

Reasonable Force?

Use of Force Review as a Learning Process

by

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Whatever may be the outcome of the controversy over the amendment of Section 49 of the Criminal Procedure Act there will be a need to ensure that high standards are maintained on firearm use and the use of force generally. At the same time it appears unrealistic to rely exclusively on in-service training to provide the level of ongoing training required in relation to the use of force. One possibility would be to transform the present adversarial model of investigating use of force incidents into a cooperative learning process.

While police departments around the world try to ensure that all members understand the proper use of force, the [South African Police Service](#) (SAPS) has reason to be especially concerned with this issue:

- The current crime situation in the country regularly brings SAPS members into situations in which the use of force may be required. Under these conditions, considerations of police safety, and effectiveness, motivate for police members to be highly skilled in the use of force.
- Even taking these conditions into consideration, however, the high numbers of people being killed and injured by the SAPS are worrisome. During the last three years, over 1 500 people have been killed by the police in South Africa, with many more being injured.

The exploratory study on which this article is based (Bruce, 2000) was concerned with understanding the operation of systems for managing the use of force within the SAPS. The research involved a review of literature, legislation, and SAPS regulations; a series of 15 in-depth interviews; and an e-mail survey of area headquarters.

The interviews were conducted with national, divisional, provincial, and area level managers, as well as senior and junior commanders at station level. In response to the e-mail survey, replies were eventually received from 15 of the 42 (36%) policing areas in South Africa.

Mechanisms

In addition to external mechanisms such as the courts and watchdog agencies, police agencies usually have a number of internal mechanisms which, in one way or another, impact on how members use force. In the SAPS these include:

- the SAPS Standing Orders;
- operational management;
- the recruitment and training systems;
- the systems for issuing, inspection, and the withdrawal of weapons;
- the post-trauma debriefing system; and
- the internal disciplinary system.

The key characteristic of use of force situations is that they mostly cannot be predicted and when they occur take place in situations where managers cannot be present. As a result, if they are to engage with the issue of the use of force, police managers are compelled to rely on retrospective evaluation of use of force situations. Following a shooting incident (and rarely, it would appear, in relation to other uses of force), many police organisations therefore require that an investigation be conducted. (Some police services also use behaviour and trend monitoring and evaluation systems. These are applied in some SAPS areas but are not the focus of this article.)

Use of force incidents involving SAPS members may be the subject of both internal (Standing Order 251) and external ([Independent Complaints Directorate](#)) investigations. The common factor in these investigations, as with most such systems internationally, is that they "focus primarily on criminal and other grossly substandard officer misbehaviour that merits punitive responses" (Geller and Toch).

In addition, the SAPS Public Order Police (POP) practise a system of incident investigation that shows interesting variations from the other two systems.

Standing Order 251

SAPS Standing Order 251 provides that:

- A member must promptly report a shooting incident to his immediate commander;
- That a member of officer rank should be immediately notified by the commander, if such a member was not present at the time of the incident, so that he can visit the scene to investigate the circumstances of the shooting;
- That a full factual shooting incident report (SIR), including details under 32 specified headings, should then be submitted; and
- The commander may conduct the investigation if a ranking officer is not available. In specified circumstances of a serious nature, the officer must still visit the scene and verify the report.

SO 251 indicates that the SIR must indicate whether, in the supervisor's opinion, the police member's actions were legal or not. SAPS data on SIRs from the Western Cape, Eastern Cape and Free State between 1996 and 1998 indicate the following (Bruce and O'Malley, 1999):

- Of 4754 shootings, 14% were evaluated as not legal in the SIRs.
- Among fatal shootings, the proportion deemed to be not lawful increases dramatically to 41% (127 of 311 fatal incidents).

- While 16% of on-duty fatal shootings (28 out of 178) were evaluated to be not lawful, 74% of off-duty fatal shootings (99 out of 133) were deemed not lawful.

The evaluation contained in a SIR is the initial opinion of the investigating officer and does not have the status of a court judgement.

Where the officer decides that a shooting has been unlawful, a criminal case must be opened. Internal disciplinary action may also be initiated and a notice of contemplated suspension may be served on the member. In some circumstances the member's service weapon may be taken and the member may be declared unfit to possess a firearm in terms of the Arms and Ammunition Act.

Other investigations

Another measure that provides for the review of some uses of force is section 53(2)(b) of the South African Police Services Act. This section provides that the Independent Complaints Directorate (ICD) must investigate all deaths as a result of police action or in police custody. "Deaths as a result of police action" are usually the result of shootings.

As is the case with SO 251, section 53(2)(b) investigations are also primarily focused on issues of legality. In particular, Section 222 of the Interim Constitution (which originally established the ICD), says the primary duty of the ICD is to ensure "offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner."

In addition to these procedures, the Public Order Police (POP) have their own system of investigating shooting incidents. The National Head of POP is generally charged with investigating the functions and operations of his division, and thus, at his discretion, can initiate an inquiry wherever he feels there might be an irregularity or departure from policy.

The unique feature of the POP investigation is that even where the shooting is deemed legal, the investigator may comment on how the situation might have been better managed. This information may be used to the benefit of the members involved, as well as for the purpose of improving policy and training.

An effective system of review?

In response to the e-mail survey, one area indicated that "at some of the shooting incidents no officer visited the scene, and therefore the shooting report was not compiled. In other cases, members involved do not report to their station immediately."

In addition to irregularities of this kind, the way in which investigations are conducted may be characterised by a "protectionist attitude", particularly if it is perceived that the member was acting within the scope of employment. According to one interviewee, "unless it is a clear cut case of murder, they will try and protect him as far as possible." In addition, there may be a risk of evidence tampering. As another interviewee put it, "a lot can happen before he [the investigating officer] gets to the scene."

While Standing Order 251 provides that the shooting incident report should contain detail on a number of questions, the report is ultimately concerned with whether the

shooters actions "were legal or not". Similarly, investigations by the ICD (in terms of section 53(2)(b)) are focused on issues of legality. But approaches to incident investigation within the SAPS are not uniform in this respect.

The POP make use of a system of incident investigation which evaluates incidents, at least in part, in terms of standards of skill or experience. In addition to being instructive for those whose conduct is being questioned, these investigations may be used to feed into modification of POP policy regarding the use of force by members or into the improvement of training programmes.

Other than in the POP, all that police members who are involved in shooting incidents ever face is a type of double jeopardy. As soon as members have been involved in the shooting of a firearm, they will be faced with an inquiry whose sole purpose is to discover whether the action was criminal or not.

As is the case in criminal investigations, police members in SO 251 investigations may make use of a right to remain silent. According to one interviewee, members rarely if ever make use of this right (though this has not been the case with the ICD).

But despite this apparent cooperation, the accusatory nature of the investigation means that most members will be very guarded in their statements. Rather than making use of the opportunity to analyse and evaluate the way the situation was handled, members are compelled by the nature of circumstances to give a one-dimensional depiction of events which focuses purely on self-justification.

While measures such as training do impact on how force is used, at the end of the day much of a member's learning takes place through trial and error. As one interviewee, a staff member in one of the SAPS legal sections indicated, "a lot of unlawful shootings don't come down to criminal intent but to a lack of experience." But SO 251 is of little value to the inexperienced member.

One estimate, based on recorded shooting incidents in three provinces, is that SAPS members are involved in over 6 000 shooting incidents per year (Bruce and O'Malley). Statistics suggest that, in 86% of the incidents which are investigated, the investigation purely serves to exonerate the member of criminal conduct. This organisational energy could be put to more productive use.

Supervisory incident investigation

As Geller and Toch argue, "little progress will be made in upgrading the skill with which police decide whether to use force, what type of force, and how much force to use, until we broaden administrative inquiries and other interventions."

According to Klockars, the most suitable mechanism for managing the use of force would work differently from a mechanism designed to discover and control criminal misconduct. In order to be effective it should be composed of two parts: "[a] policy, goal or objective, and an organisational apparatus through which to realise it."

The statement of policy that he proposes is simply: "*police officers shall work in ways that minimise the use of force*". The organisational apparatus, he suggests, must at minimum, "*do three things: monitor the use of force, evaluate the skill with which it is used, and educate officers in its skilled use.*"

Use of force incident reports should be written in any incident where a person is injured as a result of a use of force. In addition, Klockars suggests that reports be compiled "whenever anyone gives any indication or suggestion of any dissatisfaction with the officer's use of force, or any occasion on which any officer involved in the incident believes for any reason that a use-of-force report would be desirable."

The report, compiled by the member's immediate supervisor, would reach one of three conclusions:

- The use of force was justified and appropriate; or
- The use of force was a violation of the law or the disciplinary code - such cases would be referred for further criminal or disciplinary investigation; or
- The use of force was consistent with policy, but an alternative approach would have been desirable, one which might have avoided the use of force.

As Klockars says

it's that third option that you want officers to consider. You want a supervisor to look at that, use that supervisor's skill and history in policing and say: 'Is there a way that this could have been handled better?' You don't punish the officer whom you find in this case. You simply say this is the way it could have been done. If that sergeant can't find that 'way', that report then goes up to a lieutenant. The lieutenant reads the case and says, wait a minute, it didn't have to happen this way - that police officer could have handled it this way. So that lieutenant then turns it back down to the sergeant and officer and says, this whole thing could have been avoided if you did X, Y, and Z.¹

The suggested approach therefore uses a standard that is defined in police agency policy, rather than a legal standard, with an emphasis on evaluating issues of skill. This focuses on whether the use of force could have been avoided (or reduced in level) by more skilful policing. Rather than disciplinary measures, the emphasis is on education of the member concerned.

This approach puts initial responsibility for the evaluation of use of force incidents in the hands of first line supervisors, building in a process of evaluation and criticism into the day to day management of the use of force. A strength of this model is that it provides supervisors with a tool which enables them to become involved in the daily management of how force is used.

In the South African context, it is also imperative that concerns of effectiveness, and particularly of police safety, be given emphasis within use of force investigations. A more comprehensive statement of policy would be one that encourages or directs members to:

- Protect and value human life;
- Give attention to considerations of safety in all situations of the potential use of force;
- Conduct their duties in a manner that seeks to avoid the use of force;
- Where it is legal and necessary, to use force effectively according to the principles of minimum force.

In addition to providing a framework for the evaluation of use of force incidents, a clearly defined policy may also assist in addressing issues of values. For issues of the use of force to be effectively addressed within a police organisation it is necessary that the relevant organisational values be clearly and consistently articulated.

Review and learning

Punitive review systems tend to feed into a culture that discourages self-criticism within the police organisation. This generates a police culture in which the rank and file are resistant to learning and criticism.

The transformation of the SAPS requires the building of a culture of learning, self-analysis and self-criticism. The culture of silence which punitive review generates may impede this process. For example, according to a Human Rights Watch (1998) report that examined police brutality in 14 US cities:

In each city we examined, internal affairs . . . often shielded officers who committed human rights violations from exposure and guaranteed them immunity from disciplinary sanctions or criminal prosecutions.

What this reflects is a culture within police services that condones the abuse of force as functional in achieving the law enforcement objectives. While police may modify their behaviour to avoid external criticism, what may emerge is an attitude that "anything goes" as long as it is not likely to incur such criticism. This is a scenario that we should endeavour to avoid.

As well as discouraging abuses an effective system of incident investigation can assist members in learning about how to use force effectively, whilst giving appropriate attention to their own safety.

A system of incident investigation should, therefore, be developed within the SAPS to address issues of skill in the handling of use of force situations. In developing such a system, attention could be paid both to the model currently in use within the POP as well as that put forward by Klockars. Such a system would presumably be applied to incidents where it is clear that the member did not deliberately violate the law. In order for it to be implemented effectively, the policy and values of the SAPS in relation to the use of force would need to be articulated more clearly.

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Note:

¹ The quote is from [an interview conducted with Carl Klockars and William Geller](#) on 14 April 1999. An edited version of the interview appeared in Crime and Conflict, No 18, Summer, 1999.

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