequent than they were during the 2012/2014 period (See Table 4).

Table 4: IPID statistics on number of crowd incidents in which there have been deaths as a result of police action (2012-2017).[302]

	2012-13	2013-14	2014-15	2015-16	2016-17
Number of crowd incidents in which deaths occurred as a result of police action[303]	15 (of which one is the incident on 13 August and one is the incident on 16th August at Marikana)	11 (of which one is the Mothutlung incident in which 4 people were killed)	8	4	5

409. The Andries Tatane and Marikana incidents focused considerable attention on the question of Public Order Policing in South Africa and fed into perceptions that public order policing is frequently carried out in a heavy handed manner.

410. The use of live ammunition by police was responsible for all of the deaths at Marikana and has been responsible for some deaths in other crowd management incidents.

[301] https://www.iol.co.za/dailynews/cop-awaits-sentence-after-killing-teenager-10327141.
[302] IPID was established on 1 April 2012 so there are no IPID figures on deaths in crowd management incidents prior to the 2012-13 year.
[303] Does not necessarily reflect total number as more than one person may be killed in an incident.

410.1. At Marikana, virtually all of the deaths were as a result of the use of R5 rifles by the police, or other rifles capable of automatic gunfire. The use of R5s in crowd management is discussed later in this report.

410.2. Shotgun ammunition was also used at Marikana and by the SAPS member who was convicted for the three killings in January 2014 in Mothutlung.

410.3. The use of live ammunition was also responsible for the death of the 17 year old girl who was killed in Cato Crest in September 2013 and also alleged to have been the cause of death of a 16 year old boy killed in Standerton in May 2017.[304]

411. Currently, the main cause of fatalities and injuries in crowd management incidents is the use of less-lethal-weapons including, in particular, rubber bullets, but also teargas and stun grenades. The death of Andries Tatane was primarily the result of rubber bullets fired at close range. Issues to do with the use of these weapons are discussed later in this report.

412. A cause for concern is evidence that there are a number of children amongst fatalities as a result of use of force by police in crowd management incidents. Notably in 2017, three of the deaths that are alleged to have resulted from police use of force in crowd management incidents, were those of children. These included:

412.1. An 11 year old boy, Karabo Khumalo, who died on the 7th of February 2017 after allegedly being hit on the head by a rubber bullet during a protest in Bela- Bela.[305]

412.2. The 16 year old boy killed in Standerton in May 2017 (referred to above), allegedly as a result of the use of live ammunition.

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[304] http://www.702.co.za/articles/256888/listen-cop-allegedly-shot-at-standerton-protesters-killing-teen-16 ; http://ewn.co.za/2017/05/19/boy-16-shot-dead-in-mpumalanga-protest.

[305] http://www.diepos.co.za/articles/news/40893/2017-02-17/young-child-dies-during-protests-at-bela-bela?&p890=3.

412.3. The death of two month old Jayden Khoza in the eThekwini metropolitan on the 29th of May 2017 was alleged to have been the result of asphyxiation caused by teargas.[306]

412.4. The deaths in Bela-Bela and eThekwini highlight an issue, addressed further in this report, about the lethal consequences of less-lethal-weapons. They also reflect the fact, documented internationally, that young children, and particularly infants, are at greater risk of suffering fatal consequences as a result of the use of these weapons. This motivates that POP members, or others who are using these weapons, should take additional care when using them to ensure that young children are not adversely affected by them. Elderly people may also be especially vulnerable to adverse effects as a result of the use of these weapons. The risks to children and elderly people may be accentuated by the problems of accuracy associated with the use of rubber bullets and the inherently indiscriminate nature of weapons such as teargas and stun grenades (these issues are discussed further below).

413. **PANEL RECOMMENDATION 58:** Training should emphasise that POP members should take care to minimise the risk that vulnerable groups such as young children, people with disabilities, and elderly people, can be adversely affected by the use of LLWs.

Other allegations of excessive force

414. As indicated, with a few exceptions, notably at Marikana, most fatalities in crowd management incidents are the result of the use or misuse of LLWs. While there is a risk of fatalities from LLWs, the vast majority of uses of these weapons do not result in fatalities. As implied by their name, these weapons are much less likely to be fatal than firearms using live ammunition. Nevertheless, while the available information is not sufficient to clarify how broad this problem is, the Panel holds the view that LLWs continue to be used in an inappropriate manner in the management of crowds in South Africa. A focus on deaths during crowd

[306] http://www.dailysun.co.za/News/National/teargas-killed-my-baby-boy-20170531; https://www.timeslive.co.za/news/south-africa/2017-05-30-baby-dies-after-police-tear-gas-hit/; https://www.timeslive.co.za/news/south-africa/2017-06-01-conflicting-reports-over-baby-jayden-khozas-death/ .

management may obscure the main problem associated with the use of force in crowd management.

415. The Panel also received a submission from the Socio-Economic Rights Institute (SERI), a South African NGO, which documented alleged incidents of excessive and inappropriate use of LLWs during protests at Wits University in October 2016. In addition to these allegations, other alleged instances of excessive force during the Wits protests, are also reported in a publication released in 2017 by SERI.[307]

416. IPID statistics also indicate that complaints of 'assaults' during crowd management incidents have increased in recent years. See Table 5. IPID statistics however cannot be taken as representative of the problem. On the one hand, the cases reported on are allegations that unjustified force was used, and some allegations may not be justified. On the other hand, many people who are affected by the use of force during crowd management incidents do not report this to IPID, even when they believe they have been targeted unfairly.

Table 5: IPID statistics on complaints of assault related to crowd management incidents (2012/13 to2016/17).[308]

	2012-13	2013-14	2014-15	2015-16	2016-17
Complaints of 'assaults' related to crowd management	6	2	30	27	42

417. The Panel makes note of the fact that Public Order Policing is frequently carried out under difficult circumstances. In many cases POP members are trying to manage difficult and sometimes dangerous situations in a manner that conforms to their training and the applicable laws and standing orders. The fact that people are killed or injured during a crowd management incident does not, in itself, demonstrate that the police acted inappropriately, though it may point to the

[307] Double Harm.
[308] IPID was established on 1 April 2012 so there are no IPID figures on deaths in crowd management incidents prior to the 2012/13 year.

possibility that excessive and unjustified force was used. The Panel believes that there continues to be grounds for concern about unjustified force being used.

418. Some cases of unjustified force may be a consequence of deliberate and conscious violation of the law and the SAPS national instruction governing the use of force in crowd management. One of the major themes that emerged from the Panel's visits to various POP units was that various features of the current crowd management environment also contribute to a major reliance on the use of LLWs. These features include:

418.1. The high levels of protest and notably of violent protest and other complex features of the crowd management environment, as highlighted above.

418.2. The fact that POP members are frequently deployed to respond to these situations in very small numbers. As a result, their ability to make use of some of the techniques that they are trained in, is limited.

419. These features may also be exacerbated by the fact that POP units suffer from weaknesses in terms of level of training, including inadequate training of Section and Platoon commanders.

420. The tendency of POP units to rely on the use of force, and factors contributing thereto, are highlighted in a 2016 report from the Civilian Secretariat for Police Service. Findings based on interviews with POP members included that:

420.1. "Proper policing strategies and tactics cannot be implemented by the POP Unit due to a lack of human and physical resources. Members are required to deploy to crowd management situations with minimal resources. The crowd management deployments are contrary to the tactics and techniques that POP members are trained to execute, resulting in increased use of force to compensate for the shortage of resources.

420.2. Command and control is a challenge at the units mainly because members appointed into senior positions do not possess the necessary knowledge, skills, and experience required of the job and to give the proper commands.

420.3. The integration of other law enforcement agencies and divisions of SAPS such as Municipal Police, Private Security, TRT and VISPOL, into the public order policing space has created challenges with regards to command and control.

420.4. The deployment strategies of POP are not consistent with POP policies, which have resulted in the increased use of force. For example, in a KZN student protest incident, two POP members were deployed to police a crowd of 200 protesting students at the University of Kwa-Zulu Natal for the Fees Must Fall Campaign in February 2016.[309] This incident highlighted the unrealistic demands placed on POP members which resulted in their inability to effectively implement their operational protocols.

420.5. There is a lack of modernisation and professionalisation of the POP units, and no advancements with regards to international trends and developments. The only advancements were introduced during the 2010 FIFA World Cup, but these were not sustained and the new equipment is not serviceable.

420.6. The level of violent protests has been steadily increasing and the burden this has created on policing is not being adequately addressed by SAPS management. Additionally, the change in attitude and behaviour of protestors has not been dealt with by government leaders.

420.7. Members raised concerns regarding the lack of implementation of the recruitment and selection process of POP members, resulting in the recruitment and appointment of members with less knowledge and inexperience.

420.8. The formal and in-service training provided is not addressing the operational needs of POP. The training tactics and techniques cannot be

[309] Information provided by SAPS members of the Panel was that, in order to avoid delays, POP members are sometimes sent to a situation to assess and await the reinforcement of other POP members who are involved at other events. These members may be sent to reinforce SAPS VISPOL members who are sent to the scene with a view to containing it rather than to resolve the situation. However for purposes of intervention the minimum number is supposed to be a section (8 members) or a platoon.

implemented at ground level due to lack of resources and the will of senior members.

420.9. Members indicated that political interference in policing is negatively impacting on command and control of POP as they are required to act against their operational doctrines to comply with the political requests.

420.10. Members are choosing the adoption of the easy approach to resolving issues. They are resorting to using stun grenades and rubber bullets to disperse crowds, rather than the long drawn out process of management and negotiation as prescribed by the Regulations of Gatherings Act."[310]

421. These issues are revisited in some detail later in this report.

Part C: The law regarding protest: the Regulation of Gatherings Act (RGA)

422. The RGA regulates the holding of public gatherings and demonstrations. It is intended to concretise the freedom to assemble peacefully by prescribing the procedure that should be respected for this right to be exercised. As this freedom is not absolute, it must be balanced against the fundamental rights and interests of others. In order to achieve this purpose, the RGA provides municipalities and the police with certain powers. Hence, the RGA is supposed to provide the parameters for how protest is conducted and how municipalities and the police manage and control it.

423. In the aftermath of apartheid the RGA represented a giant leap forward in promoting conditions conducive to the exercise of the right to freedom of assembly in South Africa. Informed by the findings of the Goldstone Commission[311] the Act has provided a valuable framework for facilitating peaceful protest whilst attempting to balance this with acknowledgment of the rights of others.

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[310] Civilian Secretariat for Police Service. pp. 40-42.
[311] Comp. P.B. Heymann, Towards Peaceful Protest in South Africa, HSRC Publishers: Pretoria, 1992.

424. It is important to remember that the RGA was enacted at a similar time to the Interim Constitution of 1993.[312] The RGA was therefore enacted well before the 1996 Constitution and has only been amended in a very limited way since it was passed. It continues to contain provisions which are anachronisms by Constitutional standards. There is clearly now a need to amend the RGA so that it more clearly serves the purpose for which it was introduced, above all enabling South Africans to enjoy the right to freedom of assembly in an optimal way.

425. Not only is there local experience which helps us critically reflect on the limitations of the RGA, but international understanding of the standards that should be applied in facilitating enjoyment of the right to freedom of assembly has also progressed. In engaging with questions about the strengths and limitations of the RGA the Panel has taken into account ongoing public debate on this piece of legislation as well as recent and current cases dealing with the interpretation of the RGA and the Constitutionality of its provisions that have been or are before the Courts.

426. The RGA is undoubtedly the most important piece of legislation in South Africa for crowd management operations. As indicated, in this report this term is understood in a broad sense to comprise both the policing of peaceful assemblies and violent protests, not or no longer protected by the freedom of peaceful and unarmed assembly. It provides the basis for other standards and regulations, such as the SAPS National Instruction 4 of 2014 and the National Municipal Policing Standard (NMPS) of 2008, both of which are supposed to guide the conduct of crowd management. Both the government and the people of South Africa have an interest in having an up-to-date law on this subject. In line with its terms of reference, the Panel has consulted international standards and best practice in order to identify inconsistencies, gaps, and possible solutions for such shortcomings. The following analysis highlights particular areas of concern.

427. As noted above crowd events other than protests are regulated by the Safety at Sports and Recreational Events Act (No. 2 of 2010)(SASREA) which is intended

[312] The Interim Constitution is Act 200 of 1993 and was assented to by the President on the 28th of January 1994. The RGA is Act 205 of 1993 and was assented to by the President on the 14th of January 1994.

to "provide for measures to safeguard the physical well-being and safety of persons and property at sports, recreational, religious, cultural, exhibitional, organisational or similar events held at stadiums, venues or along a route."[313]

The framework provided by the RGA for the regulation of protest

The definitions of 'demonstration' and 'gathering'

428. Section 17 of the Constitution, 1996, states that, "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions." Related to the fact that it was passed prior to the Constitution, and has not been significantly amended since it was initially passed, there is no explicit reference in the RGA to section 17 of the Constitution. Section 17 should undoubtedly be foundational to the regulation of the freedom of assembly in South Africa.

429. As noted above, a 'demonstration' involves not more than 15 people. On the other hand, a 'gathering' is comprised of more than 15 people.[314] Apart from these differences there are other differences between the two definitions. According to section 1(2) of the RGA:

429.1. Both a 'demonstration' and a 'gathering' are defined in terms of their purpose. In the case of a demonstration this aspect of the definition is that the demonstration is 'for or against any person, cause, action or failure to take action.'[315] On the other hand the purpose or focus aspect of the definition of a 'gathering' states that it is an assembly:

429.1.1. "(a) at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticised, promoted or propagated; or

429.1.2. (b) held to form pressure groups, to hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the

[313] See the objects of and preamble to the SASREA Act.
[314] To section 1 (2) RGA.
[315] Reads in full: includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action."

views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution."

429.1.3. For reasons that are not entirely clear the 'purpose' provisions relating to 'demonstrations' and 'gatherings' are therefore worded in very different ways. It is not apparent what consequences these aspects of the definition may have. In both cases they appear to indicate that the types of assemblies that the RGA is concerned with are forms of protest by people in crowds, whether large or small. They would also extend to assemblies held for purposes of mobilising people to address a particular issue or support a particular cause.

429.2. A further aspect of the definition of a 'gathering' is that it is also defined by its location being 'on any public road as defined in the Road Traffic Act, 1989 (No. 29 of 1989), or any other public place and premises wholly or partly open to the air.' For reasons that are unclear there is no such limitation imposed on the definition of 'demonstration'.

429.2.1. 'Gatherings' (but not demonstrations) are therefore partly defined in terms of the types of locations at which they occur. On the one hand this raises questions about what types of publicly owned property, apart from public roads, qualify as public places. If there are types of public property that do not qualify as 'public places' it also raises the question about what type of legal regime applies to assemblies that occur in these places. It also raises questions to do with whether, and in what circumstances, there is also a right to assemble in privately owned space. This issue is revisited further below.

429.3. As indicated, the significance of the distinction between 'demonstrations' and 'gatherings' lies partly in the fact that those planning 'demonstrations' (of 15 people or under) are exempt from giving notice to the

local authorities. Only the conveners of a gathering are obliged to give such notice in accordance with section 3 of the RGA[316].

The need for a definition of 'peaceful assembly'

430. The Panel's view is that it is important for the law dealing with protests to explicitly be based on and refer to the rights provided in section 17, even at the level of definition. This is in line with international best practice which motivates that, in order to define the scope of the right to freedom of assembly —a right that must be protected and facilitated by the authorities —it is necessary to have a definition of 'peaceful assembly'. Otherwise protection of the right to freedom of assembly would run the risk of becoming subordinated to the broader logic of maintaining public order. In turn this would run counter to the legal duty of not interpreting this fundamental freedom restrictively.[317]

431. The Panel has taken note of the assessment that "the scope and content of' section 17 of the Constitution, 1996, has not been dealt with comprehensively by the South African courts and that where it has been considered, very little definition has been provided, as the courts have tended to focus on what section 17 does not protect, rather than on the interests, needs and purposes to which it does extend."[318]

432. The Panel is therefore of the view that the RGA should be amended to provide a definition of 'peaceful assembly'. The definition would contribute to more legal certainty concerning the exercise of the right to assemble peacefully. However, the scope of application of an amended RGA must not be limited to peaceful assemblies but should also address situations where assemblies are not peaceful.

Definition of the term 'assembly'

433. For the purposes of this report the Panel has agreed that it will make reference to the definition provided by the OSCE that "an assembly means the intentional

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[316] Once again excluding the instances mentioned in section 7 of the RGA where permission is required in respect of either a demonstration or a gathering.
[317] Joint Report of the of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 18.
[318] Socio-Economic Rights Institute (SERI) of South Africa, *Ex parte: Council for the Advancement of the South African Constitution – In Re: Restraint of Protest On or Near University Campuses*, 22 December 2016, para. 15.

and temporary presence of a number of individuals in a public place for a common expressive purpose."[319] There are three issues that are raised by this definition that it is important to make note of.

434. The first concerns whether the right to freedom of assembly is limited to 'public space' or also applies in 'private space'. For instance the 2016 joint report of the UN Special Rapporteurs on 'the proper management of assemblies' proposes that the term 'assembly' may be defined as "Any intentional and temporary gathering in a private or public space for a specific purpose." [320] The use of this definition is also endorsed by the Study Group on Freedom of Association & Assembly, established by the African Commission on Human and Peoples´ Rights.[321] However, it is apparent that the issue has certain complexities. It cannot be said that the right to peaceful assembly applies equally and in the same way in both public and private spaces. The 'practical recommendation' of the UN Special Rapporteurs on this issue for instance formulate the right in a far more limited way stating that, "Where privately owned spaces are open to the general public and serve a similar function as public spaces, they should be treated as a public space for the purposes of the rights to freedom of assembly and expression."[322]

434.1. For the purposes of this report the right to peaceful assembly is therefore discussed in the context of public space. The Panel recognises that the right is not one that is limited only to public space. The issue is therefore revisited briefly later in this report.

435. The second issue concerns the manner in which the purpose of an assembly is defined in order to give effect to the right to freedom of assembly. The purpose of defining 'assembly' is primarily to indicate what types of gatherings are protected

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[319] OSCE/ODIHR Panel of Experts on the Freedom of Assembly, Guidelines on Freedom of Peaceful Assembly, Second Edition, 2010, 16. See also the definition 'An intentional presence of a number of individuals in a public place for a common expressive purpose" in OSCE, 2016, 120.
[320] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN doc. A/HRC/20/27, 21 February 2012, para. 24; Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 10.
[321] Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 60.
[322] Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 88(b).

in terms of section 17 of the Constitution, 1996. It is clear that, in order to give full effect to the right to freedom of assembly, this right should not be defined too restrictively. As indicated the RGA has different approaches to defining 'demonstrations' and 'gatherings' in relation to their purpose though it is unclear for what purpose this differentiation has been introduced. Of the definitions referred to above the OSCE/ODIHR definition makes use of the term 'a common expressive purpose' while the UN Special Rapporteur definition merely refers to 'a specific purpose'.

435.1. As noted, the latter definition is provided by the UN Special Rapporteurs. The 2016 joint report of the UN Special Rapporteurs on 'the proper management of assemblies' acknowledges that this definition would apply to "sporting events, music concerts and other such gatherings." However, the Special Rapporteurs indicate that the focus of their recommendations is "on assemblies that express a common position, grievance, aspiration or identity and that diverge from mainstream positions or challenge established political, social, cultural or economic interests."[323] This is a recognition that attempts to limit freedom of assembly tend to focus on assemblies that are oppositional or that express norms and values that are not the prevailing norms of politically dominant groups. The basic point that Special Rapporteurs make though is that "none of the rights enjoyed by the participants of an assembly are in any way contingent upon the political, or other, content of that assembly's expression."[324]

435.2. On the other hand the OSCE/ODIHR use of the term 'common expressive purpose' makes it clear that random gathering of people would not be regarded as a protected assembly. The term 'expressive' would accommodate the expression of a 'common position, grievance, aspiration or identity' as referred to by the UN special rapporteurs, but also other types of expression, such as gatherings of a celebratory nature.

[323] Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, paras. 10 and 11.
[324] Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 11.

435.3. Beyond acceptance of the principle that it would be inappropriate to define the term assembly in such a manner as to restrict the rights provided in section 17 of the Constitution, 1996, there is room for debate about what is the most appropriate way to describe the purpose of assemblies in legislation pertaining thereto. [325] In terms of the current South African legal framework the RGA is primarily concerned with assemblies convened for the purposes of protest while other types of events held 'at stadiums, venues, or along a route' are supposed to be regulated by SASREA. SASREA places a far more onerous burden on the organisers of assemblies that fall under it, than are placed on the organisers of events that are convened in terms of the RGA. It is of course possible for a cultural or entertainment or religious event, or even a sporting event,[326] to be organised for purposes of protest. In such circumstances it would be necessary to clarify the legislative provision that is applicable.[327]

436. The third issue concerns why the word 'temporary' is used in some definitions of 'assembly' and how the term should be understood. Both the definitions put forward by the OSCE/ODIHR and that put forward by the Special Rapporteur, incorporate this term.

436.1. The answer to the first question would appear to be related to the disruptive consequences of some protests. Exercise of the right to peaceful assembly may in some circumstances interfere with the rights of others. The question that arises in these circumstances is: what type and level of interference should be regarded as acceptable in a society in which the right to peaceful assembly is enshrined? One of the reasons for emphasis on the word temporary in definitions of assembly would appear to be that assemblies do not involve long term or permanent interference with, or denial of, other rights that are enjoyed by members of the public. In so far as an assembly does not have any significant impact in interfering with the rights exercised by

[325] Finding terminology that is neither too broad nor too narrow is not straightforward. For instance a group of people who are gathered waiting for a bus would be gathered for a 'specific purpose'.
[326] In the 1980 opponents of apartheid organised protest "fun runs" in order to circumvent legal restrictions on protests.
[327] See section 2(2)(b) of SASREA which provides that the Act "does not apply to gatherings as defined in the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993)."

others, it may be regarded as being of little significance as to whether it is temporary or not.

436.2. It is therefore debateable whether the term 'temporary' should be regarded as an essential component of the definition of an assembly. The term temporary has no limitations placed on it and there is "no agreement over how short or long a time an assembly may take place and still be considered a temporary gathering."[328] Sometimes protests may be long term events. In some countries they have been known to involve "a semi-permanent presence of protesters in a location with tent-like structures and other facilities to serve their needs."[329]

'Peaceful assemblies'

437. As already indicated it is clearly important to define what assemblies should be considered as 'peaceful'. It is these assemblies that are supposed to be facilitated and protected by the authorities. International standards motivate that 'peaceful assemblies' should be defined broadly in order to give full effect to the freedom of peaceful assembly. In line with this, best practice is to establish a presumption of peacefulness, so that the authorities must have clear and firm reasons for deciding that it is not peaceful.

438. Indeed, there is considerable international opinion in favour of classifying an assembly as peaceful if:

438.1. "The organizers have professed peaceful intentions and the conduct of the assembly is non-violent. It includes conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties."[330]

439. In discussing the definition of peaceful protest it is also important to refer to the opinions expressed by courts, and in particular the Constitutional Court on this

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[328] OSCE, Handbook, 2016, 108.
[329] *Ibid*. See also Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 10.
[330] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edition, 2010, p. 15.

matter. In a 2012 judgment the Court noted that "the right in s17 must be exercised peacefully" adding that it is only when participants in an assembly "have no intention of acting peacefully that they lose their constitutional protection." [331] In relation to this point the Court makes reference to a judgment of the European Court of Human Rights which states that, "An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior."[332]

440. In line with this the Panel proposes the following definition of 'peaceful assembly':

440.1. A peaceful assembly is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful'. In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly.

The notification process and section 4 meeting ('golden triangle')

441. The central mechanism through which the RGA is supposed to operate is a process through which:

441.1. As provided for in section 3 of the RGA, the convenor of a 'gathering' (a protest or other assembly of more than 15 people on a public road or in other public space) is supposed to provide a notification to the person appointed by the municipality as a 'responsible officer'; and

441.2. After receiving the notification the responsible officer:

441.2.1. May either, in consultation with the 'authorised member', decide that the gathering can go ahead (section 4(1) and 4(2)(c) of the RGA); or

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[331] *South African Transport and Allied Workers Union and Another v Jacqueline Garvas and Others*, Case no. CCT 112/11, 2012 ZACC 13, 13 June 2012, para 53.
[332] Ziliberberg v Moldova ECHR (Application No 61821/00) (4 May 2004) at para 2 as cited in *South African Transport and Allied Workers Union and Another v Jacqueline Garvas and Others*, Case no. CCT 112/11, 2012 ZACC 13, 13 June 2012, para 53.

441.2.2. Decide that it is necessary to conduct negotiations with the convenor of the gathering, in which event s/he should convene a meeting. This meeting, which is provided for in various parts of section 4 is frequently referred to as a 'section 4 meeting.' Related to the idea that it involves a three-way meeting between the municipality, police and protest convenors, it is also commonly referred to as the 'golden triangle.' In addition the RGA provides that the responsible officer also has the discretion to invite other parties.[333]

442. The primary function of the notification process and section 4 meeting is to facilitate enjoyment of the right to assemble. The section 4 meeting is a mechanism to generate an agreement between the conveners, the local authority, and the authorised SAPS officer on how exactly the freedom of assembly is to be exercised in a safe and proper manner, with the assistance of the relevant government authorities. If practised by all involved with good faith and with the necessary professionalism, it should provide an effective mechanism for carefully balancing the interests and rights affected in a democratic manner.

443. It is salutary to remind ourselves of the Goldstone Commission's concern, in the early 1990s, of:

443.1. "Well-founded suspicions that some local government authorities have been unsympathetic to the right to demonstrate and may be biased against particular parties."[334]

444. Unfortunately, it seems that the reality described by the Goldstone Commission is still alive. As noted above, there is a tendency for municipalities to act in a manner that impedes protest (see paragraph 316.3). Rather than either assisting protestors in resolving their grievances, or supporting them in exercising their rights to protest, some municipalities have been guilty of obstructing the notification process, imposing conditions on protests that are not authorised by the RGA, and prohibiting protests in an arbitrary manner.[335]

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[333] The latter is provided for in section 4(2)(b)(iv).
[334] P.B. Heymann, Towards Peaceful Protest in South Africa, HSRC Publishers: Pretoria, 1992, p. 11.
[335] Jane Duncan, Protest Nation, University of KwaZulu-Natal Press, 2016. Tsangadzaome Alexander Mukumba and Imraan Abdullah, Enabling the enabler - Using access to information to ensure the right to peaceful protest, SACQ, ISS: Pretoria and Centre of Criminology: Cape Town 62, 2017, 54.

445. A recent assessment of the RGA for instance states that:

445.1. "Civil society organisations have routinely reported that local authorities have interpreted the requirement as affording them the discretion to veto the protest, often without effective negotiation on aspects of planning that could be improved. While an argument in response is that this is an issue of implementation rather than the legislation itself, as the Act invokes the use of the SAPS and other local authorities, such as municipalities, the machinery imagined by the Act needs to be reconsidered. It should take into account that the SAPS and municipalities lack the capacity and understanding to implement the Act in a manner that respects the right to protest."[336]

446. A particular concern has been the practice whereby municipalities, including the Johannesburg Metro, require that convenors pay a fee in order for their 'notification' to be considered or to pay for the costs of the municipal officials attending a gathering.[337]

447. Concerns with regard to the manner in which the RGA is administered have already been noted. Panel Recommendations 46, 50, 51 and 52 above are intended to address them.

448. The issue of protest in private space that is referred to earlier in this report also raises a similar issue. Notably in the labour context there may be a tendency for management to seek to determine the terms on which strike related protest is conducted rather than being readily amenable to negotiation. This would appear to have been the case at Marikana. However, the point also highlights differences between the two contexts. With respect to protests that take place on private property in the context of a strike management are likely to not only be representatives of the property owners, but also representatives of the employer in an employer-employee relationship with the strikers.

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[336] Jameelah Omar, A legal analysis in context - The Regulation of Gatherings Act – a hindrance to the right to protest? SACQ 62, ISS: Pretoria and Centre of Criminology: Cape Town, 2017, 21. See also Ch. Sali, A constitutional challenge to section 12 (1) of the RGA, in: APCOF (ed.), Dialogue on Public Order Policing in South Africa, 11-12 July 2017, 2017, p. 15 (16).

[337] Ch. Sali, A constitutional challenge to section 12 (1) of the RGA, in: APCOF (ed.), Dialogue on Public Order Policing in South Africa, 11-12 July 2017, 2017, p. 15 (16). Also Duncan, Jane. 2016.

449. It is also noted that section 3(3)(g) of the RGA provides that the notification should specify ”the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering.”

450. The requirement that the names of marshals be provided is listed by the UN Special Rapporteur on the Rights to Freedom of Association and Assembly as an example of unduly bureaucratic notification procedures. [338] While the section says that this should only be provided ‘where possible’ this provision should be deleted, as it may also lend itself to creating bureaucratic obstacles to the notification process.

The notification issue

451. Section (3)(1) of the RGA provides that, “The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.”

452. From a legal point of view it is clear that the term ’notice’ indicates that protesters do not require a formal permit to exercise their ’right to gather.’ In the words of the Goldstone Commission:

452.1. “The ’notice only’ system expresses most clearly that there is a right to demonstrate peacefully which does not depend upon the discretion of local authorities. It requires the authorities to initiate restrictive action, thus symbolising the right to demonstrate and making very clear a point crucial to clarify in South Africa: that failure to comply with legal requirements preceding a demonstration does not necessarily require some forceful action.”[339]

453. One issue on which the RGA requires interrogation is in relation to the notification provisions. The critical provision of the RGA in this regard is section 3(2) which provides that:

[338] J. Biegon, A. Boru, D. Mawazo, Domestic Adherence to Continental and International Standards in the Practice of Policing Assemblies in Africa, Copenhagen 2017, p. 31.
[339] P.B. Heymann, Towards Peaceful Protest in South Africa, HSRC Publishers: Pretoria, 1992, p. 10.

453.1. “The convener shall not later than seven days before the date on which the gathering is to be held, give notice of the gathering to the responsible officer concerned: Provided that if it is not reasonably possible for the convener to give such notice earlier than seven days before such date, he shall give such notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice prohibit the gathering.”

454. The provision is far from straightforward. If interpreted in a manner that is not restrictive it may be understood to mean that, though the convenor is encouraged to provide notice seven days in advance, s/he is free to provide notice at virtually any time before the gathering, though if this is done less than 48 hours before hand, the responsible officer may prohibit it. On the other hand, if it is applied in a restrictive manner, a responsible office might choose to dispute whether or not it was ‘reasonably possible’ to provide notification at least seven days before the event. Section 3(2) of the RGA might therefore be used to insist that notice be given seven days before a protest.

455. As noted above the provision in terms of which a person who convenes a gathering without giving notice could be found guilty of a criminal offence, were declared unconstitutional by the High Court in a January 2018 judgment (though this is subject to confirmation by the Constitutional Court).[340] The judgement nevertheless provides that, in terms of section 12(1)(a) of the RGA, it continues to be an administrative offence for a person to convene a gathering “in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3.” (As indicated, in terms of the judgment, the types of penalties that are to be imposed are to be determined by Parliament).

456. The Guidelines on Freedom of Peaceful Assembly of the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) affirm that:

456.1. “It is not necessary under international human rights law for domestic legislation to require advance notification about an assembly. Indeed, in an

[340] *Phumeza Mlungwana et al.,* Case No: A431/15, Appeal judgement, 24 January 2018.

open society, many types of assembly do not warrant any form of official regulation. Prior notification should, therefore, only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others."[341]

457. In a recently adopted report the UN Human Rights Council also recommended that:

457.1. "States must ensure that any system of prior notification gives effect to the presumption in favour of assemblies, places narrow limits on the discretion of authorities to restrict assemblies, and incorporates a proportionality assessment."[342]

458. The requirement of giving notice should therefore not be treated as imperative under all circumstances. The broad question that needs to be clarified is what should be seen as the key underlying concerns that motivate for notification.

458.1. One motivation is that, due to the fact that there is a right to peaceful assembly, peaceful assemblies are entitled to protection and support from the police. One implication of this principle should be that convenors (or even individual protestors) who believe that their protest will need to be protected by the police should be able to notify the police about this in order to ensure that the protest is protected. There should not necessarily be an obligation on participants in an assembly who intend to assemble in a disciplined peaceful manner, to receive state protection and support.

458.2. As discussed further below (see paragraph 483 to 506), recognition of the right to protest implies acceptance of the potential that assemblies may be disruptive to some degree. Advance notice enables the police and other official agencies to put in place whatever measures are necessary to support the safe and peaceful conduct of an assembly and ameliorate the impact of any disruption that it may cause. However if a protest is organised as a 'static'

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[341] Prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edition, 2010, p. 17-18.

[342] Joint Report of the of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 28.

gathering that takes place at a single location, is conducted in a peaceful manner, and will not disrupt vehicular or pedestrian traffic, it is not clear why notification should be required. For instance in some countries the requirement of notification is focused on 'processions' (protests that involve movement from one location to another) while notification is not required for "static protests".[343]

458.3. A third motivation for notification would be where there is a danger that the protest itself will become violent.

459. Ultimately the issue would appear to be whether 'risk assessment' can only be carried out by state officials or whether some level of responsibility may be transferred to protest organisers to ensure that protest is carried out peacefully and to address the potential for disruption. The current paradox is that many of those who do provide notification are protest convenors who feel a sense of responsibility to ensure that protest is carried out peacefully. It is these protest convenors who frequently are then faced with an obstructive approach by the responsible officers appointed by municipalities. On the other hand widespread informal protest means that the notification requirements provided for in the RGA are being widely ignored (or are not complied with for other reasons). Even where they start peacefully, it is these informal protests that are most likely to be unstable and volatile events that may become violent.

460. The notification provisions of the RGA might therefore be seen as over-general in nature. Thus notification is required even if a 'gathering' is unlikely to be or is deliberately organised so as to be peaceful and not to be disruptive. It may therefore be motivated that the RGA should be amended to provide that the time frame for notification is linked to the envisaged scale and disruptive impact of a protest. Notification provisions could primarily focus on:

460.1. Protests that are likely to result in 'counter protests' and therefore the potential for conflict and violence;

[343] This system is applied in Ireland. In England and Wales no notification is required for open air public meetings. (OSCE, Guidelines, 2010, 147, note 175.

460.2. Static protests (i.e. protests that take place in a single location) that are likely to be of a size that causes disruptions to vehicle or pedestrian traffic; and

460.3. Processions i.e. assemblies that involve proceeding from one location to another.

461. A further issue concerns the time frame within which notification is required. In 1992, at a time in which 'e-administration' was more a vision of the future than a reality, the Goldstone Commission proposed six (6) working days as an adequate period for giving such notice.[344] More recently the Study Group on Freedom of Association & Assembly in Africa observed that: "2 days is the international standard."[345] It might be argued that a 'one size fits all' approach is not appropriate in relation to the notification time frames. A longer time frame than two days may be reasonable for very large gatherings which are likely to have a significant disruptive impact and where there will be need for negotiation in the manner envisaged in section 4 of the RGA. On the other hand for smaller protests (possibly at a threshold higher than the threshold of 15 currently used in the RGA) it may be reasonable to reduce the notification time to as little as 24 hours and even to dispense with the need for section 4 procedures altogether.

462. **PANEL RECOMMENDATION 59: T**he RGA provisions relating to notification should be amended to make them more user friendly and to seek to ensure that notification is provided where it is genuinely necessary.

Authorisation for summary prohibition of gatherings

463. As indicated, section 3 (2) of the RGA, after setting the time limit of giving notice not later than seven days before the gathering is to be held, continues:

463.1. "Provided that it is not reasonably possible for the convener to give such notice earlier than seven days before such date, s/he shall give notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may, by notice, prohibit the gathering."

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[344] *Ibid*., p. 12.
[345] Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 61.

464. Section 3(2) of the RGA therefore does not impose any limitation or restriction on the exercise of this power by the responsible officer. Section 3 (2) may therefore be considered to amount to what is effectively a blanket provision,[346] in so far as it allows for a gathering to be prohibited for any reason, no matter whether it is of substance. Such practice would run counter to international standards. As a rule, to prohibit an assembly, authorities have to show that it represents a genuine threat.[347]

465. The provision may be seen as an irrational one as it may discourage notification (this has been reinforced by the recent legal developments). If there is no notification, section 12(1)(a) of the RGA provides that it is only the convenors, and not those who attend, who may be convicted of an offence (as indicated above this may now only become an administrative rather than a criminal offence). On the one hand, if a late notification is submitted, convenors run a high risk that the gathering will summarily be prohibited. If the gathering then goes ahead both convenors and other participants may be convicted of an offence.[348] A gathering prohibited under section 3(2) may therefore result in both convenors and other protestors being prosecuted. On the other hand, a gathering for which no notification is given may only lead to administrative penalties for the convenor/s.

466. The Panel is concerned about the potential consequences of an arbitrary application of section 3(2) of the RGA. The provision creates the possibility that people may be convicted for the offence of attending a prohibited gathering, even though the grounds for the prohibition were of no significant merit.

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[346] S. Woolman, Assembly, Demonstration and Petition, in: I. Currie/J. de Waal (eds.) The Bill of Rights Handbook, 6th edn, 2013, p. 382; J. Biegon/A. Boru/D. Mawazo, Domestic Adherence to Continental and International Standards in the Practice of Policing Assemblies in Africa, Copenhagen 2017, p. 30. See also the statement by the Study Group of African Commission on Human and Peoples´ Rights: "In no cases should blanket prohibitions be imposed. Prohibitions should only be used as a measure of last resort where no other less intrusive response would achieve the specific purpose pursued." Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 62-63.

[347] Comp. L. Doswald-Beck, Human Rights in Times of Conflict and Terrorism, OUP: Oxford 2011, p. 424.

[348] Section 12 (1) (e) RGA criminalises, inter alia, any person who "in 'convenes or attends a gathering or demonstration prohibited in terms of this Ac.t"

467. The issue of the powers provided for in section 3(2) is addressed in Panel Recommendation 50. This motivates that the powers of the responsible officer to prohibit gathering must be subject to clear limitations.

Other criminalisation provisions

468. The report has already noted that in terms of a recent High Court judgment, someone who convenes 'a gathering in respect of which no notice or no adequate notice was given' may no longer be convicted of a criminal offence, though they may be convicted of an administrative violation. [349] The judgment is subject to confirmation by the Constitutional Court.

469. Nevertheless the RGA continues to provide for the criminalisation of convenors.

469.1. Section 12(1)(b) of the RGA provides for criminalisation of a convenor who, "After giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4 (2) (b)."

469.2. People who are convicted in terms of this provision (as well as other offences created under section 12(1)) are liable to a fine or to imprisonment for up to one year or to both such fine and such imprisonment.

470. It seems clear that the purpose of sections 12(1)(a) and (b) is to deter conveners from not giving notice in accordance with section 3 of the RGA and from not participating in the section 4 meeting process.

470.1. As discussed further below, as the RGA currently stands, the principal motivation for notification is in relation to the possibility of some form of disruption. This includes disruption of 'vehicle or pedestrian traffic' or 'disruption of a rival assembly', though the Act also identifies a concern with the possibility of disrupting access to the entrances of 'buildings or premises' including those of hospitals, fire or ambulance station, or any other emergency services. Nevertheless, the RGA criminalises the convenors of gatherings who fail to give notice, even if the gathering is peaceful and not disruptive. Provisions relating to notifications for assemblies place a substantial burden

[349] *Phumeza Mlungwana et al.,* Case No: A431/15, Appeal judgement, 24 January 2018.

on assembly organisers, in a manner which takes very limited account of the scale of protests and their likely disruptive impact.

471. The RGA therefore places a strong emphasis on compliance by convenors with the RGA framework. But it does not give the same amount of weight to the facilitation of the freedom of assembly. Amongst the problems highlighted in this respect are that:

471.1. There is no requirement that municipalities should make information readily available to assist convenors in complying with the process.

471.2. There is good evidence that the notification system is used extensively by municipalities to obstruct gatherings. The RGA provides the responsible officer, an official appointed by the municipality, with a high degree of discretionary power, for the exercise of which there is limited accountability.

471.3. Provisions relating to notifications for assemblies may place a substantial burden on assembly organisers, in a manner which takes very limited account of the scale of protests and their likely disruptive impact.

472. No consequences are provided for in the RGA for non-compliance by municipalities with the RGA provisions. [350]

473. The Study Group on Freedom of Association & Assembly in Africa has observed in its 2014 Report on Freedom of Association and Assembly in Africa that, "The inappropriate penalization of assembly organizers is clearly contrary to international law."[351]

474. The Study Group therefore recommends as good practice:

474.1. "In no case should a country attempt to deter assemblies by imposing excessive responsibilities or liabilities on assembly organizers.[352] […]

474.2. In no case should assembly organizers be penalised, or an assembly dispersed merely for failure to notify."[353]

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[350] Compare the Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 65.
[351] *Ibid*, p. 64.
[352] *Ibid*., *id*.
[353] *Ibid*., p. 62.

475. One argument against criminalisation of convenors is that, once an assembly takes place, it is important for the authorities to establish contact with the conveners. The criminalisation of the conveners frustrates this objective. It is the threat of being criminalised that is likely to prompt them to hide instead of openly identifying themselves as organisers of the gathering.

476. As indicated, the Panel recognises that, in so far as protest is peaceful, there is still an official and public interest in notification in some circumstances. This report has already motivated that the RGA should be amended to ensure that notification is primarily required where there is a real need for it. In circumstances where there is a genuine need for notification it will continue to be important for such notification to be provided and it will therefore continue to be valid for the law to be used as an instrument for emphasising the importance of notification. At the same time the role of convenor of peaceful protest may be seen as an exercise of civic responsibility and should in principle not be criminalised. Criminalisation provisions should primarily emphasise protest related violence.

477. **PANEL RECOMMENDATION 60:** The RGA should be amended to provide that, in so far as convenors of peaceful protest may face penalties, this should be limited to the imposition of a modest fine and should not carry a criminal record.

Spontaneous assemblies

478. It is worth noting that the RGA only refers to spontaneous assemblies indirectly. Section 12(2) of the RGA states that, ”It shall be a defence to a charge of convening a gathering in contravention of subsection (a) that the gathering concerned took place spontaneously.” The implication is that there is no notice requirement when the gathering is spontaneous. In Patricia Tsoaeli and Others v State [Unreported judgment (17 November 2016) Case No: A222/2015] the Full Bench of the Free State High Court held that the spontaneous nature of a gathering is a complete defence to a failure to give notice prior to a protest.[354]

[354] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution: In re: Restraint of protest on or near university campuses, December 2016, 12 (34) .

479. The legal position is therefore consistent with international opinion in favour of recognising such assemblies as lawful, as long as they are peaceful.[355] While the RGA technically allows for this, in practice there has been a tendency for police to treat assemblies that have not been organised in accordance with the RGA notification procedure as unlawful.

Other issues with the RGA

Application of the term 'unarmed'

480. The question of the carrying of arms by protestors is discussed earlier on in this report (see paragraph 351 and following including Panel Recommendation 49) and readers are referred to that discussion. It is important to re-iterate the point that Section 17 of the Constitution guarantees the right to assemble 'peacefully and unarmed.' It therefore classifies 'peaceful' as being on a par with 'unarmed.'

480.1. In line with the argument presented above regarding the right to protest peacefully, just as an assembly does not lose its peaceful character, if individual protesters or a minority of persons engage in violent conduct, similarly an assembly should not be classified as 'armed' solely because there are some individuals carrying dangerous objects.[356]

481. More generally it is not clear that the problem of armed protestors can be resolved through further amendments to the RGA. As suggested above the most useful measures may possibly be pre-emptive measures, or alternatively using video or photographic recording as a basis for subsequent prosecution of armed protestors.

482. Above all, the Act should not predetermine operational decisions which are typically guided by policing instruments such as National Instruction 4 of 2014. Therefore, the Panel has integrated some operational considerations on this issue below, in the section dealing with NI4 of 2014.

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[355] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edn, 2010.
[356]The distinction is illustrated at Marikana where it is estimated that roughly 300 of the 3000 strikers who were gathered at the Marikana koppie were armed (SAPS Heads, page ..).

Limitations on the right to peaceful assembly

483. Both the OSCE definition of 'peaceful assembly' and the definition recommended by the Panel indicate that a peaceful assembly may include conduct "that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties."[357] This raises the need to address questions about how far the right to peaceful assembly extends and to what degree this right may be exercised at the expense of the rights of others.

484. Various commentaries on the issue of protest emphasise the point that protest is by its nature often disruptive.

484.1. According to the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly: "Temporary disruption of vehicular or pedestrian traffic is not, of itself, a reason to impose restrictions on an assembly. […] Given the need for tolerance in a democratic society, a high threshold will need to be overcome before it can be established that a public assembly will unreasonably infringe upon the rights and freedoms of others. This is particularly so given the freedom of assembly, by definition, constitutes only a temporary interference with these other rights." [358]

484.2. The Study Group of the African Commission of Human and Peoples Rights presents a similar view. It has argued that the freedom of assembly "must be recognized as a core right of no less value than other uses of public space such as informal commerce or free flow of traffic."[359]

485. In Rhodes v SRC, the High Court also held that, "crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion" and that "this is what is protected in s17 of the Constitution."[360]

486. This court judgment and these commentaries therefore tackle a popular misunderstanding concerning the lawful and legitimate exercise of the right to

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[357] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edn, 2010, p. 15.
[358] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edn, 2010, p. 52.
[359] Report of the Study Group on Freedom of Association & Assembly in Africa, 2014.
[360] *Rhodes University v Student Representative Council of Rhodes University and Others* (1937/2016) [2016] , para 89.

assemble, i.e. the idea that it reaches its limits where the rights of others begin. It is therefore important to clarify that the exercise of the right to protest may involve interferences in some of the rights and freedoms of others. The freedom of assembly is not in any way a secondary right and therefore cannot simply be subordinated to other rights or interests. This raises questions about how to assess the legality, necessity, and proportionality of the conditions and restrictions that are imposed on assemblies.[361]

487. The Constitutional Court has stated that, "The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms."[362] According to the Constitutional Court the right to freedom of assembly is therefore based in part on acknowledgement of the fact of marginalisation. Even in a democratic country, all people do not have the same access to and ability to influence decision making by the powerful.[363] It is clearly preferable that some level of disruption of public life is allowed, rather than a situation where people feel that their only way of being heard is through destroying public or private property, or other forms of violence. Once people elect to take the latter path the operation of the law may reinforce their exclusion, by transforming it into criminalisation. They may be punished for their conduct yet legitimate concerns that they were trying to address may remain unresolved.

488. In order to give full effect to the freedom of peaceful assembly, the grounds for imposing limitations must be interpreted restrictively. The limitation clause of the

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[361] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly, 2nd edition. 2010. p. 52.
[362] *South African Transport and Allied workers Union and Another v GARVAS and Others* 2013 (1) SA 83 (CC) [61].
[363] See also Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 6.

1981 African Charter on Human and Peoples Rights that refers to the 'right to assembly freely with others' states that:

488.1. "The exercise of this right shall be subject only to the necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics, and the rights and freedoms of others."[364]

489. In South Africa the core principles governing limitations on any right are those provided in the limitations clause, which is section 36 of the Constitution, 1996. This provides that, "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors." (The limitations clause then lists some of the critical factors that need to be considered).

The RGA and disruption

490. The potential for 'gatherings' to be disruptive is referred to in various parts of the RGA.

491. Specific sections of the RGA define circumstances[365] in which the responsible officer[366] or a member of the police may impose 'conditions' or 'restrictions' on a gathering.

491.1. Conditions are referred to in section 4(4)(b) and are those 'rules of the game' which either have been agreed upon because of the consultations and

[364] Art. 11 of the African Charter on Human and Peoples Rights of June 27, 1981.
[365] Sections 4(4)(b) of the Regulation of Gatherings Act. Section 4(4)(b) makes provision for the municipal representative ('the responsible officer') in the Section 4 meeting ('the golden triangle') to impose conditions on the gathering' if agreement is not reached at the Section 4 meeting. Similarly Section 9(1)(c) identifies other circumstances (The circumstances are 'in the case of a responsible officer not receiving a notice in terms of section 3 (2) more than 48 hours before the gathering') in which the municipalities 'responsible officer' may 'restrict the gathering to a place, or guide the participants along a route'.
[366] A responsible officer is the key municipal official responsible for negotiating with the protest convenors. Municipalities are required to appoint responsible officers in terms of Section 2(4)(a) which states that: A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer in terms of this Act.

negotiations in the ’golden triangle’ or, on certain grounds, have been imposed prior to the holding of a gathering by the authorised SAPS member.

491.2. Restrictions are those conditions that are imposed by the police during the holding of a gathering notably those where the responsible officer has not received a notice in accordance with section 3(2) of the RGA more than 48 hours before the gathering. The basis for imposing these restrictions is provided in section 9 (1) (c). This section repeats the grounds provided in section 4 (4) (b) of the RGA.

491.3. In both sections the motivations identified for taking these steps includes to ensure ‘that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded’[367] and that there is ‘access to property and workplaces.’ [368]

491.4. In addition, both sections also recognise that a ‘gathering’ may have a disruptive effect on another ‘gathering’ allowing the officials concerned to impose conditions or restrictions to ensure ‘an appropriate distance between participants in the rival gathering and rival.’ [369] Both sections also authorise the responsible officer to impose conditions or restrictions in order to ensure the prevention of injury to persons or damage to property.

492. In section 5(1) of the RGA the ‘threat’ (identified by ‘credible information on oath’) that a ‘gathering’ may result in ‘serious disruption of vehicular or pedestrian traffic’ is identified as one of the grounds on which the responsible officer must take certain steps. If these steps are unable to resolve the threat section 5(2) provides that the responsible officer may prohibit the gathering.

493. Section 8(9) of the RGA also imposes a duty on ‘the marshals at a gathering’ to take all reasonable steps to ensure that:

493.1. “(i) No entrance to any building or premises is so barred by participants that reasonable access to the said building or premises is denied to any person;

[367] Section 4(4)(b)(i) and section 9(1)(c)(i).
[368] Section 4(4)(b)(iii) and section 9(1)(c)(iii).
[369] Section 4(4)(b)(ii) and section 9(1)(c)(ii).

493.2. (ii) no entrance to a building or premises in or on which is situated any hospital, fire or ambulance station or any other emergency services, is barred by the participants."

494. Therefore, in so far as it identifies the potential for 'disruption' as a concern, the RGA does so in very specific terms as relating to the potential for assemblies (i.e. either 'demonstrations' or 'gatherings' as defined in the RGA) to:

494.1. Disrupt pedestrian and vehicular traffic (sections (4(4)(b), 9(1)(c) and 5(1));

494.2. Prevent 'reasonable access' to the entrances of 'buildings or premises' (section 8(9)(i));

494.3. Prevent access to the entrances of hospitals, fire or ambulance station or any other emergency services (section 8(9)(ii)); and

494.4. Disrupt a rival assembly (sections 4(4)(b) and 9(1)(c) only).

495. In addition, section 9(1) of the RGA provides the police with certain powers in relation to circumstances where it is possible that a gathering may be disruptive or is disruptive. Thus for instance, in terms of section 9(1)(c) where a gathering is not one in relation to which notice has been provided more than 48 hours before the gathering[370] a member of the police may 'restrict the gathering to a place, or guide the participants along a route', *inter alia*, to avoid the types of disruption referred to in other sections of the Act.

496. The powers exercised by police to use force in terms of section 9(2) is only justified in relation to danger to persons and property, and is not authorised purely on the basis of disruption.

496.1. The use of force in terms of section 9(2) is discussed further below in relation to the authorisation provided by the RGA for lethal force to be used in defence of property.

497. In the RGA therefore the potential for disruption is defined in specific terms. This is partly in relation to the freedom of movement of the general public and partly in relation for the potential for assemblies to impede access to hospitals and

[370] Presumably this would include spontaneous gatherings amongst others.

emergency services. In addition, the potential for assemblies to disrupt other assemblies, and therefore compromise the exercise of the right to assemble, is also recognised.

498. The approach that the RGA takes to the issue of disruption is partly to try and minimise the risk of it or its impact, partly through interventions by the responsible officer or police, and also by tasking the marshals at an assembly with this responsibility. However, section 5 of the RGA also provides that the potential for 'serious disruption of vehicular or pedestrian traffic' may be one of the grounds on which a proposed gathering may be prohibited by a responsible officer.

499. This highlights the point that questions about acceptable levels of disruption invariably highlight the need for discretionary judgments to be made and are not subject to strict specifications. It might for instance be agreed that an assembly that prevents access to the entrances of hospitals, fire or ambulance station, or prevents the movement of emergency services constitutes 'serious disruption' but beyond that it is not a straightforward question as to what possible situations the provision should be seen to apply to.

500. **PANEL RECOMMENDATION 61:** The RGA should be amended to provide that the grounds for imposing conditions or restrictions should be more clearly defined and clearly comply with Constitutional provisions and international standards.

Actively disruptive protest

501. The fact that a crowd of people is gathered in a certain place is frequently disruptive in one way or another and protest assemblies by their nature, are therefore often disruptive. Disruption is therefore frequently an 'incidental' consequence of protest; some protests are '*actively disruptive*'— in these cases disruption is a deliberate strategy of protest. Active disruption may include erecting physical obstacles such as barricades.

502. The issue of 'actively disruptive' protest has been highlighted in recent years by protests at Universities, some of them associated with the Fees Must Fall movement. In these protests disruption has sometimes involved the blocking of roads or attempts to block university entrances, but has also taken other forms,

notably focused on disrupting the academic activities of the universities such as where a group of university students sing loudly outside university classrooms and other techniques to disrupt lectures.

503. The Panel has made note of the conclusions regarding the issue of 'disruptive protest' provided in a December 2016 legal opinion that is concerned specifically with the issue of disruptive protest at (public) universities. [371] Some points emerging from this opinion include that:

503.1. "'Peaceful assembly' has generally been understood to mean free of acts of physical violence against persons and property."[372] On the other hand "[s]ome level of peaceful disruption to everyday life is inherent in the idea of protest rights."[373] The opinion asserts that the right to assemble, picket, demonstrate and petition 'extends not just to passive advertisement of a grievance, but to some level of non-violent disruption and interference with University functions.[374]

503.2. The right to protest is only a right to protest peacefully. Conduct that is regarded by the law as amounting to violence is clearly not lawful. Thus for instance, due to the fact that it would qualify as an act of violence, "physically restraining a person from entering a specific place'[375] would be unlawful. Thus 'student protestors may not physically obstruct or threaten those to whom they are demonstrating their grievances.'[376]

503.3. Conduct that is proscribed may include not only violence but also some forms of disruption that are themselves unlawful. The opinion for instance cites a 2016 High Court judgment indicating that, 'blocking a public road is unlawful'.[377] Nevertheless, as noted above, the RGA takes a somewhat

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[371] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution: In re: Restraint of protest on or near university campuses, December 2016 .
[372] *Constitutional Law of South Africa*, p 43-19, quoted in Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution, 9-10.
[373] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution: In re: Restraint of protest on or near university campuses, December 2016, 15 (48).
[374] Ibid, 4.
[375] Ibid, 14 para. 42.
[376] Ibid, 15 (49).
[377] *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159 (20 October 2016) para 64 and 65 cited in Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution:, 16 (53).

different approach to the issue of blocking of public roads. In terms of the RGA it would appear that persons participating in a gathering that blocks a public road may only be prosecuted if the protest itself has been expressly prohibited. This appears to be consistent with the argument that the temporary blocking of roads, private or public, constitutes lawful protest, unless the situation is aggravated by additional, burdensome circumstances, in particular, violence.[378]

503.4. In addition "any action which has the effect of preventing teaching, learning or some other academic or associated activity from going ahead would not be lawful, unless the disruption was temporary, and its purpose was to draw attention to the grievance in question. Accordingly, ripping up exam scripts[379], permanently stopping lectures and attempting to exclude academic or administrative staff from their offices would not be lawful."[380] Nevertheless, "non-violent forms of disruption caused by assembly at or near a University entrance, a lecture or, an administrative building may have to be tolerated." [381] 'Temporary blocking of some private roads' might also 'constitute lawful protest, depending on the circumstances'.[382]

503.5. In relating to assessing questions to do with permissible conduct a critical issue is 'the legal context created by University policy, and the nature and extent of the disruption.' "The level of disruption and interference permissible is a contextual judgment to be made on the facts of each case,"[383] and that, "Where peaceful disruption crosses into unlawful obstruction has to be defined on a case- by-case basis, having regard to the context in which a particular protest takes place."[384]

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[378] Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 62. See for recent jurisprudence on aspects of this issue: Supreme Court of Appeal, *Alexandria Gabriella Hotz and Others v University of Cape Town*, Case no. 730/2016, 20 October 2016, paras. 64-65.
[379] It is possible that this would also qualify as an act of malicious damage to property.
[380] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution, 16 (54-55).
[381] *Ibid*, 40.
[382] *Ibid* citing *Hotz*, para 64 and 65.
[383] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution: 4.
[384] *Ibid,* 15-16 (49). See also 13(39).

504. It must be emphasised though that the fact that a protest is disruptive does not in itself mean that the protest is violent. Disruptive non-violent protest is in general protected by the right to peaceful assembly and may only potentially be unlawful if it involves actions that are themselves unlawful, or if proscribed by means of a court interdict.

505. The December 2016 legal opinion also addresses questions to do with the legal basis in terms of which police may take action against people who are involved in acts which are disruptive but which do not constitute a violation of the law (such as assault or malicious damage to property).[385] Related to the fact that it is a grey area, universities have sought to address the disruption caused by protests through requests to the Courts to issue interdicts against them. The opinion concludes that:

505.1. University interdicts are often too broad to satisfy principles of legality.

505.2. Even if they are properly formulated they do not in themselves provide the basis for police to arrest people. In order for police to do so they need to first satisfy themselves that people are aware of the interdicts. This may mean that they need to inform people that there is an interdict and notify them that they will be arrested for contempt of court if they continue to act in violation of the interdict.

505.3. Other than in these cases, police may only arrest people if they are alleged to be involved in a direct violation of the law (such as acts of assault, or malicious damage to property, or public violence, etc).

506. From the point of view of the police it would seem that there is at the very least the need to recognise that, even though there is a grey area between them, disruption does not, in itself, involve violence. Even though disruption may in some cases be unlawful, or be prohibited by a court, the fact that it is non-violent should therefore also imply that police recognise this fact. In particular, in so far as they are required to respond to it, and are unable to do so by negotiation, disruptive protest should in principle be addressed by the use of arrests rather than other types of force.

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[385] *Ibid,* 14(42).

Spatial application of the right to assembly: Public and private space

507. As indicated for purposes of this report the term assembly is defined as 'the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose."[386] In addition it has been noted that the RGA defines a 'gathering' partly in terms of whether it takes place "on any public road as defined in the Road Act, 1989 (Act 29 of 1989), or any other public place and premises wholly or partly open to the air". (For reasons that are unclear no such limitation is applied on the definition of 'demonstration'.) On the other hand the UN Special Rapporteurs and ACHPR Study Group argue that the term "assembly" should also apply to "private space". This raises two issues:

507.1. What spaces are 'public places' or 'public space';

507.2. Whether or not the right to peaceful assembly also applies in any circumstances in "private space".

Public places or public space

508. On the first issue one opinion is that 'public space' as referred to in the RGA is public space to which there are no limits on access by the public. Public university campuses, for instance, are typically subject to access control. There is not unlimited access by members of the public to them. Thus the legal opinion quoted above argues that protests at public universities are not subject to the RGA due to the fact that university campuses are not public places as defined in the RGA.[387] As a result it argues "while some Universities have adopted policies to regulate protest on their campuses, the right to assemble is, in principle, unregulated where no such policy has been adopted."[388]

509. It may be the case that this is an inappropriately narrow approach to defining the term "public place" as used in the RGA. The preamble to the RGA makes reference to the right to assemble. To give a narrow interpretation to "public place"

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[386] OSCE/ODIHR Panel of Experts on the Freedom of Assembly, Guidelines on Freedom of Peaceful Assembly, Second Edition, 2010, 16.
[387] Stuart Wilson and Irene de Vos, Ex parte: Council for the Advancement of the South African Constitution, para 35.
[388] *Ibid.*

would therefore be to limit the application of the RGA in giving effect to the exercise of this right.

509.1. In this regard it may also be relevant to refer to the definition of "public premises" provided in the Control of Access to Public Premises and Vehicles Act, 53 of 1985. The Act defines "public premises" as "any building, structure, hall, room, office, convenience, land, enclosure or water surface which is the property of, or is occupied or used by, or is under the control of, the State or a statutory body, and to which a member of the public has a right of access, or is usually admitted or to which he may be admitted."[389] In this definition the question is ultimately whether the location is one to which the public "may be admitted". The fact that there is access control would consequently not result in defining a location as not being public premises. It is acknowledged that the mere fact that the state is the owner of property does not make it a public space. However the term "public premises" is clearly narrower than "public property." It may be argued that the term "public space" should similarly be interpreted to refer to space to which members of the public may be admitted if they do not automatically have access to them.

Private space

510. The second question concerns whether or not the right to peaceful assembly also applies in any circumstances in "private space". As noted the 2016 joint report of the UN Special Rapporteurs on "the proper management of assemblies" proposes that the term 'assembly' may be defined as "Any intentional and temporary gathering in a private or public space for a specific purpose." [390] This definition is also endorsed by the Study Group on Freedom of Association & Assembly, established by the African Commission on Human and Peoples´ Rights[391] The 'practical recommendation' of the UN Special Rapporteurs on this issue formulates the right in a far more limited way stating that, "Where privately

[389] It should be noted that the Act was originally signed in Afrikaans. This is the English translation.
[390] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN doc. A/HRC/20/27, 21 February 2012, para. 24; Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 10.
[391] Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, p. 60.

owned spaces are open to the general public and serve a similar function as public spaces, they should be treated as a public space for the purposes of the rights to freedom of assembly and expression."[392] It thus proposes that, at the very least, there is a right to peaceful assembly in privately owned spaces that generally are accessible to a broader public, for instance for educational or commercial purposes.

511. The Panel cannot comment on all implications of this issue. It would clearly be helpful to have clear guidelines on what type of private space the right to peaceful assembly is applicable to. With regard to assemblies that are supposed to take place peacefully on private property (or space) which is accessible to a broader public, the rights and interests at stake are of a more complex nature and must be balanced with due care. Some questions that are raised by this issue include:

511.1. With respect to the 'notice only' principle——if it is assumed that clarity may be developed on the types of private space that the right to peaceful assembly is applicable to, would this mean that the 'notice only' principle would apply? The right to property is not an absolute right but neither is the right to peaceful assembly. In private spaces that the right to peaceful assembly is applicable to, would the authority of the owner be similar to that exercised by a municipality in terms of the RGA? Or would the owner exercise additional rights of some kind?

511.2. Who would be identified as the key parties who may need to be engaged in any negotiations relating to a protest for which notification has been provided? A representative of the property owner would clearly have to be involved. But would this mean that the property owner's representative would exercise the same powers as are exercised by the responsible officer? Would the municipality continue to be seen as having a role to play? Would it be assumed that the SAPS has responsibility for crowd management in such assemblies? (If so the consequence would be an expansion of its crowd management mandate). If the owner has contracted private security services,

[392] Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN doc. A/HRC/31/66, 4 February 2016, para. 88(b).

they should also participate in the consultations so that their role can be clarified, in particular, in relation to POP units.

512. **PANEL RECOMMENDATION 62:** With a view to developing greater clarity on the issue, research should be conducted by an appropriate body on current experience in relation to:

512.1.1. Convening, regulating and managing assemblies in private space in South Africa and internationally.

512.1.2. The role of private security in crowd management

512.2. The findings should be presented to the Minister of Police and the Portfolio Committee on Police.

The Use of Lethal Force in Crowd Management

513. As noted in the Panel's Interim Report of December 2016, to the Minister of Police: Section 9 (2) (d) (ii) of the RGA, which is referenced in the National Instruction 4 of 2014 and in other important documents on crowd management, including training manuals, is flagrantly incompatible with international legal principles: It provides for the use of potentially lethal force, including firearms and other weapons, in order to protect property. The exact wording is: "(d) If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration

513.1.1. (i) ….

513.1.2. (ii) destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable,

513.2. such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (i) and (ii) and may for that purpose, if he finds other method to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons."

514. The UNHCHR/UNODC Resource book on the use of force and firearms in law enforcement explains that:

514.1. “As firearms should only be used to protect human life or against serious injury, it follows that a threat merely against property cannot justify using firearms against a person.”[393]

515. It is in this section of the RGA where the decision of Parliament to privilege certain property rights over other human rights, including the right to life, has become unsustainable. In the following, the necessity to ensure the RGA´s full compatibility with international legal principles on the use of force shall be further highlighted and explained why South Africa runs the risk of being held responsible by the international community for their violation. Thereafter, some short-term remedies are discussed that could be taken to prevent such a situation: action to be taken by the Minister of the Police that does not require the involvement of Parliament.

516. The 2016 Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies stresses that:

516.1. “The principles of necessity and proportionality apply to the use of all force, including potentially lethal force. Specific rules apply to the use of firearms for law enforcement, also during assemblies. Firearms may be used only against an imminent threat either to protect life or to prevent life-threatening injuries (making the use of force proportionate). In addition, there must be no other feasible option, such as capture or the use of less-lethal force to address the threat to life (making the force necessary).”[394]

517. The report thus affirms Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). It reads:

517.1. “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and

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[393] UNHCHR/UNODC. 2017. *Resource book on the use of force and firearms in law enforcement*. New York. S. 21.
[394] U.N. Doc. A/HRC/31/66, 4 February 2016, para. 59.

resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."[395]

518. Section 9 (2) (d) (ii) of the RGA clearly deviates from the 'protect life principle.' Lastly, it disregards the assertion of the Goldstone Commission that only:

518.1. "Self-defence, protection of the lives of others, and prevention of certain serious violent crimes justify the use of lethal force. The protection of property normally does not."[396]

519. Thus, section 9 (2) (d) (ii) of the RGA represents 'bad practice' that is unfortunately reproduced in the NI 4 of 2014 as well as in the NMPS of 2008: both contain explicit references to section 9 (2) of the RGA. More precisely, paragraph 13 of NI 4, on the 'Execution of peaceful crowd management operations', instructs POP units in its subparagraph 3, sentence 3 that, "The use of force (…) must comply with the requirements of section 9 (1) and (2) of the Act." It thus reproduces the wording of section 12 (1), sentence 2 of the NMPS of 2008.

520. It is true, though, that the NI 4 of 2014 was drafted with the intention to overcome this deficiency. This is documented in paragraph 14 (5) (b) which prohibits the use of "firearms and sharp ammunition, including birdshot (fine lead pellets) and buckshot (small lead pellets)" within the ambit of "public order restoration operations." Hence, on the operational level, the above-explained problem may be less virulent, although not completely irrelevant: The RGA has higher legal authority and the cited reference in the NI 4 is part of the section dealing with 'peaceful crowd management operations'.

521. The RGA not only justifies action that, according to international legal principles, should be omitted and prohibited, it might even stimulate such conduct. As every law motivates for its enforcement, police officers may feel encouraged to use firearms for protecting property. Worse, the RGA encourages such action by using a vocabulary that concedes irresponsibly broad discretionary powers to police

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[395] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[396] P.B. Heymann, Towards Peaceful Protest in South Africa, HSRC Publishers: Pretoria, 1992, p. 24.

officers, in particular, speaking of a person that "shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable." This situation is particularly regrettable, because section 199 (5) of the Constitution stipulates that:

521.1. "The security services must act, and must teach and require their members to act, in accordance with the Constitution, 1996, and the law, including customary international law and international agreements binding on the Republic."

522. In this context, it is worth recalling that the African Commission on Human and Peoples´ Rights has adopted a 'Resolution on the Right to Peaceful Demonstrations' in which it calls on States to, "Ensure that any legislation governing the exercise of fundamental human rights fully complies with the relevant regional and international standards."[397] In this context, it considered "the provisions of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials providing for conditions in which force may lawfully be used without violating human rights." Moreover, the Commission has recently presented Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly. They explicitly confirm that:

522.1. "21.2.3. Restriction on the use of firearms must be provided for by law. The restriction should limit the use of firearms to circumstances in which there is an imminent risk of death or serious injury to a person, or to prevent the commission of a serious crime involving a grave threat to life, and only when less extreme measures are insufficient to achieve these objectives. "[398]

523. At the time of writing this recommendation, the Human Rights Committee, being the monitoring body of the world´s leading human rights treaty, the 1966 Covenant on Civil and Political Rights, had already received notice from civil society organisations that:

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[397] Resolution 281, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014.
[398] African Commission on Human & Peoples´ Rights, *Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa,* Banjul 2017, p. 22.

523.1. “current legal provisions in South Africa allowing for the use of force in other policing contexts, including public gatherings, are inadequate and inconsistent with the international normative human rights framework for the use of force. In particular, the Regulation of Gatherings Act permits police officers to use lethal force in the protection of property.”[399]

524. For the reasons laid down, the Panel is of the view that the Human Rights Committee is likely to share this position in its Concluding Observation on South Africa´s compliance with the Covenant. This would impact negatively on the country´s reputation and could trigger a host of other legal and non-legal consequences. Amongst others, it increases the likelihood of being found responsible for human rights violations that flow from the application of section 9 (2) (d) (ii) RGA, for instance, through individual petitions submitted in accordance with the 1966 Optional Protocol to the above cited treaty.[400] So far, the Human Rights Committee has stated in response to South Africa´s initial report that it is:

524.1. “Concerned about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests that has resulted in the loss of lives.”[401]

525. It concluded that South Africa should:

525.1. “Expedite the work of the Task Team and the Panel of International Experts established by the Ministry of Police in implementing the recommendations of the Marikana Commission of Inquiry, revise laws and policies regarding public order policing and the use of force, including lethal force by law enforcement officials, to ensure that all policing laws, policies and guidelines are consistent with article 6 of the Covenant and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”[402]

526. Against this backdrop, it seems irresponsible to wait until Parliament has remedied the shortcoming. Rather, immediate action should be taken. Fortunately,

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[399] APCOF, Alternative Report Submission to the Human Rights Committee in Response to South Africa´s Initial Report and Replies to the List of Issues Under the International Covenant on Civil and Political Rights, March 2016, p. 7.
[400] South African is a State Party to the Optional Protocol.
[401] U.N. Doc. CCPR/C/ZAF/CO/1, 27 April 2016, p. 5.
[402] *Ibid*., *id*.

section 10 of the RGA provides a potential solution to this problem by allowing for the Minister to make regulations with regards to certain matters including "the use, and procedure to be followed before the use, of force against participants in a gathering or demonstration."[403]

527. This power to make regulations has never been used by the Minister of the Police. For overcoming the situation described above, the Minister may now find it opportune to do so. Consequently, NI4 of 2014, the NMPS of 2008, and all training material would have to be aligned with the content of such a regulation.

528. At a minimum, awareness must be raised amongst SAPS members that section 9 (2) (d) (ii) is inconsistent with international legal principles which must be respected and promoted by all security services, according to section 199 (5) of the Constitution, 1996. The RGA must be interpreted in the light of superior norms. Until today, this duty has not been explicitly identified by section 13 of the RGA which is about 'interpretation.'

529. **PANEL RECOMMENDATION 63:** Section 9 (2) (d) (ii) of the RGA should be repealed.

Audio-visual observation and recording

530. Another gap in the RGA identified by the Panel is a lack of regulation concerning the audio-visual observation and recording of gatherings, being peaceful protests or other crowds.

531. Unfortunately, the issue of state surveillance of protest is often neglected. It is wrongly assumed that due to the public nature of protest, privacy rights cannot be affected. Consequently, the human rights dimensions of data collection and retention issues are often ignored. It is quite clear, though, that the state does not have an unlimited right to take pictures of persons, even publicly gathered together, to film them or to record their voices.[404]

532. Maybe even more important, it is also often ignored that surveillance activities may have a significant deterrent and/or chilling effect on (potential) demonstrators

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[403] Section 10(b) of the RGA.
[404] Compare V. Aston, State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protesters perspectives, 8: 1 *European Journal of Law and* Technology (2017), p. 1-15.

even though it is guaranteed that the information obtained is not recorded, stored or used for other purposes than crowd management.[405] As stressed in the OSCE/ODIHR *Guidelines on Freedom of Peaceful Assembly*:

532.1. "169. Photography and video recording (by both law-enforcement personnel and participants) should not be restricted, but data retention may breach the right to private life: During public assemblies the photographing or video recording of participants by law-enforcement personnel is permissible. However, while monitoring individuals in a public place for identification purposes does not necessarily give rise to interference with their right to private life, the recording of such data and the systematic processing or permanent nature of the record created and retained might give rise to violations of privacy. Moreover, photographing or making video recordings of assemblies for the purpose of gathering intelligence can discourage individuals from enjoying the freedom to assemble and should, therefore, not be done routinely." [406]

533. A further issue concerns the audio-visual recording of assemblies by participants, photo-journalists, or other observers. On this issue the OSCE/ODIHR *Guidelines on Freedom of Peaceful Assembly* state that:

533.1. "The photographing or video recording of the policing operation by participants and other third parties should not be prevented, and any requirement to surrender film or digitally recorded images or footage to the law-enforcement agencies should be subject to prior judicial scrutiny. Law-enforcement agencies should develop and publish a policy related to their use of overt filming/photography at public assemblies."[407]

534. In the same vein, the above-cited *Draft Guidelines on Freedom of Assembly as Pertaining to Civil Society & Guidelines on Peaceful Assembly* affirm that:

[405] *Ibid*.
[406] OSCE/ODIHR. 2010. *Guidelines on Freedom of Peaceful Assembly*, 2nd edition. p 83.
[407] *Ibid*.

534.1. “42.1. Photography and video recording of law-enforcement shall not be restricted.”[408]

535. The Panel, being aware of complex human rights issues related to surveillance measures and its importance for policing, in particular, for crowd management, is of the opinion that the RGA should offer at least some rudimentary guidance on how to balance the interests at stake in full compliance with constitutional and international standards.

536. This is because the primary responsibility to regulate this issue rests with Parliament. Although the Executive and the Judiciary may take some remedial actions, a broader debate and a democratically more consistent consensus on whether and in how far the SAPS are authorised to use video cameras and other technical support (such as drones and body cams) during public protest and other public order policing situations seems desirable. Both South African residents and SAPS should be provided with more legal certainty in this respect.

537. This issue is addressed in Panel Recommendation 116.

Overall recommendation regarding RGA

538. **PANEL RECOMMENDATION 64:** The RGA should be amended to ensure that it more adequately grants the freedom of peaceful assembly in accordance with section 17 of the Constitution, 1996, and international human rights standards. The definition of peaceful assembly proposed by the Panel (see paragraph 440) should provide the basis for understanding the concept of peaceful assembly and should be incorporated into a revised Act. Recommendations by the Panel that should be considered in such a process of revision include recommendations 46, 50, 59, 60, 61, 63 and 116. The process of revision should rely on active participation from academics and civil society.

[408] African Commission on Human & Peoples´ Rights, *Draft Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly* (2016), p. 32.

Part D: The SAPS Public Order Policing units and crowd management

Terminology

539. Readers of this report are reminded of the terminology section provided at the back of this report. For the purpose of this section the Panel wishes to reiterate certain key aspects of the terminology that is used in this report.

539.1. The term 'crowd management' refers to 'the policing of crowds, whether these are peaceful assemblies or not, including those defined in the Regulation of Gatherings Act, 1993.'

539.2. Public order policing is understood to be concerned with 'crowd management.' Public order policing is distinguished by 'the deployment of officers in squad formations.' [409]

540. The Panel has proposed that the following should be accepted as a definition of 'peaceful assembly':

540.1. A 'peaceful assembly' is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups within the larger group, should not lead to the assembly as a whole being classified as 'not peaceful.' In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly.

[409] See *P.A.J. Waddington*, Policing of Public Order, 1: 4 Policing (2007), 375, 375. This definition seems to be in line with the definition given in section 2 (t) of National Instruction 4 of 2014, where "POP" means "the specialized Public Order Police unit, trained to manage and control crowds or persons engaged in a gathering or demonstration with a view to restore public order." (This includes managing pre-planned and spontaneous assemblies, gatherings and demonstrations whether of a peaceful or unrest nature). See also section 2 (O) of the National Municipal Policing Standard of 2008.

SAPS crowd management doctrine

The need for a clear SAPS crowd management doctrine

541. When the Panel deliberated on its approach to the issue of crowd management, it acknowledged that this would only be reasonable on the basis of a principled approach. The Panel's approach therefore is that SAPS crowd management must be based on a clearly formulated doctrine[410] that is grounded on clear principles.

542. It is an almost worldwide phenomenon that failure to properly implement a crowd management model frequently provokes unwanted crowd behaviour. Worse still, such critical situations are often exacerbated by police officials rapidly turning to the use of forceful techniques which again can have dramatic negative effects on crowd dynamics and behaviour. As there is sufficient information indicating that the SAPS is not immune to this tendency, it was the responsibility of the Panel to take a closer look at factors contributing to poor crowd management techniques and propose more suitable solutions.

543. Of course, there are multiple factors that contribute to individual POP units in different contexts abandoning crowd management techniques, some of which are of an external nature that the police can hardly influence. The Panel appreciates that POP units often arrive at gatherings, for which no notice have been given, and where the situation has already deteriorated. In addition, the SAPS is frequently unable to deploy the necessary human resources with adequate equipment at their disposal. At the same time, this does not account for all of the shortcomings in crowd management. Neither can they be excused by blaming the legal or policy framework governing public order policing. The escalation of violence in the course of gatherings and the poor management thereof is a frequent phenomenon in South Africa. While there are a number of causes for violent protest in South Africa, it seems evident to the Panel that an important aspect of this equation is that POP units tend to frustrate effective crowd management by approaching crowds

[410] The Panel's use of the term doctrine is consistent with the understanding of doctrine as 'a set of principles and standard operating procedures is at the core of any bureaucracy, including national police services and other civilian institutions'. (http://www.ipes.info/WPS/WPS%20No%2018.pdf page 7).

focusing on how to immediately arrest dissent and 'control the scene' as soon as possible, thereby undermining the protest as well as their own safety.

544. In the opinion of the Panel, an important contributing factor to this tendency is the absence of a clearly articulated crowd management doctrine. In its interactions with SAPS members it has been clear to Panel members that many members of the SAPS, to some degree, have a common understanding about the framework that is to be applied in carrying out crowd management operations. Nevertheless, the SAPS does not have a core document that clearly and consistently articulates its crowd management doctrine and the related role that it should perform. In addition, there is often a lack of consistency between and within documents in the articulation of doctrine. In particular, these documents do not consistently communicate the message that a primary responsibility of POP units in relation to protests and assemblies is to uphold and protect the right to peaceful assembly as provided for in section 17 of the Constitution.

Crowd management and crowd control

545. The terms 'crowd management' and 'crowd control' are sometimes used interchangeably.[411] However, crowd management is also sometimes distinguished from crowd control. For instance, crowd management has been described as the "systematic planning for, and supervision of, the orderly movement and assembly of people"[412] while crowd control is seen as restricting or limiting group behaviour 'after things go wrong', thus indicating its reserve function in comparison to crowd management.[413]

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[411] See for instance "Policy and Guidelines: Policing of Public Protests, Gatherings, and Major Events", signed by the Minister of Police on 29 August 2011 (hereafter "Crowd Management Policy"). The document predates the Marikana massacre and is still in force and declares to "promote ideal crowd control and management capacity with the police in order to secure public trust and maintenance of safety during public gatherings."

[412] John J. Fruin, The Causes and Prevention of Crowd Disasters, 2002, p. 6.

[413] For instance the International Association of Chiefs of Police strongly distinguishes between the two concepts stating that "crowd management" refers to "techniques to manage lawful assemblies before, during and after the event for the purpose of maintaining their lawful status through event planning, pre-event contact with group leaders". On the other hand the IACP defines "crowd control" as "techniques used to address civil disturbances, to include a show of force, crowd containment, dispersal equipment and tactics, and preparations for multiple arrests."Comp. the Crowd Management and Control Model Policy of the International Association of Chiefs of the Police, October 2014, p. 1, accessible at: http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/CrowdsPolicy.pdf (13/10/2017).

546. The Panel's approach to this issue is to avoid treating 'crowd management' and 'crowd control' as two exclusive concepts. Such an approach promotes an overly binary vision which may feed into an 'either/or' approach in terms of which certain situations merit negotiation whilst others call for dispersal and the use of force, potentially further escalating the potential for unnecessary confrontations with protesters. Crowd control techniques may therefore be seen as part of the repertoire of crowd management. They are tools to be considered in specific crowd management situations where there are problems of public order that need to be addressed, and where possible, crowd management should involve a focus on preventing situations from escalating into incidents which necessitate the use of these crowd control techniques.

547. This approach is aligned with the definition used by the SAPS in National Instruction 4 of 2014. This defines crowd management as, "the policing of assemblies, demonstrations and all gatherings, as defined in the [Regulation of Gatherings Act], whether recreational, peaceful, or of an unrest nature."[414]

548. The Panel therefore wishes to clarify that, in addressing the issue of crowd management doctrine, it is addressing the broad doctrine that should guide SAPS POP units in engaging with crowds whether peaceful or not peaceful.

Negotiated crowd management

549. In almost every democratic country 'negotiated management' has replaced the handling of crowds by means of so-called 'escalated force'. Previously the policing of protest was characterised by the tendency for police to focus on the 'concomitant escalation of their opposing strength' as a means of addressing challenges of any kind.[415]

550. Negotiated management entails a process of proactive 'peacekeeping' rather than simply 'order maintenance'.[416] The idea of so-called, 'negotiated (crowd) management' particularly, is based on the 'soft power' approach of community

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[414] National Instruction 4 of 2014. Issued by Consolidation Notice 7 of 2014. Division Operation Response Services. V 01.00. Section 2 (e) defines "crowd management" as the policing of assemblies, demonstrations and all gatherings, as defined in the [Regulation of Gatherings] *Act*, whether recreational, peaceful, or of an unrest nature."

[415] Willem de Lint, Public Order Policing and Liberal Democracy.

[416] M. King, From Reactive Policing to Crowd Management?: Policing Anti-Globalization Protest in Canada, 79 *Jurisprudencija* 1 (2006), 40, 43.

policing aimed at neutralising tensions and de-escalating processes of radicalisation. It has been defined as "centrally involving a negotiation of orders and grounded in the anticipated benefits of demonstrator-police communication and liaison."[417] The model relies heavily on the sharing of responsibilities with protest leaders.

551. As indicated above, this model is formalised in South Africa through the 1993 Regulation of Gatherings Act which provides for a partnership-creating notification system which creates the so-called 'golden triangle meeting' between the organiser, the local government representatives, and the police.

552. Related to the passing of the RGA, the idea of negotiated management was integrated into the SAPS framework for crowd management during the process of police transformation in the 1990s. In so far as it is possible to identify a current SAPS crowd management doctrine this is clearly a part of it.

552.1. For instance, in paragraph 13, dealing with 'peaceful crowd management operations', National Instruction 4 of 2014 states that, "During any operation, ongoing negotiations must take place between police officers and *conveners* or other leadership elements to resolve issues before they escalate."

552.2. Similarly, paragraph 15 dealing with 'first responders' at the scene of an 'unforeseen (spontaneous)' gathering, requires SAPS members to emphasise an 'atmosphere which is conducive to negotiations' and focus on identifying 'the leadership element in order to establish communication and start negotiations.'

553. A key distinction in NI4 of 2014 is the distinction between 'peaceful crowd management operations' in which the duty of the police is to *maintain* public order (paragraph 13) and what are called 'public order restoration operations' which are dealt with in paragraph 14. Negotiation is not referred to in paragraph 14 and the

[417] W De Lint, 2016 21 referencing C. McPhail/D. Schweingruber, J.D. McCarthy, "Policing Protest in the United States: 1960-1995." In D. della Porta/H. Reiter (eds.), Policing Protest: The Control of Mass Demonstrations in Western Democracies, 1998, 49, 50.

NI therefore implies that negotiation is primarily relevant to peaceful crowds whilst not being part of 'public order restoration' which involves the use of force.[418]

554. Though negotiation is referred to in paragraphs 13 and 15 the idea that is more prominent in National Instruction 4 of 2014 is the idea of 'Pro-Active Conflict Resolution' which is the heading of paragraph 5. Pro-active conflict resolution is supposed to be the responsibility of station commanders and it is supposed to involve identifying 'indicators of potential violent disorder in their areas by continuously gathering information' with the assistance of Crime Intelligence.[419] If a 'threat to public safety' is identified: "The Station Commanders concerned, supported by his or her cluster commander, must initiate a facilitation process to resolve the factors that underlie the disorder peacefully."[420]

555. There are a number of observations that can be made:

555.1. The term 'indicators of potential violent disorder' is a vague term that is open to different interpretations. One study indicates that when such disorder actually takes place a wide number of contributory factors can be identified including 'root' causes (that are common to a large number of South Africa communities) but also 'proximate' and 'trigger' factors.[421] All of these causes and factors may be seen as 'indicators of potential violent disorder'. Applied broadly, the term could apply to a wide number of 'indicators' that may be encountered in many South African communities. Rather than 'indicators of potential violent disorder' what should be regarded as deserving a pro-active focus is mobilisation by a community or other group around a specific grievance.

555.2. Violent protest is an enduring problem in South Africa, suggesting that the 'pro-active conflict resolution model' is not working. It may be that some would attribute the failure of the model to current weaknesses in crime intelligence. It is also apparent that station commanders tend to prioritise crime

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[418] Paragraph 1 (7) seems to imply that 'restoration' is required even if violence is anticipated, stating that "the purpose of this Instruction is to regulate crowd management environment and, if violence is anticipated or has occurred during any gathering or demonstration, the restoration of public order'.
[419] Paragraph 5(1).
[420] Paragraph 5(2).
[421] Bandeira, Monica and Craig Higson Smith. 2015. *Responding to the smoke that calls: Principles of community-level interventions for the prevention of collective violence*. CSVR: Johannesburg.

fighting, and are encouraged to do so by the performance measurement system. The risk of public disorder is not something that receives sustained attention from them.

556. As indicated above, one of the factors that feeds into the prevalence of violent protest is an absence of responsiveness: the fact that communities where protest is violent often have a history of repeated attempts to raise grievances peacefully and that it is only when they raise their grievances through violent protest, that government agencies take notice of their concerns and attempt to resolve them. The pro-active conflict resolution model would therefore appear to task SAPS station commanders with addressing the problem of lack of responsiveness, *inter alia* by local government, to these grievances. Whether it should be something that they are responsible for is open to debate. Arguably broad responsibility for local level conflict resolution is an over extension of the SAPS mandate. Nevertheless, the fact that the SAPS has responsibility for crowd management means that it is in the interests of the SAPS for such conflicts to be addressed. In addition to motivating for the SAPS to respond proactively to mobilisation by communities as well as for strengthening existing mechanisms and/or establishing new mechanisms for purposes of mediation and conflict resolution prior to protest being undertaken (see Panel Recommendation 52).

557. The issue of the SAPS role in negotiations was also a significant issue at Marikana, and was discussed in the hearings of the Marikana Commission, notably when the chief SAPS negotiator gave evidence before the Commission.[422] A critical obstacle to resolving the situation was the refusal of Lonmin management to speak to the strikers. One of the points debated was, to what degree, police should be given the responsibility of resolving disputes between strikers (or other protestors) and those against whom they have a grievance [423] and whether the SAPS role was merely to serve as a messenger between the two parties, or whether it should have focused more on resolution of the underlying issue (the

[422] Marikana Commission transcripts pages 28829-40, 28862-3, 28911-4.
[423] Marikana Commission transcripts, 28838-40.

wage dispute)[424] or at least put firmer pressure on Lonmin to speak to the strikers.[425]

558. 'Pro-active conflict resolution' and 'negotiated crowd management' are therefore not mutually exclusive ideas. They both emphasise resolving problems through dialogue. 'Negotiated management' may therefore clearly be seen as part of SAPS crowd management doctrine. However, the SAPS does not have a coherent model of negotiated management and this is reflected in the inadequacies of NI4 of 2014 in addressing the issue. There is also no sustained engagement with the issue of negotiated management in both the Crowd Management for Platoon Commanders (CMPC)[426] and the Operational Commanders Training (OCT) programme. Many POP commanders have developed their own approach to the issue but development of understanding around negotiated management is not effectively supported by SAPS training.

559. In other countries the need for dedicated focus on negotiation and communication has been taken more seriously. While, as in the case of the USA's Community Relations Service, this is located outside of the policing domain, there are also examples of considerable investment in developing the police negotiations capability. Most notably in Sweden there has been a move to introduce 'dialogue police.' According to one article:

559.1. "They work in pairs and normally civilian clothes but are distinguishable by yellow bibs which display the words 'Dialogue Police'. Their primary role is to act as a communication link between demonstrators and police commanders and their goal is to avoid confrontation through genuine dialogue, communication, identifying potential risks to public order, the facilitation of protestors' legitimate intentions, and to create self-policing among the crowd."[427]

[424] Marikana Commission transcripts, 28913-4.
[425] Marikana Commission transcripts, 28862-3.
[426] See for instance the section 'Negotiation before and after physical force is applied' (pages 30-32) and 'Actions that are taken, do not provoke or result in a higher level of violence' (page 33-34) of the CMPC module 1.
[427] Stott, 17.

559.2. “Many were drawn from a background of being negotiators and some had experience of negotiation from peacekeeping missions in the Balkans.”[428]

559.3. “They work before during and after events to establish links to radical protest groups over extended periods such that during events they know and are known to key figures within such groups. In effect, the dialogue police adopt a ‘community policing’ orientation to crowd participants. They are then able to build links of mediation and negotiation between police commanders and influential protesters during crowd events. Moreover, since they understand and have points of contact with the groups they are able to assist both commanders and protestors by providing advice on and negotiating the potential impacts of different courses of action.” [429]

559.4. To facilitate their ability to build trust with protestors they play no role in law enforcement. “Since their inception, no information from dialogue police has ever been used in the conviction of anyone arrested during a crowd event.”[430]

560. The Panel notes that the SAPS has developed the Crowd Conflict Management module for training of Public Order Policing personnel in negotiations in the context of crowd management.

561. **PANEL RECOMMENDATION 65:** The SAPS should develop a more coherent framework to support negotiated management of protest.

561.1. The SAPS negotiated management framework should prioritise responding to mobilisation by communities or other groups rather than the vaguely defined ‘indicators of potential violent disorder’.

561.2. A dedicated negotiation capability should be developed which is located at each POP unit. The negotiation capability should be available to be deployed if requested by station or cluster commanders as well as SAPS authorised members. If needed it should also be available to accompany and support POP commanders when POP units respond to protest incidents.

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[428] Stott, 17.
[429] Stott, 17-18.
[430] *Ibid*.

561.3. NI 4 should be amended to support implementation of the model.

Situational appropriateness

562. A primary responsibility of POP units in relation to protests and assemblies is to uphold and protect the right to peaceful assembly provided for in section 17 of the Constitution. This implies that SAPS crowd management doctrine needs to be grounded in a concept of what constitutes a 'peaceful assembly'. The Panel has proposed that the following definition of peaceful assembly should be accepted:

562.1. A peaceful assembly is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful'. In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly.

563. The definition therefore does not imply that all peaceful assemblies will be free of challenges for the police.

Unlawful but peaceful assemblies

564. In some circumstances it may be that a protest is entirely peaceful but that, by virtue of the fact that it is taking place in a location where assemblies are prohibited, or has been declared to be a prohibited gathering, it is therefore unlawful.

565. One of the key principles that SAPS POP members are trained in, which in effect is a core principle of SAPS crowd management doctrine is the principle of 'situational appropriateness.' In the PCT, the principle of legality is qualified by the principle of 'situational appropriateness.' The principle of 'legality'[431] emphasises that there must be a legal basis for any action by POP units. The principle of situational appropriateness is explained to mean that:

565.1. "The main idea of this principle is that if public order will be more disturbed by an immediate SAPS intervention than by doing nothing, then it is

[431] Other key principles are: The principle of proportionality between goals and means, the principle of optimisation, and the optimal effect of means.

definitely better to opt for another solution to the problem: either stand back and do nothing, or negotiate and enter into dialogue with the parties concerned, or postpone the planned operation."[432]

566. The point is widely accepted as a fundamental aspect of crowd management in democratic countries. Various international publications on policing and crowd management make similar assertions:

566.1. "Where an assembly occurs in violation of applicable laws, but is otherwise peaceful, non-intervention or active facilitation may sometimes be the best way to ensure a peaceful outcome."[433]

566.2. "The fact that an assembly, though unlawful, takes place peacefully may lead to a decision not to disperse it and, in particular, not to use force to that end, the aim being to prevent an unnecessary and potentially dangerous escalation of the situation. … [I]n the interest of protecting other important rights (including the life, physical integrity and property of people who are not involved in the assembly), the recommended course of action may be to allow the assembly itself to proceed."[434]

567. This type of approach is sometimes motivated for on the basis that where an assembly is peaceful, the consequences of forceful intervention are likely to aggravate the situation. For instance the OSCE-ODHIR states that:

567.1. "In many cases, the dispersal of any event may create more law-enforcement problems than its accommodation and facilitation, and over-zealous and heavy-handed policing are likely to significantly undermine police-community relationships. Furthermore, the policing costs of protecting freedom of assembly and other fundamental rights are likely to be significantly lower than the costs of policing disorder borne of repression."[435]

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[432] CMPC, Module 1, Chapter 3, 16.
[433] Guidelines on Freedom of Assembly, prepared by the OSCE/ODIHR Panel of Experts on Freedom of Assembly, 2nd ed., 2010, p. 78, para. 155.
[434] To serve and protect, 181/182.
[435] Guidelines on Freedom of Assembly, prepared by the OSCE/ODIHR Panel of Experts on Freedom of Assembly, 2nd ed., 2010, p. 78, para. 155. See also the argument that this approach should be seen as based on the principle of proportionality: Thus, in application of the principle of proportionality, law enforcement officials have to balance carefully the public interest in dispersing such an unlawful assembly against the possible negative consequences of its dispersion (see Basic Principles of Use of Force and Firearms, No. 13). To serve and protect, 181/182.

568. Commentaries often also emphasise the point that, "such a decision does not prevent the subsequent prosecution of those participating in an unlawful event."[436]

569. The Panel accepts these as valid motivations. In the Panel's view, the fundamental issue concerns the need for a consistent and clear distinction between peaceful and non-peaceful gatherings. If the gathering is entirely or largely peaceful then respect for the dignity of participants and their right to peaceful assembly should preclude the use of force against members of such a crowd. The use of force should in general be regarded as not justified for dispersing a peaceful crowd unless there are compelling reasons for doing so. (For instance if a crowd is preventing access by ambulances or other vehicles to a hospital where emergency medical treatment is provided, and it is not possible to disperse the crowd by other means, it may be justified to use force to disperse the crowd.)

570. Unless there are compelling and urgent reasons why a crowd needs to be dispersed, less intrusive measures should be used by the police. This implies that police should arrest members of an unlawful but peaceful assembly rather than using force to disperse them. The legal basis for such action may derive from the RGA, in particular, section 12 (1) (g) or other criminal offences. Members of the crowd should therefore be warned that, if they do not disperse they will be arrested for not complying with the order. Alternatively they should be warned that, if they do not disperse, they may be prosecuted and video or photographic records of the event be collected in such a manner as to support potential prosecution.

Dealing with violent individuals

571. The definition of peaceful assemblies also allows for the possibility that, in some peaceful assemblies POP members will have to assess how or whether to respond to violence by individuals within the group in a manner that aims to respect the generally peaceful nature of the assembly. One publication on this issue for instance notes that:

571.1. "Acts of violence by individuals or groups may be deliberately provocative, the intention being to seek violent confrontations with the

[436] To serve and protect, 181/182. See also 'Post-event prosecution of violations of law remains an option." Guidelines on Freedom of Assembly, prepared by the OSCE/ODIHR Panel of Experts on Freedom of Assembly, 2nd ed., 2010, p. 78, para. 155.

authorities." In such a case the approach that may be appropriate "might be … not giving in to provocations by such groups while limiting police action to the protection of those not involved in violence." This might be the most "appropriate means of preventing the escalation sought by a minority."[437]

572. In some situations it may be more effective to intervene 'at an early stage' by "seeking to apprehend the first individual throwing a stone (or, more generally, individuals breaking the law) and to remove them from the scene before their behaviour acts as a stimulus on other people present." [438]

573. Wherever possible such situations should be managed in consultation with protest leaders or convenors as it will be preferable if they can address the situation themselves. In addition, in such situations, arrests, or other interventions are probably not viable unless they can be "specifically targeted and … have a low impact on the demonstration, not affecting innocent bystanders." [439]

De-escalation

574. The discussion above deals with the application of the principle of situational appropriateness in the context of crowds that are peaceful (as defined). In this discussion it is apparent that the purpose of the principle of situational appropriateness is to support public order police in using tactics that ensure that they avoid escalation of situations. At the same time the principle of situational appropriateness should also be seen to motivate POP units to deal with situations where there is conflict or violence in a manner that will facilitate de-escalation. Questions of situational appropriateness and de-escalation are also relevant to protests that are not peaceful and to questions about the effective use of force in this regard.

575. The need for a focus on de-escalation is recognised internationally and is also reflected in NI 4 and in SAPS training materials. For instance section 14(3) of NI 4 states that:

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[437] To Serve and Protect, 183-184.
[438] *Ibid.*
[439] *Ibid.*

575.1. “The purpose of offensive actions must be to de-escalate conflict with the minimum force to accomplish the goal and therefore the success of the actions will be measured by the results of the operation in terms of loss of life, injuries to people, damage to property and cost.”

576. SAPS training materials also refer to ‘the Five C stairs’ conflict resolution model. This model encourages police to ‘Comprehend’ (understand) the situation (this is the middle of the 5 stairs) in order to move down the stairs to ‘Communication’ and ‘Co-operation’, the lowest stair. Reaching the lowest stair is the preferred goal rather going up the stairs to ‘Conflict’ and ‘Confrontation’ (violence)’.[440]

Dispersal and de-escalation

577. If the purpose of police action is to ‘de-escalate conflict’ then the utility of dispersal needs to be re-examined. Even if authorised by law, dispersal may not be productive in relation to violent crowds. One major reason for questioning the utility of dispersal is that it may simply displace violent members of a crowd without bringing to an end their violent conduct. This problem has already been referred to in relation to the London riots of 2011 where it was reported that:

577.1. ”simple dispersal was not always effective with highly mobile crowds forming (enabled by communications including the use of social media) and then dissipating rapidly. Indeed, in some areas, dispersal tactics simply displaced looting to the fringes of main retail areas: in hindsight spreading the problem rather than resolving it. Almost all of the commanders interviewed recognised that arresting suspects was the only possible response once the looting had started in earnest.’[441]

Arrests to address protest related violence

578. Dispersal may therefore lead to an escalation of the problem rather than resolving it. As suggested by British police therefore, in situations of violence, arrests may be more likely to be effective in addressing the problem, if they can be accomplished.

[440] CMPC module 1, page 35.
[441] HMIC, 2011b, 60.

579. The issue of carrying out arrests in crowd management situations is debated in the *2011 Policy and Guidelines: Policing of Public Protests, Gatherings, and Major Events*, signed by the Minister of Police on 29 August 2011 (hereafter *'Crowd Management Policy*'). The Policy argues in favour of what is called the 'French model' (as opposed to the 'Belgian model') on the basis that:

579.1. "The French model drastically cut down on the distance between protestors and the police and requires that the police should be a few meters in front of the crowd. This provides the opportunity to restrain forward movement of the crowd and the possibility for snatchers to pick on certain individuals who are [thought] to be the most provocative within the crowd."[442]

580. The Panel is hesitant about supporting of the use of the French model as this is a paramilitary model and is incompatible with the Panel's emphasis on creating a climate that is supportive of peaceful protest. The key issue that is raised is about how the SAPS can use arrests more effectively as a tactic for addressing violence in protest. A key point of emphasis in this report is on the need for flexibility in relation to the complex nature of the protest environment in South Africa and approaches to carrying out arrests should be developed with this in mind.

581. One international model is that of the Arrest and Spotter Units (ASUs) used by police in Holland.

581.1. An ASU is an 8 person team, plus a designated ASU driver for the special ASU vehicle. Each ASU has a commander, usually at the rank of sergeant and seven group members (male and female) at the rank of constable or senior constable.

581.2. Primarily their task is one of surveillance and observation. They are the eyes and ears of the POP commanders. They look out for early signs of potentially violent behaviour of individuals and or groups within a gathered crowd. Their capability also extends to the (early) isolation, arrest and extraction of violent individuals within the crowd. Their tactics permit them to

[442] Ministry of Police, Policy and Guidelines: Policing of Public Protests, Gatherings, and Major Events, 29 August 2011.

work from within the crowd, from behind POP lines, or, based on their own mobility capabilities, around the crowd.

581.3. ASU members are only drawn from those police members who have completed crowd management training and who come with a positive recommendation from their commanders. Aspiring ASU members face a stringent selection process in order to retain those candidates that are best suited to ASU work, in addition to excellent fitness (both stamina and endurance) and above average shooting results. The ASU training course last 4 weeks and contains around 270 hours of training. Examples of core topics include:

581.3.1. General fitness, running, swimming, boxing, obstacle course, team building;

581.3.2. Self-defence and arrest and intervention procedures and techniques;

581.3.3. Procedures and interventions on foot and from vehicles including scenario based training;

581.3.4. Principles of observation and surveillance;

581.3.5. Use of radios and concealed communication devices;

581.3.6. Use of hand signals and coded signs;

581.3.7. ASU observation and surveillance and collaboration with police negotiators;

581.3.8. Firearms training, self-defensive shooting, ASU formations on foot and contact drills (front; side, rear);

581.3.9. Exit exercise in large public order scenario.

581.4. ASUs have a designated van type vehicle, which can seat 7 team members in the rear on bench style seating permitting rapid vehicle entry and exit. It includes a holding cage for arrested persons with a maximum capacity for 2 persons at the rear of the vehicle.

581.5. ASU members carry side arms only and hand cuffs or plastic cuffs or zip ties with the possibility for concealed pepper spray and or hand held Tasers.

581.6. Each ASU member plus the commander and driver have personal radios with fitted in ear receivers and collar placed transmitters.

582. **PANEL RECOMMENDATION 66:** The SAPS should explore the potential for greater use of arrests, particularly the potential for the use of arrest teams, during violent protest. In so far as arrests can play a role in reducing the levels of violence in protest situations they should be used more actively. If arrested persons are going to be detained in custody and charged then the use of arrests should be supported by the collection of video material that is managed in terms of principles of evidence collection.

Principle of Differentiation

583. A second important reason for expressing strong reservations about dispersal as a crowd management practice is that it tends to be associated with the indiscriminate use of force.

583.1. The orientation towards using force in this way for purposes of dispersal is illustrated by paragraph 14(6) of National Instruction 4 of 2014 which currently states that, “Approved rubber rounds may only be used as offensive measures to disperse a crowd in extreme circumstances, if less forceful methods have proven ineffective.”

583.2. This provision therefore authorises the use of rubber round against members of a crowd generally, irrespective of the conduct of people who are being targeted.

584. Contemporary studies of crowd psychology show that where police use force indiscriminately:

584.1. “They tend to do so against those in the crowd who saw themselves or others around them, as posing very little, if any, threat to public order. As a consequence there would be corresponding increases in the number of people in the crowd who perceived the police as an illegitimate force. Such interactive social psychological processes, occurring during the crowd event, would then

lead directly to a change in the nature of the crowd's social identity (their shared sense of categorisation of 'us' and 'them') along two critically important dimensions. On the one hand, the indiscriminate use of force would create a redefined sense of unity in the crowd in terms of the illegitimacy of and opposition to the actions of the police. Consequently, there would be an increase in the numbers within the crowd who would then perceive conflict against the police as acceptable or legitimate behaviour. On the other, this sense of unity and legitimacy in opposition to the police would subsequently increase the influence of and empower those prepared to engage in physical confrontation with the police." [443]

585. Indiscriminate use of force therefore violates the rights of peaceful protestors. But it is not only for this reason that it is destructive. It may also be seen as a tactic that is more likely to escalate than de-escalate the situation. The studies referred to above show that, rather than discouraging violence, the primary consequences of the indiscriminate use of force is to generate solidarity in a crowd. Studies of crowd behaviour show that perpetrators of violence in a crowd are often a relatively small and isolated group. However, the consequence of the indiscriminate use of force is frequently to encourage a sense of solidarity between peaceful members of the crowd, and those individuals who engage in violence, in opposition to the police. As a result there is an increase in "the numbers within the crowd who … perceive conflict against the police as acceptable or legitimate behaviour" as well as an increase in the status within the crowd of those willing to engage the police in confrontation.[444]

586. The Panel therefore motivates that the principle of 'differentiation' should be adopted by the SAPS as one of the fundamental principles of crowd management doctrine. This principle means that:

586.1. Police should not treat assemblies and other crowds as homogenous and should distinguish carefully between people who are involved in violence and other participants in an assembly, so that the rights of the latter can be

[443] Dr Clifford Stott, Crowd psychology and public order policing: An overview of Scientific Theory and Evidence'. School of Psychology, University of Liverpool, 2009, 7 (Marikana Commission Exhibit UUUU13).
[444] *Ibid.*

respected, protected, and facilitated. People who are participating peacefully in an assembly should not be treated as acting unlawfully because others are engaged in violence.

586.2. In situations where it is necessary for police to use force, this should be targeted at specific individuals. Unless there are exceptional and urgent reasons for doing so, less-lethal-weapons should only be used in response to violence and should only be targeted at the perpetrators thereof, with care being taken to minimise the risk of affecting others.

586.3. The use of force in an indiscriminate manner must be avoided unless there are special circumstances motivating for use of force against the crowd as whole. Weapons that are by their nature indiscriminate (such as teargas, which cannot be targeted at a specific individual) should be avoided unless the crowd is broadly involved in violence or there are other special circumstances motivating for their use.

587. **PANEL RECOMMENDATION 67:** SAPS should consistently demonstrate that they treat peaceful protestors differently from those protestors engaging in violence.

587.1. The SAPS should consistently apply the principle of differentiation in relation to the use of force. As a general rule (in the absence of a compelling motivation to depart from this rule) less-lethal-weapons should only be used against people involved in violence with care being taken to avoid hurting others.

587.2. The SAPS approach to dealing with peaceful protest that is unlawful (prohibited protests or protests that are unlawful for other reasons) should rely on arrest and not rely on the use of LLWs.

587.3. The SAPS should publicise the framework that it applies in policing protest with a focus on communities and groups that have been associated with the use of violence in protest. It should emphasise that it will take firm measures, within the framework of the law, against people who use violence but that police will support peaceful protestors in exercising their rights.

588. Differentiation and de-escalation are referred to further below as ‘fundamental principles of the use of force in crowd management’ in the discussion of National Instruction 4. The Panel would like to note the important role that application of the principle of differentiation is likely to play in gaining trust in police as supporters of the right to peaceful assembly and therefore in strengthening the culture of peaceful protest in South Africa.

589. The principle of differentiation also supports the principle of ‘protection of life’, another principle motivated for below under ‘fundamental principles of the use of force in crowd management’. As indicated above, one of the key causes of fatalities in crowd management operations is the unintentional killing of children by LLWs. The principle of differentiation motivates for greater accuracy and precision in the use of force, thereby reducing this risk.

Impartiality and Non-Discrimination

590. A further set of principles that must be recognised as part of POP doctrine are principles of impartiality and non-discrimination. As indicated, professionalism requires that policing be conducted on a principled basis. One aspect of this is that police are protected against political pressures to act in violation of these principles and should act impartially in upholding the right to peaceful protest. Police members shall uphold the principle of non-discrimination, ensuring that any person or group is free to hold a protest. In addition, police should not discriminate against anyone on the basis of identity.

591. The Panel finds it equally important to draw particular attention to the need for impartiality and non-discrimination during crowd management. In South Africa, protests have multiple causes and reasons for which the police are rarely responsible. While engaging with crowds, police must not be perceived as political representatives of a government or other interest groups that protesters are at odds with. Indeed, if POP units behave in a partisan manner, they not only run the risk of violating basic rights such as the principle of non-discrimination, but also not being able to apply the principle of negotiated crowd management. Confidence and trust are preconditions for the effective implementation of their crowd management mandate. In addition, partisan implementation of the law will undermine efforts to

build trust in police as supporters of the right to peaceful assembly and therefore in strengthening the culture of peaceful protest in South Africa.

Recommendation regarding core SAPS crowd management doctrine

592. **PANEL RECOMMENDATION 68:** The SAPS crowd management doctrine must guide the SAPS in supporting and respecting the right to peaceful assembly. In line with this objective the core crowd management doctrine of the SAPS should be defined in terms of the following concepts: negotiated crowd management; situational appropriateness in order to support de-escalation; differentiation; and impartiality and non-discrimination. This doctrine should be foregrounded in NI4 of 2014

593. Panel Recommendations 65, 66, 67 (above) and 69 and 70 (below) will also support implementation of this doctrine.

594. The Panel recognises that translating this doctrine into practice will not always be straightforward.

594.1. One of the difficulties that need to be acknowledged is that it is frequently difficult for police to engage in dialogue with protestors when they arrive at protests that have already become violent. Whether or not police are able to resolve this problem, greater police investment in negotiated crowd management, in a non-partisan manner, would give protestors greater confidence that attendance by police at a protest will enhance the potential for their concerns to be heard and attended to.

595. The following proposed guidelines support greater clarity about implementation of the doctrine:

595.1. That the term ‘crowd management’ be understood as an inclusive, overarching concept that incentivises negotiations and de-escalation measures in all situations. In all crowd management situations where there is a need for them, negotiation and de-escalation, must wherever reasonably possible, be applied.

595.2. That in general, force should not be used against peaceful assemblies. If such assemblies are unlawful and the cooperation of participants cannot be

secured, other law enforcement measures may be considered. The fact that police do not have adequate personnel or resources to carry out law enforcement measures should not be regarded as justification for the use of force.

595.3. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful' (definition of peaceful assembly).

595.4. POP is authorised to act in a manner that is situationally appropriate in order to avoid escalation of situations, and to allow POP units to deal with situations in a manner that will facilitate de-escalation. In so far as it will assist in achieving this purpose, the principle of situational appropriateness allows for intervention in some situations and non-intervention in others.

595.5. Where force is used it should be targeted at individuals who are engaged in violent behaviour with care being taken to avoid harm to others (principle of differentiation).

595.6. Where the presence of the police is the principal factor giving rise to hostile or violent behaviour by the crowd, it is acceptable for the police to tactically withdraw from the scene while continuing to observe events.

596. Further proposed guidelines for the conduct of crowd management operations are provided in the discussion of NI 4 below.

597. A further issue concerns the types of performance indicators that are used by POP. Currently the SAPS has two main performance indicators for crowd management:

597.1. "Percentage of peaceful crowd management incidents policed."

597.2. "Percentage of unrest crowd management incidents stabilised."[445]

[445] SAPS, 2017, pages 116 and 118 available at: https://www.saps.gov.za/about/stratframework/strategic_plan/2017_2018/saps_technical_indicator_descriptions_2017_18.pdf.

597.3. The performance target ('desired performance') for each of these indicators is 100% and the SAPS reports 100% performance against each of these indicators each year.

598. **PANEL RECOMMENDATION 69:** Crowd management training must be firmly grounded in the crowd management doctrine. Facilitating the right to peaceful assembly should be the pillar of crowd management policing and be the primary basis for the existence of POP units.

599. **PANEL RECOMMENDATION 70:** In order to support institutionalisation of negotiated crowd management and the use of minimum force the SAPS should also use indicators that support the use of negotiation, de-escalation and minimum force. Performance indicators should focus not only on whether incidents are policed or stabilised but also (i) the percentage of all incidents that are successfully policed without the use of weapons such as rubber bullets, teargas and stun grenades; and (ii) a performance target should be implemented focusing on the goal of protecting life, including that of police, protestors and others, in the context of crowd management.

Requirements for effective crowd management

600. Requirements for effective crowd management include:

600.1. Adopting an evidence and scenario-based planning approach to inform decision making;

600.2. Willingness to reach out to and communicate with protesting groups and stakeholders as it encourages the shared responsibility for ensuring a peaceful protest, sets tolerance levels, and furthermore enables consultation throughout the process;

600.3. Developing situational awareness which provides critical information that enables POP units to apply the principle of differentiation, allowing for appropriate operational strategies and tactics; and

600.4. Ensuring that the principle of negotiations is employed which includes using time, patience, and appropriate communication, to attempt to facilitate lawful protest activities and obtain voluntary compliance wherever possible.

601. Furthermore, they encompass:

601.1. Leadership and distinguishable levels of command vested with the appropriate level of authority and decision making;

601.2. Gender-sensitivity which means recognising that both the people in the crowd and POP members will be affected by and respond differently to the crowd management and protest environment, dependent on their gender;

601.3. The reasonable use of force, as per the fundamental principles on the use of force discussed in this document and use of force policy guidelines;

601.4. Thorough incident documentation, including, if necessary, thorough and complete criminal investigations; and

601.5. Last but not least, learning and training, as well as the astute use of social media and electronic communication, all form part of the principles of effective crowd management.

Need for a specialised crowd management capability - location and mandate of Public Order Policing within the SAPS

Outline of POP history

602. The history of the Public Order Policing unit dates back to the apartheid period. During that time crowd control units existed in various guises including as the Riot unit and Internal Stability units, with wide ranging functions and powers[446] and with the military, notably by the mid-1980s, often in a supporting role. Its public order management philosophy was militaristic in approach; it often violated people's rights with impunity. The transformation of police during the post-apartheid period saw the Internal Stability units being reconstituted as Public Order Policing units.

603. Since then POP has undergone a number of name changes including being designated as the Area Crime Combatting Units (ACCU) in 2002 and the Crime Combatting Units in 2006, before being re-designated as POP units in 2011. Initially these fell under the 'Area' level[447] of the SAPS but this level was removed

[446] See Rauch and Storey, http://www.csvr.org.za/publications/1483-the-policing-of-public-gatherings-and-demonstrations-in-south-africa-1960-1994.html.

[447] The 'Area' level was a management level beneath the provincial level but above the station level. The area level was removed in 2006. Subsequently the 'cluster' level has replaced the area level but the cluster are smaller than the Areas were. There were approximately 50 SAPS Areas in South Africa but there are now 117 clusters.

in 2006 and since then these units have effectively been under the direct authority of the provincial SAPS offices. The changes in POP not only involved changes in name but also in the number of personnel and units. Notably in the 2006 restructuring process, the number of ACC units was reduced to 23 and 2596 members from the 47 units and 7227 members in the previous year.[448] This was a reduction of more than 60% in personnel numbers. In Gauteng numbers dropped from 1383 to 614, a 55 per cent reduction.[449]

604. The motivation for these changes was influenced by the view that there was limited need for specialised crowd management, [450] as well as the view that crime fighting should be prioritised[451] Consequently, POP units were reduced and public order policing resources diverted to addressing the needs of police stations that were experiencing high crime levels. The dismantling of the POP capability took place over several years resulting in the loss of skilled personnel in the POP environment. Public order policing capacity within SAPS was diminished, not only in terms of personnel but also in relation to equipment and there was a loss of focus on the need to maintain skills through ongoing training.[452] The SAPS POP units continue to feel the impact of these decisions to this day.

605. POP's personnel strength remained low for some time with the rebuilding of the units only becoming a focus at the time of the 2010 FIFA World Cup and particularly after the Andries Tatane incident in April 2011. By 2014 the number of personnel had reached 4700 in 27 regional units and one national reserve unit.[453] By early 2018 personnel numbers had reached roughly 6222 (including about 400 Public Service Act personnel). Restoring the numbers of POP personnel was initially

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[448] Johan Burger, https://issafrica.org/iss-today/the-south-african-police-service-must-renew-its-focus-on-specialised-units.
[449] Bilkis Omar, page 25, https://issafrica.s3.amazonaws.com/site/uploads/M138FULL.PDF.
[450] It should be noted that the statistics recorded during this period cannot be simply regarded as a consequence of changing levels of protest. It is generally acknowledged that one of the major factors impacting on levels of recorded protest was the reduction in the number of POP units and POP personnel, notably in 2006. It is likely that the decline recorded between 2006 and 2009 was strongly influenced by the fact that that there were fewer units recording crowd incidents. It is therefore difficult to comment with any confidence on trends in protest during this period.
[451] Bilkis Omar, page 25, https://issafrica.s3.amazonaws.com/site/uploads/M138FULL.PDF.
[452] Marks and Bruce, Groundhog Day? Public order policing twenty years into democracy, SACJ, 2014(3) 346, 360-361.
[453] Johan Burger, https://issafrica.org/iss-today/the-south-african-police-service-must-renew-its-focus-on-specialised-units.

largely based on inviting former members of the unit to return. It has only been very recently that POP has begun to augment its numbers by recruiting new members.

606. The history of POP since 1994 reflects competing priorities, with the need to maintain a specialised crowd management capability within the SAPS, sometimes being disregarded as a result of the prioritization of crime fighting. The legacy of this problem is that the current SAPS POP units are inadequately resourced and trained and do not have all the necessary skills to effectively perform the crowd management role in the current complex crowd management environment.

Organisational location and structure of POP in the SAPS

607. There are 41 POP units of which four are the national POP Reserve units, located in Pretoria, Gauteng; Matsulu, Mpumalanga; Marrianhill, KwaZulu-Natal; and in Faure, Western Cape. The other 37 POP units are located at provincial level.[454]

608. The four national POP Reserve units fall under the command and control of the Divisional Commissioner, Operational Response Services. The 37 POP provincial units resort under the command and control of the Provincial Commissioner. ORS is responsible for setting standards for both provincial and national POP units as well as providing physical and human resources. The national POP is a SAPS component located within the division. The Division: ORS consists of the following components:

608.1. Component: Border Policing;

608.2. Component: National Co-ordination of Operations;

608.3. Component: Operational Support;

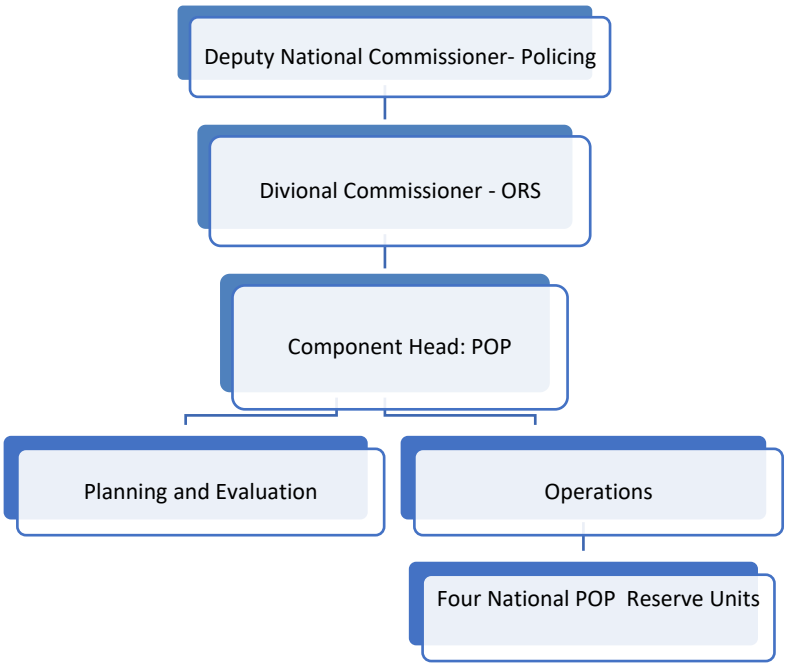
608.4. Component: Public Order Policing; and

608.5. Component: Specialised Operations

609. POP consists of national and provincial structures as illustrated in Diagram 6 and 7 below.

[454] SAPS, 2016-2017 SAPS Annual report, 141.

Diagram 6: The Structure of National Public Order Policing



610. Within ORS, Public Order Policing is headed by a component head (referred to in NI 4 as 'the Head: National POP') and is accountable to the Divisional Commissioner.

610.1. Below the national head is the section head who is responsible for POP operations. However, the section head only has "direct operational command and control in respect of the national POP units in the provinces."[455]

610.2. The section heads of POP at national and provincial levels are responsible for the implementation of standards, operationalising policies, circulating directives and SOP's and monitoring adherence to these by POP units.

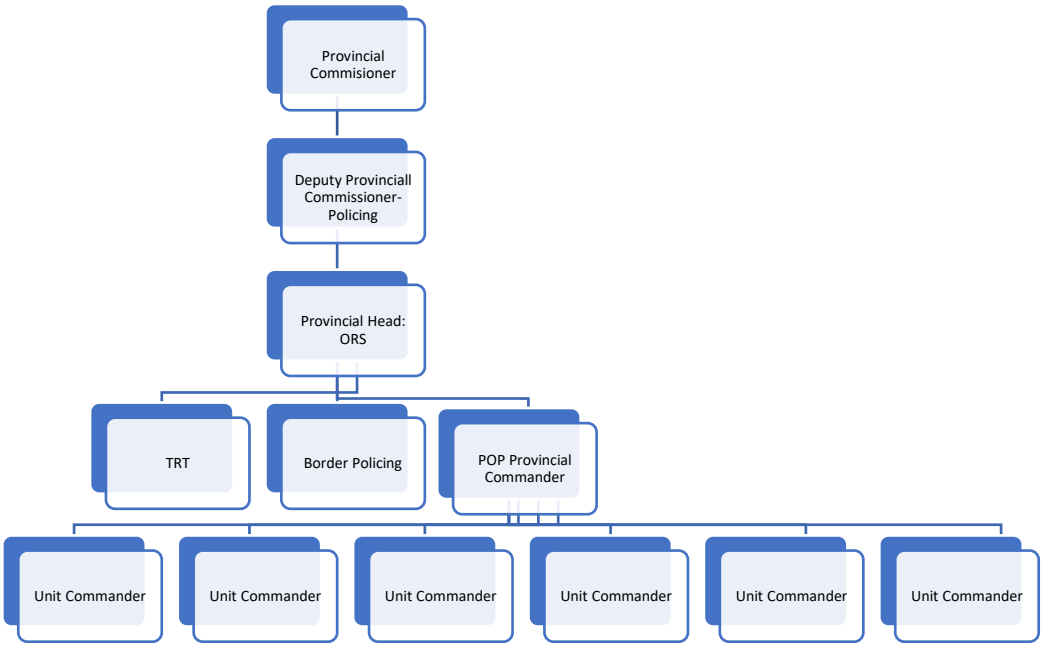
611. Some responsibilities are located at ORS divisional level rather than within the component. The section head for support services within ORS is responsible for the maintenance of vehicles and equipment, finance and budgeting, policy development, human resources and training. The division ORS is also responsible

[455] *Ibid.*

for the development, revision and implementation of policies, standard operation procedures and directives in respect of POP.

612. At provincial level, the provincial commissioner is the overall commander of policing in the province and the accounting officer. The Provincial Head: ORS is accountable for public order in the province. The POP provincial commander is responsible for coordinating and gathering information relating to POP functioning in the province.

Diagram 7: Provincial structure of Public Order Policing



The mandate of POP as provided for in National Instruction 4 of 2014

613. In a presentation to the Marikana Commission the SAPS stated that the mandate of Public Order Policing is "to provide security and stabilise solutions for crowd management and crowd unrest situations, where classic policing strategies are not equipped to deal with the situation."[456] The statement is noteworthy because it makes no reference to the need to uphold the right to freedom of peaceful assembly, provided for in section 17 of the Constitution. In addition it has

[456] SAPS Basic and Specialised Training overview. http://www.marikanacomm.org.za/exhibits/Exhibit-Q-SAPS-Training-overview.pdf. Accessed 23 June 2017.

also consistently been the case that Public Order Policing units perform far more diverse functions.

614. This inconsistency in relation to POP units is also reflected in NI 4 of 2014. On the one hand NI 4 defines POP as “the specialised Public Order Police unit, trained to manage and control crowds or persons engaged in a gathering or demonstration with a view to restore public order’ including "managing pre-planned and spontaneous assemblies, gatherings and demonstrations whether of a peaceful or unrest nature.”[457] On the other hand NI 4 of 2014 also makes it clear that POP units are intended to perform a range of different functions.

614.1. In its introductory Section it states that ‘Public Order Policing requires the maintenance of public order firstly by ensuring public order during public gatherings and demonstrations and secondly by intelligence driven crime combatting and prevention operations” (Section 1(6)).[458]

614.2. Paragraph 4(1) dealing with the ‘functions and tasks of POP units,’ and describes these as:

614.2.1. The policing of public gatherings

614.2.2. The combating of serious and violent crime

614.2.3. The rendering of Specialised Operational Support.

615. A further source of confusion is that the explanatory text relating to ‘the combating of serious and violent crime’ states that:

615.1. “Combating of serious and violent crime includes stabilizing outbreaks of public violence at incidents of (and the combating of) serious and violent crime and dealing with any occurrences of crowd gathering during the management of crime incidents (such as cash in transit heists, armed robberies and transport sector violence and farm attacks) to protect persons and property.”[459]

615.2. This paragraph says that POP units are responsible for crowd management functions that take place in the context of incidents of serious

[457] National Instruction 4 of 2014, section 2(t), page 3.
[458] National Instruction 4 of 2014. Para 6 of Background.
[459] NI4 of 2014, paragraph 4(b).

and violent crime and police responses thereto. Therefore, the paragraph does not say that they are directly responsible for combating serious and violent crime, although the heading of the paragraph confuses the issue as it implies that 'Combating of serious and violent crime' is itself a POP responsibility.

615.3. In paragraph 1(6) the mandate or function of POP includes "intelligence driven crime combatting and prevention operations."

615.4. NI4 of 2014 is therefore confusing and inconsistent on the issue of whether or not either "combating of serious and violent crime" or "intelligence driven crime combating and prevention operations" are part of the POP mandate.

616. In a similar way the explanatory text regarding 'the rendering of specialised operational support' essentially describes this function as 'rendering support to other police components or divisions'. But no restrictions or limitations are placed on what types of support are being referred to. (Various, very open ended, examples are provided including searching for and apprehending suspects, protecting VIPS 'by controlling perimeters' and protecting National Key Points, and 'providing tactical reserves'.)

617. It is not clear from NI4 of 2014 whether crowd management should be seen as the primary mandate of POP units, or whether it is just one aspect of their mandate. In the definition of POP in paragraph 2 of NI4, POP are said to be defined by the fact that they are 'trained to manage and control crowds.' However, paragraph 1(6) and paragraph 4 contribute to this confusion.

618. Ultimately NI4 does not put any limit on how POP units may be used. POP may therefore be said to have an 'open mandate.' Virtually any use of POP units may be justified in terms of the National Instruction.

The POP mandate in practice

619. POP units are therefore not used exclusively for crowd management and are frequently deployed in other roles:

619.1. POP units are widely utilised for general crime prevention policing duties. Police management often justify the utilisation of POP in this way on the basis of operational demands. In this role POP units are not deployed as a

specialised capability but simply to supplement the ranks of other station based SAPS personnel.

619.2. As indicated paragraph 1(6) of NI4 of 2014 indicates that POP is also responsible for 'intelligence driven crime combating and prevention operations'. POP units are therefore also sometimes used as a capability that is suited for 'medium to high risk' operations, particularly in a support role.[460] Operations of this kind are operations where police anticipate that they may face a threat of gunfire or other violence of a life threatening nature. This role is partly performed by the Tactical Response Team and National Intervention Unit and may involve responding to cash in transit heists, gang violence, armed robberies, taxi violence and farm attacks and other crimes of violent nature. These serious crimes require highly skilled and experienced police officers. POP units continue to retain personnel from POP's predecessor, the pre-1994 Internal Stability Units. In this period the high levels of violence meant that members of the unit developed extensive experience of 'medium to high risk' situations. It is partly for this reason that they are regarded as a support resource in these kinds of operations. The fact that they are resourced with bullet resistant armoured vehicles is an additional reason for including these units (though as discussed further below the armoured vehicle fleet is composed largely of fairly old vehicles, many of which are in need of repeated maintenance)

619.3. POP personnel may also be in other roles such as to provide routine guard duties at residences for ministers. In some cases, POP armoured vehicles are also used by POP members during these deployments.

Control and management of POP units

Background – provisions of the interim Constitution

620. In order to understand the current legal provisions governing Public Order Policing in South Africa it is helpful to refer to the interim Constitution (No. 200 of

[460] In some cases the mandate of POP is specifically defined as 'medium risk' but this is not consistent. See for instance the 2012 SAPS presentation to the Portfolio Committee on 'Specialised Operations, undated, 3.

1993) (Constitution 1993). In terms of section 218(1)(k) of the Constitution, 1993, one of the responsibilities of the National Commissioner was:

620.1. The establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner: Provided that the Act referred to in section 214 (1)[461] shall provide that the President, in consultation with the Cabinet, may direct the National Commissioner to deploy the said unit in circumstances where the Provincial Commissioner is unable to maintain public order and the deployment of the said unit is necessary to restore public order;

621. It must be noted that the 'Transitional arrangements' schedule to the 1996 Constitution provides that section 218 (1) remains in force.[462] However, it also amended section 218(1)(k) in effect deleting the latter part of the provision so that it now only provides that the National Commissioner is responsible for:

621.1. "The establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner."[463]

622. In its original form section 218(1)(k) was a Constitutional provision. However, the amended section 218(1)(k) has the status of an ordinary legislative provision and may be amended or repealed by an ordinary Act of Parliament.[464] The Panel emphasises this point as section 218(1)(k) should not be seen as presenting any special obstacle to amendment by Parliament of the legislative provisions regarding control of the national public order unit.

Section 17 of the SAPS Act

623. Section 17, which provides for the establishment and maintenance of a national public order policing unit, was therefore passed as part of the South African Police Act, Act No.68 of 1995 in compliance with the original section 218(1)(k) of the interim Constitution.

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[461] Section 214(1) provided that: 'There shall be established and regulated by an Act of Parliament a South African Police Service, which shall be structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments.'
[462] Constitution, Schedule 6, section 24(1)(b).
[463] Constitution, Schedule 6, Annexure D, section 1(d).
[464] Constitution, 1996, Schedule 6, section 24(1)(b).

623.1. Section 17 (1) and (2) provide that the SAPS National Commissioner must ("shall") maintain a national public order policing unit and that the national public order policing unit may be deployed to a province upon request of and in support of the Provincial Commissioner. According to section 17(3), such deployment is subject to the directions of the Provincial Commissioner.[465]

623.2. The President may also, in consultation with Cabinet instruct the National Commissioner, in terms of section 17(5), to deploy the national public order unit in circumstances where the Provincial Commissioner is unable to maintain public order and the deployment of the unit is necessary to restore public order.

SAPS compliance with section 17 of the SAPS Act

624. Four of the 41 POP units are designated as national reserve units, and the SAPS is therefore compliant with section 17(1).[466] As indicated, the other 37 POP units fall under provincial commissioners and are not part of the 'national public order policing unit.'

625. Certain paragraphs of NI4 of 2014 appear to be inconsistent with section 17 of the SAPS Act.

625.1. Paragraph 3(1) of NI 4 provides that 'The Head: National POP will have direct command and control over POP units in the provinces';

625.2. Paragraph 3(2) provides that 'The Section Head: POP Operations (at the division: ORS) will have direct operational command and control in respect of the national POP units in the provinces.'

626. Section 17(5) of the SAPS Act provides that it is only 'in circumstances where the Provincial Commissioner is unable to maintain public order and the deployment of the unit is necessary to restore public order' and where it is authorised by the President, in consultation with the Cabinet, that there is national authority over the deployment of POP units in the provinces.

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[465] Section 17(1)(3) of the SAPS Act.
[466] As indicated above further recruitment and training is taking place in order to support the establishment of three more reserve (i.e. national) units in Cape Town, Durban and Mbombela. SAPS, 2016-2017 SAPS Annual report, 141.

627. There are also other provisions of the NI4 of 2014 that refer to 'national operations' but do not make it clear whether or not these are references to operations authorised in terms of section 17(5).

627.1. Paragraph 3(3) provides that "National operations will be initiated by the National Commissioner or the Divisional Commissioner: ORS."

627.2. Paragraph 3(4) provides that "The Divisional Commissioner ORS has the authority to deploy POP members of national POP units as well as physical resources across provincial borders for national operations or priorities."

627.3. Paragraph 3(5) provides, inter alia, that "The divisional commissioner, ORS may in consultation with the relevant provincial commissioner, deploy POP members as well as physical resources of provincial POP units in that province across provincial borders for national operations or priorities".[467]

Challenges raised by legal provisions relating to command and control

628. Notwithstanding the provisions of NI4 it is therefore apparent that, in any situation where the national POP is deployed this will be "subject to the directions of the provincial commissioner of the province in which the unit is deployed" unless it is a deployment under section 17(5) of the SAPS Act that is authorised by the President in consultation with Cabinet.

629. As indicated the 37 provincial POP units are provincial policing resources that fall under the Provincial Commissioners. The Provincial Commissioner's authority over these units is exercised in terms of their general authority for 'policing in their provinces' subject to the provisions of section 207(4) of the Constitution, 1996. The current legal position is therefore that in practice power over the deployment of POP units is almost entirely a power exercised by the provincial commissioners.

630. During the Panel's visits to various POP units in different parts of the country, the Panel consistently received the same message: that training is not adequate for operational demands and that Provincial Commissioners consistently prioritise crime, disregarding the need for full strength POP units to be deployed to attend crowd management incidents and for the specialised crowd management

[467] *Ibid.* p.4.

capabilities of POP units to be maintained through ongoing training. POP units are frequently diverted from their primary responsibility of crowd management in order to supplement, in one way or another, the crime fighting capabilities of the SAPS.

631. This situation has a negative impact on the operational readiness of POP units for the following reasons:

631.1. Inadequate numbers of POP personnel are deployed to crowd management operations. The basic POP squad formation or unit is a 'section' comprised of 8 members, but POP members find themselves being routinely deployed to crowd management situations in smaller numbers than this.[468] Considering the fact that the crowd management techniques that POP units are trained in usually involve more than one POP section, this renders their training irrelevant.

631.2. Neglect of training—as a specialised policing capability POP units need to maintain their operational readiness through training. In areas where, and at times when levels of protest are high, this may make it difficult for POP units to give adequate attention to training. Furthermore, the tendency for POP units to be deployed in crime fighting roles is also a major contributing factor to this.

631.3. Another problem is that this places the Provincial Commissioner in charge of resources so that s/he has a major influence over which resources are allocated to POP. In some cases complaints were raised that provincial commissioners use their control over provincial policing resources to divert POP from its crowd management responsibilities. For instance, the vehicles that would be provided to them would be two seater vehicles suited to crime prevention responsibilities, rather than vehicles that are suitable for an 8 person POP section to be deployed to a crowd incident.

632. Cluster commanders also tend to utilise the 'open mandate' provided by NI 4 to make use of POP as a crime fighting resource. For instance the 2016 Civilian Secretariat for Police Service report, referred to above, notes that:

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[468] One example is the KZN student protest in February 2016 incident referred to in the Civilian Secretariat for Police 2016 report in which 'two POP members were deployed to police a crowd of 200 protesting students at the University of Kwa-Zulu Natal for the # Fees Must Fall Campaign' (Civilian Secretariat for Police, 41).

632.1. “The mandate of POP is confusing and misunderstood by members in terms of their role and function in the broader strategy of policing. Cluster commanders favour the use of POP for crime combating as their performance is measured by the number of arrests made, with the result that the crowd management responsibilities are being neglected.”[469]

632.2. The ability of cluster commanders to exercise authority over POP units is also related to the fact that some of them are at a higher rank than the provincial heads of POP.

633. The likelihood that POP personnel will be used for this purpose has also been accentuated by the introduction of Operational Command Centre (OCC) model at cluster level by the SAPS in 2016.[470] The OCCs are intended to serve as planning and coordination mechanisms for police operations at the cluster level. Their focus is supposed to be on policing of serious and organised crimes by combining all police units in intelligence driven operations. The multi-agency and integrated approach to policing embodied in the OCC is commendable in many respects, with the current OCC concept providing for the deployment of 6 POP members to each OCC. There are currently 118 clusters and the implication is that over 70 POP personnel would be deployed to OCCs. This is more than 10% of the current total POP human resource complement nationally.

633.1. The Panel therefore believes that it is unacceptable for POP units to become part of the OCC as this will further deplete POP units. It is also inappropriate for POP personnel to be deployed to the OCC in 6 person units as the basic POP unit is an 8 person unit (‘a section’) and this will destroy their formations and defeat the whole concept of a crowd management approach which is anchored on team work, cohesiveness and robustness of the team. It is therefore not preferable for a full section to be deployed to each OCC as this

[469] Civilian Secretariat for Police Service. p. 40.
[470] See for instance SAPS. 2017. The launch of a Cluster Operational Command Centre yields positive results in the Western Cape, Media Statement, 5 May 2017. See at: https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=11081 ; https://www.algoafm.co.za/article/local/87234/eastern-cape-pilots-saps-s-first-operation-command-centre.

will impact on the proper functioning of POP units who are already severely depleted.

634. As illustrated above, the OCC system is merely one example of the competing demands for POP and competing ideas about how its resources should be used.

The mandate of POP

635. As indicated above NI4 of 2014 does not put any limit on how POP units may be used and POP may therefore be said to have an 'open mandate.' Virtually any use of POP units may be justified in terms of the National Instruction. In addition most POP units fall under the authority of the provincial commissioners and there is a tendency for them to take advantage of the "open mandate" provided by NI4 to use POP personnel as a "stop gap" in crime combatting or other roles.

636. The Panel therefore debated whether the solution to this problem would be to change the mandate of POP. The concern is how to ensure that POP units are not simply utilised as a general policing resource so that, at the very least, full strength POP sections can be deployed to crowd management events, and their competencies maintained through ongoing training.

637. One perspective presented in the Panel was that the mandate of POP should be an 'exclusive mandate' in terms of which SAPS regulations would provide that POP units should only be used for crowd management and for no other function. The Panel decided not to adopt this approach.

638. One of the major issues in this regard is simply the need for resources to be used in a productive way. There is a need for SAPS to be able to maintain operational readiness for crowd management. But even if the need to maintain POP as a specialist crowd management capability is emphasised, and sufficient time is allocated in order to maintain the crowd management capabilities of POP units through training, in any area the demand for crowd management is not consistent. It is not reasonable to adopt a position in terms of which POP units will only perform crowd management functions irrespective of the levels of protest. It is also necessary to acknowledge that trends in levels and types of protest are not

predictable. It is not reasonable to expect that trends can necessarily be predicted nor that 'better intelligence' can always identify potential threats in advance.[471]

639. In addition POP units have equipment and resources that no other units possess in the SAPS. For example, POP armoured vehicles (Nyalas) may in some circumstances be required to enhance police capabilities in a specific operation.

Recommendation regarding POP mandate

640. Crowd management is recognised in the SAPS and internationally as a specialised policing function. In a country experiencing high levels of protest it is important that a specialised crowd management capacity be maintained.

641. **PANEL RECOMMENDATION 71:** Crowd management, as broadly defined in this report, should be the primary function of POP units. In line with this POP personnel must be adequately trained and equipped and should be deployed to crowd management incidents in sufficient numbers to be able to perform their duties in line with accepted operational standards and practice. POP must ensure that it has all the resources and capacity to address the range of challenges that exist in the crowd management environment.

641.1. In order to comply with this recommendation and minimise delays in the deployment of POP personnel to crowd management situations, POP units will need to have personnel who are available on standby. Subject to this requirement the Panel recognises that the POP units are also able to provide specialised operational support in medium-risk crime combatting operations and other operations where the specialised capabilities of POP are needed. In so far as POP performs other functions the focus should be on utilisation of the specialised capabilities of POP. POP should in no way be the lead role-player responsible for combating serious and violent crime. POP's role should be to offer a unique set of functions that would add value to the broader operational concept, within the 'rendering of Specialised Operational Support.

[471] HMIC, 2011b, 4.

The type of specialist crowd management capability that is required

642. The manner in which POP are utilised in the SAPS does not support the maintenance of a specialist crowd management capacity. As indicated above the combination of the POP mandate, and the way in which command is exercised over the utilisation of POP as a resource, is that POP units are used as a 'stop gap' general resource to supplement other police resources. Sometimes this is because it is helpful to deploy them in 'squad' type formations but frequently it is simply that a handful of POP members are deployed to support other police in one or other crime combatting or VIP protection role.

643. Crowd management requires specialised policing skills and this has a variety of implications ranging from concerns regarding the selection/recruitment of suitable personnel, appropriate training, to ensuring the deployment of POP personnel in formations that support implementation of their training. However, it is important to clarify the type of specialist crowd management capability that is required.

643.1. The definition of 'peaceful assembly' that appears in this report is a broad definition. This indicates that an assembly is peaceful if a large majority of participants conduct themselves in a peaceful manner though it may involve some unruly, provocative or even violent behaviour by individuals within the crowd. The definition does not therefore mean that peaceful assemblies will be problem free. Whether or not they are, they would fall within what the SAPS refers to as crowd management 'maintenance'. In these situations the primary POP responsibility is to support the peaceful conduct of the protest. In such a situation the emphasis of POP units should be on management of the situation through negotiation, on a non-threatening posture and on maintaining discipline within police ranks through an emphasis on tolerance levels. The possibility of targeted measures might be considered if these is violence from individuals within the crowd though the manner in which this is done should be such as to avoid escalation of the situation. Some of the key qualities for this kind of policing, associated with the need to 'hold the line' therefore include attributes such as patience, endurance and resilience.

643.2. The discussion of POP doctrine above emphasises that in 'not peaceful' protest situations, or other situations of unrest, negotiation remains a primary part of POP doctrine, where possible. At the same time situations that are not peaceful raise questions about the need for police to intervene in order to reduce violence and de-escalate the situation. In NI4 such interventions are referred to as 'public order restoration operations.' Panel Recommendation 66 above is that POP should strengthen its ability to carry out arrests as in many situations of this kind this may be more effective than dispersal as a means of bringing the situation under control and is also less likely to involve injury to people who are not engaged in violence.

644. One of the defining features of POP currently is that POP members are on average fairly old relative to the SAPS as a whole. For instance statistics provided to members of the Panel indicated that the average age of personnel in the Rustenburg POP unit was approximately 42 years.[472] This is related to the fact that there has been limited emphasis on recruiting new members.

645. It is sometimes said that POP serves as something of a 'dumping ground' rather than a unit that has special status attached to it. When attempts are made to expand POP from within SAPS ranks, members who are released to join POP are sometimes members who are unwanted in other units. Whilst at one point POP members received a bonus, this also no longer serves as an incentive to join POP as the bonus has been generalised to other units.

646. These points emphasise the need for the recruitment and selection of POP members to be based on consistent criteria in order to ensure that members are suited to perform crowd management functions. It also raises the need for incentivising membership of POP in some way.

647. Though there are common areas the skills involved in 'maintenance' and 'restoration' operations are different in some respects. As indicated above, the current "default position" is one in which POP have a tendency to over-rely on the use of less-lethal-weapons. The Panel has motivated that POP needs to be able to improve its capacity to carry out arrests (in line with a reduced reliance on the

[472] Rustenburg Public Order Police, Presentation to Marikana Panel of Experts, 28 November 2017, 3.

use of less-lethal-weapons). It is clear that improving this capacity will require that more POP members are not only trained and equipped but in a state of physical preparedness which is suited to performing this role. A more youthful personnel complement would be better suited to maintain the standards of fitness that would be necessary to perform this role

648. The issue of POP's general lack of agility and flexibility to anticipate and adapt to changing situations on the ground is highlighted in the report of the Marikana Commission. In this respect the Marikana Commission quotes the evidence of one of the expert witnesses to the effect that 'POP capabilities are mainly reactive, they are mainly static, set piece, aimed at containment and crucially, prefer a distance between them and the crowd'.[473] The discussion of these issues at the Marikana Commission was framed in relation to the issue of the SAPS capacity for dealing with crowds 'armed with sharp weapons and firearms'.

649. This report argues that the protest environment in South Africa is best characterised as complex. Crowds armed with sharp weapons and firearms are only one dimension of the crowd management landscape. Most of the non-peaceful protests that the SAPS has to deal with are not characterised by the presence of these weapons. In incidents where there is serious violence, whether or not sharp weapons and firearms are present, there is a need for POP to be able to respond in a manner that not 'static and set piece.'

650. In the medium to long term POP should therefore be comprehensively overhauled as a unit. In the shorter term the priority is to strengthen POP's ability to engage in 'restoration' operations in a manner consistent with the doctrine and principles put forward in this report. The recommendation that POP needs to improve its ability to carry out arrests should be seen as only one dimension of a broader need for POP to be able to deploy more agile and flexible capabilities in crowd management 'restoration' situations.

Recommendations

651. It is clear that the present system does not support the optimal functioning of POP units as a specialist crowd management capability. The Panel concluded that

[473] Marikana Commission report. p. 548, para 3.

there are various aspects to addressing this problem and makes the following recommendations in this regard.

Centralised command of POP units

652. The Panel is of the view that, in order to ensure that POP is maintained as a specialist capability, it is necessary to locate all POP units under one command at national level.

653. **PANEL RECOMMENDATION 72:** POP should be centralised under one command at national level so that all POP units form part of the national public order policing unit provided for in section 17 of the SAPS Act, 68 of 1995. This may involve locating all POP units within the current Public Order Policing component within ORS or as a separate division, thereby ensuring a direct link to the National Commissioner. This will enable the head of POP to:

653.1. Ensure that POP is deployed in a manner consistent with section 17 of the SAPS Act;

653.2. Ensure that consistent standards are applied in relation to decisions about when POP units are to be deployed at the request of and in support of the Provincial Commissioner. The head of POP would need to consent to any request by the Provincial Commissioner to use POP personnel outside of the primary POP mandate.

653.3. Ensure the proper allocation of resources to the unit (both physical and human resources), thereby enabling the effective functioning of POP.

653.4. The operational functioning of the POP unit should be reviewed in order to allow the members to have time to attend operations as well as ongoing in-service training.

654. **PANEL RECOMMENDATION 73:** Key Performance Indicators for the head of POP (whether at component or division level) should include:

654.1. Maintenance of a specialised crowd management capability, ensuring that all POP units nationally are adequately trained and equipped.

654.2. Deployment of POP members to crowd management situations shall be in line with SAPS principles regarding minimum acceptable deployments (addressed in Panel Recommendation 83 below).

655. In terms of the system that is proposed here it would be preferable for the head of POP to be at the same rank as a Provincial Commissioner. This is necessary in order for him/her to have an equivalent level of authority to a Provincial Commissioner. The head of POP will have to exercise authority on behalf of the National Commissioner in relation to the utilisation of POP units by the Provincial Commissioner (in terms of section 17(2) of the SAPS Act). .

Restoration capability

656. **PANEL RECOMMENDATION 74:** Within each POP unit there should be a public order restoration capability consisting of one section for each platoon. The capability should:

656.1. Be highly trained in line with the crowd management doctrine and fundamental principles on the use of force in this document, with particular emphasis on protection of life.

656.2. Apply strict selection criteria;

656.3. Include specialist firearms officers (see Panel Recommendation 106);

656.4. Impose limits on the duration of service by most members of the unit so that some experienced members remain in the unit but the unit is able to maintain a relatively youthful character.

Recruitment and retention of POP unit personnel

657. **PANEL RECOMMENDATION 75:** Competency-based policing is premised on the recruitment of quality personnel into POP units. The recruitment system should be strengthened in order to support the competence of POP units thereby ensuring that they are able to perform their mandate. The criteria for POP unit personnel needs to be clarified and consistently applied.

658. Many POP members with vast experience also lamented the lack of promotion prospects as one of the demotivating factors within the POP working environment. At the same time, in some platoons, there were more supervisory elements of the

rank of warrant officers which was not proportional with corresponding strength of their subordinates.

659. **PANEL RECOMMENDATION 76:** POP needs to better be able to both attract appropriate personnel and retain their services by creating an environment in terms of which employment in POP is seen as a 'choice' assignment within the SAPS and members remain committed to the unit. Critical skills must be retained through a number of interventions including better remuneration even where prospects of promotions are slim due to the nature of the task (in this regard see Panel Recommendation 3 regarding introduction of a two-stream system). Job rotation should also be used as a way of improving retention and improving the skills of POP members.

Improving representation of women in operational roles

660. One issue that Panel members raised during visits to POP units was the question about retention of female personnel. Some POP units emphasised that female members were actively involved in an operational role. A point that was raised in many POP units was about the difficulties that they experienced in retaining women in an operational role. This appeared partly related to the fact that POP units are sometimes deployed to other provinces or areas for extended periods and that this presents more of a problem for female POP members. However, improving the representation of women in POP units is not an issue that should be neglected. Amongst other reasons in many crowd management situations a significant number of participants are women and it is appropriate that the composition of POP units be better aligned with that of the crowds that they are policing.

661. Therefore, recruitment of women police members into the POP units is crucial. This will align crowd management policing in South Africa with international guidelines, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), as well as to ensure compliance with the national legislative framework (Criminal Procedure Act 51 of 1977).

662. In this regard and in compliance with Article 18 of CEDAW, the South African government adopted a policy that each line ministry/ organisation must have a gender structure or gender focal point. To this end SAPS established a gender

desk within SAPS. The intention is to enable these structures to address both internal and external transformation. The functioning of these structures is monitored by the Office on the Status of Women situated in the Presidency.

663. The United Nations Public Order Policing units for peace keeping mission operations are guided by among other instruments, the Standard Operating Procedure (SOP) for Assessment of Operational Capability of Formed Police Units for Service in Peacekeeping Operations and Special Political Missions .The 2017 SOP edition stipulates that, “Female police officers play a crucial role in the various tasks of FPUs (public order units) , including public order management.” The SOP further argues that the role of women in public order including crowd management is indispensable. To that effect, some United Nations public order units from UN member countries have established all women platoons.

Psychological and wellness support

664. **PANEL RECOMMENDATION 77:** The provision of psychological and wellness support services to POP personnel should be mandatory and routine. Compulsory post incident psychological debriefing and trauma support services are an essential part of the provision of wellness support. Psychological and wellness support services to all SAPS members should continue to be provided in-house together with the option of members making use of an accredited external service provider. The provision of mandatory psychological and wellness support services is an essential part of the duty of care for the maintenance of sound mental health and operational readiness. Police members who are severely traumatised and unable to effectively perform their policing duties are to be withdrawn from an operation and provided with the necessary psycho-social support.

Training curriculum

665. **PANEL RECOMMENDATION 78:** Public order situations are dynamic and complex and therefore the training curriculum needs to be aligned to this reality. The curriculum for crowd management needs to be adapted to reflect the dynamic crowd management environment. The ongoing review and updating of training manuals, and training methods that integrate lessons learned from operational experience and best practice, will ensure that the training is relevant, appropriately task centred and cognisant of operational demands.

666. **PANEL RECOMMENDATION 79:** The SAPS should establish a guardian committee responsible for curriculum review and development with respect to crowd management. The guardian committee should consist of experienced operational members.

Training

667. The ongoing use of POP personnel in crime combating operations and other policing duties has negative impacts on POP readiness and its training cycle. In particular, maintenance exercises and refresher courses are adversely affected by these operational demands, which have been given precedence over training and development. Consequently, some training programmes designed to address performance deficiencies have not been undertaken. In terms of the SAPS National Instruction 4 of 2014[474], police personnel are required to attend training on a regular basis to maintain operational standards and to address specific challenges identified during crowd management operations. As a specialist policing function, POP members must undergo regular maintenance and refresher courses to maintain their fitness levels, standards, proficiency and competencies. Assessment should be linked to training of POP members to ensure that their competencies and skills remain at high levels: this is consistent with international policing practice. POP members who fail to meet the required standards should be sent back to training or re-assigned to other policing functions.

668. **PANEL RECOMMENDATION 80:** POP should prioritise training and learning, with in-service training (both maintenance and refresher training) focusing on strengthening the core competencies of POP personnel. This is to ensure that the skills level, competencies and capacities of POP personnel are well maintained. Implementation of this recommendation would require the necessary financial support.

668.1. SAPS must put in place a training cycle to ensure that POP members maintain their standards and competencies.

[474] See NI4 of 2014, paragraph 20(2).

668.2. Such training should focus on both individual and group competencies required for the roles and responsibilities of the units and deepen their understanding of their crowd management mandate and role.

668.3. Periodic assessments should be built into and part of the training cycle.

668.4. A member who fails, or fails to undergo mandatory crowd management training should be restricted from carrying out crowd management duties until such a time that she or he has undertaken the course and satisfied examiners on key competencies. This should apply to all POP members who are charged with the responsibility of crowd management, irrespective of rank.

668.5. POP members who no longer possess the required competency and capability should be transferred to other less demanding policing roles.

669. In terms of the SAPS National Instructions, POP members are obliged to undergo regular maintenance exercises to ensure for their readiness for operational deployment. This is only possible when there are dedicated trainers and facilities for regular in-service training to take place.

Training facilities

670. Currently, POP training takes place in only two training facilities, namely, Thabazimbi and Mankwe. These training centres vary both in size and facilities with regards to classrooms, housing for accommodation and layout for simulations. The challenge is that these training facilities are not easily available as they cater for the training needs of all divisions in the SAPS as well as SAPS basic training. This impacts on training as training can only take place when these facilities are available. In terms of the National Instructions, police officers are required to attend periodic training. Also, the proximity of these training facilities to communities also vary, as some are much closer to community settlements than others. The proximity to human settlements determines what training can be conducted which does not pose risk and inconvenience to communities around the facility.

671. Currently, there is no dedicated POP training facility: Thabazimbi has the potential to be a world-class training facility depending on funding being made available. The Thabazimbi training facility when completed will still not be the most

suitable training centre for POP and other specialised training. This training facility is suitably placed in a remote area away from human settlements and other distractions. The facility can be further developed and properly designed with layout for both rural and urban operations. The issue of costs to complete the facility has been the biggest obstacle in completing it. When completed, the facility will also have adequate facilities for accommodation, field and classroom exercises.

672. To maintain acceptable standards, implement public order policing techniques and strategies requires that POP members undergo basic crowd management training, maintenance exercises and regular refresher training courses at a dedicated training facility. The dedicated POP training facility should employ highly skilled trainers, curriculum developers and assessors on a fulltime basis. The benefits for this is that there are opportunities for experienced police officers who are unable to perform physically demanding and strenuous operational duties, but can be utilised to share their skills and knowledge as trainers, they can also be utilised as assessors or curriculum developers. Also, there is an opportunity for such centres to develop and conduct research and come out with innovative methods, tactics and techniques.

673. In Zimbabwe the POP units have their own training facilities (training centres). In addition to the main Public Order training centre, Zimbabwe Republic Police Public Order Unit (Support Unit) has additional training centres per district. This signifies the importance of the function of the public order units through the provision of training facilities.

673.1. The role of each district training centre is to facilitate ongoing training programmes. Initial training for public order management is conducted at the Public Order Headquarters, whereupon completion members are deployed to different units in different districts.

673.2. At district level, different troops (Companies) are deployed for operations in support of provinces using a flow chart system. This means that companies/troops are deployed for a tour of duty for a period of between 30 to 42 days before they are changed for time off. After the completion of the time off period, they then undergo mandatory retraining, including crowd

management retraining as a company. Each unit undergoes retraining at least once per quarter.

673.3. As a result, these training centres are also utilised to assess and evaluate periodically the operational readiness of POP units and their ability to maintain minimum standards for public order policing. The assessment and evaluations of POP units includes physical fitness, theory and application of techniques and tactics. Public Order Police commanders are also regularly assessed to evaluate their decision making, command and control. They are given practical scenarios using simulations programmes where their decision making is assessed and evaluated.

674. A dedicated training centre for POP will be crucial for standardising and in ensuring that POP standards are met.

675. **PANEL RECOMMENDATION 81:** A dedicated, well designed crowd management training facility must be developed for crowd management training of Public Order Policing members. Such a training facility should have in place as a minimum requirement: road patterns, house facades, natural features, adequate accommodation, and recreational facilities. Such a facility should be adequately designed and equipped to reflect the operational realities on the ground to enable POP members test different 'real scenarios' in 'real simulated environments' to develop capabilities and resilience to deal with different scenarios. In particular to adequately prepare officers, provide them with the necessary skills and capabilities to deal with all sorts of crowds including armed crowds.

675.1. The training facility should employ experienced and fulltime trainers, curriculum developers, assessors and moderators. This is aimed at ensuring that training can take place regularly throughout the year. This will ensure that police officers and POP units are regularly assessed and evaluated. Also, this will ensure that the training curriculum, training methods and methodologies are regularly updated to reflect the operational dynamics of public order situations.

Additional infrastructure for POP at unit level

676. There are several infrastructural requirements for POP units. The infrastructural requirements are mainly to support the administrative and

operational requirements for POP units. The infrastructure for administrative purpose includes office space, meeting rooms and secure space for human resources records, files and equipment. Also, adequate space in the POP units is required for in-service (in-house) training, briefing and debriefing of police officers, storage of equipment, ammunition and weapons. It is important that POP units are secure given the kind of equipment that is kept in these units.

677. **PANEL RECOMMENDATION 82:** Minimum standards should be developed and maintained for infrastructure requirements for each POP unit. This needs to take into account that POP units are located at and deployed in a variety of settings. This should include administrative office space, debriefing rooms, and storage space for space for equipment, including weapons and ammunition.

Minimum strength and capabilities of POP units

678. In principle the deployment of POP units to crowd management situations should vary in terms of nature, size and whether the crowd situation is expected to be peaceful or not. In general it is recognised internationally that being able to deploy greater numbers of public order police enables less reliance on the use of weapons and crowd management operations are anchored on personnel numbers with personnel working in teams rather than an individual approach.

679. For instance, internationally the use of arrest teams is regarded as a tactical option that is preferable to the use of less-lethal-weapons as it involves reduced risk of injury for the person targeted and others. However, arrests in particular require police to be able to deploy sufficient numbers. For instance, a British government report on the 2011 London riots states that police estimated that:

679.1. "They need to outnumber rioters by three or five to one if they are to make arrests and disperse groups – a much higher level of resource than is needed to hold a line and protect territory. This meant that arrest as a tactic was impossible in some circumstances."[475]

[475] HMIC, 2011b, 7.

680. The types of numbers that are required will influence the tactics that can be used.

681. Internationally there are different approaches to how to deploy public order police. In the SAPS, POP crowd management theory is based on the concepts of, derived from military organisations of sections, platoons etc. This should mean that POP units can be deployed as follows:

681.1. A section comprises 8 POP members including/and a section leader.

681.2. The second level of deployment of POP personnel for crowd management operations is a platoon. When 4 sections are deployed together in a crowd management situation they form a platoon. A platoon is headed by a platoon commander.

681.3. The third level of deployment of POP members for large operations is a company. A company is formed when 4 platoons are deployed together for a crowd management operation.

682. As highlighted above a recurring problem is that the number deployed is inadequate:

682.1. The minimum required numbers should be required to enable them to implement their tactics and techniques.

682.2. Ideally minimum deployments should be directly linked to operational realities and the training should be directly aligned with this.

683. For example, the United Nations Formed Police Units (FPU) responsible for crowd management prohibits the deployment of crowd control unit if the number of personnel available are less than a section consisting of 10 personnel. They cannot be divided beyond this figure which is considered the smallest deployable for operations. Also for POP Units, during their training, emphasis through drills is put on team work and numbers. If the number of police personnel is sufficient, they can implement their crowd management tactical approaches in line with their crowd management doctrine.

684. An entirely different system is used in England and Wales in terms of which the ‘public order trained teams’ are called police support units (PSU’s) with each PSU

composed of 25 police members including an inspector, three sergeants and 21 constables.[476]

685. **PANEL RECOMMENDATION 83:** POP deployments should at a minimum be of a section strength, comprising eight members and not less than that. In addition training should be clearly linked to the framework for minimum deployment and should address deployment at section level.

686. **PANEL RECOMMENDATION 84:** To ensure that POP is able to deploy the necessary resources in managing crowds, there should be a minimum of four platoons per unit. Staffing, resourcing and training plans for POP units should also take into account:

686.1. Panel Recommendation 40 regarding deployment of first aid teams in crowd management operations and other large operations or operations where the use of lethal force is likely.

686.2. Panel Recommendation 65 regarding development of a dedicated negotiation capability at each POP unit.

686.3. Panel Recommendation 67 regarding the potential for greater use of arrests.

686.4. Panel Recommendations 74 and 106 regarding establishment of a restoration section within each platoon including specialist firearms officers.

686.5. Panel Recommendation 124 regarding establishment of a technical support function at each unit.

Other units and agencies involved in crowd management

Other SAPS units involved in crowd management

687. In the South African context, crowd management policing is done mainly by POP units and Visible Policing (VisPol). During the Marikina operation, tactical units were summoned to manage the operation. It was a public order operation which they were not trained for.

688. The capability and capacity to fulfil this mandate is primarily in the public order policing units with other units like the VisPol coming in playing a first responder

[476] HMIC, 2011b, 21.

role and the POP units being employed as crowd management units, trained and equipped to deal with crowd management situations.

689. There are presently approximately 109 053 personnel in the Operational Services programme (OSP) and more than 90% of these are within Visible policing.[477] This is the largest programme in the SAPS which performs the bulk of the mandate of the SAPS. Changes to the basic training curriculum will bring about the required capacity at station level to manage especially peaceful and low to medium risk crowd management situations. While applauding SAPS for introducing crowd management programme for basic initial police training, the Panel laments the lack of same approach for the SAPS members who have already attended basic training and are part of the visible policing division. In view of the hierarchical structure of police organisations, the impact of these programmes will not be felt or achieve the desired goals. It should be noted that police operations are generally based on command and control, often more autocratic leadership than the democratic approach that is not consensus based. Operational issues are based on directives that are 'top-down'; hence communication from the lower ranks to higher ranks is very limited and cannot influence operational decisions. While the Panel notes the positive development, it's importance will not be felt until training and learning targets seasoned and experienced members and all the command element of SAPS that have a role to play in crowd management.

690. In the context of budgetary cuts and increasing demands for public order policing and station level policing demands, an innovative enhancement strategy is required. The creation of capacity within Visible Policing that is capable of doing public order and in particular crowd management is desirable. This approach will enhance the capability of POP units without diminishing the capability of police stations to provide general policing. Also, this approach will enable SAPS to increase its capacity in dealing with public order including crowd management without drastic budgetary expenditure. Visible police will thus be effectively used as the force multiplier and strategic reserve, and this is envisaged to effectively augment the specialised POP units.

[477] SAPS Annual Report 2016/2017.

Other agencies involved in crowd management

691. Other police personnel in other policing units in SAPS, and other law enforcement agencies, for example the Metropolitan police are also deployed to provide policing in crowd management situations. The National Instruction 4 of 2014 provides useful guidelines on the roles and responsibilities for Visible policing units at station level or Metro police (in their capacity as first responders) to attend to a crowd management situation in the event of a spontaneous public gathering which is peaceful, or less significant sport, entertainment or social events. However, the national instruction provides that "if a crowd management or public order situation escalates to the extent that public violence erupts and the necessity to restore public order is required, POP must take full operational command and stabilise the situation".[478]

692. The Panel notes that besides SAPS role in public order, the involvement of VisPol, Traffic Police and Metro Police in the domain of public order policing has, as yet, not lead to the establishment of one set of guiding principles and practices for all these entities that are observed by all of them.

693. This is compounded by the fact that increasingly private security providers actively venture into crowd management operations. The Panel notes that private security providers have access to ways and means, particularly weapons, armament and canines, not available to POP. It is with grave concern that the Panel observes the singular lack of public accountability, transparency and Ministerial governance of private security providers in the public order domain.

694. Many protests take place on private property, be it shopping centres or company installations. This fact does neither categorically deprive protesters of their basic rights nor the owners of such property.[479] Related to the large number

[478] National Instruction 4 of 2014, p10.
[479] For this reason, the internationally recognised definition of assembly encompasses every "intentional and temporary gathering in a private or public space for a specific purpose." Compare African Union, African Commission on Human & Peoples´ Rights. Report of the Study Group on Freedom of Association & Assembly in Africa. 2014. p. 24, para. 18.

of security companies that give employment to almost half a million people,[480] the private security industry play an important complementary role in crowd management situations. At the same time it must be clear that such situations fall under the mandate of POP which has the lead role.

695. So the rights, duties and responsibilities of private security in crowd management events must be addressed with haste. A simplistic binary vision of the challenges of policing protest, perceived as the involvement of police and protesters only, would certainly disrespect and undermine a far more complex reality.

Municipal police and crowd management

696. The role of municipal police also needs to be commented on. Crowds frequently use public roads for gatherings and controlling the traffic on such roads, indeed is part of "traffic policing". Furthermore, the municipal authorities are part of the "golden triangle", consisting of the municipal authority, the police and the convenors of a gathering. Frequently representatives of the municipal police serve as the municipal "responsible officer" who represent the municipality in the "golden triangle". In practice municipal police act as first-responders and often jointly with the South African Police Service in crowd management situations.

697. The question arises whether the mandate of the municipal police is wide enough to allow a role for such police in respect of crowd management. In terms of section 64E of the South African Police Service Act, 1995, the functions of a municipal police service are-

697.1.1. "(a) traffic policing, subject to any legislation relating to road traffic;

697.1.2. (b) the policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and

697.1.3. (c) the prevention of crime.

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[480] According to the *PSIRA Annual Report 2014-2015.* p. 8: the number of active security officers has dropped to 451 565 as at March 31, 2015. The number of active armed response businesses has decreased 3.163 (p. 10).

698. In terms of section 64L(1) of the South African Police Service Act (No. 68 of 1995) the National Municipal Policing Standard for Crowd Management during Gatherings and Demonstrations[481] was issued by the National Commissioner in 2008. This implies that the municipal police have powers in respect of crowd management.

699. The Regulation of Gatherings Act (205 of 1993) was passed prior to the SAPS Act and its amendments regarding the powers of municipal police.[482] "Police" is defined in the Act as: "the South African Police Service established by section 5 (1) of the South African Police Service Act, 1995, and includes any body of persons established or enrolled under any law and exercising or performing the powers, duties and functions of a police service, but does not include any body of traffic officers". The definition is primarily relevant to the powers related to crowd management of "members of the Police" referred to in section 9. These include the powers related to the dispersal of gatherings as well as the use of force.

700. The Panel is of the view that the South African Police Service Act, 1995, should be amended to confirm that municipal police services have a mandate in respect of crowd management.

Integrated training

701. In situations where different police units are likely to carry out joint crowd management operations, joint training exercises should be done. An integrated public order policing training approach brings together different police units that will be involved in a crowd management operation. This training will bring together units such as air wing, tactical units, negotiators to mediate with protesters, information officers to conduct forward intelligence, video operators, water cannon, armoured vehicles, liaison officers to provide a link and promote dialogue and support teams to provide psycho-social welfare to police officers who are traumatised by operations. Such operations will improve command and control, communication and the transition between different units during an operation. Municipal police should also be involved.

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[481] See Government Notice 307, published in *Gazette* No. 30882 of 20 March 2008.
[482] The SAPS Act provisions relating to municipal and metropolitan police (Section 64-64Q) were inserted by means Act 83 of 1998.

702. In the area of policing, the UN also employs a similar concept for its peace keeping missions operations which involve police and the military. When the United Nations Formed Police Units (FPU) are being deployed in high risk operations where there is also the UN military component, crowd management units have to undergo joint tactical exercises with the military for the purposes of co-ordination during operations. The essence is not about the issue of military involvement in crowd management issues, but of importance is the issue of integration during an operation. This integrated training is designed to co-ordinate activities of different units that carry out or are likely to carry out joint operations. In the military world, the concept is also used by soldiers to carry out military manoeuvres or simulation tactical exercise to improve on co-ordination, co-operation, and communication to achieve specific goals. Such simulation exercises usually involve the navy, ground forces, air force, special forces and other military logistics units. These drills are designed also to achieve perfection or precision in terms of the military doctrine.

703. Roles of different tactical units particularly when it comes to the policing protests should be clarified.

Private security

704. At Marikana, private security officers were killed and the question on the role of private security in crowd management is relevant. Private security at mines as well as universities, etc are employed to ensure the security of persons as well as property. In many instances private security officers are equipped exactly the same as police officials in terms of crowd management.

705. From the outset it should be made clear that private security officers have no powers other than that of a private person. Only police officials may disperse a gathering by means of the use of force. On the other hand, as private persons, private security officers also do have the right to, in limited circumstances perform an arrest and they have the right to protect their lives, when threatened within the ambit of recognised self-defence.

706. Though they are frequently involved in responding to crowd situations, unlike the SAPS, there are also no formal mechanisms for accountability for private security companies in relation to their conduct of crowd management. There are also no training prescripts for private security officers from the Private Security

Industry Regulatory Authority and no framework or mandate for use of powers related to crowd management.

707. There is a need for further examination of the role being played by private security in crowd management, whether in private or public space, and how this should be regulated (see Panel Recommendation 62).

Recommendations

708. **PANEL RECOMMENDATION 85:** The crowd management training of SAPS visible policing personnel and municipal police should at least be at the level of first responder. The roles of these agencies should be to intervene during crowd management situations by containing the situation, pending the arrival of the more specialised, equipped and trained POP units. The training of visible police members and municipal police will significantly increase the capacity of the SAPS to deal with crowd management situations in line with professional policing principles and given regulatory prescripts. In this regard, the South African Police Service Act, 1995, should be amended to provide for a mandate for municipal police services in respect of crowd management.

709. **PANEL RECOMMENDATION 86:** In order to enhance co-ordination and co-operation during crowd management operations, joint training exercises should be held involving SAPS personnel who may be involved in crowd management. This entails:

709.1. Including different POP specialised elements such as information managers, command negotiators, Nyala operators, water cannon crew, specialised firearms officers (as proposed in this report), and any other specialised elements within POP units. Visible policing units who are frequently called upon to respond to crowd incidents within their given capacities and capabilities should also be included.

709.2. Involving scenario-based drills to enhance operational readiness through co-ordination of different roles and responsibilities including, *inter alia*, practical and operationally appropriate role-play and mock drills.

709.3. Ensuring that during these practical exercises, the overall commander should be someone with a high level of knowledge and experience in crowd management operations. She or he should exercise command and control during these drills.

709.4. Ensuring that SAPS liaises with and invites trainers or facilitators from other countries with experience and excellent track record in crowd management operations. This approach will enable the sharing of ideas and experiences.

709.5. Routinely involving municipal police in crowd management training.

710. **PANEL RECOMMENDATION 87:** SAPS should not deploy tactical units to support POP in crowd management situations unless their specialist capabilities are requested by the responsible POP commander and that they remain under the overall command of the POP commander throughout the operation. The relevant directives should be amended to reflect this requirement.

Command and control of operations

711. Police operations, whether small or large, require a measure of command and control. This refers to situations where police officials carry out tasks and duties directed by one or more senior officials. Public Order Policing units, along with some other specialised 'tactical units' are also distinguished by the fact that they are typically deployed as a group.

711.1. "[W]hen police are now deployed in public order situations they are no longer an assembly of individuals, but are formed into squads … and can be expected to follow the orders of superior officers, rather than exercising individual discretion."[483]

Unity of command

712. A core principle in relation to the command of crowd management operations is that of unity of command. This requires that there should be "a single clear chain

[483] Waddington, 1991, 136.

of command" so that it is always possible to determine which superior officer is ultimately responsible whether it is a scheduled or spontaneous event.[484] Compliance with the principle requires that "each person who has command or supervisory functions knows: To whom the person reports; the person's role, responsibilities and objectives; what resources are allocated and available; and the person's geographical or functional area of operation."[485]

713. The presence of different units with different capabilities on the scene of an incident poses issues of command. It is important therefore that police leadership decide on the nature of any such incident. For example, if an incident is predominantly a crowd management incident, then all units present must come under the command of a POP commander.

Unity of command and rank authority

714. Marikana Commission Recommendation D2 provides that: "The Commission recommends further that in Public Order Policing situations operational decisions must be made by an officer in overall command with recent and relevant training, skills and experience in Public Order Policing."

715. As indicated above the SAPS has a strong emphasis on rank authority. This means that authority is primarily determined by the rank one holds, not the knowledge and expertise one possesses; and that those with the highest rank always have the last word and make decisions regardless of their expertise or experience or lack thereof. This was manifested at Marikana where the Provincial Commissioner who is said to have taken the decision to implement the 'tactical option'[486],"did not have the training, the skills or the experience to enable her to make decisions as to what should be done in the complex and difficult situation at Marikana."[487] Holders of specific ranks should have the skills and competencies required from persons of that rank: rank does not necessarily confer expertise on all issues and cannot substitute for it or take precedence over it.

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[484] OSCE. 2016. Handbook. p. 42.
[485] *Ibid.*
[486] Marikana Commission report. p. 366.
[487] Marikana Commission report. p. 367.

Command as dealt with in National Instruction 4 of 2014

716. Currently, questions of the command structure for POP operations are dealt with in NI4 of 2014. It indicates that the command structure of an operation should include:

716.1. The 'overall commander' is the "member, designated in writing, who is in overall command of the operation (not only of the Joint Operation Centre, but of all persons and resources engaged in the operation)."[488] In addition to this definition, paragraph 10 deals with how the overall commander is appointed ('designation of an overall commander') with different processes being provided for in relation to the level of the 'threat'. This section further states that the overall commander is "in overall command of the specific operation for which he or she is designated and is responsible for all actions taken, and for all persons and resources deployed to manage that particular operation."

716.2. A JOC commander, operational commander, intelligence commander and a support commander, all of whom are 'designated by the overall commander'.[489]

716.3. Importantly the 'operational commander' is defined as "an operational officer or member who is responsible for the operational execution and coordination of an operation, and who has been designated in writing."[490]

717. National Instruction 4 therefore indicates that the 'overall commander' has authority over the operation as a whole and that the 'operational commander' is responsible for its 'operational execution and coordination'. How this works in practice may depend on the nature of the operation but this framework would appear to have been inadequate in the context of Marikana. The Marikana operation was dispersed over a relatively large geographical area and it was decided to have a number of commanders responsible for command of SAPS members in different geographical locations. In terms of the command model used by the SAPS these were still subject to instructions issued by an 'operational

[488] Paragraph 2(r).
[489] Paragraph 11(3) item 8 in the table.
[490] Paragraph 2(q).

commander'. However the person identified as the operational commander was also in command of a group of police at a specific location within the Marikana area.

718. In terms of National Instruction 4 there is only a single 'operational commander'. SAPS members of the Panel indicated that other commanders in the field should be referred to as 'tactical' or 'zone' commanders but that these would still be subject to direction by the 'operational commander'.

719. **PANEL RECOMMENDATION 88:** As emphasised by Marikana Commission recommendation D2, the allocation of roles in the command structure of a crowd management operation is critical in ensuring that these be carried out in terms of appropriate standards. Most importantly the Operational Commander should always be a SAPS member with recent and relevant training and Public Order Policing experience. Members who are appointed to roles in the command structure due to the fact that they have the relevant training and experience must maintain their positions and authority in the command structure for the duration of an operation, irrespective of their rank. The relevant directives should be amended to reflect this requirement.

720. The model of 'Large and Special Operations' discussed below allows for the possibility that different commanders would have authority over 'operational execution and coordination' within the area for which they are responsible, in so far as this falls within the parameters set by the overall commander.[491]

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[491] Marikana Commission Report, 305-313. The nominal 'overall commander' (Brigadier Calitz) was focused on carrying out aspects of the operation in one part of this area and only gave passing attention to issuing commands to others involved in the operation. It may however be noted that there appears to have been an overall breakdown in the functioning of the system of command. In respect of Marikana it may be noted that: the recordings from the radio system indicate that there was no input given by an 'overall commander' to the 'operational commander'; the person nominally identified as the overall commander expressed uncertainty as to whether he had the authority to intervene in the operation and indicated that he was obliged to defer to the operational commander. He said that 'operationally speaking, once the operation had commenced, it was in the hands of the operational commander' and that 'As the overall commander, he could only give direction when it was sought from him, either from the operational commander or the JOC. Neither sought direction from him. He said it is not the function of the overall commander to usurp the functions of the operational commander when he was better positioned as being on the ground and experiencing the action first hand (Marikana Commission Report 307 para 7.); the person nominally identified as the 'operational commander' was in one of the Nyala's involved in the intervention, had 'very limited view of what was happening' (Marikana Commission Report, 311 para 6) and did not apply himself to exercising overall control of the 'operational execution and coordination' of the intervention (Marikana Commission Report, 311-12 paras 7-9).

Large and Special Operations (LSO)

721. One of the weaknesses exposed by the Marikana Operation was the inability of the SAPS to manage large and complex operations requiring flexibility. In line with this, one of the recommendations that the Panel was requested to consider is the recommendation that the SAPS should carry out research to identify a 'command and control model which is fit for major public order operations'. [492]

722. As operations get larger in terms of personnel or complex in terms of the number and designation of units involved, the need for correct command and control structures becomes more acute.

723. The complexities of control and management over large crowd management operations, as well as other complex operations, require a specialised command structure. The Panel recommends that the SAPS adopt a specialised command and control model for LSOs, including operations in which different types of units are deployed (multi-disciplinary operations) and adhere to the process contained there-in.

723.1. Staff Large and Special Operations is a command and control concept practiced in various European police services. This concept departs from the notion that effective command and control of such operations requires specialised expertise from different policing disciplines as well as reliable and up to date information. The overall commander of such operations needs to have continuous access to the required expertise and information to formulate the operational plan as well as to adapt it when and where required.

723.2. In terms of the model, each policing discipline (called a primary column) present in a given operation (example, Visible Policing, POP, Detectives, TRT, etc.) would be represented in the LSO through a Primary Process Owner who is responsible for formulating and shaping the inputs to be delivered from his/her discipline, as well as for advising the Overall Commander on their capabilities and limitations. Cross-cutting the Primary Process Column is the Head of Information (intelligence) and the Head of Logistics.

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[492] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3 para 30 - 33 notably at para 33-35.

723.3. The setup of the LSO model guarantees that all information only needs to be relayed once and that at all times all columns are aware of the latest information pertaining to the operation.

723.4. The LSO senior command staff should give policy advice to the overall commander and operational commander and subsequent to their approval formulate the orders for the tactical commanders on the ground. The LSO staff follow a scenario-based approach based on assessment of desired, likely and undesired outcomes and their risks of occurring, plus their mitigation strategies.

723.5. The senior command staff, which can include those from other disciplines outside of policing such as local government, social development and home affairs, formulate the objectives and tolerance levels for any such given operation, which should include guidelines for the use of force and firearms.[493] Within the boundaries provided by the senior command staff, the Overall Commander and LSO staff proceed with the formulation of their operational plans and risk assessments. Within the boundaries set by the Overall Commander, the tactical commanders carry out the actual operation with no further need to seek permission or authorisation from the Overall Commander.

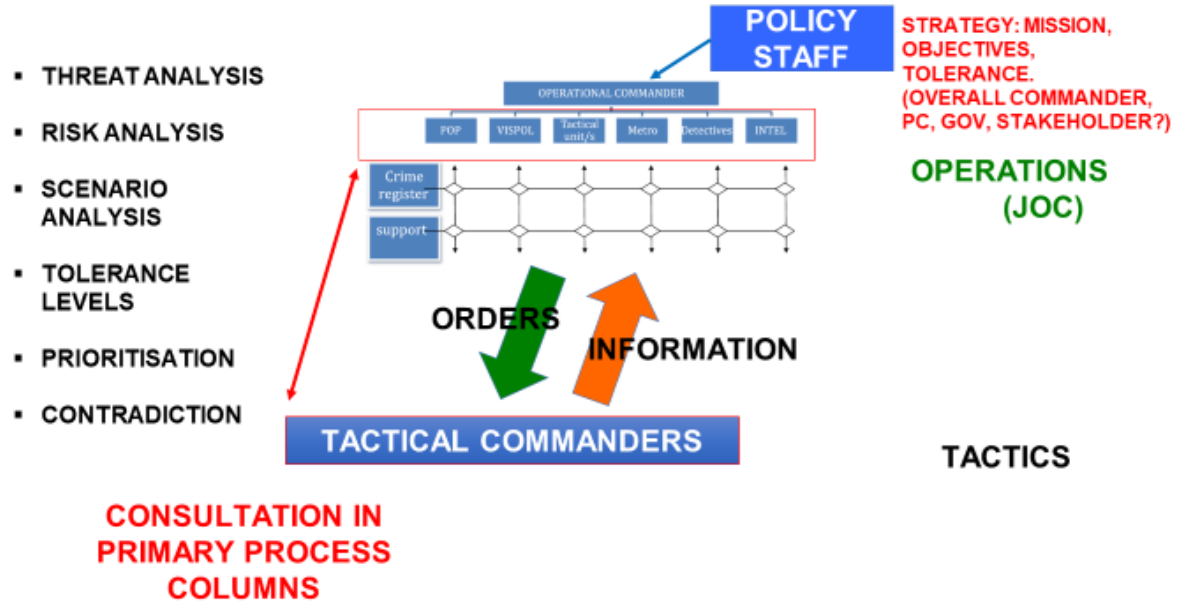
723.6. In developing plans for the operation, command staff are guided by a 'principle of contradiction'. This serves as a means for testing all ideas that are put forward in order to ensure that they are sufficiently robust and that all options as well as all potential risks are considered.

723.7. The tactical commanders on the ground are the eyes and ears of the LSO and feed the LSO, where appropriate, with information concerning their findings. This can lead to operational orders being adjusted by the LSO if required by exigencies on the ground.

As indicated in the diagram outlining this model, communication channels are critical, both to ensure commanders receive information and therefore have 'situational awareness', and in order for commands to be issued.

[493] This is currently the practice in the SAPS as seen in the composition of the NATJOC.

Diagram 8: A Model for Command and Control of Large and/or Special Operations



Source: C de Rover

724. Issues of control of Public Order Policing units are also addressed elsewhere in this report notably in the sections on the legal framework and on the structure and functioning of Public Order Policing.

Training for POP commanders

725. There are two types of training programmes that are provided to POP commanders:

725.1. Platoon Commanders attend the Platoon Commanders Training programme (PCT)

725.2. In addition POP members of officer rank attend the Operational Commanders Training (OCT) programme with other SAPS at officer rank.

726. The OCT is a generic 'operational commanders' training programme. It partly addresses issues related to crowd management but does not have a consistent

focus on this and is not conceptually grounded in crowd management doctrine[494] or have any sustained focus on the challenges of POP operational command. More generally it is fairly formulaic rather than being clearly grounded in operational realities. It therefore does not provide sufficient preparation to exercise command and control in complex crowd management operations.

727. The SAPS training system is based on training manuals that are not regularly updated and this counts against an adaptable approach to the training *curriculum* where new insights, challenges, and tactics can be integrated where appropriate. Neither of these curricula is reviewed regularly to align with operational demands and dynamics of public order and crowd management. For instance, the training *curriculum* for platoon commanders and the Operational Commander Training *curriculum* which were developed more than a decade ago are yet to be reviewed.

728. Commanders at all levels must be equipped with the necessary skills and knowledge of command and control. The Panel is of the view that there is a need for a specialised crowd management commander training curriculum, for the following reasons:

728.1. Currently, the Operational Commander Training (OCT) is inadequate in this regard.

728.2. In particular, there is a need for training to address issues of problem solving, situation assessment and operational planning in crowd management operations that were raised in some of the expert submissions to the Marikana Commission. [495]

729. **PANEL RECOMMENDATION 89:** An operational commanders training *curriculum* that is specifically focused on and takes into account the complexities of the crowd management environment, and which is grounded in operational realities, should be developed and provided to POP officers and experienced platoon commanders. The new POP command training *curriculum* should be

[494] OCT Module 3 refers to the people that police are dealing with as 'the opposition' while OCT Module 2 Chapter 2 and Module 3 uses the 4M mnemonic which refers to 'mission, menace, milieu and means'.

[495] See for instance Marikana Commission, 342-345, 15-17; Evidence leaders, 560-564, 1025-1033; Hendrickx, 2; White, Part 3, para 18- 22 notably at para 19 and 20; The Commission takes particular note of Mr White's evidence on the absence of a 'challenge process'. See page 340. 8-9. See also pages 341-342, paragraph 14.

flexible to move across command levels. As with other POP training there should be periodic assessment that is linked to the training cycle.

730. **PANEL RECOMMENDATION 90:** The training *curriculum* should be revised and adjusted to include among others, techniques, tactics and formations relevant for large POP deployments such as deployments at company and battalion (four companies) level so that commanders who are tasked with exercising a certain level of decision making can be trained to exercise tactical command at the relevant level of command.

Crowd management weapons and equipment

Less-lethal-weapons

731. The Panel examined in detail questions to do with the use of less-lethal-weapons by the SAPS, exploring the challenges in the use of such weaponry in a rapidly changing global protest environment, and offering a rationale for the definitional use of the term less-lethal-weapon. In particular, the Panel was concerned with the tendency to treat the harm caused by these weapons as inconsequential. The Panel asserted that there is a need for recognition within the SAPS that all of these weapons have potential lethal consequences, including the potential to cause serious injury and permanent disability, and in some instances death, as in the case of the death of Andries Tatane. The Panel was concerned about what appeared to be a lack of control over the use of these weapons and that the indiscriminate nature of some of these weapons is not taken seriously enough by police in many instances.

732. It may be noted that there is a concern that at Marikana these less-lethal-weapons were not an effective deterrent against armed crowds. At the same time it must be noted that some of the critical problems at Marikana were caused, at least in part, by these weapons being used in undisciplined[496] (on the 13th) and ineffective[497] (on the 16th) ways. The Marikana Commission report emphasised the need for police responses to crowd management situations where there is a high risk of violence to be under the control of appropriately qualified and

[496] Marikana Commission report. p. 557, 9.
[497] Marikana Commission report. p.230.

experienced SAPS personnel. It is reasonable to believe that proper planning and deployment of POP members on the 16th August may have been more than sufficient to stop the crowd from advancing towards policing lines (if one for the moment disregards the fact that it was inappropriate to launch the operation on the afternoon of the 16th).

733. The Panel's conclusions regarding command and control, and regarding the use of firearms, in crowd management situations, are discussed elsewhere. In considering questions to do with the use of less-lethal-weapons in crowd management the Panel also gave detailed attention to the current crowd management context and the recommendations discussed below are motivated by a concern to ensure that this is done in a manner consistent with the broader framework for crowd management put forward in this report.

734. Although these weapons have become popular with both law enforcement agencies and the military, they have a number of limitations: structural, tactical and doctrinal. For instance, the major limitation of modern kinetic energy weapons is that their accuracy deteriorates at longer distances. In addition, "there is little consensus among the police and military users regarding tactical and policy requirements for LLWs."[498] There is also very little information on how these weapons should be used including the potential for misuse and the negative health impacts; this in part because the manufacturers provide limited information on the use of LLWs and because police agencies collect limited information on the use and misuse of LLWs, especially in the context of public order policing. The idea that the use of less-lethal-weapons as a force option that generally inflicts less harm or injury is not a "sufficient justification for its acceptability or humanity."[499]

735. There is a tendency for LLWs sometimes to be referred to as 'non-lethal'. There is a distinction between the terms 'non-lethal weapon' and 'less-lethal-weapon' and given the risk of severe and/or permanent injury that LLWs can inflict, including death, it is more appropriate to use the term less-lethal-weapon when talking about

[498] Needs a reference – perhaps same as next citation.
[499] Rappert, Brian. 2004. A Framework for the Assessment of Non-Lethal Weapons. *Medicine, Conflict and Survival.* Vol 20. 35-54. 2004. London.

the class of weapons that SAPS POP units use and are trained to use in the policing of crowds.

736. As part of professional practice and in order to support broad recognition of the potentially lethal nature of these weapons the Panel recommends that:

737. **PANEL RECOMMENDATION 91:** The SAPS should consistently use the term less-lethal-weapon when referring to the class of weapons used in crowd management situations, recognising that all weapons including less-lethal have the potential to cause injury and death. This is in line with emerging international and regional good practice. The use of the term less-lethal-weapon must support the doctrine and be incorporated into all relevant National Instructions, directives, guidelines, Standard Operating Procedures, and training manuals. (Panel Recommendation 58 highlights the fact that young children, elderly people and other vulnerable groups may be particularly at risk from the use of these weapons).

Testing of LLWS

738. The rapid growth of the industry has meant that often the guidelines for use and standard operating procedures are industry-driven, meaning that those designing and profiting from these weapons systems are determining how they should or should not be used. Furthermore, a number of factors contribute to the misuse of less-lethal-weapons: this includes gaps in international norms and regulations; insufficient testing of the weapons; poor training in the use of these weapons; as well as the lack of accountability in the misuse of these weapons, including poor record keeping and reporting.

739. A key principle that emerged from the Patten Report in 2001 which was tasked with evaluating the use of 'less-lethal' weapons in policing in Northern Ireland and mainland Britain is that the military and police forces should not be left alone to police themselves regarding the evaluation and control of their weaponry.[500] Furthermore, in assessing the range of less-lethal kinetic projectiles it was found

[500] Steering Group for Patten Report. Recommendations 69 and 70 relating to Public Order Equipment. *A Research Programme into Alternative Policing Approaches Towards the Management of Conflict – Phase 11*. Belfast: Northern Ireland Office, 2001.

that the data provided by manufacturers was often unreliable.[501] Rappert argues that one of the reasons why it is important to have external scrutiny on the type of less-lethal-weapons being procured by law enforcement agencies is that "the publicly circulated claim about the acceptability of the use of these weapons is predicated on assumptions of how they will be used and the psychological and physical state of those targeted — assumptions that prove unattainable in practice."[502] In addition, given that less-lethal-weapons are relatively novel technology, one of the challenges in assessing efficacy and safety is that there is a long lag "between initiating a new endeavour and finding out about its undesirable features, so problems may accumulate and proliferate for many years before error correction is even attempted."[503]

740. Rappert suggests a number of steps that can be taken to minimise problems associated with new technologies and which are particularly relevant for the use of less-lethal-weapons. These include the following:[504]

740.1. Protect against the potential hazard by initially placing limits on its use and protecting against severe risks;

740.2. Proceed cautiously;

740.3. Test the risks;

740.4. Reduce major uncertainties; and

740.5. Learn from experience.

741. Paragraph 67(c) of the Joint Report of the UN special rapporteurs also recommends that:

741.1. "Before the selection and procurement of equipment, including for less-lethal weapons, by law enforcement agencies for use in assemblies, States should subject such equipment to a transparent and independent assessment to determine compliance with international human rights law and standards. In particular, equipment should be assessed for accuracy, reliability and its ability

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[501] *Ibid*.
[502] Rappert, Brian. 2004. A Framework for the Assessment of Non-Lethal Weapons. *Medicine, Conflict and Survival.* Vol 20. p.43. 2004. London.
[503] *Ibid.*
[504] *Ibid*. p.44.

to minimize physical and psychological harm. Equipment should be procured only where there is sufficient capacity to train officers effectively on its proper use."[505]

742. The following recommendations address the need for consistent testing of less-lethal-weapons weapons.

743. **PANEL RECOMMENDATION 92:** Ensure that any less-lethal-weapon currently in use in the SAPS has been subject to rigorous pre-deployment testing in appropriate settings. This requires a process of verification and certification that the said weapon meets SAPS operational standards and is compliant with SAPS protocols particularly with regard to its appropriate use for the management of crowds and in accordance with the requirement as specified in the UN Special Rapporteur Report, clause 67 (b).

744. **PANEL RECOMMENDATION 93:** Ensure that any future procurement of less-lethal-weapons by the SAPS for use in POP operations is based on need, and has been subject to pre-deployment testing both by the manufacturer and/or an independent instate to verify as well as during the training of POP unit members.

745. **PANEL RECOMMENDATION 94:** Adopt the approach suggested by Rappert to ensure that there is an independent verification process which means that SAPS alone does not evaluate the testing of its own less-lethal-weapons and that the five steps suggested above are integrated into policy and practice within the SAPS.

746. Although our mandate here is largely concerned with POP, in appropriate places in our report it applies to the entire SAPS.

Joint Report of the UN Special Rapporteurs

747. In February 2016, the Human Rights Council adopted the recommendations of the *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur to extrajudicial, summary or arbitrary executions on the proper management of assemblies (*also referred to as the *Special Rapporteur Report)*.[506]

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[505] United Nations. 4 February 2016. A/HRC/31/66, page 15.
[506] United Nations. 4 February 2016. A/HRC/31/66.

748. The section of the joint report of the *Special Rapporteurs* which is relevant to the Panel's consideration of the use of weapons — less-lethal or otherwise — in crowd management situations is found in section E of the report. Section E is relevant for the Panel's Report as it makes strong pronouncements on the use of weapons in the management of assemblies and provides clear recommendations in this regard.

749. Some of the recommendations in the joint report of the *Special Rapporteurs* are that: [507]

749.1. (a) States should ensure that law enforcement officials have the equipment, training and instructions necessary to police assemblies wherever possible without recourse to any use of force.

749.2. (b) Tactics in the policing of assemblies should emphasize de-escalation tactics based on communication, negotiation and engagement. Training of law enforcement officials should include pre- and in-service instruction in both classroom and scenario-based settings.

749.3. (d) Specific regulations and detailed operational guidance should be developed and publicly disseminated on the use of tactical options in assemblies, including weapons, which, by design, tend to be indiscriminate, such as tear gas and water cannons. Training must encompass the lawful and appropriate use of less-lethal equipment in crowds. Law enforcement officials should also be properly trained on protective equipment and clearly instructed that such equipment should be used exclusively as defensive tools. States should monitor the effectiveness of the training in the prevention of abuse or misuse of weapons and tactics.

749.4. (e) Automatic firearms should not be used in the policing of assemblies under any circumstances.

750. Many of the recommendations made by the Panel, including recommendations on crowd management doctrine, recommendations relating to the use of less-lethal

[507] A/HRC/31/66.

weapons, and recommendations relating to the use of firearms, are aligned with the recommendations made in the joint report of the Special Rapporteurs.

Regional norms and guidelines

751. There are two regional documents that have a bearing on the use of less-lethal-weapons in crowd management in South Africa: one is the *Eastern African Police Chiefs Cooperation Organisation (EAPCCO) Standard Operating Procedures on Public Order Policing* adopted in September 2016. The other is the *ACHPR Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa* (adopted April 2017).

752. These documents acknowledge that the means are required to ensure that police personnel are able to adopt a rights-based approach in the policing of assemblies, in particular with regard to the use of force and firearms and states the following:

753. One or the pertinent provisions of the ACPHR guidelines is Clause 21.3.1 which states that: Law enforcement agencies should provide officials with a range of appropriate personal protective equipment and appropriate less-lethal-weapons to reduce reliance on methods that are capable of causing death or serious injury. Appropriate protection and less-lethal equipment includes shields, helmets, batons, bulletproof jackets and other equipment and less-lethal weapons. Any equipment or weaponry provided to law enforcement officials must have been independently tested and verified for accuracy, reliability, and suitability to crowd management situations, and must comply with regional and international human rights standards.

National Instruction 4 of 2014

754. Later on in this report the panel makes detailed recommendations relating to the provisions of National Instruction 4 of 2014 with respect to the use of less lethal weapons and the recommendations in this section should be understood as supplementary to those recommendations.

755. **PANEL RECOMMENDATION 95:** Section 12(5)(f) and (i) of NI4 indicate that CS teargas grenades and 40mm launchers with rounds are only to be issued to designated members. Greater clarity is needed on:

755.1. The requirements for a member to be designated to use these weapons;

755.2. Who has the authority to designate members to use these weapons and ammunition;

756. As indicated below (see Panel Recommendation 131) the requirement should still be that these weapons can only be used under command.

757. **PANEL RECOMMENDATION 96:** Only handcuffs or other approved physical restraints should, and only when necessary, be used against passively resistant individuals.

Less-lethal-weapon types

758. The use of less-lethal or crowd control weapons, have increasingly been used by law enforcement agencies across the world in response to popular protest. One of the factors contributing to the increase in the use of less-lethal-weapons is that it is seen as potentially 'alleviating the varied problems associated with the police use of force."[508] Rappert argues that what constitutes acceptable levels of force are linked with the authority and legitimacy of the police in a particular society, and in liberal democracies in particular.

759. One of the key challenges is how and in what situations, less-lethal-weapons should be used. Furthermore, in much of the literature, the discussion on the use of less-lethal-weapons in crowd management is assessed largely on technical terms (for example, its capacity, calibre, etc), with the view that their use addresses some of the use of force challenges, and seldom is there an exploration of the social, ethical, and political dilemmas the use of these weapons may pose.[509]

760. The Panel examined five of the most commonly used LLWs (such as chemical irritants, rubber bullets, and the Long Range Acoustic Device also known as LRAD), identifying some of the negative impact of the inappropriate use of these weapons and their potential for causing severe injury, and in some instances death.

Kinetic Impact Projectiles (impact rounds)

[508] Rappert, Brian. 2007. Policing and the Use of Force: Less Lethal Weapons. *Policing: A Journal of Policy and Practice*. Vol 1. Number 4. Pp. 472-484.
[509] *Ibid*.

761. The term kinetic impact projectiles (KIPs) or impact rounds is a broad category for various different types of projectiles that may be made from a variety of materials including rubber, plastic, wood, hard foam and some metal such as steel. In the SAPS the KIPS that are used are rubber rounds (rubber bullets) that are fired from a shotgun. Other types of KIPS that are used in crowd management situations across the world include plastic bullets, attenuated energy projectiles (AEPS) and safe impact rounds (SIRs).

762. Guidelines on the use of force in crowd management generally recommend that KIPs "be used only for individual force-control rather than on groups of people."[510] Evidence from many countries is that these guidelines are often violated including the firing of KIPS at the upper body or face, being fired from very short distances, and fired indiscriminately at crowds.[511]

763. In relation to the use of KIPs the Panel considered the recommendation that "SAPS conduct research in order to identify alternative 'less-than-lethal' options to replace inaccurate and indiscriminate rubber rounds used at Marikana."[512] Motivation for this recommendation can be found in Gary White's statement to the Commission. He motivates that:

763.1. There is a need to consider alternatives to the rubber rounds inter alia in relation to problems with their accuracy and ineffectiveness notably at long range.

763.2. Consideration to be given to Safe Impact Rounds (SIRS) or Attenuated Energy Projectiles (AEPs) which are similar types of Kinetic Energy Projectiles. White observes that "my own experience in Northern Ireland, where we moved from using plastic baton rounds to using AEPs, confirms that they are a more effective less-lethal option which delivers an impact which is unlikely to cause serious or life threatening injury, but is of sufficient force to dissuade or prevent

[510] INCLO and PHR. 2016. *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons*. p.25.
[511] *Ibid.*
[512] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31, paragraph 46.

a violent or potentially violent person from their intended course of action and thereby neutralise the threat."[513]

764. **PANEL RECOMMENDATION 97:** Given that KIPs are difficult to deploy safely and effectively they should only be used under strict command.

765. **PANEL RECOMMENDATION 98:** Regulations regarding the use of KIPS should indicate:

765.1. That these are to be used in line with the principle of differentiation;

765.2. That the practice of skip firing should be discontinued as it decreases accuracy and increases the risk for indiscriminate use;

765.3. That these should be aimed to strike directly (i.e. without bouncing) the lower part of the person's body (i.e. below the rib cage).

765.4. Unless there is a serious and immediate risk to life which cannot otherwise be countered, it should be prohibited to use the KIP at short range. In such circumstances they may be direct fired or skip-fired if it is believed that they can be used effectively in either manner for private defence.

766. PANEL RECOMMENDATION 99: The SAPS should explore the possibility of equipping POP units with Safe Impact Rounds or Attenuated Energy Projectiles and launchers. These projectiles might be considered as possible replacements for rubber rounds or as an additional less-lethal option which may be used as an alternative to rubber in specific circumstances.

767. NOTE: Panel members Ms Adèle Kirsten record a dissent to the previous three recommendations (Panel Recommendations 97, 98 and 99) as she is of the view that the use of KIPs should be entirely prohibited in crowd management situations.

Chemical Irritants (**teargas)**

768. This is commonly referred to as tear gas, or agent CN, and was then replaced by CS in the 1950s. Tear gas includes a variety of chemical compounds which are intended to irritate the senses. It is designed for use in open areas, allowing for escape routes to fresh air.

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[513] Gary White, Final statement of Gary White MBE, Marikana Commission Exhibit JJJ178, 4 October 2013, 19.

769. The use of tear gas is often combined with direct physical force such as a baton strike, punching and bodily restraint, and with the use of other LLWs such as water cannons and rubber bullets. One of the challenges in the use of teargas is that police agencies seldom record when and how tear gas is used in force escalation.

Disorientation Devices (stun grenades)

770. Also known as stun grenades or flash-bang devices, they deliver a very bright flash of light and are designed to cause disorientation and a sense of panic. They are often used in conjunction with tear gas in crowd control situations. There is also very poor regulation and limited guidelines on their use in crowd management situations.[514]

771. **PANEL RECOMMENDATION 100:** The SAPS should develop Regulations and guidelines on the use of stun grenades in crowd management situations which includes clarity on their use by designated members, that they should only be used under command including that they should never be fired or thrown directly into a crowd unless this is to protect life.

772. **PANEL RECOMMENDATION 101:** The SAPS should carry out research to identify alternative stun grenades that may be used more safely.

Water Cannons

773. These are large cannons mounted onto a truck that can deliver a blast of high or low-velocity streams of water for the purposes of managing a crowd. In addition to pressurised water, other chemical agents may be mixed into water cannons such as agent CS or OC in the powder form, specifically manufactured for this purpose, as well as coloured dyes. There are no publicly available guidelines on the appropriate use of water cannons, including details on minimum distance, water pressure and use of force protocols. Furthermore, the scarcity of medical literature means there is limited information on the health consequences of the use or misuse of these weapons.

[514] INCLO and PHR. 2016. *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons*. p. 63 onwards.

774. **PANEL RECOMMENDATION 102:** Directives should specify that water cannons should only be operated by specially trained members and under operational command.

775. The Panel notes that the SAPS does not currently make use of water mixed with a foul odour but that this is used in other countries.

776. **PANEL RECOMMENDATION 103:** Regulations issued by the Minister of Police should prohibit the use of water mixed with foul odour when water cannons are used in crowd management.

Acoustic Weapons (LRAD)

777. Also known as the Long-Range Acoustic Device (LRAD) this device is a sound cannon, which emits painful and loud sounds that have the potential to cause significant harm to the ear drum, including damage to other organs of the ear. Unlike a conventional loudspeaker in which sound waves travel in all directions, being driven by a single electromagnet, the LRAD sound is crated through an array of smaller drivers which create sound waves that combine to amplify their output and this is one of the reasons the wave stays focussed instead of dispersing, creating the potential for permanent injury such as severe hearing loss.

778. This is one of the most recent developments in the less-lethal-weapons industry and was first used in Iraq in 2004 by USA forces. This is one of the reasons that there is limited data available both on its use and its impact on people in crowd control situations. More research is needed to fully understand the impact of this device on the health of those using the device and those being exposed to the device including bystanders. There is little medical literature on the effects of acoustic weapons on people, and questions remain about the safety of using acoustic weapons in crowd management situations. Lack of training in the device is another area of concern with very little guidelines on safety features such as only discharging the device from a 10-20 metre distance.

779. **PANEL RECOMMENDATION 104:** Regulations issued by the Minister of Police should provide that the SAPS shall only use the LRAD as a communications device in crowd management situations. This should be by specially trained

members and under operational command. A directive to this effect must go out to all POP units.

780. The use of other less-lethal-weapons, such as pepper spray is dealt with in the section dealing with NI4 of 2014 below.

Firearms and the use of lethal force

781. The Marikana Commission concluded that the evidence before it, "clearly indicates that the measures at the disposal of the Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearm, at Marikana."[515]

782. In line with this the Marikana Commission recommended that the Panel should:

782.1. Investigate where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire (Marikana Commission Recommendation B8(b)).[516]

783. The Marikana Commission of Inquiry pointed out that, "The experts were unanimous in their view that automatic rifles like the R5 have no place in Public Order Policing." It is accepted, for purposes of this report, that the reference to the R5-rifle is applicable to any similar assault rifle, capable of either semi-automatic or fully automatic mode of fire.

784. The Marikana Commission heard expert evidence on questions to do with the use of assault rifles in law enforcement internationally and that the use of these weapons is 'generally discouraged'.[517] Nevertheless, automatic and semi-automatic rifles are used by police in many countries. Notably, firearms capable of automatic fire are generally issued to specialised units such as anti-terrorism units or other elite units. To state that there is no place for the use of a fully automatic firearm in law enforcement would be an oversimplification.

785. In South Africa the concern is that members of the SAPS in performing general and specialised policing duties, may at any time be confronted with firearms used

[515] Marikana Commission report. p. 547.
[516] Marikana Commission report. p. 549.
[517] Evidence Leaders quoted de Rover, Day 285.

against them, including several types of firearm such as R5 rifles, AK-47 rifles, homemade firearms and pistols. Situations in which this occurs include combating taxi wars, responding to cash-in-transit heists and ATM bombings where the criminals are caught red-handed, as well as during attempts to arrest criminals who resist arrest through the use of a firearm. The levels of violent crime in South Africa, police killings, and the use of firearms in crime are high.

786. SAPS members are issued with R5 rifles when involved in high risk arrest operations and road blocks, as well as, special operations such as cordoning off and search operations. In principle police officials should be able, whenever threatened with firearms, especially firearms capable of automatic fire, to protect themselves and members of the public. Members of the Special Task Force and the Tactical Response Team, as a result of the high risk operations they are involved in, are issued with automatic weapons, including the R5 rifle. Due to the fact that currently POP units are also used for crime prevention, they are also issued with R5 rifles.

787. It is accepted that these weapons cannot be used in crowd management. In respect of the use of the R5 rifle in crowd management situations, the South African Police Service has in various submissions to the Panel confirmed that presently the SAPS doctrine regarding crowd management excludes the use of the R5 in crowd management situations. Police members are armed with their police issue side-arm (9mm pistol), for purposes of self-defence and not for purposes of crowd management. The gist of the Marikana Commission report that there is no place for automatic firearms in crowd management situations is accepted by the Panel.

788. South African law confirms that the use of lethal force can be justified if this is to protect oneself or another person against an imminent threat of death or serious injury. Even if there is such a justification, a high premium is placed on avoiding the use of lethal force in crowd situations as there is a high risk that people, other than the person whom force is directed at, can be injured. In relation to the use of automatic firearms this concern is compounded. Due to the high velocity of the rounds used, the danger to other people is compounded, even when used in semi-automatic mode (including the risk that bullets may hit a person after passing through another person). Notably, the ammunition used in the R5 rifle is notorious

for the devastating effect on the human body. Although the calibre is rather small (5,56mm), the velocity of the bullet is high, causing massive internal injuries as a result of the transfer of kinetic energy. It is also capable of both semi and fully automatic fire.

789. Nevertheless, the law and existing policy frameworks recognise that firearms may be used in exceptional circumstances in a crowd management situation for the protection of life, both of police officials and the public. As highlighted at Marikana, there is the ongoing potential that in crowd situations there may be a serious danger to police and to others. The Marikana Commission expressed concern regarding "the failure of Standing Order 262 (as indicated this has subsequently been replaced by National Instruction 4 of 2014) to make any provision at all for the use of sharp ammunition."[518] The Commission motivated that, "The Standing Order should specifically address the question of … what prescripts apply to the use of sharp ammunition."[519] Furthermore, the Commission also expressed concern that, "The measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana."[520]

790. The challenge posed by the Marikana Commission is on how to deal with crowds, armed with sharp weapons, and even firearms. It should first be realised that the mere fact that persons are armed during a gathering, does not mean that the crowd is posing an immediate and direct threat. The situation can in many instances be diffused through negotiations, monitoring the crowd for some time, or resolving the issue through the intervention of other role-players. Experience has taught that to endeavour to disarm a huge crowd through the use of force is likely to have undesirable consequences, especially if the law enforcement officers are vastly outnumbered. It must be ensured that all commanders in control of crowd management situations understand this principle and during training this must be emphasised.

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[518] *Ibid,* 353.
[519] *Ibid*
[520] *Ibid,* 547.

791. In South Africa it happens in many instances that crowds, despite the provisions of the RGA, read with the Dangerous Weapons Act (No. 15 of 2013), are armed with sticks and in many instances sharp instruments. When the Dangerous Weapons Act, 2013, was promoted in Parliament the question was asked on how the Act will be enforced during crowd management and the response was that the events must be electronically recorded and that individuals who transgressed the Dangerous Weapons Act, 2013 and/or the RGA by carrying dangerous weapons during a gathering can be identified and be prosecuted.

792. Broader measures proposed in this report, regarding greater flexibility and agility by POP units in managing volatile crowd situations, should also be seen as part of the repertoire of responses to dealing with armed and potentially aggressive crowds.

793. The Goldstone Commission of Inquiry report[521]makes the observation that there might be circumstances where a dedicated shooter could be deployed to direct fire at a particular individual who might be firing a firearm from the crowd at the police or the public and it is not possible for the police to address this threat through the use of less- lethal-weapons or other measures. In relation to a possible scenario in which a group of demonstrators' fires upon the police the report argued that, "If the demonstrator cannot be arrested safely, even by specially trained arrest units, other specialised trained units should be used to target the offending demonstrator with preventive fire. Only the person firing on the police should be the target…There are no circumstances envisaged in which police would open fire on anyone not presenting an immediate threat to life." [522] The purpose of the deployment of such a dedicated or specialist shooter, who must fall under the direct command of the officer in charge of the crowd management situation, would not be crowd management, but private defence. Such an intervention will be aimed at the perpetrator only with the least risk for other persons in the crowd. Such a

[521] The Goldstone Commission recommendations led to the development of the Regulation of Gatherings Act, 1993.
[522] Heymann, Philip B. (Editor). "Towards Peaceful Protest in South Africa". HSRC Publishers. Page 35.

dedicated shooter should at all times be some distance away from the crowd management officials and out of sight of the crowd.[523]

794. It is important to emphasise that the high volume of gunfire directed at the striking miners at Scene 1 at Marikana was not only the result of the use of the R5 but also a consequence of the large number of police involved in shooting at the strikers and the 'baseline' formation in which they were deployed. The 295 rounds that were fired at the strikers during the 10-12 second fusillade of gunfire in which the 17 strikers at Scene 1 were killed were fired by 48 SAPS members (47 TRT members and one POP member).[524] The members of the TRT were deployed in a long line, known as a baseline and armed with R5 rifles or other firearms. The use of the baseline formation of police armed with lethal weapons was criticised by various expert witnesses at the Marikana Commission and identified as key contributing factor to the large number of rounds that were fired.[525] This is because this type of formation creates the likelihood that many police in the line will start shooting merely as a result of the fact that their colleagues are shooting and irrespective of whether the shooting by their colleagues is justified or not. This is a result of "associative threat perception" which occurs when 'a police official observes that another member of the SAPS is shooting, assumes that there is a threat which justifies this, and then starts shooting as well. What this means is that police members shoot not because they have themselves perceived a threat" but because other member of the SAPS have apparently done so and are shooting.[526] As a result police officers fire "without necessarily having perceived the threat themselves" which does not constitute justification for the use of force.[527] This highlights the need to

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[523] The Goldstone Commission also recommended that: (i) Units armed with lethal weapons (not merely holstered handguns), including shotguns should be available, but at some distance behind the most exposed and endangered frontlines of the police attempting to block the demonstration. Preferably they should be kept out of sight until needed; (ii)Specially armed units can be called upon only at the request of the officer in charge of policing the demonstration. Even thereafter, use of lethal force should only be on the order of the commander of the special unit who must be satisfied that the lives of officers would be severely endangered by any delay in the use of lethal force.
[524] Marikana Commission report. p. 249.
[525] SAHRC, 374. See also paragraph 1064 of the evidence leaders heads of argument at page 366 in the report.
[526] de Rover FFF11, para 77; day 229, p 28409/4 – 28410/3; day 286, p 37138/16 – 37144/2 quoted in Marikana Commission report. p. 365.
[527] [de Rover] Day 286, p 37138/18 – 22, 37142/4 – 14 quoted in Marikana Commission report. p. 365.

designate specific members of the unit as having responsibility for responding to individuals who present an imminent threat to the life. Identifying the members "who have specific responsibility for dealing with such threats would limit the risk of an undifferentiated volley of fire from police members who did not themselves identify a threat".[528]

795. The Marikana Commission therefore accepted the recommendation in favour of "Designating particular members of the unit or the line as having responsibility for identifying particular members of a crowd who are a threat to life, and giving them the responsibility of dealing with that." [529]

796. **PANEL RECOMMENDATION 105:** The prohibition against the use of the R5 rifle and other weapons capable of automatic rifles in crowd management should be formalised in regulations issued by the Minister of Police in terms of section 10 of the RGA. Such a prohibition should apply not only to POP units but to other units who may be deployed, in support of POP, for crowd management purposes.

797. **PANEL RECOMMENDATION 106:** Specialist firearms officers should form part of the restoration section (see Panel Recommendation 74) established within each POP platoon. The purpose of the specialist firearms officers is to provide the capability for targeted intervention during a crowd management operation where there is an imminent threat to the lives of police or members of the public. The specialist firearms officers shall operate and exercise their duties under the command and control of the POP commander or officer in charge.

798. To enhance their safety, the specialist firearms officers shall be provided with the necessary protective equipment including ballistic shields and ballistic helmets. Furthermore, the ballistic helmets should be fitted with radio communication equipment for easy communication. The officers may be armed with telescopic weapons to improve precision in order to reduce the risk of unnecessary injury to innocent persons during crowd management operations.

799. **PANEL RECOMMENDATION 107:** To develop a training *curriculum* for specialist firearms officers who are authorised to use lethal force in crowd

[528] Evidence Leaders, paragraph 1064 quoted in Marikana Commission report. p. 366.
[529] *Ibid.*

management situations. Training methodologies should ensure maximum compliance with the use of force policy, as well as national and international legislative frameworks. Furthermore, these officers should be trained up to the advanced level in the use of different and authorised firearms, including undergoing a compulsory marksman course to improve proficiency; this should include training in tactical weapons to enhance precision on static, mobile and intermittent targets. During the mock drills, they should practise their special roles during crowd management operations and be able to co-ordinate with the whole unit(s). Their training should not be restricted to firing at static targets, but they should be extensively drilled to manage protestors armed with a different assortment of weapons, including firearms. In view of the risks associated with the use of weapons and the dangerous working environment, it is further recommended that these authorised firearms officers are equipped with advanced first aid skills.

800. **PANEL RECOMMENDATION 108:** Training for POP commanders (see Panel Recommendations 89 and 90) should address questions to do with the deployment of specialist firearms officers.

801. Broader measures proposed in this report, regarding greater flexibility, agility and adaptability by POP units in managing volatile crowd situations, should also be seen as part of the repertoire of responses to dealing with armed and potentially aggressive crowds.

802. See also Panel Recommendation 49.

Protective equipment

803. As discussed elsewhere in this report fire in one form or another including arson, petrol bombs and burning barricades, is a common feature of violent protest (see paragraphs 334, 338.3, 350.2). One of the issues that is of concern to POP members is the danger from fire in one or other form including from burning barricades and petrol bombs.

804. **PANEL RECOMMENDATION 109:** POP members should be provided with good quality fire-retardant overalls.

805. Over and above the provision of less-lethal-weapons, POP members are equipped with personal protective equipment such as body armour, a helmet, and a shield. Although the required equipment is prescribed in paragraph 12 of NI4 of 2014 this equipment is not necessarily available on the ground for every POP member as seen in site visits to various POP units across the country.

806. Currently, POP members are issued with a Perspex shield but ballistic shields and ballistic helmets should be provided to members exposed to a higher level of threat. Ballistic shields provide greater protection to members, thereby reducing levels of threat and subsequently: this could reduce the risk of members resorting to the misuse of less-lethal weapons or the use of lethal force.

807. **PANEL RECOMMENDATION 110:** POP units should be provided with the necessary protective equipment including at least two ballistic shields per section.

Equipment and identifiability

808. One of the recommendations that the Panel is required to engage with is that "all police officers and police vehicles should carry immediately obvious identification numbers." [530] A consistent problem in public order policing in South Africa is that it is not possible to clearly identify individual members, thereby inhibiting the potential for accountability. The Panel supports the principle that POP unit members are identifiable whether through distinctive clothing, clear identification numbers, or other means—with the helmet providing the most obvious means of identification. This allows for both internal and public accountability as well as providing a measure of safety to POP unit members.

809. **PANEL RECOMMENDATION 111:** The SAPS should ensure that each POP member's helmet carries a clearly identifiable number. This could include different coloured helmets depending on command level to differentiate levels of command (see Panel Recommendation 115 regarding built-in communication capability).

810. In line with the emphasis on greater flexibility, the SAPS should explore how to facilitate more agility and mobility by POP units during crowd management operations. In particular this consideration should be given attention in relation to

[530] Gary White, Proposed recommendations by Gary White MBE, 15 October 2014, Marikana Commission Exhibit ZZZZ31.3, paragraph 16b.

units involved in ‘restoration’ operations. Options in this regard may include alternative vehicles but other options could also be considered. Inspections in loco by the Panel revealed aged vehicles unworthy of use.

Inter-police communication procedures and ways and means

811. The Marikana Commission recommended that:

811.1. “Plans for Public Order Policing operations should identify the means of communication which SAPS members will use to communicate with each other. (Recommendation E1).

811.2. A protocol should be developed and implemented for communication in large operations including alternative mechanisms where the available radio system is such that it will not provide adequate means of communication. (Recommendation E2).”

812. The issues raised in these recommendations refer to what the Panel has termed ‘inter-police communications.’ While the importance of this issue should not be downplayed it must also be emphasised that it is only part of the broader issue of communications which includes role-players in a gathering or protest including leaders or representatives, local authorities, or others. Implicitly all SAPS communications systems should be used in such a manner so as to support the overall doctrine of the policing of assemblies including supporting the right to peaceful assembly and avoiding unnecessary use of force. The effectiveness of all communication systems is crucial to the successful management of crowds.

813. The Panel developed a dedicated report focusing on the issue of inter-police communications. This outlines the various problems that were experienced with radio communication at Marikana. Nevertheless, it would appear that the key problem was the high level of recklessness with which the entire operation was undertaken, and not primarily that of poor and ineffective communications. This was a consequence of the absence of a clearly defined command structure involving SAPS members with appropriate training and experience. The shortcomings of the command system translated into poor planning, poor briefing, and poor decision making which contributed to the fact that communication was

neglected. Prerequisites for effective communication between SAPS members during large crowd management (and other large or special) operations include:

813.1. A clearly defined command structure with the competency (training and experience) to exercise command.

813.2. Proper planning where this is possible and especially in large crowd management operations.

813.3. A clearly formulated radio and communications plan, setting out equipment, frequencies and call signs to be utilised during the operation.

814. Furthermore, the Panel highlighted key issues to be addressed regarding the existing framework. These are:

814.1. National Instruction 4 of 2014: Though it addresses the need for 'information gathering,' NI4 does not identify inter-police communications as a key issue that needs to be addressed in planning and preparation for a crowd management operation. An amended NI4 should highlight this as a necessary dimension of successful police operations in crowd management.

815. **PANEL RECOMMENDATION 112:** National Instruction 4 of 2014 should be revised to clarify provisions relating to inter-police communications.

815.1. The revised instruction should state that plans for crowd management operations should:

815.1.1. Identify the means of communication which SAPS members will use to communicate with each other; and

815.1.2. Take into account possible communication challenges and put in place measures to resolve these should they occur.

815.2. The issue of reporting lines is presented in an inconsistent and contradictory way in paragraph 11 of NI4. As a result, it is not clear if information must be reported to the Operational Commander or the JOC commander. This inconsistency should be addressed.

816. The issue of inter-police communications is currently addressed in the Operational Commanders Training (OCT) module on operation planning (Module

3). The Panel's report above motivates for a dedicated operational commanders course for POP commanders (see Panel Recommendation 89).

817. **PANEL RECOMMENDATION 113:** The section on communications in the proposed dedicated training programme for POP commanders (see Panel Recommendation 89) should strengthen and expand on the relevant sections of the OCT. (The OCT would also be strengthened by implementation of this recommendation).

817.1. A key point that should be included is that in more complex crowd management operations more complex plans and systems for communication are required.

817.2. In order to optimise clarity about the communication system it is advisable for succinct and clear handouts to be distributed to personnel about the functioning of the radio system, providing information regarding radio channels, calls signs, as well as general protocols regarding radio use.

817.3. The following good practice should also be emphasised:

817.3.1. There must be consistent use of call signs by personnel using the radio system.

817.3.2. Should problems be experienced with the radio system, commanders should prioritise informing the JOC using alternatives to the radio system.

817.3.3. If there is radio traffic overload, instructions should be issued to discourage non-priority messages over the radio system.

817.3.4. To revert to the use of specially trained radio operators for large and or complex operations.

818. **PANEL RECOMMENDATION 114:** Procurement of radio systems for POP units should ensure that this is standardised so that there is compatibility across provinces.

819. The issue of inter-police communications is only addressed in a cursory manner in the Platoon Commanders Training (PCT) programme. The communication issues for platoon commanders are likely to be different from those for 'Operational

Commanders' but nevertheless the importance of the issue motivates that the question be dealt with in more detail in this training programme as well.

820. Training for POP commanders at all levels should emphasise the need to share information and for commands to be provided in such a manner as to optimise situational awareness.[531]

821. **PANEL RECOMMENDATION 115:** Helmets should also include a built-in communication capability that enables members to communicate with their commander.

Accountability in the crowd management context

Operation planning and briefing

822. Proactive police operations involving multiple personnel require planning to ensure that members tasked with carrying out the operation are briefed on the objective(s) to be achieved and their task and responsibility in the operation. This planning process needs to ensure that records are kept for issues of accountability and governance.

Reporting on the policing of crowd management events and monitoring of trends

823. In line with principles of professionalism and accountability, police organisations have a duty to regularly render public account of their functioning through formal channels of truthful reporting. In order to support this there must be detailed record keeping during an operation, including recording of decisions and the compilation of reports after an operation.

824. In terms of reporting on an operation relevant provisions of NI4 include that:

824.1. All vehicles must have an operational diary which is completed by a member on that specific vehicle. The operational diary must contain all postings and instructions issued and all activities of participants during the event. An Occurrence Book entry must be made of the action taken and measures instituted by all functional role-players involved in the operation.[532]

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[531] JJJ178, Final statement of Gary White, MBE, 119-120.
[532] National Instruction 4 of 2014, paragraph 17(2).

824.2. Records of operational plans, all reports on the execution of operations, and debriefing reports, must be filed together and kept according to the Record Classification System of the Service, with an additional copy at the POP information component.[533]

824.3. All incidents of crowd management must be reported to the local POP unit for registration on the IRIS, irrespective of the threat level or whether POP was involved or not.[534]

825. The last point raises a critical issue. As highlighted above, the nature and quality of information provided by IRIS is not currently assisting the SAPS in understanding the public order environment. In order to be able to effectively manage its public order policing capabilities the SAPS needs to be able to assess the demand for public order policing. This will enable it to adjust resource allocations relative to reasonable projections of the scale at which this type of capacity needs to be maintained. In order to make informed decisions about the resourcing of POP, the SAPS need to have good quality information about the demand for public order policing. The SAPS's main information system in this regard is the IRIS. This applies, *inter alia,* to questions about (i) Levels of and scale of protest; (ii) Their geographic distribution and regional (provincial, urban-rural, etc.) differences in the nature of protest; (iii) Reasons for police interventions; (v) Immediate precipitating factors leading to violence; and (vi) Characteristics of disorderly and violent protests.

Registration of events and decision-making

826. This section focuses on police decision making and on events as they occur from the moment police become aware of an incident to the conclusion of such incident. Issues relevant to this are discussed in sections 4.2.12 (dealing with audio-visual recording) and paragraph 4.2.13 (dealing with reporting and review procedures).

827. It is important to note that the absence of ways and means for audio visual recording does not absolve police from keeping an accurate record from events

[533] National Instruction 4 of 2014, paragraph 17(3).
[534] National Instruction 4 of 2014, paragraph 17(5).

and decisions as they occur. The resulting logs are also an important tool to decide what type of reports need to be compiled following an incident, and by whom.

(Audio-visual) recording of decision making and crowd and police conduct during crowd management operations

828. A number of recommendations in the report of the Marikana Commission were motivated by the inability of the SAPS to provide recordings of police radio communications, or an audio-visual record, of the police intervention at Marikana on 16th August 2012. These included the recommendations that:

828.1. E1a:"All radio communications should be recorded and the recordings should be preserved."[535]

828.2. E3: The SAPS should review the adequacy of the training of the members who use specialised equipment (e.g. water cannons and video equipment), and ensure that all members who may use such equipment are adequately trained to do so.

828.3. E4: All SAPS helicopters should be equipped with functional video cameras.

828.4. E5: The SAPS should review the procurement, servicing and training processes which have had the result that expensive equipment purchased by the SAPS cannot be used, either adequately or at all.

829. Recommendations E1a and E4 are explicitly about audio-visual recording of police operations. But E3 and E5 were also motivated for by problems that contributed to the fact that there was no consistent SAPS audio-visual recording by the SAPS at Marikana.[536]

[535] This is the first sentence of Recommendation E1. The second sentence dealing with plans for communications, and recommendation E2, are discussed in report Section 4.2.11.
[536]There were in fact some audio-visual records taken by SAPS members that are of use in understanding the events at Marikana notably at Scene 2. Arguably the main such material are some photographs (taken with cellphones and cameras) taken intermittently by personnel in the two SAPS helicopters. There are also some video recordings but, with the exception of a cellphone video taken by one of the TRT members, these are of marginal, if any, utility.

829.1. The principal motivation for recommendation E3 appears to be the fact that, in both of the water cannons deployed at Marikana, personnel had not received any training in the use of the water cannon cameras.

829.2. Recommendation E5 overlaps with Recommendation E3 as both concern training of personnel in the use of specialised equipment. Additional motivating factors for recommendation E5 were problems that resulted in there being very limited SAPS aerial video footage of the operation. This included the fact that (i) the helicopter with the most sophisticated video equipment was not working; and (ii) on the other helicopter that had video equipment, this equipment was not working and had not been working for roughly three years (a third SAPS helicopter at Marikana had no built-in video equipment).

830. In this report the focus is on recordings of police radio communications and video recording during assemblies. Technically the possibilities for video recording include recording by ground based or air (helicopter based) video operators or by cameras installed in helicopters. There are also other possibilities including the use of 'body cameras' and drones (also referred to as unmanned aerial vehicles or remotely piloted aircraft systems (RPAS)) for this purpose. The concerns raised also apply to photographic records of protests. This must take into account the complicated legal issues such as the fact that the use of body cameras may be affected by the Regulation of the Interception of Communications and Provision of Communication-related Information Act 70 of 2002. It is understood that the Department of Justice and Constitutional Development is busy with an amendment of the said Act that will cater for the use of body cameras by law enforcement officials.

831. The primary motivation for radio communications is to support 'situational awareness' by commanders and provide effective communication channels between police commanders, personnel falling under their command, and other role-players. Video monitoring of events can also support situational awareness if there are 'live streaming' facilities and personnel dedicated to monitoring this footage. The motivations for retaining audio and visual records include:

831.1. **Fact finding and accountability:** The Marikana Commission's emphasis on the need for detailed recording of crowd management operations

was motivated by the absence of comprehensive audio and video recordings of the Marikana operation. This obstructed the Commission in its attempts to establish what had happened at Marikana, and therefore to hold police accountable.[537] As already outlined in paragraph 17 of NI4 of 2014 the police should keep an accurate record of events and decisions in all operations, as they occur. This is partly carried out through the minutes of meetings as well as keeping logs of events and decision making. The resulting logs are also an important tool to decide on what type of reports are required, and by whom they should be compiled, following an incident. Recording of radio communication and audio visual recording is a means of strengthening record keeping about command decision making and police actions. For as long as occurrences on the ground conform to police planning and expectations it is relatively easy to keep an accurate log of events as they occur and of corresponding decisions made. Once, like at Marikana, the situation escalates, it is virtually impossible to keep a real time and accurate log. The recording of radio communications and audio visual recording of JOC and JOCCOM meetings as well as crowd and police conduct 'on the ground' is the gold standard.

831.2. **Intelligence gathering and the arrest and prosecution of people involved in unlawful actions during crowd incidents:** It should be noted that the emphasis that the SAPS has given to the issue, as reflected in the procurement of video cameras and efforts to increase the number of POP video camera operators, appears to be mainly motivated by the concern to be able to identify and ensure the effective prosecution of people involved in acts of violence, or other unlawful conduct, during crowd incidents. This is aligned with the current emphasis of government on strengthening law enforcement against those who violate the law during protest.

831.3. **Evaluation (debriefing):** Another motivation for video recording is to carry out evaluations of the management of crowd incidents as discussed in paragraph 19 of NI4 of 2014. The use of video recordings during debriefing sessions is motivated for in paragraph 19(3). According to paragraph 19(4) the

[537] Marikana Commission report. p. 198, para 10.

purpose of this evaluation or review is to identify ”All best practices, as well as shortcomings … as part of a learning process to enhance best practices and address or prevent recurrences of identified mistakes.”

832. All of these are in principle legitimate motivations for audio-visual recording of police operations. Video recording (whether from the ground or air) may serve any of these purposes, while the recording of police radio communications is primarily relevant to fact finding, accountability, and review.

833. Whether audio-visual records are used for any of these purposes depends on a number of factors:

833.1. The culture of accountability: The SAPS apparently did not have facilities at Marikana for recording radio communications. However, the evidence also suggests that the SAPS commanders had little enthusiasm for video recording of the operation. It was not only that some equipment was not in working order, or that SAPS members were inadequately trained in the use of the equipment that they were responsible for, video recordings were also not recorded by personnel who had the necessary training and equipment that was in working order. [538] It is unlikely that systems for audio-visual recording of SAPS operations will be used to support fact finding, accountability, and the evaluation of crowd management operations unless they are supported by a leadership and organisational culture that more fully supports professionalism and accountability.

833.2. Furthermore, the fact that audio-visual recordings have been made will not on its own ensure that people involved in unlawful conduct during protests are prosecuted. For this to take place the investigation and prosecution of these cases would need to be prioritised by the SAPS and NPA. It would

[538] The Marikana Commission report states that ‘At about 12h25 [on Thursday 16 August 2012] Captain Dennis Adriao, the SAPS liaison officer, informed the two SAPS video operators, Warrant Officer Masinya and Warrant Officer Ndlovu, who were on the koppie, that the strikers had identified them as police spies and that they might be killed if they remained in the general media group. He told them that they should withdraw from that place. They accordingly left and went back to the Joint Operational Centre (JOC). Why they went back to the JOC and did not go to the neutral area or into one of the Nyalas, where they would have been safe and able to take video footage of the strikers and their actions, was never explained. The absence of SAPS video footage of all phases of the operation has significantly hampered the Commission in its work’. (The Commission points out that this contravened a national instruction that had been issued by the National Commissioner two months previously). Marikana Commission report. p. 198, para 10.

appear that prosecutors frequently decide not to pursue cases against people alleged to have been involved in unlawful conduct during protests. Reasons for this may include cases that have not been properly investigated by the police; or the perception that these are not priority cases; or an aversion to prosecuting people for using protests to address their grievances.

834. The Panel recognises that there are different technical possibilities for video recording of assemblies and related police operations. These include:

834.1. Where it is necessary to transport or 'insert' personnel urgently during a crowd management situation, or remove people urgently (such as where there is a need for medical care), helicopters may continue to play an important role as a police tool in the management of assemblies. However, for purposes of providing a 'platform' for video monitoring and recording of assemblies and the policing thereof it would appear that drones represent a preferable alternative due to the fact that they are far cheaper and there is less of a danger of serious accidents (the fact that they use less fuel is also preferable from an environmental point of view). Any use of drones by the SAPS will need to be carried out in compliance with applicable Civil Aviation Authority regulations and other applicable legislation.

835. The Panel has not reached a position where it is able to recommend a specific technology. There was also, for instance, some interest within the Panel in the possibility of the use of 'body cameras'. Whether and how these might be used in the crowd management context is not something that the Panel was able to explore in any detail. The key point is that any technological option that is adopted cannot be understood simply as a 'quick fix'. The SAPS not only needs to be able to afford any technical option but also to sustain support for its use. Investments in technology do not necessarily translate into benefits for organisations.[539] At Marikana this was reflected in the degree to which 'expensive equipment purchased by the SAPS' could not be used 'either adequately or at all'.[540]

[539] Janet B L Chan, "Police and New Technologies", in Tim Newburn (ed.), Handbook of Policing, 655–79. Cullompton, Devon, UK: Willan Publishing, 2003, pp. 674-5.
[540] Marikana Commission report. Recommendation E5).

836. An issue that has repeatedly come up in the Panel concerns the difficulties that the SAPS is having with equipment maintenance. At Marikana the problems in this regard related to helicopters and helicopter cameras that were not working, and lenses on water cannon cameras that needed to be cleaned. Information presented to the Panel indicates that the biggest problem that the SAPS is currently facing in this regard concerns maintenance of its vehicle fleet, including its fleet of aged Nyalas.[541] These problems therefore highlight a critical issue: an organisation like the SAPS can procure sophisticated equipment. However, unless it is able to manage the systems to ensure that the equipment is maintained, that personnel are effectively trained in the use of the equipment, and that, where necessary, the equipment is repaired, the possible result is that equipment may not be fit for use, may not be used effectively, or may be misused. In the absence of effective systems to address these issues then, this amounts to wasteful expenditure. The optimum benefits of new technology may only be realised if resources and dedicated and appropriately skilled personnel are allocated to enable police organisations to reap the benefits of new technology. There must be political or managerial will not only to invest resources in new technology, but to ensure that police organisations are able to optimally benefit from the new resources.

837. In addition, the use of any technology needs to be accompanied by attention to the human rights implications, and the ability and will to ensure compliance by the organisation with human rights standards in using this technology. Given that participation, 'peaceful and unarmed', in assemblies is a right protected in the Constitution, the police should refrain from activities that might serve to discourage or intimidate people against the exercise of this right. At the same time, as noted, there are legitimate motivations for video recording of protests and other assemblies, including the public interest in the accountability of police for their handling of events. Furthermore, SAPS members of the Panel argued that many violent protests start out as peaceful protests and that it would therefore be unreasonable only to record assemblies once violence or other unlawful conduct was already occurring.

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[541] Problems with one of the Nyalas also affected events at Marikana. During negotiations the SAPS negotiation team in the Nyala struggled to communicate with the strikers' representatives due to the noise of the Nyala which had to be kept idling due to issues. 20th May, 28630.

838. It therefore appears reasonable to state that the police have a legitimate interest in video recording of assemblies. This interest is accentuated if there is a risk of violence or of police taking action against participants in the assembly. But if photographic and video recordings are made, then attention needs to be given to compliance with standards regarding which recordings are retained and whether this is for a legitimate purpose or not. [542] One of the submissions received by the Panel also raised concerns about the apparent absence of clear standards governing information gathering, including 'data and photographic and video material' both prior to, and during assemblies, and that there was a need for greater clarity on "What operational limitations exist on overt and covert intelligence gathering in public order policing?" and "What procedures exist on the retention, protection or access of intelligence, data and photographic and video material collected for public order policing?"[543] In principle, techniques that are used for information gathering should be those that are least invasive of privacy, unless there are clear grounds for alternative techniques to be used.[544]

839. A further question is whether police photo/videographers should be identifiable as such by crowd members. One of the presentations to the Panel indicated that in the Netherlands preference is for videographers to be clearly identifiable. This was apparently a strategic choice motivated by the police belief that, if crowd members know that they are being filmed by the police, this may discourage lawbreaking. It may also be argued that, where police are involved in video or photographic recording of protests, particularly where these protests are peaceful, members of the public have a right to know that state officials are recording this and that it is preferable that police video operators should be identifiable as such for this reason. The same approach applies to any aerial video recording.

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[542] See for instance the European Court of Human Rights judgement that 'The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person's rights is in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger of terrorism or really serious criminal activity.' Wood v Commissioner of Police of the Metropolis [2009] EWCA Civ 414 para 86.

[543] Right2Know, Right2Know Submission to Panel of Experts on Public Order Policing, 2 October 2017, 8.

[544] Access, Article 19, et al, Necessary and proportionate: International principles on the application of human rights to communications surveillance, 2014, 8: https://necessaryandproportionate.org/files/2016/03/04/en_principles_2014.pdf (accessed 19 November 2017).

840. Various guidelines that have been issued on the management of assemblies emphasise the sensitivity of the issue of audio-visual recording of crowds:

840.1. The joint report of the UN special rapporteurs for instance states that: “While there may be legitimate law enforcement and accountability reasons to record an assembly, the act of recording participants may have a chilling effect on the exercise of rights, including freedom of assembly, association and expression. Recording peaceful assembly participants in a context and manner that intimidates or harasses is an impermissible interference to these rights.”[545]

841. The OSCE/ODIHR handbook on policing assemblies emphasises that video recording of the crowd should always be done by police 'deployed in police uniform' and that they should 'gather their evidence in full view of the public'.[546] The handbook motivates that: “The deployment of still or video cameras at an assembly can be a means not only to gather evidence of offences, but also to provide a psychological inhibitor that can discourage potential criminals and troublemakers from breaking the law. Criminals may seek out assemblies to commit offences such as theft or sexual assaults.”[547] Other considerations that should apply in these situations are that:

841.1. “The purpose of such evidence gathering should be clearly communicated to organizers and participants.”

841.2. “Evidence-gathering teams should only be used to gather evidence for criminal proceedings”;

841.3. Recording should not be done “constantly, but in response to an increase in tension or the danger of criminal offences or violence occurring;”

841.4. The need to be aware “that, in some cases, pointing cameras directly at individuals at close range may be considered provocative.”

841.5. Photographs or video should be stored “in a secure manner that cannot be accessed by unauthorized personnel;” and

[545] Page 17, para 76.
[546] OSCE, Handbook, 2016, 70.
[547] *Ibid.*

841.6. Film and photos that are retained should be “limited to immediate law enforcement needs or evidence in court proceedings, and not long term.”[548]

842. SAPS Panel members raised concerns about this issue on the basis that videographers who are identifiable as police are more likely to be in danger from hostile crowds. It should be noted that at Marikana, on the 16th of August 2012, the police videographers in plain clothes fell under suspicion for being ‘police spies’.[549] At Marikana at least, the fact that videographers were deployed covertly, dressed in civilian clothes, contributed to hostility against them. If they had been clearly identifiable as police it seems possible then they would have been seen as police who were doing their work. The issue is not straightforward as police had already been involved in a violent confrontation with strikers on the 13th of August and believed that they might be at risk from further violence from the strikers. During the Panel’s visit to Port Elizabeth Panel members were also told about an SAPS videographer in civilian clothes whose activities created suspicion and who was nearly attacked by crowd members. These incidents therefore do not support the assertion that that police videographers who are dressed in civilian clothes are safe. Furthermore where there is suspicion that videographers in civilian clothes are actually police this contribute to an environment of distrust and suspicion about the motives and tactics being employed by police.

843. The approach taken here is grounded on the fact that participants who are attending a peaceful assembly are exercising a Constitutional right. In addition it will serve the interests of the SAPS if it can build relationships of greater trust with participants in protest. Building such trust requires that the ‘default position” should be that in peaceful assemblies audio-visual recording will be carried out in a transparent manner. If an assembly is not peaceful and it is helpful to do so it will be legitimate for police to deploy videographers in civilian clothes. However, whether deployed in uniform or not the safety of videographers needs to be recognised as a concern. Videographers who are identifiable as SAPS members, or who are suspected of being so, may become targets. Where it appears that there is danger to them they should ensure that they are positioned in such a

[548] *Ibid.*
[549] Marikana Commission report. p. 198, para 10.

manner as to do their work safely. Commanders should, where necessary, also allocate personnel to protect them against potential risks from hostile members of a crowd. Where violence is a significant problem the videographers should be deployed with a protection team so that they are able to obtain good quality evidential material while being confident that their safety is being attended to.

Conclusions and recommendations

844. The public interest in accountability by police for their conduct during demonstrations motivates for consistent standards to be developed and adhered to regarding recording of communications, decision making, and police action during the policing of assemblies. Furthermore, there is also an interest in strengthening law enforcement against people involved in violations of the law during protests. Access by any accused person to such video material may also assist any person who feels that they are unfairly accused of unlawful conduct. The need for recording of communications and for video recording is accentuated during crowd events where there is a risk of violence and of police taking forceful action against participants.

845. However, the fact that there is a legitimate public interest in the audio-visual recording of assemblies does not mean that such recording will not give rise to anxieties amongst organisers and people involved in protest about such recording being used for an ulterior purpose. The issue of audio-visual recording therefore, further strengthens the motivation for the SAPS to communicate more actively about its framework for and approach to the policing of assemblies through a variety of means. This should include clarifying the motivation for and intention behind audio-visual recording and promote confidence that the SAPS's aim is to carry out its constitutionally mandated responsibilities in a transparent manner. Furthermore, advancements in recording and storing of information regarding the policing of protest needs to take place within a SAPS culture that is strongly orientated towards strengthening professionalism and accountability and which is principle-based.

846. **PANEL RECOMMENDATION 116:** The RGA should be amended as to set standards that police must comply with in relation to information and data gathering, as well as the making of photographic, video or other recording, both

prior to and during protests or other assemblies. This includes standards that should be complied with in relation to audio-visual observation and recording and the retention of video or other recordings of assemblies. There should be systems to ensure compliance with these standards. Principles in regard to this issue are already set out in the Protection of Personal Information Act.[550] However, there is a need to address this issue within the context of the right to assemble and appropriate interpretation of the exclusions set out in the Act.[551]

847. **PANEL RECOMMENDATION 117:** Marikana Commission recommendations E3 and E5, and information presented to the Panel, motivate for an overhaul of SAPS systems for technology management. The SAPS should review all equipment, including vehicles, used in crowd management operations in relation to provisions for the training of SAPS members and the servicing of such equipment.

848. **PANEL RECOMMENDATION 118:** Procurement processes must take account of training and maintenance that will be required for equipment to be effectively operated. In relation to recordings of communications, and photographic and video records, there is also a need to deploy personnel and maintain systems to ensure the effective utilisation of records of operations in processes of accountability, criminal investigation or review.

849. **PANEL RECOMMENDATION 119:** The SAPS should adopt an approach to audio visual and other recording of protests that emphasises transparency and visibility. This would mean that SAPS videographers would be identifiable as SAPS members[552] unless the risk assessment clearly motivates that this would expose them to danger. The principle is that both the crowd and the SAPS members understand the roles played by the various members. This will assist in building trust.

850. **PANEL RECOMMENDATION 120:** POP video operators should only be deployed after a proper risk management assessment has been undertaken and adequate security measures have been addressed. These video operators should

[550] The Protection of Personal Information Act, Act 4 of 2013.
[551] The Protection of Personal Information Act, Act 4 of 2013, section 6(1)(c).
[552] Identifiability could be through wearing a SAPS bib or through wearing police uniform.

be identifiable as SAPS members unless authorised to wear civilian attire based on the risk management assessment and under the authority of the POP commander. It shall be the responsibility of POP unit commanders to ensure safety and discipline of video operators during crowd management operations. Aerial drones may also be deployed in lieu of video operators should there be serious security concerns which might compromise the safety of the video operators during crowd management operations.

851. **PANEL RECOMMENDATION 121:** SAPS should draft directives to regulate POP video operators during crowd management operations: these must be in line with national and international legal frameworks.

852. **PANEL RECOMMENDATION 122:** Training for personnel responsible for capturing, recording, and processing audio-visual material should address legal and human rights concerns (in particular related to privacy, decency, dignity, the use and storage of and access to information).

853. **PANEL RECOMMENDATION 123:** Specifications for communications for the mobile command centre should include:

853.1. Recording equipment for radio communications;

853.2. Facilities for live streaming of aerial video recordings; and

853.3. Facilities for video recording of JOCCOM meetings and other JOC decision making.

854. **PANEL RECOMMENDATION 124:** A technical support function should be established in each POP unit to support effective use of radio communications, and live streaming and recording of POP operations.

855. **PANEL RECOMMENDATION 125:** National Instruction 4 of 2014 should be amended to provide that:

855.1. Where recording facilities are available, all radio communications should be recorded.

855.2. Paragraph 17, dealing with the preservation of video recordings, should be amended to include the preservation of recordings of radio communications.

856. It should be noted that giving effect to these recommendations would only give partial effect to the Marikana Commission recommendations. The current SAPS framework does not appear to allow for radio communications to be recorded unless it goes through the 10111 call centre or a mobile JOC with radio communications recording facilities. Furthermore, in so far as alternative mechanisms of communication are used such as cell phones (such as for situations where commanders encounter problems with the radio system) these communications will also not be recorded.

Other requirements for strengthening crowd management

857. Strengthening POP's ability to perform its crowd management function also requires more detailed attention to a number of issues. This includes:

857.1. Communication strategies before, during and after crowd management events; and

857.2. Intelligence and information gathering strategies including social media monitoring.

858. The Panel received inputs from SAPS members in relation to some of these issues. *Inter alia* these motivated for:

858.1. Strengthening and capacitation of the intelligence function (information managers) through training and learning.

858.2. Resourcing of the POP intelligence function with adequate and unmarked vehicles.

858.3. Intelligence function should be allowed to operate in civilian attire to carry out lawful intelligence gathering, bearing in mind maximum safety consideration.

859. The Panel notes that these issues are worthy of more detailed attention than it has been possible for the Panel to provide in this report.

Debriefing, review and evaluation

860. Post incident management is a complex issue and it is paramount that police organisations have good procedures which manage and draw together all the key threads, including operational and evidential review as well as therapeutic and

psychological debriefing (both individual and group). Ideally, the review process should also include the media, organisational and political briefings, and agreed processes with any external independent police oversight and/or complaints investigation capabilities. Issues of debriefing, review and evaluation are therefore only one aspect of this process.

861. Following any incident or operation, police organisations should routinely debrief their members and evaluate their performance in a bid to learn from mistakes made as well as to reinforce those elements that went well. A proper debriefing follows a structured model and results in a written report that forms the basis for an evaluation by management officials and may lead to decisions to adapt future police operations in key points.

862. In terms of paragraph 19 of NI4 of 2014, the Overall Commander must ensure that a debriefing takes place after each event and that a record is kept thereof. The purpose of debriefing in terms of NI4 is to assess the effectiveness of the operation as well as communications with stake-holders. NI4 also provides that video footage must be used, and trainers and instructors should be present to capture pertinent issues for in-service training. It further states that IPID must be given appropriate assistance, and that Employee Health and Wellness support to police officers after an operation should be rendered.

863. According to paragraph 19(4), the purpose of debriefings is to identify ”All best practices, as well as shortcomings … as part of a learning process to enhance best practices and address or prevent recurrences of identified mistakes.”

864. According to paragraph 19(2), “Every level of command must debrief the levels below it individually, followed by an in-depth debriefing by the commanders of the operation. Afterwards a debriefing must be held with all role-players to determine whether the operation was effective and whether communication with the role-players was adequate.” A provision of this kind, which provides for multiple debriefing processes after each operation, is ambitious and likely to be disregarded in many cases. The situation where instructions are unrealistic and cannot reasonably be complied with undermines the credibility of the framework of rules that is supposed to govern the conduct of police. Other provisions of paragraph

19 may also be unrealistic especially in a context of high levels of public protest where POP units are engaged in responding to protest on an ongoing basis.

865. The need for a differentiated approach to debriefing which links debriefing to the nature of the operation is recognised in the OSCE/ODIHR handbook on policing assemblies which states that: “There are generally three types of debriefing: a “hot” (or immediate) debrief, an internal organizational debrief and a multi-agency debrief. A hot debrief will take place after all events; an organizational debrief should take place after larger events; while a multi-agency debrief will take place when the management of the event involves large elements of multi-agency response or where multiple communities are involved.”[553]

866. **PANEL RECOMMENDATION 126:** Debriefing is critical to maintaining the effectiveness and preparedness of POP units and the well-being of their members. Nevertheless paragraph 19 of NI4 of 2014 should be amended to provide for a more differentiated approach that POP units are better able to comply with. The multiple debriefing processes provided for should be required in relation to large operations and other operations where there are special concerns about role player perceptions.

867. In countries like Zimbabwe, at the end of an operation, a public opinion survey is carried out by police press community and liaison officers to ascertain if public expectations were met. Complaints and compliments are then recorded and used as checks and balances, and for remedial action. Complaints arising out of police operations are also investigated by the police internal investigations department.

868. In terms of the SAPS guidelines for debriefing as outlined in NI4 of 2014 the following gaps have been noted:

868.1.1. In order to get the best outcome from the debriefing exercise, there should be principles or guidelines which encourage participation without fear; this includes creating a climate for honesty and openness.

868.2. The crowd management operation cycle should include relevant role-players from the planning stage through to the process of debriefing. While consultation or engagement with other role-players can take place during the

[553] OSCE, Handbook, 2016, 122.

planning process, there is a danger of excluding the same role-players when it comes to the issue of debriefing.

868.3. While different agencies can conduct their own independent debriefings, SAPS should encourage such agencies to compile their own debriefs and refer issues relevant for policing to SAPS attention and consideration. A clear communication policy must be developed in this respect.

868.3.1. In order to deepen its understanding of this subject SAPS training and operational systems should categorise debriefs. In countries like the UK, debriefing is put into different categories such as:

868.3.1.1. Hot Debrief

868.3.1.2. Cold Debrief

868.3.1.3. Multi-agency Debrief

868.3.1.4. Formal Debrief

868.4. For both training and operational purposes, SAPS should categorise debriefing processes.

868.5. All agents or stake-holders involved in police operations should be invited to participate in the debriefing process. These should include stake-holders like emergency services, local authorities, traditional leaders, civil society organisations, as well as various government departments.

868.6. Whatever format is adopted for debriefing, it should have an action plan. This is very important as it identifies who should address short comings or reinforce good practices.

868.7. A public opinion survey should be conducted by SAPS after a major public order management incident.

Interaction between SAPS operational level and the training cycle

869. The debriefing report of any operation can also usefully form the basis for a dialogue between operations and those responsible for training. Training seeks to prepare individuals for their operational roles. At times it will transpire that training does not cover all operational eventualities, or that in an operation a new phenomenon arises that requires incorporation in the existing curriculum.

The regulatory framework with respect to crowd management (National Instruction 4 of 2014)

870. The RGA had been supplemented by Standing Order (SO) 262: *Crowd Management during Gatherings and Demonstrations*. SO 262 was in force during Marikana and the Marikana Commission recommended that the standing order be reviewed. However in 2014, the SAPS replaced SO 262 with National Instruction 4 of 2014 (this was intended to address the supposed shortcomings of SO 262).[554] The Panel's review of the current legal and regulatory framework therefore focuses on the Regulation of Gatherings Act and NI4. These are reviewed with reference to the SO 262 as well as international law requirements.

871. It may be noted that the declared purpose of SO 262 was to regulate gatherings and demonstrations "in accordance with the democratic principles of the Constitution and international standards".[555] SO 262 recognised that it must be read in conjunction with the RGA[556] and emphasised the need to work in partnership with communities. Furthermore, it stated that, "The Service must play a pro-active role in attempting to identify and diffuse any possible conflict before it escalates to violence".[557]

872. In NI4 of 2014 the reference to international standards was eliminated. Interestingly, that reference to section 17 of the Constitution, 1996, reads: "The Service respects that everyone has the right, to assemble peacefully and unarmed, to demonstrate, picket and present petitions".[558] It thus expresses the outdated notion that the State has only a negative duty not to interfere in this human right. It is now accepted that the exercise of such rights must be actively protected and facilitated (promoted) by the State.[559] For example, the International Covenant on

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[554] Standing Orders were issued in terms of the South African Police Act, 1958. They remained in force through transitional provisions in the SAPS Act, 1995. National instructions are issued in terms of the SAPS Act, 1995. Some Standing Orders are amended where necessary and these remain Standing Orders. Where Standing Orders in a particular environment are reviewed or consolidated, they are promulgated as National Instructions.
[555] (Paragraph 1 (1) SO 262).
[556] (Paragraph 1 (2) of SO 262).
[557] (Paragraph 1 (3) of SO 262).
[558] (Paragraph 1 (2) NI4).
[559] See, e.g., E. Klein (ed.), The Duty to Protect and Ensure Human Rights, Berlin Verlag: Berlin 2000.

Civil and Political Rights of 1966 (CCPR) establishes the State´s duty "to respect and to ensure … the rights recognised in the Covenant."[560]

873. A comparison of the background sections of SO 262 and NI4 of 2014 shows that the latter tries to expand on SO 262, but that it also sets a different tone: a tone that is not necessarily in harmony with the ideal of democratic policing. For example, NI4 of 2014 stresses that, "the Rights in the Bill of Rights are however subject to limitations",[561] NI4) and that the mandate of SAPS is—as highlighted in the text of the NI4 of 2014 — "to **maintain public order**, protect and secure the inhabitants of South Africa and to uphold and enforce the law." (emphasis in original)[562]

874. This emphasis on 'law and order' is a conceptual hallmark of NI4. The Panel has great difficulties in accepting that it can thus be considered as implementing the 'lessons learnt' from Marikana; nor that it represents any substantial progress in comparison to SO 262, not even in terms of user-friendliness.

Definitions

875. While SO 262 contained 15 definitions, NI4 of 2014 added another 10. The definition of 'crowd management' - as "the policing of assemblies, demonstrations and all gatherings, as defined in the [Regulation of Gatherings] Act, whether recreational, peaceful, or of an unrest nature" - remained unchanged.[563] A novelty is however the definition of "public order". That it is a key concept of NI 4 is illustrated by the fact that NI 4 distinguishes between the 'Execution of peaceful crowd management operations' and the 'Execution of Public Order Restoration Operations.'[564] SO 262 only referred to 'Execution' (Paragraph 11 SO 262) for regulating the use of force by SAPS in one paragraph only. NI4 even aspires to regulate the 'Normalization of an area where public order was restored by the use of force."[565]

876. NI4 of 2014 defines 'public order' in section 2 (u) as:

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[560] Art. 2, International Covenant of Civil and Political Rights of 1966.
[561] (Paragraph 1 (3) of NI4 of 2014.
[562] (Paragraph 1 (4), NI4).
[563] Paragraph 2 (e) of SO 262; Paragraph 2 (d) of NI4.
[564] Paragraphs 13 and 14 respectively.
[565] Paragraph 16, NI4.

876.1. “The state of normality and security that is needed in a society and that should be pursued by the state in order to exercise constitutional rights and to thus benefit a harmonious development of society.”

877. Such a definition puts a heavy burden on the shoulders of police officials who are supposed to interpret and apply it adequately and without bias. The Panel has grappled with the origin of this definition. It is aware, however, that it is a concept contained in the Constitution as well as the limitation clauses of many human rights instruments. This is particularly true for provisions that deal with the freedom of expression and peaceful assembly.[566]

878. Concerns have been expressed by various writers about the term public order, partly on the basis that it is difficult to give a precise legal meaning to the term[567] but also due to the risk that it may be used as a rationale for repressive measures. “[568]

879. As stated above, all limitations to human rights must satisfy the principles of legality, legitimacy (necessity) and proportionality. If the conditions for such limitations are not enshrined into law, their judicial review becomes difficult.

880. The Panel does not say that the definition of ‘public order’ in the NI4 has effectively the quality of such a limitation clause that violates this principle. However, it is evident that the definition is and that it has far-reaching practical consequences for crowd management. Furthermore, due to the nature of the NI4, it also escapes judicial review. Any irresponsible interpretation of this definition may therefore negatively impact on how police understand the right to freedom of assembly, with consequences for police practice.

881. The scope of application of SO 262 was solely based on the above-presented definition of ’crowd management’ which links the policing of crowds to gatherings

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[566] See, e.g., Art. 29 (2) of the Universal Declaration of Human Rights of 1948; Art. 21 of Covenant on Civil and Political Rights of 1966. Interestingly, the African Charter of Human and Peoples Rights of 1981 prefers to speak of “law and order”, but omits such reference in Art.11 on the freedom of assembly. There, “safety” is one ground for restricting this right.

[567] J.P. Humphrey, The International Bill of Rights: Scope and Implementation, 17: 3 William & Mary Law Review (1976), 527 (535).

[568] *Ibid*, p. 536; C. Tomuschat, Human Rights. Between Idealism and Realism, 2nd ed., OUP: Oxford 2008, p. 80.

as defined in the RGA. The NI4 adds the concept of 'public order' and declares that:

881.1. "Public Order Policing requires the maintenance of public order firstly by ensuring public order during public gatherings and demonstrations and secondly by intelligence driven crime combating and prevention operations."

882. Evidently, the definition in NI4 of 2014 of 'public order policing' is seen as a concept broader than that of crowd management. The material scope of application of NI4 thus extends beyond the regulation of '*Crowd Management During Public Gatherings and Demonstrations*', as incorrectly suggested by the title of NI4.

883. Other provisions that were not part of SO 262 are the definition of 'POP' and 4 on Operational functions. This wording confirms the view of the Panel that NI4 is marked by a shift away from crowd management to public order policing in a broader sense: 'POP' is defined in paragraph 2(t) of NI4 of 2014 as:

883.1. "The specialized Public Order Police unit, trained to manage and control *crowds* or persons engaged in a gathering or demonstration with a view to restore public order. (This includes managing pre-planned and spontaneous assemblies, *gatherings* and *demonstrations* whether of a peaceful or unrest nature)."

884. The provision in paragraph 4(1)(b) of NI4 indicates that the functions and tasks of POP units are not restricted to the policing of public gatherings, but include the rendering of specialised operational support to other police components and divisions:

884.1. "Combating of serious and violent **crime** includes stabilizing outbreaks of public violence at incidents of (and the combating of) serious and violent crime and dealing with any occurrences of crowd gathering during the management of crime incidents (such as cash in transit heists, armed robberies and transport sector violence and farm attacks) to protect persons and property.")

885. In practice, this may imply that crowd management considerations become subordinated to public order policing activities such as crime combating.

886. There is therefore an operational need to distinguish between ‘crowd management’ and ‘crime combating’. The recognition of this distinction should be the *raison d´être* of NI4 of 2014. Instead, it creates some confusion in this respect and, due the lack of clarity in the definition of ‘public order’, seems to turn around this logic: Crowd management is treated as an integral part of public order policing. It thus has lost its status of a concept that always guides NI4.

887. The Panel is of the view that the current definition of ’public order’ should be deleted from NI4 of 2014. This would have far-reaching consequences for the meaning and interpretation of other sections that build upon this term. Therefore NI4 must undergo major reform: It should shift the focus back to crowd management, ideally, linking up with an amended RGA, which, as proposed above, should be aligned with section 17 of the Constitution, 1996, and international law standards.

888. However, by modifying NI4 before such amendments to the RGA has taken place, the Minister of Police has the chance to give this discussion important direction. For example, the above definitions of ’assembly’ and ’peaceful’ could be introduced, thereby complementing the existing definition of ’crowd’ which currently “means a number (more than 15) persons gathered together or an audience (consisting of more than 15 persons), at a sporting event or a group of people with a common interest.”[569]

889. The definition of ’POP’ may equally be modified and aligned, stating that, “POP means the specialised Public Order Policing unit, trained to manage and, if necessary and viable, contain crowds.” The change proposed is not only motivated by an attempt to exclude the reference to ’with a view to restore public order’,[570] it also aspires to overcome the notion that ’crowd management’ and ’crowd control’ are two exclusive concepts. Sometimes, a sharp distinction is made between these concepts. While ’crowd management’ often refers to:

[569] Paragraph 2 (d), NI4.
[570] Paragraph 2 (t) of NI4.

889.1. “Techniques to manage lawful assemblies before, during and after the event for the purpose of maintaining their lawful status through event planning, and pre-event contact with group leaders.” [571]

890. However, ’crowd control’ typically envisages:

890.1. “Techniques used to address civil disturbances, to include a show of force, crowd containment, dispersal equipment and tactics, and preparations for multiple arrests.”[572]

891. Such definitions might promote an overly binary vision. The critique that can be made is that ’crowd control’ stands for a dispersal model which, if applied imprudently, provokes unnecessary confrontations with protesters. It is said to typically trigger a gradual use of force: an approach which is criticised as typically stimulating “one-dimensional repressive, brutal, and heavy-handed coercion, as police is instructed to react to any threat to the peacefulness of a gathering with “concomitant escalation of their opposing strength.”[573]

892. Paragraph 2(p) of NI4 a definition of ’offensive measures’ meaning:

892.1. “Reactive tactical measures required to normalize a situation and include search and seizure, push back, evacuation, encircling and dispersal and requires the systematic escalation of appropriate force.”

893. Those measures are exclusively dealt with under paragraph 14(2) under *’Execution of Public Order Restoration Operations.’* Hence, at first glance, the terms ’crowd management’ and ‘crowd control’ seem to be defined slightly differently in NI4, as the latter is associated with the gradual escalation of the use of force.

894. It is also true that paragraph 14 of NI4 of 2014 refers throughout to 'crowd management' only. It also emphasises that if the use of force is unavoidable: “the purpose of offensive measures must be to de-escalate the conflict with the

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[571] Comp. the Crowd Management and Control Model Policy of the International Association of Chiefs of the Police, October 2014, p. 1, accessible under: http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/CrowdsPolicy.pdf (13/10/2017).
[572] Ibid.
[573] *W. de Lint*, Public Order Policing and Liberal Democracy, in: Tony Michael et al. (eds.) Oxford Handbooks Online: Criminology and Criminal Justice. New York, United States of America: Oxford University Press, 2016.

minimum force to accomplish the goal and therefore the success of the actions will be measured by the results of the operation in terms of loss of life, injuries to people, damage to property and cost.” (paragraph 14 (3) (a) of NI4). Here, crowd management appears to be perceived as inclusive, overarching and not an exclusive concept that incentivises negotiations and defensive measures in all situations, so that de-escalation may take place even under the most difficult conditions. Hence, NI 4 is in a way contradictory as it promotes both “negotiated crowd management” and a use of force model that seems to have its roots in an overcome crowd control logic. This lack of clarity is detrimental to NI 4´s interpretation and application. Most of the proposed changes and conceptualizations appear in the diagram below.

CROWD MANAGEMENT

"Crowd means a number of persons (more than 15) gathered together or an audience (more than 15) at a

"Crowd Management means the policing of crowds, being peaceful assemblies or not, under the command of

POP means the specialized Public Order Policing unit, trained to manage and, if necessary and viable, contain crowds."

PEACEFUL

"Policing of peaceful assemblies" refers to techniques, tactics and strategies used to manage peaceful assemblies before, during and after the event. Its purpose is to respect, protect and facilitate the right to peaceful assembly. The maintenance of the peaceful status may require law enforcement responses to deal with isolated unlawful, in particular, violent behavior while allowing the event to continue;

"Assembly" "an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose";

"Peaceful" are assemblies where the conduct of the assembly is non-violent. . It includes conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups

OTHER CROWDS

"Policing of other crowds" refers to techniques, tactics and strategies to manage gatherings not or no longer constituting peaceful assemblies. Wherever reasonably possible, attempts should be made to de-escalate the situation through dialogue and negotiation with crowd leaders or other participants in the assembly. Under all circumstances, in responding to other crowds police shall be guided by the fundamental principles on the use of force as outlined in section 3;

"Crowd containment measures" refers to measures to control larger groups involved in illegal behavior, in particular, acts of collective violence and against vital facilities. Their initiation is strictly conditioned to the criteria established in section 14

895. **PANEL RECOMMENDATION 127:** NI4 2014 must undergo substantial reform: It should shift the focus back to crowd management and be aligned with section 17 of the Constitution, 1996, international law standards, and the RGA, including any regulations issued thereunder and amendments thereto. For example, the current definition of 'public order' should be deleted from NI4 of 2014. This would have far-reaching consequences for the meaning and interpretation of key parts of NI4 that build upon this term. Implementation of these steps should be done in a phased manner taking into account the urgency of issues and practical considerations such as the process for amending legislation and pending Constitutional Court judgments.

896. **PANEL RECOMMENDATION 128:** To modify the existing notion of crowd management, reformulating it to mean "The policing of crowds, being peaceful assemblies or not, under the command of POP, including those defined in terms of the Regulation of Gatherings Act of 1993", thereby ensuring that NI4 of 2014 is aligned with the Constitution, international human rights law and the RGA. This would establish 'crowd' and 'crowd management' as umbrella concepts that include peaceful assemblies, but is not restricted to them.

897. **PANEL RECOMMENDATION 129:** Many of the definitions currently contained in paragraph 2 of NI4 of 2014 are not definitions but simply acronyms. For example: "IRIS", "JOC", "OCT", "PCCF", "VOC". In the interests of increased user-friendliness, this needs to be resolved. If deemed necessary, they could be inserted as an annex.

Fundamental Principles for Use of Force in Crowd Management

898. The Panel recognises that policing and crowd management has become an increasingly complex task over recent decades. This development has made it necessary for special competencies to be acquired within the policing environment. The normative regulation for attaining the implementation of good practices, higher professionalism and, not less important, holding law enforcement officials accountable, has resulted in an impressive density of provisions that need to be known and correctly interpreted and implemented by police officials.

899. Indeed, overregulation may have counterproductive effects on both the performance of police officials as such and particularly the willingness to comply rigorously with the law they are supposed to enforce. That is why every police official must fully comprehend why the rules and procedures that are in place are important for their tasks and performance. Continuous learning and training serve this purpose.

900. The Panel does not wish to question the need for police to comply with all relevant laws and norms. Yet it believes that it might be helpful to build on the crowd management doctrine, by highlighting specific principles that should be regarded as fundamental guiding principles for the use of force in such operations. A succinct set of core principles for the use of force may better support appropriate decision making in the difficult and complex conditions in which crowd management often takes place. If understood and internalised, they might prevent POP members from some wrongdoing. This idea flows from the 'principled approach' taken by the Panel and its strong interest in a more user-friendly normative policing framework.

901. The Panel therefore proposes that alongside the crowd management doctrine the following text be inserted into paragraph 3 of NI4 of 2014. The fundamental principles that were selected and further defined are:

902. De-escalation

902.1. With the purpose of avoiding or minimising the use of force, SAPS members should always attempt to de-escalate the situation. The use of negotiation and/or mediation should never be understood as being exclusively restricted to peaceful assemblies. Rather, powers to intervene should be used selectively, so that more time, options and resources are available for conflict resolution and decision-making.

903. Protect Life

903.1. Where the use of force is unavoidable, respect for and protection of life has highest priority. The duty to protect life requires the taking of all feasible precautions to minimise the recourse to potentially lethal force as well as rendering first aid in situations where serious injury does occur. Intentional lethal force might only be used to protect another life.

904. Differentiation

904.1. Officers must not treat assemblies and other crowds as homogenous and static. They must distinguish acts of violence, attributable to a person or a smaller group, from the peaceful behaviour of other participants and bystanders, so that the rights of the latter can be respected, protected and facilitated.

905. Legality, Necessity and Proportionality

905.1. All actions must be based on the law. They should not affect or restrict human rights more than is necessary and in no way, that is disproportionate to the aim and threat. Each SAPS member has the duty to intervene in order to prevent other members from using excessive force or other illegal means.

906. Accountability

906.1. Full accountability must be ensured for any use of force during crowd management, in particular when weapons were used or death or injury occurred. This includes superiors who give orders, supervise or otherwise command and control the operations, as well as those who are responsible for the planning and preparation.

907. One 'lesson learnt' from the Marikana incident and other crowd management incidents is the need to prevent the police from ill-advised interventions that escalate a situation, even when it is still somehow manageable and does not pose a major threat to the persons involved. Such a principle of de-escalation derives from the principle of proportionality and is today seen as a key concept of policing: its internalisation and operationalisation through the training of specific tactics can help the police to act more reasonably and effectively.[574] People participating in a gathering must always be given the opportunity to constructively dialogue and engage with the police. The principle under analysis shall assist to deliberately slow down situations for avoiding unnecessary over-reaction to certain infringements or provocations. It thus recognises that both the use of force by the police and the violence committed by individuals can often be avoided through thoughtful interventions of law-enforcement officials. Hence, de-escalation strengthens the

[574] See, e.g., Police Executive Research Forum, *Guiding Principles on Use of Force* (2016), p. 40.

idea of negotiation.[575] The principle shall remind police officers to 'cool down' and gain time and options for handling crowd situations without unnecessary interferences and interventions that may provoke disproportionate harm and violent responses capable of escalating tensions and levels of violence.

908. With regards to the 'protect life principle', rooted in the human right to life, the Marikana Commission has extensively commented on the so-called 'McCann-Principle'. [576] This principle was developed by the European Court of Human Rights[577], but is part of South African law.[578] It requires police operations to be organised in such a way as to minimise to the greatest extent possible any risk to the life of persons.[579]

909. Such precautions are an important aspect of upholding the broader 'protect life-principle'.[580] Strict adherence to this principle is regarded as a non-negotiable condition of crowd management. Respect for this principle creates the kind of trust that every police official depends upon when acting under heated conditions. As already shown above, it is good practice to enshrine the 'protect life-principle' carefully into law,[581] assigning it a special place and turning it into a flagship of crowd management. It goes without saying that emphasising this fundamental principle does not guarantee full compliance with it. It rather needs to be concretised by more specific norms (e.g., on the use of (potentially lethal) force).

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[575] OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly* (2nd edn, 2010), p. 78.
[576] Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lomnin Mine in Marikana, in the North West Province* (2015), p. 36-41, 520-521.
[577] ECtHR, 27/9/1995, *McCann a.o. v UK*, NO. 18984, 91, § 202. See also, C. Grabenwarter, *European Convention on Human Rights – Commentary* (2014), Art. 2 para. 21.
[578] Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lomnin Mine in Marikana, in the North West Province* (2015), p. 41.
[579] *Ibid*., p. 521. See also, C. Grabenwarter, *European Convention on Human Rights – Commentary* (2014), Art. 2 para. 21.
[580] Compare UN Basic Principles on the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), Principles 5 b), 9, 13 and 14; African Commission on Human Rights & People´s Rights. *Draft Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly* (2016), para. 53; Amnesty International, *Use of Force. Guidelines for the Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (2015), p. 53.
[581] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), Principle 1; African Commission on Human Rights & People´s Rights. *Draft Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly* (2016), para. 51; Amnesty International, *Use of Force. Guidelines for the Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (2015), p. 51.

Yet it may be perceived as a 'super-principle', having a special 'lighthouse function': it might be easily memorised as a 'number 1 concern' under adverse conditions in which adherence to specific standards of professionality may be diluted by the complexity of the situation.

910. The decision to highlight 'first aid' as part of the 'protect life-principle' can equally be traced back to the recommendations of the Marikana Commission.[582] A more adequate implementation of the duty to provide first aid would probably have saved the lives of some persons who were wounded during the Marikana incident. The duty derives from the right to life and is therefore stressed by several international documents that are relevant in policing, in particular, the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990).[583] Its eminent recognition would represent an important response to the critique that:

910.1. "The existing police protocols relating to the management of public assemblies in South Africa do not require police officers to provide such medical assistance, despite the fact that members of the SAPS generally receive some training in first aid."[584]

911. It is unacceptable to treat a crowd as a monolithic block or entity.[585] Crowds are dynamic phenomena or processes composed of a multitude of individuals and small groups with different motivations. They seldom act in unison.[586] Understanding and acting upon this fact is fundamental for policing all sorts of crowds. Such understanding might therefore be a precondition for taking the right decision. If isolated violent or other unlawful actions occur, this alone cannot justify

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[582] See, e.g., Marikana Commission of Inquiry, Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lomnin Mine in Marikana, in the North West Province, 2015, p. 360-364 and 552 (recommendation F).
[583] Principle 5 reads: "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment." See also the "Model Bill´s" Art. 11.
[584] J. Biegon/A. Boru/D. Mawazo*, Domestic Adherence to Continental and International Standards in the Practice of Policing Assemblies in Africa*, Copenhagen 2017, p. 36.
[585] Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015, p. 154.
[586] Institute for Non-Lethal Defense Technologies, *Report of Findings of the Human Effects Advisory Pane on Crowd Behavior, Crowd Control, and the Use of Non-Lethal Weapons* (2001), p. 12.

the shift to offensive measures that often affect other protesters.[587] It particularly does not justify the dispersal of the crowd. This is because, as pointed out elsewhere:

911.1. "If some individuals engage in violence, this does not affect the right of others to peacefully continue with the assembly. A necessary and proportionate response must therefore focus on the few violent individuals."[588]

912. Hence, the principle of differentiation is of great operational relevance as it helps POP members to treat complex situations without reproducing stereotypes and unqualified generalisations.

913. The principle of legality seeks to appeal to police members to mutually check and control their compliance with the rule of law, regardless of the particular rank or position, and in so doing, to prevent or, at least, limit the occurrence of transgressions.[589] Thus, the principle obtains an important ethical connotation which may not only stimulate a healthier team spirit, but also build trust and confidence from the population in their police.

914. The principle of accountability enforces the above stated, but of course has wider implications, for example, with regards to record keeping or investigations after the report of injuries or deaths. Superiors have special responsibilities in this respect. On the one hand, they have the duty to ensure the accountability of their subordinates. On the other, they must equally be held responsible for their specific failures. The recommended definition builds on a proposal given by Amnesty International, where it is, however, limited to public assemblies.[590]

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[587] The Constitutional Court of South Africa held in the "Garvas"-case (*South African Transport and Allied Workers Union and Another v Jacqueline Garvas and Others*, Case no. CCT 112/11, 2012 ZACC 13, 13 June 2012, para 53) that "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."

[588] Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015. p. 153.

[589] Police Executive Research Forum, *Guiding Principles on Use of Force* (2016), p. 41.

[590] Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015, p. 149.

Re-conceptualisation of paragraphs 13 and 14 of NI 4 of 2014

915. As stated above, SO 262 was not based on the 'two box-approach' then taken by the NI4 (paragraphs 13 and 14). Apparently, it thus offered a more inclusive conceptualisation of how crowd management operations should be executed. The risk of a falling into an overly binary logic has been pointed out above by referencing the critique concerning the sharp distinction between 'crowd management' and 'crowd control'.

916. The SAPS members of the Panel have repeatedly assured the Panel that the doctrine of SAPS is that of 'negotiated crowd management' and that they therefore neither apply mechanically the 'escalation of force' nor encourage this in training. Suffice here to stress that the use of de-escalation tactics, the consistent application of principles of necessity and the avoidance of unnecessary force, flexible crowd containment responses, and the appropriate use of force must be continuously trained and tested to have more significant practical effects.

917. However, there is a human rights obligation to distinguish between peaceful assemblies and other crowds. The former must not only be respected by the authorities, but also actively protected and facilitated. This has important implications for policing and, in particular, the execution of crowd management operations. Hence, treating peaceful assemblies and other, in particular, violent crowds without distinction, is also inadequate.

918. The Panel is therefore of the view that NI4 should draw a distinction between the *'Execution of Operations to Protect and Facilitate Peaceful Assemblies*' and the '*Execution of other Crowd Management Operations*', without creating too rigorous a dichotomy: Many techniques and tactics for maintaining the peaceful status of an assembly can be equally utilised during other crowd management situations. For example, de-escalation through dialogue and negotiation is not less important with respect to attempts to pacify violent crowds. The Panel understands that it is this holistic, non-exclusive and flexible approach that flows from the doctrine of 'negotiated crowd management' promoted by the SAPS.

919. A cursory study of paragraph 13 of NI4 of 2014 on the *'Execution of peaceful crowd management operations'*, reveals that this provision only superficially deals

with techniques and tactics that should be followed in such circumstances. Paragraph 13 (2)[591] of NI4 only indicates that:

919.1. "The *operational commander* must seek to build trust with the crowd and its representatives. This can be achieved by adhering to undertakings given. The use of force must be avoided at all costs and *members* deployed for the operation must display the highest degree of tolerance. […] During any operation, ongoing negotiations must take place between police officers and conveners or other leadership elements to resolve issues before they escalate."

920. The citation shows that NI4 offers little guidance on how to 'resolve issues.' One might argue that detailing such information could result in a static approach and it belongs, above all, in the operational plan that is elaborated on a case-by-case basis. In addition, it might be argued that, if such techniques and tactics are laid down in NI4, they would be publicly available which may deprive the POP units of certain options or adopting a more flexible approach.

921. Yet, as the object of paragraph 13 of NI4 is to constitutionally protect peaceful assemblies, greater transparency with regards to their management might be seen as good democratic practice. It would also inform peaceful protesters on certain measures that are routinely taken for their protection. Higher predictability of the law enforcement actions against those who disturb the peace of the assembly can be seen as beneficial. Above all, it is in the area of crowd management operations that do not, or no longer, deal with peaceful assemblies, where containment procedures, tactics and strategies should not be public knowledge as this would render the POPs vulnerable to planned countermeasures.

922. Internationally there are many examples of such policies.[592] It would exceed the limits of this report to present them and discuss the usefulness for the South African context. The Panel has however developed a draft as a starting point for such a discussion. As the Panel has not been in a position of being able to test it in

[591]Please note that in NI4 there are two sub-paragraphs (2) to paragraph 13. This is referencing the second one.
[592] See for example: National Policing Improvement Agency, Manual of Guidance on Keeping the Peace, 2010. See for example Seattle Police Department Manual, 14.090. Crowd management. https://www.seattle.gov/police-manual/title-14---emergency-operations/14090---crowd-management

extensive debate with SAPS representative, it cannot claim to have the “seal of approval”. Indeed, it might contain some inconsistencies. In a spirit of incentivising reflections on this important issue, the Panel would therefore at least inform that it has proposed the following draft paragraphs:

923. “Paragraph 13. Execution of Operations to Protect and Facilitate Peaceful Assemblies”

923.1. Peaceful assemblies are those as defined in paragraph 2 of this Instruction.

923.2. The purpose of policing such assemblies is to maintain their non-violent status, to facilitate their safe conduct and to protect them from threats that may emerge from individuals or opposing groups.

923.3. For this purpose, trust should where possible be built with the participants, in particular, the convener, through dialogue and negotiation. Specially trained conflict resolution practitioners should facilitate this process. Interactions must be proactive and non-confrontational with a view to gaining and maintaining cooperation. They should where possible be conducted in the language predominantly spoken by the participants.

923.4. All *members* must display the highest degree of tolerance, even if verbal aggressions or passive resistance occur. Even in such instances, they must avoid any negative verbal engagement for preserving their status as impartial facilitators.

923.5. Though the carrying of weapons during protest is unlawful this should not be interpreted as automatically depriving an assembly of its peaceful status nor as necessarily requiring disarmament action.

923.6. If there is a perceivable threat of violent or unlawful behaviour attributable to certain individuals or smaller groups, and no specially trained conflict resolution practitioner available, the convener shall be requested to monitor and, where necessary, intervene in order to cease and or prevent such conduct.

923.7. In situations of an imminent threat of such behaviour that objectively frustrates this procedure, verbal appeals, directions, and warnings shall be

provided and video recording taken of both *members* and potential law violators. The use of stop and search should be strictly limited to circumstances in which there is a reasonable suspicion that the individual poses an actual risk of violence or is or has been involved in criminal activity.

923.8. Where isolated violent or unlawful behaviour occurred, the operational commander must assess whether and in how far other law enforcement measures would have an escalating or a de-escalating effect on the assembly and are indeed necessary for assuring the safety and physical integrity of individuals. Flexible low-profile tactics that reduce tensions and the risk of violence as well as methods for minimising the risk of harm to assembly participants, observers and bystanders shall be used for implementing these law enforcement measures.

923.9. The imposition of restrictions in accordance with the conditions established by section 9 (1) of the RGA must only occur after negotiation and mediation have failed. They must be strictly proportional and provide suitable alternatives for allowing the effective communication of the assembly´s key concern. When balancing the right to peaceful assembly with the rights and freedoms of others, it must be recognized that the exercise of the former right, by definition, constitutes only a temporary interference into the latter. In particular, temporary disruption of vehicular traffic or impeding access to buildings and installations, that are not vital facilities, is not, in itself, a reason to impose restrictions.

923.10. A peaceful assembly of which no notice in accordance with section 3 of the RGA was duly given or that is infringing upon restrictions relating to time, place and manner may only be dispersed as a measure of last resort and for compelling reasons in strict interpretation of the conditions established by the RGA and section 14 (XY) of this Instruction."

924. "*Paragraph 14. Execution of other Crowd Management Operations* "

924.1. This section applies to all crowds that do not or no longer qualify as peaceful assemblies in accordance with paragraph 2 (1) of this Instruction.

924.2. The purpose of policing such situations is to contain the threats they pose to persons, property and vital facilities through de-escalation and the use of the remedies indicated in paragraph 13 of this instruction

924.3. For achieving this purpose, any intervention involving the use of force must be avoided until a proper assessment of the situation has been made at the locality by the operational commander and a decision on appropriate action has been taken. Specially trained conflict resolution practitioners must promote the crowd´s voluntary compliance with POP action. The display (forceful presence) of *members*, in particular, arrest and spotter units, may as such be sufficient for containing the situation and opening channels for negotiation.

924.4. Crowd containment measures may not be initiated, unless the particular circumstances prevent any dialogue and negotiation with an identifiable organiser or group leader. Once applied, their effects must be constantly reassessed and, if reasonable, adapted to the present situation. Under all circumstances such measures must be implemented with due precaution and in strict compliance with rules on the use of force.

924.5. For tracking and containing groups involved in illegal behaviour, video recording of both the police officers and the law violators must be taken. Amplified sound, to address the protestors, may be used only if there is no evident risk for causing indiscriminate harm.

924.6. The cordoning[593] of groups without permitting egress from the area to be contained is prohibited. In all other circumstances, this method must be strictly proportionate and non-discriminatory.

924.7. Crowds must only be dispersed in accordance with section 9 (2) of the Regulation of Gatherings Act 203 of 1993 and if there are:

[593] This problematic issue cannot be studied here further. For an instructive introduction see: Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015, p. 155.

924.7.1. Criminal activities of a collective nature or a clear and present danger of violence or invasion of critical infrastructure or critical infrastructure complex[594];

924.7.2. Reasonably safe routes of dispersal;

924.7.3. Sufficient resources and contingencies available for safely responding to non-compliance with the order; and

924.7.4. Insufficient personnel for multiple simultaneous arrests.

924.8. The decision to disperse the crowd rests with the operational commander after consultation with the overall commander. The use of video recording equipment for documentation is mandatory.

925.1. Media representatives that run the risk of harm or are likely to impede the safety and success of an operation should be sent to areas where they can continue to carry out their work and do so without major hindrance.

Guidelines for application of the fundamental principles on the use of force in crowd management

926. The incompatibility of section 9 (2) (d) (ii) RGA with international legal principles has already been discussed extensively. The reference to this section in paragraph 13 (2) of NI4 should be deleted as a matter of urgency.

927. The *'Model Bill for Use of Force by Police and other Law Enforcement Agencies in South Africa'*, prepared by the Institute for International and Comparative Law in Africa, in collaboration with APCOF, should be considered as an appropriate starting point for consolidated legislation on the use of force policy by law enforcement officials. The 'Model Bill' contains provisions on the use of force in the management of assemblies (Clauses 7.7 and 10), thus following the *UN Basic*

[594] To be defined along the lines of the proposed Critical Infrastructure Protection Bill: ''critical infrastructure'' means any infrastructure which is declared as such in terms of section 20(4); ''critical infrastructure complex'' means more than one critical infrastructure grouped together for practical or administrative reasons, which is determined as such in terms of section 16(3).

Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990 (Principles 12-14) [595] and other international legal standards.

928. It is worth considering whether the proposed '*Model Bill'* could be more specific and/or whether NI4 should give some of these general rules a more specific meaning in the context of crowd management operations. For example, some of the 'fundamental principles' on the use of force in crowd management presented above, might be concretised by confirming that during crowd management:

928.1. Police should not treat assemblies and other crowds as homogenous and should distinguish between people who are involved in violence and other participants in an assembly, so that the rights of the latter can be respected, protected, and facilitated. People who are participating peacefully in an assembly should not be treated as acting unlawfully because others are engaged in violence.

928.2. In situations where it is necessary for police to use force, this should be targeted at those individuals that pose a specific threat. Unless there are exceptional and urgent reasons for doing so, less-lethal-weapons should only be used in response to violence and should only be targeted at the perpetrators thereof, with care being taken to minimise the risk of affecting others.

928.3. The use of force in an indiscriminate manner should be avoided. Weapons that are by their nature indiscriminate (such as teargas, which cannot be targeted at a specific individual) should be avoided unless the crowd is broadly involved in violence. In such cases care should still be taken to avoid endangering those who may be especially vulnerable if affected by these weapons.

928.4. The continuous escalation of force must be avoided. Rather, each force option should be considered in its utility to help de-escalate the situation so that cooperation can be sought. This can only be achieved through a differentiated and proportionate use of force.

[595] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

928.5. As excessive physical force (the application of more force than is strictly necessary in order to achieve a lawful law enforcement objective) is unlawful, any *member* observing such force or its likely occurrence must, when able to do so, safely intervene to prevent it or to stop it.

929. Another option envisaged by the Panel is to deal with details in the 'Use of Force Guidelines' discussed below as an instrument that helps to interpret the general rules already prescribed by law.

930. Lastly, greater clarity would be beneficial with respect to the use of certain weapons and ammunition in crowd management. Paragraph 14 of NI4 of 2014 already fulfils this function quite reasonably. Sub-paragraphs 5 to 8 state (*verbatim*):

930.1. "(5) The use of the following are prohibited or restricted during *crowd management* operations:

930.1.1. Pepper spray (or capsicum) is prohibited, unless the relevant commander has issued specific instruction to do so (pepper spray may not be used in confined spaces or a stadium where it could lead to a stampede); etc

930.1.2. Firearms and sharp ammunition including, birdshot (fine lead pellets) and buckshot (small lead pellets) are prohibited; and

930.1.3. Teargas (CS) may be used *only* by *POP members* on command of the *operational commander* in situations that allow for its use, but never in stadia or confined spaces that could lead to a stampede.

930.2. (6) Approved rubber rounds may only be used as *offensive measures* to disperse a *crowd* in extreme circumstances, if less forceful methods have proven ineffective

930.2.1. (7) Approved 40mm rounds may only be used on command.

930.2.2. (8) All other measures (such as water cannons, *crowd management* trained equestrian units, etc) may only be utilized upon command of the *operational commander*."

931. **PANEL RECOMMENDATION 130:** The provisions of NI4 relating to the use of weapons should be revised in order to enhance clarity, *inter alia* by clearly distinguishing between weapons that are prohibited and those for which special authorisation by superiors is required. Furthermore, certain weapons, ammunition or other equipment that are currently used, but not mentioned could be added. Particularly, the use of certain specific less-lethal weapons may be defined in greater detail.[596] Provisions in NI 4 relating to the use of weapons should be revised to provide that:

931.1. For the purposes of crowd management, the following weapons and ammunition are prohibited:

931.1.1. Firearms and sharp ammunition shall not be used except in the case of self-defence or the protection of others against the imminent threat to life or serious injury. In any event the use of birdshot (fine lead pellets) and buckshot (small lead pellets) is prohibited.

931.1.2. Rubber-coated hard (metal, wooden, etc.) bullets;

931.1.3. Electronic immobilizing devices ("EID's), such as Tasers, stun guns and stun shields;

931.1.4. Mobile Area Denial systems utilising sound or micro radio waves to disperse a crowd from an area or to deny a crowd access to a particular area;

931.1.5. CN (phenacyl chloride) gas; and

931.1.6. Any other weapon or ammunition whose use is not explicitly authorised by this Instruction.[597]

931.2. The use of the following weapons and ammunition is subject to the authorisation of the operational commander:

931.2.1. Capsicum ('pepper') spray;

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[596] On the issue: Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015, p. 157-159.

[597] So the introduction of new weapons and ammunition would require amendments to this Instruction.

931.2.2. Kinetic impact projectiles (i.e. 'rubber bullets', 'plastic bullets', etc.);

931.2.3. Water cannons;

931.2.4. 40mm rounds;

931.2.5. Teargas (CS)[598]; and

931.2.6. Stun grenades

931.3. Besides the restrictions stipulated above and implied by the general rules and principles applicable to the use of force:

931.3.1. Tonfas may only be used where reasonably necessary against individuals who pose a danger of harm to persons or property including individuals resisting arrest by means of physical force. Strikes should not be directed at the head, neck, spine, groin or centre of the chest (sternum) unless immediately necessary to protect the law enforcement official or another person against the threat of death or serious injury;

931.3.2. Tear gas (CS) and pepper spray may never be used in confined spaces or stadia.

931.3.3. Pepper spray may only be used against a specific individual for private defence or in order to overcome physical resistance to arrest. For this purpose the use of pepper spray must be confined to liquid pepper spray which emits a single stream.

931.3.4. Stun grenades may never be fired directly into a crowd unless the group of people targeted collectively pose a serious and immediate threat to life and no alternatives are available to address the threat.

931.3.5. Kinetic Impact Projectiles should be aimed to strike directly (i.e., without bouncing) the lower part of the subject's body (i.e., below the rib cage). Unless there is a serious and immediate risk to life which cannot otherwise be countered, it should be prohibited to use the KIP at short range. In such circumstances they may also be skip-fired if it is believed

[598] CS is the term commonly used for teargas based on the compound 2-chlorobenzalmalononitrile (Wikipedia, CS gas, https://en.wikipedia.org/wiki/CS_gas, 26 February 2018).

that they can be used effectively for such purpose for private defence. Other than in these circumstances the practise of skip firing Kinetic Impact Projectiles should be discontinued.

931.3.6. Water cannons may only be used by specially trained members.

Record keeping

932. Record keeping is a fundamental aspect of both accountability and information management. The current Record Classification System serves this purpose. Paragraph 17 of NI4 of 2014 contains specific duties in this respect. However, there is no deadline for compliance of this duty.

933. It is not clear in NI4 whether non-compliance with record keeping duties is sanctioned. Given the negative consequence of the potential loss of information if record-keeping is not adhered to, the Panel recommends NI4 should be more specific in this respect. It should be established that violations of this duty are to be sanctioned. The South African Police Service Disciplinary Regulations should leave no doubt in this respect.

934. The Panel recommends adding a sub-paragraph to paragraph 17 which states that:

934.1. "The deadline for the insertion of these documents into the Record Classification System is 14 days after the end of the crowd management incident. Violations of the duties established in this section shall be punished in accordance with the South African Police Service Disciplinary Regulations."

Investigations

935. The Panel has also deliberated on the adequacy and the reasonable interpretation on paragraph 18 relating to investigations. Sub-paragraphs (1) and (2) state that:

935.1. "If force had been used to disperse *crowds* or offences had been committed, relevant case dockets must be opened.

935.2. In cases where force had been used to disperse crowds, the Independent Police Investigative Directorate must be notified."

936. In general it may be noted that the issues of 'investigations' that is the heading of paragraph 18 raises different issues:

936.1. On the one hand there is the possibility that offences may have been committed by protestors or other members of the public in the context of a crowd management incident. The provisions of sub-paragraphs (1) appear to be related to this possibility.

936.2. On the other hand there is the possibility that offences may have been committed by police. Currently the IPID Act obliges IPID to investigate all deaths as a result of police action.[599] However other IPID obligations to investigate, including the obligation to investigate assaults, and the obligation to investigate the discharge of a firearm, are not mandatory in all cases, do not mandate IPID to investigate all uses of force, but only cases where a complaint has been lodged.[600]

937. From a human rights law perspective these provisions may however be regarded as having a very limited scope of application with respect to the investigation of the use of force by police members. In particular, the right to life is universally interpreted to require an investigation immediately following the use of (*quasi*-)lethal force in a law enforcement context.[601] This is due to a *prima facie* suspicion of arbitrary conduct in the potential breach of essential human rights obligations.

938. The 2017 Guidelines for Policing Assemblies in Africa, prepared by the African Commission on Human Rights and Peoples´ Rights, states what can be regarded as international customary law:[602]

938.1. "24.5 State Parties must conduct a thorough investigation and account of circumstances surrounding every case of death or serious injury of persons in the context of assemblies."

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[599] Independent Police Investigative Directorate Act (1 of 2011), section 28.
[600] *Ibid*.
[601] See, e.g., European Court of Human Rights, *McCann and Others v the United Kingdom*, 6 October 1995; at 202-204; Inter-American Court of Human Rights, *Case of the Ituango Massacres v Colombia*, 1 July 2006, at 131; Human Rights Committee, General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.14, 26 May 2004, para. 15.
[602] African Commission on Human Rights and Peoples´ Rights, Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, 2017, p. 26.

939. Hence, the duty to open case dockets should not be conditional on the dispersal of crowds or the commitment of offences but to facts indicating potential life-threatening illegal use of force, be it through a member of the police or another person. Having caused serious injuries is such a fact, as is the death of a person.

940. The above-described *lacuna* also exists with regards to the duty to notify such incidents to the Independent Police Investigative Directorate. Paragraph 18 (2) of NI4 establishes such a notification requirement only for "cases where force had been used to disperse crowds." If deaths and injuries have occurred during crowd management, it should be clear that these have been notified to IPID, too, in order to uphold the principle of investigation as enshrined in international human rights standards: According to these standards, an effective investigation requires strict adherence to the principles of independence, impartiality, thoroughness, promptness and transparency.[603] For example, the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, state that:

940.1. "The use of force should trigger an automatic and prompt review process after the event. It is good practice for law-enforcement officials to maintain a written and detailed record of force used (including weapons deployed). Moreover, where injuries or deaths result from the use of force by law-enforcement personnel, an independent, open, prompt and effective investigation must be established."[604]

941. The Panel is of the view that the *lacuna* identified is not sufficiently remedied by section 28 and s 29 of the IPID Act No. 1 of 2011. Amongst others, the Act establishes in section 29 a reporting obligation of SAPS members to IPID with regards to matters referred to in section 28 (1) (a) to (f). As indicated it includes, amongst others, deaths as a result of police actions, complaints after the discharge of an official firearm by any police officer as well as complaints of torture and assaults against police officers. However, no specific reference is made to persons that have been injured by members of the police. For this reason, the IPID Act

[603] Compare, e.g., The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of International Humanitarian Law, UN Doc. A/Res/60/147, 16 December 2005.
[604] OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly, prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly* (2nd edn, 2010), para. 176.

should be amended, for example by inserting to the relevant section ’and serious injuries.’

942. Lastly, IPID´s right to receive full assistance for successfully conducting an investigation is currently addressed in paragraph 19 (6) of NI4 on ’debriefing’ which is clearly inconsistent with the focus of this paragraph. Paragraph 19 (6) should therefore be integrated into paragraph 18 (2) of NI4 of 2014.

943. The proposed changes might be summarised as follows:

	Paragraph 18 NI4 – Investigation	Changes proposed
(1)	If force had been used to disperse *crowds* or offences had been committed, relevant case dockets must be opened.	If deaths and serious injuries have occurred in the context of a crowd management operation, pertinent case dockets must be opened promptly.
(2)	In cases where force had been used to disperse crowds, the Independent Police Investigative Directorate must be notified. (Note: Paragraph 19 (6) on “Debriefing” states: The *Overall Commander* must ensure that all appropriate assistance is provided to the Independent Police Investigative Directorate during an investigation which resulted from policing actions during an event or *gathering.*)	These incidents must be notified without delay to the Independent Police Investigative Directorate. The *Overall Commander* must ensure that all appropriate assistance is provided to any investigation that has been initiated by the Directorate and cooperate with it in spirit of good faith. It must have access to all necessary information and persons to conduct the investigation.
(3)	It is the responsibility of section and platoon commanders to oversee and guide the laying of criminal charges and making of statements by members under their command.	It is the responsibility of section and platoon commanders to oversee and guide the laying of criminal and disciplinary charges and making of statements by members under their command.
(4)	Notice must be taken of …	No changes

Post event management and withdrawal

944. The Panel has already stated its view on the understanding of the term 'public order' as currently defined in paragraph 2 (u) of NI4, and recommended that it be deleted. This again would impact on various other provisions of NI4. A case in point is section 16 which deals with *'Normalization of an area where public order was restored through the use of force'*. In the view of the Panel, this section should also be deleted or, at least, carefully revised, taking into consideration the following observations:

945. There is already an inconsistency between the heading of paragraph 16 and its first sub-paragraph. According to the heading, the section is dealing with situations where public order 'was' restored. Sub-paragraph 1 states that:

945.1. "After the outbreak of any kind of violence or where *members* of the Service have been compelled to use force, it is of vital importance that the area should be restored and normalized as soon as possible."

946. The situation referred to might be an ongoing crowd management operation, however, and not necessarily a 'public order restoration operation', as the use of force might also be necessary during the 'execution of peaceful crowd management operations' (subject of paragraph 13). This sub-section offers little utility to clarifying the task of POP and should be deleted.

947. Paragraph 16(2) of NI4 deals with the responsibilities of the "member in command at the scene". It states that-

947.1. "Roads need to be cleared and all signs of violence need to be cleared by the responsible department as soon as possible (subject of the investigation of the crime scene, if possible). These clean-up operations are not the responsibility of the Service."

948. The confusion between clear- and clean-up operations might not only be due to a typing error. It might be interpreted as a consequence of introducing a dangerous notion of 'public order' and 'public order policing': being perceived as 'hygienic measures' that must be taken to reestablish law and order. It is not only the wording that is quite unusual. What is the explanatory value of stating "These clean-up operations are not the responsibility of the Service"?

949. Paragraph 16 (2) (b) of NI4 requires POP units to remain:

949.1. “In the area to conduct saturation patrols and contain the situation by means of vehicle check points and roadblocks. Any form of violence or group forming must immediately be handled by POP in accordance with the prescripts. It is of vital importance that no violence should be tolerated and that perpetrators should be dealt with in terms of the law.”

950. This sub-section appears to address situations after very severe unrest. However, it does not provide clarity on how to proceed. Furthermore, the mere formation of groups is already perceived as a potential threat. Thus, the sub-section creates the climate not only for heavy-handed police action, but effectively ’criminalises’ people who after the end of an unrest situation show up collectively in the public.

951. Paragraph 16 (2) (e) reads:

951.1. “In worst case scenarios where normal day to day policing cannot continue in an area due to violence in that area, the normal day to day policing which is the responsibility of the local police station, may, depending on the seriousness of the situation, become the responsibility of *POP* upon the decision by the relevant provincial commissioner.”

952. This is not a useful clarification of POP´s mandate.

953. Sub-paragraph (2)(f) then requires the member in command to, “In all cases of violence, ensure that only *members* with the right equipment and training should manage the situation.” This phrase is empty of any specific meaning not already contained throughout NI4 of 2014. However, it goes on: “The use of armoured vehicles is of utmost importance to handle these kinds of situations […].” The necessity to use armoured vehicles rather depends on the factual circumstances of each crowd management situation and requires consideration of its possible negative side effects. The Goldstone Commission has stated that, “The situation of the South African Police would be much safer if they made greater use of

smaller, armoured, air-conditioned vehicles", but it added: "to confront demonstrations that are becoming dangerous."[605]

954. Sub-paragraph16 (2)(f) then continues: "It is the responsibility of the Division: ORS to maintain an armoured fleet." Again, there is no need to make such a statement in NI4. Worse, it suggests adopting a militarised approach to areas where public order has already been restored. Even though it might be necessary at times for POP units to engage in a sort of 'peace-keeping mission' in certain 'no-go-areas', this section invites misinterpretation with respect to crowd management.

955. **PANEL RECOMMENDATION 131:** Paragraph 16 of NI4 of 2014 should be reformulated.

Broad recommendations relating to National Instruction 4 of 2014

956. **PANEL RECOMMENDATION 132:** National Instruction 4 of 2014 should be amended so that it more decisively focuses on crowd management and foregrounds negotiated management as originally envisaged by SO 262 of 2004. In addition to other recommendations in this report:

956.1. Consideration should be given to the suggestions provided above (see paragraphs 923 and 924 of this report) in order to make NI4 more instructive with regards to the management of peaceful assemblies as well as in relation to other assemblies that no-longer qualify as peaceful.

956.2. A section should be introduced that explains the crowd management doctrine as well as the fundamental principles of the use of force in crowd management (regarding the latter see paragraph 898 and following).

956.3. As a matter of urgency, the reference to section 9 (2) (d) (ii) of the RGA should be deleted from paragraph 13 (2) of NI4.

956.4. As with the notion of 'public order' the Panel recommends that the definitions of 'defensive and offensive measures' as given in paragraph 2 (p)

[605] P.B. Heymann, Towards Peaceful Protest in South Africa, HSRC Publishers: Pretoria, 1992, p. 25.

NI4 of 2014 should be deleted in line with a principled and situationally appropriate approach to the policing of crowds.

956.5. Paragraph 17 on 'record keeping' should contain a deadline for inserting the information into the Record Classification System. Unjustified non-compliance with it should entail a sanction.

956.6. Paragraph 18 on 'investigation' should be aligned to international standards requiring the opening of dockets of death and injuries that have taken place in the context of a crowd management operation. The duty to notify such incidents to IPID should be equally affirmed by it.

POP training and learning

957. The issue of training came under spotlight during the Marikana Commission. The lack of adequate training and learning was raised in many heads of arguments of different legal experts, policing experts and civil society organisations.

958. For instance Eddie Hendrickx who appeared as an expert witness on behalf of the Legal Resources Centre (LRC) at the Marikana Commission, made several observations and recommendations related to training. He recommended that:

958.1. Specific POP training courses must be run for all commanders in POP.

958.2. Operational commanders' course, platoon commanders course, and POP basic training to be reviewed based on the findings of the commission.

958.3. The implementation of a continuous learning programme for all members of the SAPS involved in POP.

958.4. To ensure that POP policy and training considers the realities of gathering.

958.5. Review of interaction between lessons learned on operations and future actions.[606]

[606] Eddie Hendrickx, Recommendations, Marikana Commission Exhibit ZZZZ31.2.

959. Various Panel recommendations have already raised specific issues to do with POP training. (See Panel Recommendations 48, 58, 69, 78, 79, 80, 81, 83, 85, 86, 89, 90, 107, 108, 113, 122).

960. In pursuance of its terms of reference related to training and learning the Panel focused on the following areas:

960.1. Overview of training.

960.2. Training *curriculum* and *methodology* of POP officers, benchmarked against global and regional practice.

960.3. *International norms* related to crowd management training.

960.4. The *philosophy* and *doctrine* of training of POP officers and the *efficacy* of said training to address current crowd management incidents, admission criteria and selection, platoon and operational commander training, and training on the use of less lethal weapons, including specialised equipment.

960.5. In-service and refresher training on public order including crowd management and crowd management training techniques such as negotiations, principle of non-intervention, force continuum, de-escalation and escalation.

Overview of POP training

961. The SAPS training curriculum exposes trainees to a variety of crowd management equipment, tactics, techniques and formations for POP operations. The training curriculum includes descriptions, characteristics of the equipment, as well as why and how it should be utilised during crowd management. The training also deals with storage, maintenance and transportation of this equipment during an operation. Furthermore, the training curriculum includes the use of pyrotechnical equipment, descriptions of this crowd management equipment, manufacturer's specifications, application, storage and maintenance of the equipment.

962. There are several types of training provided in the POP environment. Training provided is specialised and is aimed at improving the capabilities and competencies of SAPS members tasked with performing their functions with regard to crowd management. This training includes the following:

962.1. Nyala driving course;

962.2. Water cannon driving course;

962.3. Video operation course; and

962.4. Course for information gathering in the POP environment.

963. Other training courses available in the POP environment include:

964. Crowd management for platoon members;

964.1. Crowd management for platoon commanders;

964.2. First Line Operational Managers' (FLOM) course;

964.3. Operational Commander Training course;

964.4. Crowd Conflict Management training; and

964.5. Operational Planning and Data Capturing training.

965. Except for the crowd management training for platoon members which is provided over 4 weeks, the other courses are provided over an average of three weeks. The *curriculum* for these courses covers the following key areas:

965.1. The theory and practical application of crowd management operational principles, tactics and techniques.

965.2. The physical training requirements, the legislative framework, operational policies, prescripts and National Instructions.

965.3. Classroom work and practical simulations of scenarios, tactics and formations.

Challenges with training and learning

966. Training exposes trainees to a variety of skills, techniques, formation and the use of equipment for crowd management. However, the following observations were made regarding training and learning and are worth highlighting:

966.1. The reviewed POP training *curriculum* for platoon members does not deal with operational realities including:

966.1.1. Crowd dynamics in which there is a serious threat to the police or others from violence of one kind or another including the possibility that crowds may be armed with sharp weapons and firearms.

966.1.2. Crowds that are organised, confrontational and may resort to using petrol bombs and other weapons.

966.2. The training manuals and curricula are not reviewed regularly to reflect the dynamic nature of crowds and crowd management in South Africa. As a result, the training curriculum, techniques and tactics do not reflect the complex nature of the current crowd management environment.

966.3. The training *curriculum* for platoon members which was developed more than a decade ago was only reviewed and updated in 2016. However, due to operational demands and the difficulties of accessing training facilities due to high demand for training in the SAPS, only a few police members have been retrained on the new curriculum.

966.4. Some of the training courses, such as the Nyala driving and water cannon driving course, and the use of the LRAD, are based mainly on the manufacturer's manuals.

966.5. The training curriculum is mainly orientated to urban operations and there is no curriculum which is orientated to rural based or open spaced crowd management operations. The public order situation in Marikana was rural based and police tactics were exposed. As such, there are no training drills and formations designed and provided during training for POP units for open spaced or rural based operations where there are no roads or linear buildings to support operations.

966.6. As highlighted above POP operations, tactics, and formations are anchored on personnel numbers and force strength. This force strength is often available during training and trainees are exposed to different tactics and formations, yet when POP members are deployed into their units at station level, the units are severely depleted by personnel numbers. As a result, POP units operate below their own minimum deployable standards. The lack of force strength is reflected in the tactics and methods which police members often deploy during crowd management operations.

966.7. The fitness levels in Public Order Policing are high and complemented by regular assessment and evaluation to ensure operational readiness. Currently, there is no mandatory or compulsory physical training for police personnel or assessment of personnel in the POP Units. When specialised units do not train regularly, they are unlikely to maintain their standards and key competencies. This means that the issue of age and levels of fitness of POP members need to be assessed.

966.8. Training facilities are not adequately resourced with POP equipment, such as water cannons and Nyala, yet POP operations are anchored on armoured vehicles. The lack of integration during training creates operational challenges in relation to the coordination and execution of POP operations.

International best practice in Crowd Management

967. The training approach of the *UN Formed Police Units* (FPUs) exposes police officers to gun fire and bombs during training to reflect the situations that police will be confronted by during their operations. There is also emphasis on field testing and mock drills that simulate the context of protests. The training philosophy is similar to the military training which prepares soldiers for sounds and sights for battle through desensitisation techniques, such as mock enemy villages. It is believed that this helps build resilience, and desensitises soldiers to sight and sounds during actual battles. In 2010 the UN FPUs were subjected to firearms and grenade attacks during their crowd management operations in Haiti. Consequently, there was a review of the crowd management training regime. The training methods exposed police officers to simulated gun fire and grenades attacks.

968. All UN crowd management personnel are trained and equipped to understand their individual roles, their roles as a team member, tactical approaches, interdependency, quick transition and their safety and that of the public.

969. The FPUs earmarked for mission deployments are subjected to rigorous pre-deployment evaluation exercises before being deployed for UN missions. These evaluation exercises include scenario-based practical drills. Prior to this evaluation, FPUs have to undergo mandatory pre-deployment training in their home countries. The evaluation exercises focus on individual roles and responsibility and the aspect of integration as well as co-ordination with the rest of the team or unit. On the crowd

management component, the unit commander is given a task to test his/her operational planning ability, selection and deployment of resources, including human resources. The whole unit is subjected to a barrage of missile throwing to test their skills including resilience and use of proportional force as well as defensive and offensive techniques. Only those members who would have exhibited unquestionable operational ability are certified fit to be deployed for the mission or operation.

970. Training facilities are used also to assess and evaluate periodically the operational readiness of POP units and their ability to maintain minimum standards for public order policing. The assessment and evaluations of POP units includes physical fitness, theory and application of techniques and tactics. Public Order Police commanders are also regularly assessed to evaluate their decision-making skills as well as their ability to command and control. They are given practical scenarios using simulation programmes where their decision making is assessed and evaluated. Police officers who fail the assessment are re-assigned to other roles.

971. One of the lessons learned from the Russian Federal Police was the presence of qualified psychologists during police operations and training, the purpose of which is to provide psychological support to police officers and assess the psychological wellbeing of police officers. Psychologists also play a significant role during training wherein they assess and evaluate police with regards to their mental and psychological readiness. The Panel was also shown a vehicle equipped with debriefing facilities for use in the field of operation.

Additional recommendations for training and learning

972. **PANEL RECOMMENDATION 133:** Training should be reviewed regularly to reflect operational realities and crowd dynamics. This will require *curriculum* changes and methodological changes to adequately prepare POP members and field test their tactics and techniques.

973. **PANEL RECOMMENDATION 134:** Given that gatherings or protests are dynamic and can become violent, the training curriculum should expose trainees to realistic crowd situations and scenario-planning in order to strengthen their

capacity to maintain tolerance levels, build their flexibility in responding appropriately to rapidly changing scenarios, and help build their resilience.

974. **PANEL RECOMMENDATION 135:** The training curriculum should be expanded to include rural based operations or open space operations. The current curriculum which is anchored on a road network infrastructure and buildings falls short of operational realities in rural areas where such infrastructure does not exist.

975. **PANEL RECOMMENDATION 136:** The POP training facilities should ensure that POP equipment and armoured vehicles that POP members will be utilising during operations is permanently available as part of their training, which is currently not the practice. This approach can serve to expose POP members to operational realities on the ground.

CHAPTER FOUR: FULL LIST OF RECOMMENDATIONS

Recommendations from Chapter Two: Professionalism, Accountability and Demilitarisation

The Panel is aware that the agency responsible for the implementation of these recommendations is the Ministerial Transformation Task Team. In this Chapter proposals are also made with regard to other role-players who will be essential to the implementation of each of the recommendations. In some instances, such as proposed amendments to legislation, the latter role-players may be the principle implementers.

Recommendation	**Focus of Recommendation**	**Key participants**
Paragraph 35		
PANEL RECOMMENDATION 1: In relation to the vicarious liability of the SAPS for the actions of its members, the manner in which state protection for members is being applied should be critically reviewed. Police officials require a high measure of protection for the lawful exercise of their powers; otherwise it might lead to reluctance to act where required. It must, however, be ensured that gross negligence, *mala fide actions*, including where a member acts purely in his or her own interest, ignorance of the law and instructions[607], and serious misconduct be addressed in all cases not only by means of disciplinary action, but also through recovering of damages incurred by the SAPS as a result of actions by the member.	Application of state protection	SAPS (Legal Services); Civilian Secretariat for Police Service (CSPS).

[607] Assessments of the whether ignorance of the law constitutes a serious dereliction of duty would be applied on a case by case basis. It is expected that a police official would not be ignorant about the law in respect of matters such as arrest, or search and seizure,,that he or she is dealing with on a daily basis. Similarly a police pilot would be expected not to be ignorant on civil aviation matters.

Recommendation	Focus of Recommendation	Key participants
Paragraphs 49, 50 and 51		
PANEL RECOMMENDATION 2: SAPS recruitment criteria and the selection system should be strengthened to support competency-based policing, including a greater focus on the quality of personnel. This should be informed by the work of the National Policing Board (see Panel Recommendation 15). The long-term view should allow for the possibility that the SAPS can fulfil its responsibilities more effectively with a smaller number of better qualified and better compensated personnel; integral to this approach is a two-tier recruitment system as recommended by the NDP.	Recruitment criteria and the selection system	SAPS (Human Resource Management)
PANEL RECOMMENDATION 3: In addition to a two-tier system, SAPS should introduce a two-stream system to support retention of skilled personnel in roles that are aligned to their skills. This could motivate personnel with specialised or scarce skills to remain in the SAPS and continue to perform these specialised functions.	Promotions	SAPS (HRM)
PANEL RECOMMENDATION 4: CSPS should commission a review of relevant policing qualifications provided at the tertiary level, including internally by the SAPS, and by the tertiary education sector. The review should focus on to what degree current qualifications that are available are aligned with the objective of professionalising the police and how the contribution	Tertiary qualifications	CSPS; SAPS (HRD).

Recommendation	Focus of Recommendation	Key participants
of the tertiary education sector to the objective of strengthening competency-based policing can be improved.		
Paragraphs 67-73		
PANEL RECOMMENDATION 5: In line with the NDP recommendation that a code of professional and ethical police practice should be developed and prescribed through regulations,[608] the present SAPS Code of Conduct and Code of Ethics should be amalgamated and referred to as the *South African Police Service Code of Conduct and Ethics.* The most applicable and enforceable indicators from the existing codes should be used.	Codes of Conduct and Ethics	SAPS & CSPS
PANEL RECOMMENDATION 6: Key Performance Areas (KPAs) for performance review of senior managers should include how they have taken responsibility for promoting the principles embodied in the Codes of Conduct and Ethics and in supporting members in understanding and applying them.	Key Performance Indicators	SAPS
PANEL RECOMMENDATION 7: In order to support the integration of the awareness of police ethics into decision-making, the SAPS should adopt the *National Decision Model*, or a model that resembles it.[609] The model should be integrated into training (including in-service training) on professional conduct and operational decisions.	Decision-Making Model	SAPS (National Commissioner, Human Resource Development)

[608] NDP 2030. p.390.
[609] Another version of the model may be found on page 37 of the OSCE publication 'Human Rights Handbook on Policing Assemblies'.

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 8: The SAPS should develop training material (including audio-visual) to ensure that the Code of Conduct and Ethics is internalised as part of police practice. This should be translated into all official South African languages.	Training curriculum	SAPS (HRD)
PANEL RECOMMENDATION 9: In line with the NDP recommendation, police members should be trained and tested in the Code of Conduct and Ethics and its application, as part of the Professional Conduct module; and the SAPS should continue with the practice which requires SAPS members to sign a copy of the Code each year, with the signed copy kept in their file.	Training curriculum	SAPS (HRD, HRM)
PANEL RECOMMENDATION 10: On an annual basis the SAPS should provide a report to the Portfolio Committee for Police on the outcomes of disciplinary investigations and hearings against SMS officers. This will enable the SAPS to publicly affirm its commitment to ethical conduct amongst its senior commanders and demonstrate that SAPS members, irrespective of rank, are accountable for their conduct (see also Panel Recommendation 32).	Outcomes of disciplinary investigations against SMS members	Minister of Police, SAPS (National Commissioner)
PANEL RECOMMENDATION 11: The CSPS should monitor and audit progress made by the SAPS in resolving disciplinary matters against SMS officers, and report to the Portfolio Committee on Police on matters finalised and on cases outstanding for over six months.	Outcomes of disciplinary investigations against SMS	CSPS

Recommendation	Focus of Recommendation	Key participants
Paragraph 84		
PANEL RECOMMENDATION 12: The SAPS Act should be amended to ensure that all directions issued by the Minister are formally recorded. The Minister should ensure that a record of all directions is presented to the Portfolio Committee on Police on an annual basis.	SAPS Act	Minister of Police and CSPS
Paragraph 88		
PANEL RECOMMENDATION 13: The SAPS Act should be amended to affirm that SAPS commanders or other members: 1. Should, wherever possible, consider and try to take into account reasonable concerns that are expressed by public officials, or others, if they can do so in a manner that is consistent with the principles of policing; 2. Are obliged to exercise independent judgement in relation to the operational implications of such concerns; and 3. May request that such concerns be provided in written form.	SAPS Act	Minister of Police and CSPS.
Paragraph 90		
PANEL RECOMMENDATION 14: A plan should be developed and work study conducted to support the capacitation of the CSPS. This should enable the CSPS to better fulfil its Constitutional duty of	CSPS capacitation	Minister of Police, CSPS

Recommendation	Focus of Recommendation	Key participants
supporting the Minister of Police in order to fulfil its oversight mandate and ensure the professionalisation of the police. The plan should ensure a balance between civilian personnel with appropriate skills and personnel with policing experience who have insight into the workings of the SAPS and are committed to oversight and the professionalisation of the SAPS.		
Paragraphs 100-102		
PANEL RECOMMENDATION 15: A National Policing Board should be established by means of legislation. The NPB should have multi-sectoral and multi-disciplinary expertise to set objective standards for recruitment, selection, appointment and promotion of SAPS members. The Board should be tasked with reviewing and further improving the criteria for all commissioned officers starting with the post of the SAPS National Commissioner which at this time does not have adequate minimum criteria from which to assess potential candidates. The NPB should be composed of between seven and nine individuals who are widely recognised as professionals who understand the demands of executive management and ethical decision-making in large public-sector organisations generally and the SAPS in particular. Ideally, the chair will be a Judge or a Senior Advocate to promote the independence of its recommendations to the Minister of Police and the SAPS. *3.1.* The Panel recommends that as the NPB will be performing a technical function it should only	Legislation to establish a National Police Board	Minister of Police & CSPS

Recommendation	Focus of Recommendation	Key participants
consist of individuals who bring specific expertise and skills to the work of the board. The NPB could therefore consist of: 3.1.1. A retired police Commissioner who has served with distinction to assess knowledge of policing policy and practice; 3.1.2. An expert in the laws and regulations governing the SAPS, and ideally criminal law, to provide capacity with regards to the legal principles within which policing should operate; 3.1.3. A representative from the Treasury to provide capacity in relation to the Public Finance Management Act and relevant regulations governing public sector procurement; 3.1.4. A representative from the Public Service Commission to provide capacity with respect to executive public administration prescripts, legislation, planning and reporting obligations; 3.1.5. An expert in executive decision-making and ethics in the public sector; and 3.1.6. Any other individuals who possess the necessary expertise to assist in assessing candidates against relevant criteria developed by the board		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 16: The SAPS National Commissioner should be appointed by the President only on recommendation by the National Policing Board. The NPB should present the President with a shortlist of candidates who performed the best against the assessment criteria used and the scores obtained. The recruitment process should be transparent and competitive with the *curriculae vitae* of the applicants being made public, and interviews taking place in public. 1. For purposes of appointing future SAPS National Commissioners and Provincial Commissioners, the NPB should develop clear merit-based criteria for these posts. These criteria must be benchmarked internationally on the necessary skills, expertise, experience, integrity, and characteristics required for effectively leading a professional police agency. 2. Where vacancies occur the CSPS should: 2.1. Over a month-long period, publicly advertise the posts for the SAPS National Commissioner and Deputies and present the responsibilities and functions of each post along with the minimum criteria required to be shortlisted; and 2.2. Receive applications and supply the NPB with a shortlist of candidates who meet the minimum criteria. To be shortlisted, the candidates must not only possess the necessary expertise, experience, and qualifications, but must first be vetted for top	Appointment of NC	President, Minister of Police, NPB

Recommendation	Focus of Recommendation	Key participants
security clearance and subjected to an appropriate psychometric evaluation. 3. The board should then interview the shortlisted candidates against the criteria in a public forum. The board should also be able to receive submissions from the public on the shortlisted candidates. 3.1. The NPB should provide scores for each shortlisted candidate against the key criteria weighted by the most important functions of the post and assessments of integrity; 3.2. The board should agree on a shortlist of no more than five candidates for each post, comprising those who achieved the highest scores from the assessment processes; and *3.3.* The shortlist of appropriate candidates for the post of SAPS National Commissioner will then be presented to the president who in terms of the constitutional mandate will appoint the new commissioner.		
PANEL RECOMMENDATION 17: The appointment of Provincial Commissioners should follow a similar process to that recommended for the National Commissioner. The shortlist of recommended candidates for each Provincial Commissioner position should be submitted to the National Commissioner and provincial executive, with a copy being sent to the Minister of Police.	Appointment of PC	National Commissioner, provincial executives, NPB, Minister of Police.

Recommendation	Focus of Recommendation	Key participants
Paragraphs 114-116		
PANEL RECOMMENDATION 18: The South African Police Service Act (No. 68 of 1995) as well as the Employment Regulations (2017) need to be amended to ensure that: 1. There can be no deviation from the prescribed processes for: 1.1. properly defining the scope and requirements of a post; 1.2. the need to advertise a post; 1.3. the requirements for applications for a post; and 1.4. the requirement of having an independent and properly constituted panel for assessing the candidates applying for the post. 2. No appointments or promotions in the SAPS should occur without the suitability of the person for the post being rigorously evaluated against objective criteria. All posts in the SAPS should only be filled following a transparent, competitive, and merit-based process to ensure that only the best suited person is appointed.	SAPS Act and Employment regulations	Minister of Police, CSPS.
PANEL RECOMMENDATION 19: Regulation 11 of the SAPS Act (1995) should be amended as follows: 1. Sub-regulation (1) should be amended to stipulate that there can be no appointment to any post without proper procedures being followed. There will never be a situation where professionalism of	Regulations	Minister of Police, CSPS.

Recommendation	Focus of Recommendation	Key participants
the organisation can be enhanced by failing to follow established processes for filling posts or effecting promotions. 2. There should be no prohibition on the re-appointment of a former member of the Service, who meets other employment criteria, purely because they are older than 30 years of age. Former members of any age prior to that of retirement should be able to be appointed if they possess the necessary skills, qualifications, integrity, and expertise to add value to the SAPS. Former members who have obtained additional skills and experience in other sectors but prefer to work as police officers should be welcomed back to the SAPS if they can contribute to achieving the professionalisation of the organisation.		
PANEL RECOMMENDATION 20: The authority of the Minister, as provided for in Regulations, should be limited to approving the criteria for appointments and promotions, and for the creation of posts, but should not in any way extend to influence senior management decisions on the individual candidates who are appointed or promoted to specific posts.	Regulations	Minister of Police, CSPS.
Paragraph 120		
PANEL RECOMMENDATION 21: The competency assessment recommended by the NDP should be implemented. The competency assessment should focus firstly on the top management, or SMS level (Brigadier and above) of the SAPS.	Competency Assessment	CSPS

Recommendation	Focus of Recommendation	Key participants
1. The overall focus of such an assessment should seek to assess the following: 1.1. Firstly, the suitability of a person to remain a member of the SAPS needs to be assessed against clear criteria of knowledge, skill, aptitude, attitude, experience, and personal conduct; 1.2. Secondly, the suitability of that person to function at a strategic level in the SAPS needs to be assessed against the general SMS criteria; and 1.3. Thirdly, the suitability of that person to occupy a particular post at a strategic level needs to be assessed against job specific criteria for that post. 2. The competency assessment must include a focus on issues of personal integrity and professionalism and should therefore include a focus on: 2.1. Procedures and processes utilised for appointment; 2.2. Whether security clearance is current; 2.3. Whether experience, expertise, and skills are adequate for the post; 2.4. Whether there is any evidence or allegations that the individual has transgressed the SAPS Codes of Conduct and Ethics;		

Recommendation	Focus of Recommendation	Key participants
2.5. Independently assess performance in the post over the previous two years; and 2.6. Recommend any necessary amendments to the criteria for appointment to strategic operational posts (e.g. Crime Intelligence). 3. The competency assessment needs to be organised and conducted in an independent, open and transparent manner under the auspices of the National Policing Board or CSPS. In the absence of the proposed NPB, the audit process could be facilitated and managed by the CSPS. This option would necessitate that the capability and capacity of the CSPS be appropriately augmented or that an appropriate independent organisation is contracted to undertake the assessment. 4. It is important that this be commenced as soon as practicable, as a highly professional and functional top management capability is a key foundation for the establishment and maintenance of a professional and strong SAPS. 5. Where officers fail to meet the required standards, they are: 5.1. In the case of inadequate skills or skills-based performance, provided with a specific and reasonable time frame in which to reach the required level of ability.		

Recommendation	Focus of Recommendation	Key participants
5.2. In cases where appointments were irregular but they meet the requirements of the post they should remain in their posts. 5.3. If there are allegations of any kind of misconduct against the officer, these should be thoroughly investigated within the prescribed time frame. Where there is evidence of misconduct, individuals must be subjected to a disciplinary hearing and suspended where appropriate. Consideration should be given to rank reductions as an option for sanctions. 5.4. Where officers are not performing to standard and the skills gap is too large for a reasonable change in performance within one year, these officers must be re-deployed to posts where they can meet the requirements of the post.		
Paragraph 136		
PANEL RECOMMENDATION 22: Directives for police managers on dealing with the aftermath of shooting incidents should note that any public statements: 1. Should emphasise that the SAPS aims to uphold the principles of professionalism and accountability; 2. Should emphasise that the SAPS is in favour of thorough and impartial investigations in order to support accountability; 3. May give a summary of information that has been received but should not under any circumstances	Directives on media statements	SAPS

Recommendation	Focus of Recommendation	Key participants
imply that management has reached final conclusions on what occurred during the incident (information provided should not undermine the potential for the incident to be investigated thoroughly); and 4. May note that the SAPS is committed to the principle of protection of life. In addition to the safety of members of the public it is also concerned about the safety and well-being of SAPS members and the potential for them to be harmed or traumatised in confrontations.		
Paragraph 143		
PANEL RECOMMENDATION 23: Professional policing requires that the SAPS as an organisation gives much greater value to honesty. The assessment of operations and efforts to improve organisational performance must emphasise the need for honesty and for accurate and truthful information. Compliance with principles of accountability and transparency is meaningless unless grounded on accurate and truthful information. 1. In order to better support lesson learning SAPS leadership should facilitate the creation of an organizational environment in which post-operational debriefing provides room for members to express their views honestly. Processes should be used that create an environment that encourages members to express their views	Information on compliance with performance targets	SAPS (National Commissioner)

Recommendation	Focus of Recommendation	Key participants
honestly about the strengths and weaknesses of an operation. 2. SAPS leadership across the organisation needs to ensure that statistics gathered against performance indicators are accurate, regardless of whether they meet the targets or not. In addition more attention should be paid to evidence that properly considered strategies have been put in place and are being properly implemented rather than focusing primarily on 'outcomes' as measured by performance indicators. 3. The selection of performance targets needs to be more carefully assessed in terms of their utility and likely contribution towards promoting public trust and improved levels of safety. Attention must be paid to the potential that targets will result in perverse incentives such as reducing the recording of crime or directing police resources away from addressing serious violent crime. 4. In order to support reliable and accurate recording of crime, crime statistics should not be measure of police performance but rather seen as measure of public safety and the crime burden facing the police,		
Paragraph 160		
PANEL RECOMMENDATION 24: The IPID should implement Marikana Commission Recommendation	IPID statement forms	IPID

Recommendation	Focus of Recommendation	Key participants
G5.[610] However, the provision should be understood as referring to 'police or other persons interviewed by IPID' and not just to 'the members concerned.'		
Paragraph 170		
PANEL RECOMMENDATION 25: A legislative framework should be considered in respect of incidents where members have used lethal force as part of their official duties. The legislative framework should better support truth telling and accountability by SAPS and municipal police services members and also be consistent with the rights provided in the Bill of Rights including the right against self-incrimination. It may be assumed that such a legal framework would protect a member against having a statement that the member has been required to make, used to incriminate him or her in any criminal prosecution or disciplinary action. The member would also need to be protected against negative consequences in applying for state representation. The fact that the incriminatory statement may not be used against the member would not mean that the member cannot be prosecuted or acted against through the use of other evidence. The need to obtain statements is a real one: Without such information the SAPS cannot account to the public in an informed manner in respect of shooting incidents; it will also enable the SAPS to make informed decisions	SAPS Act	Minister of Police, SAPS and CSPS

[610] The recommendation is that: 'The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves."

Recommendation	Focus of Recommendation	Key participants
about civil claims that are lodged against it. If a member has incriminated her/himself s/he faces a number of serious consequences and therefore would first obtain legal advice.		
Paragraphs 193 -195		
PANEL RECOMMENDATION 26: A separate SAPS Anti-Corruption or Internal Investigation Unit should be established to investigate all cases of alleged corruption and police criminality that fall outside of the mandate of the DPCI and IPID. [611] This unit should report directly to the SAPS National Commissioner and only upon the completion of an investigation of a case and not before. All attempts by other SAPS officers to influence or interfere in the investigations by these units to be viewed as an act of serious misconduct and immediately acted on once reported. This unit should be adequately resourced, for example by having its own budget, buildings, vehicles, internal database and procurement capacity. It should be staffed only with SAPS investigators who are known for high levels of skill, expertise and integrity. Appropriate incentives must be developed for serving in these units. This unit should have no fewer resources and capabilities than the SAPS Anti-Corruption Unit that existed between 1996 and 2000. [612]	Mechanisms for internal investigation	SAPS (National Commissioner)

[611] Burger, J and Grobler, S. (2017) Why the SAPS Needs an Internal Anti-Corruption Unit. Institute for Security Studies. Pretoria. p. 3. See: https://issafrica.org/research/policy-brief/why-the-saps-needs-an-internal-anti-corruption-unit.
[612] *Ibid.*

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 27: The SAPS National Commissioner must establish a dedicated capacity of personnel, namely disciplinary officers, employer representatives and chairpersons to conduct SAPS disciplinary hearings. This capacity should consist of commissioned officers who are properly selected, trained, and experienced to conduct SAPS disciplinary hearings.	SAPS disciplinary officials	SAPS (National Commissioner)
PANEL RECOMMENDATION 28: There is a need for an overall review of the functioning of the internal and external accountability mechanisms, in order to identify how their functioning can be improved in order to ensure that they function in a mutually supportive manner. The review should be carried out under the auspices of the CSPS. The review should be reported to the Minister of Police, IPID, the SAPS National Commissioner and the Portfolio Committee on Police.	Functioning of internal and external accountability mechanisms	CSPS
Paragraphs 211-212		
PANEL RECOMMENDATION 29: The SAPS should implement disciplinary steps against all SAPS members against whom there is *prima facie* evidence of misconduct relating to the events at Marikana on 16th August 2012. The outcome of all such investigations and all resulting disciplinary processes should be reported to the Portfolio Committee on Police and IPID.	Disciplinary steps	SAPS

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Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 30: Disciplinary steps should be taken against the senior managers who bear ultimate responsibility for the fact that no disciplinary steps were taken against any member of the SAPS relating to the events at Marikana on 16th August 2012. The outcome of all such investigations and all resulting disciplinary processes should be reported to the Portfolio Committee on Police and IPID.	Disciplinary steps	SAPS
Paragraphs 214-216		
PANEL RECOMMENDATION 31: The required funds should be provided in order for a full reconstruction of the events at Marikana Scene 2 to be carried out, as recommended by the Marikana Commission.	Funding for reconstruction of Scene 2	Treasury, IPID, NPA
PANEL RECOMMENDATION 32: Professionalisation requires that SAPS commanders who are alleged to have committed crimes or misconduct are held to account. In addition to the competency assessments (see Recommendation 21) there must be a purposeful focus on addressing unresolved allegations or disciplinary matters, particularly against members of the SMS. 1. All allegations of criminality or serious misconduct, whether by commission or omission, against any member of the Senior Management Structure (Brigadier, Major-Generals, and Lieutenant-Generals) must be given priority for investigation.	Disciplinary measures against SMS	SAPS

Recommendation	Focus of Recommendation	Key participants
2. All credible allegations of criminality or serious misconduct against top managers (Brigadiers and above) to result in immediate suspension. 3. All disciplinary hearings against SMS members must be chaired by an experienced independent chairperson who is not part of the SAPS. Currently, presiding officers in hearings of mid-level managers such as Captains and Colonels are usually higher-ranking officers. 4. Evidence of unreliable or dishonest evidence being provided under oath should be classified as a case of serious misconduct that may warrant dismissal from the SAPS. 5. The senior SAPS commanders named in the Heads of Argument by the Marikana Commission Evidence Leaders as having attempted to mislead the Commission, or who lied under oath should not only face disciplinary steps but also should be charged criminally for perjury. 6. SAPS commanders who are facing allegations of serious wrong doing should be subject to independent disciplinary investigations and hearings overseen by senior advocates within the prescribed time periods. 7. See also Panel Recommendations 10 and 11.		
PANEL RECOMMENDATION 33: IPID's budget should be increased in order for it to fulfil its mandate of investigating SAPS and MPS crime and misconduct	IPID budget	Minister of Police, Portfolio

Recommendation	Focus of Recommendation	Key participants
complaints. This is a decision that must be taken by the Parliamentary Portfolio Committee of Police in consultation with IPID and presented to the Minister of Police for implementation.		Committee on Police, Treasury.
Paragraph 230		
PANEL RECOMMENDATION 34: The use of force policy developed by the CSPS should urgently be adopted as an official policy. The Annex to the CSPS policy '*Use of force by members of the SAPS: legal standards and professional guidelines*' should be adopted as an internal directive by the SAPS and other relevant SAPS directives aligned with this.	Use of force policy	Minister of Police, SAPS
Paragraph 232		
PANEL RECOMMENDATION 35: Parliament should consider the *'Model Bill for Use of Force by Police and other Law Enforcement Agencies in South Africa'* as a suitable starting point for introducing an integrated law on the use of force by police and others in South Africa.	Legal framework governing use of force for law enforcement	Minister of Police, CSPS.
Paragraphs 247-250		
PANEL RECOMMENDATION 36: The SAPS should introduce an internal directive to establish the principle that SAPS members who have first aid training are required to provide first aid 'within the limits of their training' in situations where they encounter people requiring medical attention. A specific directive should	Directive regarding first aid	SAPS (National Commissioner)

Recommendation	Focus of Recommendation	Key participants
be developed on this issue as it is a general principle based on the duty of care and it will not be adequate to address it in directives on crime scene management or on arrested persons. The directive should make allowance for the fact that members who have been involved in a violent confrontation may not immediately be in a suitable frame of mind for providing first aid.		
PANEL RECOMMENDATION 37: The SAPS should develop a strategy and framework for expanding the provision of first aid training to operational SAPS members. This would better enable SAPS members to assist injured colleagues and others. The SAPS should identify achievable targets for this, subject to the principle that members who receive such training should also have access to appropriate equipment and receive routine refresher training.	Training (first aid)	SAPS (National Commissioner and HRD)
PANEL RECOMMENDATION 38: The SAPS to develop a resourcing plan to support the implementation of this recommendation including ensuring that members with first aid training have first aid kits.	Resourcing of members to provide first aid	SAPS
PANEL RECOMMENDATION 39: In so far as reasonably possible first aid training should be aligned with types of injuries or medical conditions that SAPS members are likely to encounter. SAPS members who are most likely to be involved in the use of lethal force should be trained to deal with gunshot injuries and other puncture wounds.	Training (first aid)	SAPS (HRD)
Paragraphs 255-257		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 40: In crowd management operations and other large operations or operations where the use of lethal force is likely, police should provide their own first aid teams of trained SAPS members.	First aid teams	SAPS (POP, HRD)
PANEL RECOMMENDATION 41: First aid teams that are deployed in crowd management operations should be trained and equipped to deal with potentially fatal consequences of the use of less-lethal-weapons (such as risk of asphyxiation from teargas, especially to young children) as well as other types of injuries likely to arise in these situations.	Training (POP first aid teams)	SAPS (POP, HRD)
PANEL RECOMMENDATION 42: The SAPS should also recognise and establish cooperative arrangements with other role-players involved in first aid provision at specific events. During crowd management events, SAPS members should respect the neutrality of 'third party' first aid providers and this should be incorporated into training and National Instructions.	Cooperative relationships with other first aid providers (training, NI4 of 2014)	SAPS (POP, Division ORS)
Paragraph 278		
PANEL RECOMMENDATION 43: To further support efforts at understanding SAPS culture and promoting demilitarisation, an entity with expertise in organisational culture should undertake an assessment of the management and organisational practices within the SAPS that may continue to undermine the professional orientation of the organisation and contribute to forms of militarisation,	Assessment of management and organisational practises	CSPS to appoint service provider, Portfolio Committee on Police, Minister of

Recommendation	Focus of Recommendation	Key participants
as well as exploring those practices that may strengthen a professional culture within the SAPS. The focus should be on: 1. To what extent the management culture exhibits militarised characteristics. For example, are commanders regardless of rank able to engage critically with the decisions by more senior ranks without fearing retribution? 2. To what extent does SAPS basic training promote a professional ethos and self-discipline as opposed to a militarised approach to discipline? 3. To what extent could drill protocols and militaristic ceremonies be substituted by more proper instruments and rituals? 4. The impact of the rank system on organisational culture. 5. Recommendations for changing the militarised characteristics of SAPS management and training culture to one that supports a professional policing ethos.		Police and National Commissioner.
Paragraph 280		
PANEL RECOMMENDATION 44: In line with previous efforts that have been made by the SAPS in this regard, the SAPS should re-affirm its commitment to an ethos that is service orientated and community policing orientated.	Commitment to service orientation	SAPS (National Commissioner)
Paragraph 289		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 45: An independent assessment commissioned by the CSPS should examine the functioning and structure of all units, including the STF, NIU, TRT and K9 unit that were involved at Marikana. The assessment should review any steps that have been taken to address the role performed by these tactical units, and the manner in which their members conducted themselves, at Marikana. In addition: 1. As the NIU and TRT were heavily implicated in the killings at Marikana, consideration should be given to these units being restructured, renamed and re-launched as a new unit that is founded on an ethos of protection of life, professionalism, and accountability. 2. A dedicated report on these tactical units, with detailed information on the use of firearms and any fatalities resulting from the use of force by these units, should be presented to parliament annually.	Assessment of NIU and TRT	CSPS, SAPS, Portfolio Committee on Police.

Recommendations from Chapter Three: Protest, the Law, and Crowd Management in South Africa

Recommendation	**Focus of Recommendation**	**Key participants**
Paragraph 319		
PANEL RECOMMENDATION 46: In order to support greater use of formal procedures, steps should be taken to ensure that they are easier to comply with. This should include: 1. Public information about the RGA and processes that are to be complied with should be more readily available. In particular, the RGA should be amended to state that it is mandatory for municipalities to provide contact information for the responsible officer, including hours of availability, in a readily accessible manner. 2. In the interim COGTA should issue a directive requesting all municipalities to ensure that contact information for the responsible officer, including hours of availability, in a readily accessible manner. 3. An amendment to the RGA should state explicitly that conditions on the submission of notifications, and the holding of assemblies, that are not authorised by the Act, are prohibited. Establishing sanctions for deliberately violating this provision might also be considered. 4. The RGA should be amended to provide that the time frame for notification is linked to the	RGA (2,3)	Minister of Police, CSPS COGTA

Recommendation	Focus of Recommendation	Key participants
envisaged scale and potential disruptive impact of a protest.		
Paragraph 330-331		
PANEL RECOMMENDATION 47: The current police categorisation of protest is based on the distinction between 'peaceful' and 'unrest.' However the protest environment is multi-facetted. In order to respond in an appropriate way to protest, the SAPS need to have a way of analysing, categorising, and responding to protests that more clearly distinguishes the critical differences between them. The SAPS should therefore adopt a more multi-facetted approach to understanding and classifying protest. In adopting a new approach the SAPS should consider the system of categorisation used in this report including the distinction between: Peaceful and non-peaceful protest; Formal and informal protest; Pre-planned and spontaneous; Disruptive and non-disruptive protest; Protest that is prohibited (unlawful) and which is not prohibited. (See also recommendation 56)	System for categorisation of protest	SAPS (POP)
PANEL RECOMMENDATION 48: Police commanders and personnel responsible for data entry should be trained to apply the new categories that are adopted so that responses to protest are clearly linked to the characteristics of the protest and data on protest is based on the consistent criteria for classifying protest incidents. However protest is sometimes complex in nature and the characteristics	Training of commanders and personnel responsible for data entry	SAPS (POP, HRD)

Recommendation	Focus of Recommendation	Key participants
of a protest may change. Any system for recording data on protest needs to allow for these possibilities and provide guidelines to personnel responsible for data entry for recording, in order to address these realities.		
Paragraph 351		
PANEL RECOMMENDATION 49: Taking into account the fact that the carrying of dangerous weapons at protests is illegal, the SAPS should explore whether preventive and proactive measures can play a role in addressing this problem. For this purpose: 1. The SAPS should carry out an information gathering exercise to better understand the scale and nature of the problem of armed protest. 2. A media plan should be drafted and implemented, involving relevant forms of communication to inform the public of their rights and obligations in respect of unarmed protest as referred to in the SA Constitution. The focus must be on promoting unarmed protest and to emphasise the negative consequences of armed protest. Civil society and media organisations should be requested to support this initiative 3. In areas where armed protest is a problem it may be possible to engage with local leaders and in local public information campaigns about the issue.	Proactive measures for addressing armed protest	SAPS (POP)

Recommendation	Focus of Recommendation	Key partici-pants
4. Where there is advance information about a protest in which participants are likely to be armed preventive measures could be put in place to prevent people from bringing weapons to the protest. 5. Video recordings and photographs can also be used to identify persons who were armed during a protest, in order to prosecute them after the protest.		
Paragraphs 366-367		
PANEL RECOMMENDATION 50: The RGA provisions regarding administrative decision-making in relation to gatherings, including the roles and powers of the responsible officer and the overall function that they perform, need to be reviewed. The RGA should be amended, *inter alia*, to: 1. Subject the powers of the responsible officer to prohibit gatherings to clear limitations. Responsible officers should not have the authority to prohibit gatherings without substantive reasons for doing so (as is currently provided in section 3 (2) of the RGA). 2. Strengthen the independence of the responsible officer. 3. Provide for an alternative process so that, in cases where a protest is directed at a municipality, protestors are not vulnerable to	RGA	Minister of Police, CSPS.

Recommendation	Focus of Recommendation	Key participants
abuse of the RGA process by responsible officers who are not performing their functions impartially.[613] 4. Authorise the responsible officer to refer any dispute or grievance that is the focus of the protest to mediation subject to the agreement of the group that is protesting.		
PANEL RECOMMENDATION 51: Steps should be taken to develop understanding about good practice in the manner in which the RGA is administered, and in which responsible officers should perform their functions, in order to improve administration of the RGA. 1. Research should be conducted including interviews with responsible officers, with protest convenors, and with police, in order to understand more about the challenges of the responsible officer role. 2. A training course and/or handbook should be developed and provided to responsible officers in order to promote understanding of good practice.	Administration of RGA by responsible officers	CSPS, COGTA, SALGA, SAPS.

[613] One proposal in this regard is that the following paragraph should be inserted in section 6 (1) "(c) Whenever the responsible officer is conflicted in his/her decisions related to a notice to hold a gathering where the protest is directed at the relevant local authority or any other reason, and the convenor is not in agreement with the conditions imposed by the responsible officer or a prohibition of the gathering, the authorised member may apply to an appropriate magistrate to set aside such condition or prohibition and the magistrate may refuse or grant that application." (This must be done within the same timeframes of other appeals or reviews provide for in this section).

Recommendation	Focus of Recommendation	Key partici-pants
Paragraph 374		
PANEL RECOMMENDATION 52: There should be a whole of government and cross-society initiative, convened by the most relevant ministry such as COGTA to support and strengthen the culture of peaceful protest and to strengthen local-level mechanisms for problem solving and the management of conflict. This should include: 1. A focus on the role of the responsible officers to ensure that high standards are applied by them in their administration of the RGA and in facilitating pro-active conflict resolution (see Panel Recommendations 50 and 51); 2. Establishing a new mechanism, or strengthening existing mechanisms, to ensure that protesting groups have access to a system for mediation and conflict resolution. 3. Ensuring that the various government departments adopt common strategies and share joint programming (including budgets), in realising the vision of the NDP 2030 as well as being aligned to the White Paper on Safety and Security in order to support and strengthen the culture of peaceful protest. The SAPS would have an important role in this regard given the existing avenues of engagement available within the SAPS for the prevention and resolution of community-based conflict. Other role-players	Culture of protest and governments response thereto.	Presidency and COGTA.

Recommendation	Focus of Recommendation	Key participants
might include the South African Local Government Association (SALGA), the South African Cities Network, the Department of Education, municipalities, the South African Human Rights Commission (SAHRC), universities, civil society and media groups, and others.		
Paragraph 384		
PANEL RECOMMENDATION 53: Law enforcement measures related to violent protest should be regarded as most applicable where: 1. Protest violence involves violence against members of the public or substantial damage to property; or 2. Groups are repeatedly involved in violent protests; or 3. In broad 'civil disturbances' in which there is widespread destruction of property.	Focus of law enforcement	SAPS, NPA
Paragraph 386		
PANEL RECOMMENDATION 54: In situations where there is a very high volume of criminal cases it may require that courts sit for additional hours, initially for purposes of addressing bail applications but also to expedite the hearing of cases.	Special sittings of courts to address high volume of cases.	Department of Justice to liaise with NPA, magistrates and SAPS.

Recommendation	Focus of Recommendation	Key participants
Paragraph 392		
PANEL RECOMMENDATION 55: Taking into account the complex nature of the protest environment and the fluidity of protest situations, the ability of the SAPS to respond to protest in a manner which is consistent with Constitutional principles, will depend to a significant degree on SAPS being able to develop a much greater degree of flexibility and adaptability. Analysis of protest for the purposes of police planning has to be based on recognition of this complex character. The development of POP capabilities and systems for managing and responding to protest need to be based on a recognition of the diverse and fluid character of this environment.	Flexibility and adaptability of POP	SAPS (POP)
Paragraphs 403-4		
PANEL RECOMMENDATION 56: Due to the scale of the phenomenon of protest and the challenge that it presents to the SAPS: 1. It is important for the SAPS to urgently improve the quality of its information on protests and to be able to map trends in protest over time. The SAPS should urgently evaluate if the IRIS system can be modified to meet this need or develop a new system for addressing this. 2. Changes in the system and improvements in the quality of information will also require focused	SAPS collection of data on protests	SAPS (POP, TMS)

Recommendation	Focus of Recommendation	Key participants
attention on the quality of data entry including re-training of responsible personnel. 3. (See also Panel Recommendations 47 and 48)		
PANEL RECOMMENDATION 57: Research should also be used more proactively as a tool for planning to answer critical questions relevant to the challenges of policing protest and the demand for public order policing (see Panel Recommendation 49).	Analysis of protest environment	SAPS (POP), CSPS.
Paragraph 413		
PANEL RECOMMENDATION 58: Training should emphasise that POP members should take care to minimise the risk that vulnerable groups such as young children, people with disabilities, and elderly people, can be adversely affected by the use of LLWs.	POP training	SAPS (POP, HRD)
Paragraph 462		
PANEL RECOMMENDATION 59: The RGA provisions relating to notification should be amended to make them more user friendly and to seek to ensure that notification is provided where it is genuinely necessary.	RGA	Minister of Police, CSPS.
Paragraph 477		
PANEL RECOMMENDATION 60: The RGA should be amended to provide that, in so far as convenors of peaceful protest may face penalties, this should be	RGA	Minister of Police, CSPS

Recommendation	Focus of Recommendation	Key participants
limited to the imposition of a modest fine and should not carry a criminal record.		
Paragraph 500		
PANEL RECOMMENDATION 61: The RGA should be amended to provide that the grounds for imposing conditions or restrictions should be more clearly defined and clearly comply with Constitutional provisions and international standards.	RGA	Minister of Police, CSPS.
Paragraph 512		
PANEL RECOMMENDATION 62: With a view to developing greater clarity on the issue, research should be conducted by an appropriate body on current experience in relation to: (i) Convening, regulating and managing assemblies in private space in South Africa and internationally. (ii) The role of private security in crowd management The findings should be presented to the Minister of Police and the Portfolio Committee on Police.	Protest in private space	CSPS, Parliament
Paragraph 529		
PANEL RECOMMENDATION 63: Section 9 (2) (d) (ii) of the RGA should be repealed.	RGA	Minister of Police, CSPS.
Paragraph 538		

Recommendation	Focus of Recommendation	Key partici-pants
PANEL RECOMMENDATION 64: The RGA should be amended to ensure that it more adequately grants the freedom of peaceful assembly in accordance with section 17 of the Constitution, 1996, and international human rights standards. The definition of peaceful assembly proposed by the Panel (see paragraph 440) should provide the basis for understanding the concept of peaceful assembly and should be incorporated into a revised Act. Recommendations by the Panel that should be considered in such a process of revision include recommendations 46, 50, 59, 60, 61, 63 and 116. The process of revision should rely on active participation from academics and civil society.	RGA	Minister of Police, CSPS.
Paragraph 561		
PANEL RECOMMENDATION 65: The SAPS should develop a more coherent framework to support negotiated management of protest. 1. The SAPS negotiated management framework should prioritise responding to mobilisation by communities or other groups rather than the vaguely defined 'indicators of potential violent disorder'. 2. A dedicated negotiation capability should be developed which is located at each POP unit. The negotiation capability should be available to be deployed if requested by station or cluster commanders as well as SAPS authorised members. If needed it should also be available to	SAPS framework for negotiated crowd management; NI4 of 2014; Develop dedicated negotiation capability at each unit.	SAPS (POP, Division ORS).

Recommendation	Focus of Recommendation	Key participants
accompany and support POP commanders when POP units respond to protest incidents. 3. NI 4 should be amended to support implementation of the model.		
Paragraph 582		
PANEL RECOMMENDATION 66: The SAPS should explore the potential for greater use of arrests, particularly the potential for the use of arrest teams, during violent protest. In so far as arrests can play a role in reducing the levels of violence in protest situations they should be used more actively. If arrested persons are going to be detained in custody and charged then the use of arrests should be supported by the collection of video material that is managed in terms of principles of evidence collection.	Tactical capability to carry out arrests	SAPS (POP)
Paragraph 587		
PANEL RECOMMENDATION 67: SAPS should consistently demonstrate that they treat peaceful protestors differently from those protestors engaging in violence. 1. The SAPS should consistently apply the principle of differentiation in relation to the use of force. As a general rule (in the absence of a compelling motivation to depart from this rule) less-lethal-weapons should only be used against people involved in violence with care being taken to avoid hurting others.	Framework for management of peaceful assemblies and individuals participating in protest in a non-violent manner.	SAPS (POP).

Recommendation	Focus of Recommendation	Key participants
2. The SAPS approach to dealing with peaceful protest that is unlawful (prohibited protests or protests that are unlawful for other reasons) should rely on arrest and not rely on the use of LLWs. 3. The SAPS should publicise the framework that it applies in policing protest with a focus on communities and groups that have been associated with the use of violence in protest. It should emphasise that it will take firm measures, within the framework of the law, against people who use violence but that police will support peaceful protestors in exercising their rights.		
Paragraph 592		
PANEL RECOMMENDATION 68: The SAPS crowd management doctrine must guide the SAPS in supporting and respecting the right to peaceful assembly. In line with this objective the core crowd management doctrine of the SAPS should be defined in terms of the following concepts: negotiated crowd management; situational appropriateness in order to support de-escalation; differentiation; and impartiality and non-discrimination. This doctrine should be foregrounded in NI4 of 2014 (Panel Recommendations 66, 67 and 68 (above) and 70 and 71 (below) will also support implementation of this doctrine).	POP crowd management doctrine; NI4 of 2014.	SAPS (POP, Division ORS)
Paragraphs 598-599		

Recommendation	Focus of Recommendation	Key partici-pants
PANEL RECOMMENDATION 69: Crowd management training must be firmly grounded in the crowd management doctrine. Facilitating the right to peaceful assembly should be the pillar of crowd management policing and be the primary basis for the existence of POP units.	POP Training	SAPS (POP)
PANEL RECOMMENDATION 70: In order to support institutionalisation of negotiated crowd management and the use of minimum force the SAPS should also use indicators that support the use of negotiation, de-escalation and minimum force. Performance indicators should focus not only on whether incidents are policed or stabilised but also (i) the percentage of all incidents that are successfully policed without the use of weapons such as rubber bullets, teargas and stun grenades; and (ii) a performance target should be implemented focusing on the goal of protecting life, including that of police, protestors and others, in the context of crowd management.	Key Performance Indicators	SAPS
Paragraph 641		
PANEL RECOMMENDATION 71: Crowd management, as broadly defined in this report, should be the primary function of POP units. In line with this POP personnel must be adequately trained and equipped and should be deployed to crowd management incidents in sufficient numbers to be able to perform their duties in line with accepted operational standards and practice. POP must	Mandate of POP (NI4)	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
ensure that it has all the resources and capacity to address the range of challenges that exist in the crowd management environment. 1. In order to comply with this recommendation and minimise delays in the deployment of POP personnel to crowd management situations, POP units will need to have personnel who are available on standby. Subject to this requirement the Panel recognises that the POP units are also able to provide specialised operational support in medium-risk crime combatting operations and other operations where the specialised capabilities of POP are needed. In so far as POP performs other functions the focus should be on utilisation of the specialised capabilities of POP. POP should in no way be the lead role-player responsible for combating serious and violent crime. POP's role should be to offer a unique set of functions that would add value to the broader operational concept, within the rendering of Specialised Operational Support.		
Paragraphs 653-4		
PANEL RECOMMENDATION 72: POP should be centralised under one command at national level so that all POP units form part of the national public order policing unit provided for in section 17 of the SAPS Act, 68 of 1995. This may involve locating all POP units within the current Public Order Policing component within ORS or as a separate division,	Organisational location of POP	SAPS, POP.

Recommendation	Focus of Recommendation	Key participants
thereby ensuring a direct link to the National Commissioner. This will enable the head of POP to: 1. Ensure that POP is deployed in a manner consistent with section 17 of the SAPS Act; 2. Ensure that consistent standards are applied in relation to decisions about when POP units are to be deployed at the request of and in support of the Provincial Commissioner. The head of POP would need to consent to any request by the Provincial Commissioner to use POP personnel outside of the primary POP mandate. 3. Ensure the proper allocation of resources to the unit (both physical and human resources), thereby enabling the effective functioning of POP. 4. The operational functioning of the POP unit should be reviewed in order to allow the members to have time to attend operations as well as ongoing in-service training.		
PANEL RECOMMENDATION 73: Key Performance Indicators for the head of POP (whether at component or division level) should include: 1. Maintenance of a specialised crowd management capability, ensuring that all POP units nationally are adequately trained and equipped. 2. Deployment of POP members to crowd management situations shall be in line with SAPS principles regarding minimum acceptable	Key Performance Indicators	SAPS

Recommendation	Focus of Recommendation	Key participants
deployments (addressed in Panel Recommendation 84 below).		
Paragraphs 656-657		
PANEL RECOMMENDATION 74: Within each POP unit there should be a public order restoration capability consisting of one section for each platoon. The capability should: 1. Be highly trained in line with the crowd management doctrine and fundamental principles on the use of force in this document, with particular emphasis on protection of life; 2. Apply strict selection criteria; 3. Include specialist firearms officers (see Panel Recommendation 107); 4. Impose limits on the duration of service by most members of the unit so that some experienced members remain in the unit but the unit is able to maintain a relatively youthful character.	Establish restoration capability in POP units	SAPS (POP)
PANEL RECOMMENDATION 75: Competency-based policing is premised on the recruitment of quality personnel into POP units. The recruitment system should be strengthened in order to support the competence of POP units thereby ensuring that they are able to perform their mandate. The criterion for POP unit personnel needs to be clarified and consistently applied.	POP recruitment	SAPS (POP, HRM)

Recommendation	Focus of Recommendation	Key participants
Paragraph 659		
PANEL RECOMMENDATION 76: POP needs to better be able to both attract appropriate personnel and retain their services by creating an environment in terms of which employment in POP is seen as a 'choice' assignment within the SAPS and members remain committed to the unit. Critical skills must be retained through a number of interventions including better remuneration even where prospects of promotions are slim due to the nature of the task (in this regard see Panel Recommendation 3 regarding introduction of a two-stream system). Job rotation should also be used as a way of improving retention and improving the skills of POP members.	POP's ability to retain appropriate personnel	SAPS (POP, HRM)
Paragraph 664		
PANEL RECOMMENDATION 77: The provision of psychological and wellness support services to POP personnel should be mandatory and routine. Compulsory post incident psychological debriefing and trauma support services are an essential part of the provision of wellness support. Psychological and wellness support services to all SAPS members should continue to be provided in-house together with the option of members making use of an accredited external service provider. The provision of mandatory psychological and wellness support services is an essential part of the duty of care for the maintenance of sound mental health and operational	Psychological and wellness support	SAPS (POP, Employee Health and Wellness in HRM).

Recommendation	Focus of Recommendation	Key participants
readiness. Police members who are severely traumatised and unable to effectively perform their policing duties are to be withdrawn from an operation and provided with the necessary psycho-social support.		
Paragraphs 665-666		
PANEL RECOMMENDATION 78: Public order situations are dynamic and complex and therefore the training curriculum needs to be aligned to this reality. The curriculum for crowd management needs to be adapted to reflect the dynamic crowd management environment. The ongoing review and updating of training manuals, and training methods that integrate lessons learned from operational experience and best practice, will ensure that the training is relevant, appropriately task centred and cognisant of operational demands.	POP training curriculum	SAPS (POP, HRD)
PANEL RECOMMENDATION 79: The SAPS should establish a guardian committee responsible for curriculum review and development with respect to crowd management. The guardian committee should consist of experienced operational members.	Guardian committee for crowd management curriculum review	SAPS (POP, HRD)
Paragraph 668		
PANEL RECOMMENDATION 80: POP should prioritise training and learning, with in-service training (both maintenance and refresher training) focusing on strengthening the core competencies of POP personnel. This is to ensure that the skills level,	POP training system	SAPS (POP)

Recommendation	Focus of Recommendation	Key participants
competencies and capacities of POP personnel are well maintained. Implementation of this recommendation would require the necessary financial support. 1. SAPS must put in place a training cycle to ensure that POP members maintain their standards and competencies. 2. Such training should focus on both individual and group competencies required for the roles and responsibilities of the units and deepen their understanding of their crowd management mandate and role. 3. Periodic assessments should be built into and part of the training cycle. 4. A member who fails, or fails to undergo mandatory crowd management training should be restricted from carrying out crowd management duties until such a time that she or he has undertaken the course and satisfied examiners on key competencies. This should apply to all POP members who are charged with the responsibility of crowd management, irrespective of rank. 5. POP members who no longer possess the required competency and capability should be transferred to other less demanding policing roles.		
Paragraph 675		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 81: A dedicated, well designed crowd management training facility must be developed for crowd management training of Public Order Policing members. Such a training facility should have in place as a minimum requirement: road patterns, house facades, natural features, adequate accommodation, and recreational facilities. Such a facility should be adequately designed and equipped to reflect the operational realities on the ground to enable POP members test different 'real scenarios' in 'real simulated environments' to develop capabilities and resilience to deal with different scenarios. In particular to adequately prepare officers, provide them with the necessary skills and capabilities to deal with all sorts of crowds including armed crowds. 1. The training facility should employ experienced and fulltime trainers, curriculum developers, assessors and moderators. This is aimed at ensuring that training can take place regularly throughout the year. This will ensure that police officers and POP units are regularly assessed and evaluated. Also, this will ensure that the training curriculum, training methods and methodologies are regularly updated to reflect the operational dynamics of public order situations.	POP training facility and staffing thereof	SAPS (National Commissioner, HRD, Supply Chain Management), Department of Public Works, Treasury.
Paragraph 677		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 82: Minimum standards should be developed and maintained for infrastructure requirements for each POP unit. This needs to take into account that POP units are located at and deployed in a variety of settings. This should include administrative office space, debriefing rooms, and storage space for space for equipment, including weapons and ammunition.	Standards for infrastructure for POP units	SAPS (POP, Facilities Management (Supply Chain Management))
Paragraph 685-686		
PANEL RECOMMENDATION 83: POP deployments should at a minimum be of a section strength, comprising eight members and not less than that. In addition training should be clearly linked to the framework for minimum deployment and should address deployment at section level.	Minimum POP deployment	SAPS (POP, HRM)
PANEL RECOMMENDATION 84: To ensure that POP is able to deploy the necessary resources in managing crowds, there should be a minimum of four platoons per unit. Staffing, resourcing and training plans for POP units should also take into account: 1. Panel Recommendation 40 regarding deployment of first aid teams in crowd management operations and other large operations or operations where the use of lethal force is likely. 2. Panel Recommendation 65 regarding development of a dedicated negotiation capability at each POP unit.	Minimum strength of each POP unit	SAPS (POP, HRM, HRD)

Recommendation	Focus of Recommendation	Key partici-pants
3. Panel Recommendation 67 regarding the potential for greater use of arrests. 4. Panel Recommendations 74 and 106 regarding establishment of a restoration section within each platoon including specialist firearms officers. 5. Panel Recommendation 124 regarding establishment of a technical support function at each unit.		
Paragraphs 708-710		
PANEL RECOMMENDATION 85: The crowd management training of SAPS visible policing personnel and municipal police should at least be at the level of first responder. The roles of these agencies should be to intervene during crowd management situations by containing the situation, pending the arrival of the more specialised, equipped and trained POP units. The training of visible police members and municipal police will significantly increase the capacity of the SAPS to deal with crowd management situations in line with professional policing principles and given regulatory prescripts. In this regard, the South African Police Service Act, 1995, should be amended to provide for a mandate for municipal police services in respect of crowd management.	Crowd management training of visible policing and MPS	SAPS (POP, HRD), municipal police agencies.
PANEL RECOMMENDATION 86: In order to enhance co-ordination and co-operation during crowd management operations, joint training	Crowd management training of visible policing	SAPS (POP, HRD,

Recommendation	Focus of Recommendation	Key participants
exercises should be held involving SAPS personnel who may be involved in crowd management. 1. These should: Include different POP specialised elements such as information managers, command negotiators, Nyala operators, water cannon crew, specialised firearms officers (as proposed in this report), and any other specialised elements within POP units. Visible policing units who are frequently called upon to respond to crowd incidents within their given capacities and capabilities should also be included. 2. Involve scenario-based drills to enhance operational readiness through co-ordination of different roles and responsibilities including, *inter alia*, practical and operationally appropriate role play, mock drills. 3. During these practical exercises, the overall commander should be someone with a high level of knowledge and experience in crowd management operations. She or he should exercise command and control during these drills. 4. It is prudent that during these exercises, SAPS liaises with and invites trainers or facilitators from other countries with experience and excellent track record in crowd management operations. This approach will enable the sharing of ideas and experiences. 5. Municipal police and private security companies are routinely involved in crowd management. The		Visible Policing).

Recommendation	Focus of Recommendation	Key participants
recent protests at various universities highlighted the universities' reliance on private security companies to deal with crowds. Although it is not necessary for SAPS to conduct joint training exercises or drills with the private security organisations, SAPS should endeavour to maintain close liaison and co-operation with these private security organisations.		
PANEL RECOMMENDATION 87: SAPS should not deploy tactical units to support POP in crowd management situations unless their specialist capabilities are requested by the responsible POP commander and that they remain under the overall command of the POP commander throughout the operation. The relevant directives should be amended to reflect this requirement.	Deployment of tactical units in crowd management	SAPS (POP, Division ORS)
Paragraph 719		
PANEL RECOMMENDATION 88: As emphasised by Marikana Commission recommendation D2, the allocation of roles in the command structure of a crowd management operation is critical in ensuring that these be carried out in terms of appropriate standards. Most importantly the Operational Commander should always be a SAPS member with recent and relevant training and Public Order Policing experience. Members who are appointed to roles in the command structure due to the fact that they have the relevant training and experience must maintain their positions and authority in the	Command of POP operations	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
command structure for the duration of an operation, irrespective of their rank. The relevant directives should be amended to reflect this requirement.		
Paragraph 729-730		
PANEL RECOMMENDATION 89: An operational commanders training curriculum that is specifically focused on and takes into account the complexities of the crowd management environment, and which is grounded in operational realities, should be developed and provided to POP officers and experienced platoon commanders. The new POP command training curriculum should be flexible to move across command levels. As with other POP training there should be periodic assessment that is linked to the training cycle.	POP commanders training	SAPS (POP, HRD)
PANEL RECOMMENDATION 90: The training curriculum should be revised and adjusted to include among others, techniques, tactics and formations relevant for large POP deployments such as deployments at company and battalion (four companies) level so that commanders who are tasked with exercising a certain level of decision making can be trained to exercise tactical command at the relevant level of command.	POP commanders training	SAPS (POP, HRD)
Paragraph 737		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 91: The SAPS should consistently use the term less-lethal-weapon when referring to the class of weapons used in crowd management situations, recognising that all weapons including less-lethal have the potential to cause injury and death. This is in line with emerging international and regional good practice. The use of the term less-lethal-weapon must support the doctrine and be incorporated into all relevant National Instructions, directives, guidelines, Standard Operating Procedures, and training manuals. (Panel Recommendation 58 highlights the fact that young children, elderly people and other vulnerable groups may be particularly at risk from the use of these weapons).	Terminology used (NI4 of 2014)	SAPS (POP)
Paragraph 743-745		
PANEL RECOMMENDATION 92: Ensure that any less-lethal-weapon currently in use in the SAPS has been subject to rigorous pre-deployment testing in appropriate settings. This requires a process of verification and certification that said weapon meets SAPS operational standards and is compliant with SAPS protocols particularly with regard to its appropriate use for the management of crowds and in accordance with the requirement as specified in the UN Special Rapporteur Report, clause 67(c). This states that: “Before the selection and procurement of equipment, including for less-lethal weapons, by law enforcement agencies for use in assemblies, States should subject such equipment to	Verify pre-deployment testing of LLW currently in use	SAPS

Recommendation	Focus of Recommendation	Key participants
a transparent and independent assessment to determine compliance with international human rights law and standards. In particular, equipment should be assessed for accuracy, reliability and its ability to minimize physical and psychological harm. Equipment should be procured only where there is sufficient capacity to train officers effectively on its proper use."[614]		
PANEL RECOMMENDATION 93: Ensure that any future procurement of less-lethal-weapons by the SAPS for use in POP operations is based on need, and has been subject to pre-deployment testing both by the manufacturer and/or an independent instate to verify as well as during the training of POP unit members.	Procurement of LLWs	SAPS (POP, Supply Chain Management).
PANEL RECOMMENDATION 94: Adopt the approach suggested by Rappert to ensure that there is an independent verification process which means that SAPS alone does not evaluate the testing of its own less-lethal-weapons and that the five steps suggested above are integrated into policy and practice within the SAPS.	Evaluation of testing of LLWs	SAPS (POP, Supply Chain Management)
Paragraph 755		
PANEL RECOMMENDATION 95: Section 12(5)(f) and (i) of NI4 indicate that CS teargas grenades and 40mm launchers with rounds are only to be issued to designated members. Greater clarity is needed on:	Clarity regarding 'designated members' (as	SAPS (POP, Division ORS)

[614] United Nations. 4 February 2016. A/HRC/31/66, page 15.

Recommendation	Focus of Recommendation	Key participants
1. The requirements for a member to be designated to use these weapons; 2. Who has the authority to designate members to use these weapons and ammunition.	referred to in NI4)	
Paragraph 757		
PANEL RECOMMENDATION 96: Only handcuffs or other approved physical restraints should, and only when necessary, be used against passively resistant individuals.	Framework for use of force in crowd management (NI4 of 2014)	SAPS (POP, Division ORS)
Paragraph 764-766		
PANEL RECOMMENDATION 97: Given that KIPs are difficult to deploy safely and effectively they should only be used under strict command.	NI4 of 2014	SAPS (POP, Division ORS)
PANEL RECOMMENDATION 98: Directives regarding the use of KIPS should indicate: 1. That these are to be used in line with the principle of differentiation; 2. That the practice of skip firing should be discontinued as it decreases accuracy and increases the risk for indiscriminate use; 3. That these should be aimed to strike directly (i.e. without bouncing) the lower part of the person's body (i.e. below the rib cage).	Internal guidelines/regulations of use of rubber bullets (or other KIPs)	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key partici-pants
4. Unless there is a serious and immediate risk to life which cannot otherwise be countered, it should be prohibited to use the KIP at short range. In such circumstances they may be direct fired or skip-fired if it is believed that they can be used effectively in either manner for private defence.		
PANEL RECOMMENDATION 99: The SAPS should explore the possibility of equipping POP units with Safe Impact Rounds or Attenuated Energy Projectiles and launchers. These projectiles might be considered as possible replacements for rubber rounds or as an additional less-lethal option which may be used as an alternative to rubber in specific circumstances.	Research on alternative LLWs	SAPS (POP, Research Division)
Paragraph 771-772		
PANEL RECOMMENDATION 100: Directives should be developed on the use of stun grenades in crowd management situations which includes clarity on their use by designated members, that they should only be used under command including that they should never be fired or thrown directly into a crowd unless this is to protect life.	Internal directives – stun grenades	SAPS (POP, Division ORS)
PANEL RECOMMENDATION 101: The SAPS should carry out research to identify alternative stun grenades that may be used more safely.	Research on alternative LLWs	SAPS (POP, Research Division)
Paragraph 774		

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 102: Directives should specify that water cannons should only be operated by specially trained members and under operational command.	Internal directives – water cannons	SAPS (POP, Division ORS)
Paragraph 776		
PANEL RECOMMENDATION 103: Regulations issued by the Minister of Police should prohibit the use of water mixed with foul odour when water cannons are used in crowd management.	Regulations	Minister of Police
Paragraph 779		
PANEL RECOMMENDATION 104: Regulations issued by the Minister of Police should provide that the SAPS shall only use the LRAD as a communications device in crowd management situations. This should be by specially trained members and under operational command. A directive to this effect should go out to all POP units.	Regulations	Minister of Police, SAPS (POP).
Paragraphs 796-800		
PANEL RECOMMENDATION 105: The prohibition against the use of the R5 rifle and other weapons capable of automatic fire in crowd management should be formalised in regulations issued by the Minister of Police in terms of section 10 of the RGA. Such a prohibition should apply not only to POP units but to other units who may be deployed, in support of POP, for crowd management purposes.	Regulations	Minister of Police
PANEL RECOMMENDATION 106: Specialist firearms officer should form part of the restoration	Specialist firearms	SAPS (POP)

Recommendation	Focus of Recommendation	Key participants
section established within each POP platoon. The purpose of the specialist firearms officers is to provide the capability for targeted intervention during a crowd management operation where there is an imminent threat to the lives of police or members of the public. The specialist firearms officers shall operate and exercise their duties under the command and control of the POP commander or officer in charge. 1. To enhance their safety, the specialist firearms officers shall be provided with the necessary protective equipment including ballistic shields and ballistic helmets. Furthermore, the ballistic helmets should be fitted with radio communication equipment for easy communication. The officers may be armed with telescopic weapons to improve precision in order to reduce the risk of unnecessary injury to innocent persons during crowd management operations.	teams established	
PANEL RECOMMENDATION 107: To develop a training *curriculum* for specialist firearms officers who are authorised to use lethal force in crowd management situations. Training methodologies should ensure maximum compliance with the use of force policy, as well as national and international legislative frameworks. Furthermore, these officers should be trained up to the advanced level in the use of different and authorised firearms, including undergoing a compulsory marksman course to	Training curriculum for specialist firearms officers	SAPS (POP, HRD)

Recommendation	Focus of Recommendation	Key participants
improve proficiency; this should include training in tactical weapons to enhance precision on static, mobile and intermittent targets. During the mock drills, they should practise their special roles during crowd management operations and be able to co-ordinate with the whole unit(s). Their training should not be restricted to firing at static targets, but they should be extensively drilled to manage protestors armed with a different assortment of weapons, including firearms. In view of the risks associated with the use of weapons and the dangerous working environment, it is further recommended that these authorised firearms officers are equipped with advanced first aid skills.		
PANEL RECOMMENDATION 108: Training for POP commanders (see Panel Recommendations 90 and 91) should address questions to do with the deployment of specialist firearms officers.	POP commanders training	SAPS (POP, HRD)
Paragraph 804		
PANEL RECOMMENDATION 109: POP members should be provided with good quality fire-retardant overalls.	Protective clothing for POP members.	SAPS (POP, Supply Chain Management)
Paragraph 807		
PANEL RECOMMENDATION 110: POP units should be provided with the necessary protective	Protective equipment	SAPS (POP, Supply

Recommendation	Focus of Recommendation	Key participants
equipment including at least two ballistic shields per section.		Chain Management)
Paragraph 809		
PANEL RECOMMENDATION 111: The SAPS should ensure that each POP member's helmet carries a clearly identifiable number. This could include different coloured helmets depending on command level to differentiate levels of command (see also Panel Recommendation 115 regarding the communication capability).	Protective equipment	
Paragraph 815		
PANEL RECOMMENDATION 112: National Instruction 4 of 2014 should be revised to clarify provisions relating to inter-police communications. 1. The revised instruction should state that plans for crowd management operations should: 1.1. Identify the means of communication which SAPS members will use to communicate with each other; and 1.2. Take into account possible communication challenges and put in place measures to resolve these should they occur. 2. The issue of reporting lines is presented in an inconsistent and contradictory way in paragraph 11 of NI4. As a result, it is not clear if information must be reported to the Operational Commander	NI4 of 2014	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
or the JOC commander. This inconsistency should be addressed.		
Paragraphs 817-818		
PANEL RECOMMENDATION 113: The section on communications in the proposed dedicated training programme for POP commanders (see Panel Recommendation 90) should strengthen and expand on the relevant sections of the OCT. (The OCT would also be strengthened by implementation of this recommendation). 1. A key point that should be included is that in more complex crowd management operations more complex plans and systems for communication are required. 2. In order to optimise clarity about the communication system it is advisable for succinct and clear handouts to be distributed to personnel about the functioning of the radio system, providing information regarding radio channels, calls signs, as well as general protocols regarding radio use. 3. The following good practice should also be emphasised: 3.1. There must be consistent use of call signs by personnel using the radio system. 3.2. Should problems be experienced with the radio system, commanders should prioritise	POP commanders training	SAPS (POP, HRD)

Recommendation	Focus of Recommendation	Key participants
informing the JOC using alternatives to the radio system. 3.3. If there is radio traffic overload, instructions should be issued to discourage non-priority messages over the radio system. 3.4. To revert to the use of specially trained radio operators for large and or complex operations.		
PANEL RECOMMENDATION 114: Procurement of radio systems for POP units should ensure that this is standardised so that there is compatibility across provinces.	Radio systems for POP units	SAPS (POP, Technology Management Services)
Paragraph 821		
PANEL RECOMMENDATION 115: Helmets should also include a built-in communication capability that enables members to communicate with their commander.	Design of helmets to include radio communication capability.	SAPS (POP, Technology Management Services)
Paragraphs 846-855		
PANEL RECOMMENDATION 116: The RGA should be amended as to set standards that police must comply with in relation to information and data gathering, as well as the making of photographic, video or other recording, both prior to and during protests or other assemblies This includes standards that should be complied with in relation to audio-visual observation and recording and the retention of	RGA	Minister of Police, CSPS.

Recommendation	Focus of Recommendation	Key participants
video or other recordings of assemblies. There should be systems to ensure compliance with these standards. Principles in regard to this issue are already set out in the Protection of Personal Information Act.[615] However, there is a need to address this issue within the context of the right to assemble and appropriate interpretation of the exclusions set out in the Act.[616]		
PANEL RECOMMENDATION 117: Marikana Commission recommendations E3 and E5, and information presented to the Panel, motivate for an overhaul of SAPS systems for technology management. The SAPS should review all equipment, including vehicles, used in crowd management operations in relation to provisions for the training of SAPS members and the servicing of such equipment.	All POP equipment including vehicles	SAPS (Technology Management Services)
PANEL RECOMMENDATION 118: Procurement processes must take account of training and maintenance that will be required for equipment to be effectively operated. In relation to recordings of communications, and photographic and video records, there is also a need to deploy personnel and maintain systems to ensure the effective utilisation of records of operations in processes of accountability, criminal investigation or review.	Systems for use of audio and visual records	SAPS

[615] The Protection of Personal Information Act, Act 4 of 2013.
[616] The Protection of Personal Information Act, Act 4 of 2013, section 6(1)(c).

Recommendation	Focus of Recommendation	Key participants
PANEL RECOMMENDATION 119: The SAPS should adopt an approach to audio visual and other recording of protests that emphasises transparency and visibility. This would mean that SAPS videographers would be identifiable as SAPS members[617] unless the risk assessment clearly motivates that this would expose them to danger. The principle is that both the crowd and the SAPS members understand the roles played by the various members. This will assist in building trust.	Framework for deployment of videographers	SAPS (POP)
PANEL RECOMMENDATION 120: POP video operators should only be deployed after a proper risk management assessment has been undertaken and adequate security measures have been addressed. These video operators should be identifiable as SAPS members unless authorised to wear civilian attire based on the risk management assessment and under the authority of the POP commander. It shall be the responsibility of POP unit commanders to ensure safety and discipline of video operators during crowd management operations. Aerial drones may also be deployed in lieu of video operators should there be serious security concerns which might compromise the safety of the video operators during crowd management operations.	Framework for deployment of videographers	SAPS (POP)
PANEL RECOMMENDATION 121: SAPS should draft directives to regulate POP video operators during crowd management operations: these must	Framework for deployment of videographers	SAPS (POP,

[617] Identifiability could be through wearing a SAPS bib or through wearing police uniform.

Recommendation	Focus of Recommendation	Key participants
be in line with national and international legal frameworks.		Division ORS)
PANEL RECOMMENDATION 122: Training for personnel responsible for capturing, recording, and processing audio-visual material should address legal and human rights concerns (in particular related to privacy, decency, dignity, the use and storage of and access to information).	Training for personnel responsible for capturing, recording, and processing audio-visual material	SAPS (POP, HRD)
PANEL RECOMMENDATION 123: Specifications for communications for the mobile command centre should include: 1. Recording equipment for radio communications; 2. Facilities for live streaming of aerial video recordings; and 3. Facilities for video recording of JOCCOM meetings and other JOC decision making.	Mobile command centre specifications	SAPS (POP, Supply Chain Management, Technology Management Services)
PANEL RECOMMENDATION 124: A technical support function should be established in each POP unit to support effective use of radio communications, and live streaming and recording of POP operations.	Establish technical support function	SAPS (POP)
PANEL RECOMMENDATION 125: National Instruction 4 of 2014 should be amended to provide that: 1. Where recording facilities are available, all radio communications should be recorded.	NI4 of 2014	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
2. Paragraph 17, dealing with the preservation of video recordings, should be amended to include the preservation of recordings of radio communications.		
Paragraph 866		
PANEL RECOMMENDATION 126: Debriefing is critical to maintaining the effectiveness and preparedness of POP units and the well-being of their members. Nevertheless paragraph 19 of NI4 of 2014 should be amended to provide for a more differentiated approach that POP units are better able to comply with. The multiple debriefing processes provided for should be required in relation to large operations and other operations where there are special concerns about role player perceptions.	NI4 of 2014	SAPS (POP, Division ORS)
Paragraphs 895-897		
PANEL RECOMMENDATION 127: NI4 2014 must undergo substantial reform: It should shift the focus back to crowd management and be aligned with section 17 of the Constitution, 1996, international law standards, and the RGA, including any regulations issued thereunder and amendments thereto. For example, the current definition of 'public order' should be deleted from NI4 of 2014. This would have far-reaching consequences for the meaning and interpretation of key parts of NI4 that build upon this term. Implementation of these steps should be done in a phased manner taking into account the urgency	NI4 of 2014	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
of issues and practical considerations such as the process for amending legislation and pending Constitutional Court judgments.		
PANEL RECOMMENDATION 128: To modify the existing notion of crowd management, reformulating it to mean "The policing of crowds, being peaceful assemblies or not, under the command of POP, including those defined in terms of the Regulation of Gatherings Act of 1993", thereby ensuring that NI4 of 2014 is aligned with the Constitution, international human rights law and the RGA. This would establish 'crowd' and 'crowd management' as umbrella concepts that include peaceful assemblies, but is not restricted to them.	NI4 of 2014	SAPS (POP, Division ORS)
PANEL RECOMMENDATION 129: Many of the definitions currently contained in paragraph 2 of NI4 of 2014 are not definitions but simply acronyms. For example: "IRIS", "JOC", "OCT", "PCCF", "VOC". In the interests of increased user-friendliness, this needs to be resolved. If deemed necessary, they could be inserted as an annex.	NI4 of 2014	SAPS (POP, Division ORS)
Paragraph 931		
PANEL RECOMMENDATION 130: The provisions of NI4 relating to the use of weapons should be revised in order to enhance clarity, *inter alia* by clearly distinguishing between weapons that are prohibited and those for which special authorisation by superiors is required. Furthermore, certain weapons, ammunition or other equipment that are	NI4 of 2014	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
currently used, but not mentioned could be added. Particularly, the use of certain specific less-lethal weapons may be defined in greater detail.[618] Provisions in NI 4 relating to the use of weapons should be revised to provide that: 1. For the purposes of crowd management, the following weapons and ammunition are prohibited: 1.1. Firearms and sharp ammunition shall not be used except in the case of self-defence or the protection of others against the imminent threat to life or serious injury. In any event the use of birdshot (fine lead pellets) and buckshot (small lead pellets) is prohibited. 1.2. Rubber-coated hard (metal, wooden, etc.) bullets; 1.3. Electronic immobilizing devices ("EID's), such as Tasers, stun guns and stun shields; 1.4. Mobile Area Denial systems utilising sound or micro radio waves to disperse a crowd from an area or to deny a crowd access to a particular area; 1.5. CN (phenacyl chloride) gas; and		

[618] On the problematic issue: Amnesty International, Use of Force. Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amsterdam 2015, p. 157-159.

Recommendation	Focus of Recommendation	Key participants
1.6. Any other weapon or ammunition whose use is not explicitly authorised by this Instruction.[619] 2. The use of the following weapons and ammunition is subject to the authorisation of the operational commander: 2.1. Capsicum (’pepper’) spray; 2.2. Kinetic impact projectiles (i.e. ’rubber bullets’, ’plastic bullets’, etc.); 2.3. Water cannons; 2.4. 40mm rounds; 2.5. Teargas (CS)[620]; and 2.6. Stun grenades 3. Besides the restrictions stipulated above and implied by the general rules and principles applicable to the use of force: 3.1. Tonfas may only be used where reasonably necessary against individuals who pose a danger of harm to persons or property including individuals resisting arrest by means of physical force. Strikes should not be directed at the head, neck, spine, groin or centre of the chest (sternum) unless immediately necessary to protect the law		

[619] So the introduction of new weapons and ammunition would require amendments to this Instruction.
[620] CS is the term commonly used for teargas based on the compound 2-chlorobenzalmalononitrile (Wikipedia, CS gas, https://en.wikipedia.org/wiki/CS_gas, 26 February 2018).

Recommendation	Focus of Recommendation	Key participants
enforcement official or another person against the threat of death or serious injury; 3.2. Tear gas (CS) and pepper spray may never be used in confined spaces or stadia. 3.3. Pepper spray may only be used against a specific individual for private defence or in order to overcome physical resistance to arrest. For this purpose the use of pepper spray must be confined to liquid pepper spray which emits a single stream. 3.4. Stun grenades may never be fired directly into a crowd unless the group of people targeted collectively pose a serious and immediate threat to life and no alternatives are available to address the threat. 3.5. Kinetic Impact Projectiles should be aimed to strike directly (i.e., without bouncing) the lower part of the subject's body (i.e., below the rib cage). Unless there is a serious and immediate risk to life which cannot otherwise be countered, it should be prohibited to use the KIP at short range. In such circumstances they may also be skip-fired if it is believed that they can be used effectively for such purpose for private defence. Other than in these circumstances the practise of skip firing Kinetic Impact Projectiles should be discontinued.		

Recommendation	Focus of Recommendation	Key participants
3.6. Water cannons may only be used by specially trained members.		
Paragraph 955		
PANEL RECOMMENDATION 131: Paragraph 16 of NI4 of 2014 should be reformulated.	NI4 of 2014	SAPS (POP, Division ORS)
Paragraph 956		
PANEL RECOMMENDATION 132: National Instruction 4 of 2014 should be amended so that it more decisively focuses on crowd management and foregrounds negotiated management as originally envisaged by SO 262 of 2004. In addition to other recommendations in this report: 1. Consideration should be given to the suggestions provided above (see paragraphs 923 and 924 of this report) in order to make NI4 more instructive with regards to the management of peaceful assemblies as well as in relation to other assemblies that no-longer qualify as peaceful. 2. A section should be introduced that explains the crowd management doctrine as well as the fundamental principles of the use of force in crowd management (regarding the latter see paragraph 898 and following).	NI4 of 2014	SAPS (POP, Division ORS)

Recommendation	Focus of Recommendation	Key participants
3. As a matter of urgency, the reference to section 9 (2) (d) (ii) of the RGA should be deleted from paragraph 13 (2) of NI4. 4. As with the notion of 'public order' the Panel recommends that the definitions of 'defensive and offensive measures' as given in paragraph 2 (p) NI4 of 2014 should be deleted in line with a principled and situationally appropriate approach to the policing of crowds. 5. Paragraph 17 on 'record keeping' should contain a deadline for inserting the information into the Record Classification System. Unjustified non-compliance with it should entail a sanction. 6. Paragraph 18 on investigations' should be aligned to international standards requiring the opening of dockets of death and injuries that have taken place in the context of a crowd management operation. The duty to notify such incidents to IPID should be equally affirmed by it. 7. Other recommendations that apply to NI4 or other directives relevant to crowd management include recommendations 42, 65, 68, 71, 87, 88, 91, 95, 96, 97, 98, 100, 102, 104, 112, 121, 125, 126, 127, 128, 129, 130, 131.		
Paragraphs 972-975		
PANEL RECOMMENDATION 133: Training should be reviewed regularly to reflect operational realities and crowd dynamics. This will require *curriculum*	POP training	SAPS (POP)

Recommendation	Focus of Recommendation	Key participants
changes and methodological changes to adequately prepare POP members and field test their tactics and techniques.		
PANEL RECOMMENDATION 134: Given that gatherings or protests are dynamic and can become violent, the training *curriculum* should expose trainees to realistic crowd situations and scenario-planning in order to strengthen their capacity to maintain tolerance levels, build their flexibility in responding appropriately to rapidly changing scenarios, and help build their resilience.	POP training	SAPS (POP)
PANEL RECOMMENDATION 135: The training curriculum should be expanded to include rural based operations or open space operations. The current curriculum which is anchored on a road network infrastructure and buildings falls short of operational realities in rural areas where such infrastructure does not exist.	POP training	SAPS (POP)
PANEL RECOMMENDATION 136: The POP training facilities should ensure that POP equipment and armoured vehicles that POP members will be utilising during operations is permanently available as part of their training, which is currently not the practice. This approach can serve to expose POP members to operational realities on the ground.	POP training	SAPS (POP)

Terminology

Assembly — an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.[621] Note that the focus of this report is on protests in public space. However, as discussed in the report, the right to peaceful assembly may also be seen to apply in some types of private space in some circumstances.

Authorised member — is a SAPS member who is authorised to represent the SAPS and who has specific responsibilities in terms of the RGA (see also **Responsible Officer**).

Basic crowd management training — the four-week Platoon Members Training (PMT) course that should be provided to newly recruited POP members.

Crowd management — the policing of crowds, whether these are peaceful assemblies or not, including those defined in the RGA.

Disruptive protest — protests which in one way or another stop things from functioning in their usual way. Protest may be 'peaceful' but also to be disruptive. Disruption may often be an incidental feature of protest but in some instances protests may be '**actively disruptive**', meaning it is a deliberate strategy of protest to cause disruption of one kind or another.

Force—the term force means physical force. Arrests do not constitute force in so far as they do not involve other forms of physical force.

Formal protest — protest that is carried out through the notification process (followed in some cases by a section 4 meeting) as provided for in sections 3 and 4 of the RGA.

Golden triangle — a meeting of the convenors of a gathering, the **responsible officer** and the **authorised member**, and possibly including other participants, that is organised in terms of section 4 of the RGA.

Informal protest — protest that does not take place in terms of the processes outlined in the RGA.

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[621] OSCE/ODIHR Panel of Experts on the Freedom of Assembly, Guidelines on Freedom of Peaceful Assembly, Second Edition, 2010, 16.

Less-lethal weapon - weapon intended to be less likely to kill than a firearm using live ammunition.

Maintenance exercise – is in-service training conducted at unit level as provided for in paragraph 20(2) of NI4 of 2014 (compare **refresher training**).

Municipal police—virtually all of the municipal police services that have been established in terms of section 64 of the South African Police Service Act (68 of 1995) have been established under metropolitan councils and are often referred to as metropolitan police. However in this report they are all referred to as municipal police.

Peaceful assembly — is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful'. In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly.

Peaceful protest — a peaceful protest is a **protest** that qualifies as a 'peaceful assembly'.

Protest — the term protest is used in this report to refer to collective protests that are carried out by people assembled in groups or crowds.

Public order — in terms of section 205(3) of the Constitution the responsibilities of the SAPS include 'to maintain public order. In this report the understanding is that maintenance of public order is broad function performed by the SAPS and is not the exclusive responsibility of the **Public Order Policing units**.

Public order policing — in this report the term public order policing is understood to mean the same as **crowd management**.

Public Order Policing (POP) units —the specialised Public Order Policing unit, trained to manage and control crowds including persons engaged in a gathering or demonstration as defined in the RGA.

Refresher training — in-service training that is conducted at a training facility in order to ensure that adequate levels of skill are maintained and familiarise POP members

with changes in the POP curriculum (compare **basic crowd management training** and **maintenance exercise**).

Responsible officer — is an official of a municipality who has responsibilities and exercises powers conferred on her or him by the RGA.

Spontaneous protest — protests that take place ‘on the spur of the moment’ in response to an incident or event that has just occurred.

Unlawful protest — protest where both the convening of the event and attendance at the protest is a criminal offence in terms of the RGA or other South African law.

Violence — includes violence against the person or the threat thereof as well as deliberate damage to property.

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(b) Eastern Cape – Brigadier Mandlakhe Richard Twala

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(c) Cape Town POP Unit – Col Alwyn Jacobus Botha

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ANNEXURE A1: Memorandum regarding SAPS crowd management training with respect to "Crowds armed with sharp weapons and firearms" (13 June 2018)

Section A: Introduction

1) The findings of the Marikana Commission highlight the challenges posed to SAPS POP units in dealing with crowds armed with sharp weapons and firearms. Findings of the Commission in this respect included that:

   a) Expert opinion was unanimous that there was no place for the R5, and other weapons capable of automatic fire, in crowd management; [622]

   b) That "the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana." [623]

2) Related to these findings the Commission recommended that the Panel of Experts:

   a) Should investigate "where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire (Chapter 25, Section B, paragraph 8b); and

   b) Having done so, to implement a training programme where all Public Order Policing members are extensively and adequately trained in such measures and methods (Chapter 25, Section B, paragraph 8c).

3) This document is intended as a response to these recommendations. The document:

   a) Examines the background behind the Commission's finding that "the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed … with sharp weapons and firearms".

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[622] Marikana Commission, Report, 547, para 1.
[623] Marikana Commission, Report, 547, para 2.

b) Provides an overview of the framework put forward by the Panel for POP units to manage crowds armed with sharp weapons and firearms.

c) Makes proposals regarding content that should be included in training curriculums.

4) In reading this document it should be noted that:

a) When there are people in a crowd armed with sharp weapons or firearms there may be others in the crowd who do not have weapons. One estimate for instance is that at Marikana roughly 300-400, of the total of 3000 members of the crowd, were armed.[624]

b) In line with the approach taken in the report of the Marikana Commission this report treats "crowds armed with sharp weapons and firearms"[625] as a single category. However it should be noted that managing situations where people have firearms is in some respects different from one in which they have sharp weapons. In particular for sharp weapons to be used generally requires "closing the distance" between the attacker and the victim, while firearms may pose a danger to persons who are some distance away from the shooter.

Section B: Background observations regarding the Commission's findings and recommendations regarding "measures" used by the SAPS at Marikana

5) As indicated the Marikana Commission found that "The evidence before the Commission clearly indicates that the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana." [626]

6) In order to interpret the Commission's findings and recommendations on this point it is however necessary to clarify three issues:

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[624] Marikana Commission of Inquiry, Heads of Argument of the South African Police Service, 2014, paragraph 103 (page 46).
[625] Marikana Commission of Inquiry, Report, 549, paragraph 9.
[626] Marikana Commission, Report, 547, para 2.

a) The evidence indicates that the handling of the incident on Monday, 13th 2012 was not in line with POP good practise.

b) The Commission did not find that POP less-lethal weapons were ineffective or inadequate on the 16th of August 2012 at Scene 1.

c) In addition to the use of the R5 the use of the armed baseline was also a major contributing factor to the high number of fatalities at Scene 1.

The clash at the railway line on the 13th of August 2012 - the evidence indicates that the handling of the incident was not in line with POP good practise

7) The SAPS operation at Marikana was not commanded by POP commanders and POP personnel were not involved in planning for any of the critical events. The group of SAPS members who went to intercept the strikes at the railway line on Monday the 13th of August were not under the command of a POP command but instead under a Major-General from the North West provincial head office. The instructions that were issued to the Major-General to take responsibility for intercepting the strikers were issued by the North West Provincial Commissioner who had no background in POP, or in operational policing generally.

8) After the SAPS members intercepted the strikers at the railway line there was a verbal exchange between the Major-General and the strikers in which he requested them to put down their weapons. They however ignored him and started walking to the koppie at which their colleagues were gathered. While they were heading towards the koppie the SAPS first fired teargas at them, and then fired two stun grenades. After the first stun grenade was fired, a group of strikers spontaneously rushed at members of the SAPS and attacked them. It is not clear why they did this but it appears possible that they may have believed that the police were shooting at them. In the clash that followed two SAPS members and three strikers were killed. The Marikana Commission report states that the firing of the teargas and stun grenades ‘were unreasonable and unjustifiable in the

circumstances and was the “spark" which caused the confrontation between the SAPS and the strikers.’[627]

9) The head of POP in Rustenburg was the most senior POP commander at Marikana on the 13th of August 2012 and was present during the events at the railway line. The Marikana Commission heard evidence from the head of POP in Rustenburg in which he indicated that he would have responded to the situation on the afternoon of the Monday 13th August, in a different way. The evidence is that there was a disagreement between the major-general and the senior POP commander, about how to manage the situation.[628] The Rustenburg POP commander said that: “he was first going to start talking to the strikers and explain the action that he intended taking. He would also brief his commanders and advise them what positions to be in. He testified that he would throw a stun grenade between the strikers but, before doing so, he would have explained to them what he intended doing. He testified that in his experience once you explain to people what was going to happen, they would start moving away. After using teargas he would have gone in with armoured vehicles in order to disperse the people.”[629]

10) The incident on the 13th may have taken an entirely different course if it had been under the command of the POP commander. One of the factors that may have resulted in the clash was that the strikers did not understand what was happening when teargas was fired, and that they may also have mistaken the stun grenade that was used, for gunfire. On the other hand, in his evidence before the Marikana Commission, the POP commander said that he would have explained to the strikers the course of action that he was going to take.

11) The approach taken by the POP commander is consistent with the idea of a “no-surprises” approach that is in line with international best practise. For instance a recent handbook on policing assemblies, published by the OSCE Office for

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[627] Marikana Commission, Report, 557, para 9.
[628] Marikana Commission of Inquiry Evidence Leaders, Heads of argument of evidence leaders, 27 October
2014, 233-235.
[629] Marikana Commission of Inquiry Evidence Leaders, Heads of argument of evidence leaders, 27 October
2014, 235, paragraph.

Democratic Institutions and Human Rights (ODIHR) states that "[t]he policy of "no surprises" should guide communication between police and organizers, as well as other stakeholders, to establish and maintain trust throughout all stages of an assembly and, as such, is a key preventative and de-escalation tactic." [630] This is partly based on the need to minimise the potential for confusion amongst crowd members about what is happening and what police intentions are. While the SAPS does not have a formal "no surprise" policy, the evidence is that the most senior POP commander present on the 13th believed that such an approach would have been effective.

12) The evidence is therefore that, if the SAPS had followed a different approach on the 13th, there may have been no clash with the strikers. This does not mean that, in all cases, POP commanders will be able to prevent attacks by armed people through the use of POP techniques. Nevertheless it indicates that, if trained and experienced POP commanders are placed in command of crowd situations where people are armed in line with their knowledge about good practise, this may reduce the potential for situations, such as that on the 13th of August 2012, to escalate into violent and deadly confrontations.

The Commission did not find that POP less-lethal weapons were ineffective or inadequate on the 16th of August 2012 at Scene 1.

Whether or not there was an attack on police by the strikers

13) There was no specific planning for the interception of the strikers at the railway line on the 13th.[631] Thereafter a senior member of the Special Task Force was put in charge of planning at Marikana. The Rustenburg POP commander worked with the STF commander on a plan. But this plan was not used on the 16th due to the fact that it could only be implemented early in the day when there were a small number of strikers on the koppie. The "disperse and disarm" at Marikana was

[630] OSCE/ODHIR, Human Rights Handbook on Policing Assemblies, 2016, 26.
[631] Marikana Commission of Inquiry Evidence Leaders, Heads of argument of evidence leaders, 27 October 2014, 225, paragraph 443.

implemented in the afternoon and the plan, that had been developed, was not suited to an operation that was going to be implemented at this time of day when a large number of strikers were gathered on the koppie.

14) The plan that was eventually used on the 16th was developed without the input of the POP commander. It was a very basic plan that was developed at the last minute and failed to consider many critical issues.

15) In brief what happened on the 16th was that some of the strikers moved in a group towards where the police units were positioned. It is clear that there was no common intention on the part of all members of the group to attack the police but possible that some of them intended to attack the police.[632] Ultimately therefore there are two possibilities:

   a) **Possibility 1:** One possibility is that, when the strikers moved towards where the police were positioned, they were in fact heading towards the path in order to return to the Nkaneng settlement. However the police did not know what their intentions were and were afraid that they may be attacked by the strikers.

   b) **Possibility 2:** The other possibility is that some of the strikers intended to attack the police. When the TRT members fired at the strikers they were therefore facing a genuine attack.

16) The findings of the Commission are therefore that the evidence is not clear on whether the strikers were attacking the SAPs members, or not, at Scene 1.[633] In this regard the Commission quotes extensively from a passage in the heads of argument of the Marikana Commission evidence leaders.[634] At the same time the Commission accepted that some of the members of the TRT may have believed they were being attacked. If they believed this, this would have been a reasonable belief in the circumstances.[635]

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[632] Marikana Commission, Report, 235-248.
[633] Marikana Commission, Report, 248, para 28.
[634] Marikana Commission, Report, 234-247.
[635] Marikana Commission, Report, 248-250.

The evidence with regards to the use of "non-lethal methods"

17) The Commission summarises the evidence with regard to the use of "non-lethal methods" by POP as follows:

a) "The non-lethal POPs methods were used later than they should have been and were imprecisely directed. No water was shot at, or in front of, the lead group of strikers. All the teargas and stun grenades fired before the shootings were fired behind the leading group of strikers with the result that if they tried to move away from the teargas canisters and stun grenades they would have moved towards the TRT line."[636]

b) "The objective evidence as provided by video and photographs appears to show that if the non-lethal POPs measures had been used earlier and *in a more focused* manner designed to prevent the lead group of strikers from entering the passage way to the east of the kraal or proceeding any appreciable distance along it towards the TRT basic line it would not have been necessary to use lethal force at scene 1 and the deaths and injuries could have been prevented."[637]

18) Similar points are made by the Evidence Leaders:

a) "No teargas, stun grenades or water cannons were used until 20 seconds before the scene 1 shootings. When the teargas and stun grenades were belatedly used by SAPS, they had the intended effect – they broke up the group of strikers that was advancing from the koppie to the kraal. However, by the time that teargas and stun grenades were used, this lead group of strikers was already in the channel down the east side of the kraal. So breaking up that group by shooting teargas and stun grenades into the heart of the group merely pushed the strikers at the head of that group further down the channel and closer towards the TRT line. Had teargas, stun grenades and water cannons been used before the strikers entered the channel at passage A, it is quite possible that they would have been dispersed in a manner that would have prevented the scene 1 tragedy. At the very least, such use of non-lethal

[636] Marikana Commission, Report, 230, para 16.
[637] Marikana Commission, Report, 232, para 19, emphasis added.

POPS methods would have reduced the number of strikers that ultimately came down the channel towards the TRT line and would have limited the need for lethal force and the potential numbers of casualties if it was used commensurately."[638]

19) As indicated the facts are unclear. The evidence with regards to the use of the POP less-lethal weapons needs to be analysed in relation to the two possibilities outlined above:

a) **Possibility 1 (the strikers were not in fact attacking the police):** However the effect of the less-lethal weapons that were used by the POP members was to push the strikers towards the line of TRT members. The strikers ended up running towards the TRT because of the way in which the less-lethal weapons were used. Some TRT members thought they were being attacked and started shooting at the strikers. The implications here are not that POP methods were ineffective. Rather the conclusion is that the manner in which POP weapons were used aggravated the situation. Rather than discouraging the strikers from advancing towards the POP and TRT members, in the final moments the way in which the POP weapons were used, resulted in the strikers being driven towards the POP and TRT members. This contributed to the TRT members believing that they were being attacked.

b) **Possibility 2 (the strikers were attacking the police):** The implication here is that the attack could have been prevented if POP weapons were used in a focused way and targeted at the front of the group. Instead the POP weapons were used in such a way that they did not assist the police in protecting themselves.

20) In this respect therefore Marikana does not demonstrate that "the measures at the disposal of Public Order Policing are completely inadequate". Rather it demonstrates that the manner in which the 'POP measures" were used was ineffective. If they had been used in a focused manner there is a strong possibility that they would have discouraged the strikers from advancing towards the TRT line. If there had been better planning and briefing, or at least effective command

[638] Evidence Leaders, 638-639.

and control, and the POP members had used their weapons in a focused manner to deter the strikers from advancing towards them, this may very well have been effective.

21) As with the events on the 13th this does not mean that POP commanders can guarantee that they will be able to prevent attacks by armed people, through the use of POP techniques, in all cases. Nevertheless it indicates that the events at Scene 1 at Marikana mainly show POP weapons being *used in an ineffective way*, rather than showing that the weapons themselves are inadequate.

Other situations where POP members have been unable to defend themselves

22) In order to understand the potential risks to POP members when faced with armed crowds it is also helpful to highlight some other cases where POP members have encountered difficulties in defending themselves.

a) Documentation that came to light during the Marikana Commission provides information about an incident at Thlabane in North West province on 22 May 2012. SAPS members were faced with a large crowd of mine workers, armed with pangas and sticks, who were advancing towards them. In this case the SAPS members tried to use teargas and rubber bullets to prevent the strikers from advancing, but this was ineffective. However it is not clear from the account that is provided why this was so. The available information indicates that one of the factors may have been that the POP members ran short of rubber rounds. Ultimately they relied on TRT members to fire R5 rounds over the heads of the strikers and this was sufficient to stop the mine workers from advancing further. However it is possible that, if the SAPS members had an adequate supply of rubber rounds, they would not have needed to rely on the use of live ammunition by TRT members.[639]

b) Public order members from Rustenburg also discussed an incident, which took place in Lichtenberg in April 2017, with members of the Panel. In the incident, members of the crowd used dustbin lids and other materials as shields to defend themselves against the use of rubber rounds by POP members. They were advancing towards SAPS lines in a coordinated way. A

[639] Evidence Leaders, 57-60.

SAPS Nyala, which had a wheel caught in a ditch, was set alight by the protestors. In this case the SAPS members said that they chose to fall back, and allow the protestors to burn the Nyala, rather than use live ammunition which would have been likely to result in the loss of life.

23) It is therefore apparent that in some situations, especially where there is a crowd that is armed and has hostile intentions against the police, less-lethal weapons such as rubber bullets, water cannons, teargas and stun grenades, may be inadequate. At the same time it is necessary to recognise that in some situations the reasons why POP members are not able to stop protestors from advancing towards them may not be due to the fact that weapons are inadequate but to other factors such as:

a) Weapons being used in an ineffective and counter-productive way – likely to be linked to inadequate planning, briefing and/or command and control;

b) Running out of ammunition – possibly reflecting inadequacies in logistics and supply-chain management.

In addition to the use of the R5 the use of an armed baseline was also a major contributing factor to the high number of fatalities at Scene 1.

24) In the terms of reference of the Panel the issue that is highlighted is the need to identify best practices and measures for managing crowds armed with sharp weapons and firearms without resorting to the use of weapons capable of automatic fire.[640] However in discussing 'the measures' that were used at Marikana it is also important to make note of the "baseline" formation used by the TRT (and other units) and the consequences of the use of the baseline.

25) At Scene 1 the TRT was deployed in a long line of roughly 60 TRT members.[641] This formation is referred to as a 'baseline". During the period of roughly 10 seconds during which the strikers were shot at Scene 1, 47 TRT members, as well as one POP member[642], opened fire on them with live ammunition. More

[640] Marikana Commission report. 549, paragraph 8.
[641] SAHRC 373, 7.1.3 and following
[642] Marikana Commission report. p. 249.

than three quarters of the TRT members were using R5 rifles[643] and over 80% of the 305 rounds fired were fired from R5s.[644] The large number of rounds fired in this short period of time was not only the consequence of the fact that most of the rifles used were capable of automatic gunfire but also of the large number of shooters involved.[645] In addition the number of deaths was influenced by the fact that the R5 is a high velocity rifle.[646]

26) In addition to the criticism of the use of the R5 in crowd management[647], the use of the baseline formation of police armed with lethal weapons was also criticised by various expert witnesses at the Marikana Commission and identified as key contributing factor to the large number of rounds that were fired, and the resulting loss of life.[648] One of the major risks of using an armed baseline is that many police in the line may start shooting primarily as a result of the fact that their colleagues are shooting. This is because of the tendency to assume that, if their colleagues are shooting, there must be a threat and that it is therefore justified to shoot. This phenomenon, which has been called "associative threat perception", occurs when 'a police official observes that another member of the SAPS is shooting, assumes that there is a threat which justifies this, and then starts shooting as well. What this means is that police members shoot not because they have themselves perceived a threat" but because other police have apparently done so and are shooting.[649] As a result police officers fire "without necessarily having perceived the threat themselves" which does not constitute justification for the use of force.[650] If a baseline formation is used, the more police who are in the line, the more people who may be prone to acting in this way.

27) In the terms of reference of the Panel the issue that is highlighted is the danger arising from the use of the R5, or other weapons capable of automatic gunfire in

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[643] According to exhibit XXX8, 36 were using R5s, 10 were using 9 mm and 1 was using an R1.
[644] According to exhibit XXX8, 247 of the 305 rounds were fired from R5s.
[645] There were seven TRT members who fired 10 or more rounds but at least two of the TRT hooters who were using 9mms also fired 10 rounds each.
[646] If gunfire was generally directed towards the upper bodies of the approaching strikers this would also have been a factor.
[647] Marikana Commission report, 355-356. .
[648] SAHRC, 374. See also paragraph 1064 of the Heads of Argument of the Evidence Leaders at page 366 in the report.
[649] de Rover FFF11, para 77; day 229, p 28409/4 – 28410/3; day 286, p 37138/16 – 37144/2 quoted in Marikana Commission report. p. 365.
[650] de Rover, Day 286, p 37138/18 – 22, 37142/4 – 14 quoted in Marikana Commission report. p. 365.

the crowd management context. However the Marikana experience not only highlights the risk of the use of such rifles, but also the dangers related to the deployment of an armed baseline. The SAPS approach to dealing with armed crowds should be one that therefore uses neither this type of rifle nor an armed baseline. Shooters should be trained to act on the basis of their own judgment and should not be deployed in a baseline formation. Specific members of a unit should be responsible for responding to individuals who present an imminent threat to the life. Identifying the members "who have specific responsibility for dealing with such threats would limit the risk of an undifferentiated volley of fire from police members who did not themselves identify a threat".[651]

Summary of remarks regarding POP measures

28) In reading the statement by the Marikana Commission that "the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed … with sharp weapons and firearms" it is therefore important to make note of the following:

a) If trained and experienced POP commanders had been involved in the command and planning of the Marikana operation it is possible that the SAPS would have been able to manage the incidents on the 13th and 16th successfully and without the loss of life. The evidence is that, if the SAPS had followed a different approach on the 13th, there may have been no clash with the strikers. Likewise, on the 16th, if POP weapons had been used effectively – in a focused manner directing them towards the front of the group of strikers who were advancing towards the police – it is likely that the strikers would not have advanced towards the police lines. In turn this implies that proper planning, briefing and command related to the deployment of POP units at Marikana may have resulted in the situation being resolved without the use of lethal force.

b) This does not mean that POP commanders can guarantee that they will be able to prevent attacks by armed people, through the use of POP techniques,

[651] Evidence Leaders, paragraph 1064 quoted in Marikana Commission report. p. 366.

in all cases. Nevertheless it indicates that, if trained and experienced POP commanders are placed in command of crowd situations where people are armed, this may reduce the potential for situations, such as that on the 13th of August 2012, to escalate into violent and deadly confrontations.

29) Furthermore the reasons for the high number of fatalities at Scene 1 is not only because of the use of a rifle capable of automatic gunfire (mainly in this case the R5)[652]. The use of an armed baseline was also a major contributing factor. Shooters should not be deployed in a baseline formation. They should be highly trained and deployed on the basis that they will only shoot on the basis of their own judgment.

30) The Marikana Commission findings and recommendations are therefore best understood in the following way:

a) POP units sometimes have to engage with crowds armed with firearms or other dangerous weapons. Effective command of POP units in these situations and the use of POP tactics and weapons in an effective manner may be adequate.As the report of the Panel states[653]

i) The fact that persons are armed during a gathering, does not mean that the crowd is posing an immediate and direct threat.

ii) The situation can often be diffused through negotiations, monitoring the crowd for some time, or resolving the issue through the intervention of other role-players.

iii) Experience is that attempts to disarm a large crowd through the use of force is likely to have undesirable consequences.

b) Nevertheless POP units may sometimes be placed in situations of danger and this may be greater if crowds are not only armed but have aggressive intentions as well as being mobile and organised. It cannot always be assumed that POP planning will be able to consider all eventualities or that commanders will make the “right decision” (i.e. the decision most likely to prevent the situation from escalating into a confrontation or attack). Even if

[652] At least one TRT member was used an R1.
[653] Panel Report, Paragraph 790 (page 319).

decision making and command is of a high standard this may not be sufficient to prevent potentially lethal attacks by members of the crowd. In such situations it cannot always be assumed that the POP tactics, and less-lethal weapons, will be adequate. POP units therefore need to have access to the option of a higher level of force. It is clearly preferable that this "higher level" of force should be force that can be used in a highly targeted and disciplined manner.

Section C: Proposed framework for managing crowds armed with sharp weapons or firearms

Protecting the right to peaceful protest

31) The report of the Panel puts forward the following as a proposed definition of ""peaceful assembly".

a) "A peaceful assembly is an assembly where the conduct of the assembly is non-violent. It may include conduct that may annoy or give offence, and even temporarily hinders, impedes or obstructs the activities of third parties. Where a large majority of participants are acting in a peaceful manner, violent actions by individuals or small groups should not lead to the assembly as a whole being classified as 'not peaceful'. In case of doubt concerning the classification of an assembly, it shall be presumed that it is protected as a peaceful assembly."[654]

b) This definition is aligned with a 2012 Constitutional Court judgement which indicates that people who are conducting themselves peacefully at a protest cannot be denied the right to protest simply because other people who are attending the protest are acting in a violent manner.[655]

c) This definition therefore has various implications including that:

[654] Paragraph 440.
[655] *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13, para 53.

i) Protecting the right to protest peacefully is regarded as a central purpose of Public Order Policing units. The Panel's approach is that if some individuals are involved in violence (understood as harm to persons or damage to property) this should not necessarily mean that the protest as a whole is classified as not peaceful. Whether or not a protest is regarded as peaceful should therefore be determined in relation to the overall conduct of participants rather than by the conduct of an isolated number of individuals.

ii) By implication if there are people who are attending a protest who are acting violently or who are armed, it is primarily these people who should be regarded as acting unlawfully. It is only when the protest is generally of a violent nature that is it appropriate to classify the protest as violent.

32) In line with the emphasis on protecting the right to peaceful protest the report of the Panel emphasises the principle of differentiation. [656] This emphasises that "As a general rule (in the absence of a compelling motivation to depart from this rule) less-lethal-weapons should only be used against people involved in violence, with care being taken to avoid hurting others."[657]

33) These principles are clearly also in line with the principles governing the use of lethal force. Where police use lethal force against members of a crowd this force should only ever be targeted at individuals posing an imminent threat of death or serious bodily harm to members of the police or others.

Proposed structuring and deployments of POP units

34) In order to understand the recommendations for training of POP members it is necessary to also make note of the framework put forward in the Panel's report for structuring and deployment of POP units. The framework includes that:

[656] As per Panel Recommendation 67 and 68.
[657] Panel Recommendation 67.

a) POP deployments should at a minimum be of a section strength, comprising eight members and not less than that.[658]

b) There should be a minimum of four platoons per unit.[659]

c) Within each POP unit there should be a public order restoration capability consisting of one section for each platoon (Panel Recommendation 74).[660]

d) Specialist firearms officers should form part of the restoration section established within each POP platoon (Panel Recommendation 106). The recommendation states that: "The purpose of the specialist firearms officers is to provide the capability for targeted intervention during a crowd management operation where there is an imminent threat to the lives of police or members of the public. The specialist firearms officers shall operate and exercise their duties under the command and control of the POP commander or officer in charge."

35) The proposed framework is therefore that the minimum deployment is a section (8 POP members). However the specialist firearms officer capability would be located within the restoration section that is comprised of one section within each platoon. This does not mean that all members of the restoration section would be

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[658] PANEL RECOMMENDATION 83 states that: POP deployments should at a minimum be of a section strength, comprising eight members and not less than that. In addition training should be clearly linked to the framework for minimum deployment and should address deployment at section level.

[659] PANEL RECOMMENDATION 84 states that: To ensure that POP is able to deploy the necessary resources in managing crowds, there should be a minimum of four platoons per unit. Staffing, resourcing and training plans for POP units should also take into account:
a) Panel Recommendation 40 regarding deployment of first aid teams in crowd management operations and other large operations or operations where the use of lethal force is likely.
b) Panel Recommendation 65 regarding development of a dedicated negotiation capability at each POP unit.
c) Panel Recommendation 67 regarding the potential for greater use of arrests.
d) Panel Recommendations 74 and 106 regarding establishment of a restoration section within each platoon including specialist firearms officers.
e) Panel Recommendation 124 regarding establishment of a technical support function at each unit.

[660] The recommendation goes on to state that: The public order restoration capability should:
i) Be highly trained in line with the crowd management doctrine and fundamental principles on the use of force in this document, with particular emphasis on protection of life.
ii) Apply strict selection criteria;
iii) Include specialist firearms officers (see Panel Recommendation 106);
iv) Impose limits on the duration of service by most members of the unit so that some experienced members remain in the unit but the unit is able to maintain a relatively youthful character.

specialist firearms officers. Potentially two or three members of the restoration section within each platoon would be specialist firearms officers. The specialist firearms officer capability would be one that is available therefore when POP platoons are deployed, but not necessarily available when only a section is deployed (unless this is the restoration section).

36) The proposal regarding specialist firearms officers is in line with international best practise. For instance the handbook (referred to above) published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) recognises that there may be a need to deploy specialised firearms officers though these officers must be "well trained and equipped and have the single function of firearms officers for the duration of the event."[661] Additional guidelines for deployment of these officers provided in the handbook include that:

a) "Public order officers should be supported by small teams of firearms officers who are equipped with more accurate two handled weapons with sight enhancement, where possible;
b) Firearms teams should only be deployed by operational command based on clear threats and controlled by tactical command officers on the ground;
c) Responsibility for the use of firearms lies with command, as well as the officers using the firearms;
d) Firearms should only be used after other methods have been tried and failed or would be unlikely to succeed if they were tried;
e) Only aimed single shots should be fired and only until the threat is removed: automatic fire is never acceptable;
f) Firing indiscriminately into a crowd is never legitimate or acceptable;
g) Shots must be aimed only at individuals who present an immediate and real risk to the life of any person, including police officers;
h) Firearms officers must be aware of the possibility of stray bullets and the possibility of hitting an innocent bystander;
i) When the desired goal is achieved their use must be stopped and their deployment reviewed by operational and tactical command. As in all instances

[661] OSCE/ODHIR, Human Rights Handbook on Policing Assemblies, 2016, 81.

involving the use of force, the individual officer must cease use of firearms when the goal is achieved or there is no longer a necessity for their use;

j) Avenues of escape must be considered for the assembly in case of panic;
k) Medical care must be available to those who require it; and
l) Police must report and review any use of firearms."[662]

37) The proposals regarding Specialist Firearms Officers do not mean that POP would start relying on them. As part of the restoration section in each platoon, the recommendation is that Be highly trained in line with the crowd management doctrine and fundamental principles on the use of force in this document, with particular emphasis on protection of life.'[663] They would continue to be a last resort measure amongst a range of options that would also include:

a) Proactive measures
b) Planning and briefing
c) Negotiation
d) Defensive measures
e) Crowd management techniques
f) Arrest teams

38) One of the key issues is also for POP units to develop greater flexibility. Ideally POP units should be able to adapt to specific situations, and should have a wider range of possible tactics for responding, rather than responding in a fixed "set piece" manner. In this respect the Marikana Commission quotes the evidence of one of the expert witnesses to the effect that 'POP capabilities are mainly reactive, they are mainly static, set piece, aimed at containment and crucially, prefer a distance between them and the crowd'.[664]

39) The Panel makes various other recommendations regarding questions of training. These include but are not limited to:

[662] OSCE/ODHIR, Human Rights Handbook on Policing Assemblies, 2016, 81-82.
[663] Panel Recommendation 74.
[664] Marikana Commission report. p. 548, para 3.

a) Training programmes should provide for exposure of trainees to real practicalities of crowd management realities that involve intense object throwing and reaction to fire-arms from the crowd.[665]

b) Integrated training.[666]

c) Panel Recommendations that address the issue of training include 48, 58, 69, 78, 79, 80, 81, 83, 85, 86, 89, 90, 107, 108, 113, 122, 133, 134, 135 and 136.

Section D: Proposed content to be integrated into training curriculum

40) In order to support fulfilment of the Panel's terms of reference, this document outlines issues that need to be integrated into the training for POP commanders, specialist firearms officers (still to be developed) and other POP members in relation to situations where crowds are armed with sharp weapons or firearms.

41) To understand the Panel's recommendations regarding management of crowds armed with sharp weapons or firearms it is necessary to understand the more general recommendations of the Panel in respect of crowd management. The issues listed here therefore cover both:

i) Key Panel recommendations regarding broad issue of crowd management; and

ii) The specific issue of managing crowds armed with sharp weapons or firearms.

Target audience(s) and goals and objectives (purpose) of training

42) **Target audiences:** The training content that is outlined in this document would need to be integrated into training that is provided to:

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[665] As per panel recommendation 134 reads, for the purposes of putting the record straight, this is an extract from the panel report, *"Given that gatherings or protests are dynamic and can become violent, the training curriculum should expose trainees to realistic crowd situations and scenario-planning in order to strengthen their capacity to maintain tolerance levels, build their flexibility in responding appropriately to rapidly changing scenarios, and help build their resilience"*

[666] See Panel Recommendation 86.

a) Commanders – including platoon commanders and POP operational commanders.[667] This should address the broad range of options for managing crowds armed with sharp weapons and firearms.

b) Specialist firearms officers. This should focus on their role in managing crowds armed with sharp weapons and firearms. The position of specialist firearms officer has not as yet been created. It is necessary for an overall specialist firearms officer curriculum to be developed.

c) POP units generally – to address issues regarding situations where members of a crowd are armed with sharp weapons or firearms as well as the role of other POP members when specialist firearms officers are deployed.

d) The curriculum will need to be adapted depending on the specific target audience.

43) **Learning goals and objectives (purpose):**

a) To ensure that POP commanders understand the different options for managing crowds armed with sharp weapons and firearms, without resorting to weapons capable of automatic fire.;

b) To ensure that specialist firearms officers understand their role in managing crowds armed with sharp weapons or firearms;

c) To ensure that other POP members understand their roles and responsibilities in situations where specialist firearms officers are deployed.

44) This document deals with the **theoretical aspects** of the curriculum. In addition to these, the curriculum should include **practical lessons** on the use of force and firearms, where principles of legality, necessity and proportionality are taught in a

[667] Note that Panel Recommendation 89 provides that: An operational commanders training curriculum that is specifically focused on and takes into account the complexities of the crowd management environment, and which is grounded in operational realities, should be developed and provided to POP officers and experienced platoon commanders. The new POP command training curriculum should be flexible to move across command levels. As with other POP training there should be periodic assessment that is linked to the training cycle (see also Panel Recommendation 90).

practical fashion that goes beyond classroom training. To know proportionality as a principle does not by itself guarantee proportionate behavior in application.

45) Note that: The framework of principles put forward by the Panel is aligned with the Constitution. The Panel has also made various recommendations for amendment to the Regulation of Gatherings Act (Act 205 of 1993) as well as National Instruction 4 of 2014. The framework put forward in this document is aligned with the recommended amendments.

Issues to be addressed in curriculum on managing crowds armed with sharp weapons and firearms

46) **Background to training programme - lessons from Marikana and other operations -** This would address the issues outlined in Section B of this memorandum.

47) Analysing and classifying types of protest assemblies[668]

a) "Demonstrations" and "gatherings";

b) "Formal" and informal protest.

c) Prohibited (unlawful) protest.

d) Peaceful protest.

e) Disruptive protest.

48) **Assemblies where some participants are armed**

a) Reasons why people carry arms when attending assemblies;

b) Legality of carrying arms during assemblies:

i) Legality of attending an assembly while armed;

ii) Legal status of those attending an assembly who are not armed, when other participants are armed;

[668] See paragraphs 309 to 331 of the Panel's report.

iii) Is an assembly where some participants are armed an unlawful assembly or not?

c) Dangers to police and others during armed protests.

49) Principles governing crowd management and the use of force

a) Principle of freedom of assembly;

b) The use of violence in protest and the principle of differentiation.[669]

c) Principles of private defence (Common law) and applicability thereof.

d) Other key principles regarding crowd management as put forward in the proposed crowd management doctrine,[670] fundamental principles for the use of force management,[671] and the draft use of force policy. (see Table 1 on following page)

e) Other relevant principles:

i) Training should emphasise that POP members should take care to minimise the risk that vulnerable groups such as young children, people with disabilities, and elderly people, can be adversely affected by the use of LLWs (Panel Recommendation 58);

ii) Provision of first aid in terms of a duty of care (see below).

[669] As per Panel Recommendation 67 and 68.
[670] As per Panel recommendation 68
[671] See paragraphs 898 to 914.

Table 1: Key principles regarding crowd management as put forward in the proposed crowd management doctrine,[672] fundamental principles of use of force[673] and the draft use of force policy.

	Crowd management doctrine[674]	Fundamental principles for the use of force in crowd management	Use of force policy
1. Principle of protection of life;		✓	✓
2. Negotiated crowd management	✓		
3. Situational appropriateness in order to support de-escalation;[675]	✓		
4. Differentiation;[676]	✓	✓	
5. Impartiality and non-discrimination.[677]	✓		
6. De-escalation;	✓	✓	✓
7. Legality, necessity, proportionality;		✓	✓
8. McCann Principle			✓
9. Accountability		✓	✓

50) **Accountability[678]**

a) Obligation to document and record crowd management operations.

b) SAPS and municipal police members' obligation on accountability and truth telling after use of force and fire-arms.

[672] As per Panel recommendation 68
[673] See paragraphs 898 to 914.
[674] As per Panel recommendation 68
[675] As per Panel Recommendation 68.
[676] As per Panel Recommendation 67 and 68.
[677] As per Panel Recommendation 68.
[678] See Panel Recommendation 25.

c) Rights of police officers against self-incrimination

51) Introduction to intervention options for crowds armed with sharp weapons and firearms

i) Key principles: de-escalation, differentiation and protection of life.

ii) Proactive measures

iii) Planning and briefing

iv) Negotiation

v) Defensive measures

vi) Crowd management techniques

vii) Arrest teams

viii) Specialist Firearms Officers

52) Building flexibility and agility into POP responses.[679]

53) Proactive measures[680]

a) Information gathering.

b) Communication and media plan.

c) Engage local leaders.

d) Use of technology.

e) Video recordings and photographs.

f) Prosecution.

54) Application of negotiated crowd management principle

[679] See for instance Panel Recommendation 55.
[680] See Panel Recommendation 49.

a) Situational appropriateness and de-escalation

b) Potential for assistance by “third party” independent mediators.

55) Defensive measures

a) Deployment of armoured vehicles and barbed wire

b) De-escalation

c) Dispersal and de-escalation[681]

d) Withdrawal.[682]

56) Crowd management techniques

a) Role of planning, briefing and command and control in ensuring effective use of crowd management techniques.

b) Crowd management formations.

c) The principle of differentiation, discriminate and indiscriminate use of force, and types of crowd management weapons.[683]

d) Relevance of crowd management techniques with respect to crowd members who are armed with sharp weapons or firearms.

57) **Use of arrest teams during violent protests[684]**

a) Situational appropriatness, de-escalation and early intervention;

b) Violent individuals.

[681] See discussion at particularly at paragraphs 577-578.
[682] At paragraph 595.6 the report of the Panel says that: “Where the presence of the police is the principal factor giving rise to hostile or violent behaviour by the crowd, it is acceptable for the police to tactically withdraw from the scene while continuing to observe events.”
[683] With reference to Panel recommendation 130);
[684] As per Panel Recommendation 66)

58) Specialist Firearm Officers[685]

a) Roles and responsibilities of special firearms officers in crowd management

b) Roles and responsibilities of commanders in respect of specialist fire-arms officers.

c) Special equipment for firearms officers (special weapons, ballistic shields, ballistic helmets, in crowd management operations.

d) Special training of firearms officers on use force policy.

e) Integration of firearms officers with crowd management units.

59) **Crowd Management First Aid[686]**

a) Crowd management first-aid principles

b) Crowd management tactical options and first-aid management (integrated approach)

c) Role of POP units in crowd management first-aid

d) Role of other stakeholders in crowd management first- aid.

60) **Debriefing[687]**

[685] As per recommendations 49, 106 , 107, 108
[686] As per Panel Recommendation 39, 40, 41 and 42
[687] See for instance Panel Recommendation 55.

Annexure B1: Marikana Commission Report Recommendations (Chapter 25, Sections B-G, pages 547-555)

B: The Commission recommends with regard to Public Order Policing that a panel as described in paragraph 8 below be established to perform the tasks set out in paragraphs 8, 9 and 10.

1) The experts were unanimous in their view that automatic rifles like the R5 have no place in Public Order Policing. Mr De Rover testified that he suggested an immediate withdrawal of R5 from POP operations. He said that military assault weapons have no place in law enforcement and that he was fully aware of the particular problems of violence in South Africa. Mr White also recommended an immediate withdrawal of R5 rifles and added that any replacement weapon system should not be capable of "automatic fire" mode".

2) The evidence before the Commission clearly indicates that the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana.

3) Mr De Rover said POP capabilities are mainly reactive, they are mainly static, set piece, aimed at containment and crucially, prefer a distance between them and the crowd and the current configurations offer very limited options to deal with such situations.

4) He said that the strikers on the 13th, and more so on the 16th, appeared confrontational, organised, mobile, armed, violent and volatile.

5) He said that the 13th, where POP members ran away from the scene during the attack by the strikers upon their colleagues, was an abject failure of Public Order Policing. He said POPS cannot deal with such situations. He went so far as to say that none of the units in the SAPS has the ability to stop a crowd with those characteristics if they decided to walk into the Union Buildings.

6) Major General Mpembe said in a discussion with Mr Zokwana that no amount of training enables him with a rifle to disarm someone with an axe, without bloodshed. Mr De Rover said that the approach at Marikana has never been field tested. It was

such a dangerous situation and the members of the South African Police Services were not trained for it.

7) The Commission is mindful of the dangers inherent in the situation when Public Order Policing members are faced with a crowd armed with sharp weapons and where non-lethal force is ineffective. However the use of R5 or any automatic rifle is clearly untenable, not only because of the Constitutional imperatives, but also because the effects seen at Marikana are just too disturbing and devastating for South Africa even to contemplate any recurrence.

8) Bearing in mind Mr De Rover's comment that no unit in SAPS is currently in a position to deal with such a crowd, it is recommended that a panel of experts be appointed, comprising senior officers of the Legal Department of the SAPS together with senior officers with extensive experience in Public Order Policing and specifically including independent experts in Public Order Policing, both local and international, who have experience in dealing with crowds armed with sharp weapons and firearms as presently prevalent in the South African context, to:

(a) Revise and amend Standing Order 262 and all other prescripts relevant to Public Order Policing;

(b) Investigate where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire;

(c) Having done so, to implement a training programme where all Public Order Policing members are extensively and adequately trained in such measures and methods; and

(d) Consider and advise on the recommendations made by Mr Robert David Bruce and Amnesty International.

9) In addition to the above, the experts have made detailed and far reaching recommendations.[688] We recommend that the abovementioned panel investigate and determine the suitability of each of the recommendations to the South African situation, and, where found to be apposite, to authorize and implement such

[688] Exhibit ZZZ31.1 to 31.3 (see Annexures B2, B3 and B4 of this report).

recommendations, and to ensure that adequate and appropriate prescripts, protocols and training are put into place to give urgent effect to those decisions.

10) The Commission has heard evidence of uncertainty as to the exact roles to be played when tactical units are deployed together with Public Order Policing Units in instances of crowd control. It is specifically recommended that the above mentioned panel pay particular attention to the lacunae in the standing orders and prescripts and identify, revise and amend the relevant protocols with clearly defined roles for each tactical unit.

11) It is recommended that the abovementioned panel be constituted as soon as possible to enable urgent attention to be directed to these recommendations.

C Recommendations by National Planning Commission

The National Planning Commission, in its report, which has been accepted as

Government policy, has made a number of important recommendations regarding the need to demilitarise the SAPS and to professionalise the police. These recommendations must be implemented as a matter of priority.

D Control over operational decisions

1) While it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be appropriately and securely recorded.

2) The Commission recommends further that in Public Order Policing situations operational decisions must be made by an officer in overall command with recent and relevant training, skills and experience in Public Order Policing.

E Police Equipment

1) All radio communications should be recorded and the recordings should be preserved. Plans for Public Order Policing operations should identify the means of communication which SAPS members will use to communicate with each other.

2) A protocol should be developed and implemented for communication in large operations including alternative mechanisms where the available radio system is such that it will not provide adequate means of communication.

3) The SAPS should review the adequacy of the training of the members who use specialised equipment (eg water cannons and video equipment), and ensure that all members who may use such equipment are adequately trained to do so.

4) All SAPS helicopters should be equipped with functional video cameras.

5) The SAPS should review the procurement, servicing and training processes which have had the result that expensive equipment purchased by the SAPS cannot be used, either adequately or at all.

F First Aid

1) In operations where there is a high likelihood of the use of force, the plan should include the provision of adequate and speedy first aid to those who are injured.

2) There should be a clear protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is required, should administer first aid.

3) All police officers should be trained in basic first aid.

4) Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds.

G Accountability

1) Where a police operation and its consequences have been controversial requiring further investigation, the Minister and the National Commissioner should take care when making public statements or addressing members of the SAPS not to say anything which might have the effect of “closing the ranks" or discouraging members who are aware of inappropriate actions from disclosing what they know.

2) The standing orders should more clearly require a full audit trail and adequate recording of police operations.

3) The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.

4) The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.

5) The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves.

Annexure B2: Recommendations submitted to the Marikana Commission by Cees de Rover

RECOMMENDATIONS WITH REGARDS TO POLICING IN SOUTH AFRICA

C. de Rover

Following on evidence led before the Commission and from my engagement with the South African Police Service (SAPS) since February 2013, I make the following recommendations with regards to policing in South Africa.

I make these recommendations in my capacity of an independent expert. I did not consult SAPS prior to their submission.

I am aware of the fact that the Marikana Commission of Inquiry may well give rise to a raft of recommendations that will be procedural and operational in nature. My contention is that those can only truly make sense of the processes within SAPS that are to underpin those undergo fundamental change first. I have therefore refrained from making such recommendations.

INDEPENDENT POLICE LEADERSHIP

1. Police leadership is crucial to every aspect of the organization – from strategic management to its operational conduct and to public perception and trust. In most modern democracies the appointment of police leadership is an executive function – ensuring an appropriate separation from the political process. Most modern democracies also require that police leaders are experienced law and justice practitioners. There has also been a clear departure, in recent years, from the paramilitary style of police organization, which is characterized by military ranks and hierarchical, centralized decision-making. On all three matters South Africa has taken a rather different approach: senior police appointments are highly politicized,

non-experts are appointed; and the organization is paramilitary in structure and functioning. It is well beyond my remit to make a judgment on the success or otherwise of that approach. However the Commission's work may have provided some insight into issues around leadership that could be usefully addressed in its recommendations. As a minimum SAPS requires consummate professionals on key strategic positions to provide the organization with the effective leadership it desperately needs.

AN OPERATIONAL APPROACH TO TRAINING:

2. SAPS approach to training and the substantive content of that training both appear to be insufficiently anchored in operational realities and demands. The image and reputation of any police force are largely based on the quality of its interactions with the public in the delivery of its services, and the performance of its duties. It follows that the professional qualities and personal attitudes of individual police officials are therefore of critical importance. The ability to learn and to continuously adapt to the changing demands and expectations of society needs to be structured in processes and practices of command, control, supervision, education and training. I recommend a thorough, external evaluation of current training needs and practices. Mechanisms should be put into place to ensure that operational experiences (such as those related to Marikana) are translated, quickly and efficiently, into future training as well as into timely adaptations of operational practices when and where necessary.

BAN ON ASSAULT RIFLES AND REVIEW OF SAPS WEAPONRY

3. The SAPS is using inappropriate weaponry in its public order operations and this was the case at Marikana. It is recommended that the Commission advise the South African government to ban the use, by SAPS, of assault rifles (5.56mm and 7.62mm) in public order management and crowd control. I further recommend that an independent expert review be undertaken to determine whether other inappropriate weaponry is in use or potential use by SAPS.

WHOLE OF GOVERNMENT AND WHOLE OF COMMUNITY COMMITMENT TO ENDING PRACTICES OF VIOLENT PROTEST

4. Violent protest is increasing in South Africa. The SAPS is too often left on its own to deal with conflict that others have a responsibility to prevent, mediate an/or resolve. Marikana was a stark, disgraceful example of this. It is recommended that the Commission advise the South African Government to consider carefully its own responsibilities in this regard, as well as the responsibilities of the broader community (religious groups, human rights organizations, unions, the business community) with respect to violence in society in general and in relation to violent protest in particular.

FORMALIZATION OF SPECIALIZED UNITS MANDATES AND FUNCTIONING

5. It is recommended that the Commission advises the South African government to formalize, in law, the existence, role, tasks, deployment and armament of SAPS specialized units. With the existence of TRT, NIU and STF there are clear issues of overlapping mandates and associated mission creep. A clear delineation of roles and responsibilities accompanied by clearly defined competency requirements of unit members should remedy currently existing problems as well as place these units under political and judicial supervision.

6. Large and special operations, in law enforcement, presuppose significant levels of knowledge, skill and experience in those who lead such operations. Individuals who do not meet those requirements must not be put/allowed into a position where they have to lead such operations. See also points 1 and 2 above.

PROVISION OF POLICY GUIDANCE FROM THE EXECUTIVE

7. Where large and special operations, (e.g. the Marikana protests) of high public interest / significance and / or present significant risks to safety and security, it is essential that clear policy guidance be given to the Police Service for the conduct of

its operations. This policy guidance should identify strategic objectives and formulate desired and acceptable outcomes of any such operations. That policy guidance should be provided in a timely manner and should be appropriately and securely recorded, preferable through real time audio and visual recording. Subject to security and other operational requirements it should also be made public. The latter two requirements will serve to minimize the risk of political or other interference in public order management. Equally it will serve to manage public expectations with regards to police capabilities and anticipated police responses.

SAPS AND IPID: RESOLUTION OF CONFLICTING MANDATES

8. The apparently conflicting/incompatible mandates of SAPS and IPID following shooting incidents involving police are of grave concern. It is recommended that steps be taken to resolve the mandates in a manner that serves justice and ensures prompt, thorough and impartial investigations, as well as protecting the rights of victims.

9. Public accountability on incidents of use of force and firearms must be part of SAPS organizational ethos. In any event it is recommended that SAPS establish and manage a data base for the collection of all relevant data relating to each shooting incident involving SAPS members.

Bangkok, 25 September 2014

Cees de Rover MBA, MIL(hons)

Annexure B3: Recommendations submitted to the Marikana Commission by Eddie Hendrickx

At the level of crowd management and POP operations I would recommend the following:

1. The current SAPS public order practices to be compared to the original SAPS on the 1996 – 2000 SAPS crowd management model in crowd management situations and how this model is to be implemented in all future crowd management operations.
2. Review the foundations of problem-solving levels of actual SAPS crowd management practice.
3. Review existing police practices within the framework of the SAPS 1996 - 2000 crowd management model.
4. Review levels of interaction between lessons learned on acutual operations and future actions.
5. Review strength and operational use of (number) of POP units
6. Crowd management operations (such as Marikana) should only be developed and implemented by trained POP members.
7. POP units should be confined to crowd management operations. In instances where POP services may be required elsewhere, an adequate POP reserve should be kept available at all times.
8. Specific POP training courses must be run for all commanders in POP. Operational commanders course, platoon commanders course, POP basic training to be reviewed based on findings of the commission
9. The implementation of a continuous learning programme for all members of the SAPS involved in POP.
10. Clear policy delineation between the roles and functions of the POP and the other units within ORS.
11. Make sure POP policy and training takes into account the realities of gathering (David Waddington)
12. All reviews to take the “UK Manual of guidance on keeping the peace 2010” in consideration

In relation to the operation at Marikana, I would recommend that:

13. The NPA be required as a matter of urgency to investigate the prosecution of those who were in command and those who fired shots.

I recommend specific attention to post incident management I would

14. Post incident management is a complex issue and it is paramount that police organizations have good procedures which manage and draw together all the key threads, operational, evidential, therapeutic including psychological debriefing (individual and group). This must also include media, organizational and political briefings and agreed process with any external independent Police oversight/ complaints investigation.
15. I would recommend a specific attention to debriefing crowd management operations
    a. Different events will require different types of debrief and each will need different focus:
        - Operational and tactical debrief to be based on crowd management model
        - Organizational debrief to be based on crowd management model
        - Evidential,
        - Emotional / post traumatic
    b. On emotional / post traumatic debriefs the following:
        - Prior to officers finishing duty, the senior supervisory officer should also consider if there are any outstanding issues which need to be addressed including issues of anger, fear, rumour management aimed at defusing any individual or group issues. This can be a short and informal process, but should be facilitated by trained people, which is why post incident processes and procedures should be part of the way the organization operates. The defusing process may assist officers and other staff to recognize and manage the reactions and feelings that they are experiencing or may experience as a result of what they have been involved in. Most modern police services also would

consider giving supporting the families of officers involved in very traumatic a situations. Also special or administrative leave should be considered in appropriate cases.

c. A full explanation of post traumatic responses (normal responses to abnormal situations) will be experienced my most people who are closely involved. Conventional thinking is that approximately 1/3 of persons who experience these responses will experience negative feelings and experiences for up to 3 days, the next third the responses may last for some time and may require professional (medical/trained therapeutic) assistance but 1/3 are likely to go on to suffer prolonged PTSD.

In relation to the current (re-)militarisation of the SAPS

16. Commissions of inquiry all over the world into the functioning of police organisations tend to find that there are a number of individual, organisational and environmental factors that contribute to the problem of police behaviour. One of these factors is the militarisation or re-miltarisation of the police. Therefore the following recommendations:
    a. An expert review of policing policy and practice within the SAPS be undertaken to identify and recommend specific action to be taken to ensure that the community policing approach is consolidated in the SAPS and that all characteristics of the military-bureaucratic policing model are removed from policing in South Africa.
    b. The organizational culture and subcultures of the police to be reviewed to assess the effects of what has been termed the militarization of the police" and in the words of the NDP, "the serial crises of top management."
    c. As soon as possible, all officers should undergo competency assessment and be rated accordingly. The NDP goes further to state that commissioned officers (i.e. police managers), should lose their commissions if they fail to meet the standards.

Annexure B4: Recommendations submitted to the Marikana Commission by Gary White MBE

PROPOSED RECOMMENDATIONS BY GARY WHITE MBE

INTRODUCTION

1. On 19 September 2014, I received a request from Mr Budlender SC for any proposals as to recommendations which the Commission should make in its Report with regard to policing in South Africa.

2. I should first note that I did not include any recommendations in my two written reports. I previously took the view that my focus was on 9 – 16 August 2012 and that I ought not to extrapolate from the failures of that week to assume more general failures within the SAPS. However, on reflection, in light of the totality of the evidence before the Commission, and given the request from Mr Budlender, I have set out below the recommendations I propose and would support.

3. The recommendations I have proposed should be read with the caveat that they are based on assumptions that certain issues identified in the SAPS operation of 9 – 16 August are systemic rather than 'one-off'. However, it is possible that in respect of some recommendations there may be evidence that was not placed before the Commission – or which I have not seen --- which requires the recommendation to be adjusted. For instance, where I have proposed a recommendation that certain training be provided by the SAPS, it may turn out that the type of training proposed already exists. In that case, I would suggest that the effectiveness and regularity of that training be reviewed because the recommendation emerges from clear and observed failures during the week of 9 – 16 August 2012.

4. In sum, I do not claim to propose these recommendations with a complete understanding of the internal workings of the SAPS. I make them based on my conclusions in relation to the SAPS operation at Marikana during the week of 9 – 16 August 2012 where I have judged that the problems identified appear to be of a systemic, rather than one-off nature.

5. I now turn to set out each of the recommendations I propose should be made by the Commission in relation to the SAPS.

PROPOSED RECOMMENDATIONS

Part 1: The appointment of an Implementation Oversight Body (IOB)

6. I am conscious that the SAHRC is one of several parties contributing to the Commission and I offer my proposed recommendations cognisant of the fact that other parties will do likewise and it will be for the Commission to consider and adopt or discard these proposed recommendations as it sees fit. Regardless of their source, however, I anticipate that there are likely to be a significant number of recommendations arising from the Commission that relate to the policing practices of the SAPS.

7. A key issue of concern will be to ensure that the recommendations made by the Commission to the President, and endorsed by the President, are in fact implemented by the SAPS and implemented promptly and satisfactorily.

8. In light of this, my first proposed recommendation is therefore that **an Implementation Oversight Body (IOB) should be created.**

9. I have some experience of such a body. In Northern Ireland, as part of the Peace Process, the Patten Report made 175 recommendations on policing in Northern Ireland.[689] Recommendations 172 – 175 involved the setting up of an independent Oversight Commission to ensure the implementation of all of the recommendations. The Oversight Commission was an effective body which monitored and ensured compliance with the Patten recommendations.[690]

10. In light of the Commission's recommendations, a similar body could be set up in South Africa. The exact composition and mandate of the body will be a matter for

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[689] Annexure GW1 to my Provisional Statement: see recommendations 172 --- 175

[690] The post of Oversight Commissioner was occupied by a retired senior Canadian police official. His team was given unrestricted access to the PSNI and related bodies to ensure implementation of the recommendations contained in the Patten Report. They also produced a monitoring framework for the 175 Recommendations of the Patten Report, and published a series of update reports regarding the PSNI's implementation of those recommendations.

the Commission, but – as a suggestion – it might have the following characteristics:

a. The life of the IOB should be time-limited and based on a realistic expectation of the time period required for the SAPS to implement the endorsed recommendations.

b. The IOB should be led by an Oversight Commissioner, of significant standing, experience and independence to ensure the compliance of SAPS, and other related actors, with effective and efficient implementation of the endorsed recommendations.

c. The IOB should have both technical policing and relevant legal expertise available to it.

d. There should also be representation on it from civil society organisations focussed on human rights, safety and security, policing, the use of force and the rule of law.

e. The IOB should report to the Presidency and the Minister of Police, as the executive authority of the SAPS, and should publish quarterly reports regarding its progress in the implementation of the endorsed recommendations by and within the SAPS.

11. In my view, an IOB is likely to be determinative of the successful implementation by the SAPS of any policing-related endorsed recommendations. It would not only ensure oversight of the implementation process, but provide additional, required expertise to the SAPS during the course of the implementation process.

12. Finally, an IOB would ensure the expeditious implementation of the Commission's recommendations and ensure effective interventions to improve the policing capabilities of the SAPS. This would ensure immediate steps to address the operational failures identified at Marikana.

Part 2: Accountability as the cornerstone of the proposed recommendations

13. Related to the need for an IOB, is the question of accountability within the

SAPS. In my extensive engagement with the evidence relating to the SAPS' Marikana operation I have concluded that the evidence indicates **an absence of a culture of accountability operating within the SAPS**. This lack of accountability, in my opinion, was a key causal driver of the outcome of the operation.

14. It is therefore inappropriate to make one or two simple recommendations to address the evident lack of accountability within the SAPS, given that substantial organisational changes are required in order to impact on the prevailing mindset evident within the organisation.

15. In my supplementary statement I noted that during my 30 years of policing, I witnessed a significant cultural change in relation to the use of higher levels of force by police in Northern Ireland. I believe that that cultural shift was significantly driven by the consequence of increasingly robust accountability mechanisms. A prerequisite to instilling an accountability-based culture in any police service is the existence and utilisation of internal processes wherein members' actions are recorded contemporaneously, and open to scrutiny. The knowledge of the inevitable scrutiny of one's actions, and being held responsible for them, create a culture of accountability from a culture of impunity or indifference.

16. I would therefore highlight the following minimum requirements to attempt to change the organisational culture and mindset exhibited by the SAPS,[691] including:

a. **The introduction of decision-making logs to record all planning and operational decisions by those in command of major public order/ protest operations.** These logs would be disclosed to IPID and in any subsequent court proceedings. Ensuring that such logs are maintained would be the responsibility of the officer in overall command, but it also extends to other members in the command structure. These logs are not the same as the records already maintained in Occurrence Books or minutes of JOCCOM meetings. They exist to record the fact and rationale for decision-making. It is essential that key decisions are recorded, including the rationale for those decisions and, crucially,

[691] As I noted above, some of these may already exist. I list them all to set out the minimum standard to be met. If the measures already exist, then their implementation should be reviewed.

the rationale for excluding alternative tactics or course of action. The recording of decisions and rationales will also require those in decision-making roles to take responsibility for their own decisions.

b. **All police officers and police vehicles should carry immediately obvious identification numbers**. Often police officers in public order uniforms appear anonymous due to the protective equipment that they wear. Individual identification numbers or names should be overtly displayed on uniforms **and** helmets. Vehicles should be marked on the side, the rear and on the roof;

c. **The SAPS should introduce a system to monitor the use of force by its members**. All use of force by officers, whether firearms or less-than-lethal options such as rubber rounds, water cannon and teargas, should be recorded and entered onto a central database. This should also extend to officers using equipment such as batons and handcuffs in the ordinary course of their patrol duties. The database should be maintained by a Professional Standards Department within the SAPS, responsible for 'tracking and trending' officers who regularly appear to be using force – and highlighting this to local command for remedial action;

d. **The SAPS should introduce or amend existing disciplinary codes to include the 'duty of supervisors', which creates a vicarious liability for the actions of those who are under the command of supervisory and officer ranks**. Such an approach extends accountability for actions beyond the officer themselves. It places an additional responsibility on those in supervisory or command positions for the actions of those who work for them;

e. **The SAPS should ensure that any firearms and ammunition issued to officers can be forensically matched**. All firearms issued by SAPS should be pre-fired and have the forensic signature recorded, so that, in any subsequent firing, bullets can be linked to individual weapons. For a related reason, weapons systems where this is not possible should not be used;

f. **The SAPS should introduce robust systems of accounting for firearms and ammunition issued to individual officers**. Throughout the evidence supplied by SAPS, there are numerous examples of officers who are not aware of the number of rounds that they have fired. This suggests that there is no robust

mechanism in place requiring officers to account for equipment that they have been issued with. Supervisors should be required to inspect and record all equipment relating to the use of force and particularly 'live rounds';

g. **The SAPS should introduce a system to record all radio transmissions**. The evidence before the Commission contains a number of occasions involving disputes over what had been said in various radio transmissions. The ability to retrieve radio communications after an event would be of significant benefit in any post-incident review, including identifying good practice;

h. **Consideration should be given to introducing a 'Post-Incident Management' regime.** This would assist in resolving disputes and contradictions in the roles of the SAPS and IPID following an operation, ensuring that officers' rights are protected but equally providing for the earliest possible securing of evidence. Officers, like any other person who might be suspected of being responsible for a crime, have rights. However, as police officers they have a professional duty to assist by providing early explanations of their actions. A PIM regime, on the basis of an agreed operating procedures between the two organisations, can help to avoid some of the difficulties and seeming conflicts as to the sequence in which each organisation undertakes investigation of and establishes accountability for an operation – as have been highlighted between the SAPS and IPID during the Commission;

i. **SAPS members should be properly trained in their obligations for providing evidence**. A startling feature of the evidence placed before the Commission by the SAPS was the generally poor quality of the statements provided by members present at Marikana in August 2012. It has been suggested by the SAPS that this was as a result of these statements being 'warning statements' by officers who were being investigated by IPID. However, this does not explain the many instances where members who did not fire during the operation, but were present where and when other members did use lethal force, provided statements that do no more than simply record that fact. There is a legal and professional obligation on police officers to provide comprehensive, legally relevant and material evidence of what they witnessed, in addition to what is arguably a moral obligation to their colleagues to provide corroboration to justify

their use of the highest levels of force. The absence of such evidence, and the generally poor quality of the undetailed, cursory statements, even from senior officers, requires remedial measures.

j. **The tactic of 'armed police officers forming a baseline' in public order policing operations requires to be urgently reconsidered by the SAPS.** The justification for such a tactic is difficult to understand and the likely outcome could have been easily anticipated. It is not clear what this tactic sought to achieve, when it actually placed officers at a heightened level of risk. This recommendation is included within this section because as currently configured, the tactic of armed officers forming a baseline in circumstances similar to those at Marikana would lead to a large number of officers perceiving the same threat at the same time and therefore being likely to respond to that. When police are planning for an event where the risk of having to use lethal force is high, all measures must be taken in order to avoid having to use such. However, when lethal force is required to be used by police, there needs to be a clear line of responsibility from the officer in command of the operation right down to the 'person pulling the trigger'. Those who approved such a tactic must be accountable for that approval.

17. These recommendations would be a starting point in ensuring that accountability is enhanced and entrenched within the SAPS. Beyond these measures, **strong and consistent leadership which sets transparency and accountability as key objectives for the SAPS** will also be required.

Part 3: Planning-related recommendations

18. In my review of the evidence before the Commission, I identified clear failures of planning by the SAPS, which contributed to the tragic outcome at Marikana on 16 August 2012. These include that:

a. The officer in overall command of the operation, Lt Gen Mbombo,[692] had no relevant public order policing experience;

[692] As I have said consistently, she may not have been the 'Overall Commander' for the purposes of SO.262, but she was clearly in overall command.

b. The officer given responsibility for planning had limited experience in public order policing operations and no knowledge of the SAPS policy in policing of protests;

c. Very few of the senior command team for this operation had recent and relevant training in respect of the policing of protests;

d. Critical decisions were taken without reference to what had been 'planned' and therefore what was reasonably foreseeable;

e. A direction to initiate 'Stage 3' came from the Provincial Commissioner before it had been planned by Lt Col Scott;

f. This critical decision resulted in an unrealistic timeframe being imposed that prevented proper planning;

g. No critical examination took place of the plan in the form of a 'challenge process' to the efforts of the planning team; and

h. Fundamental errors based on a misunderstanding of crowd behaviour and dynamics were included in the plan.

19. For these reasons, I propose that the Commission recommend that **a strategic review should be undertaken relating to the planning model utilised by the SAPS for major public order operations.** This would not simply be a review of SO.262, which I have concluded is broadly acceptable as a public order policing policy framework. Instead, it should include a review of policy, training, the selection of commanders and the creation of a system to monitor and evaluate performance of commanders while in that crucial role.

20. I would anticipate that the outcomes of such a review could encompass:

a. A recommended command structure for major public order operations;

b. An approved planning model, including planning components such as intelligence, risk assessment, the applicable legal framework, the available and acceptable tactical options, and the process by which a plan is challenged through adversarial testing before adoption;

c. Development of specific training courses for officers tasked with planning public order operations, as well as for those who command such operations; and

d. The creation of specialist support including tactical advisors in a range of disciplines that may be relevant to public order policing of a particular operation, such as negotiation, public order crowd dynamics, and firearms.

21. Best practice public order policing policy needs to be supported by a planning process that ensures that the correct personnel:

a. Are selected for the appropriate and required operational roles;

b. Undertake regular and updated training for those roles; and

c. Are then subjected to some form of evaluation of their performance within that role.

22. The identification of the commander of an operation, and the articulation of clear expectations of that role, will improve planning of any given operation. Such a planning model should ensure that the commander's objectives are met, in the most effective and situationally-appropriate manner. It should ensure flexibility, while satisfying best planning practice.

Part 4: Intelligence-related recommendations

23. In my review of the evidence before the Commission, I identified key failings in respect of the intelligence system utilised by the SAPS at Marikana. Notwithstanding the fact that intelligence was difficult to cultivate due to the operating environment, the key failings I identified throughout the evidence supplied by the SAPS included:

a. The fact that only 10 entries were recorded on TT5 ------ the composite of all intelligence gathered for the operation at Marikana ------ and that only 2 or 3 of these entries related to actionable intelligence;

b. Potential intelligence-gathering opportunities available to the SAPS were not followed up on;

c. On occasion, actionable intelligence was passed to key commanders, but was not properly responded to in their planning or command of the operation;

d. The failure to respond to – or follow up on – specific intelligence requirements issued by the chief planner, Lt Col Scott.

e. The failure by the overall strategic commander (Provincial Commissioner) to engage with the most up-to-date intelligence before taking mission-critical decisions; and

f. Critical decisions in the operation were made contrary to what the intelligence (limited as it was) was suggesting, such as the decision to implement the tactical phase of the operation when the intelligence indicated the risks and likelihood of violence.

24. All of these intelligence-related failures underscore for me the need for a review of the role played by intelligence, and intelligence-gathering processes, in the planning and execution of public order policing operations in the future.

25. I recommend that **a review should be undertaken regarding the role of intelligence in the planning and execution of all major operations.** This should include examination of:

a. The current operating procedures and systems of the SAPS intelligence department or units;

b. The role that these intelligence units play in the planning by SAPS for major public order policing operations;

c. The intelligence tasking methodologies and priorities employed by these units relating to public order policing; and

d. Crucially, the systems required to ensure that intelligence produced is shared with those charged with the planning, operational command and post-incident investigation of public order policing operations.

26. I propose this review since all major policing operations should be intelligence-led in order to ensure the adoption of appropriate strategic objectives, tactical plans that are consistent with such objectives and proportionate operational tactics.

Part 5: Briefing-related recommendations

27. My evidence before the Commission highlighted the ample evidence of insufficient briefing to officers as one of the contributory factors leading to the operational failures evident in the events of both the 13th and 16th August 2012 at Marikana. This included evidence of:

a. Officers not being briefed at all regarding their role in the operation;

b. Officers' misunderstanding of even the fundamental features of the stage 3 operation;

c. Inadequate time made available for briefing;

d. Inappropriate environment for briefing;

e. Lack of necessary detail contained within the briefing;

f. No written notes from which briefing was conducted nor a written record of what various units were told during the briefing; and

g. No video record of 'mission critical' briefings.

28. I propose a recommendation that the **SAPS should develop and adopt a structured briefing model, to be used in all significant public order/ protest operations.** This structure should be incorporated into written operational orders and the briefing model should set out the key areas that are required to be covered in any operational briefing. Training in support of this model should highlight good practice in how to deliver briefings and the minimum requirements regarding how briefings are to be recorded or documented, as well as to provide for the necessary testing of the levels of understanding of members following receipt of a briefing.

29. Developing and adopting a structured briefing model will ensure that SAPS briefings are comprehensive and consistent, covering all of the necessary components of an operation effectively and efficiently. Structured briefing strives to minimise confusion about roles, expectations and operational details, and seeks to ensure clarity and discipline in the communication of a given plan to the SAPS members required to implement it.

Part 6: Command and control-related recommendations

30. My engagement with the evidence before the Commission confirms that there

was inadequate command and control. There was no clear strategy that was informing the actions of the police on the ground. Despite the fact that a 'command structure' had been put in place, critical decisions were made outside of that structure, notably at the National Management Forum.

31. This resulted in a dislocation between those officers who, in fact, were directing the operation and identifying its strategic aim, and those officers who were involved in more detailed planning for the operation. As highlighted in my supplementary statement, I remain of the view that it was entirely appropriate that the Provincial Commissioner delegated the task of planning to more junior officers who had planning experience; however, her lack of engagement with the planning process contributed to the failure of the operation as she was not sufficiently informed of the risks of the proposed operation or the tactics that the SAPS intended to employ.

32. In addition, the events following Scene 1 appeared to show a complete breakdown in command and control, including failures in the JOC, by the Overall Commander, by the Operational Commander, and by individual unit commanders. It also appears that the Operational Commander was overwhelmed with the scope of command required of multiple units across an expansive operational terrain.

33. I propose that **the SAPS should carry out research with the aim of identifying or building a command and control model, which is fit for purpose for major public order policing or protest-related operations.** The model should identify responsibilities for separate levels of command, the limits of those responsibilities and the relationships between each level of command.

34. This research and development of a command and control model is necessary since, in any significant public order policing operation, it is important that the officer in overall command clearly sets out the aim of the operation and the strategy for achieving that articulated aim. The members occupying the other levels of command in a given operation will then be required to operationalize the announced strategy and develop a tactical plan in keeping with that aim. The tactical plan, in turn, will inform the operational activity of commanders on the ground.

35. I would consider an appropriate or 'fit for purpose' command and control model

as one that includes at least:

a A strategic commander, who provides the overall aim, delineates the style of the operation, sets its tactical parameters and then remains sufficiently engaged so as to satisfy themselves that the plan meets their requirements and also is able to adjust and amend the strategy as circumstances during the operation significantly change;

b The appointment of experienced and qualified personnel in key positions, responsible for developing the tactical plan in accordance with best (SAPS) practice;

c The appointment of experienced ground commanders who will be in charge of specified resources and required to fulfil a specified purpose;

d A command protocol which defines the relationship between the various commanders, i.e. the limits of their responsibility, the extent to which they have command authority and the issues regarding which they will be required to seek approval from their superior officers.

Part 7: Training-related recommendations

36. Having engaged with the evidence presented to the Commission, my view is that the failure of the operation at Marikana can be principally attributed to the issues highlighted above. However, issues relating to deficiencies in the training (and equipment) available to and utilised by the SAPS also may have contributed to that failure. There is clear evidence of inadequate training of POP members and commanders, as well as clear evidence of inadequate firearms training.

37. Accordingly, I propose a recommendation that **a strategic review into the adequacy and effectiveness of the SAPS training regime be undertaken.** That regime should have the protection of human rights as a core theme present in all training courses and would go beyond a simple module on any particular course. Rather, it should be a visible philosophy guiding all actions of the police, from operational planning, the use of force and tactical considerations through to how operational outcomes are investigated after the fact.

38. With respect to the **training for command level officers**, I propose a

recommendation that all officers who command significant public order operations must undergo role-specific training. This should focus on issues such as setting strategic operational objectives, the role of stakeholders and negotiated settlements, media engagement, minimum use of force principles, the use of a planning model, accountability and audit trails.

39. With respect to the **training for officers involved in planning operations**, I propose a recommendation that this training should cover issues such as tactical awareness, the use of specialist resources, the use of a structured planning model, minimum use of force principles, the use of structured briefing and debriefing models, contingency planning, accountability and audit trails.

40. With respect to the **training for operational officers**, including platoon commanders, I propose a recommendation that this training include scenario-based lessons, which introduce a judgemental element particularly with regards to the use of force. Operational officers must have the opportunity to learn not only in a classroom environment, but also through practical, field-based exercises. Officers who will be required to command multiple units and a variety of specialisms should have the opportunity to train in simulated practical scenarios.

41. With respect to **firearms training and training in the use of less-than-lethal options**, I propose a recommendation of training premised on the principle that the use of potentially lethal force by law enforcement agencies should be a last resort and a matter of absolute necessity, to be avoided whenever possible. Training in relation to the use of firearms should therefore reflect this exacting standard. Training must go beyond simple target practice. It must include legal and policy instruction. Crucially, it must also include practical training which includes judgemental aspects of the use of force; i.e. distinguishing between threats and non-threats in high stress situations. Similarly, training for the use of less-than-lethal options must reflect the considerations that need to be in place before recourse to such use of force can be justified.

42. Further, for the reasons set out in my Final Statement, **firearms officers should be provided with the basic first aid skills needed to deal with gunshot wounds.**

43. Finally, in respect of all training, the **SAPS must ensure that all members**

continue to update and refresh their training at regular periods. SAPS should set specific continuous professional development requirements for members of each rank and should monitor compliance with those requirements, with disciplinary consequences for failure to meet them.

Part 8: Equipment and resources recommendations

44. The better protected officers are, the less need they will have to resort to the use of force to defend themselves in a public order policing operation. I therefore propose that the Commission recommend **that a review is undertaken by the SAPS regarding the protective equipment available to officers and utilised by them in dealing with public order policing operations.**

45. Moreover, I confirm my view that the R5 rifles carried by the SAPS at Marikana have no place in the policing of public order events and should be withdrawn immediately. Further, any replacement weapons system should not be capable of 'automatic fire' mode.

46. In addition, I propose a recommendation that **SAPS conduct research in order to identify alternative 'less-than-lethal' options to replace inaccurate and indiscriminate rubber rounds** used at Marikana.

47. Furthermore, I propose a recommendation that **consideration should be given by the SAPS to equipping all officers in POP Units with personal radios to enhance command and control.** Modern radio systems will normally have a provision to allow for an 'override facility', to enable emergency calls for assistance, or to allow for those in command to have priority during heavy radio traffic. Training in radio discipline will also assist in this regard.

CONCLUSIONS

48. I summary, I make the following proposals for recommendations:

(1) An Implementation Oversight Body (IOB) should be created to ensure compliance with the recommendations of the Commission;

(2) In order to improve accountability within the SAPS, the following steps

should be implemented, at a minimum:

a. Decision-making logs should be introduced to record all planning and operational decisions by those in command of major public order/ protest operations.

b. All police officers and police vehicles should be immediately identifiable through obvious identification numbers or names.

c. A system to monitor the use of force by SAPS members should be introduced in order to 'track and trend' officers who regularly use force.

d. The SAPS should introduce or amend its existing disciplinary code to include the 'duty of supervisors', which creates a vicarious liability for the actions of those who are under the command of supervisory and officer ranks.

e. The SAPS should ensure that any firearms and ammunition issued to officers can be forensically matched to each other and to any body.

f. The SAPS should introduce robust systems of accounting for firearms and ammunition issued to individual officers.

g. The SAPS should introduce a system to record all radio transmissions.

h. Consideration should be given to introducing a 'Post-Incident Management' regime.

i. SAPS members should be properly trained in their obligations for providing evidence.

j. The tactic of 'armed police officers forming a baseline' in public order policing operations requires to be urgently reconsidered by the SAPS.

(3) In order to improve accountability in the SAPS, the SAPS leadership should be mandated to bring transparency and accountability to the heart of SAPS culture and ensure that it permeates SAPS policies and practice.

(4) In relation to operational matters, strategic reviews should be undertaken in order to ensure best practice in:

a. The planning model utilised by the SAPS for major public order operations;

b. The gathering and use of intelligence in the planning and execution of major

operations;

c. The briefing model used in all major operations;

d. The command and control model used in major public order operations.

(5) A strategic review into the adequacy and effectiveness of the SAPS training regime must be undertaken, to ensure that:

a. Human rights is a core theme throughout all training;

b. Those involved at all levels of public order operations are sufficiently trained for the purpose;

c. Firearms training incorporates legal and policy instruction, and incorporates practical judgement-based scenario training;

d. Firearms officers are provided with first aid training sufficient to provide basic first aid for those with gunshot wounds;

e. Continuing professional development requirements for all members are published and monitored, with disciplinary consequences for non-compliance.

(6) In relation to equipment and resources:

a. A review should be undertaken by the SAPS regarding the protective equipment available to officers and utilised by them in dealing with public order policing operations.

b. R5 rifles should be withdrawn from use in public order events with immediate effect. Further, any replacement weapons system should not be capable of 'automatic fire' mode.

c. SAPS should conduct research in order to identify alternative 'less-than-lethal' options to replace inaccurate and indiscriminate rubber rounds.

d. Consideration should be given by the SAPS to equipping all officers in POP Units with personal radios to enhance command and control.

GARY WHITE MBE

15 October 2014

Annexure B5: Recommendations submitted to the Marikana Commission by David Bruce

SUBMISSION BY ROBERT DAVID BRUCE
(27 October 2014)

Introduction

1. I am an adult male freelance researcher. I wish to make a submission to the Marikana Commission on the 'structural or systemic policing issues' highlighted by the events in Marikana that should be addressed in order to avoid further events of this kind.
2. My focus is on the events of the afternoon of the 16th of August 2012 in which 34 people were killed and many others injured, a number of them having suffered permanent disabilities as a result.
3. In line with the Commission's preference regarding 'neutral' terminology the events during the afternoon of 16th August 2012 are referred to in this submission as 'the Marikana incident'.
4. I make this submission in my capacity as an expert on police and the use of force in South Africa. My qualifications and experience in this regard are set out below.

BASIS FOR MY SUBMISSION TO THE COMMISSION

5. I heard about the incident at Marikana through news media on the evening of 16th August 2012. Related to my ongoing professional interest in questions about the use of force by police in South Africa I took an extensive interest in the incident. I have had an ongoing professional relationship with the African Policing Civilian Oversight Forum and was asked by them to put together an analytical piece responding to the incident. My first analysis of the incident was published on Friday 24th August.[693] Over the following five months I

[693] Marikana: Disastrous crowd control led to mayhem, Mail & Guardian, 24 August 2012, http://mg.co.za/article/2012-08-24-00-marikana-disastrous-crowd-control-led-to-mayhem

published various other press articles in relation to the Marikana incident.[694] A longer article of mine was also published on the website www.mampoer.org.za.[695] I also assisted the Council for the Advancement of the South African Constitution (CASAC) with the preparation of their submission to the Marikana Commission.

6. The main focus of this work was on:

    a. Using information that was available in the public domain, including press reports and video material available online, to try to make sense of what had happened in Marikana on the 16th of August including understanding in what ways events over the previous week might have influenced the events on that day; and

    b. Considering ways in which the promotion by government officials of the aggressive use of force by police, including a 'doctrine of maximum force' that was being put forward by then Minister of Police, might have influenced the course of events in Marikana on the 16th of August.

7. Since the beginning of 2013 I have continued to take an interest in and keep up to date with developments in the Commission.

    a. I have followed coverage of the commission in the news media as well as engaging with some of the testimony that has been presented to the commission including reading some transcripts and some of the expert submissions to the commission.

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[694] *The Truth About Marikana, Sunday Times, 9 September 2012; Justice for Marikana: Farlam Commission Not Up to the Task, South African Civil Society Information Service, 14 September 2012, http://www.sacsis.org.za/site/article/1425; Who Murdered NUM Branch Secretary Daluvuyo Bongo? South African Civil Society Information Service, 29 October 2012, http://www.sacsis.org.za/site/article/1471 (also published in the Daily Maverick, www.dailymaverick.co.za, 2 November 2012); The Road to Marikana: Abuses of Force During Public Order Policing Operations, South African Civil Society Information Service, 12 October 2012 http://www.sacsis.org.za/site/article/1455; Dag van brute mag, Rapport, 28 October 2012 http://152.111.1.87/argief/berigte/rapport/2012/10/29/RH/III/RH003-StoryA.html; A template for marikana was made in Ermelo a year ago, Business Day, 5 November 2012, http://www.bdlive.co.za/opinion/2012/11/05/a-template-for-marikana-was-made-in-ermelo-a-year-ago; Marikana not Ramaphosa's finest moment, Mail & Guardian, 18 January 2013 http://mg.co.za/article/2013-01-18-00-marikana-not-ramaphosas-finest-moment.*

[695] Marikana and the doctrine of maximum force, 2012, http://www.mampoer.co.za/david-bruce/24-marikana

b. I have read, in part or in their entirety, transcripts relating to the evidence and cross-examination of various witnesses:
    i. Mr Nathi Mthethwa
    ii. Mr Shadrack Mtshamba
    iii. Mr Cees de Rover
    iv. Lieutenant Colonel Vermaak
c. I have also studied submissions by various expert witnesses to the commission including
    i. The final submission of Mr Hendrickx
    ii. The statement and supplementary statement of Mr Cees de Rover.
    iii. The final submission of Mr White MBE as well as Mr White's responses to the statements and supplementary statement of Mr de Rover and responses to written questions put to him by the SAPS.
    iv. The submission by Dr Johan Burger of the Institute for Security Studies (ISS) headed 'The militarization of the South African Police Service and Possible Implications for Public Order Policing'.
    v. The statement of Gareth Newham of the ISS.
d. I have also read, in part or in their entirety, written statements by some members of the SAPS including, but not limited to, those of Colonel Duncan Scott, Major-General Mpembe and Hendrich Wouter Myburgh.
e. I have watched audio-visual material on the Marikana incident including the film Miners Shot Down.
f. I have on occasions engaged with members of the legal teams or other officials associated with the commission about specific points or issues related to the work of the commission.

g. During 2013 I also carried out a survey of information in the public domain on ‘tactical units’ in the SAPS (the Special Task Force, the National Intervention Unit, the Tactical Response Teams).

h. During 2014 I have worked with professor Monique Marks on an article on public order policing in South Africa since 1994. This process has also involved considerable reflection on the Marikana incident and to what degree it can be accounted for in terms of this history.

i. Whilst preparing this submission I circulated an email message to a range of South African analysts and academics with expertise in the policing field. In the email I asked for any suggestions or comments relating to the topic of the submission. I received comments from Lukas Muntingh, Monique Marks, Andrew Faull, Johan Burger and Gareth Newham. Gwenaelle Dereymaeker also sent me the draft of a paper on the subject of impunity of law enforcement officials for my consideration. I have drawn on these inputs where, in my judgement, they seem relevant to the submission. However the submission reflects my own perspective of the issues raised by the Marikana incident.

8. I would like to emphasise that I am not familiar with the totality of evidence that has been put before the commission. Nevertheless I have made an ongoing effort to keep up to date with what is happening in the commission and to take note of significant evidence and developments.

THIS SUBMISSION

9. As indicated this submission focuses on ‘structural or systemic policing issues’ highlighted by the events in Marikana that need to be addressed in order to avoid a repetition of <u>incidents of this kind</u>.

    a. In paragraph 73 below I present an argument on how ‘incidents of this kind’ should be understood. It is argued that the Marikana incident raises systemic issues about the use of force by the SAPS generally and not only in relation to public order policing situations.

10. The need for systemic' issues to be addressed was motivated for by Mr de Rover in saying that there is need to examine issues on 'the level of how the police organises as an organisation, how it trains its personnel, what it teaches them, to what standards it holds them, how it is managed and who does the managing' as well as to 'go one level higher … and say that those that exercise authority over the police in government, there needs to be a structure to how police receive policy direction that goes beyond a phone call to a PC on a mobile, those are not I think the types of auditable trails you'd be looking for if afterwards you need to render account.[696]

    a. In relation to Mr de Rover's point I would like to suggest that it may be most productive to conceive of the key 'systemic' issues as issues relevant to the management of the use of force by the South African Police Service.

11. The Open Society Foundation for South Africa have kindly agreed to provide me with financial support in order to do this work. However the arguments and opinions presented here are my own arguments and not those of OSFSA.

12. The purpose of this submission is not to persuade the commission as to how to interpret the facts relating to the events in Marikana in August 2012. However my analysis of the 'structural or systemic policing issues' that are relevant to understanding the Marikana incident is directly linked to my current understanding of evidence and information relating to the incident. I have therefore set out my understanding of the evidence in order to assess what recommendations regarding systemic policing issues may be regarded as relevant. In so far as the Commission reaches conclusions about the facts that are different from my own, or believes that the available evidence does not support my interpretation of the facts, this may affect its view on the relevance of certain recommendations that are motivated for in this submission.

    a. Related to this point, the submission is not concerned with motivating or persuading the commission about the culpability of one or other

[696] Transcripts, day 285, pages 36983-84

person or party. In so far as there are arguments about culpability or responsibility they are provided because they are believed to be relevant to the analysis of ‘structural or systemic policing issues’.

UNDERSTANDING OF THE EVENTS AT MARIKANA LEADING TO THE DEATHS ON 16th AUGUST 2012

13. Linked to the information and evidence that I have been exposed to my understanding is that the following points are a reasonable assessment of what is known about the Marikana incident.

14. There were several incidents of violence from at least Saturday 11 August onwards, prior to the 16th of August including:

    a. An incident on the 11th where a group of miners were fired at, with at least two of them being injured, by people at or near the NUM office in Marikana.

    b. On 12th August two security guards and two mine employees at one of the shafts were killed. My understanding is that these killings are believed to have been carried out by people associated with the group of miners who were on strike though I have not encountered specific evidence on this point.

    c. On 13th August there was a confrontation between members of the SAPS and a group of miners. Two SAPS members and three miners were killed at or near the scene of this confrontation.

    d. On 14th August a body was discovered near ‘koppie 1’. Koppie 1 had become established as a gathering point for the miners who were on strike.

15. My impression is that these incidents of violence are relevant to understanding the course of events on the 15th and 16th of August in the following specific ways:

    a. They are relevant to understanding the fact that the miners were heavily armed.

b. They are relevant to understanding the state of mind of rank-and-file police who participated in the Marikana incident (and possibly some of those at a command level). Related above all to the killing of SAPS members, many of the rank and file police who were present at Marikana on the 16th were frightened of the miners and of having to engage with them at close-quarters.

    i. This fear may have predisposed some of them to seeing (interpreting) the group of miners who were running towards them at koppie 1 as being involved in an attack.

    ii. In addition to fearing the miners it appears likely that attitudes of a vindictive nature also influenced the actions of the police. On a rank-and-file level these vindictive attitudes amongst police may have been an expression of fear combined with the perception that the miners were hostile towards them. This fear may also have fed into a vindictive orientation towards the miners illustrated by the alleged statement by the evidence that one of the police officers at 'scene 2' said that the miners 'deserve to die' after shooting one of them.[697]

    iii. My view that it is likely that many police were afraid of the miners and held 'vindictive attitudes' towards them might be seen to be linked to what Mr White refers to as 'Evidence of a mindset which treated the crowd as a single violent entity rather than a grouping of distinct individuals'.[698] (see further section 4.5 to check)

    iv. In relation to the state of mind of police who participated in the operation it is also worthwhile to take note of the observation that after the incident on Monday the 13th of August 'The evidence of Major General Mpembe suggests that the "cooling-off" period was not catered for with premature psychological assessments being undertaken and SAPS members being

[697] Statement of Henrich Wouter Myburgh
[698] White, final, 4.1.3(c)

redeployed on Thursday, 16 August 2012.[699] Some of those who were redeployed may have been suffering trauma as a result of the incident on the 13th.

c. The incidents of violence are relevant to understanding the fact that the operation came to be defined as a 'hybrid' operation and related to this, the planning of the operation was taken out of the hands of the POP commanders who were at Marikana.

d. They are relevant to understanding how the decision to bring an end to the strike, despite the likelihood that this would result in death or injury, may have been rationalised – as opposed to the actual motivation of the decision. The word rationalisation is used here deliberately to distinguish this from the motivation for the decision. My understanding is that no clearly defined motivation for the decision was articulated by any senior member of the SAPS prior to the operation. The motivation for the decision appears to have been political in nature rather than based on considerations to do with the effective policing of the situation.

    i. It also appears likely that vindictive attitudes also had an influence on this decision-making process. These vindictive attitudes are likely to have been given energy by a process through which the miners collectively had come to be labelled as 'violent' and 'criminals'. Since at least [July] 2011 the Minister of Police had stated repeatedly that 'violent criminals' should be dealt with by means of 'maximum force.' It appears likely that the Minister would have labelled the miners as 'violent criminals' partlcularly as his communications with Mr Ramaphosa and Ms Shabangu are likely to have supported labelling them in this way.

e. The incidents of violence are also relevant to understanding the Lonmin decision not to negotiate with the rock drill operators. It is

[699] Hendricks, final, para 43 (p 21).

possible that there were a number of motivations for this (e.g. the desire to ensure that AMCU did not gain credibility and to protect the position of the NUM). The fact that some of the miners had been linked to acts of violence may therefore have served more as a rationalisation than a motivation for this decision. On the other hand Lonmin executives might have felt that it would be inappropriate to negotiate with the miners because of the violence.

16. It appears that police attempts to negotiate a resolution to the situation were obstructed partly due to the inflexible approach adopted by Lonmin management. In so far as it is true that people at a (political and/or police) leadership level held vindictive attitudes it may be noted that, notwithstanding the fact that it was to some degree Lonmin who obstructed efforts to resolve the situation, these vindictive attitudes were directed towards the miners as being 'morally blameworthy'. Factors that resulted in the vindictive attitudes being directed towards the miners may have included:

    a. The preceding incidents of violence, the attribution of the violence to the strikers (though they had also been victims of violence) and related perceptions that the miners as a group were 'violent' or 'violent criminals'.

    b. Related to this the fact that a number of the miners were armed.

    c. Intelligence and other information indicating that the miners were willing to resist police efforts to disarm or disperse them.

    d. Racial and/or class bias.

17. My understanding is that it is a necessary inference that the decision to launch the police operation on the 16th of August 2012 was influenced by and endorsed by political role-players and essentially amounted to a directive from the executive to terminate the strike.

    a. My submission allows for the possibility that the Commission may not conclude that the decision was influenced by political role-players. In the relevant section of the submission two 'scenarios' are outlined one

of them being consistent with what I understand to be the government and SAPS account of the decision making process

18. Those who made the decision, and particularly the senior leaders of the police who instructed police commanders to carry out the operation on the 16th, were aware that the group of SAPS personnel in Marikana included a large group of members of the tactical units who were armed with automatic rifles. Confidence that the police would get the upper hand over the miners was partly based on the knowledge that the SAPS would be able to rely on these units. Related to this those who made this decision knew that the operation would involve a high risk that police would be involved in a confrontation with the miners and that there was a high risk of injury and loss of life. Possibly as a result of the role played by vindictive attitudes, and political considerations which created a sense of urgency around bringing an end to the situation, they did not concern themselves with or gave limited attention to the fact that other options remained open to them. The course of action that was taken was therefore guided by a reckless attitude with respect to its potential consequences rather than a careful consideration of different options and the selection of options that were least likely to result in death and injury.

    a. Although they knew there was the likelihood of death and injury the politicians and/or senior police leaders involved probably did not anticipate the scale of loss of life and injury that ensued. They may therefore have assumed that whatever happened would be easy to justify or rationalise to the public.

19. The plan for the operation had to be developed at very short notice and was hastily put together and only very briefly discussed by those responsible for implementing the operation. There was very little or no detailed planning and preparation for the operation.

20. When the miners started moving down from ‘koppie 1’ related to the deployment of the barbed wire:

    a. POP members fired at them with rubber bullets, tear gas and stun grenades but were unable to successfully deter the miners from moving forward

b. During his evidence before the commission Mr de Rover stated that: I think that SAPS' use of teargas and stun grenades is more aimed at maintaining that separation between police and protesters, and I see much more, like knowing that and knowing that preference from speaking to them, that I see the use of that teargas and those stun grenades there as POP members trying to have that safety barrier between them and the demonstrators.[700]

c. My understanding of Mr de Rovers evidence is that he is saying that it is established practise for POP units to try and maintain a distance between themselves and protestors and the teargas and stun grenades were used for this purpose. My impression is that this is correct. However an additional motivation may have been that the police were afraid of the miners.

21. My understanding is that the actions by the POP units and police personnel in the Nyalas propelled the miners into running towards the line of TRT members and that the miners were not launching an attack on the police at scene 1.

    a. I have tried to maintain an open mind on issues regarding the Marikana incident and remain open to arguments that this may be the incorrect interpretation. However my impression from reading the transcripts of day 285 of the Commission hearings (the cross-examination of Mr de Rover by Adv le Roux) is that this was demonstrated very persuasively.

    b. The arguments in my submission are largely not dependent on this conclusion.

22. My impression is that some of the police who fired at the miners genuinely believed they were being attacked. However the Commission has not been presented with clear information indicating which SAPS members genuinely believed they were being attacked. It may have been very few of them or a relatively large number.

[700] Transcripts, day 286, page 37116

a. My understanding here is consistent with the statement by Mr de Rover that: 'Due to police training, conditioning and indoctrination, discharge of a firearm by one police officer against a perceived threat to life or serious injury, may well trigger support fire from officers at the scene, without they themselves at that stage having fully perceived the threat themselves (associative threat presumption). 'My colleague is under attack, my duty is to back him/her up, in order to protect his/her life'.[701]

b. However I suspect that the 'internal mental process' that shapes actions of this kind in the South Africa context may also be related to thinking that 'I may be punished or ostracised for not taking action when others were doing so'.

c. I also have the impression that the SAPS has developed 'concentrated fire' as a technique for dealing with confrontations with armed groups (notably cash-in-transit robbery gangs) and that the barrage of gunfire at scene 1 may have been an illustration of this technique being put into effect.

d. **Recommendation 1** – The shooting at scene 1 raises issues about SAPS practise in confrontations with groups of armed people. Legal and tactical issues raised by situations of this kind should be clarified by means of a formal policy.

23. That there were several instances of police use of force at scene 2/koppie 3 which amounted to the unlawful use of force.

a. My impression is that if full evidence was available on the events at 'scene 2' it is likely that they would reveal that there were a significant number of unlawful killings by police at scene 2. However the Commission may not be able to reach comprehensive conclusions about the events at scene 2 due to the nature of the available evidence.

24. In the absence of clear information to the contrary it is reasonable to believe that irresponsible political rhetoric including the promotion by the Minister of

[701] De Rover statement (initial), para 72 (p 17) – see also 77

Police of the use of 'maximum force' may have contributed to some SAPS believing that there was official backing for them to act unlawfully.

25. That the provision of medical treatment to injured miners after the incident was not prioritised (again also possibly reflecting the vindictive attitudes of the police towards the miners).

26. The Marikana incident not only gave rise to the deaths of 34 people and the injury to 78 others but in its turn has given rise to a multi-dimensional conspiracy of silence and concealment. Both at a rank and file level and at a leadership level, members of the SAPS were involved in attempts to cover-up evidence or at the very least, were less than forthcoming in providing evidence to the commission. There were a limited number of individuals who represent exceptions to this generalisation.

KEY STRUCTURAL OR SYSTEMIC POLICING ISSUES HIGHLIGHTED BY THE MARIKANA INCIDENT

27. Based on the above understanding of the facts relating to the events in Marikana it is therefore possible to reach the following conclusions about 'structural or systemic policing issues' that resulted in the events of the afternoon of the 16th of August that led to the deaths of 34 people.

28. South Africa's Public Order Policing units are in a debilitated condition arising from the failure to maintain them in a sufficient state of readiness. This is reflected in the fact that there were insufficient POP members present to effect the dispersal[702] and, in line with this, they were unable to control the group of miners who had started moving down from koppie 1. (The history leading to this situation is outlined in the submission by Dr Johan Burger.[703])

    a. Alongside this it appears that the senior leadership of the POP units have a type of subordinate status within the Operational Response Services division of the SAPS. This was reflected in the fact that the

[702] Final statement Mr Hendryckx, page 40, par 89
[703] Dr Johan Burger, The militarization of the South African Police Service and possible implications for public order policing, Submission by the Institute for Security Studies to the Marikana Commission of Inquiry, 27 June 2014.

planning and management ('command and control') of the operation was taken out of their hands. This may reflect the fact that they were not regarded as the having the skills to plan and manage the operation. However it may also reflect informal dynamics within Operational Response Services, in line with government's emphasis (most visible in the period from late 2008 to August 2012) on a 'tough' approach, in terms of which the 'tactical units' have been accorded an elavated status over and above the POP units within the ORS division. (According to Professor Monique Marks a POP commander who she spoke to recently described the POP as 'the orphans of ORS'.)

29. The consequences of the weakness of the POP units and the lack of skills or low status of the POP leadership within ORS was at least two fold:

    a. As indicated, the POP commanders were side-lined in relation to the planning and management of the operation. (This extended to the fact that no POP commanders were even present at the JOCCOM meeting at which the operational plan was presented). The consequences of this may be seen to have included, inter alia,

        i. the fact that the operation was defined as a 'hybrid'[704] operation that was not governed by policies on the policing of demonstrations, and

        ii. That those planning the operation had limited knowledge of the principles that are supposed to apply in relation to the policing of demonstrations.

30. When the operation was launched the POP units were unable to fulfil their allotted role effectively and the operation quickly became one that was reliant on the 'tactical units' whose range of force options was essentially restricted to uses of force at the highest level of the use of force continuum.

31. However the debilitated condition of the POP units and their 'junior' status within the Operational Response Service division was a necessary but not a

[704] Consolidated statement of Duncan Scott, para 6.24.

sufficient condition for the Marikana incident. Other structural or systemic issues that are implicated in the Marikana incident include:

a. The ability of the Minister of Police to intervene and influence operational decisions by police management in a manner that is unaccountable.

b. The absence of a professional police leadership corps at senior level in the SAPS.

c. The shift to increasing use of 'tactical units' in public order operations.

d. The generalised use of R5 rifles in policing in South Africa.

e. The absence of a professional orientation towards the use of force including a clearly defined policy that specifies that police have an obligation to minimise the use of force

f. The absence of meaningful accountability for the use of force within the SAPS.

32. The points above are discussed in more detail under separate headings in what follows.

33. In the conclusion the submission draws together the above argument. It motivates that the SAPS adopt recommendations that will assist it in moving towards a professional orientation towards the use of force. It is argued that concepts of 'demilitarisation' and 'community policing' on their own are inadequate for purposes of addressing questions to do with the use of force.

THE DEBILITATED CONDITION OF THE PUBLIC ORDER POLICE (POP) UNITS

34. My understanding is that both Mr White and Mr Hendricks have in general confirmed that the public order policy framework, as it stood in August 2012, was of a relatively high quality. It therefore appears that the need is to focus on factors relevant to the ability of POP units, and the SAPS generally, to give effect to the policies and laws governing the policing of demonstrations.

35. The issue of the shortcomings of the operation, as a public order policing operation, is set out in detail in the statements of Mr White and Mr Hendricks.

Issues of this kind are also alluded to by Lieutenant Colonel Vermaak during his evidence.

a. In Mr White's words the 'deficiencies in the SAPS approach' were 'in respect of planning, preparation, briefing and operational execution'[705] and 'poor planning, poor briefing and most importantly poor decision making'.[706]

b. Mr Hendricks also emphasises that the problems with the operation on one level lay with the faulty interpretation of the situation and comprehension of the principles of crowd management, 'a failure on the part of the SAPS leadership to understand, to appreciate and apply principles of crowd management, in particular the realities of gatherings, to the events'.[707]

36. While the issues of interpretation, planning, preparation, briefing and execution may in some respects be the central issues, these problems in turn need to be understood in terms of the overall debilitated state of public order policing in South Africa. These issues in turn would appear to speak to the need, referred to by Mr de Rover, to look at the broad managerial and administrative issues regarding 'how the police organises as an organisation, how it trains its personnel, what it teaches them, to what standards it holds them, how it is managed and who does the managing'. [708] These would need to be looked at within the SAPS, and more specifically within the Operational Response Services division, and the management and command structures for the POP units. If one were to deal with this comprehensively it would involve a review of a wide range of issues including:

a. Leadership and command structures - including questions highlighted above to do with informal dynamics affecting the overall status of POP leadership within the ORS hierarchy as well as the role of national and provincial commissioners in operational decision making.

[705] White, final, 4.1.2.
[706] White, final, 4.2.23.
[707] Hendricks, para 33, 15
[708] Transcripts, day 285, 36983-84

b. Equipment including:
    i. Protective equipment,
    ii. Vehicles
    iii. Weaponry
    iv. Communications equipment and technology
    v. Incident recording
c. Training including
    i. Training of commanders in the interpretation and analysis of information relating to crowd management situations
    ii. Training of commanders in negotiation and conflict resolution and
    iii. Training of commanders in operational command including operational communication.
    iv. Operational training of members
d. Systems for intelligence gathering
e. Operational planning including the review of operational plans by members of the operational command structure.
f. The role of tactical units in public order operations (see further below).
g. The role of aerial units in public order operations
h. The briefing of members
i. Systems of post incident review
j. Broad SAPS systems for analysis of data relating to crowd management and the alignment between needs and resources.

37. During 2014 government has signalled that it intends resuscitating the POP units including increasing their personnel strength to 9000 and improving their equipment for which an amount of R3.3 billion has been requested from

treasury.[709] It is not clear to what degree this simply involves 'throwing money at the problem' or is based on a properly thought through approach to the current problems in public order policing.

38. What this announcement also does not engage with is the problem that in the past (around 2002 when the POP units were still at full strength) one of the issues that caused concern was that public order units were frequently underutilised. In the vast majority of demonstrations in South Africa there is no need for a highly specialised public order policing capacity to be deployed. Essentially such a capacity is only necessary where there is a known likelihood or clearly identified risk of such violence. The fact that these units were underutilised was part of the motivation for deploying them in the 'crime combatting' environment. Factors that need to be kept in mind here include that:

    a. In terms of the need to maintain highly specialised public order units there is also a need for these units to engage in training on a regular basis.

    b. On the other hand government may be inclined to prioritise deploying them in the crime-combatting role even if this is defined as their 'secondary function' when they are not required for public order duties. This may be at the expense of training. In the recent period in South Africa public pressure on government to address crime encouraged government to prioritise the use of these units as 'crime-combatting' units and to neglect the need to maintain public order units at an adequate level of preparedness.

    c. The point is frequently made that public order policing in South Africa places police in the position where they are forced to deal with the consequences of service delivery and poverty alleviation deficits.[710] It

[709] Rebecca Davis. "Public Order Policing: SAPS Demands More Muscle." *Daily Maverick*. Accessed September 10, 2014. http://www.dailymaverick.co.za/article/2014-09-03-public-order-policing-saps-demands-more-muscle/.
[710] Julia Hornberger, J. "We Need a Complicit Police!: Political Policing Then and Now." *South African Crime Quarterly* 48, no. 1 (July 17, 2014.

is also therefore sometimes suggested that a large part of the 'solution' to the problem of public order, and thus of public order policing, lies in addressing the problems of state capacity that lead to these deficits. Were this to be accomplished, perhaps by determined implementation of the National Development Plan for instance, the scale of the demand for public order policing might therefore be reduced substantially. The answer to questions about the optimum configuration of public order policing in South Africa may therefore change over time.

39. **Recommendation 2:** The critical issue is that government needs at all times to recognise the importance of maintaining a public order policing capacity that is appropriately staffed and equipped and is maintained in an appropriate state of readiness. The public order policing capacity of the SAPS needs to be brought up to a strength that is appropriate in terms of the scale of the public order policing problem. For this purpose government needs to be able to assess the demand for specialised public order policing and to adjust resource allocations in this regard relative to reasonable projections of the scale at which this type of capacity needs to be maintained.

40. **Recommendation 3** – Though some role in crime combatting may be provided for in the work of these units, this should at no time take priority over the need to maintain these units as effective public order policing units.

41. **Recommendation 4** - The central role of public order policing principles, public order units, and public orders commanders needs to be recognised and institutionalised within the Operational Response Service division and within the SAPS. In line with this steps need to be taken to try to ensure that the leadership of POP are drawn from the highest calibre personnel within the Operational Response Services division.

42. **Recommendation 5** – A systematic and detailed independent review of public order policing systems in South Africa should be carried out along the lines set out at points 40.1 - 40.10.

43. What is frequently not acknowledged is that South Africa is having widespread problems in various government departments in complying with policy prescripts. This indicates that there are problems of a systemic nature

that impact on the SAPS ability to achieve the high standards of planning and command that are required in terms of existing policies. This means not only that to be useful recommendations need to be aligned with 'the local context' in the sense that 'best practice is something that you can afford economically'[711] but also that any policy recommendations need to engage with the systemic problems in the overall public service environment.[712]

44. I note that various 'preliminary recommendations' in relation to Public Order Policing are also put forward by Mr Hendrickx in his final statement[713]

THE ABILITY OF THE MINISTER OF POLICE TO INTERVENE AND INFLUENCE OPERATIONAL DECISIONS BY POLICE MANAGEMENT IN A MANNER THAT IS UNACCOUNTABLE

45. The Constitution states that

    a. A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.[714]

    b. The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.[715]

    c. The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.[716]

[711] De Rover (transcript day 285, 36996)
[712] See for instance von holdt, chipkin
[713] Hendricks, final, paragraphs 154-159
[714] Section 206 (1)
[715] Section 207 (1)
[716] Section 207 (2) – emphasis added.

46. An interpretation of these provisions is put forward by Mr Mthethwa, who in August 2012 was the Minister of Police, during his evidence before the Marikana Commision. Inter alia Mr Mthethwa says that:

    a. '[T]he task of the Minister is to ensure that policy is being implemented and whatever is happening is done implementing the policy. So there would be no need for any pressure except the oversight over the police where people are supposed to do the job and you ask them to do the job.'[717]

    b. In response to the question 'did you set about to prescribe how SAPS perhaps should manage what was unfolding in Marikana?' Minister Mthethwa says 'Well, that's the how part. You as the minister, that's not your province how operationally you have to carry your tasks. As police officers that's your job. I don't enter into that terrain. It's not my terrain.[718]

47. I do not know if there are any court judgments in South Africa on the interpretation of the Constitutional provisions. In so far as there may be judgments on these provisions I acknowledge the limitations of my knowledge. However it appears to me that at face value it cannot be said that the Constitution limits the powers of the Minister to 'policy' and 'oversight' as it explicitly, in Section 207(2), authorises the Minister to provide 'directiions' to the National Commissioner. It seems reasonable to interpret the provision to mean that these 'directions' are in addition to policy (it for instance does NOT say 'and directions issued in terms of the policy).

48. Furthermore, as a policing researcher, it is my understanding that the view that the Minister may only set 'policy' and not engage with 'operational matters' reflects what might, with respect, be called 'conventional wisdom' This 'conventional wisdom' is sometimes said to have originated from the statement of an English court that 'the police are accountable to the law and the law alone'.[719] The 'conventional wisdom' is however inconsistent with

[717] Transcripts, day 255, page 32064
[718] Transcripts, day 255, page 32086
[719] See Lord Dennings as quoted in Phillip Stenning (see Annexure B), p. 8.

democratic principles in terms of which the executive are supposed to ensure that the departments of government act in the public interest, subject of course to the requirement that this is in a manner that is consistent with law.

a. This ‘conventional wisdom’ is inadequate also because it suggests that the line between ‘policy’ and ‘operational’ can be clearly demarcated.

b. These issues are examined in a paper by Phillip Stenning that I have attached with this submission (Annexure B). The paper is focused on the Australian context but has relevance to the South African situation linked to the fact that policing both in Australia and South Africa share a British colonial administrative inheritance.

49. The undesirable side of ‘opening the door’ to the potential of Ministerial influence over operational decision making is the concern that this influence will be used for inappropriate purposes (‘undue influence’). However what needs to be recognised here is that:

a. The central place of issues to do with policing in the exercise of government powers, in authoritarian or democratic societies, implies that the Minister and Commissioner are inevitably engaged with each other intensively. This relationship is very rarely, and perhaps never, organised around a neatly defined distinction between ‘policy’ and ‘oversight’. It also tends to be carried out through a high level of direct interpersonal communication, sometimes of a relatively informal nature.

b. In jurisdictions that have engaged with this issue, the approach that is adopted is that, rather than restricting the Minister to an authority over ‘policy’ it is preferable to try and ensure that there is transparency over any policy directives that are issued by the Minister. This can be done by

i. Requiring that any directives from the Minister to the Commissioner be reduced to writing.

ii. Requiring in turn that any such directive be placed before an appropriate body, such as a committee of parliament, within an appropriate time.

iii. Provisions of this kind may be found in Section 4.6 of the Queensland, Police Service Administration Act, 1990 and Sections 6 and 7 of the South Australia, Police Act, 1998.

c. A review carried out in the Australian state of Victoria also recommended that legislation should provide a 'non-exhaustive list... including, for example, decisions to investigate arrest or charge in a particular case' and decisions 'to appoint, deploy, promote or transfer individual police officers' that defines matters on which members of the executive may not intervene.[720]

50. As with any provisions, if provisions of the kind outlined here were to be put in place this would not guarantee that they would be adhered to. However introducing provisions of this kind is firstly more realistic as well as being more consistent with the principles of democratic government. Essentially the approach therefore seeks to regulate the content of directives and ensure transparency so that these can be evaluated in terms of whether they are consistent with democratic norms and the public interest. Provisions of this kind can also be used by a commissioner who is so minded as a basis for resisting what appears to be 'inappropriate' or 'undue' influence.

51. My understanding is that it was issues of this kind that Mr de Rover was alluding to when he said that

a. I hope that the police are not an entity on itself, they are agents of the state. They are accountable to the executive.[721]

b. … and say that those that exercise authority over the police in government, there needs to be a structure to how police receive policy direction that goes beyond a phone call to a PC on a mobile, those are not I think the types of auditable trails you'd be looking for if afterwards you need to render account.[722]

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[720] Victoria, Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues (2001) (John C. Johnson, Chair) *Report* (Melbourne: Department of Justice) quoted in Philip Stenning, Governance of the police: independence, accountability and interference, Ray Whitrod Memorial Lecture, 2011, p 12
[721] Transcripts, day 286, page 37076
[722] Transcripts, day 285, 36983-84

52. **Recommendation 6** – Government should adopt legislation to regulate and introduce greater transparency in relation to directions issued by the Minister of the Police in terms of Section 207(2) of the Constitution.

THE ABSENCE OF A PROFESSIONAL POLICE LEADERSHIP CORPS AT SENIOR LEVEL IN THE SAPS

53. For the purposes of this submission it is not necessary to comprehensively define the term 'professional police leadership'. It may for instance be assumed that such leadership should, inter alia, be fully conversant with the legal and regulatory framework governing policing as well as having a sophisticated understanding of operational policing. In relation to this submission what is of central importance is that 'professional police leadership' is leadership:

    a. That is highly conscious of the risks associated with the powers and duties that police have to use force; and

    b. That emphasises the obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

54. Implicit to this definition of professional police leadership is that professional police leadership would have recognised the risks associated with the Marikana operation and given due emphasis to the likelihood that death and injury would result from the operation in considering whether to go ahead with it or not.

55. As indicated (paragraph 22.1) this submission allows for two different 'scenarios' in relation to the high level decision making process that authorised the police operation that led to the Marikana incident.

    a. **Scenario 1:** The operation that lead to the Marikana incident is the result of a directive from the Minister of Police (or other member of the executive) to the national commissioner or provincial commissioner - this scenario is in line with my own reading of the evidence.

i. My understanding is that in this scenario, had there been professional police leadership, the relevant police official would have recognised that the operation was likely to place police officers in jeopardy as well as carrying a high risk of death or injury to others. In addition a professional police leader would have recognised that there was no urgent need to implement the operation. A professional police leader would have strongly advised the member of the executive against implementing the police action on the 16th of August. (The question whether any directives or orders that were issued would have qualified as 'manifestly illegal orders' under section 199(6) of the Constitution may also be relevant here).

ii. In line with my own remarks in relation to Scenario 1 I also note the question posed by Mr de Rover at the end of the following passage from his evidence before the commission: [I]if I take that that is what is normal in a democratic society and therefore normal here, I would find it very hard to believe that there [was] no political […] guidance on that decision. [… B]ecause a higher authority made it and gave it as an order, then you have your answer to your question as to why it was implemented and why the haste and why the day and why those 12 points in the end, although raised, did not weigh heavily enough to counter the order. And hence my question is the order, because were the ones that issued it made sufficiently aware of those 12 points and the risk […] in going ahead[?][723]

iii. I also note the following passage from Mr de Rover's testimony: '[I]n the face of such overwhelming evidence as you now present and that you hold the police were aware of when they were making that decision and trying to operationalise it, why

[723] Mr de Rover, day 286, page 37076. I have inserted square brackets to indicate modifications made to the original transcript. I have made these modifications to rectify I apparent error (the use of the word 'weapons' instead of 'was') as well as to bring out more clearly what I understand Mr de Rover to be saying.

didn't they refuse to do it[? B]ecause if it originated from within the police itself it would have been simple to stop that.[724]

iv. It may be assumed that, if there is a political directive or political pressure, the only police officials who are in a position to negotiate about or question it are the high level leadership (essentially the level of national or provincial commissioners). It is presumably difficult for police officials lower down in the chain of command to contest such a directive even if it appears unreasonable (though this does not negate their legal obligation not to obey it if it is 'manifestly illegal').

b. **Scenario 2:** The national commissioner or provincial commissioner was the author of the decision to implement the operation that lead to the Marikana incident – my understanding that this scenario is consistent with the SAPS version.

i. My remarks relating to scenario 1 also imply that a professional police leadership would not have authorised the police operation on the 16th.

56. In addition to the fact that the senior police leadership responsible did not resist political pressure to implement the operation and/or themselves authorised the operation some other points that support the contention that the current police leadership is not a professional police leadership include:

a. The statement issued by the SAPS on August 17th 2012 under the name of the National Commissioner reflected a lack of understanding of the type of management approach that is appropriate in the aftermath of an incident of this nature. By taking these positions the National Commissioner not only prematurely exonerated the SAPS. She also placed all SAPS members who had evidence contradicting this in the unenviable position of having to expose her as completely mistaken. She therefore, even if inadvertently, in effect helped to reinforce a dynamic in terms of which SAPS members who had

[724] Transcripts, day 286, page 37072

information which did not support the official SAPS version, faced the risk of being seen as disloyal. This in itself would have contributed to the cover-up by creating an informal dynamic obliging SAPS members to conceal information that contradicted her.

i. See the remarks by Mr White: This approach in the aftermath of the shooting incidents may have set a tone which may have discouraged proper reflection and internal examination of what had gone wrong. It potentially encouraged the adoption of a robust defensive stance. [725]

b. The statements that the actions of the police represented 'the best of responsible policing' and were consistent with the police oath to 'ensure that all South Africans remain safe' as part of the speech by the National Commissioner on the 20th of August. For professional police leadership it would be virtually inconceivable that an operation in which police had killed 34 people could be seen as 'the best of responsible policing'.

57. The failure of government to develop professional police leadership cohort at senior level may therefore be seen to be one of the causes of the Marikana incident as well as being implicated in the subsequent apparent police cover-up.

58. **Recommendation 7 –** Government and the SAPS should focus on the development of a professional senior level police leadership corps. The National Development Plan also puts forward recommendations relating to this and these should be taken account of in addressing this issue.

THE SHIFT TO THE INCREASING USE OF 'TACTICAL UNITS' IN PUBLIC ORDER OPERATIONS

59. At least two of the international policing experts appear to agree that there may be circumstances in which it is appropriate for 'tactical units' to be brought in to play a support function in public order policing operations.

[725] See White, final, 4.2.13

a. I am not clear on Mr Hendricks view on the involvement of the 'tactical units' specifically in the Marikana operation. However as a general statement Mr Hendricks observes that 'The use of tactical units trained solely or specifically in the use of deadly force in relation to public order policing should be limited and exceptional and accordingly requires special justification.[726] It would therefore appear that Mr Hendricks would agree that, in exceptional circumstances, it may be appropriate to deploy tactical units, in public order operations.

b. The fact that Mr White holds views that are similar to this would also appear from the statement that 'Given that officers had already been shot and there was information to suggest that the protestors had access to dangerous weapons, the decision to engage assistance and support from various specialist branches of the SAPS cannot be criticised. However, a POP commander should have remained in control of planning the operation with support provided from other specialists.'[727]

60. These two experts, both of whom have operational police experience, therefore do not motivate that members of tactical units should be comprehensively excluded from public order operations. They do however advise that the use of officers with specialist firearms skills should be highly selective.

    a. The issue is further addressed in the final statement of Mr White as follows: 'I have experience of commanding public order operations where intelligence has indicated that there may be protestors with firearms or explosive devices on the scene. In planning for such eventualities I have had cause to deploy officers who are equipped with firearms in order to provide protection from a ballistic threat. Typically this has involved deploying specialist firearms teams at either end of a public order shield line (with officers making use of the protection afforded by armoured vehicles and ballistic shields if necessary) and,

[726] Hendrickx final, par 88 (page 40).
[727] White, final, par 6.3.4, pages 62-63.

depending on the topography, situating officers who are trained as snipers. In circumstances where the officers are faced with a threat to life, emanating from firearms or explosive devices, the specialist firearms officers are trained to engage an identified target in order to neutralise the threat. Through scenario-based training and intelligence-led planning, which will include the firearms teams examining potential arcs of fire, and working out in advance their specific areas of responsibility, the potential for the use of lethal force will be minimised.[728]

61. There is limited information on the history of the use of 'tactical units' in public order policing in South Africa since 1994. It appears that the SAPS approach has envisaged that 'tactical units' may be used in public order operations for some time.

    a. A publication issued by the SAPS in 2005 indicates that:

        i. The functions of the Special Task Force to include include: Providing assistance to other divisions of the SAPS when they require the specialized skills, techniques and equipment of the unit to deal with, among other things, serious and violent crimes and major events.[729]

        ii. The functions of the National Intervention Unit include 'Responding quickly to abnormally high levels of crime and public violence' and 'performing specialized duties regarding the combating of public violence in urban and rural areas'.[730]

    b. The NIU was deployed at a late stage during the xenophobic riots that erupted in May 2008.

[728] White, final, paragraph 7.5.11, page 115)
[729] South African Police Service, 10 years of policing in a democracy, 1995-2005, 2005, 75.
[730] South African Police Service, 10 years of policing in a democracy, 1995-2005, 2005, 76 -77.

c. From their inception in 2009 it is also clear that a key function of the Tactical Response Teams was intended to be that of bolstering SAPS capabilities in the policing of public order.[731]

62. In the period from 2009 onwards there was a shift by government towards more forceful policing. This included more forceful policing of public order incidents. In line with this approach 'tactical units' were increasingly employed alongside POP units in public order operations. In effect, rather than addressing the debilitated state of public order policing, the official approach was that it could address the weaknesses of these units by deploying public order police alongside them.

    a. The issue was identified as a problem in an article published in December 2011 which states that 'An additional problem confronting those police responsible for public order policing has been the introduction of additional layers of 'paramilitary' police, such as the Tactical Response Units (TRU), into public order management. Many of the members of these units lack training and skills in the democratic policing of public order events.[732]

    b. The police operation in Wesselton (Ermelo) in February 2011 reflected this approach.

63. **Recommendation 8** – The public order policing national instruction should be amended to provide guidelines and procedures to be followed in relation to the use of tactical units in public order policing. This should include explicit provision that the deployment of members of tactical units in public order operations should be under the overall command of public order commanders.

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[731] See for instance: http://www.sanews.gov.za/south-africa/special-force-teams-support-local-police-stations. See also http://www.sanews.gov.za/features/deployment-saps-specialised-units-commended

[732] Sean Tait, and Monique Marks. "You Strke a Gathering, You Strike a Rock - Current Debates in the Policing of Public Order in South Africa." *South African Crime Quarterly* 38 (2011): 15–22. Dec 2011 SACQ carries an article by Sean Tait and Monique Marks in which they comment that http://www.issafrica.org/uploads/CQ38Tait_Marks.pdf

THE ABSENCE OF A PROFESSIONAL ORIENTATION TO THE USE OF FORCE AND A CLEARLY DEFINED POLICY THAT SPECIFIES THAT POLICE HAVE AN OBLIGATION TO MINIMISE THE USE OF FORCE

64. For the purposes of this submission I would like to consider the implications of what I understand to be the SAPS account of the Marikana incident. As I understand it, in addition to accepting that all SAPS members acted in self-defence, this included accepting that the SAPS commanders classified the operation as a 'hybrid' operation. What is implied by this is that the operation was no longer necessarily subject to the principles and policies governing public order policing or to management by POP commanders. By taking the operation out of the 'public order' arena the SAPS commanders therefore took the operation out of the ambit of 'public order policing' and into an area of policing that is subject to the general laws and regulations governing the use of force by SAPS members.

    a. I accept the argument that Mr Hendricks has made that it was wrong for the SAPS commanders to classify the Marikana operation as a 'hybrid operation' and that the Marikana operation should have been classified as a public order policing operation[733] and should have been under the control of experienced public order officers.

    b. However if one were to accept the SAPS version then the implication would be that the decision to classify the operation as a hybrid operation was taken in good faith and implemented with the understanding that it was a legally valid course of action to pursue.

65. This points to two questions:

    a. If the operation was not a public order operation, what laws and policies was it governed by?

    b. Was there any law or policy which the decision to launch the operation violated taking into account that:

[733] Hendrickx, final, paragraphs 48 – 70 (pages 24-33)

i. The operation was likely to lead to confrontation and carried a high risk that it would lead to death or injury to police officers and to the people assembled on koppie 1; and that

ii. There were no pressing or urgent considerations motivating for the operation to be launched at that point; and that

iii. It was apparent to police that there were other options open to them that would be less likely to lead to confrontation, death and injury?

66. Effectively the question is: would the approach and principles that were applied in relation to the operation have been valid and appropriate if the operation had not been a public order policing operation?

a. My understanding is the legal and regulatory framework governing the use of force by police is essentially defined by section 49 of the Criminal Procedure Act and Section 13(3)(b) of the South African Police Service Act as well as principles of common law relating to private defence.

b. There are also SAPS internal regulations, standing orders or instructions that are issued by SAPS management particularly following changes in the law. However these documents are essentially legally orientated in that they are orientated towards explaining the law (as defined in the Criminal Procedure Act and SAPS Act and common law) to SAPS members.

c. However the legal provisions that exist are all essentially situationally orientated. They explain what people (including SAPS members) should do if: they are (i) using force (SAPS Act) (ii) facing an attack (common law), or (iii) arresting someone who flees from or resists arrest (Criminal Procedure Act).

d. <u>There is no law, policy or guideline that explains to police the general principles that they should apply in formulating their approach to operations or other actions</u>. For instance there is no law or policy that

says that, in deciding on a course of action or planning operations (other than public order operations) SAPS members should:

i. Seek to resolve the situation effectively whilst minimising the use of force;

ii. Seek to protect human life including the lives of police officers or others.

iii. Seek to minimise the risk of injury to police officers and others.

67. My understanding is therefore that if, for the sake of argument, one accepts (i) that all SAPS members who used force did so in private defence, and (ii) the operation was not governed by the provisions governing public order policing, then the implication would be that the SAPS had indeed not violated any law or regulation in deciding to implement the operation.

    a. In terms of the legal and regulatory framework the primary shortcoming of the operation would then be the failure to ensure that prompt medical treatment was provided to injured people in terms of Standing Order (G) 349 dealing with the provision of medical treatment to people in custody[734] (Carelessly or maliciously failing to ensure that mortally injured people receive medical treatment may also be a criminal offence).

68. However it seems clear that the decision to implement the operation was not only inconsistent with the principles of public order policing but was also inconsistent with the principles of the Constitution which places an obligation on the state to protect rights including the right to life[735] and the right to 'to be free from all forms of violence from either public or private sources'[736]. In terms of the approach outlined above, which is believed to be aligned with the police version, even if the operation was not governed by public order principles it would nevertheless therefore have been unconstitutional.

[734] SAPS, Standing Order (G) 349: Medical Treatment and the Hospitalisation of a Person in Custody;
[735] Section 11 of the Constitution
[736] Section 12(1)(c) of the Constitution.

a. Essentially it should have been apparent to all SAPS members involved, including the National Commissioner, the Provincial Commission and the commanding officers that, even if it was not a public order operation, the operation would not pass muster unless it was clearly motivated that it was likely to reduce, rather than enhance, the risk of death and injury to police officers and others.

b. The Marikana incident therefore reflects an absence of clarity within the SAPS on questions of principle regarding the use of force. The absence of clear principles governing the use of force by SAPS members generally was then in itself a cause of the Marikana incident. The 'systematic weakness' that this highlights is the absence within the SAPS of an awareness of overarching principles governing the planning and implementation of actions or operations that are likely to involve the use of force especially if this is likely to involve the risk of death or injury to police officers or others.

c. Consistent with the definition of professional police leadership that is provided above (paragraph 57) the Marikana incident therefore also highlights the absence within the SAPS of a professional orientation towards the use of force. This involves exercising police powers in a manner that is highly conscious of:

    i. The risks associated with the powers and duties that police have to use force; and

    ii. The obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

d. The need for police agencies to provide policy frameworks that provide overall guidance to police officers on the use of force is widely recognised internationally.

    i. Use of force policies are widely used by police departments in the USA as well as in Australia. This is based on the recognition that the state laws governing the use of force by police are usually not sufficient to support a professional policing

approach, inter alia, because they do not address the broad obligation of police to seek to minimise the use of force. Some police departments also chose to adopt policies that restrict the use of force more narrowly than the provisions of state law.[737]

ii. In the SAPS the need for policy to complement the legislative framework is acknowledged in relation to public order policing but not in relation to the use of force more generally. The SAPS has resisted initiatives motivating for it to adopt a general use of force policies to inform SAPS members about principles and considerations that should apply in relation to the use of force.[738]

iii. In the absence of clearly defined use of force policies the vulnerability of police officers to inflammatory rhetoric by politicians or others is enhanced. As stated in the CASAC submission 'At the very least political pronouncements in favour of maximum force would have exacerbated a prevailing climate of confusion within the SAPS about the principles, which are supposed to guide members in using force.'[739]

69. The question that this submission is trying to address is 'what are the structural or systemic issues' that need to be addressed in order to ensure that incidents of this kind are not repeated? In this submission 'Incidents of this kind' may be understood to include not only situations classified as 'public order' situations but any situation where police action will unnecessarily increase the risk of harm to police officers, people who are believed to have been linked to acts of violence or other crimes, or other people.

70. In principle what is objectionable about the Marikana incident is not simply the scale of the incident related to the number of people killed and injured. The essential objectionable aspect of the incident is that it amounted to a situation where the SAPS deliberately implemented an operation that was likely to lead to confrontation, death and injury when this was not necessary. Whether or

[737] See for instance the NYPD which restricts the use of lethal force to situations of defence of life.
[738] The last sentence refers to events within my own personal experience over the period 2011-2012.
[739] CASAC submission, Paragraph 14 on page 32.

not any member of the SAPS violated any legal provision, the Marikana incident therefore constitutes an incident that from a professional policing perspective constitutes a case of 'unnecessary force'.

71. **Recommendation 9:** The SAPS should develop a use of force policy that, inter alia, sets out the principles governing the approach that SAPS members should adopt in relation to operations or actions in which there is a likelihood that force may be used, especially if this is likely to involve the risk of death or injury to police officers or others. The policy should be publicised and promoted to ensure its visibility and accessibility to SAPS members.

72. **Recommendation 10:** The SAPS should review its existing mechanisms for reviewing the use of force, in particular the provision for shooting incident investigations in terms of 251, with a view to supporting implementation of the above policy and establishing a professional orientation towards the use of force within the SAPS.

73. **Recommendation 11:** The need for a professional orientation towards the use of force should also be addressed through basic and in-service training.

THE GENERALISED USE OF THE R5 RIFLE IN POLICING IN SOUTH AFRICA

74. My understanding is that the SAPS has already agreed that the R5 or similar weapons should not be used in public order policing and it is not necessary for this issue to be addressed in this submission.[740]

75. However my impression is that there has been a move towards the use of the R5 by police in South Africa more generally such that many police, engaged in routine policing functions, are armed with these weapons. This is also an issue that has not been publicly documented. My impression is that these weapons are not appropriate or necessary in most contexts in which police are involved in South Africa and exacerbate the risks involved in the use of force by police in South Africa including those to 'innocent bystanders'.

[740] Issues in this regard are addressed in various submissions including submissions of Mr White, final, 7.5.10(e), p 113 and de Rover, at paragraphs 87-90 (page 20).

76. I note in this regard Mr de Rover's remarks 'I consider military assault weapons have no place in law enforcement, full stop, and that I say aware of particular problems of violence South Africa faces, but to me the solution is not in the police arming up, the police needs to arm down and smarten up.'[741]

77. **Recommendation 12:** The SAPS should review the use of the R5 by SAPS members and restrict its use to circumstances where there is a clear and specific motivation for SAPS members to be provided with the weapon.

THE ABSENCE OF MEANINGFUL ACCOUNTABILITY BY POLICE FOR THE USE OF FORCE

78. The fact that there have been serious limitations in accountability is endorsed in the statements and/or evidence of all three of the international experts. The generally unsatisfactory nature of statements provided to the Commisison is highlighted extensively in Mr White's final statement. He for instance refers to 'An overall lack of accountability and failure to accept responsibility, demonstrated by the way in which the SAPS evidence has been provided to the Commission'.[742] The weaknesses of accountability are also implicated in (i.e. a cause of) the Marikana incident in so far as they reflect the fact that many SAPS members do not regard themselves as accountable for the use of force. In reflecting on this issue there are a number of factors that should be considered:

79. My understanding is that the incident exposes both the ability and orientation of many SAPS members to evade accountability. However the police 'code of silence' is a dimension of police culture in many countries. One issue that is of particular concern is where leadership appear complicit in efforts to conceal what has happened, or at the very least, do not actively support efforts to reveal the truth.

80. The problem is not confined to the denial and concealment of abuses of force or other offences involving police officers. Part of the underlying problem is a

[741] Transcripts, day 285, page 36984:
[742] White, final, 4.1.3(a). See also at 4.2.14.

generalised inability to comply with official standards of performance (as reflected in performance targets) and conduct (codified in laws and regulations). In some respects the police are therefore involved in an elaborate charade that involves manufacturing the illusion of compliance with these standards.[743] The 'performance' involved in pretending to be cooperating with and assisting the commission is therefore in some ways part of a general 'way of operating' within the SAPS.

a. The fact that the SAPS is involved in this type of practise at an institutional level is reflected if the SAPS annual report is juxtaposed against the report of the Khayelitsha Commission of inquiry released in August 2014. The highly sanitised version of policing in South Africa presented in the annual report, in terms of which the SAPS is constantly meeting, if not exceeding, performance targets, is starkly at odds with the picture of disarray that emerges from the report of the Khayelitsha Commission of inquiry, a picture of the reality of policing not only in Khayelitsha but in many parts of South Africa.

81. There are very serious limits on the ability of the oversight system to resolve these problems of accountability. The principal instruments of the oversight system for accountability relating to the use of force is the IPID (Independent Police Investigative Directorate) previously known as the ICD (Independent Complaints Directorate). In my work on the use of force by police I have often reflected on, and sought to explore, questions to do with the ability of the IPID/ICD to effectively investigate 'deaths as a result of police action' as well as (other)[744] incidents where it is alleged that police have used excessive force. Factors limiting the ability of the IPID to investigate these deaths effectively may be seen to include:

a. Related to the resource and capacity constraints which they face the IPID has not always been able to attend all death scenes and even

[743] This perspective has been shaped by correspondence with Andrew Faull.
[744] Note that most deaths are reported to the IPID in terms of statutory provisions requiring that the police report these deaths. Related to this most cases of 'death as a result of police action' that are brought to the attention of the IPID do not involve allegations that police have acted unlawfully.

where it attends such scenes only ‘takes over’ the investigation from the SAPS when there are overt reasons for suspicion.

b. Where IPID investigators do attend the scenes at which shootings have taken place this is often after having travelled a substantial distance with the result that there is a considerable delay between the killing and the time at which the investigator gets to the scene.

c. Even in serious cases IPID investigators often have to work alone rather than forming part of an ‘investigative team’. (The actual ‘crime scene’ investigation at the scene of a death is done by a crime scene expert from the SAPS Local Criminal Records Centre (LCRC) and the IPID also mostly uses SAPS ballistics experts, on occasions where such experts are called to the scene and send evidence to SAPS labs for ballistic and other forensic tests).

d. Though legal provisions require SAPS cooperation with the IPID, this does not extend to an obligation on police members who have been involved in a shooting to provide a statement to the IPID on the circumstances or justification for the use of lethal force as police are issued with warning statements and may exercise the right to remain silent.

e. In practice the police also have discretion as to when exactly to call the IPID to the scene. Not only is there a factor of delay but police also in general, by virtue of their occupation, have the know-how on how to manipulate evidence in order to cover up unlawful shootings if they wish to. In interviews that I conducted with ICD investigators in 2010 several of them indicated that they believe that police practises intended to obstruct investigations including deliberate delay in the reporting of shooting incidents, planting weapons at locations where people have been killed by police, and the ‘homogenisation’ of statements by those police who were present during the incident.

f. A further limitation on the ability of a body such as the IPID to achieve prosecutions against police officials implicated in acts of criminality is that prosecutors generally work quite closely with police and, related to

this, may be inclined to soft peddle prosecutions against some SAPS members.

g. As part of my work on the use of force I have taken an interest in matters related to ICD and IPID investigations of killings by police. I assume that a significant majority of these killings are carried out by police who are acting within the law and therefore do not assume that the majority of them should provide the basis for prosecutions or convictions. Nevertheless my understanding is that, though it pertains to a minority of killings, there is a consistent problem of unlawful uses of force by police 'in the line of duty'. In reviewing reports of convictions obtained by the ICD/IPID I have come to the conclusion that it is very rare for the ICD/IPID to achieve a conviction for killings of this kind and that high proportion (likely to be the majority) of convictions obtained by the ICD/IPID are for cases where police officers have killed their wives or other romantic partner. The IPID is in general not able to secure convictions in cases where the police have acted unlawfully in the line of duty. (I have the impression that, though the IPID does not have a strong conviction record regarding deaths resulting from unlawful police action, the requirement that it investigate deaths does have some deterrent impact in discouraging unjustified use of lethal force).

h. Examination of various high profile cases including the prosecution of SAPS members for the death of Andries Tatane and the case (currently still in court) of the Cato Manor Organised Crime Unit who are alleged to have been linked to a large number of extrajudicial executions, would appear to support this view. In the latter case the police were only brought to court after an expose in one of the Sunday newspapers in 2011. In interviews that I conducted in 2010 ICD investigators in KwaZulu-Natal indicated that they believed that there was a pattern of extrajudicial executions but that the police generally 'staged' these in such a way as to make it very difficult to prove that they had acted unlawfully.

i. The serious limitations on the ability of the IPID to hold police officers accountable in relation to the (non-lethal) use of force is also illustrated by the report of the Khayelitsha commission of Inquiry. Over pages 417- 418 the report states, inter alia that: The Commission was provided with four box files of finalised complaints relating to the three Khayelitsha police stations for the period 1 April 2010 – 31 August 2013. In all, there were 87 closed cases relating to the period.61 of the 87 cases had been closed by the ICD or IPID as unsubstantiated, and referred back to SAPS. […] The Commission has not been in a position to investigate the 67 complaints closed as unsubstantiated, but a perusal of the nature of the complaints which were closed "unsubstantiated" included many complaints of alleged attempted murder, assault with intent to do grievous bodily harm, common assault and discharge of a firearm. […] The Commission is not persuaded that these matters are being treated with sufficient care and concern. […] The Commission accordingly concludes that the manner in which complaints relating to SAPS members at the three Khayelitsha police stations, and other issues of alleged misconduct, have been addressed in the past by the ICD, and are currently being addressed by IPID is a factor that has in all probability contributed to the breakdown in relations between the Khayelitsha community and SAPS. The Commission finds it completely improbable that 61 of the 87 matters referred to the ICD and/or IPID could properly, on the ordinary meaning of the word, be described as "unsubstantiated" […].

82. Questions to do with the IPID are alluded to in this passage from the evidence of Mr de Rover: 'But the prompt bringing of IPID to that scene, which is a requirement and IPID not having the resources to adequately manage that incident, ah really. That makes it really difficult because now you create a reality where you've done what you're supposed to do and you've given it to an organisation that sends two people there to initially administer the incident on site. That is inadequate and it is unacceptable because then it would have been much better to actually realise that that would likely produce […] I don't

know if SAPS was in a position to judge what the resources were that IPID could make available.[745]

a. My understanding of this passage is that the key point that Mr de Rover raises here is that IPID did not send enough investigators to the scene and that there was therefore no chance that the scene would be investigated effectively.

83. In the passage quoted here Mr de Rover also appears to raise a question about whether the SAPS would have been aware that the IPID would not be able to dedicate sufficient resources to the investigation. My impression, though I acknowledge that it is based on limited information, is that the tactical units tend to regard the IPID in a dismissive manner and do not take it very seriously. Therefore the fact that they anticipated an IPID investigation[746] may have been largely irrelevant

a. My understanding is that the severe limitations on the ability of the IPID to ensure police accountability in relation to the use of lethal (and other) force is accentuated in relation to specialised units and particularly in relation to 'tactical units' such as the STF, NIU and the TRTS. This is partly because the 'scenes' of fatal shootings by these units are often fairly complex. However the IPID is also dependent on the SAPS for cooperation in various forms and has to ensure that it projects itself to the SAPS as 'reasonable'. This also serves as a constraint against carrying out more probing investigations in many cases. My impression is that factors to do with ranks and informal status considerations also become more prominent in relation to the tactical units leading to a situation where IPID members are unable to impose effective authority over members of these units in securing their cooperation with investigations. In an interview that I conducted with an ICD investigator in 2010 s/he:[747]

i. Referred to the Special Task Force as 'untouchables'.

[745] Transcrips, day 286, 37129
[746] As suggested in White, final, 4.3.6
[747] The following points are from my notes on the interviews compiled at that time (July 2010).

ii. Said that ‘They do give statements but it is difficult to insist that they give in their firearms for ballistics tests’ .

iii. Referring to an ICD investigations in the aftermath of a shootout with a gang of heavily armed cash-in-transit robbers s/he acknowledged that there is a ‘politics’ to how one handles these investigations which makes it difficult to investigate them properly. S/he said that ‘One would need to assess what one would achieve [by pursuing the possibility that some police might be implicated in criminal conduct] particularly when the bigger picture is of a legitimate police action against heavily armed criminals, and therefore might decide to let this one go.’

b. It is known that police often obstruct people who want to lay a complaint against a police officer at a police station. It appears possible that this may be additionally difficulty in relation to the ‘tactical’ units. There are at least two media reports that I am aware of that highlight difficulties that people have had in laying complaints against TRT members.[748]

c. It may be reasonable to argue that these units to some extent function in such a manner as to be largely exempt from oversight not only from the IPID but from any other body. The information provided on the units in the SAPS annual report each year is largely perfunctory or non-existent. The problem of accountability is a characteristic problem of these kinds of units internationally.

i. I note here that during the period from 2010 onwards the SAPS has been inconsistent in describing the profile of the units in Operational Response Services. At one point the SAPS website appeared to identify TRT as part of Operational Response

[748] See the E-TV expose on the TRT available at http://www.youtube.com/watch?NR=1&v=rBehRHqQiy4&feature=endscreen, http://www.youtube.com/watch?v=L8gvUm9dGOA, and http://www.youtube.com/watch?NR=1&v=EpJs985DfpA&feature=endscreen; Alfred Moselakgomo, 'Brutal police' face class action suit, Sowetan, 18 January 2012, http://www.sowetanlive.co.za/news/2012/01/18/brutal-police-face-class-action-suit

Services.[749] As far as I understand, they are not generally identified as part of the ORS division. As far as I know since the establishment of the TRTs in 2009 SAPS annual reports have largely omitted to even mention them.

84. During his appearance before the commission Mr de Rover indicated that the impact of the IPID may be to discourage police from providing information. My understanding of Mr de Rover's evidence on this point is the following:[750]

    a. Police should be able to be relied on as 'witnesses of truth'. This implies that 'You're a witness of truth and we will treat you as such and hold you to that truth'. In his work as a police officer the courts always encouraged them to give as much detail as possible. Detail, including detail regarding one's state of mind as a police officer during the incident, is necessary to evaluate whether a shooting is justified.

    b. Many SAPS members merely signed the warning statement provided to them by the IPID and elected not to say anything further. Where SAPS members have made statements these generally 'fall far short'. In addition to the fact that SAPS statements are lacking in detail the SAPS members that he spoke to demonstrated 'a general reticence to be specific with me on detail' which he attributes to the fact that they were issued with warning statements.

    c. From a professional point of view Mr de Rover regards it as problematic that SAPS members were issues with warning statements right at the beginning of the [overall] investigation. The reluctance of SAPS members to speak to him was also explained to him being a consequence of IPID's involvement. He interprets this to mean that, as a consequence of the status that they now have as potential suspects in a crime, police officers involved in the incident 'are no longer witnesses of truth [who] because of their public office can help you and assist you and should assist you to piece together in [37123] detail

[749] Estimated date 2011.
[750] This is my own summary of the evidence of Mr de Rover as reflected in the commissions transcripts for day 286, pages 37122-37124

what happened'. They are now suspects 'because these warning statements basically […] tell them you're a suspect of murder now and you are advised to avail yourself of legal support. You are advised of the fact that you do not have to say anything if you do not wish to do so'. Mr de Rover indicates that it is understandable that police have chosen to withhold information. 'Now personally I think […] if I can't really oversee the consequences of speaking with that warning being given, I'd rather say nothing for the time being'. The impact of the IPID's involvement (implicitly its focus on investigation in relation to the possibility that police officers have committed a crime) is to discourage police from freely and openly accounting for their actions. Essentially the fact that police are now placed in the position of being criminal suspects has the consequence that police 'clam up, they don't say anything'.

d. Mr de Rover's view is that the preferable position (what he refers to as 'normal circumstances') is that there should be a delay in involving IPID. He appears to imply that they would only be involved once police officer had been asked to provide information in terms of their position as 'witness to truth' (''the public official role'). This involves engaging with police officers in relation to the expectations that the police organisation should have of 'integrity and professionalism'. 'You'd first walk that path and if you're not satisfied that you are getting what you need you can still change tact. If there is evidence that a police officer has committed a criminal offence a different approach is then applied in terms of which 'we'll call you a suspect and advise you of your rights that come with that status'.

85. My understanding is that it is likely that a number of the police officers at Marikana may be guilty of criminal offences. In making this point I am referring primarily to police officers who were involved in using force at 'Scene 2'. (Though the point may have equal relevance to Scene 1 my understand is that the evidence seems to suggest that at least some of the police who used force at scene 1 may be regarded as being justified on the basis that they believed they were being attacked and therefore their actions amounted to

‘putative self-defence’). It is therefore possible that many of the police officers had a personal interest in concealment of the truth.

a. More generally I believe, whether through habit or formal or informal pressure, the approach that many SAPS members have adopted is guided by certain 'rules' to the effect that

    i. They should not say anything that would incriminate another SAPS member and especially not any senior member, and

    ii. They should make sure to support the SAPS official narrative of self-defence, and

    iii. They should give limited detail to avoid saying anything that might result in their being 'caught out'

b. I therefore do not believe that the warning statements issued by the IPID were the sole reason why SAPS members have concealed information.

c. Nevertheless in so far as I have correctly understood Mr de Rover’s evidence I agree with the contention that the impact of placing police officer’s in the position of being criminal suspects has the consequence of discouraging police from providing truthful accounts of shooting incidents that they were involved in. The essential point is that the way in which requirements for accountability are structured in South Africa in fact reinforces the impact of the 'code of silence' rather than supporting accountability.

86. The impact of the current ‘status quo’ is also, as far as I understand, to discourages police from being able to reflect on incidents in which they have been involved with a view to learning lessons and improving police practise. Alongside the problems of accountability the SAPS response to the Marikana incident has also exposed the very limited ability of SAPS members to reflect on their handling of specific incidents with a view to learning lessons The issue is mentioned in the final statement of Mr White[751] as well as by Mr de

[751] White, final, 4.2.23

Rover during his appearance before the commission to the effect that ‘my reading of the responses I got in meetings where I tried to push this point’ was that ‘They equate lessons learned with mistakes made, [Page 36930] rather than saying I have an experience and I learn from that experience, and whether that was a good experience or a bad experience I seek to further the learning organisation model and I seek to improve my professional practices, and I think there has been a genuine reticence on that perception of lesson learned equals mistake made, for them to be as forthcoming as you would have wanted them to be.[752]

87. Effectively the impact of the way in which the accountability system operates contributes to members often being very guarded in their statements, responding in a defensive manner and providing minimal information about the event. Rather than making use of the opportunity to analyse and evaluate the way the situation was handled, members give a one-dimensional depiction of events which focuses essentially on demonstrating that 'one's actions were reasonable, acceptable, right, and to be accepted under the circumstances'[753].Not only does the approach to investigation motivate the police officer to provide an account of what happened, which is intended to sanitise his or her conduct, but the need to do so also has the effect of discouraging the police officer from discussing the incident in a more open and candid way.

88. The Marikana incident therefore highlights various aspects of the current accountability system that up to this point have received limited attention. On the one hand it demonstrates powerfully the degree to which members of the SAPS, and the SAPS as an organisation, are able to resist accountability. The stark reality revealed by the incident is that the state can gun down 34 people in an afternoon without it being necessary for the officers involved to account for their actions in doing so. The incident also highlights the fact that the current accountability system appears to detract from the potential for frank

[752] Transcripts, day 285, page 36929 - 36930
[753]Van Maanen, J. (1980) 'Beyond Account: The Personal Impact of Police Shootings' Annals, AAPSS, 452, November 1980, p, 154

discussion and assessment of incidents in which police are involved in the use of force.

89. The Marikana incident therefore raises an issue which is fairly complex: while it should be possible to rely on police officers to provide a full account of incidents in which they have been involved in the use of force in so far as they may be regarded as criminal suspects they are also entitled to the right to silence in relation to possible criminal proceedings that may be instituted against them.

    a. It would appear that there may be ways of resolving this issue that do not undermine the rights of police members. For instance one option would be to require police officers to make full statements and/or to submit to questioning in relation to incidents in which they have been involved but to provide that statements or information provided under these circumstances cannot be used in prosecutions against them.

    b. I have attached a chapter by Carl Klockars on this question as Annexure C

90. **Recommendation 13** – The South African Law Reform Commission should be asked to investigate questions to do with the accountability of police in relation to the use of force including the possibility that there should be some form of mandatory statement and make recommendations in this regard.

91. **Recommendation 14:** Parliament should review the existing SAPS provisions for accountability of the 'tactical units' and make recommendations for more systemic oversight of their functioning.

CONCLUSION

92. It is hoped that this submission will be of assistance to the Commission in reflecting on 'structural or systemic issues' that that need to be addressed in order to try and ensure that incidents like the Marikana incident are not repeated.

93. Various submissions have argued that the Marikana incident is unique and if the Commission is to focus on the systemic issues then it may have to reflect

on what ‘type of incident’ Marikana represents. The expert submissions by Mr White and Mr Hendricks have for instance focused on a critique of the approach applied by the police at Marikana in terms of a professional approach to the conduct of public order operations.

94. However this submission argues that the structural and systemic issues highlighted by the Marikana incident are issues that cut across the SAPS as an organisation. In line with this it argues:

    a. That ‘Incidents of this kind’ may be understood to include not only those situations classified as ‘public order’ situations but any situation where police action will unnecessarily increase the risk of harm to police officers, people who are believed to have been linked to acts of violence or other crimes, or other people; and

    b. That in principle what is objectionable about the policing of the Marikana incident is not simply the scale of the incident related to the number of people killed and injured. The essential objectionable aspect of the incident is that it amounted to a situation where the SAPS deliberately implemented an operation that was likely to lead to confrontation, death and injury when this was not necessary; and

    c. That, whether or not any member of the SAPS violated any legal provision, the Marikana incident therefore constitutes an incident that from a professional policing perspective constitutes a case of ‘unnecessary force’.

95. A key issue that the analysis contained in this submission highlights is that the current model of control and accountability for the use of force is not effective. Not only does the current system not ensure that police avoid unnecessary uses of force but it also does not ensure accountability and is also not conducive to the creation of an environment where police in South Africa can engage in critical reflection about incidents in which they, and their colleagues, are involved in the use of force.

96. In looking back at the apartheid system people tend to focus on the abuses of force by police. Despite the fact that there were widespread abuses it is nevertheless true that the formal system that was established was legalistic in

nature. In the South African Police the essential mechanism for ‘management of force’ was a post shooting review, carried out by an officer, that was supposed to focus on whether the shooting was lawful or not. Issues to do with ‘minimising the use of force’ or ‘protecting life’ and with the overall handling of situations where never the subject of the review. The apartheid era system essentially remains in place except that another legalistically orientated investigation, carried out by the IPID, has been grafted on top of it. This system is inadequate because it fails to address issues to do with minimising unnecessary force.

97. In order for a police organisation to minimise the use of force effectively it needs to optimise understanding and learning about questions to do with the use of force. This cannot be done solely through the training academy but requires that mechanisms be put in place through which uses of force are evaluated, and lessons learnt from them, through the management system. In terms of this kind of approach therefore the key mechanism for ensuring that proper standards are adhered to is the management system. Accountability bodies serve as an additional safeguard but the model does not rely on these bodies to ensure that force is used in an accountable manner, as is currently the case.

98. Effective control of the use of force can only properly be achieved through the development of an orientation towards the professional use of force within the SAPS. As indicated this involves an approach to the use of force by police that is highly conscious of:

    a. The risks associated with the powers and duties that police have to use force; and

    b. The obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

99. The key recommendations put forward in this proposal that would support the development of such an orientation are:

    a. **Recommendation 7** – Government and the SAPS should focus on the development of a professional senior level police leadership corps.

b. **Recommendation 9:** The SAPS should develop a use of force policy that, inter alia, sets out the principles governing the approach that SAPS members should adopt in relation to operations or actions in which there is a likelihood that force may be used, especially if this is likely to involve the risk of death or injury to police officers or others. The policy should be publicised and promoted to ensure its visibility and accessibility to SAPS members.

c. **Recommendation 10:** The SAPS should review its existing mechanisms for reviewing the use of force, in particular the provision for shooting incident investigations in terms of 251, with a view to supporting implementation of the above policy and establishing a professional orientation towards the use of force within the SAPS.

d. **Recommendation 11:** The need for a professional orientation towards the use of force should also be addressed through basic and in-service training.

e. **Recommendation 13** – The South African Law Reform Commission should be asked to investigate questions to do with the accountability of police in relation to the use of force including the possibility that there should be some form of mandatory statement and make recommendations in this regard.

f. Recommendations 1 and 12 are also directly relevant to this issue.

100. Recommendations 2, 3, 4, 5, and 8, may be seen as intended to support such an orientation within the public order policing environment.

101. It must be emphasised that, to the best of my knowledge, the development of a professional orientation towards the use of force is highly compatible with the concern to improve the safety of the police and members of the public and to improve overall police effectiveness, legitimacy and credibility. My understanding is that it would also support much greater accountability by police for the use of force.

102. While I believe that militarisation/demilitarisation are useful concepts for analysing police reform in South Africa I do not believe that it is useful to

define a programme for the way forward simply in terms of concepts of demilitarisation and community policing. It is evident that one of the challenges that is faced by police in South Africa is in relation to the use of force. This is partly an issue that relates to questions of police safety. Police are also obliged to intervene in the public interest in some situations through the use of force. It is important that police be supported in the optimum way in doing so. There is a need for people who are engaged with police reform to be sensitive to the challenges that police face in relation to the use of force.

103. There is therefore a need for those involved with police management and police reform in South Africa to deepen their engagement with questions to do with the police use of force. The approach is consistent with what may be regarded as a 'professional policing' orientation. While the 'community policing' paradigm has value, it does not provide a basis for addressing questions to do with the use of force and, in the past, has led to questions of this kind being neglected.

104. Whatever measures may be put in place to bring about justice or reparation, the terrible events of August 2012, will not be undone by the Commission or by any other process. If the legacy of Marikana is to be addressed however one way in which this will need to be done is by focusing on 'deep level' lessons that the incident holds for policing in South Africa. It is hoped that this submission may be of assistance in helping to reflect on how these lessons should be understood.

105. END OF SUBMISSION: David Bruce, 27 October 2014.

Annexure B6: Recommendations submitted to the Marikana Commission by Amnesty International

MEMORANDUM FROM AMNESTY INTERNATIONAL - RECOMMENDATIONS FOR CONSIDERATION BY THE MARIKANA COMMISSION OF INQUIRY

DATE: 27 October 2014

Preliminary comment:

In making the following recommendations Amnesty International has taken into account evidence before the Marikana Commission of Inquiry, which Amnesty International has been following closely since its establishment in 2012, and South Africa's obligations under international human rights law, which provides that no-one should be arbitrarily deprived of their life and that one of the State's central duties is to protect life.[754] This obligation carries a requirement to conduct "thorough, prompt and impartial investigation" of all suspected cases of "arbitrary deprivation of life". These include deaths occurring under circumstances of "excessive or illegal use of force" by public officials or others acting at their instigation.[755] The State must also ensure that individuals have accessible and effective remedies,[756] which include access to an independent process, such as a judicial process.[757] Finally, a failure by a State to investigate allegations of violations of the right to life could also in and of

[754] A/HRC/26/36, at para 26. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christophe Heyns. 1 April 2014 (Heyns). The right to life is entrenched in s11 of the 1996 Constitution of the Republic of South Africa. It is one of the rights in the Bill of Rights in the Constitution which the "state must respect, protect, promote and fulfil" (s7(2)). It is recognized in a variety of global and regional treaties to which South Africa is a State Party, including under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) which states that "No one shall be arbitrarily deprived of his life", and similarly Article 4 of the African Charter on Human and Peoples' Rights. The right to life is also a rule of customary international law (Heyns, at para 42).

[755] United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, 24 May 1989. United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), Principle No.22. See also the United Nations Human Rights Committee, General Comment No.31 to Article 2 of the ICCPR (CCPR/C/21/Rev.1/Add.13, 26 May 2004, 2004, para.15.

[756] General Comment 31 to Article 2 of the ICCPR (CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.15.

[757] UN Basic Principles, Principle No.6 and Principle No. 22. See also United Nations Human Rights Committee, General Comment No.6 on Article 6 of the ICCPR, para.3 and General Comment 31, para.15.

itself constitute a separate breach of its obligations to respect and protect the right to life.

Amnesty International recognizes the Marikana Commission of Inquiry, established in terms of Presidential Proclamation No.50 of 2012, has been the primary vehicle through which to date the State's international as well as domestic human rights law obligations to investigate and ensure access to remedies have been implemented.

1. FINDING AND RECOMMENDATIONS CONCERNING VIOLATIONS OF THE RIGHT TO LIFE: *The decision on 15 August 2012 to deploy force*

The inquiry process through the Marikana Commission has allowed for the gathering and testing of evidence which cumulatively and objectively, in Amnesty International's view, confirms that the decision by senior police officials to forcibly disarm and disperse the striking mine workers by 16 August 2012 was unlawful under both international and domestic law. It led to the deployment of police armed with live ammunition and to the deaths of 34 of the protestors at two separate sites (Scene 1 and shortly after at Scene 2).

Under international law and standards, force must only be used when strictly necessary and proportional to the threat posed. Lethal force may be used only as a last resort to defend persons against an imminent threat of death or serious injury, and only when less extreme means are sufficient to achieve this.[758] Oral and documentary evidence before the Commission confirms, in Amnesty International's view, that a decision was taken late on 15 August 2012 by the Provincial Commissioner of Police of the North West Province and endorsed at an "extraordinary meeting" which followed the regular meeting of the National Police Management Forum, to disarm, disperse and arrest the protestors gathered at the Marikana koppie. The decision did not arise from any escalation of threat to life or the intention to protect or save life.

Furthermore the disarmament was to be done forcibly if the protestors refused to disarm voluntarily, according to the evidence of the Provincial Commission of Police in February 2014. Again according to evidence before the Commission, the decision on the 15th was taken despite the anticipation of possible loss of life and injury, and

[758] UN Basic Principles, Principle No.9; Heyns, paras. 56-73.

despite information suggesting that the disarming and dispersal of the protestors could be done in a less high risk manner. Amnesty International is of the view that this decision was taken with reckless disregard for life in violation of the state's obligation to protect life. The decision was communicated to three senior police commanders involved in the Marikana operation that same evening, along with a deadline to accomplish the operation before the end of 16 August.[759]

The launch of the operation on 16 August in the anticipation of almost inevitable loss of life and serious injury was therefore unlawful under international human rights law, in particular the obligation to protect life.[760] The decision taken to proceed to the tactical option involving the use of lethal force was also a breach of domestic law and regulations, including Standing Order (General) 262: Crowd Management during Gatherings and Demonstrations, which obliges police officers to act within an operational framework prohibiting firearms and sharp ammunition, requiring the avoidance of the use of force "at all costs", or if unavoidable, its purpose being to de-escalate conflict with the minimum force to accomplish the goal.[761]

The resulting deaths of 34 people on 16 August must therefore be considered arbitrary deprivation of life for which the authorities who made the decision to forcibly disarm and disperse the protestors, and others who directly influenced that decision, bear overall responsibility.[762]

Recommendations arising:

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[759] Marikana Commission, Statement of Lt General MNZ Mbombo, 19 November 2012, para.18; Extract: Minutes of National Management Forum of the Police of 15 August 2012 (Exhibit JJJ177 and Exhibit LLL1, para.43 cited by Gary White, Supplementary Statement, 21 June 2014, Section 2.2.3); Phone records of Lt. General Mbombo (Exhibit LLL3) and oral evidence of Lt. General Mbombo, Transcript Day 180 4 February 2014, pages 21573-21580; 21616-21619; and Transcript Day 181, 6 February 2014, pages 21719 – 21725.

[760] Principle 9 of the UN Basic Principles allows for the use of firearms only in defence against imminent threat of death or serious injury and only when less extreme methods are insufficient.

[761] See for instance Sections 7(2); 11(1); 11 (3)(a); 11(3)(b); and 11(4)(b), the last one of which prohibits the use of firearms and sharp ammunition. It was common cause amongst the experts called before the Commission of Inquiry that the South African Police Service regulatory framework including Standing Order 262 is consistent with international policing and human rights standards.

[762] Applicable jurisprudence before the Commission includes the case of McCann and Others v The United Kingdom, (Application no. 18984/91), Grand Chamber Judgment of 27 September 1995, in particular paras.192 -214. At para. 194 the Court noted that "in determining whether the force used was compatible with Article 2 the Court must carefully scrutinize…not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence *but also whether the antiterrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.*" (emphasis added) (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943,)

- All of those involved in the decision taken at the irregular meeting which followed the National Police Management Forum on 15 August 2012 should be recommended for further investigation with a view to possible criminal and disciplinary proceedings as appropriate for involvement in the arbitrary deprivation of life of 34 protestors and injuries sustained by many others on 16 August 2012.
- This recommendation is made bearing in mind that certain evidence regarding this meeting on 15 August was withheld from the Commission and testimony of key witnesses was evasive concerning prior conversations, the identities of participants at the meeting, and the content of the discussions at the meeting. (See also section 4 below on this issue.)
- Recommendations should be made for the State to make reparations, including adequate compensation and other appropriate forms of redress to the victims, including those who survived and the families of those who died.

2. FINDING AND RECOMMENDATIONS CONCERNING VIOLATIONS OF THE RIGHT TO LIFE: *Evidence and consequences of the use of excessive force*

The policing operation which followed the decision taken on 15 August 2012 was tainted at the start by the unlawfulness of that decision. The operational plan for what was referred to as Stage 3 was hastily put together on 16 August by the commander of the Special Task Force, without any adequate briefing for the units involved and implemented without the written or audio-visual documentation required under police procedures.[763] Evidence before the Commission has highlighted the marginal role of public order policing units and commanders in the planning and conduct of this operation.[764] The extent of departure from the existing public order framework and

[763] Marikana Commission, Supplementary Statement of expert witness Gary White, 21 June 2014, Sections 2.3, 2.4 and 2.5 succinctly summarises the evidence and consequences for the protection of life, in response to the command to disarm on 15 August, from the unrealistic time-frame, the lack of a written operational plan, the poor or no briefing for the different units involved, the lack of contingency planning, the loss of command and control particularly at Scene 2, and the inevitability of the tactical units being deployed.

[764] Marikana Commission, Final Statement of expert witness Gary White, 4 October 2013, sections 7.3.15 – 7.3.19 where he notes from a review of the training records of the senior police leadership, including Provincial Commissioner Mbombo, involved in the Marikana operation, that five out of the six had had no public order policing training since the 1980s. The sixth, Major General Annandale, had undertaken Crowd Management training in 2000.

the effective dependence on the deployment of armed tactical units, the Special Task Force, the National Intervention Unit and the Tactical Response Team, is strikingly suggestive of a military approach to dealing with the situation.[765] In a situation of anticipated resistance from some of the protestors to being disarmed, the likelihood of the tactical units engaging with the protestors was high. These units were armed only with live ammunition, including R5 rifles capable of being put on automatic fire, which is totally inappropriate in law enforcement where only aimed shots may be fired in response to a specific and imminent threat to life or of serious injury.

The excessive force used in this operation, as further evidence of the arbitrary deprivation of life, can be measured in terms of the number of shots by the police, the number of fatalities amongst the protestors and the grave nature of the injuries sustained. Although there was at least one pistol shot fired by a protestor in the direction of the police at Scene 1, there were no police fatalities or injuries reported at either Scene 1 or Scene 2.

According to objective evidence before the Commission the number of shots fired by police at Scene 1 were 327 live rounds. Analysis of audio enhanced visual footage showed also that the shooting continued for over one minute after the first cease fire call.[766] Fourteen minutes later, at Scene 2 (koppie 3 to which some protesters had

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[765] A key aspect of the de-militarisation of the police during the 1990s was the creation of public order policing capacity, trained and equipped to work within the framework of the use of minimum force, as reflected in SAPS Standing Order 262. However during the 2000s, as noted in evidence before the Commission, the role and capacity of the public order policing units was weakened by decisions taken by senior officials. (Marikana Commission, Exhibit R, Ministry of Police, Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events, August 2011; Marikana Commission, expert witness Eddie Hendrickx, Final Statement, 27 January 2014, paras.10-20 and oral evidence to the Commission of Inquiry on 3 September 2014, Transcript Day 284, at pages 36762 – 36767, on the demilitarisation of the South African Police and the development of POP capacity in the 1990s; Marikana Commission, Exhibit FFF-17, Council for the Advancement of the South African Constitution (CASAC) to the Marikana Commission, January 2013, on the drift into the development of what they referred to as the 'doctrine of maximum force'.) The former Minister of Police, Nathi Mthethwa, in his written and oral evidence to the Commission, denied that this 'maximum force' approach existed, a view challenged during cross-examination of his evidence-in-chief (Marikana Commission, Supplementary Statement Emmanuel Nkosinathi Mthethwa, which was handed in to the Commission on 14 July 2014; Transcript Days 255 (14 July 2014) and 256 (15 July 2014).

[766] Marikana Commission, Exhibit FFF8 and Exhibit FFF35, Discharge 16 August 2012, corrected version of the report, cited by Gary White, Final Statement, Section 3.1.11-3.1.15. Marikana Commission, Exhibit JJJ198, Affidavit of Katherine Scott relating to analysis of audio enhanced video footage from Scene 1, done at the request of the Centre for Applied Legal Studies legal team for the South African Human Rights Commission

fled), police fired 295 rounds of live ammunition and 30 rubber bullet rounds over a 12 minute period.[767]

The excessive level of force used is further illustrated by the scale of fatalities and the nature of the injuries suffered by the protestors who died and by those who survived. Independent forensic pathologists and the state pathologists who undertook the post-mortem examinations on 22 and 23 August 2012 were in agreement on their findings. The causes of death were identified as being a result of gunshot wounds to the upper body or head in nearly all cases. Thirty of the 34 men died as a result of injuries caused by police high-velocity ammunition from R5 assault rifles. The fatal injuries in three other cases were caused by handgun ammunition and in one case by shotgun ammunition.[768]

The level of force used and its impact is evident also in the injuries sustained by those who survived. Expert analysis of the medical records of 46 injured survivors admitted for treatment on or shortly after 16 August indicate that 31 cases involved high-velocity gunshot injuries. In cases where shot direction could be ascertained, 18 of the survivors appear to have been shot from the rear. |n 14 cases the severity of the injuries was classified as “major”, with resulting major/long-term/permanent disabilities noted in 22 cases.[769]

A further objective reflection of the extent of excessive force used is evident in the expert analysis of the post-mortem records of 16 of the men who died at Scene 1, 15 of whom died as a result of high-velocity gunshot injuries. The analysis, focused on survivability of the injured and undertaken by a chief specialist in trauma and emergency medicine, also highlights the inappropriate weaponry used.[770] The R5 assault rifle, which has military origins and can be set to fire on automatic, and the

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[767] See above note 13.
[768] Marikana Commission, Exhibit FFF20, Medico-Legal Report: Marikana Mine Deaths, 22 October 2012. There was agreement in all significant respects in the findings made by the two independent forensic pathologists and five of the six state pathologists, with differences eventually resolved in respect of the sixth state doctor. The causes of death were identified as a result of gunshot wounds to the head and/or face (8 cases); to the neck (3); to the chest (11); to the chest and neck (1); to the abdomen (2); to both chest and abdomen (7); to the pelvis (1); and to the chest and lower limbs (1).
[769] Marikana Commission, Exhibit FFF22, 26 March 2013. The information had been gathered and analysis done by an independent forensic medical expert, Dr S R Naidoo, at the request of one the legal parties to the Commission, the Legal Resources Centre, representing the family of one of the deceased and Benchmarks Foundation. The medical records accessed were often incomplete.
[770] Marikana Commission, Exhibit MMM10, Medico-Legal Report, Professor K D Boffard, done at the request of the Commission’s Evidence Leader Team.

5.56mm ammunition used (known also as 'Nato Rounds'), have highly destructive effects at skin impact level and internally.[771]

In seven of the 16 cases examined, even if appropriate medical care could have been accessed rapidly, the "catastrophic" nature of the injuries would have precluded survival, in the expert's view. The remaining nine, including the 16th person who died from shotgun injuries to his neck and chest, did not have necessarily fatal injuries, but their condition would have rapidly deteriorated. With two exceptions, their survival would have depended on the availability of higher level medical care within at most one hour.[772]

Recommendations arising:

- Notwithstanding the overall responsibility of those involved in the decision of 15 August, recommendations should be made concerning further investigations into the conduct of commanding officers, whom the Commission may identify as having followed an illegal order. They must be held accountable if found responsible for arbitrary deprivation of life of 34 protesters as well as for the injuries sustained by many others.
- While very few of those who fired shots on 16 August have been called before the Commission to give oral evidence confirming their justification of private or self-defence contained in their written statements, further investigations, including criminal investigations, should be conducted, whether through the oversight body, IPID, or other criminal justice channels.
- All allegations that some of the deaths, such as at Scene 2, were the result of deliberate killings, should be fully and independently investigated.
- Government authorities and police officials should urgently restore public order policing units to full capacity, with appropriate training and equipment, and to ensure that these units are always fully in command in resolving public order situations.
- There should be an immediate prohibition in public order policing situations of the use of R5 rifles and similar military style weapons and ammunition.

[771] Advice to Amnesty International from an independent forensic medical expert, Dr S. R. Naidoo, familiar through post-mortem examinations with the effects of R5 rifle fire on victims.
[772] See above note 17.

3. FINDING AND RECOMMENDATIONS CONCERNING VIOLATIONS OF THE RIGHT TO LIFE: *Failure to provide medical assistance*

Despite the bloodshed that was foreseen by those who made the decision on 15 August to disarm, disperse and arrest the protestors there is evidence before the Commission indicating further failures to protect the right to life - the failure to plan for adequate medical assistance to be available and in addition, once persons had been grievously injured by police action, the failure in some cases to provide first aid or similar assistance to them.

Although there are indications that mass casualties were anticipated by those involved in making the decision on 15 August to disarm and disperse the protestors, there appears to be no indication in evidence before the Commission that any planning was done to mitigate the consequences of the force used by ensuring that emergency medical aid would be at hand.[773] On the contrary the evidence - that of a police request for four mortuary vans in advance of the operation - indicates that the focus was on planning for the inevitability of deaths.[774]

On the day of the operation, 16 August, the police commander in charge of the paramedic units inexplicably failed to bring them to Scene 1 for nearly one hour after the shooting occurred. His evidence before the Commission failed to explain his decisions which caused him to lead the paramedic teams away from where they were most urgently needed.[775]

Of further concern is the conduct of police who were at Scene 1 who, pending the arrival of the paramedic team, failed to take any remedial measures to ease the suffering of the injured and to attempt to save lives. Their actions in securing the scene in the aftermath of the shootings at both Scene 1 and Scene 2 could actually have increased the suffering of the injured. At Scene 2, several of the severely

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[773] Conduct which is contrary to requirements under international standards, such as UN Basic Principles, Principle No.5, which states: "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:…(b) Minimise damage and injury, and respect and preserve human life."

[774][774][774] Marikana Commission, Exhibit JJJ183) Affidavit of Josephine Keetseng Ngake; Gary White, Supplementary Statement, Sec 2.3.7 (d), notes that the request by Brigadier Van Zyl is a further indication that deaths were anticipated as a result of the impending operation.

[775] Marikana Commission, Transcripts Day 192 (26 February 2014) and Day 193 (27 February 2014), under cross-examination of General Naidoo by Evidence Leader Advocate Matthew Chaskalson, and using Professor Boffard's expert report (above note 17) to draw out the consequences of the delay in bringing the paramedics to Scene 1 in specific cases.

injured persons were manacled and placed into positions which could either have hastened their deaths or made it difficult for them to change position to ease pain or assist their breathing.[776]

Such conduct constituted a violation of the UN Basic Principles on the Use of Force and Firearms, Principle 5, which states that "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:…(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment". In addition it appears to constitute a violation of the right to life in terms of the state obligation to protect the right to life and to do all that could be reasonably expected to avoid a real and immediate risk to life.[777] Moreover, the failure to provide such assistance in such circumstances would also constitute a breach of the obligation not to subject (anyone) to cruel, inhuman or degrading treatment or punishment.

Further compounding the effects of the delay in provision of medical care was the location of the shooting, a rural area with the nearest hospital facilities of an appropriate level being 40 minutes to two hours away by ambulance. With regards to suitable modes of transport, evidence before the Commission indicates that there was available on the day locally only one emergency helicopter with a paramedic on board and two Advanced Life Support vehicles with paramedics on board.[778]

Recommendations arising:

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[776] Advice to Amnesty International, in relation of the manacling and forced positions of several of the injured at Scene 2, from independent forensic medical expert, Dr S. R. Naidoo. Marikana Commission, Gary White, Final Statement, Sec 8.1.4, notes that the 52 police officers who had shot firearms at the crowd of protestors at Scene 1 proceeded to disarm the wounded protestors, and then appear to have left them unattended for nearly an hour before medical attention arrived. See above note 22. The issue of the obligation to provide first aid arose during cross-examination of General Naidoo by the Evidence Leader Advocate Chaskalson (Day 193).

[777] As part of the State's positive obligations to protect the right to life, to take appropriate steps to safeguard the lives of those within its jurisdiction and to avoid a real and immediate risk to life of which the authorities have or ought to have knowledge. In *Osman v the United Kingdom* the reasoning was applied in terms of horizontal effects between non-state actors (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257); and similarly, in respect of positive obligations to prevent harm, in *Carmichele v Minister of Safety and Security* (CCT 48/00 [2001], http://www.saflii.org/za/cases/ZACC/2001/22.html. The African Commission on Human and Peoples' Rights, interpreting Article 4 of the African Charter which prohibits the arbitrary deprivation of life, found in the case of *Association of Victims of Post-Electoral Violence & INTERIGHTS* that states must use their 'legal, technical, human and material resources' to produce the expected result of guaranteeing the protection of the right to life.

[778] See above note 17.

- Officials involved in the decision on 15 August to order the deployment of units armed with live ammunition while failing to plan for medical assistance to mitigate the consequences of the use of force should be held accountable for the failure to protect the right to life.
- Any law enforcement official who failed to give immediate attention or to ensure that this is rendered in the shortest possible time must be held accountable for involvement in the arbitrary deprivation of life.
- All law enforcement officials, including members of Public Order Police Units and the tactical units, should receive first aid training, as well as training on their obligations to protect life. Planning for medical assistance must be an obligatory component in any large-scale or high risk law enforcement operation.

*4. FINDING AND RECOMMENDATIONS CONCERNING VIOLATIONS OF THE **RIGHT TO LIFE:** Obstruction of the state's obligation to investigate suspected violations of the right to life*

The mass fatalities on 16 August resulting from the unlawful decision of the previous day clearly obliged the State to launch an investigation as part of its obligation to protect the right to life.[779] Such an investigation should, among other things, be an official investigation initiated by the State, be exhaustive and impartial, be conducted by persons independent from those potentially implicated, and be promptly established and reasonably expeditious. It must be capable of making a finding on whether the force used was justified in the circumstances and should seek to establish command responsibility in relation to the incident under investigation. Public scrutiny is essential to the accountability process.[780]

As noted at the outset of this document, the Commission of Inquiry chaired by Mr Justice Ian Farlam has been the primary vehicle through which these international as well as domestic human rights law obligations of the State to investigate and ensure access to remedies have been implemented to date.

[779] Heyns, para.78
[780] Heyns, paras.80-83

Of serious concern to Amnesty International is the evidence indicating what appears to have been a systematic attempt from the start by the police authorities, with possibly higher level involvement or influence, to conceal or falsify evidence and to mislead the inquiry. These activities appear, at least by inference, to have been intended to jeopardise the ability of the current inquiry process and potentially other criminal or civil legal processes to establish individual, organizational or corporate responsibility for acts or omissions leading to the loss of life on 16 August.[781] They involved, obscuring or "losing" evidence relating to the meeting held on 15 August 2012 when the crucial decision was taken to implement the 'tactical' phase to force the dispersal and disarmament of the protestors on the following day.

The issue of the impact of these activities on the functioning and the prolongation of the inquiry process has been raised as a matter of concern during open hearings a number of times.[782]

Some of the very disturbing indications of attempts to frustrate investigations into the suspected unlawful use of force on 16 August include:

1. The withholding of information about, and the "loss" of the minutes of the irregular meeting which followed the National Police Management Forum meeting on 15 August 2012 and at which the decision to proceed to the tactical option was made; the most persistent and striking failure to co-operate with the Commission on this issue being that of the National Commissioner of Police;[783]
2. The withholding until September 2013 of a significant body of evidence contained on police hard drives;[784]

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[781] During the final stages of the hearings in 2014 evidence relating to concealment or altering of evidence by Lonmin officials has also been considered.
[782] Comments for instance by Mr Justice Ian Farlam during proceedings on 8 August 2014 regarding "documents which had previously been asked for and were said to be non-existent finally appeared on Colonel Scott's computer" (Transcript Day 250, 26 June 2014, at page 31508, lines 4-10). Similar frustration was expressed during the evasive testimony of the National Commissioner of Police when she was recalled as a witness on 10 September 2014 (Transcript Day 288, at pages 37425, 37427, 37428, 37429, 37430, 37448, 37452).
[783] Marikana Commission, Transcript Day 270, 8 August 2014, Evidence of Major Lethoko. See citations in note 29 concerning the National Commissioner of Police.
[784] Marikana Commission, Transcript Day 250, 26 June 2014, at page 31508, where Mr Justice Farlam noted "…documents which had previously been asked for and were said to be non-existent finally appeared on Colonel Scott's computer and that led to lengthy cross-examination and other documents came forward" (referring to events in September 2013 and subsequently, following the handing over of a hard drive by Scott during his cross-examination by a member of Evidence Leader Team).

3. Political interference by an inter-ministerial committee in the process normally applying in cases of police-related suspicious deaths, as well as placing completely inappropriate time limits on the post-mortem examinations of the 34 protestors shot dead by the police;[785]
4. The withholding of or unacceptable delays in the handing in of certain weapons for ballistics testing, including shotguns and handguns;[786] and the altering of crime scenes, in particular in relation to the placement of weapons in the vicinity of some bodies;[787]
5. The rapid creation of a version of "private and self-defence", beginning with a briefing sent to the government Minister of International Relations and Co-operation on the night of 16 August 2012; the first press conference called by the police authorities on 17 August 2012, which was also attended by the then Minister of Police; the "Shooting Incident" report completed on the same day; and continuing through the so-called Roots conference of police officers involved and held secretly from late August 2012 and which resulted in the police version, known as Exhibit L, subsequently presented at the Commission hearings in November 2012;[788] and
6. Police statements submitted to the inquiry lacking in detail (although in some cases supplemented with further detail a year later), as well as evasive oral evidence of senior police officials and commanders to the Commission of Inquiry in 2013 and

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[785] Government officials publicly stated that the post-mortem examinations of the 34 fatally wounded miners had to be completed in less than two days. The ministerial committee terminated the mandate of IPID and the two independent forensic pathologists who had been requested by IPID, along with their own investigators, to observe the post-mortem examinations conducted by the state pathologists. However, a concerted effort by the Legal Resources Centre with the support of others, helped secure the presence of the two independent forensic specialists at the Ga-Rankuwa mortuary. Nonetheless the time pressures remained, with certain limitations inherent to optimal medical examinations, and circumstances less than ideal for conducting these critical examinations. (Provisional Statement of Dr S. R. Naidoo, 20 February 2013, for the Marikana Commission of Inquiry.)

[786] The impact for the investigation process of the withholding from ballistics matching of the shotguns and some of the handguns fired by police on 16 August 2012 remains a serious problem.

[787] Marikana Commission, Evidence of Captain Mohlaki (Days 6,7, 8 and 9 on 30, 31 October, 5, 6 November 2012); Evidence of Warrant Officer Thamae (Day 13 on 15 November 2012); http://www.iol.co.za/news/special-features/mining-crisis/did-cops-plant-marikana-weapons-1.1418225

[788] Marikana Commission, Exhibit FFF4, Civil Unrest Incident: Marikana: North West Province: Internal Brief; Exhibit FFF5, Media Statement from the South African Police Service, 17 August 2012; Police Shooting Incident Report Compiled by the Office of the Station Commander Marikana, 17 August 2012 (and cross-examination of Major Govender, Transcript Day 274, 14 August 2014, at pages 35055-35087). The version of the police case known as Exhibit L was presented to the Commission of Inquiry by Lt Colonel Visser and Lt Colonel Scott who were not under oath (Transcript Days 9, 10, 11 and 12) on 6,8,9 and 12 November 2012.

2014.

These and other attempts by police authorities to frustrate the inquiry process constitute another serious violation of the human rights of the victims of the unlawful use of force on 16 August, as well as the rights of survivors and the families of the victims who died.

Recommendations arising:

- All those found to be involved in acts intended to or which had the effect of obstructing the ability of the Commission of Inquiry to fully and thoroughly investigate the suspected unlawful use of force and the arbitrary deprivation of life on 16 August should be held fully accountable for their actions.
- Suggesting that the Commission could draw adverse inferences from the conduct of certain witnesses who failed to provide information to the Commission of Inquiry when in all fairness or likelihood that witness was in a position to do so.

ENDS