



**COMMISSION OF INQUIRY INTO ALLEGATIONS OF POLICE INEFFICIENCY  
IN KHAYELITSHA AND A BREAKDOWN IN RELATIONS BETWEEN THE  
COMMUNITY AND THE POLICE IN KHAYELITSHA**

**Civil Society Prison Reform Initiative (Community Law Centre) Submission for Phase  
One of Commission of Inquiry**

*“Constitutionally immaculate law enforcement may well be impossible in every case, but most communities and commentators will continue to demand zero-tolerance for police and prosecutorial misconduct regardless of formal realizability. This is not only a theoretical aspiration to legitimate authority but also a recognition that abusive government has a destructive expressive meaning that tends to demoralize the power and influence of law.”<sup>1</sup>*

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**Introduction**

The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 as a project of the Community Law Centre. The Centre, linked to the Law Faculty of the University of the Western Cape, was established in 1990 with a view to engage in policy development, advocacy and educational initiatives through high-quality research, focusing on areas critical to the realisation of human rights and democracy in South Africa and Africa in general.

CSPRI focuses on prisons and other places of confinement, with the aim of furthering constitutional and human rights imperatives within these settings. Much of CSPRI’s recent work has involved pre-trial detention and the range of issues prevalent in the administration

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<sup>1</sup> Erik Luna “Transparent Policing” 85 Iowa L. Rev. 1107 1999-2000, 1120.

of justice from the time of arrest to sentencing. Such issues include the police harassment and wrongful arrest, the use of force (including deadly force), complaints of assault and torture, conditions of detention, bail and legal representation.

CSPRI has not engaged directly in Khayelitsha-specific research, but does, however, have insight into certain policing issues in general and the nature of the causes underpinning police inefficiency and public distrust of the police and the manner in which the police behave undoubtedly shapes the relationship between the public and the police. With the state having the monopoly on the lawful use of force, and the police being an important actor in this monopoly, we therefore welcome the opportunity to present a submission before the Commission.

The submission is structured as follows:

- Context: Khayelitsha, crime and incidences of vigilantism
- Arrests, detection and investigations
- Complaints
- Conclusions and recommendations

### **Khayelitsha, crime and incidences of vigilantism**

1. The overall crime rate in South Africa decreased slightly during the 2011/2012 period.<sup>2</sup> In line with this trend, certain areas of the Western Cape and Cape Town Metropolitan area experienced a decrease in crime across most crime categories.<sup>3</sup> The crime rate in Khayelitsha (and many similarly situated areas), however, has not only bucked the national trend and saw increased crime, particularly violent crime, but is also much higher than many other suburbs of Cape Town.<sup>4</sup> According to the official SAPS 2011/2012 crime statistics Khayelitsha has the second highest murder rate in the country with 286 murders (per 100 000) having been reported during the 2011/2012 period (representing a 28.8% increase during the financial year).

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<sup>2</sup>The average decrease across all categories of crime was 2.6% (SAPS Crime Statistics for 2011/2012 available at [http://cdn.mg.co.za/content/documents/2012/09/20/2012\\_Crime\\_Statistics.pdf](http://cdn.mg.co.za/content/documents/2012/09/20/2012_Crime_Statistics.pdf))

<sup>3</sup> See statistics in relation to aggressive, contact and non-contact crimes (with the exception of certain drug-related crimes and driving offences) for Claremont, Rondebosch, Sea Point, Cape Town Central and Wynberg police station districts, available at <http://www.issafrica.org/crimehub/wizard>

<sup>4</sup> See statistics in relation to Khayelitsha and all categories of crimes at <http://www.issafrica.org/crimehub/wizard>

2. Although crime statistics offer only a limited understanding of police performance,<sup>5</sup> it is perhaps quite telling that the “crimes heavily dependent of police action” category increased dramatically in Khayelitsha in the 2011/2012 period - in sharp contrast to certain other Cape Town Metropolitan suburbs.<sup>6</sup> This indicates increased surveillance on the part of the police, but may also come at a cost to community-police relations.
  
3. Recent research suggests that ambivalence towards the SAPS, generally, is linked to “widespread perceptions of incompetence.... [and that] widely publicised allegations of police brutality and corruption further undermine the image and efficacy of the SAPS.”<sup>7</sup>The response from poorer, more vulnerable communities to police inefficiency often comes in the form of violence. Martin states:
 

“The many problems associated with the SAPS greatly restrict state involvement in policing the poorest black townships and informal settlements. Likewise, the indigent nature of these areas ensures that the personalised and prompt private security services in the middle and upper classes remain unobtainable. For these “forgotten” communities, mistrusting of the SAPS and being too poor to afford the private alternative, there remains only one viable and ubiquitous option for accessing justice: the vigilante.”<sup>8</sup>
  
4. Based on media reportage, there have been approximately 20 vigilante-related deaths in Khayelitsha during 2012.<sup>9</sup> However, vigilantism is not new to Khayelitsha. The occurrence of repeated incidences of vigilantism in response to crime dates back as far as 2001.<sup>10</sup>
  
5. A 2006 study into the causes of vigilantism in Khayelitsha indicated that incidences of vigilantism occurred in the wake of crimes such as murder, attempted murder,

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<sup>5</sup> A Faull “Missing the Target: When measuring performance undermines police effectiveness” (2012) 31 SA Crime Quarterly.

<sup>6</sup> The suburbs listed at FN 3 were examined in relation to such crimes.

<sup>7</sup> See authors cited in JR Martin “Vigilantism and informal social control in South Africa.” Acta Criminologica 23(3) 2010 at pg 54.

<sup>8</sup> JR Martin “Vigilantism and informal social control in South Africa.” Acta Criminologica 23(3) 2010 at 61.

<sup>9</sup> “Police investigate Khayelitsha mob killing” 26 September 2012, Eyewitness New Report, available at <http://ewn.co.za/2012/09/26/Police-investigate-Khayelitsha-mob-justice>; “Mob justice on the increase” 15 July 2012, IOL News Report, available at <http://www.iol.co.za/news/crime-courts/mob-justice-on-the-increase-1.1341497#.UHaTONmDzct>

<sup>10</sup> B Baefele “Vigilantism in the Western Cape” 2006, available at [http://www.westerncape.gov.za/Text/2006/4/vigilantism\\_in\\_the\\_western\\_cape.pdf](http://www.westerncape.gov.za/Text/2006/4/vigilantism_in_the_western_cape.pdf)

robbery with aggravated circumstances, public violence and common assault.<sup>11</sup> The primary cause of vigilantism, according to the research subjects (residents of Khayelitsha) cited in the report, is, essentially, a lack of the trust in the SAPS due to:

- a slow reaction time to complaints;
- weak statement-taking;
- poor detective work and evidence gathering;
- no follow-up on cases;
- no communication between the detectives and the community; and
- corruption.

These incidents indicate at least erosion – if not total failure – of the functioning of certain state processes and institution and calls into question the adequacy of the legal framework as it pertains to policing in Khayelitsha.

6. The information set out below indicates that it is indeed possible that policing in Khayelitsha remains ineffective and corrupt, despite the fact that it has one of the highest crime rates in the province.

### **Arrests, detection and investigations**

7. Amongst the provinces, the Western Cape has the third highest rate of attempted murders (2328 cases reported) and a crime ratio of 44 cases per 100 000 people. It also has the fourth highest rate of murders (2300), representing a crime ratio of 43 cases per 100 000 people.
8. Cases of attempted murder in the Western Cape rose over the 2011/2012 period and cases of murder fell by 9 just counts. Nevertheless, the number of arrests for murder and attempted murder – albeit calculated at a national level - fell.<sup>12</sup>
9. The detection rates for murder and attempted murder are both below 50% nationally, at 31% and 48% respectively, as are some of the other serious contact crimes.<sup>13</sup> Certain contact crimes have a much higher detection rate, such as assault

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<sup>11</sup> Id.

<sup>12</sup> SAPS Annual Report, pg 65.

<sup>13</sup> SAPS Annual Report, pg 96.

gbh,<sup>14</sup> sexual offences<sup>15</sup> and common assault.<sup>16</sup> This is unsurprising given the fact that these crimes generally involve two parties known to each other.

10. What the detection rate means in relation to murder cases, however, is that at any given time, only 31% of such cases will proceed to formal investigation and that 69% of such matters will not, due to being withdrawn or dismissed before reaching the court for purposes of formal indictment.
11. The rate of complaints rendered “court ready,”<sup>17</sup> nationally, by the Police is very low across all categories of crimes.<sup>18</sup> At any given time, only 47% and 45% of murder and attempted murder cases, for example, are ready for court. In fact, very few of the crime categories listed in the SAPS Annual Report have a “court ready” rate of more than 50%.<sup>19</sup>
12. The rate of detection and existence of “court ready” dockets, indeed raises the possibility that there are significant constraints in a number of the pre-indictment and/or pre-trial phases of investigation, namely, resource constraints, understaffing and poorly trained SAPS personnel when it comes to forensic investigation, the gathering of physical evidence, knowledge of the requisite legislation and SAPS standing orders. Although province-specific information on detection and “court ready” rates is not publicly available, given the high rate of reported crime in the Western Cape, particularly in the Khayelitsha district, it is at least plausible that such problems are a feature in that area.
13. In addition, the poor detection rate suggests that a number of arrests may be unnecessary, unfounded, or based on spurious charges. And in this regard, it is important to emphasise the fact that at the Western Cape, which has the highest rate of

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<sup>14</sup>80%, SAPS Annual Report pg 95.

<sup>15</sup>63.6% SAPS Annual Report, pg 95.

<sup>16</sup>78% SAPS Annual Report, pg 95.

<sup>17</sup>The SAPS Annual Report defines “court ready complaints” as a “fully investigated case docket that can be utilized by the NPA for the prosecution of an offender. A declared fully investigated docket suggests that there is no outstanding information which requires further investigation by a detective and that all evidence (e.g. statements, DNA evidence etc.) has been obtained.” Pg 93.

<sup>18</sup>SAPS Annual Report, pg 95-97.

<sup>19</sup>Id.

incarceration in the country (363 per 100 000),<sup>20</sup> has 9516 remand detainees, accounting for over one third of the Western Cape inmate population. The 2010/2011 JICS Annual Report indicates that two Western Cape prisons constituted some of the country's most overcrowded (Pollsmoor Maximum, 227.88% occupation and Grootvlei Max, 210% occupation) due to the remand detainee population in those prisons. Moreover, more than half of the remand detainee population will ultimately be released due to acquittal or their charges being withdrawn or struck off the roll.<sup>21</sup>

14. Based on the preceding there is reason to believe that many arrests made by the police is unnecessary. In 2004/5 the Judicial Inspectorate for Correctional Services attempted to quantify this. It was estimated that in excess of 18 000 people per month were unnecessarily arrested nationally by the police and consequently ended up in prison awaiting trial.<sup>22</sup> Even though the exact quantum may be hard to pin down, it is well known that the police have monthly arrest targets and it is hence likely that these targets contribute to unnecessary arrests.<sup>23</sup> A closer analysis of police arrests statistics shows that 53% of the 1 452 600 arrests made by the police in 2010/11 were not for priority crimes, or they involved crimes less serious than shoplifting.<sup>24</sup> These observations are given further credence by findings from three magisterial courts, to the effect that one out of two accused persons remanded to custody are never tried – instead, their cases are either withdrawn or struck from the roll.<sup>25</sup> The sheer number of arrests raises serious concerns that many of them would amount to arbitrary arrest and detention, which is a violation of section 12(1)(a) of the Constitution.

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<sup>20</sup> Judicial Inspectorate for Correctional Services (JICS) Annual Report 2011/2012, pg 31.

<sup>21</sup> See V Karth "Between a Rock and a Hard Place: Bail decisions in three South African courts." Research paper, Open Society Foundation for South Africa, Cape Town and C Ballard "A statute of Liberty? The right to bail and a case for legislative reform." (2012) SACJ (1) 24.

<sup>22</sup> Office of the Inspecting Judge (2005) *Judicial Inspectorate for Correctional Services Annual Report 2004/5*, Cape Town: Office of the Inspecting Judge, p. 21.

<sup>23</sup> Women's Legal Centre (Undated) *Submissions on South Africa to the Commission on status of Women*, para 188.

<sup>24</sup> SAPS (2011) *Annual Report 2010/11*, Pretoria: SAPS, p. 66.

<sup>25</sup> Karth, V (2008) *'Between a rock and a hard place' - Bail decisions in three South African courts*, Cape Town: Open Society Foundation (South Africa), p. 32.

15. We therefore request that the Commission investigates this matter further, with particular reference to the crimes people are arrested for and specifically the proportion of these arrests that fall in the broad category of priority crimes.

## **Complaints**

16. According to the 2011/2012 Independent Complaints Directorate Annual Report (ICD Report), the Western Cape accounted for the second highest number of complaints (857) and 18% of all complaints nationally.<sup>26</sup> 426 of these complaints were made in relation to police misconduct, 348 in relation to criminal conduct, 29 regarding the Domestic Violence Act and 54 on deaths in police custody or as a result of police action.<sup>27</sup> In the 2010/2011 period, the Western Cape accounted for 17% of all complaints and notifications in the country, which was, again, the second highest.<sup>28</sup> 70% of the complaints (calculated across the provinces) concerned police brutality (attempted murder, assault and assault GBH), 4% concerned torture and 2% concerned incidences of rape.<sup>29</sup>

17. The 2009/2010 ICD Annual Report, which indicates that the Western Cape constituted 17% all complaints in the county, indicates that there were 7 deaths at the Khayelitsha police station which occurred whilst suspects were in custody or as a result of police action.<sup>30</sup> The report describes one of these incidences involving police brutality in Khayelitsha which led to the death of an individual:

“...on 28/09/2009, two permanent members and six reserve members assaulted a member of the public by kicking and hitting him with half a brick. He was transported to the Khayelitsha police station where individual members again assaulted him in full view of other police members and administration staff – these members and administration staff declined to make statements. The victim of the assault died in hospital.”<sup>31</sup>

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<sup>26</sup>ICD Report, pg 25.

<sup>27</sup>Id.

<sup>28</sup> ICD Annual Report 2010/2011, pg 28.

<sup>29</sup> Institute for Security Studies presentation (2011),Johan Burger available at <http://www.issafrica.org/uploads/State-of-the-SAPS%20copy.pdf>

<sup>30</sup> ICD Annual Report 2009/2010, pg 87.

<sup>31</sup> ICD Annual Report 2009/2010, pg 65.

## **Transparency, accountability and oversight**

18. As illustrated above, there is much evidence in the public domain that the Khayelitsha area has, and continues to experience poor ineffective policing in the face of extremely high crime levels of violence and violent crime. In addition, the Western Cape has a high number of complaints about the police and the Khayelitsha district has a history of police brutality and deaths in police custody. Circumstances such as these lead to, and are indicative of, a loss of legitimacy on the part of the SAPS in the eyes of Khayelitsha residents.

19. On policing in a constitutional democracy, Erik Luna states:

“There is no magic cure for official misconduct...in neighbourhoods that have every reason to distrust. But a step in the right direction, toward a more democratic conception of discretion and a level of trust in government, requires systematic visibility of policing decisions and concomitant justifications. In other words, official intentions and actions should be transparent to the public: the electorate should be able to observe and scrutinize the substantive and procedural policy choices of criminal law enforcement.”<sup>32</sup>

20. Indeed, research findings in the United Kingdom indicate that “perceptions of the police as being fair in their actions is the most influential factor when it comes to earning legitimacy in the eyes of the public.”<sup>33</sup> Instilling fear, by contrast, serves simply to alienate the public.

21. In order to earn or regain a sense of legitimacy, it is essential that the SAPS in Khayelitsha strive to be as transparent as they possibly can and accountable to the members of the community. The foundational values of the South African Constitution indeed require a “system of democratic government, to ensure accountability, responsiveness and openness.”<sup>34</sup> What this means in the context of the South African policing sector, is that the public are empowered and able to scrutinise

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<sup>32</sup> Luna above supra 1 at 1120.

<sup>33</sup> A Faull “Corruption in the South Africa Police Service: Civilian perceptions and experiences” (2011) Institute of Security Studies publication, at 2. See also Ben Bradford and Jackson, Public trust and police legitimacy in Great Britain: short term effects and long term processes (undated).

<sup>34</sup> Section 1(d) of the Constitution



the actions and policy of the SAPS and have a means of holding them accountable for their actions. In essence, it requires a system of meaningful independent oversight.

22. The IPID is instrumental in this respect. We do wish to point out, however, that despite its robust and wide-ranging provisions in relation to investigative powers, the IPID Act does not oblige investigators to monitor the conditions of places of confinement (i.e. police cells) and we recommend that the Commission raise the possibility of adjusting the IPID's legislative mandate accordingly.

23. The Optional Protocol to the Convention against Torture (OPCAT) serves as an excellent example of independent oversight of places of confinement. Relevant provisions of the OPCAT require state parties to do the following:

- Maintain, designate or establish national preventive mechanisms (NPM's), defined as "independent national preventive mechanisms for the prevention of torture at the domestic level";<sup>35</sup>
- Receive the Sub-Committee on Torture (SPT) in South Africa and grant it unrestricted access to places of detention including access to all documents and people detained there and allow interviews in private;<sup>36</sup>
- Consider advice from the SPT on the NPM's;<sup>37</sup>
- Encourage and facilitate contact between the SPT and the NPM,<sup>38</sup> and
- Examine and consider recommendations of the SPT.<sup>39</sup>

24. Although the South African government signed the OPCAT in 2006, it has yet to ratify it. Given the OPCAT's importance in promoting the transparency and accountability of state organs dealing with persons deprived of their liberty, we recommend that the Commission consider including in its findings a recommendation that the government ratify the OPCAT as soon as is reasonably possible.

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<sup>35</sup> Articles 3 and 17.

<sup>36</sup> Articles 4, 12 and 14.

<sup>37</sup> Articles 11.

<sup>38</sup> Articles 12.

<sup>39</sup> Article 12.

25. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UNCAT), which the South African government ratified in 1998, stipulates in Article 10, that:

“(1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”

(2) Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”

26. In July 2012, and in accordance with the UNCAT, the Department of Justice and Constitutional Development tabled the Combating of Torture of Persons Bill [B21-2012]. In addition to criminalising torture, the Bill requires, *inter alia* that

(1) The State has a duty to promote awareness of the prohibition against torture, aimed at the prevention and combating of torture.

(2) Without derogating from the general nature of the duty referred to subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to—

- a) conduct education and information campaigns of the prohibition against torture aimed at the prevention and combating of torture;
- b) ensure that all public officials who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, are educated and informed of the prohibition against torture;
- c) provide assistance and advice to victims of torture; and
- d) train public officials on the prohibition, prevention and combating of torture.

27. Although the Bill has not yet come into force, the provisions of the UNCAT remain binding. And in accordance with this binding obligation, the SAPS established a “Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service.”<sup>40</sup> The establishment of such a policy is indeed

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<sup>40</sup> Available at [http://www.saps.gov.za/docs\\_pubs/legislation/policies/torture.htm](http://www.saps.gov.za/docs_pubs/legislation/policies/torture.htm).

commendable. However, in accordance with the UNCAT and OPCAT, we request that the Commission recommend that this policy be reviewed and that any changes be incorporated into SAPS training manuals, standing orders and code of conduct. In addition, we recommend that the Commission consider including a recommendation that calls for the training of SAPS officials, not only on the prohibition of torture, but on human rights norms in general, particularly those concerning the use of force and the liberty interests and rights of suspects and detainees. Such training should not be a once-off exercise. Rather, in the spirit of both the OPCAT and UNCAT, training should be regular, updated and continuously reviewed.

28. We recommend too, that the Commission challenge the Western Cape Province to take more of an active role in the monitoring of police conduct as well as police effectiveness. The needs of each province will always be different and localised monitoring will be able to assess the needs peculiar to each police station district. We highlight sections 206(3)(a)-(c) of the Constitution, which state:

“Each province is entitled-

- a) To monitor police conduct;
- b) To oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- c) To promote good relations between the police and the community...”

29. The UNCAT also requires that “each state party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” In this regard, we note that the ICD Annual Report for 2011/2012, although it lists the recommendations it delivers and the verdicts in both departmental and court proceedings, we request that the Commission recommend that the nature of complaints be further delineated into assaults / torture (once the Torture Bill is passed) / attempted murder as well as list the number and incidences of fatal shootings. A more detailed analysis of complaints against the SAPS gives the public and leadership a clearer idea as to what particular problems in the SAPS are, and how education and training could be tailored to best combat such issues.

30. Essential to good policing, is public co-operation. It is also a vital aspect of police accountability. Members of the public may be witnesses and victims of crime, and they can provide the police with relevant information. However, it is only if the public “trust the police and regard them as legitimate that they are they willing to assist them (for example by sharing information) and comply with their instructions, enabling the police to succeed in carrying out their core functions of maintaining public order and preventing and detecting crime.”<sup>41</sup>
31. We note that the SAPS Annual Report indicates that all 149 police stations in the Western Cape have Community Police Forums (CPF). Given the importance of such forums, we request that the Commission inquire into the functioning of the Khayelitsha CPFs, i.e. how regularly they meet, their stated objectives and purposes, and whether the community are, in fact, satisfied with the CPF mechanism
32. Lastly, we wish to draw the Commission’s attention to the publication, “The police that we want: a handbook for oversight of police in South Africa” by D Bruce and R Neild. This handbook has a list of extremely useful indicators which serve to analyse the extent to which the police service are adhering to “democratic standards.” It is our recommendation that the Commission incorporate these indicators as standards into their findings by using them to gauge the effectiveness, transparency and accountability of the Khayelitsha police.

End.

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<sup>41</sup> UNODC Handbook on police accountability, oversight and integrity (2011), pg 8.

