

# South African CRIME QUARTERLY

No. 54 | Dec 2015



- > A criminal law response to obstetric violence in South Africa
- > Evaluating parenting skills programmes
- > Reconciling restorative justice and victim participation
- > Civil claims against the SAPS
- > Fluctuations in price and value of illegal substances in Cape Town
- > Sentencing child offenders after they turn 18

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**Editor**

Chandré Gould e-mail [cgould@issafrica.org](mailto:cgould@issafrica.org)

**Sub editors who worked on this edition**

Nadia Beard  
Camilla Pickles  
Jane Kelly

**Editorial board**

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Pregnant woman rests in the Company Gardens with her friend, Cape Town, 2011.  
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## Editorial policy

*South African Crime Quarterly* is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus of the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including academics. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.



# Editorial

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## SACQ: progress towards publishing excellence

Over the past five years *South African Crime Quarterly* (SACQ) has undergone a number of changes to make the journal a more reliable and credible source of practical and theoretical knowledge about violence, crime and criminal justice in South Africa. In 2011 the journal was accredited by the Department of Higher Education in South Africa, and it has recently been assessed by the Academy of Science of South Africa (ASSAf), and accepted for inclusion in the Scielo index. Acceptance in the index is based on a thorough assessment of the journal, and on-going monitoring of indicators of excellence by ASSAf. The inclusion of SACQ in this index is thus a significant milestone for the journal. It also means that within the next three years the journal will have an impact factor based on the number of citations of articles published. In addition, SACQ is now available through African Journals Online (AJOL), a service that offers a growing collection of open-access African scholarly journals; through AJOL we are increasing our continental readership.

SACQ is currently the only accredited, open-access criminological journal in South Africa. We are deeply committed to retaining our open-access status, as we believe that this is essential to ensuring that the information and knowledge contained in the journal is accessible to practitioners, policymakers and non-governmental organisations (NGOs) that do not have access to university libraries; and to scholars at academic institutions that cannot afford the high costs of journal subscriptions. Accreditation by the Department of Higher Education has increased the attractiveness of the journal to authors from South African universities and thus the number of submissions received by the journal is steadily increasing. This is good news for readers because it ensures diversity both in relation to the subjects covered and in authorship. Despite the increase in the number of submissions from universities, we are committed to ensuring that the articles in SACQ remain accessible to our diverse audience.

The most recent changes to SACQ include the addition of Digital Object Identifiers (DIO) numbers for each article and the migration to a digital journal management system. SACQ is one of three South African journals to have been included in an ASSAf pilot to test an open-access online journal management system. This means that from the first edition of 2016 all articles will be submitted online and authors will be able to track the progress of their articles from submission to publication (or rejection). Through the system we are able to keep better metrics, which enables us to keep improving the journal.

Part of improving the journal is also ensuring that our policies remain relevant, appropriate and up-to-date. The most recent addition is a policy relating to how and when we use racial terms in SACQ. This is such an important matter that we have reproduced the policy in full at the end of this editorial, and urge readers and authors to take careful note of it. We also urge other journals to consider adopting similar policies.

Turning to this edition of SACQ, I am pleased to be able to offer readers an eclectic collection of articles on topical issues with which to end the year.

While readers of medical journals may already be familiar with the concept of obstetric violence, it is not a subject that has made its way into discussions about violence in South Africa. In her article Camilla Pickles argues that it is time to address the violence women often experience at the hands of health professionals while giving birth, and thereafter. She argues that the impact of this form of violence on mother and infant is such that it should be criminalised. Whether or not criminalising obstetric violence is indeed the most effective way to counter the problem may be debatable, but there can be little doubt that this has been a significant omission from the discourse around gender-based violence. I hope this article will increase the visibility of the issue and stimulate debate.

The March 2015 edition of *SACQ* was a special edition that focused on the prevention of violence through evidence-based primary interventions, such as those that improve positive parenting. In this edition Inge Wessels and Cathy Ward present a model for assessing the extent to which parenting programmes incorporate, or are based on, evidence. We hope this will be a useful tool both for NGOs that seek to implement parenting programmes and the state and non-state donors that support them.

The case note in this edition, provided by Carina du Toit and Zita Hansungule from the Centre for Child Law at the University of Pretoria, continues the child-centred theme by providing an analysis of judgements relating to the sentencing of children who turn 18 before they are sentenced, but who had committed the crimes in question while still a child (under the age of 18). The note centres on a Western Cape High Court judgement that found that such child offenders should be sentenced as children, and not as adults. This is an important and progressive precedent for upholding and protecting the rights of children.

In her article, Hema Hargovan draws on her vast experience of the practice of restorative justice in South Africa to offer a sobering assessment of the use of victim/offender dialogues as a factor in assessing offenders for parole. She argues that not enough is being done to safeguard the rights of victims.

Gwen Dereymaeker's article draws attention to the massive civil claims against the South African Police Service (SAPS). She provides an overview of the civil claims against the SAPS between 2007/8 and the current financial year, and navigates the complexity of claims versus settlements made by the police. She carefully assesses the potential drivers of civil claims and argues that unlawful police behaviour, particularly the use of violence by the police, along with an apparent lack of faith in the Independent Police Investigative Directorate, has an impact on these claims – which at the time of writing stood at well over R9 billion just for the current financial year.

Finally, Simon Howell and his colleagues from the Medical Research Council and the University of Cape Town contribute an article that presents select findings from a study to determine the change over time in the price of illegal drugs in Cape Town. While the study does not offer significant new insights into the illicit drug market, it does provide a basis for assessing price fluctuations in the future and thus an ability to assess market demand.

I hope you enjoy the read.

**Chandré Gould**

#### **Policy on the use of racial classifications in articles published in *South African Crime Quarterly***

Racial classifications have continued to be widely used in South Africa post-apartheid. Justifications for the use of racial descriptors usually relate to the need to ensure and monitor societal transformation. However, in the research and policy community racial descriptors are often used because they are believed to enable readers and peers to understand the phenomenon they are considering. We seem unable to make sense of our society, and discussions about our society, without reference to race.

*South African Crime Quarterly (SACQ)* seeks to challenge the use of race to make meaning, because this reinforces a racialised understanding of our society. We also seek to resist the lazy use of racial categories and descriptors that lock us into categories of identity that we have rejected and yet continue to use without critical engagement post-apartheid. Through adopting this policy *SACQ* seeks to signal its commitment to challenging the racialisation of our society, and racism in all its forms.

We are aware that in some instances using racial categories is necessary, appropriate and relevant; for example, in an article that assesses and addresses racial transformation policies, such as affirmative action. In this case, the subject of the article is directly related to race.

However, when race or racial inequality or injustice is not the subject of the article, *SACQ* will not allow the use of racial categories. We are aware that some readers might find this confusing at first and may request information about the race of research subjects or participants. However, we deliberately seek to foster such a response in order to disrupt racialised thinking and meaning-making.

# Eliminating abusive ‘care’

## A criminal law response to obstetric violence in South Africa

**Camilla Pickles\***

camilla.pickles@gmail.com

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*This article examines the disrespectful, abusive and violent maternity care that many South African people face. It identifies this conduct as a human rights violation and argues that intentional abusive maternity care should be labelled as obstetric violence, a specific form of gender-based violence, and that it should be criminalised. This approach reflects a nascent global trend to act against obstetric violence, and draws inspiration from statutory crimes introduced in Venezuela and Mexico. Building on the Latin American experience, the article proposes how the current legal conception of obstetric violence should be further developed to suit the unique position of pregnant people in South Africa.*

This article is inspired by recent legal developments in Latin America. In Venezuela, the Organic Law on the Right of Women to a Life Free from Violence (2007) recognises obstetric violence as a form of violence that health personnel inflict on pregnant and birthing people, and it imposes criminal liability for such conduct.<sup>1</sup> Soon after the introduction of this law Mexico followed with similar laws.<sup>2</sup> The laws prohibiting obstetric violence draw attention to the broader social inequalities faced by women and girls and which lead to unacceptable practices in their medical care while pregnant and birthing. The purpose of these laws is to curb abusive and dehumanising obstetric care and ensure accountability when certain standards of care are not maintained during pregnancy and birth. Curbing abusive and disrespectful treatment helps ensure healthy pregnancies and pregnancy outcomes.

The article serves a two-fold purpose. Firstly, it seeks to introduce the concept of obstetric violence into the broader South African discussion on gender-based violence. It considers the origin and scope of obstetric violence, as developed through Latin American social movements and legal instruments. Going further, the article reveals how the term is being used by a body of commentators and activists beyond Latin America to describe a list of inappropriate practices that constitute obstetric violence. Secondly, the article draws on reports of abusive treatment of pregnant people at public health-care facilities in South Africa and argues that a criminal law response to violence against pregnant people in South Africa is necessary. Conduct identified as obstetric violence in foreign jurisdictions mirrors conduct in the South African health-care system. The article argues that criminalising obstetric violence in South African is an appropriate legal response, which should explicitly prohibit abusive obstetric care, drawing on a woman-centred perspective.

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\* Camilla Pickles is a doctoral candidate at the Centre for Child Law, Department of Private Law, University of Pretoria.

Developing a specific legal response towards obstetric violence is necessary, for several reasons: South Africa is not expected to meet its Millennium Development Goal of reducing maternal morbidity and mortality,<sup>3</sup> and poor quality obstetric care is considered to be one of the causes of maternal mortality and morbidity rates.<sup>4</sup> In response to this, stakeholders are calling for health workers responsible for abusive obstetric care to be held accountable.<sup>5</sup> It has been recognised that tackling obstetric violence requires a coherent approach, involving professional associations, governmental, non-governmental and grassroots organisations, communities and families.<sup>6</sup> Yet the law, as an instrument that protects human rights and ensures accountability, is not recognised as having a role to play in curbing abusive and violent obstetric care.

## What is obstetric violence?

The term ‘obstetric violence’ first appeared in Latin America during the 2000s. According to Sánchez, activism against obstetric violence in Latin America emerged from a long history of global activism to ensure respectful childbirth.<sup>7</sup> She ascribes the recognition of obstetric violence to international acknowledgement of the efforts of the women’s health movement over time,<sup>8</sup> notably by the World Health Organization, which initiated a drive to reduce unnecessary medical interventions during the birth process.<sup>9</sup>

Efforts to respond to and prevent obstetric violence are rooted in the humanised birth movement, which focuses on de-medicalising birth, arguing that ‘birth is a normal event in which women should be in charge and medical interventions should be used only when necessary’.<sup>10</sup>

In Spain, the movement to humanise birth employed the term ‘obstetric violence’ as an umbrella concept to describe facility-based obstetric care that is over-medicalised and harmful to birthing women.<sup>11</sup> However, in Mexico the concept also includes violence during birth, and thus broadens the scope of the term.<sup>12</sup>

According to Dixon, while the humanised birth movement primarily focused on changing medical protocols, the movement against obstetric violence

identifies certain protocols as violence and ‘not just less-than-ideal practices carried out by unknowing but well-meaning providers’ (see below for examples of such practices).<sup>13</sup>

The move to recognise and respond to obstetric violence encourages a change in thinking from only considering the medical necessity of a procedure to seeing *unnecessary* medical intervention as potentially dangerous.<sup>14</sup> Going further, the movement locates this form of violence in broader concerns about women’s social inequalities based on gender, race and class. That is, ‘how women are treated in labor and birth ... mirrors how they are treated in society in general’.<sup>15</sup> When certain obstetric practices are identified and framed as harmful violations, it demands legal accountability from individual perpetrators and state institutions that allow the conduct to persist.<sup>16</sup>

Spanish activists view obstetric violence as a form of gender-based violence. Their work assists to conceptualise the ‘malaise that many women feel after childbirth, even though society tells them that everything is alright and all that is important is that the baby is alive’.<sup>17</sup> The concept of obstetric violence gives expression to women’s bad birthing experiences as a specific form of violence, and it validates the pain women might feel after a negative experience.<sup>18</sup> The concept is also viewed as a transformative tool that can be used to question and change women’s lived realities.<sup>19</sup> Activists reportedly view obstetric violence as a useful term to describe and raise awareness about the abuses women face when birthing: ‘This is a question of violence, serious and aggressive, that women and children pay for with their bodies and health.’<sup>20</sup>

Despite the fact that legislation prohibiting obstetric violence is limited to Latin American countries, the use of ‘obstetric violence’ as a concept is being applied elsewhere in the world.<sup>21</sup> The term is used to describe a wide range of conduct, including verbal abuse, humiliation, shouting, scolding, threatening, and crude and aggressive attacks on women’s sexuality, which are all intentionally employed to assert authority and cast shame on women.<sup>22</sup> Performing procedures without consent, with coerced consent, or enforcing procedures by an order of

court is also deemed obstetric violence by National Advocates for Pregnant Women.<sup>23</sup>

Procedures that have been identified as forms of obstetric violence are those that are imposed on women as routine (without having any scientific foundation) and without informed consent. These include unnecessary episiotomies or performing episiotomies after delivery solely for the purpose of training; manual revision of women's uterine cavities without pain relief;<sup>24</sup> inserting long-term birth control mechanisms directly after birth; collective vaginal examinations for training purposes; tying women's legs to the delivery table; health-care providers' failing to introduce themselves prior to treating women; and forced sterilisations.<sup>25</sup>

Coercive practices that are identified as obstetric violence include over-emphasising foetal risk when a health-care intervention is for the benefit of a pregnant woman, while understating maternal risk when the health-care intervention is for the benefit for the foetus; using social authority to silence women's dissent to certain procedures; lying to women about the progression of labour in order to encourage Caesarean section delivery; and overriding women's refusal of medical intervention and forcing interventions with or without court sanction.<sup>26</sup> Procedures that are performed without consent and forced upon women may involve forceful physical control over the body of a pregnant woman, use of restraints, and further interventions such as sedation.<sup>27</sup>

Other forms of physical violence that have been labelled as obstetric violence include slapping; humiliating pregnant women by forcing them to clean the delivery room after birth; performing clitoridectomies<sup>28</sup> and virginity inspections<sup>29</sup> where consent is socially coerced;<sup>30</sup> and deliberate refusal of pain relief.<sup>31</sup>

Medical neglect, in the form of unattended birth at a health facility, is also identified as a form of violence inflicted on birthing women.<sup>32</sup> Pires Lucas d'Oliveira, Diniz and Schraiber identify a number of reasons for neglect that include the attending facility lacking the resources to provide adequate care (in which case structural violence comes to the fore); staff acting unprofessionally; and staff intentionally

neglecting women as a method of punishment for non-compliance with obstetric care protocols.<sup>33</sup>

There are many reasons for disrespectful and abusive care. Jewkes and Penn-Kekana state that structural gender inequality, which 'systematically devalues women and girls', fosters an environment that allows for the infliction of violence.<sup>34</sup> Systematic devaluation permits poor allocation of resources and effectively disempowers women and girls.<sup>35</sup> Honikman, Fawcus and Meintjies state that patients are abused because of a lack of professional support for healthcare providers, hierarchical work relationships, excessive workloads, and poor infrastructure and staffing levels.<sup>36</sup>

This discussion demonstrates that the term 'obstetric violence' is rooted in the notion that the way birthing women are treated in health-care facilities correlates with their broader unequal social and economic standing and constitutes a form of gender-based violence. It gives expression to women's physical experiences of abusive, dehumanising or violent 'care' and to the wrongs suffered by women despite surviving birth and having a live born child. Furthermore, research (as discussed above) demonstrates that the term 'obstetric violence' is being used to describe a wide range of inappropriate obstetric care, which spans basic verbal abuse to serious and intentional instances of physical assault.

## Responses to obstetric violence

At a global level, Millennium Development Goal 5 and now Sustainable Development Goal (SDG) 3 to reduce maternal mortality rates provide a context for addressing abusive and disrespectful maternity care.<sup>37</sup> SDG 3 is supported by the Respectful Maternity Care Charter<sup>38</sup> and guidelines issued by the International Federation of Gynecology and Obstetrics, International Confederation of Midwives, White Ribbon Alliance, International Pediatric Association and the World Health Organization (FIGO Guidelines).<sup>39</sup> The Charter and Guidelines set out the rights of patients and provide strategies to improve quality of care at a health-care system level. These are essentially a 'health system approach'<sup>40</sup> to addressing inappropriate obstetric care and as such they do not provide for a *legal* response or position.

The FIGO Guidelines suggest that ‘ongoing accountability’ can be expected with its proper implementation.<sup>41</sup> In this respect, Dickens and Cook explain that in ‘law, professional guidelines may serve as a shield to defend practitioners who comply with them, and as a sword with which to attack those who fail or refuse to follow them’.<sup>42</sup> However, guidelines are not law and may have limited reach; also, as Dickens and Cook point out, legal responses to guidelines may differ from court to court and in different jurisdictions.<sup>43</sup>

Nevertheless, these and similar health-care guidelines, protocols or charters can be used to inform the content of statutory crimes or other legal responses. In this respect Venezuela and certain states in Mexico have criminalised obstetric violence. As will be seen below, the statutory provisions correlate with the health system approach, but the statutes obviously go further by attaching legal consequences.

Article 15 of the Venezuelan Organic Law on the Right of Women to a Life Free from Violence recognises obstetric violence as one of 19 forms of violence against women. It defines obstetric violence as the

appropriation of the body and reproductive processes of women by health personnel, which is expressed as dehumanized treatment, an abuse of medication, and to convert the natural processes into pathological ones, bringing with it loss of autonomy and the ability to decide freely about their bodies and sexuality, negatively impacting the quality of life of women.<sup>44</sup>

Article 51 recognises the following conduct as obstetric violence:

- Untimely and ineffective attention to obstetric emergencies
- Forcing women to give birth in a supine position with legs raised, when the means to perform a vertical delivery are available
- Impeding early attachment of neonates with their mothers without a medical cause
- Altering the natural process of low-risk deliveries by using acceleration techniques without voluntary, expressed and informed consent of women

- Performing deliveries via Caesarean section delivery when natural childbirth is possible and without obtaining voluntary, expressed, and informed consent from women

Contravention of these provisions can lead to the imposition of a fine, and disciplinary proceedings by the relevant professional body.

The Mexican states of Durango, Veracruz, Guanajuato and Chiapas have legislation prohibiting obstetric violence.<sup>45</sup> In Veracruz, obstetric violence includes coercive practices such as ‘bullying and psychological or offensive pressure’, which inhibit women’s free decision-making about motherhood.<sup>46</sup> Where a person is found to be in contravention of obstetric violence provisions, that person may face up to six years’ imprisonment and fines amounting to 300 days of their salary.<sup>47</sup>

It was not possible to determine whether obstetric violence provisions are successfully implemented in Venezuela and Mexico, because there is no English language literature available about this. However, it would appear that there is no Venezuelan case law applying obstetric violence legislation, which suggests that the legislation is not being used to support pregnant people’s rights.<sup>48</sup> Reasons for this could not be found.

Research by Prof. Magally Huggins Castaneda suggests that, aside from the fact that implementation measures are very expensive (in that specialist courts must be established), state authorities are reportedly incompetent and ineffective when receiving complaints.<sup>49</sup> The National Institute for Women in Venezuela recognises the legislation as being progressive<sup>50</sup> but ultimately it seems that there is no established commitment to address the issue, which is exacerbated by a lack of mobilisation and enforcement mechanisms to implement the enacted statutory provisions.

## **Violence during pregnancy in South Africa**

There are a number of publications from the public health-care sector that describe current reproductive health-care practices in South Africa as a violation of the notion of ‘care’. These practices (described below) have been identified as contributing to the

increase in maternal mortality and morbidity rates.<sup>51</sup> In a 2009 article, Chopra et al. questioned whether the apartheid-scarred South African health-care system would be able to reduce maternal and neonatal mortality rates, and found that despite making progress in increasing access to maternal health-care, this did not necessarily improve health outcomes for women and children in South Africa.<sup>52</sup> While women and girls are successfully being steered towards facility-based care, the care they receive there may be disrespectful, abusive and violent.

During 2010 and 2011 Human Rights Watch (HRW) visited a number of health-care facilities providing maternal health services in the Eastern Cape in order to determine how patients experience maternity care.<sup>53</sup> After interviewing patients, medical staff, health officials and experts, HRW reported that nurses believed that violent and abusive control and authority were necessary to achieve healthy births and ensure maternal survival.<sup>54</sup>

### **Patterns of abusive, violent and disrespectful care**

Abuse in obstetric care is deep-rooted and has been described as ritualised, sanctioned, normalised and institutionalised.<sup>55</sup> A senior midwife in South Africa was reported as stating that 'she did not believe there was a midwife in the country who had never hit a patient and explained that they were taught how to do so during training'.<sup>56</sup>

While most reports on substandard and abusive treatment focus on labouring and birthing women, there have been reports of abusive treatment in prenatal care and termination of pregnancy services. In 2014 Amnesty International reported on a number of coercive practices that were widespread in KwaZulu-Natal and Mpumalanga, such as forced HIV testing of pregnant women and girls, and the disclosure of HIV and pregnancy status without consent.<sup>57</sup> The same report noted that many women and girls also faced verbal abuse and crude remarks concerning female sexuality from nursing staff.<sup>58</sup> Staff were said to be dismissive and rude when patients reported prenatal concerns and at times patients were scolded when they called a clinic for advice.<sup>59</sup> Public admonishment is a prominent feature of prenatal care; teenagers are scolded for deviant

behaviour, others for being 'dirty', and at times patients are collectively scolded in order to prevent future wrongdoing.<sup>60</sup>

Women who fail to attend antenatal care and later present for care while in labour face deliberate abuse as a form of punishment for non-compliance with obstetric protocols.<sup>61</sup> This includes neglect to varying degrees, verbal abuse and scolding, and not receiving labour and birth care timeously, or receiving no care at all.<sup>62</sup> Jewkes et al. describe one patient as having explained that 'we are supposed to accept it [abuse] because that is beneficial to us ... If a person can be cheeky to the nurses and go home (refusing to attend again), she would be digging her own grave not the nurses'.<sup>63</sup>

Women and girls also face physical abuse while labouring and/or birthing. This includes being slapped and pinched; being stabbed with scissors; rough handling; being hit with instruments such as a ruler; being 'hit between the buttocks'; being denied pain medication when medically indicated, such as when performing episiotomies<sup>64</sup> or after Caesarean section deliveries; suffering painful internal examinations; women's legs being forced closed while the baby is emerging from the birth canal; women's legs being forced open; women being forced to walk from one ward to the next during birth and/or soon after delivery; women being forced to clean up after themselves or collect supplies from cupboards during labour and/or after delivery; procedures on women being performed without consultation or consent;<sup>65</sup> and women being told that if they refuse a Caesarean section delivery no one will help if complications arise later.<sup>66</sup>

Numerous reports indicate that women and girls also face neglect at various stages of labour and delivery. At times there is very little monitoring of patients in labour; calls for assistance are left unanswered either because of resource shortages or intentional staff conduct (watching television, sleeping, talking, having tea or a meal); patients deliver without knowledge of what to expect and at times on their own; and questions about complications, procedures, labour progress and general care are left unanswered.<sup>67</sup> At times women have been told not to

ask questions, or requests are met with hostility and further threats of violence.<sup>68</sup>

HRW highlighted extreme cases of neglect that resulted in death, and reported that women were left for hours holding stillborn babies.<sup>69</sup> In cases where women do deliver without a midwife present, they face further abuse, or are accused of trying to 'kill the baby'.<sup>70</sup> Kruger and Schoombee, and HRW indicate that some of the reasons for neglect include punishment for being disobedient; avoidance of HIV positive women; a refusal to treat migrant, non-South African citizens or refugee patients; or that patients are perceived to be undeserving (such as the poor, single or unmarried patients, and black patients).<sup>71</sup>

Further, labouring and birthing patients face verbal abuse, which includes sarcasm, scolding, being shouted at and ridiculed, being called derogatory names and being identified as being 'dirty', 'stupid', 'arrogant' and 'lazy'. Patients also face crude and inappropriate references to female sexuality.<sup>72</sup>

Most of the conduct described here can rightly be labelled a form of obstetric violence. These practices ultimately violate patients' right to access reproductive health-care, bodily and psychological integrity, privacy, dignity, equality and, at times, their right to life.<sup>73</sup> It is evident that human rights are being violated at an individual (intentional abuse) and structural level ('structural disrespect' being insufficient allocation of resources, poor infrastructure and training).<sup>74</sup> Jewkes and Penn-Kekana emphasise that while developing interventions to improve mistreatment of pregnant and birthing people more generally (such as the Better Births Initiative<sup>75</sup> and Compassionate Birth Project<sup>76</sup>) it is still necessary to ensure individual accountability in cases of intentional abuse.<sup>77</sup>

## Principles of criminal law

Many of the acts described above already constitute criminal acts as defined in South African law, and are prohibited. Performing any procedure, regardless of how trivial, without informed consent or with coerced consent may constitute criminal assault. Snyman defines the crime of assault as an unlawful and intentional act (or omission) that impairs another person's bodily integrity, or inspires a belief that such impairment will immediately take

place.<sup>78</sup> Thus, even the *threat* of imminent assault is sufficient to constitute the crime of assault.<sup>79</sup> Assault is clearly taking place when women and girls are slapped, pinched, stabbed or handled in a physically aggressive manner, or when they face threats of abuse or neglect.<sup>80</sup>

Going further, the crime of *crimen injuria* is also implicated. It is defined as the unlawful, intentional and serious violation of another's dignity or privacy.<sup>81</sup> A number of acts described above might amount to *crimen injuria*, such as when health status is intentionally disclosed without consent, being shouted at, being publicly degraded and called names, or being refused treatment based on social or health status.

Moreover, negligent treatment that results in death can amount to the crime of culpable homicide. Culpable homicide is defined as the unlawful and negligent killing of another person.<sup>82</sup> The crime of murder may be implicated where women are intentionally neglected or mistreated and death ensues, or attempted murder where death would have likely ensued but did not.<sup>83</sup> While it can be argued that health-care providers do not have the direct intention to murder their patients, they may still be held liable on the basis of *dolus eventualis*.<sup>84</sup> *Dolus eventualis* is a form of intention and concerns an unlawful action or result that is not a person's main aim, but where he or she subjectively foresees the possibility that in striving for his or her main aim, the unlawful act or result may be caused and he or she reconciles him or herself to this possibility.

Despite well-established criminal law principles prohibiting the conduct described in the reports and publications considered above, no case law has been sourced where perpetrators have been held liable. In fact, those reporting and publishing on substandard health-care of pregnant and birthing people do not readily identify intentional abusive and disrespectful care as criminal conduct and a form of gender-based violence. Furthermore, there has been no collective legal effort to bring the state (Department of Health) to account either.

Reasons for inactivity may lie in the fact that disrespectful, abusive and violent maternity care is invisible, or possibly not viewed as serious enough

to prompt a criminal investigation, especially in cases where a woman and her baby have survived birth.

Further, these common law crimes might not be seen as adequate mechanisms to remedy the distinct harms experienced at the hands of medical practitioners during pregnancy and birth. This might be the case because the harm is taking place in a medical 'care' and life-giving context, and as long as a pregnant person and baby survive birth, medical care could be considered to have been sufficient. The people who are abused and violated, while possibly feeling wronged and hurt, may not identify those wrongs and harms as criminal, or, even if they do, may think that there are no mechanisms available to remedy the specific wrongs and harms caused. Moreover, it might be difficult to report cases to the police, given that the South African Police Service also forms part of the state, and women and girls may fear further prejudice when attempting to report a case. Jewkes et al. suggest that patients fear victimisation and therefore do not report abusive nurses.<sup>85</sup>

Most practices identified in this article are viewed as abusive, disrespectful and/or violent more generally, but those practices have never been identified as criminal. This might be a consequence of these harms never having reached the attention of legal scholars or practitioners. It is submitted that intentionally abusive, disrespectful and violent 'care' should be labelled as obstetric violence and explicitly established as criminal conduct through the introduction of a women-centred statutory crime. The very unique harm and gendered context of this form of violence requires the development of a statutory response as a mechanism that acknowledges and enforces pregnant people's rights. It must address the vulnerabilities that pregnant people face in the context of maternity care and instil a sense of accountability.

While this article advances a criminal law response to obstetric violence, it is recognised that merely introducing a statutory crime in this context may not bring about a normative change and thus more is needed. According to Freedman and Kruk, disrespectful and abusive treatment 'is a signal of a health system in crisis – a crisis of quality and

accountability'.<sup>86</sup> Improving quality of care requires additional interventions such as improving training, sensitisation to and education campaigns on patients' rights, improving working conditions and staff support, improving internal reporting processes and improving broader gender equalities.<sup>87</sup> A statutory crime will merely serve as one response out of a number of required responses.

## Responding to obstetric violence in South Africa

Explicitly criminalising obstetric violence via statutory law reform should receive increased and meaningful consideration in South Africa. The global movement against obstetric violence provides helpful parameters for what such legislation should encompass. However, if the aim is to develop a South African response to obstetric violence, a number of weaknesses in the current conception of obstetric violence must be considered and addressed.

First, obstetric violence is a very wide, all-inclusive term. While this is helpful for purposes of mobilising civil society organisations, if obstetric violence is to be used to describe a crime, a narrower construction of the term will be required. More specifically, it should be limited to intentional individual conduct. The statutory crime should take its cue from the above described common law crimes but be developed in a way that renders the statutory crime sensitive to the specific context of pregnancy and birth.

Second, the focus of current obstetric violence law in Latin America tends to be on women. This approach appears to exclude girls and intersex persons (who do not self-identify as female or women) from the scope of consideration. Consequently, it fails to respond to the intersection of sex, age and gender that might perpetuate the experience of violence at the hands of health-care providers. By primarily focusing on women and not 'pregnant people', these efforts themselves re-enforce gender roles and 'other' those who are pregnant but do not self-identify as female or women. Arguably, protection only accrues to those who conform to social notions of womanhood.

Third, there is a persistent focus on childbirth. This fails to take into account reproductive health-

care beyond childbirth. According to the Beijing Declaration and Platform for Action, reproductive health-care is 'a constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems'.<sup>88</sup> Further, 'reproductive health' concerns a state of complete physical, mental and social well-being in all matters relating to the reproductive system, its functions and processes.<sup>89</sup> Reproductive health therefore entails a wide range of concerns: a safe sex life; the capability to reproduce and the freedom to decide if, when and how often to do so; access to safe, effective, affordable and acceptable family planning and other methods of fertility regulation; and appropriate healthcare that enables 'women' to safely progress through pregnancy and childbirth. Here, childbirth is only one of many care needs. By focusing on childbirth, people in need of respectful termination of pregnancy services are excluded, so too are those who face forced or coercive contraception and/or prenatal care prior to childbirth. As long as obstetric care is implicated in the broad scope of reproductive health-care, the possibility of violent and intentional infringement of rights exists and the crime should be all-encompassing.

Fourth, obstetric violence legislation mainly focuses on individual wrongdoers and not the structural violence that facilitates systematic human rights violations within the realms of obstetric care. Commenting on Venezuela's Organic Law on the Right of Women to a Life Free from Violence, D'Gregorio points out that providing emergency obstetric care might be difficult to achieve in overcrowded public hospitals that are resource deficient and lack suitable infrastructure.<sup>90</sup> He rightfully argues that the state has the responsibility to solve these concerns, but the legislation holds health personnel 'responsible for a situation that is an institutional responsibility, not a personal one'.<sup>91</sup>

Going beyond the limited scope of emergency care, Freedman and Kruk argue that disrespectful and abusive care 'is not the phenomenon of a few bad apples but is inflicted by health systems as a whole, especially when care environments digress from accepted standards of care'.<sup>92</sup> Sánchez places these concerns in a broader gendered context. She argues

that obstetric violence persists because of embedded patriarchal values, which use women's reproduction and sexuality as a means to keep women in a subordinate position and maintain traditional views of women's gender roles.<sup>93</sup> Thus, the entire system of obstetric violence is facilitated by the individuals *and* the state and is founded on the devalued position of women and girls in society. With this view in place, it is argued that the judiciary is also implicated since there is increasing jurisprudence of court-ordered medical treatment of pregnant and birthing people.<sup>94</sup>

Consequently, any statutory crime developed in response to obstetric violence should be adequately linked to broader efforts that specifically denounce the appropriation of pregnant people's bodies by individuals, civil society groups, the judiciary and the state. Legislation needs to be explicitly positioned to advance substantive equality; between pregnant people and civil society, between different pregnant and birthing people, between providers and pregnant people, between the state and pregnant people, and between the courts and pregnant people. It must enforce a shift in power relations and maintain accountability on an individual and collective level.

Fifth, most of the discourse on obstetric violence falls within the realm of public provision of obstetric care. This gives the impression that pregnant people's rights are less likely to be violated while receiving private obstetric care. This is not the case. Lutomski et al. found that pregnant people face a higher risk of obstetric intervention in private facilities than in public facilities for reasons that are not clinically indicated, such as obstetric preferences, fear of litigation and maternal preferences.<sup>95</sup> On the face of it, maternal preference may appear to remove the presence of obstetric violence, but it is now well established that coercive tactics by providers are regularly employed in order to sway pregnant people into accepting certain procedures or processes over others.<sup>96</sup> These coercive practices result in coerced consent, which constitutes obstetric violence and should be identified and labelled as criminal, and a human rights violation.

Going beyond facility-based care, it might be necessary to contemplate including traditional obstetric care provided by traditional health-care providers. Including traditional healers and birth

attendants is important in a South African context because they are frequently consulted for purposes of termination, and pregnancy services and care during pregnancy and birth.<sup>97</sup> Traditional healers and birth attendants are the first health-care choice for many South Africans.<sup>98</sup> While no reports can be sourced on violent traditional health-care providers, it is an area that will need further research and consideration.

Sixth, 'obstetric violence' emerged from a movement that focused on de-medicalising childbirth. This approach needs to be further developed. It fails to acknowledge that medical interventions are beneficial and can be life-saving in appropriate circumstances. It further fails to recognise that pregnant people are increasingly electing medical interventions as expressions of patient autonomy.<sup>99</sup> By focusing primarily on de-medicalising childbirth, the obstetric violence discourse adopted by activists may inadvertently fail to effectively sensitise South African medical practice and hospital protocol to patients' rights while within the realms of medicalised births and prenatal care.

## Conclusion

This article demonstrates that violence against pregnant people in South Africa includes obstetric care that is characterised as abusive, disrespectful and violent. Discussions of gender-based violence must be sensitive to the abusive medical care pregnant people face and its specificities must be properly considered when developing a way forward.

This article suggests that 'obstetric violence' is an important concept for raising and addressing violent and abusive care. The term encapsulates conduct that violates autonomy, privacy, physical and psychological security and integrity, dignity and equality. It is conduct that takes place without consent or with coerced consent. Obstetric violence concerns unnecessary medical interventions that are imposed on people as routine, which, without consent, amounts to embarrassing and degrading treatment. It is conduct that removes pregnant people as active participants of their pregnancies, treats them disrespectfully and in a one-size-fits-all manner. It is an empowering tool because the term gives expression to the hurt felt and the wrong imposed.

It mobilises thinking about how to characterise harmful 'care' and provides a legal mechanism to vindicate those who have been hurt. While a number of shortcomings to the current obstetric violence discourse have been identified in this article, this should be seen as an opportunity to develop the concept further when considering how to formulate a statutory crime in South Africa.

It is hoped that this article will serve as a springboard for further discussions on how to respond to violence against pregnant and birthing people receiving obstetric care and the feasibility of adopting legislation prohibiting obstetric violence. Further, it reveals that the scope of possible victims of obstetric violence is much broader than the current discourse provides for, and aims to encourage research into the intersection of race, class, sex and gender within the realms of care during pregnancy and birth.



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## Notes

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# A 'best buy' for violence prevention

## Evaluating parenting skills programmes

Inge Wessels and Catherine L Ward\*

inge.m.wessels@gmail.com

cathy.ward.sa@gmail.com

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*Effective parenting programmes are central to successful violence prevention efforts. Although parenting programmes are available in South Africa, few are evidence-based. This lack of evaluation makes it impossible to know whether programmes are helpful or harmful and whether they use resources efficiently. This article outlines a process for gauging the extent to which parenting programmes incorporate evidence-based practices, which may then assist in identifying promising programmes. This involves the application of two interlinked instruments – an interview schedule and rating metric. It was applied to 21 group-based parenting programmes in South Africa that were identified via convenience and snowball sampling. Results indicated that the use of evidence-based practices was low, especially in terms of monitoring and evaluation. Findings highlight clear areas where programme strengthening is needed. A similar process could be used to identify other promising violence prevention interventions.*

Levels of violence in South Africa are extremely high,<sup>1</sup> and the consequences are far-reaching. Not only does violence negatively affect health and wellbeing, it also places great strain on the health, welfare and criminal justice systems, and hinders social and economic development.<sup>2</sup> Effective violence prevention interventions are urgently needed. While there are violence prevention programmes in South

Africa, few have been through a rigorous evaluation to determine their effectiveness.<sup>3</sup> This lack of evaluation is concerning because no country, least of all a relatively low-resource one such as South Africa, can afford to roll out what might be ineffective programmes, thus wasting resources that could be put to better use. Additionally, until a programme is evaluated, one cannot determine whether it is helping or harming beneficiaries.

Because so few programmes have been evaluated, one approach may be to first identify practices common to effective evidence-based programmes and then investigate to what extent local programmes incorporate them.<sup>4</sup> The more evidence-based practices are included in a programme, the more likely it is to achieve positive outcomes.<sup>5</sup> This approach offers a relatively quick and easy way for decision-makers to select interventions to consider for evaluation and wider roll-out.

\* Inge Wessels and Catherine Ward are with the Department of Psychology at the University of Cape Town. Catherine Ward is also with the Safety and Violence Initiative at the University of Cape Town. The authors would like to thank all of the programmes that participated in this research, and the staff members who gave up valuable time to be interviewed and provided us with such useful input. We would also like to thank the reviewers for their suggestions, which have significantly strengthened the article. This research was supported by a grant from the National Research Foundation of South Africa awarded to the second author. Any opinion, findings and conclusions or recommendations expressed in this material are those of the authors and the NRF does not accept any liability in regard thereto.

This article outlines how an understanding of the state of parenting programmes in South Africa was gained through investigating the use of evidence-based practices, a process that could certainly be applied to other types of prevention programming with minimal adjustment. Parenting programmes were selected for this research as they are central to violence prevention, with the World Health Organization recently identifying programmes that enable a healthy parent-child relationship as a 'best buy' for violence prevention.<sup>6</sup> Parenting programmes enable parents to learn strategies to strengthen their relationships with their children and also to manage misbehaviour without the use of harsh discipline, and so can help to reduce both child maltreatment (itself a form of violence) and youth violence.

In South Africa, the need for these programmes has been recognised in Chapter 8 of the Children's Act, which states that the government must provide and fund prevention and early intervention programmes to prevent child maltreatment.<sup>7</sup> It also recognises that programmes that develop parenting skills are critical to promoting children's wellbeing. The Western Cape provincial government has acknowledged the potential role of parenting programmes in preventing violence by including them in its Integrated Provincial Violence Prevention Policy Framework.<sup>8</sup>

This article will firstly provide an overview of evidence-based practices within the context of parenting programmes. Secondly, it will outline the development of instruments used to gain information from programmes and to rank programmes. Thirdly, it will discuss the findings from the application of these instruments to parenting programmes in South Africa. Finally, it will make some comments about the use and adaptation of this process for other areas of violence prevention.

## **Evidence-based practices for parenting programmes**

### **Programme targeting**

#### ***Needs assessment***

Programmes are more likely to be effective if they are informed by a clear understanding of the nature, prevalence and distribution of the targeted problem.<sup>9</sup> This understanding should be gained via a formal

needs assessment, which is ideally conducted when the idea for the programme is conceptualised. A needs assessment reveals whether services are needed, what services are currently available, and which intervention type would be most suitable and acceptable for the target population. This information then guides programme development and implementation.<sup>10</sup>

#### ***Programme timing***

Programmes are best implemented at a time in a child's life when they will have the greatest impact, and when parents will be most receptive to change.<sup>11</sup> Additionally, programmes must be developmentally appropriate, in terms of both the targeted age-range of children and the cognitive, social and intellectual abilities of parents.<sup>12</sup>

#### ***Recruitment and retention***

Parenting programmes are more likely to recruit appropriate parents if they have explicit screening processes in place. Screening allows programme staff to establish if individuals meet the criteria for the programme. It also enables staff to refer parents on if they require services that are beyond the scope of the programme, thus maximising the chances that those receiving the programme will in fact be helped, and that the resources ploughed into the programme are used to maximum effect.

Retention is another issue that needs careful thought. Many parents, especially those in greatest need of intervention, do not access services, or drop out of them. For example, recorded drop-out rates for family-centred interventions for parents of children at risk of conduct problems have been as high as 50%.<sup>13</sup> Not only does this retention failure waste resources and potentially lead to low morale of group leaders, it also means that many parents who could benefit from programmes are missing out completely or are only receiving bits of the intervention (which may not be as effective as the whole programme).

It is therefore essential to carefully consider appropriate recruitment and retention techniques and address barriers to programme access and participation, so that parents who might otherwise find it difficult to engage in parenting programmes, are more likely to do so.<sup>14</sup> This may involve

delivering programmes at times convenient to parents, delivering programmes at venues that are easily accessible to parents, providing child care, and ensuring that programme content is culturally appropriate and relevant to parents.

## **Programme design and delivery**

### ***Programme theory***

Many programmes are based on intuition, available resources and past experiences, rather than on solid evidence.<sup>15</sup> However, programmes are more likely to be effective if they have a strong theoretical basis and clearly articulate the mechanisms by which they aim to achieve their goals.<sup>16</sup> If a programme theory is not plausible in terms of the scientific literature, that programme is unlikely to be effective, however well it is implemented.

### ***Programme content***

Although specific programme content will vary, depending on desired outcomes, certain content components have been identified as consistently having a positive impact on parenting and child outcomes. For programmes targeting parents of children aged 0 to 7, for instance, these include increasing positive parent-child interactions and emotional communication skills, as well as teaching parents to use time out, and emphasising the importance of parenting consistency.<sup>17</sup>

### ***Programme delivery***

Parenting programmes are also more likely to foster lasting positive outcomes if they aim to change parents' attitudes, behaviours and goals, rather than to simply improve their knowledge.<sup>18</sup> Programmes should take a collaborative and strengths-based approach, rather than one that is didactic, expert-driven and deficit-based.<sup>19</sup> Additionally, it is key that there is an active skills-based component that provides parents with an opportunity to role-play new skills in a safe and supportive environment.<sup>20</sup>

Programme content should be clearly outlined in programme materials to increase the likelihood of the programme being delivered as intended.<sup>21</sup> However, it is important to remember that even if this is done, intervention drift may still occur during implementation. For instance, content that appears

within the materials may be inadequately addressed during sessions, or aligned activities, such as role-plays, may receive an insufficient time allocation or may be omitted by facilitators. This reflects the necessity of adequately training and supervising facilitators, as well as conducting process monitoring to ensure that the programme is delivered with fidelity.

### ***Programme dosage***

Programmes are more likely to generate desired outcomes if they provide participants with a sufficient amount of intervention.<sup>22</sup> The necessary 'dosage' will depend on the target population's level of risk.<sup>23</sup> For example, longer programmes tend to be more effective than shorter programmes in addressing severe problems and high-risk parents.<sup>24</sup> On the other hand, recent studies have found that brief interventions may be effective for universal roll-out for parents facing less severe problems. For instance, Mejia and colleagues recently found that a group-based, single session version of the evidence-based parenting programme, Triple P, led to reductions in parent self-reports of child behaviour problems.<sup>25</sup> This positive effect was maintained over time and was even more significant at the six-month follow-up assessment.

Whatever the duration of a programme, the inclusion of booster sessions after programme completion may assist parents in maintaining positive programme outcomes.<sup>26</sup>

## **Training and supervision**

Most evidence-based parenting programmes in high-income countries use professionals, including nurses, psychologists or social workers, to deliver interventions.<sup>27</sup> There is some evidence (at least from one home-visiting programme for infants) that professionals may be more effective than para-professionals.<sup>28</sup> However, there is also evidence that positive outcomes can be achieved when using para-professionals, including community-based facilitators. For example, the results of a randomised controlled trial of a peer-led parenting programme delivered in a socially deprived part of inner London compared favourably with professional-led programmes in terms of improved parenting and reductions in child behaviour problems.<sup>29</sup> The peer-led intervention also

had a low dropout rate, which may indicate that this approach is an acceptable means of supporting parents.

The decision whether to use professionals or para-professionals as facilitators should be informed by an understanding of various factors, including how effective each has shown to be with the target population, training and supervision needs, turnover rates and cost,<sup>30</sup> and how the programme was designed and trialled. This being said, the use of para-professionals may be necessary for a country such as South Africa where it is unlikely that there are sufficient numbers of professionals to deliver programmes on a large scale.

Whether professionals or para-professionals are used, training is critical to programme fidelity and effectiveness.<sup>31</sup> Since parenting programmes are transformative in nature, it is necessary that supervisors and facilitators go through the programme as participants during the training process.<sup>32</sup> Training should also include information on the programme's theory, strategies to increase participant engagement, facilitation skills, as well as content on ethics, confidentiality and handling sensitive situations.<sup>33</sup> In order to increase the likelihood of evaluation uptake, the importance of monitoring and evaluation should be discussed and the steps to collect necessary data should be explained.<sup>34</sup>

Together with high-quality pre-service and in-service training, ongoing and regular support and supervision provide the foundation for an effective programme.<sup>35</sup> The importance of support and supervision was demonstrated in the Birmingham (UK) Brighter Start initiative, which included the evaluation of the Incredible Years BASIC parenting programme and the Level 4 Group Triple P parenting programme.<sup>36</sup> The former led to improvements in both parent and child outcomes, while the latter showed no effects. Poor implementation was identified by the evaluators as a possible reason for the lack of effects shown by Triple P, a programme that does not include mandatory facilitator supervision (unlike Incredible Years). Supervision is key to ensuring that programmes are implemented as planned.

## Monitoring and evaluation

Programmes are strengthened by the inclusion of well-designed monitoring and evaluation processes throughout their duration.<sup>37</sup> Monitoring systems assist with understanding programme reach, programme fidelity, relevance to participants and whether the programme needs any adaptations.<sup>38</sup> Outcome evaluation is particularly essential as it generates information on intervention effectiveness. Together, monitoring and evaluation data can be used to justify ongoing investment and inform further programme development.

The randomised controlled trial is typically considered to be the gold standard for outcome evaluation as it allows for the strongest conclusions to be drawn regarding a programme's effect.<sup>39</sup> However, if this design is not feasible, other high-quality evaluation designs are available and may achieve the same goal.<sup>40</sup>

Since outcome evaluations are resource-intensive, it is helpful to conduct two steps prior to initiating an evaluation. The first step is to conduct an assessment to determine whether carrying out an evaluation would be feasible and likely to generate useful information.<sup>41</sup> Typically, a programme is likely to be evaluable if it:

- Has a plausible programme theory
- Serves the intended target population
- Has a clear and specified curriculum
- Implements activities as planned
- Has realistic and attainable goals
- Has the resources outlined in the programme design
- Has the capacity to provide the necessary data for an evaluation<sup>42</sup>

The second step is to conduct a pilot evaluation to determine whether or not the programme is promising and warrants a larger scale evaluation in its current form.<sup>43</sup>

## Programme scalability

Unless evidence-based programmes are scaled up successfully and widely used, their impact will remain

limited.<sup>44</sup> A programme is only really ready for broad dissemination if it has solid evidence of efficacy and effectiveness, materials and services that facilitate going to scale (i.e., manuals, training and technical support), clear cost information, as well as monitoring and evaluation tools, so that adopting organisations can monitor and evaluate how well the programme works.<sup>45</sup> Prinz and Sanders propose that additional standards are needed if programmes are intended to reach whole populations: these include evidence of flexibility, ease of accessibility, cost efficiency, practicality at a population level, and effectiveness in population-level applications.<sup>46</sup>

## Instrument development

In applying these ideas to parenting programmes in South Africa, we developed a set of interlinked instruments – an interview schedule and rating metric (see Table 1, in which the instruments have been combined) – for assessing the degree to which group-based parenting programmes incorporate the practices discussed above. These instruments were based on two expert-compiled checklists, namely the University of Delaware guide for measuring fit between parent education and support groups with best practice,<sup>47</sup> and the Children’s Workforce Development Council’s Parenting Programme Evaluation Tool<sup>48</sup> for measuring alignment with evidence-based practice in early intervention and prevention programmes. Additional information, based on the authors’ review of the literature and experience in the parenting programme sector, has been added to these, and distilled into the two instruments: an efficient means to extract information about a programme from programme staff (through the interview schedule), and a means to rank and compare programmes (through the rating metric).

Some of the items in these instruments are specific to parenting programmes, while others are generic to all prevention programmes. We offer the instruments here in the hope that they could be useful to other areas of violence prevention, if a similar process of instrument development is used: the generic items would of course be widely applicable, and a review of the literature in the specific area of violence prevention would yield items that are specific to that area.

After some initial development, the interview schedule was piloted with two parenting programmes in order to determine whether the included questions elicited the desired information. After pilot-testing, additional questions relating to programme cost and to the language used for delivery were added to the schedule.

In order to gain an accurate assessment of a programme, the interview should be conducted with a staff member who has a thorough understanding of both the theoretical underpinnings of the intervention and its delivery – for example, the programme developer, organisational director or programme manager. The length of the interview will depend on the complexity of the programme and the time made available for the interview by the targeted staff member. Once the interview has been completed, the interviewee should be given the opportunity to comment on what has been recorded. This allows the interviewee to add any further information to the schedule, or modify any information the interviewer may have misinterpreted. Interview data should be analysed using content analysis.

In addition to conducting interviews with programme staff, programme materials, including facilitator and parent manuals, handouts and DVDs, should be collected. The type of content covered by programmes can be verified by scrutinising these materials. It also enables the readability of the materials to be assessed, using scales like the Flesch Readability Ease Score and Flesch-Kincaid Grade Level (available on most of today’s word-processing programmes). These scales provide an assessment of the appropriateness of materials for targeted parents in terms of their reading level. This process may be particularly important for programmes implemented in low-income communities where literacy levels may be low.

Once these data have been analysed, a rating of the programme’s fit with evidence-based practices can be calculated using the metric, which scores how the programme matches with evidence-based practices. Programmes score one of: 2 (programme fully incorporates practice), 1 (programme partially incorporates practice), 0 (programme does not

incorporate practice) or 'not applicable'. Once all statements have been scored, a total rating out of a total of 122 can be calculated.

These instruments are not without their limitations. Firstly, although fairly simple, they can only be administered by someone with adequate knowledge of programme development, monitoring and evaluation. Secondly, the amount of data generated by the interviews can vary considerably between programmes and depends on the interaction between the duration of the interview and the interviewee's understanding of design and evaluation terminology. Considerably more data are typically gained from programmes that have a staff member who is able to commit to a lengthier interview, and

who has a good understanding of the necessary terminology. If relevant information is omitted during the interview, it may affect the programme's rating of their fit with evidence-based practice. Furthermore, programmes that do not provide their materials for review cannot be rated on these criteria.

The final limitation is that each item in the metric is given the same weighting, although some are more critical than others. For example, having a plausible programme theory should be given a greater weighting than whether the programme content develops participants' network of social support. Despite this limitation, these instruments still provide a fairly quick and easy means of assessing use of evidence-based practices.

**Table 1: Interview schedule and rating metric for assessing use of evidence-based practices**

Programme component	Interview questions	Rating metric items	Score*
<b>Programme targeting</b>	<ul style="list-style-type: none"> <li>- What problem is the programme trying to address?</li> <li>- How was the need for the programme identified? Was a formal needs assessment conducted?</li> <li>- Who is the programme designed for?</li> <li>- How many parents are served per month? How many parents start the programme? How many drop out?</li> <li>- Which risk factors do the targeted parents face? How were these identified?</li> <li>- What is the process for screening if parents are eligible for the programme?</li> <li>- When is the programme delivered? Are there any challenges with these delivery days/times?</li> <li>- Where is the programme delivered? Why is it delivered there?</li> <li>- Is childcare provided?</li> </ul>	1. Targeted problem is clearly described.	
		2. Target population is clearly described.	
		3. Programme has conducted a formal needs assessment.	
		4. Programme addresses known risk factors and specific needs of parents.	
		5. Clear screening processes are in place.	
		6. Programme has considered how best to work with mandated parents.	
		7. Programme is developmentally appropriate for the targeted age range of children.	
		8. Programme is appropriately timed in order to achieve desired goals.	
		9. Programme runs at times convenient for parents.	
		10. Programme location is easily accessible to parents.	
		11. Childcare facilities are available while parents participate in the programme.	
		12. Recruitment and retention issues have been thoroughly considered.	
<b>Programme design and delivery</b>	<p><i>Programme theory</i></p> <ul style="list-style-type: none"> <li>- What is the theoretical framework or assumptions on which the programme is based?</li> <li>- Is the programme a replication of an effective programme? Does it incorporate components of effective programmes? What are these? Or is it an innovative programme? How was it developed?</li> </ul>	<i>Programme theory</i>	
		13. Programme is a replication of an effective programme, uses components of effective programmes, or is an original design with evidence of effectiveness.	
		14. Programme is based on a plausible theory of change.	
		15. Programme acknowledges that establishing parenting skills (and not simply changing knowledge) is necessary in order to lead to desired behaviour change.	
		16. Required change in parental attitudes is identified.	
		17. Desired outcomes are clearly described.	
		18. Realistic short-term goals have been identified.	
		19. Knowledge parents need is identified.	
20. Required change in parental behaviour is identified.			

Programme component	Interview questions	Rating metric items	Score*	
<b>Programme design and delivery</b> <i>continued</i>	<i>Programme content</i> - What is the programme content? - Does the programme assist parents in developing their own social skills and building a network of social support? - Does the programme facilitate participants accessing other community resources? Does the programme incorporate content on social problems faced by the targeted parents? - Is programme content tailored to the developmental needs of the children of targeted parents?	<i>Programme content</i> 21. Programme materials reflect the diversity of presenting parents. 22. Programme activities are likely to be associated with programme goals. 23. Programme is culturally sensitive. 24. Programme assists parents in building their social skills. 25. Programme content highlights experiences of vulnerable and culturally diverse families. 26. Programme incorporates content on social problems faced by presenting parents. 27. Programme recognises the effects of other relationships and the community on the family. 28. Programme assists parents in building a social support network. 29. Parents have an opportunity to provide input on their needs, interests and goals. 30. Programme addresses parents' needs, interests and goals. 31. Programme educates parents on accessing community resources.		
	<i>Programme delivery</i> - How many parents are in one parenting group? - Do parents have opportunities for input about their needs, interests, and expectations? - Do parents have to pay to participate in the programme or is it free? If yes, how is this amount calculated? - What languages are used for programme delivery? - How is programme content delivered?	<i>Programme delivery</i> 32. Delivery methods are based on the evidence on effectiveness and parental preferences. 33. Programme activities and delivery methods are flexible and are adapted to parents' strengths, interests and needs. 34. Programme is strengths-based and not deficit-based. 35. Programme involves an active skills-based component (e.g., role-playing). 36. Programme activities and delivery methods consider parents' capabilities (e.g., literacy levels).		
	<i>Programme dosage</i> - What is the dosage of the programme? - Are follow-up sessions provided?	<i>Programme dosage</i> 37. Dosage is appropriate for the targeted level of risk. 38. Follow-up sessions are conducted after programme completion.		
	<b>Training and supervision</b>	- How many programme facilitators are there? - Do facilitators work on a voluntary basis or are they paid staff? - What level of experience and qualification do facilitators need? - What criteria do you use when hiring facilitators? - What is the background of the facilitators, in terms of race, class, language, culture, and so forth? - What training is provided to facilitators before they can deliver the programme? - Are facilitators trained to deal with issues of diversity? - Are facilitators equipped to identify problems that are outside the focus of the programme (such as family/child/mental health/social problems)? Do you have a referral network? - Please describe the facilitator support and supervision. - What training and resources are available to support practitioners or agencies that want to deliver the programme in other settings? - Do you network with other organisations doing similar work to you?	39. Programme has a clear rationale for using paraprofessional and/or professionals as facilitators.	
			40. Hiring processes consider cultural competency.	
			41. Facilitator training fosters cultural competency.	
			42. Facilitators are trained on programme content and the rationale behind the programme.	
			43. Facilitators are taught communication skills and how to handle difficult group dynamics and sensitive situations.	
			44. Facilitators are trained to deal with issues of diversity.	
			45. Facilitators are trained in administration and reporting techniques.	
			46. Facilitators are trained to identify problems that are outside the programme's focus.	
			47. Facilitators are provided with regular and ongoing supervision.	
			48. Facilitator supervision and support is sufficient to ensure successful programme implementation.	
49. Programme networks with similar organisations.				

Programme component	Interview questions	Rating metric items	Score*
Monitoring and evaluation	<ul style="list-style-type: none"> <li>- What are the expected programme outcomes? Are there indicators of these outcomes?</li> <li>- What methods do you use to measure outcomes? When are outcomes measured?</li> <li>- Who collects information on outcomes?</li> <li>- Is money budgeted for programme evaluation?</li> <li>- Has the programme been externally evaluated? If yes, how were the findings used? If no, how would findings be used should the programme be evaluated?</li> <li>- Is baseline data collected on parents' knowledge, attitudes, and/or behaviours that are the focus of change?</li> <li>- Is the programme fidelity assessed during programme implementation?</li> <li>- Is the success in reaching programme goals measured and reported at the end of the programme?</li> <li>- Are parents given the opportunity to assess the quality of the programme? If yes, how is this information used?</li> </ul>	50. Money is budgeted for monitoring and evaluation.	
		51. Baseline data are collected on the knowledge, attitudes, and behaviours that are targeted by the intervention.	
		52. Process evaluation is conducted and findings are used to improve programme implementation.	
		53. The extent to which parents' needs, interests and goals are being met is measured regularly.	
		54. Parents are given the opportunity to evaluate programme quality.	
		55. Post-test data are collected on the knowledge, attitudes, and behaviours that are targeted by the intervention.	
		56. Data collection methods are appropriate for the programme.	
		57. Data collection intervals are appropriate for the programme's duration and the number of indicators being tracked.	
		58. Follow-up with parents is planned for after the programme ends in order to monitor outcomes.	
		59. A training package is available that includes recommendations for training and supervision as well as processes for ensuring fidelity and assessing agency readiness.	
		60. Programme has been externally evaluated.	
		61. Clear cost information for the programme is available.	
		<b>TOTAL: /122</b>	

\*Note. Scoring options are as follows: 2 - programme fully incorporates practice; 1 - programme partially incorporates practice; 0 - programme does not incorporate practice; N/A - Not applicable.

## Application to parenting programmes in South Africa

Through snowball and convenience sampling, 21 group-based parenting programmes located across South Africa were identified and included in this study. All these programmes were designed to reduce negative parenting, teach positive parenting strategies, or improve parent-child relationships. They all contained specific parenting components or curricula aimed at changing general parenting knowledge, attitudes or skills.

Three programmes (14%) were developed outside of South Africa, while 18 (86%) were developed in South Africa. In terms of provincial distribution within South Africa, three programmes (14%) were available nationally. Two-thirds of the programmes ( $n = 14$ ; 67%) were available in more than one province, while the others were only available within one province or community. The Western Cape ( $n = 16$ ; 76%), followed by Gauteng ( $n = 11$ ; 52%), had the most programmes, while the Eastern Cape and

the Northern Cape ( $n = 4$ ; 19% respectively) had the least.

Thirteen programmes (62%) were located within the non-profit sector, with the other eight (38%) being commercially run. The former typically served parents from low socio-economic backgrounds, while the latter tended to target parents from upper middle to upper socio-economic backgrounds. There were considerably more urban-based ( $n = 16$ ; 76%) than rural or mixed urban- and rural-based programmes ( $n = 5$ ; 24%). Unfortunately, it was not possible to determine the reach of most programmes as they either did not track attendance or did so haphazardly.

A senior staff member, typically the director or programme manager, from each of the 21 programmes was interviewed, either telephonically or in person, using the interview schedule. Interviews lasted between one and three hours. Programme materials, including handbooks and DVDs, were also gathered. Each programme was assessed against the metric by one rater, and, in order to

validate the scores, another rater independently rated a subsample of five programmes. The inter-rater reliability was found to be 0.62 (Cohen's Kappa;  $p < 0.001$ ), which is considered an adequate level of agreement<sup>49</sup> – this was achieved with minimal training, suggesting that the instrument is simple to use and should transfer to other contexts. As a result, the first rater's ratings were used.

**Table 2: Ranking of programmes according to fit with evidence-based practices**

Programme	Rating (%)
Programme U	95/122 (78%)
Programme S	91/122 (75%)
Programme K	84/122 (69%)
Programme C	81/122 (67%)
Programme O	78/122 (64%)
Programme R	75/122 (61%)
Programme F	73/122 (60%)
Programme E	72/122 (59%)
Programme M	68/122 (56%)
Programme T	66/122 (54%)
Programme G	62/122 (50%)
Programme P	62/122 (50%)
Programme D	61/122 (50%)
Programme I	60/122 (49%)
Programme L	58/122 (48%)
Programme Q	57/122 (47%)
Programme A	53/122 (44%)
Programme N	52/122 (43%)
Programme B	50/122 (41%)
Programme H	46/122 (38%)
Programme J	43/122 (35%)

Results showed that none of the 21 programmes was fully aligned with the evidence-based practices identified in the metric (see Table 2). However, 13 programmes incorporated at least half of them, with two having incorporated 72% and 75% respectively. Alignment with evidence-based practice for the remaining eight programmes ranged from between 35% and 49%. The mean across the programmes was 52%.

Despite the generally low uptake of evidence-based practices, an encouraging finding was that most programmes had considered ways of addressing

barriers to programme access and participation. For example, programmes serving parents from low socio-economic backgrounds were typically delivered in community venues, such as churches, close to participants' homes. Through locating programmes within served communities, common barriers to engagement, including financial barriers and transport difficulties, were often avoided.

There were, however, specific areas in which the use of evidence-based practices was clearly lacking. For example, only five programmes (24%) had conducted a formal needs assessment, which is concerning as this is a key step in ensuring that the programme is based on an accurate understanding of the target population and context. Programmes that had not conducted a needs assessment often relied on informal contact with community members as a means of assessing need.

Additionally, many programmes did not have a clearly articulated and empirically sound programme theory, which is one of the core building blocks of an effective programme.<sup>50</sup> Programmes would be strengthened if they drew on the available evidence base on parenting programmes and other prevention interventions to create a plausible theory of change. This said, there is a need to build this evidence in low- and middle-income countries by conducting evaluations of local programmes, testing cultural adaptations of imported and local programmes, and investigating cultural conceptions of parenting.

Aligned to the lack of developed programme theories was a lack of monitoring and evaluation processes, especially outcome evaluation. Only two programmes (10%) had undergone external evaluation, and because they did not make the evaluation reports available, it is not clear whether these were outcome or process evaluations. A shortage of funding was the main reason stated by programme staff as to why evaluation had not been conducted. High-quality evaluation is expensive, and so funders should be encouraged to include a compulsory evaluation component in their funding allocations.

Lastly, training and supervision for programme facilitators was often inadequate, with only 14 programmes (67%) providing this essential service. This was particularly concerning, as most

programmes made use of para-professional staff who possibly require more intensive training and ongoing support and supervision than professionals, especially in terms of understanding the theoretical underpinnings of the intervention and thus the importance of fidelity to the model.

Largely for these reasons, most programmes were not currently evaluable, and therefore none of the programmes was in a position where it could be scaled up successfully.<sup>51</sup> In order to increase their likelihood of becoming effective and scalable, it is recommended that these programmes incorporate more of the practices associated with programme success. It is acknowledged, however, that the addition of some of these practices may depend on resources that might not be available, especially within low-resource settings. However, it may be possible to eliminate practices that have been associated with less effective programmes – potentially leading to the cutting of some programme costs.

There is a need to build the evidence base in low- and middle-income countries so that programme developers can draw from these. This can be achieved by conducting rigorous evaluations of local programmes and sharing the results, be they positive, negative or equivocal, within the public domain.<sup>52</sup> Programme staff commonly identified a lack of capacity and financial resources as a barrier to conducting evaluation. In order to address this barrier, programmes may benefit from linking with local government and research institutions that may offer assistance in conducting evaluations. As mentioned above, donors also have a role to play in fostering a culture of evaluation by providing the necessary funding, and guiding programme developers and implementers towards appropriate technical assistance.

## Implications of these findings

The instruments enabled an understanding of available group-based parenting programmes in South Africa. This understanding can inform the way in which donors and policymakers select programmes to implement, and can support programmes in becoming more effective and scalable by highlighting areas of programme design, delivery,

and evaluation that require additional research and strengthening. For example, there is a need to support existing programmes in developing plausible programme theories, providing adequate training and support to facilitators, and setting up monitoring and evaluation systems. Furthermore, once programmes increase their adoption of evidence-based practices, their effectiveness should be tested. If programmes are found to be effective, it is then necessary to investigate how best to take them to scale so that fidelity is maintained.

The approach used in this research can be applied to other violence prevention programmes where little is known about intervention effectiveness. The instruments provide a quick, relatively low-cost means for surveying programmes and identifying promising programmes and areas where programmes need strengthening. They may also be useful during programme development by providing insight into key components that should be included in intervention design and delivery. Content that is specific to parenting programmes can be replaced with that which is relevant to another area (such as youth violence prevention, or elder abuse prevention); much of the content (such as the requirement for needs assessments, or for sound programme theory), however, is generic and applies to all prevention programming.<sup>53</sup> It thus provides a basis for national strategies to introduce violence prevention interventions; and for individual programmes to carry out self-assessments prior to engaging in outcome evaluations.



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## Notes

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# Making sense of the numbers

## Civil claims against the SAPS

**Gwen Dereymaeker\***

g.dereymaeker@gmail.com

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*In recent years reports have increasingly pointed to the mounting quantum of claims for civil damages faced by the South African Police Service (SAPS). A close analysis of the publicly available data shows that increasingly large amounts of claims are filed against the SAPS, but that most of these claims are finalised without the SAPS, being held financially liable. However, the backlog of claims is ever mounting and needs to be addressed more proactively. It appears that factors external to police officials' behaviour do not explain the increase in claims. The reasons are more likely related to unlawful police behaviour, and in particular police violence.*

The South African Police Service (SAPS) has in recent years reported a substantial annual increase in civil claims filed for damages as a result of actions or omissions by its officials, and an even larger increase in claims pending. The 2014/15 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget.

The minister of police said in 2014 that he was not satisfied with the number of civil claims made against the SAPS, and that increased police professionalism, coupled with compliance with the law and the relevant policies in place, should reduce the amount of claims made.<sup>1</sup> The minister of police also instructed the national commissioner to address the issue of mounting civil claims, and the national commissioner instructed SAPS officials to comply with the law when making arrests or detaining someone, in order to avoid civil claims.<sup>2</sup>

The 2014/15 SAPS annual report reiterates that the SAPS regards the causes behind civil claims as

a lack of compliance with standing orders and a high rate of unlawful arrests and detentions.<sup>3</sup> The 2014/15 annual report adds that '[c]itizens have become more aware of their rights and are enforcing them vigorously'.<sup>4</sup>

This article attempts to clarify the issue of civil claims against the police. After outlining the legal basis for vicarious liability of the state for actions of police officials, the article analyses data from SAPS annual reports (from 2007/08 to 2014/15) to better understand the trends in relation to claims being made, paid out, reduced or cancelled. The last section of the article offers an explanation for these trends.

### **State liability for individual police action**

This section outlines the legal basis for filing claims for damages against the minister of police, and the potential individual financial liability of police officials responsible for the actions or omissions that resulted in such claims. Although the article focuses on claims made against and payments made by the state, there exists a regulatory basis in terms of which individual officials responsible for unlawful

\* Gwen Dereymaeker is a researcher at the Civil Society Prison Reform Initiative, a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape.

behaviour that resulted in payment can be held personally liable.

Under the South African civil law of delict, any person who 'wrongfully and culpably causes damage or harm to another' through an act or omission is liable for compensation.<sup>5</sup> Therefore, if a police official voluntarily or negligently commits an act or omits to perform an act and by (not) doing so causes another person's rights to be infringed, he or she can be held directly liable to pay compensation. However, under the State Liability Act, the state can also be held vicariously liable for any wrongful act committed by its officials in the course of their employment.<sup>6</sup> There is an academic debate about the extent and adequacy of the common law of delict relating to state liability, and how it is applied by the courts, but this will not be addressed here. (See also the case note by Heidi Barnes in SACQ 47.)

The Public Finance Management Act states that the National Treasury Regulations or Instructions must address 'the settlement of claims by or against the State' and 'the recovery of losses and damages'.<sup>8</sup> Regulation 12 of the Treasury regulations regulates the state's liability for acts and omissions by its officials. As a principle, the regulations grant 'state protection' to public officials, in that any state institution must accept liability 'for any loss or damage suffered by another person, which arose from an act or omission of an official'.<sup>9</sup> The individual official cannot be held directly liable for acts committed in the course of his or her employment, if there is a causal link between the wrongful act or omission of the official and the loss or damage caused.<sup>10</sup> This explains why the state (in this case, the minister of police) is most often cited as a defendant in civil claims cases. Also, the financial resources available to the minister are vast in comparison to the often meagre financial resources of the individual officials responsible for the wrongful behaviour.

However, the regulations also contain a series of exceptions where the state will not provide protection to the official and should, in theory, not be held liable or should recover the compensation paid to the victim from the official.<sup>11</sup> These exceptions include any criminal act committed by an official;

intentionally exceeding one's powers; or acting recklessly or intentionally.<sup>12</sup>

In practice, the relevant provisions of the Treasury regulations requiring accounting officers to recover expenses from negligent, reckless, power-abusing or criminal officials (such as those committing unlawful arrests, unlawful or irregular search and seizures, police detention beyond the 48-hours rule, or general unlawful police behaviour) are not being implemented. In a July 2013 parliamentary reply, the minister of police indicated that no police member had been '[disciplinarily] charged for misconduct as a result of civil claims against the SAPS'.<sup>13</sup> Despite committing, in the same parliamentary reply, to developing recommendations to hold individual police officials liable, these never surfaced in the public domain.

### **Civil claims against SAPS: understanding the data**

Annually, the SAPS reports on the amount of contingent liabilities pending against the Department of Police.<sup>14</sup> Contingent liabilities are *potential* expenses dependent on the outcome of an event, such as a court ruling or an out-of-court settlement. In other words, there is no certainty in these cases that any money will be paid out. Each annual report lists contingent liabilities, the largest proportion of which are claims for civil damages made by individuals against the minister of police for alleged unlawful actions by police officials. (This article only focuses on civil claims.)

The minister of police has provided additional information on civil claims in written replies to parliamentary questions in 2013 and 2015, including on the number of claims incurred by the SAPS (annual reports only contain information on the total amounts claimed). However, the information provided in the annual reports does not match the information provided in parliamentary replies.<sup>15</sup> Since information from annual reports is audited by the auditor-general, this article almost exclusively relies on annual reports.

The SAPS reports on claims incurred over each financial year, claims cancelled or paid out during the year (i.e. either following a court finding that the SAPS was either liable or not liable, an out-of-court settlement or a claim that was withdrawn), and a

closing balance (i.e. all claims that remain pending against the SAPS at the end of each financial year, which constitutes an accumulative figure of all claims pending from that financial year and from previous financial years).<sup>16</sup> These three categories of liabilities (incurred, finalised and pending) will be examined in the following sections. Both amounts originally reported on and amounts adjusted to inflation (at March 2015 rand value) will be used.<sup>17</sup> The latter is how much a particular amount would be worth if adjusted to the value of the rand in March 2015, considering annual inflation rates. Amounts adjusted to inflation provide a more accurate estimate of the value of each figure, as each amount is adjusted to the value of the rand on the same date.

Important to note is that not all civil claims are for actions that can be qualified as gross human rights violations by police officials. The categories of civil claims are typically the following: vehicle accidents, legal fees, damage to property and damage to state property, assault, police actions (a 'catch-all' category that includes unlawful arrests), shooting incidents, and a large 'other' category that includes all claims that have yet to be classified. The 'assault', 'police actions' and 'shooting incidents' categories are those that raise the most questions about the SAPS's compliance with basic constitutional and legal precepts and general ethical conduct.

During the period 2007/08 to 2014/15, an average of 80% of all claims made annually, an average of 86% of all claims pending at the end of a financial year, and an average of 86% of all payments made,

fell into these three categories. Therefore, assaults, shooting incidents and other police actions (including unlawful arrests) constitute the majority of claims the department has to deal with.

For the sake of conciseness, this article will only deal with overall civil claim figures, and will not examine in detail the claims made or paid out in these three specific categories.

## Incurring liabilities

Table 1 outlines the total claims for civil damages incurred by the SAPS annually between 2007/8 and 2014/15, as well as all claims that remain pending at the end of the financial year.<sup>18</sup> The figures used are both the original values reported on, and those adjusted to the rand value of March 2015.

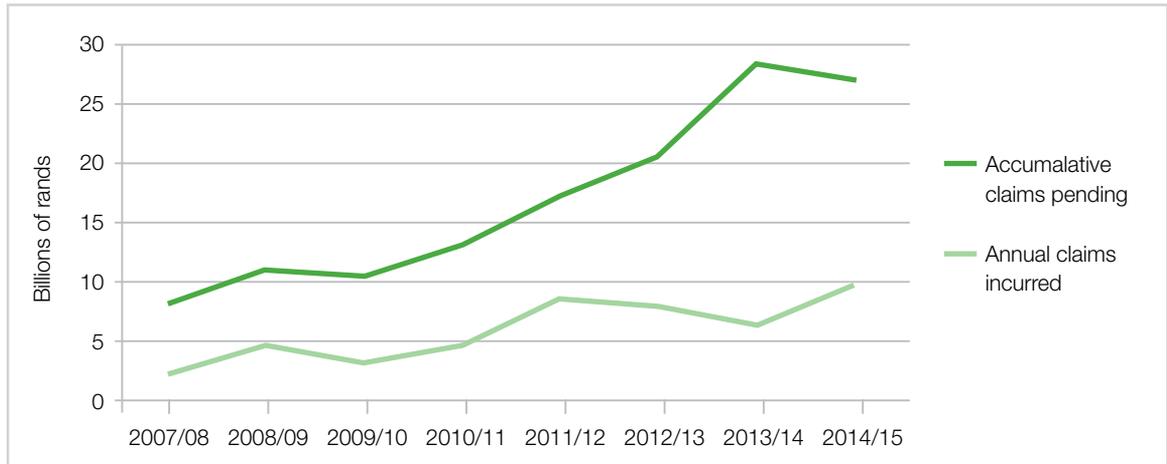
Figure 1 on the next page reflects on the numbers contained in Table 1 and shows the increase in claims made annually against the SAPS until 2011/12. Between 2011/12 and 2013/14 there was a slight reduction, followed by a sharp increase in the last financial year. The top line shows the accumulative claims pending against the SAPS that have yet to be finalised.

Between the 2007/08 and 2014/15 financial years, claims made annually against the SAPS increased by 533% if considering the original rand value, or 313% if adjusted to the same rand value (a more accurate figure). Claims made since the 2011/12 financial year decreased for two years, then sharply increased in the past financial year, and stood at R9.6 billion in

**Table 1: Total claims incurred in one financial year and pending at the end of a financial year, at original value and at current rand value (March 2015), 2007/08 to 2014/15**

Financial year	Total amounts incurred, at original value ('000)	Total amounts incurred, at March 2015 rand value	Total amounts pending, at original value ('000)	Total amounts pending, at March 2015 rand value
2007/08	R 1 515 597	R 2 320 158	R 5 290 512	R 8 099 003
2008/09	R 3 266 230	R 4 498 535	R 7 916 554	R 10 903 365
2009/10	R 2 522 463	R 3 262 117	R 8 098 669	R 10 473 418
2010/11	R 3 692 193	R 4 600 042	R 10 489 004	R 13 068 077
2011/12	R 7 174 091	R 8 464 092	R 14 492 322	R 17 098 243
2012/13	R 6 976 537	R 7 794 522	R 18 322 416	R 20 470 683
2013/14	R 5 934 019	R 6 266 324	R 20 544 283	R 28 367 826
2014/15	R 9 589 568	R 9 589 568	R 26 918 721	R 26 918 721
<b>TOTAL</b>	<b>R 40 670 698</b>	<b>R 46 795 359</b>	<b>N.A.</b>	<b>N.A.</b>

**Figure 1: Total amount of claims incurred per financial year and total amount of accumulative pending claims, at current rand value (March 2015), 2007/08 to 2014/15**



2014/15. The as-yet undisclosed amounts claimed by the Marikana victims were filed in August 2015 and are therefore not reflected in this article. In total, over the eight-year period analysed here, claims totalling R46.8 billion have been made against the police, at adjusted rand value.<sup>20</sup> These worryingly high figures indicate a public perception that police behaviour is too often not compliant with laws and regulations and worthy of a civil claim.

A large portion of claims made in one financial year are not ‘dealt with’, or finalised, in the same financial year, creating an ever-mounting backlog of claims pending against the SAPS. These are the amounts often referred to in the media,<sup>21</sup> and are reflected in the third and fourth columns of Table 1. These pending claims also represent an ever-increasing portion of the total SAPS budget. Indeed, pending claims at the end of 2007/08 represented 16% of the SAPS budget, whereas the 2014/15 overall accumulative contingent liability for civil claims represented 37% of the SAPS annual budget.<sup>22</sup> As will be shown in the next section, most of these claims will not result in payment, and the SAPS does not actually make provision for payment of all amounts claimed.<sup>23</sup> However, the fact that accumulative pending claims represent such a large segment of the SAPS budget has an impact on the public perception of the behaviour of SAPS officials, since the general assumption is that most if not all claims pending will result in payment by the SAPS.

One must also question whether the SAPS intends to finalise claims as swiftly as possible.

When attempting to outline the reasons behind the large volume of claims pending, the SAPS has focused on the procedural challenges affecting it. The SAPS has explained that each claim had to follow due process (knowing that a trial takes on average three years to complete, and that pending claims therefore stay on the SAPS books for that duration), that pending claims are claims only, that the amounts claimed are decided by the plaintiff or their legal representative, which are, according to the SAPS (and confirmed by the analysis below) ‘very much inflated’, and that there is no certainty regarding the outcome of the claim, which may or may not result in a liability for the SAPS.<sup>24</sup> These may explain the reasons for the ever-growing accumulative pending claims, but not the reasons for the claims having been made in the first place.

The principal reason for the increasing pending claims is the length of court proceedings. A time- and cost-effective process to circumvent slow court proceedings would be to enter into an out-of-court settlement.<sup>25</sup> The SAPS does enter into a number of out-of-court settlements to settle civil claims. However, no information is available on the SAPS’s possible strategy to go this route (with the notable exception of the SAPS’s public efforts to prefer an out-of-court settlement with the Marikana victims),<sup>26</sup>

especially when the outcome of the case, based on the evidence available and similarity with previous cases, will manifestly be in favour of the plaintiff. Also, the SAPS may struggle to reach out-of-court settlements as plaintiffs prefer to wait for a court ruling, hoping to obtain more substantial damages than through an out-of-court settlement – this despite the length of, and legal fees associated with, court proceedings.

## Claims finalised

A claim is finalised following a court ruling, an out-of-court settlement or its withdrawal by the plaintiff. Court rulings in favour of the plaintiff and out-of-court settlements can result in payment for the full amount originally claimed, or for a reduced amount.

Table 2 shows that the vast majority of claims that are finalised result in the claim being cancelled or reduced, i.e. in the plaintiff withdrawing the claim, in a court finding that the SAPS was not liable for the amounts claimed or was liable for a lower amount, or in a settlement for an amount lower than what was originally claimed.<sup>27</sup>

Adjusting all amounts to the rand value of March 2015, Table 2 shows that R30 billion was finalised over the eight-year period analysed in this article, of which R1.2 billion resulted in a liability for the SAPS (i.e. a payment by the SAPS) and R29 billion resulted in non-payment (either the claim was withdrawn, or the SAPS was not held liable, or was ordered to pay less than originally claimed, or an agreement was

reached to pay less than originally claimed). Over the eight-year period under review, only 4% of all amounts claimed that were finalised resulted in a payment by the SAPS.

Comparing the data from Table 1 and Table 2, only 65% of all claims made against the SAPS between 2007/08 and 2014/15 were finalised, whether the outcome was that of a liability for the SAPS or not. The further 35% of claims remain pending. However, in 2014/15 and for the first time in the period under review, a similar quantum of claims was finalised and made, indicating that the SAPS appears to be attempting to address the backlog of cases.

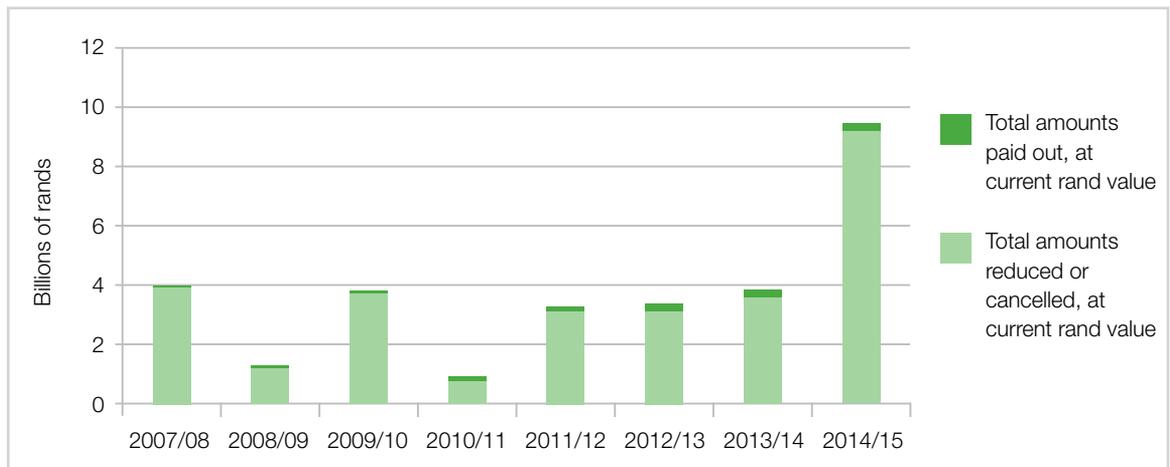
The amounts paid out annually have also steadily increased. They increased by 338% between 2007/08 and 2014/15, a slightly higher increase than the claims made annually (313%, as indicated above).

Figure 2 on the next page summarises the total amounts finalised. This chart shows that, at current rand value and with the exception of 2008/09, 2010/11 and 2014/15, amounts finalised were in a similar value range every year, while claims incurred kept increasing (see Figure 1). More claims were incurred than claims finalised, resulting in the backlog of pending claims accumulating year after year, as identified above. This said, 2014/15 was an obvious exception, as a similar amount of claims was finalised and incurred. However, based on the available data, it is impossible to tell whether the SAPS decided in that year to finalise all claims that were without merit and to focus on claims with merit (those that remain

**Table 2: Total amounts finalised and total amounts paid out, at original value and at current rand value, 2007/08 to 2014/15**

Financial year	Total amounts finalised, at original value ('000)	Total amounts finalised, at current rand value ('000)	Total amounts paid out, at original value ('000)	Total amounts paid out, at current rand value ('000)
2007/08	R 2 591 851	R 3 967 746	R 38 207	R 58 489
2008/09	R 960 857	R 1 323 376	R 57 403	R 79 060
2009/10	R 2 952 198	R 3 817 862	R 79 451	R 102 748
2010/11	R 746 164	R 929 633	R 85 605	R 106 654
2011/12	R 2 818 726	R 3 325 572	R 105 960	R 125 013
2012/13	R 3 021 501	R 3 375 766	R 187 132	R 209 073
2013/14	R 3 712 152	R 3 920 032	R 251 192	R 265 259
2014/15	R 9 534 319	R 9 534 319	R 256 188	R 256 188
<b>TOTAL</b>	<b>R 26 337 768</b>	<b>R 30 194 307</b>	<b>R 1 061 138</b>	<b>R 1 202 484</b>

**Figure 2: Total amounts finalised, whether resulting in a liability for the SAPS (payments made, dark green) or resulting in the SAPS not being liable (amounts reduced or cancelled, light green), at March 2015 rand value, 2007/08 to 2014/15**



pending) going forward, or whether the claims finalised in the last financial year are any different to the claims that remain pending. It is therefore impossible to predict whether the claims that remain pending will result in payment by the SAPS or not.

### Legal fees to defend civil claims to be added to damages awarded

The figures outlined above only focused on damages claimed and awarded. They exclude the additional cost of legal fees incurred by both the plaintiff and the SAPS. Like any other government department, the SAPS pays the Department of Justice and Correctional Services (DOJ&CS) for the services of the State Attorney. This includes defending claims for civil damages before the courts or through out-of-court settlements. Legal fees paid to the DOJ&CS also include legal costs that are due to plaintiffs, following court orders and settlements.<sup>29</sup> These additional costs to the tax-payer have to be factored in when calculating the overall cost of civil claims. The annual reports do not contain itemised information on the cost of legal counsel and other legal services specifically in relation to civil claims. Only overall legal costs are reported on.

A parliamentary reply from the minister of police indicated that just under R570 million had been spent by the SAPS on legal costs relating to civil

claims between 2011/12 and 2013/14.<sup>30</sup> As shown in Table 3 below, in the financial years 2011/12 and 2013/14, the legal fees were higher than the actual payments made (keeping in mind that legal fees are incurred in all cases, whether the outcome results in a liability for the SAPS or not).

**Table 3: Cost of legal fees for civil claims at original value, 2011/12 to 2013/14**

Financial year	Legal fees for civil claims, at original value ('000)	Total payments made, at original value ('000)	Total amounts finalised, at original value ('000)
2011/12	R131 342	R 105 960	R 2 818 726
2012/13	R156 903	R 187 132	R 3 021 501
2013/14	R280 547	R 251 192	R 3 712 152

Source: Parliamentary reply and SAPS annual reports 2011/12 to 2013/14.

This section has outlined the amounts claimed from the SAPS annually for civil claims, the amounts finalised, whether they resulted in the SAPS being financially liable or not, and the amounts that remain pending at the end of each financial year. While claims made annually have drastically increased, the amounts finalised, either through court proceedings or out-of-court settlements, have not followed the same trend, resulting in an ever-mounting backlog of claims that remain pending against the SAPS.

## Reasons for the claims

It must be noted that reasons for successful claims cannot be analysed without a thorough review of individual cases and an examination of the reasons behind the awarding of damages on a case-by-case basis. This article does not review a sample of individual cases. However, reasons that may lead individuals to bring claims against the SAPS can be inferred from several factors, both directly linked and external to the behaviour of individual SAPS officials.

In 2014, National Police Commissioner of Police, General Riah Phiyega, issued a statement condemning the 'irregular, improper, unlawful and unacceptable conduct by members' that led to civil claims, and exhorted SAPS members to comply with legal requirements regarding arrest and detention.<sup>31</sup> However, apart from a general reference to 'respect of human rights', there was no clear condemnation of abusive behaviour by police. Also, Phiyega linked civil claims to the individual behaviour of some SAPS members – a few 'bad apples' who do not comply with the law – rather than recognising the systemic failures of law enforcement underpinning the commission of crime by law enforcement officials.<sup>32</sup>

The 2014/15 SAPS annual report linked civil claims to a lack of compliance with rules and regulations, unlawful arrest and detention, as well as the fact that individuals are more aware of their rights.<sup>33</sup> The same annual report also introduced a new performance target for the SAPS: a reduction of 3.4% in the number of civil claims instituted against the department (as opposed to amounts claimed). However, the target was not reached since the number of claims increased by 21% – the amounts claimed against the department increased by 61%, compared to 2013/14.<sup>34</sup>

Unlawful police behaviour, and in particular police brutality, certainly constitutes one of the primary reasons for the high volume of claims.<sup>35</sup> Recruitment choices, poor training, negligent management, lack of leadership, poor command and control, political condonation of police violence and criminal elements in the employ of the SAPS all affect police behaviour.<sup>36</sup> One could assume that the 2012 amendment to section 49(2) of the Criminal Procedure Act, which authorises the use

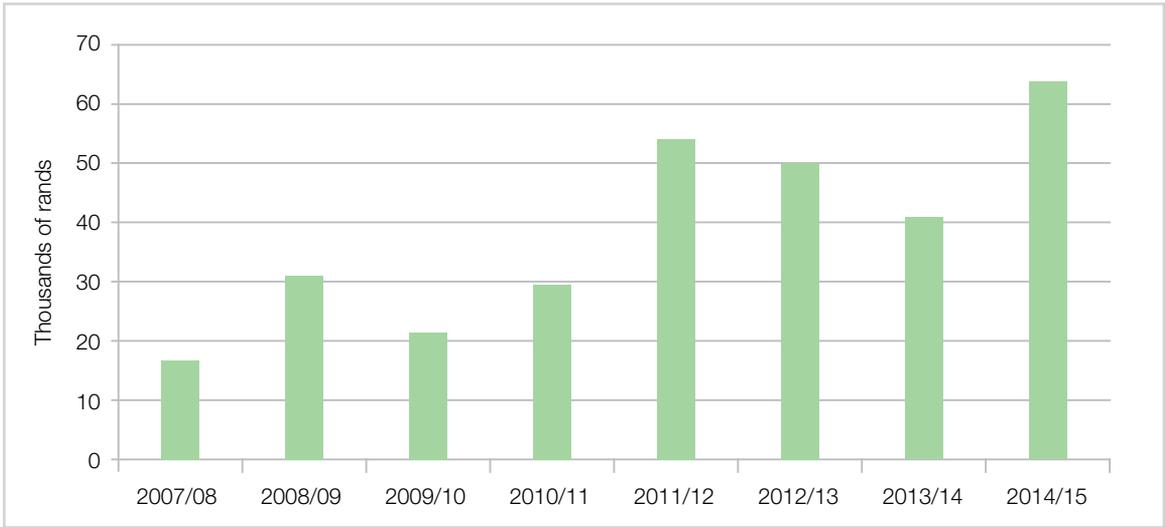
of deadly force even when the threat of violence is not immediate, has facilitated the use of force by police.<sup>37</sup> However, this amendment does not seem to have had a direct impact on civil claims made, as the increase in claims or payments made after 2012 follows a general increase already seen in previous years. This said, the legislative amendment may certainly have been one factor explaining the increase post-2012. Police brutality has an obvious impact on civil claims filed against the SAPS, especially considering the fact that there is no clear correlation between other potential reasons (analysed below) and the trends in civil claims.

Other reasons for civil claims include an increase in SAPS personnel, an increase in the number of arrests, an increase in the number of violent protests, and an increase in the number of complaints filed to the Independent Complaints Directorate (ICD) and its successor, the Independent Police Investigative Directorate (IPID).

Between 2002 and 2012 the SAPS drastically increased its personnel, from a staff contingency of 120 549 in 2002 to 199 345 in 2012. Since then the SAPS staff establishment has again been reduced and stood at 193 692 at the end of the 2014/15 financial year. About 80% of SAPS staff members are police officers, the rest being administrative and support staff. More staff means more encounters between the police and individuals, and potentially more situations that may give rise to a civil claim, especially considering that the massive recruitment drive was to a certain extent conducted at the expense of quality of staff.<sup>38</sup> Could the increase in claims filed against the SAPS be related to the increase in staff?

Figure 3 on the next page shows that the ratio of amounts claimed annually (at current rand value) against the number of police officers has increased in recent years.<sup>39</sup> If there had been a direct correlation between the two, the ratio would have remained relatively stable. But in 2007/08 the average value of each claim per SAPS staff member was R16 848 (at current rand value), increasing to R63 527 in 2014/15. The average claim incurred annually per staff member has more than tripled in eight years.

**Figure 3: Average value of each claim filed per police official, 2007/08 to 2014/15**



The value of claims made against the SAPS therefore increased faster than the number of police officials in the employ of the SAPS.

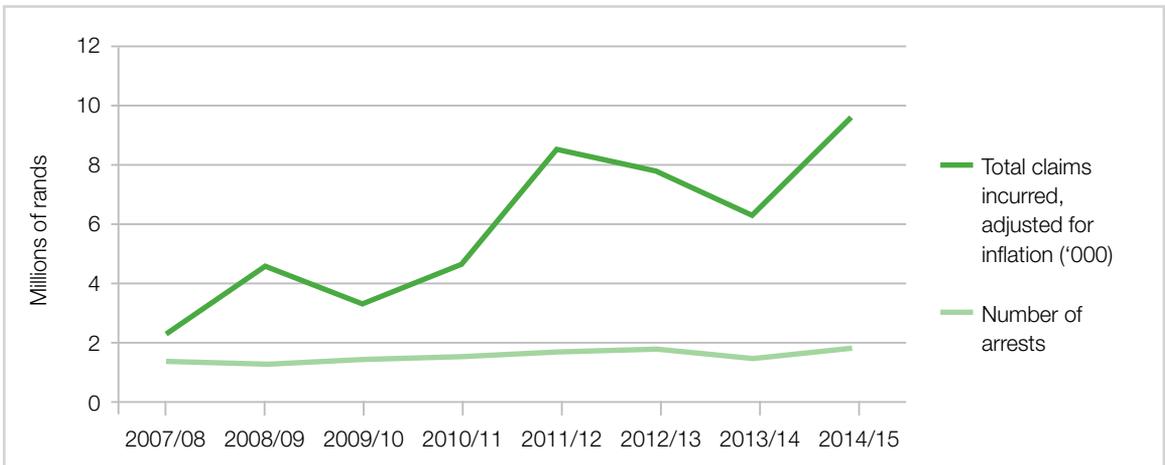
The next factor to consider is the number of arrests. As noted in the National Commissioner’s 2014 statement and in the 2014/15 SAPS annual report, unlawful arrests and police detention create the potential for a high volume of claims.<sup>40</sup> This raises the question whether the increase in civil claims might follow the increase in arrests conducted by the SAPS.

However, as shown in Figure 4, there is no clear correlation between the two. The pattern of claims

incurred (at current rand value) does not follow the pattern of the overall arrests made by the SAPS on an annual basis. On the contrary, the two spikes in civil claims (between 2010/11 and 2011/12 and between 2013/14 and 2014/15) are not reflected in a similar variation in the number of arrests. This would suggest that the SAPS’s reading of the causes for the increase in claims is at least partially erroneous. There are, however, major discrepancies in the data sets for the last two financial years.<sup>41</sup>

Another factor that might explain the increase in civil claims is the number of violent protests to which the

**Figure 4: Comparison between total claims incurred by the SAPS, at current rand value, and the number of arrests performed by the SAPS, 2007/08 to 2014/15**



SAPS has had to respond. Indeed, violent protests that result in the use of excessive force by the police increase the potential for a civil claim.

Figure 5 outlines the variation in the number of claims filed against the SAPS from one year to the next (expressed in percentages) and the variation in the number of violent protests to which the SAPS responded (expressed in percentages).<sup>42</sup> If the column is above 100%, it means that there was an increase in the following year. If the column is under 100%, it means that there was a decrease in the following year. Figure 5 shows that there is no clear correlation between civil claims made and responses to violent protests, since the variations do not follow each other.

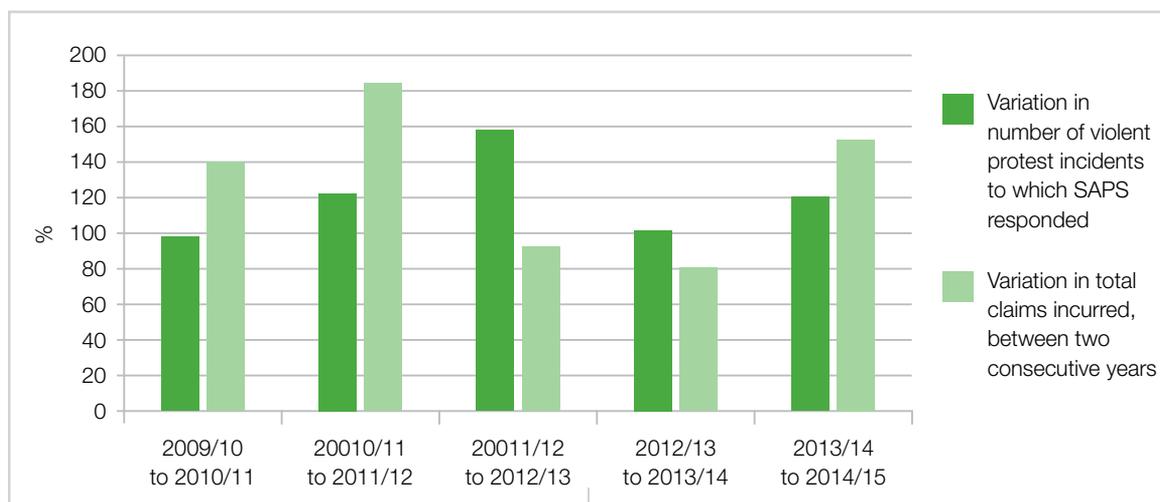
The data on the number of arrests and violent protests provide an insight into the socio-economic profile of plaintiffs pursuing claims for civil damages. Indeed, it can be inferred that arrests in South Africa mostly target poor people, one indicator being that the majority of arrests are for non-priority crimes (less serious than shoplifting).<sup>43</sup> Secondly, violent protests are often triggered by frustration at a lack of service delivery in poor areas. Since there is no correlation between civil claims on the one hand and the number of arrests or the number of violent protests on the other (the latter two mostly involving the poor), it may be inferred that the poor are not those filing civil

claims for damages. This is possibly due to the cost of civil proceedings, for which no legal aid is available.<sup>44</sup>

Another possible correlation is between the number of civil claims filed against the SAPS and the number of complaints filed with the ICD (until 2012) and the IPID (from 2012), the civilian oversight body mandated to receive complaints of police misconduct or criminal activity and investigate them. IPID's powers were reinforced compared to those of the ICD, but its mandate was also changed to focus on the most serious crimes allegedly committed by SAPS members, and no longer includes police misconduct.<sup>45</sup>

If plaintiffs were filing civil claims for damages as well as laying complaints with IPID, the two data sets would follow the same trend. However, as shown in Figure 6, this is not the case. During the eight-year period under review, the overall number of complaints recorded by the ICD/IPID have oscillated between 4 923 (in 2011/12) and 6 728 (in 2012/13).<sup>46</sup> The data from civil claims to a certain extent confirm this, with 2012/13 recording the highest number of complaints, but seeing lower numbers of civil claims filed in the two years thereafter. Important to note is the major discrepancy in figures available for 2013/14.<sup>47</sup> Since 2010/11, the overall number of civil claims filed has been much higher than the number of complaints filed with IPID, with IPID recording less than half the

**Figure 5: Variation in the number of violent protest incidents to which the SAPS responded and in the total civil claims against the SAPS, variation between two subsequent years, 2009/10 – 2014/15**



total number of civil claims filed against the SAPS in 2011/12. This seems to suggest that IPID suffers from a crisis of legitimacy, and that individuals prefer going the route of civil claims rather than referring their complaints to IPID.<sup>48</sup> These figures also seem to show that data on civil claims may provide a more accurate picture of the extent of police criminality than the number of IPID complaints, the former having been much higher than the latter in recent years. This said, one must keep in mind that a plaintiff may file a civil claim for police misconduct that cannot be dealt with by IPID, such as unlawful arrests or unlawful detention, and that the socio-economic profile of claimants for civil damages and of complainants to IPID may be different.

As noted above, in practice individual police officials are not held financially accountable for the liabilities they cause by their unlawful behaviour. In addition, Muntingh and Dereymaeker found that law enforcement officials enjoy de facto impunity for illegal acts they commit, in that the vast majority of officials are neither adequately internally disciplined nor prosecuted for their illegal behaviour. While large volumes of complaints are recorded by the ICD/IPID, and criminal prosecutions are recommended to the National Prosecuting Authority (NPA), in the past five years less than 15% of such recommendations resulted in prosecutions. About 3% of ICD/IPID recommendations resulted in a conviction and a sentence of imprisonment without the option of

a fine.<sup>49</sup> Without financial, disciplinary or criminal accountability, police officers know that their unlawful behaviour will most likely remain unpunished.

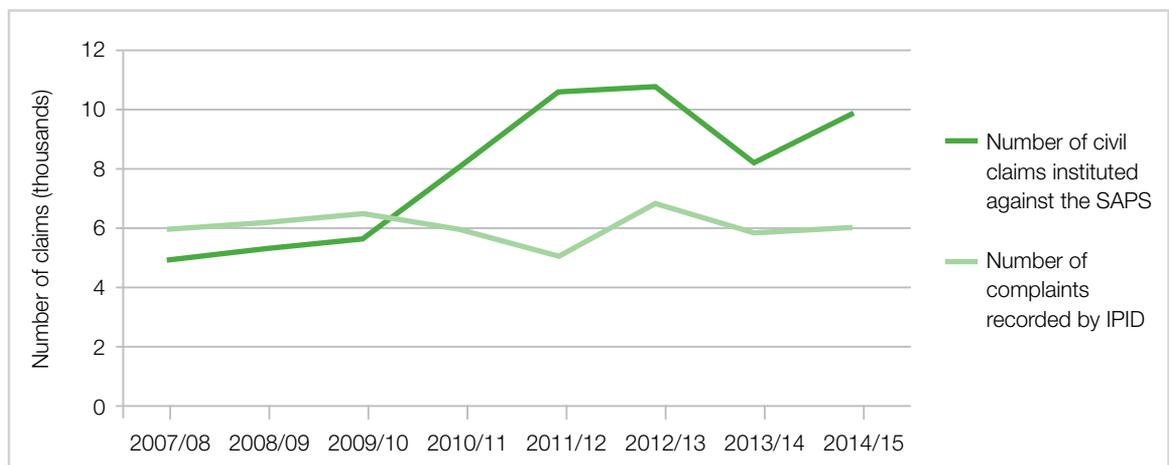
## Conclusion

The amounts claimed against the SAPS in civil litigation by individuals have drastically increased over the years, and culminated in claims amounting to more than R9 billion in the 2014/15 financial year. These large claims have affected the public perception of police behaviour, and it would take a drastic reduction in claims to restore confidence in the police and convince the South African public that police brutality and other misconduct is on the decrease.

However, claims that remain pending at the end of a financial year – and are accumulating – seem to be the biggest challenge faced by the SAPS. Pending claims in civil litigation at the end of the 2014/15 financial year stood at more than R26 billion, more than a third of the SAPS budget. It appears that the SAPS is unable or unwilling to influence the speedy finalisation of claims, either through court orders or out-of-court settlements, resulting in either payment or non-payment, with the result that the backlog is mounting, although figures from the latest annual report may be indicating a change.

Furthermore, payments made by the SAPS have drastically increased over the years. In total, and

**Figure 6: Number of civil claims filed against the SAPS vs number of complaints recorded by IPID, 2007/08 to 2014/15**



over the eight years under review in this article, R1 billion was spent compensating victims of police misconduct or criminal behaviour. However, the vast majority of claims that are finalised result in the SAPS not being financially liable, indicating that many claims are either unsubstantiated or grossly inflated.

The question must be asked whether it has not become a 'business' to sue the SAPS. It may be that many people arrested by police officials immediately assume that the officials' behaviour was illegal. Such sentiment is fuelled by the general lack of legitimacy of and confidence in the police in South Africa.<sup>50</sup> However, the reaction to sue also affects police morale, and confirms that the police enjoy little public support in the execution of their mandate.

Attempting to understand the reasons behind the filing of civil claims, this article found no direct correlation between claims and the increase in SAPS personnel, the number of arrests, the number of violent protests or the number of complaints made to IPID. Furthermore, the fact that civil claims are much higher than complaints to IPID indicates that IPID suffers from a crisis of legitimacy. This lack of correlation suggests that the main reason for civil claims is indeed unlawful police behaviour, be it unlawful arrests and detention or police brutality, to name a few. Some were identified by the SAPS itself. The fact that police officials enjoy de facto financial, disciplinary and prosecutorial impunity for their behaviour has an impact on their future conduct, as it is unlikely that they will be required to answer for their misdeeds.



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## Notes

- 1 Questions to the minister, written reply by Minister of Police Nathi Mthethwa to question no. 944, internal question paper no. 10-2014, September 2014, [https://pmg.org.za/question\\_reply/490/](https://pmg.org.za/question_reply/490/) (accessed 30 March 2015).
- 2 *City Press*, Phiyega must avert civil claims against cops – Mthethwa, 12 March 2013, <http://www.news24.com/Archives/City-Press/Phiyega-must-avert-civil-claims-against-cops-Mthethwa-20150429> (accessed 3 September 2015); *SAPS Journal online*, Riah Phiyega, Members must avoid incidents that could result in civil claims, Organisational communication, 25 February 2014, [http://www.sapsjournalonline.gov.za/dynamic/journal\\_dynamic.aspx?pageid=414&jid=40623](http://www.sapsjournalonline.gov.za/dynamic/journal_dynamic.aspx?pageid=414&jid=40623) (accessed 9 September 2015).
- 3 South African Police Service (SAPS), *2014/15 Annual report*, Pretoria, 71, 122.
- 4 SAPS, *2014/15 Annual report*, 122.
- 5 Max Loubser, Law of delict, in CG van der Merwe and Jacques du Plessis (eds), *Introduction to the law of South Africa*, The Hague: Kluwer Law International, 2004, 275–315.
- 6 State Liability Act of 1957 (Act 20 of 1957), section 1; Cerita Joubert, *Applied law for police officials*, Claremont: Juta Law, 2001, 26. A court will have to rule on the extent of the state's liability as per the portion of its fault, as per the Apportionment of Damages Act of 1956 (Act 34 of 1956), section 2.
- 7 See, for example, Leo Boonzaier, State liability in South Africa: a more direct approach, *South African Law Journal*, 2, 2013, 330; and Heidi Barnes, F v Minister of Safety and Security: vicarious liability and state accountability for the criminal acts of police officers, *South African Crime Quarterly*, 47, 2014, 29.
- 8 Public Finance Management Act of 1999 (Act 1 of 1999), section 76(1)(h).
- 9 Treasury Regulations, section 12.2.1. See also section 12.7.3.
- 10 Joubert, *Applied law for police officials*, 26.
- 11 Treasury Regulations, sections 12.2.1, 12.5, 12.7.1.
- 12 *Ibid.*, sections 12.5, 12.7.1, 12.7.3.
- 13 Questions to the minister, Written reply by Minister of Police Nathi Mthethwa to question no. 1661, Internal question paper no. 22-2013, 6 August 2013, [https://pmg.org.za/question\\_reply/461/](https://pmg.org.za/question_reply/461/) (accessed 30 March 2015). See also Questions to the minister, Written reply by Minister of Police Nathi Mthethwa to question no. 659, reply no. 36/1/4/1/201100297, 13 December 2011, [https://pmg.org.za/question\\_reply/288/](https://pmg.org.za/question_reply/288/) (accessed 30 March 2015), in which the minister clarified the legal basis under which officials can be held individually liable for damages paid following a successful civil claim in delict against the minister of police.
- 14 Contingent liabilities are defined as 'a possible obligation that arises from past events, and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not within the control of the department or when there is a present obligation that is not recognised because it is not probable that an outflow of resources will be required to settle the obligation or the amount of the obligation cannot be measured reliably'. See SAPS, *2013/14 Annual report*, 302.
- 15 SAPS, *2007/08 Annual report*, 218; SAPS, *2008/09 Annual report*, 216; SAPS, *2009/10 Annual report*, 190; SAPS, *2010/11 Annual report*, 190; SAPS, *2011/12 Annual report*, 200; SAPS, *2012/13 Annual report*, 257; SAPS, *2013/14 Annual report*, 336; SAPS, *2014/15 Annual report*, 416; Questions to the minister, Written reply by Minister of Police Nathi Mthethwa to question no. 644, reply no. 201136/1/4/1/201300073, 16 April 2013, <http://www.politicsweb.co.za/documents/10-552-claims-for-r71bn-instituted-against-saps-in> (accessed 30 November 2015); Questions to the minister, Written reply by Minister of Police Nkosinathi Nhleko to question no. 502, reply no. 36/1/4/1/201500067, 26 March 2015, unpublished.

Financial year	Total claims paid out – as reported in annual reports	Total claims paid out – as reported in the April 2013 parliamentary reply	Total claims paid out – as reported in the March 2015 parliamentary reply
2007/08	R 38 207 000	R165 558 000	
2008/09	R 57 403 000	R145 620 000	
2009/10	R 79 451 000	R162 783 000	
2010/11	R 85 605 000	R149 264 000	
2011/12	R105 960 000	R 93 120 000	R134 836 021
2012/13	R187 132 000		R209 926 037
2013/14	R251 192 000		R296 500 333

16 Each year, the SAPS adjusts its closing balances of the previous year, based on data that were not available at the time the audit was compiled. This means that the 2013/14 annual report will contain an opening balance (which is the same as the 2012/13 closing balance) as well as an adjusted opening balance. This paper uses the adjusted figures.

17 Using Statistics SA's annual inflation rates. See Statistics SA, CPI headline index numbers, <http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf> (accessed 2 September 2015).

18 The figures used here of pending claims, or closing balances, are those based on adjustments made by the SAPS in the following year's annual report.

19 These amounts include adjustments to prior year balances as reflected in annual reports.

20 SAPS, *2007/08 Annual report*, 218; SAPS, *2008/09 Annual report*, 216; SAPS, *2009/10 Annual report*, 190; SAPS, *2010/11 Annual report*, 190; SAPS, *2011/12 Annual report*, 200; SAPS, *2012/13 Annual report*, 257; SAPS, *2013/14 Annual report*, 336; SAPS, *2014/15 Annual report*, 416.

21 See, for example, Mandy de Waal, The expensive side of police brutality and recklessness, *The Daily Maverick*, 16 July 2012, <http://www.dailymaverick.co.za/article/2012-07-16-the-expensive-side-of-police-brutality-and-recklessness/> (accessed 3 September 2015); Diane Kohler-Barnard, SAPS' R21 billion contingent liability projection must now be capped, *DA News*, 2 October 2014, <https://www.da.org.za/2014/10/saps-r21-billion-contingent-liability-projection-must-now-capped/> (accessed 3 September 2015).

22 In 2007/08, the SAPS's annual budget was R36.4 billion. In 2014/15, its annual budget was R72.5 billion.

23 For example, in his March 2015 parliamentary reply, the minister of police indicated that he had budgeted R312 million for the payment of claims in 2015/16, despite accumulative claims pending at the end of 2014/15 sitting at R26.9 billion. See Written reply by Minister of Police Nkosinathi Nhleko to question no. 502.

24 Col Tumi Shai, SAPS explains R11bn liability figure, SAPS press statement, 10 October 2011, <http://www.politicsweb.co.za/archive/saps-explains-r11bn-liability-figure> (accessed 9 September 2015).

25 Uniform Rules of Court, Rule 34; Magistrates Courts' Rules of Court, Rule 18; South African Law Commission, Simplification

of criminal procedure (out-of-court settlements in criminal cases), Discussion Paper 100, Project 73, 5, 28–30.

26 Greg Nicolson, Marikana: Another delay and a hint of compensation, *The Daily Maverick*, 15 September 2015, <http://www.dailymaverick.co.za/article/2015-09-15-marikana-another-delay-and-a-hint-of-compensation/> (accessed 15 September 2015).

27 Again, it is unclear whether most claims result in a finding in the SAPS's favour, or whether most claims result in a finding in favour of the plaintiff, but with an order of compensation for a much lower amount than what the plaintiff originally claimed, or a combination of both.

28 SAPS, *2007/08 Annual report*, 218; SAPS, *2008/09 Annual report*, 216; SAPS, *2009/10 Annual report*, 190; SAPS, *2010/11 Annual report*, 190; SAPS, *2011/12 Annual report*, 200; SAPS, *2012/13 Annual report*, 257; SAPS, *2013/14 Annual report*, 336; SAPS, *2014/15 Annual report*, 416.

29 Written reply by Minister of Police Nkosinathi Nhleko to question no. 502.

30 Written reply by Minister of Police Nkosinathi Nhleko to question no. 502; *2011/12 Annual report*, 200; SAPS, *2012/13 Annual report*, 257; SAPS, *2013/14 Annual report*, 336.

31 Phiyega, Members must avoid incidents that could result in civil claims.

32 Lukas Muntingh and Gwénaëlle Dereymaeker, *Understanding impunity in the South African law enforcement agencies*, Civil Society Prison Reform Initiative (CSPRI), Research Report, Bellville: Community Law Centre, 2013, 23.

33 SAPS, *2014/15 Annual report*, 71, 122.

34 *Ibid.*, 71, 127, 416. The same annual report indicated that managers would be held accountable for a reduction (or increase) in civil claims instituted, through their performance agreements.

35 See for example, De Waal, The expensive side of police brutality and recklessness, which links police brutality and civil claims, but only speaks about claims made and not actual liabilities.

36 Institute for Security Studies (ISS) and University of South Africa (UNISA) seminar, Understanding police brutality in South Africa: challenges and solutions, UNISA, 11 April 2013. The most notorious example of political condonation was when Deputy Minister of Safety and Security Susan Shabangu, when addressing a group of police officers, said that they must shoot to kill 'the bastards', referring to criminals (speaking at an anti-crime rally in Pretoria on 9 April 2008). For more examples of political rhetoric facilitating the abuse of force by police, see Muntingh and Dereymaeker, *Understanding impunity in the South African law enforcement agencies*, 25–28.

37 David Bruce, Beyond Section 49: control of the use of lethal force, *South African Crime Quarterly*, 36, 2011, 3.

38 David Bruce, New blood: implications of en masse recruitment for the South African Police Service, *South African Crime Quarterly*, 43, 2013, 17.

39 SAPS, *2007/08 Annual report*, xv; SAPS, *2008/09 Annual report*, xvi; SAPS, *2009/10 Annual report*, xv; SAPS, *2010/11 Annual report*, iv; SAPS, *2011/12 Annual report*, iv; SAPS, *2012/13 Annual report*, 12; SAPS, *2013/14 Annual report*, 31; SAPS, *2014/15 Annual report*, 308.

40 Phiyega, Members must avoid incidents that could result in civil claims; SAPS, *2014/15 Annual report*, 71, 122.

- 41 SAPS, *2007/08 Annual report*, 84; SAPS, *2008/09 Annual report*, 73; SAPS, *2009/10 Annual report*, 87; SAPS, *2010/11 Annual report*, 66; SAPS, *2011/12 Annual report*, 66; SAPS, *2012/13 Annual report*, 77; SAPS, *2013/14 Annual report*, 107; SAPS, *2014/15 Annual Report*, 141–142. This chart uses the number of arrests for 2013/14 as reported in the *2013/14 annual report* (1 392 856 arrests). However, the *2014/15 annual report* states that the SAPS effected 1 820 846 arrests in 2013/14. Also, the 2014/15 contains two figures for arrests. The general table on arrests reports that 1 707 654 arrests were made (pp. 141–142). However, other parts of the annual report state that the SAPS arrested 1 660 833 people in 2014/15 (pp. 132, 150–151). The reasons for the discrepancies are unclear. The 2014/15 figures may be explained by the fact that the first figure refers to ‘arrests’ and the second to ‘arrests and charges’. It is unclear whether the number of arrests reported on in the annual reports includes arrests that do not lead to a charge. These scenarios in particular may amount to unlawful arrest and detention and therefore a civil claim. If arrests that do not lead to a charge are never reported on in annual reports, it may explain why there is no correlation between the number of arrests and the amount of civil claims made against the SAPS.
- 42 SAPS, *2009/10 Annual report*, 94; SAPS, *2010/11 Annual report*, 78; SAPS, *2011/12 Annual report*, 84; SAPS, *2012/13 Annual report*, 101; SAPS, *2013/14 Annual report*, 141; SAPS, *2014/15 Annual Report*, 182.
- 43 SAPS, *2007/08 Annual report*, 84; SAPS, *2008/09 Annual report*, 73; SAPS, *2009/10 Annual report*, 87; SAPS, *2010/11 Annual report*, 66; SAPS, *2011/12 Annual report*, 66; SAPS, *2012/13 Annual report*, 77; SAPS, *2013/14 Annual report*, 107; SAPS, *2014/15 Annual Report*, 141–142.
- 44 Although Legal Aid South Africa does not rule out the provision of legal assistance in civil cases, it states that as a priority it provides legal assistance in criminal cases.
- 45 Julie Berg, Civilian oversight of police in South Africa: from the ICD to the IPID, *Police Practice and Research*, 2013, 144–154.
- 46 The latter reflects the first year of the Independent Police Investigative Directorate’s (IPID) operation, and was followed by a dip in the number of complaints recorded in the following year. See Independent Complaints Directorate (ICD), *2009/10 Annual report*, 69–130; ICD, *2010/11 Annual report*, 28–45; IPID, *2011/12 Annual report*, 25–41; IPID, *2012/13 Annual report*, 15–68; IPID, *2013/14 Annual report*, 27; IPID, *2014/15 Annual report*, 43.
- 47 All data on the number of civil claims filed comes from a parliamentary reply, which reported that 10 434 civil claims had been filed in 2013/14. However, the SAPS’s 2014/15 annual report stated that 8161 civil claims had been filed in 2013/14. The reason for the discrepancy is unclear. The data used in Figure 6 is that taken from the annual report. See Written reply by Minister of Police Nkosinathi Nhleko to question no. 502; and SAPS, *2014/15 Annual Report*, 122.
- 48 It is unclear whether those filing a civil claim have also filed a complaint with the IPID. The two categories of plaintiffs may be entirely different.
- 49 Muntingh and Dereymaeker, *Understanding impunity in the South African law enforcement agencies*.
- 50 Johan Burger, To protect and to serve: restoring public confidence in the police, *South African Crime Quarterly*, 36, 2011, 13–22.



# The wrong type of decline

## Fluctuations in price and value of illegal substances in Cape Town

**Simon Howell, Nadine Harker-Burnhams,  
Lorraine Townsend and Mark Shaw\***

Simon.Howell@uct.ac.za

Nadine.Harker@mrc.ac.za

Lorrainejoytownsend@gmail.com

Mark.Shaw@uct.ac.za

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*This article documents and contextualises fluctuations in the street-level prices and values of selected illegal substances over a 10-year period in Cape Town, South Africa, by drawing on recent empirical research and past reports. The contemporary prices are compared and contrasted with each other, as well as with those previously documented. We show that when adjusted for inflation, the value of these substances has decreased over the last decade, making them more affordable, even though their nominal prices have remained more stable. In beginning to provide explanations for these changes, we outline some of the mechanisms that shape the market and point to the primary structural drivers of substance use in the country.*

While illegal drug pricing surveys are conducted routinely elsewhere,<sup>1</sup> in South Africa almost nothing is presently known of how illegal substances are sold, what quantities they are sold in, what prices are paid, how prices vary between areas, what patterns of consumption exist, and how the distribution processes are organised. This is surprising, considering that data from both treatment centres and elsewhere have shown a rapid escalation in the prevalence and (ab)use rates of specific substances in a number of communities, such as methamphetamine and a highly adulterated opiate-based mixture known as ‘whoonga’.<sup>2</sup>

Moreover, various studies have shown that an increasing number of African countries now play an important role in the transnational trade in illegal substances,<sup>3</sup> while the production capacity of South Africa and Nigeria to synthesise substances such as methamphetamine has increased.<sup>4</sup> It seems that a) the illegal substance economy has grown in sophistication, and that b) many of the criminal organisations that control the distribution networks are including a broader range of substances and products, such as those derived from poaching activities.<sup>5</sup> The expansion of this illegal economy may have an impact, among others, on the reported arrest rates relating to illegal substances, which in South Africa have increased 181.6% over the last 10 years.<sup>6</sup> However, the country’s policy framework is tentatively shifting from punitive regulatory approaches to harm reduction-based strategies.<sup>7</sup>

\* Simon Howell and Mark Shaw are based at the Centre of Criminology at the University of Cape Town. Nadine Harker-Burnhams is based at the Alcohol, Tobacco and Other Drug Research Unit, Medical Research Council. Lorraine Townsend is based at the Health Systems Research Unit, Medical Research Council.

While there may be an ever-growing literature on the multiple and diverse impacts of illegal substances on individuals, communities and South African society as a whole,<sup>8</sup> there is little empirical information on the illegal substance economy itself. What does exist invariably focuses on public health concerns, such as treatment centre data, and does not engage with the criminal economy itself. This is especially true in the instance of polysubstance use/users, an increasingly important cohort of the South African illegal substance economy, not just because they habitually consume more than one illegal substance, but also because they are more vulnerable to disease and are more likely to be arrested.<sup>9</sup>

With these deficits in mind, we present here an analysis of the results drawn from the first phase of a drug-pricing study conducted in Cape Town in 2014 and 2015.

The article's purpose is to a) document the reported prices and units of sale in a systematic way, b) compare these prices and their relative worth (where possible) with previous reports, and c) begin examining their relevance to and meaning for policy and research. While geographically limited, we have systematically compared these data with the findings of the single previous study to have undertaken such a structured review of street-level substance prices in the past, published in 2010.<sup>10</sup> In so doing we show that while the nominal prices of many illegal substances have remained relatively resilient, the real value of these products has greatly decreased. Illegal substances, in short, are more easily available and more affordable than ever. By documenting these trends, we tease out some of the implications that they may have for consumption patterns, regulatory frameworks and policing strategies in the city. While many authors have independently reached similar conclusions to our own, the evidence-based data presented here seems to indicate that not only is the regulatory system currently used ineffective, but it may be counter-productive.

## The study

The nominal prices and real value of the illegal substances presented here are derived from data gathered by a larger mixed-methods, multisite study conducted in Cape Town, South Africa between

2014 and 2015, which specifically focused on polysubstance use/users. Reports by respondents from three socially and economically diverse sites were recorded, all of whom used a combination of the various substances documented in Table 2. The study comprised three phases, the first and third of which utilised semi-structured focus group discussions (FGDs) as a means of gathering information. This article is primarily based on information collected in the first/formative phase, and will not speak to the processes or results of the other two phases unless explicitly stated. It should be noted that results from the larger study (n=374), while still under analysis, do indicate that these prices are accurate.

The purpose of the formative phase was a) to explore the acceptability and feasibility of the methodology/survey instruments needed in the second phase and b) to begin building relationships and gathering data from participants. Resultantly, six FGDs (three with men and three with women) were conducted in the three selected communities where polysubstance use was thought to be prevalent. A total of 42 respondents participated in the FGDs, and it is their experiences that underpin the research documented here, and which informed the larger study.

The selected communities are all socio-economically and ethnically disparate, and were targeted to provide as broad a representative sample as possible from a geospatially diverse range of locations (see Table 1). Potential participants were recruited by outreach fieldworkers and invited to take part in the FGDs, having self-identified as polysubstance users. Once identified, they had to pass a verbal test to clarify whether they met the requirements of the study. In order to meet these requirements, they had to have used more than one of the preselected substances in the last seven days, had to have resided in the location for more than one year, and had to agree to the study's ethical requirements. The resulting discussions lasted approximately one hour and were audio recorded. While unintended, the information that emerged from these discussions was sufficiently important and original to be presented separately from the broader study, as is documented here. It should, however, be noted that the figures cited here have been collated from individual responses, and thus not every respondent provided

input on every substance in each area. This being said, all of the prices are based on figures cited by at least three respondents.

**Table 1: Municipal area by size and income (based on 2011 census data)**

Municipal area	Population size	Median monthly household income
Area 1	391 749	R 1 301
Area 2	152 030	R 1 601
Area 3	9 301	R18 801

The study included six illegal substances – methamphetamine, heroin, mandrax, cocaine, ecstasy and methcathinone – and excluded alcohol, tobacco and cannabis. Alcohol and tobacco were excluded because they are still legal. Cannabis was excluded because of the large variety of types and forms available (reflected in the prices of individual strains, the price of which can vary drastically, from as little as R10 to R350 per unit) and because of its ubiquity of use – it is not seen or (importantly) policed as a ‘hard’ drug, which the broader study was more concerned with. The list of substances that were included in the study was derived from reports based on information from the users themselves, with urine-based screening measures for the substances occurring in the second phase of the study.

## Reported prices and method of comparison

The preliminary findings of the study are tabulated in Table 2. While noteworthy in themselves, a comparative analysis with previous results creates an opportunity for a more nuanced assessment of any fluctuations and, as discussed below, offers an opportunity to indirectly assess those forces acting on the market. It is for these reasons that we have contextually situated the prices by juxtaposing them with those reported between 2002 and 2006, as found in Peltzer et al.<sup>11</sup>

In order to provide as accurate a comparison as possible, we aggregated the nominal unit prices per measure of weight, one unit of which equals one gram, as was done in the previous study.<sup>12</sup> Such comparisons are at best generalisations, but even so reveal that there have been movements

in the prices and, perhaps, the illegal economy as a whole. As we show, for instance, the street-level prices have decreased slightly in nominal price, which may point to an increase in supply, suggesting that past interventions aimed at limiting this have not been successful.<sup>13</sup> These prices are, however, comparatively resilient to their real values, which speaks to broader changes in the economic environment in which they are sold. Indeed, these fluctuations are perhaps more important to consider than the nominal price, as their real value gives an indication of their *affordability*. If illegal substances are more affordable, more people can access them, which appears to be the case in South Africa today.

That the information is contextual and locally limited is revealing of the structural dynamics shaping the illegal substance economy and the way this economy operates. These forces shape the local economy, we believe, to such an extent that it is not possible to accurately generalise the results to the level of a region or continent, as is often done in the literature (as seen, for instance, in the United Nations (UN) World Drug Reports. Considering that illegal substances have become more affordable, and noting that state-level interventions and regulations have been primarily focused on law enforcement, we question their continued utility or purpose. This is supported by much of the contemporary literature, as we discuss below.

## Limitations

To what extent individuals can afford illegal substances is not only dependent on their economic position but is also relative to their spending patterns, the most essential of which would be on basic foodstuffs. Basic food prices have fluctuated quite widely in the last decade, such as that in March 2008 wheat prices increased by some 93% year-on-year.<sup>14</sup> Energy prices have also consistently increased, affecting public transport costs. The overall impact on the use of illegal substances is very difficult to determine, a) because these fluctuations have not been consistent, and b) because individuals will not be consistently affected by these. Some of the respondents in this study, for instance, lived in formal housing, some were homeless, some begged for money, some had semi-formal forms of

employment, and so on. One can, once more, only use such information to provide a general reflection of trends, which are more accurate at the level of communities rather than individuals.

It should also be noted that the comparisons with information reported in Peltzer et al. are made because it is the only other study to have previously documented the individual prices of illegal substances in a systematic and comparative way.<sup>15</sup> This study did not, however, draw on empirical data, but rather collated and presented the results from a number of individual studies published between 2002 and 2006.<sup>16</sup> Moreover, and with the exception of Plüddemann et al.,<sup>17</sup> not much attention is given to the methodological tools and methods used in producing the quoted figures, and thus they may be the product of data sourced from different areas of the country, and/or bi-products of epidemiological research.

The studies cited by Peltzer et al. were also not all conducted at precisely the same time, and therefore small pricing discrepancies were already likely to have existed in the market.<sup>18</sup> To the best of our knowledge, however, it remains the only previous study to systematically document the street prices of illegal substances in the peer-reviewed literature, and thus the sole reference point when trying to conduct an accurate comparison of figures.<sup>19</sup> Despite these constraints, the comparisons presented here indicate that state responses to drug use have not limited the affordability or availability of illegal substances in Cape Town.

## Comparisons and relevance

In the following section we compare the nominal prices of the individual substances, as reported by the participants in the different sites in our study, with those from Peltzer et al.,<sup>20</sup> which are positioned as national averages but are based on sporadic primary data. These are presented in Table 2. In an attempt to formulate as accurate a comparison as possible, we have aggregated the data in this study to create an inclusive, single total figure for each substance. This aggregation is done for comparative purposes, although the limitations noted above should be kept in mind. While the comparisons are at best estimations, they do serve to tentatively illustrate the primary congruencies/disparities that exist between

the present-day nominal prices of the substances, and, importantly, their relative value to consumers in the context in which they are bought. We have focused on affordability rather than just nominal price, because while South Africa's macroeconomic changes have fluctuated, the rand has weakened and inflation increased more consistently. Determining what is *affordable* to consumers may thus more accurately reflect the present *impact* that substance use may have on their lives.<sup>21</sup>

In Table 2, columns 1 and 2 detail the names of the substances, columns 3 and 4 the reported prices by unit of sale and site, and column 6 reproduces the prices detailed in the Peltzer et al. study.<sup>22</sup> In column 5 we provide two separate prices for the individual substances. The first is the aggregated present-day nominal price at street level, as reported by respondents (formatted in *italics*). The second (formatted in **bold**) presents the nominal figures reported in Peltzer et al.,<sup>23</sup> but adjusted so as to take into account the annual cumulative Consumer Price Index (CPI) inflation rate reported between 2004 and 2014 (calculated between 1 January 2004 and 1 January 2014).<sup>24</sup> Using these rates, the year-on-year annual CPI increase stands at an average of 5.8%, with the cumulative CPI increase at a total of 75.7% over the 10 years.<sup>25</sup>

Even though the street prices of illegal substances are not themselves subject to formal economic regulations, review or taxation, their retail price would still be influenced by the purchasing power and income increases of users. The CPI is thus an illustrative means of calculating the real value of illegal substances historically, as it determines their affordability relative to nominal price. In summary, then, in column 5 of Table 2, the first price (in *italics*) is the user-reported nominal price of the individual substances in 2014–2015, the second (in **bold**) the real value of the substances reported if adjusted for the CPI fluctuations over the past 10 years, while in column 6, the original nominal prices reported in Peltzer et al. are reported.<sup>26</sup>

Speaking more broadly, pricing studies of this nature are of relevance to a number of broader concerns, including regulation strategies, governance policies, policing protocols, and in determining prevalence/

**Table 2: Substance variants by unit, quantity and price in comparison**

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Substance	Street name(s)	Quantities of units of sale	Average reported price per unit (by area)	Mean price/gram – 2014 (2004 inflation-adjusted price in bold)	Mean price/gram – 2004
Methamphetamine	Tik	≤ 200 mg	1=R30 2=R20–R25 3=R20–R25	<i>R217.50</i> <b>R395.24</b>	R225
		≤ 500 mg	1=R150–R170 2=R100–R120 3=R100–R120		
		1 gram	1=R250–R300 2=R150–R170 3=R150–R170		
Heroin	Whoonga Uunga Nyaope	≤ 100 mg	Free (all areas)	<i>R119</i> <b>R377.67</b>	R215
		≤ 250 grams	1=R25–R30 2=R18–R25 3=R22		
		1 gram	1=R100–R150 2=R100–R125 3=R100–R125		
		9-10 grams	1=R800–R1 000 (unmentioned in other areas)		
Mandrax	Buttons	125 mg	3=R15 (not available in other areas)	<i>R60</i> <b>R114.18</b>	R65
		250 mg	1=R30 2=R25–R30 3=R25–R30		
		500 mg	1=R60 2=R60 3=R60		
Cocaine	Coke Powder	500 mg	1=R120–R150 (not readily available in other areas)	<i>R275</i> <b>R439.16</b>	R250
		1 gram	1=R250–R300 (not readily available in other areas)		
Ecstasy/MDMA	E Mandies	±50 mg (sold as half a pill)	1=R35–R50 (not readily available elsewhere)	<i>R95</i> <b>R105.40</b>	R60
		±100 mg (sold as a full pill)	1=R70–R120 (not readily available in other areas)		
Cathinone	CAT	500 mg	1=R150 (not readily available in other areas)	<i>R300</i> <b>NA</b>	NA
		1 gram	1=R300 (not readily available in other areas)		

usage rates. They may also reflect public health concerns insofar as they may have an impact on treatment and prevention strategies.

While we speak specifically to the South African context, it is useful to keep in mind that previous studies have also used pricing data as:

- Indirect indicators of movements and fluctuations in the illicit economy, such as in determining the effects of regulatory interventions and policy prescriptions.<sup>27</sup>
- Markers of supply/demand levels, transnational flows and consumption patterns, such as those

found in the UN's annual World Drug Reports (the latest of which, at the time of writing, is 2015).<sup>28</sup>

- Useful benchmarks for the indirect mapping of structural trends in the illicit economy, such as its growth, decline and broader movements; whether the result of direct intervention or as a function of changing patterns in public health.<sup>29</sup>
- As a barometer of the successes/failures of policing and regulatory efforts, in so far as they may undermine or enable the supply or availability of the substances.<sup>30</sup>

These indirect assessments are strengthened when market indicators, such as street-level prices, are repeatedly sampled at regular intervals over longer periods of time. By temporally and spatially overlaying this information with pre-existing knowledge of the points and periods during which regulatory and/or operational efforts occurred, the resulting pricing fluctuations can be used as an indirect measurement of these interventions' successes and/or failures.<sup>31</sup> For example, should it be known that policing efforts were focused on production facilities in an area or for a specific substance, price increases at street level may indirectly indicate their success, as limiting supply may drive up prices.<sup>32</sup> While the utility of the research still requires further reflection, the data presented here will be greatly strengthened by iterative sampling strategies.

## Nominal price fluctuations and variations

In reviewing the information presented in Table 2, we first discuss the individual substances and the pricing variances before highlighting the comparative fluctuations. This information is contextually situated in the next section.

### Individual substance results

Following the table order, the reported street-level price for methamphetamine or 'tik' reveals two important trends. The first is that quantity and unit price are inversely related – the larger the quantity purchased, the less the nominal price per weight unit. This is a familiar marketing strategy, employed in everything from methamphetamine to mobile data deals.<sup>33</sup> Such variations, assumedly, may also indicate

that the larger the quantity of illegal drugs purchased, the more likely that the 'order' will be passed on to distributors at a higher level, thus beginning the process of minimising the number of transactions from producer to consumer.

Secondly, price variances can exist even in areas that are close to one another. Respondents in area 3, for example, reported much higher nominal unit prices than those in areas 1 and 2. These areas are little more than 25km apart, precluding explanations relating to distance or distribution costs. Moreover, the respondents were neither foreign tourists nor naïve youngsters, unfamiliar with the rituals of illegal substance purchasing, but regular users familiar with the local distributors. It is therefore unlikely that the participants would be frequent victims to nefarious pricing tactics or scams. This variance can, however, be explained when placed within the broader socio-economic and geopolitical differences that structure the city of Cape Town. As a product of attempts to socially engineer the country's major urban areas during apartheid, socio-political disparities between many of the city's suburbs continue to exist. These historical differences remain relevant in many facets of daily life, such as the type/availability of housing, crime levels and employment opportunities that exist in different parts of the city.

Such differences also find realisation economically. For instance, the first site, a peri-urban township, has, according to the 2011 census, a population of 391 749 and a median monthly household income of R1 301. The third site, a middle-class suburb, has a population of 9 301 and a median monthly household income of R18 801. These differences deeply influence the ways in which people understand themselves, others, and indeed drug use. While these are not the only indicators that will affect illegal substance prevalence rates or distribution patterns, they are indicative of the vast disparities between areas in the same city, and that continue to define contemporary Cape Town life.

It is also important to note that the resilience of the nominal prices may indicate that distributors are loath to increase their prices. This could be due to competition or because buyers are likely to bring the exact amount of money they need to each deal

so as to hasten the process. Waiting for change when completing an illegal transaction increases the risk of being seen or arrested, and dealers are unlikely to accept bank cards, although some will accept credit if buyers have a familiar relationship with them. To offset small nominal increases in the face of decreasing real value, the most obvious strategy would thus be to further 'cut' or adulterate the products, decreasing the cost to the supplier. Iterative, long-term toxicological analyses would be needed to confirm this.

Speaking to each of the subjects individually, we follow the order found in Table 2. Methamphetamine has previously been reported to be the most widely used drug in the city, and the data confirm that it is available across the sites surveyed. The contemporary nominal price can, however, vary by as much as 100%, for reasons that are still to be understood. At R217.50 per gram, the mean nominal price itself occupies a median position in relation to the cost of other illegal substances. Moreover, and at first glance, a nominal decrease of just R7.50 over the last 10 years does not seem to be particularly extensive. However, when adjusted for CPI, the decrease in real value is some 104.65%. In other words, had a gram of methamphetamine been purchased 10 years ago, using the current value of the rand, the substance would have cost R395.24. As we explore below, such a large decrease in value is not only a function of inflation but may also be driven by a growth in local production capacity, as indirectly indicated by users consistently reporting five different forms of the substance, for which they also showed preferences.

With regards to heroin, present-day nominal prices between the areas were consistent, although, similarly to methamphetamine, bulk sales frequently attracted discounted price rates. The nominal price decrease has, however, been much larger, from R215 in 2004 to R119 in 2014, a reduction of 180.67%. Based on anecdotal evidence this decrease seems to be the result of a shift from the distribution of actual heroin or 'sugars' to that of 'whoonga', which is highly adulterated. By containing so little heroin, the production costs per unit have dramatically decreased. In terms of real value, the result is that the drug has become much more

affordable and thus more widely used. Participants also commented on heroin sales being bolstered by the use of 'specials' or 'freebies' by distributors, particularly on Sundays and public holidays. This marketing strategy indicates that distributors are using the physiological characteristics of opiate addiction to their own advantage. Pharmacologically, opiate-based substance users develop a tolerance to the substance's actions, so that the frequency of dosages and their size increase over time. By providing 'specials', distributors ensure increased dosages, which over time may hasten tolerance levels and thus create a form of customer 'loyalty' that ensures repeat custom.

Mandrax, from the perspective of pricing, was the most stable of the substances investigated, with little variance between sites. The unit of sale did, however, vary, with the smallest 'quarter' only available in site 1. This is congruent with the socio-economic differences of the sites, with site 1 also having the highest levels of poverty and the least formal structures/resources in place. In this impoverished 'township', the demand for smaller units seems anecdotally linked to consumption patterns. Because of the ease of availability, and the innumerable warrens and coves in which users may seclude themselves, the consumption of smaller quantities of mandrax is easier despite its preparation process being more complex than that of the other substances. Its use also creates large plumes of acrid smoke, easily detectable in developed areas that are more heavily policed. Inversely, its consumption in the other sites may be limited by a lack of suitable places in which to smoke it, and because law enforcement agents might easily detect it. In terms of pricing, a nominal decrease of R5 may be small, but because of the low overall cost it translates into a real value reduction of 108.38%. This supports the anecdotal evidence, itself consistent with recent research.<sup>34</sup>

Cocaine was frequently described by participants as the 'white people's drug', a reflection of its cost and because of their daily experiences in which 'white' people are the predominant purchasers of the substance. Cocaine is simply too expensive and its effects too short lived to be economically attractive to users for whom the use of illegal substances is not recreational. In a country

saddled with racially charged economic conflicts, such distinctions become normative, as much an observation on socio-economic difference as it is on use. The participants did not regularly consume cocaine, although all of them knew how and where to purchase it. In subsequent FGDs, held after the main survey, some reported that they would operate as 'runners', purchasing and delivering illegal substances on behalf of others so as to mitigate the risk taken by the purchaser. This explains why they knew the price of cocaine and could access it. The reported pricing fluctuations seemed to be contingent on individuals' familiarity with distributors, and whether they bought cocaine in tandem with another substance, thus increasing the total amount of the 'order'. A comparison with the information in the Peltzer article is especially difficult,<sup>35</sup> as it does not differentiate between crack cocaine and cocaine hydrochloride, which are priced differently in markets across the world, regulated differently, and consumed differently.

Reported levels of ecstasy use and its price variances were low, possibly as a result of the high levels of methamphetamine use, which is also a stimulant. Indeed, and in contrast to the other substances, it seems to have become much more expensive, with previous research indicating a nominal price of R60 per pill in 2004, and present users reporting a price of R95. Adjusting for CPI indicates that the real value has increased by 63.18%. In conversation with the respondents, it seems that there is comparatively little demand and little local production, and therefore most is imported. The low demand may be explained as a function of its typically being associated with the electronic dance music (EDM) subculture and nightclubs, which in South Africa may be limited to individuals with more disposable income. Only a few of the participants had engaged with the subcultures in which ecstasy use has been prevalent.<sup>36</sup> They did, however, know of the substance, many had previously used it, and could still obtain it.

Cathinone (CAT), finally, has seen rapid increases in use in Europe and North America.<sup>37</sup> In exploring whether this is the case in Cape Town, especially considering the city's large tourism industry, the substance was included in the study. However, participants did not report frequent use of the

substance, with some respondents not even being familiar with it. Its novelty also prevents any comparison with the past study. Broadly, and retrospectively, it seems that knowledge of and experience with the substance tended to follow urban development patterns – those in the city centre knew more about the substance than those in outlying areas. This, again, is consistent with reports in the literature from elsewhere, which have found its use to be propagated by specific youth subcultures that are mostly economically inaccessible to the majority of participants in this study.

## Comparative/contextual placement

As was noted above, the street-level prices presented here are limited to the time and places that they were documented in. While further research would be needed to paint a broader picture of the production, distribution and use of illegal substances in the country, the results do have implications for policy and practice. It is hoped that they may also act as an evidence-based baseline for further research.

Adjusting for CPI-based value, a comparison of the reported prices with those documented 10 years ago reveals two very important fluctuations. Barring ecstasy – and disregarding cocaine and cathinone because of a lack of comparative data – all of the substances' nominal prices and real values have decreased. In explaining this, these changes may be understood as the product of the decreasing nominal value of the rand, CPI increases, socio-economic/structural variances in the city, changing consumption patterns, localised production increases, and policing practices. We draw attention to these factors as a result of the analysis and literature survey,<sup>38</sup> but also because they were frequently highlighted by respondents in the descriptions and explanations that they provided of their own experiences.

When comparing the average street-level prices reported by users in each site and the site's broader economic markers, there seems to be a correlation between drug prices and household income. For example, the highest reported nominal prices for cocaine, methamphetamine and heroin per gram were found in the area with the highest average household income of all the sites. In reverse, the lowest reported nominal prices for mandrax per

'button' mirrored the sites with the lowest average household income. Moreover, there may be a correlation between average household income and the availability and cost of individual substances. For instance, users reported that the availability of the smallest unit of sale of mandrax (worth R15) was only available in the poorest area, while cocaine (with a unit price of R250–R300 per gram) was only readily available in the richest area. Correlation is of course not causation, and further research is needed to understand these symmetries.

Changing consumption patterns, as noted in the FGDs and broader literature, were also often used to explain fluctuations, although these were invariably implicit. The dramatic decrease in the price of heroin reported here is probably the result of the users reporting on the price of 'whoonga' (a particularly low-grade and highly adulterated mixture) rather than relatively purer 'sugars'. The decrease in price could partly be a reflection of the decrease in purity, which is consistent with studies based on toxicology tests elsewhere in the country,<sup>39</sup> and mentioned anecdotally by the participants in this study. The price of cocaine per gram has also decreased, tentatively indicating an increase in supply, which is congruent with studies indicating the growing importance of South Africa in the international cocaine economy.<sup>40</sup> Moreover, information derived from extensive interviews with law enforcement officials and the (increasing) discovery of numerous production facilities indicate an increase in the production capacity and the concomitant decrease in distribution costs of methamphetamine in the city.

Economic differences also affect how the illegal economy is policed and the consumption patterns of specific substances. For instance, those substances that require longer preparation times or that can be more easily detected may be less attractive to users in areas where policing is more visible. Wealthier areas are probably patrolled more frequently by both government law enforcement agencies and private security firms, making these drugs harder to use without being noticed. Further research would be required to determine what correlations exist between the operational activities of both private and public security operatives and consumption patterns of specific substances.

With reference to, and in support of, the related conclusions reached by a large number of previous studies it is clear that illegal substances are, in total, cheaper, more affordable and more readily available in South Africa now than they were 10 years ago.<sup>41</sup> This conclusion has serious implications for the regulation and policing of the production, distribution, use and users of illegal substances in the country.

## Implications for policy and research

Over the course of the last decade there have been substantial changes to South Africa's substance-related policy frameworks and perspectives. Indeed, the most recent National Drug Master Plan (NDMP) (2013–2017) considers numerous public health orientated and community-based options, such as education initiatives, aftercare services and youth development programmes, and includes a somewhat tentative review of harm-reduction approaches.<sup>42</sup> However, there is a rather large dissonance – perhaps even disjuncture – between these more socially reflective policy approaches and the actual regulation of illegal substances and their use, which remains the primary concern and mandate of law-enforcement agencies. While new and revised NDMPs are released every three to four years, the central act by which substances are demarcated as illegal, and which determines how substances and those who come into contact with them are policed, is the Drugs and Drugs Trafficking Act of 1992 (Act 140 of 1992).<sup>43</sup> Barring a single amendment in 2002, this act is now over two decades old and is a product of an internationally sanctioned regulatory discourse that promoted fundamental prohibitionist and exclusionary strategies of control, such as those characterised by the now largely defunct 'War on Drugs'.

The regulation of illegal substances, using a predominantly punitive model, has repeatedly been shown to be not only ineffective, but in some instances actively counterproductive to the goal of the reduction and/or elimination of illegal substances.<sup>44</sup> In the Western Cape, for example, the total number of substance-related 'crime detection' events recorded by the SAPS in 2004 stood at 30 432. In 2014, the number recorded was 85 463, just shy of a two-thirds increase over the 10 years.<sup>45</sup> While these statistics are not disaggregated

for individual substances, it is clear that there has been a large overall increase in substance-related policing efforts, and from the data presented here, a decreasing trend in nominal price and increase in the affordability of the included substances. If these price decreases are related to increases in supply that have occurred in the context of greater efforts by law enforcement bodies to contain substance-related crimes, these efforts can be characterised as nothing short of a failure.

The 2014/2015 SAPS crime statistics indicate that from 2005 until 2015 the number of drug-related arrests nationally has increased by 181.6%.<sup>46</sup> These increases, while national, mirror almost exactly the real value decreases of both methamphetamine and heroin. Such decreases make these substances more affordable to more people in the country, some of whom will be arrested. It might be tentatively argued, then, that the increases in drug-related arrests are indicative of a growing population of users, rather than lacklustre policing. That this population is growing cannot solely be the responsibility of policing, but is rather symptomatic of a broad range of social ills, as well as the tendency to rely on the criminal justice system to remove, rather than rehabilitate, substance users. Often such removal practices are more akin to a revolving door than structured process.

While the South African media continues to draw on hackneyed and prejudiced understandings of substance use and users – frequently using, for instance, the metaphors of disease, irrationality and moral degeneracy<sup>47</sup> – research both in South Africa and in many other countries has found that there are central *drivers* related to the statistical frequency, potential and depth of substance (ab)use levels in individual communities. These include, but are not limited to, poverty, education levels and economic opportunity. Dealing in illegal substances, for instance, becomes more attractive in environments where access to legitimate forms of income is limited. In South Africa it is increasingly clear that we might add to this list concerns with the geospatial design of major urban areas, high levels of unemployment, frequent (and frequently accepted) instances of violent behaviour, systemically entrenched corruption, political disenfranchisement and social

stigma.<sup>48</sup> As such, and even though policing has not been effective, many of the country's urban areas present ideal environments in which these drivers become potent and meaningful. Indeed, it is these environmental and structural issues described above that policy might look to remedy in the long term in endeavouring to address substance-related issues.

## Conclusion

This article has a) documented the reported street-level prices of a number of illegal substances in Cape Town, b) provided a systematic comparison of these prices in relation to those reported some 10 years ago, and c) briefly explored just some of the implications that this comparison has for policy and policing in the country. In short it is clear, at least in the areas that came under analysis in this study, that there are market fluctuations that are not divorced from the context in which they occur. This is congruent with much of the literature on these topics, whether drawn from the domains of public health, criminology or history.

Considering the complexity of the illegal substance economy, the complexity of substance use, and the continuing socio-economic and political disparities in South Africa, it would be premature to suggest an 'answer' or 'path' by which substance (ab)use might be more effectively controlled. If anything, the results reported in this article show that looking for such definitive 'answers' might be unwise when the drivers, changes and dynamics of drug use in the country are still so poorly understood. The prices reported here reveal a brief snapshot of a complex market, which appears to be on the rise.

With this in mind, the formulation and implementation of policies and regulations that are responsive to the illegal economy will require accurate information that is reflective of contemporary trends *in situ*. Pricing data generate a 'snapshot' of that economy, with comparative analyses providing the means by which the results of interventions and regulatory practices can be indirectly monitored and judged. However, to do so requires new information to be contextually situated, economically, politically and socially. Substance use does not occur in isolation from broader society and substance users invariably live within communities. The regulatory system, as it

pertains to illegal substances, is thus in dire need of a substantial and systematic review.



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# Violence, victimisation and parole

## Reconciling restorative justice and victim participation

**Hema Hargovan\***

Hargovanh@ukzn.ac.za

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*When a crime is committed and an offender is incarcerated, victims and offenders are denied agency in influencing the outcome of the criminal justice process, resulting in harmful consequences for both. On the one hand, there is growing consensus that the criminal justice system does not treat victims well. On the other, high levels of violent crime in the country,<sup>1</sup> coupled with society's call for stiffer sentences, have seen growing numbers of inmates receiving longer prison sentences, due in part to the minimum sentence legislation.<sup>2</sup> Restorative approaches to justice have the potential to recognise the injustice caused not only by the crime itself, but also by the structural injustice experienced by the offender. The key question is how to respond to the intergenerational effects of historical injustices and victimisation that so often result in identity switches: from vulnerable victim to violent offender. This article elaborates on restorative approaches to corrections at the parole phase and the implementation of these approaches through the victim offender dialogue programme, and questions whether due regard is being paid to the needs and rights of victims.*

South Africa has one of the highest per capita inmate populations, ranking ninth in the world and the highest in Africa.<sup>3</sup> While there is a persistent belief among the judiciary, ordinary citizens and politicians alike that imprisonment will reduce crime, this approach has had no visible impact either on the rate of violent crime<sup>4</sup> or on the rate of recidivism.<sup>5</sup> In 1995 there were 433 offenders serving life sentences. By the end of 2014 this number had grown to a staggering 13 847.<sup>6</sup> Many will be released on parole at the earliest possible parole date.

It is predominantly young men with disadvantaged class, education and family backgrounds who are

responsible for most serious violent crimes.<sup>7</sup> Not only does poverty exacerbate the effect of risk factors for violence, such as exposure to violent subcultures and substance abuse, but it may also increase the likelihood of youth turning to crime in order to 'redress the exclusion felt through not having material goods that define social inclusion'.<sup>8</sup>

Research shows that structural inequity and past maltreatment continues to affect adult offenders.<sup>9</sup> Widespread structural inequality remains firmly entrenched in many communities and neighbourhoods in South Africa, which are still effectively segregated along racial and class lines.<sup>10</sup> Here the majority of young people live in communities that experience high rates of poverty, unemployment, substance abuse, weak social cohesion and

\* Hema Hargovan is a lecturer in the Community Development Programme at the University of KwaZulu-Natal, Durban, South Africa.

inequality; thereby establishing the preconditions for the social diffusion of violence.<sup>11</sup> Even today, experiences of marginalisation, impoverishment and relative deprivation continue to frame the lives of young people.<sup>12</sup> It is not surprising that these factors form a recurrent and dominant theme in the profiles of many offenders who are being considered for parole placement.

This article emanated out of experiential learning and research. As a member of the National Council for Correctional Services (NCCS), the author has reviewed more than 1 000 profiles of 'lifers' – offenders serving life sentences – who were eligible to be considered for parole by the NCCS.<sup>13</sup> This exercise allows not only the introduction of numerous generalised insights into the life experiences of offenders, but also a deeper understanding of 'what it takes to make a criminal'. In addition, the author has been integrally involved in the 2013–2014 work sessions for social workers, psychologists and Correctional Supervision and Parole Boards (CSPBs), jointly arranged by the Department of Justice and Correctional Services (DCS) and the NCCS.<sup>14</sup> Evaluation of feedback from these work sessions provided the author with interesting insights into the challenges on the ground relating to the implementation of restorative justice. However, it is envisaged that an in-depth, quantitative and qualitative analysis of offender profiles may assist in revealing further insights on criminogenic risk factors for youth and adult offending in South Africa; thus contributing to and enhancing the national crime prevention agenda.

## To parole or not to parole?

Parole is an internationally accepted mechanism that provides for the conditional release of offenders from correctional centres into society before they have served their entire sentence of imprisonment. In South Africa it is referred to as a placement option from a correctional centre into the system of community corrections. This means that the offender is released from the correctional centre prior to the expiry of his or her sentence, to serve the remainder thereof within the community. While parole is always subject to specific conditions that an offender must comply with, it allows an offender to return to normal

community life until the sentence expires, albeit under controlled conditions and under the supervision of correctional officials.

The Correctional Services Act of 1998 (Act 111 of 1998) is the law governing parole in South Africa. The White Paper on Corrections sees parole as 'contributing to humane custodial conditions and as a vehicle for social reintegration'.<sup>15</sup> In terms of the act, offenders sentenced to life imprisonment before 1 October 2004 had to serve a minimum detention period of 25 years before being eligible for consideration for placement on parole.

Due to a series of amendments over the years the act's current form is significantly different from previous versions, making the South African parole regime complex and confusing. As Mujuzi has said, 'The law relating to parole has changed several times in South Africa, with the result that many prisoners, correctional officials and parole board members have understandably found it difficult to establish which specific provision governs specific prisoners.'<sup>16</sup> Recent court rulings highlight the effect of amendments to the governing legislation and how the eligibility for parole will be determined for various categories of offenders.<sup>17</sup> In effect, there are two systems of parole applicable to offenders serving life sentences, with one system for those sentenced before 1 October 2004 and a second for those sentenced after this date. Section 136 of the Correctional Services Act is a transitional provision that governs certain minimum periods of incarceration, which sentenced offenders must serve before they can be considered for parole. Section 136(3) (a) of the act<sup>18</sup> creates a mandatory non-parole period of 20 years before a 'lifer' can be considered for release on parole. In the Van Vuuren case,<sup>19</sup> the applicant (Mr van Vuuren) argued that if section 136(3)(a) applied to him, with the consequence being that he would have to serve the prescribed 20 years before being eligible for consideration for parole, that section would be retrospective in operation and, for that reason, unconstitutional.<sup>20</sup>

Acting on a ruling by the High Court in Pretoria in the Van Wyk judgement,<sup>21</sup> and in line with the principle that sentenced offenders must be treated in accordance with the parole system applicable at the time of sentencing, the credit system was applicable

to 'lifers' sentenced between 1 August 1993 and 30 September 2004. Just like other inmates serving lesser sentences, all 'lifers' sentenced before October 2004 were entitled to earn credits to advance their date of parole eligibility. Consequently, the DCS was compelled to award maximum good behaviour credits to close to 5 000 'lifers' sentenced before October 2004 – irrespective of their conduct in prison. In effect this meant that a period of 6 years and 8 months had to be deducted from the minimum of 20 years. After allocation of the maximum credits their consideration dates were advanced from 20 years to 13 years and 4 months. Amnesty provisions brought this down even further to 12 years and 10 months.<sup>22</sup>

The effect of these court cases has been a dramatic increase in the number of 'lifers' becoming eligible for consideration for placement on parole by the CSPBs and the NCCS.<sup>23</sup> Ironically, 'lifers' sentenced *after* 30 September 2004 may not be placed on parole until they have served at least 25 years,<sup>24</sup> which will result in larger numbers of inmates remaining incarcerated for longer periods, placing enormous pressure on already overcrowded correctional facilities,<sup>25</sup> and increasing costs to the state. There is also an increased risk of inmates becoming institutionalised, suffering from mental illness and being exposed to infectious diseases such as tuberculosis and HIV, thus placing a greater financial and social burden not only on the correctional system but also on their own families and communities.<sup>26</sup>

While restorative justice jurisprudence is steadily growing in the trial and sentencing phase of the criminal justice process, there is a great deal of uncertainty on how exactly restorative justice can be part of the post-sentence and post-incarceration phase, and to what extent the victim's cause can be met by adopting a restorative justice approach to how offenders are dealt with in the correctional environment and pre- and post-release.

## Restorative justice in custodial settings

One reason for the rediscovery of restorative justice in the last century is that victims of crime were formerly completely excluded by the criminal justice system. With this realisation, many countries, such as Australia, the United Kingdom and South Africa,

began adopting restorative approaches to justice alongside or within the formal criminal justice system, especially in relation to child and youth justice.<sup>27</sup> These approaches may be located on a continuum, where at one end efforts are made to bring greater awareness to offenders of the harm they have caused, and of their obligation to desist from further harmful acts in the future (either within the prison or on their release); and, on the other, where there is a fully restorative justice process, where the victim, offender and family/community members voluntarily participate in a facilitated restorative justice process.

The aim of such processes is to orientate offenders towards restorative justice values: victim empathy, making amends, and accepting responsibility for the harm they have caused. This may also include participation in restorative justice programmes, which may entail offenders being assisted to write letters of apology to their victims, or where they themselves request such assistance. Somewhat more idealistic are projects in which restorative justice principles are used as a guide to prison reform, bringing about wider organisational and cultural changes in the prison and the prison system in pursuit of the ultimate goal – a restorative prison.<sup>28</sup>

Restorative approaches to justice in South Africa are largely informed by indigenous and customary responses to crime, and include processes within and outside of the criminal justice system. Hence, the Restorative Justice National Policy Framework follows a broad approach; seeking to connect criminal justice, civil law, family law and African traditional justice.<sup>29</sup> Furthermore, the framework favours the term 'restorative approaches to justice' as it embraces a broader definition of restorative justice, that includes non-custodial sentences, conflict resolution, victim support, and interventions that contain restorative elements.

While restorative justice activity in prison settings is gradually on the increase globally,<sup>30</sup> there is scepticism and ambivalence about the 'possibility of integrating the constructive ethos of restorative justice within a punishment-based social institution such as the prison'.<sup>31</sup> Some writers and practitioners suggest that a choice has to be made between the two, while others visualise both working together, and

hold that these 'tensions' should not be seen as an obstacle to transforming the ethos of prisons.<sup>32</sup> This is because restorative justice challenges the belief that 'wrongdoers deserve pain' and suggests that 'the practice of imprisonment might itself be reformed so that it serves restorative rather than punitive functions'.<sup>33</sup>

Guidoni suggests it is more likely that limited aspects of restorative justice will be temporarily adopted, 'which are then used to add legitimacy to an institution which remains essentially punitive', than that prisons can be transformed in line with restorative justice principles.<sup>34</sup> Restorative justice in the prison context may appear as prison programmes that teach skills such as alternatives to violence and victim awareness, community service work performed by prisoners and victim offender mediation, and may even see prisons adopting, albeit rarely, a complete restorative justice philosophy.<sup>35</sup>

Of relevance to this article are the insights provided by Gail Super in the South African context. The author posits that prison in the 'new' South Africa is 'chameleon-like in its symbolism', with a 'seemingly endless capacity to reform'.<sup>36</sup> While capital punishment for the most serious of offenders has been abolished, imprisonment is justified and characterised as part of an overall humanising process, closely associated with the concept of **ubuntu**, all while conditions in many facilities remain dire.<sup>37</sup>

Restorative justice was launched by the DCS as early as 2001<sup>38</sup> and became formalised with its incorporation into the White Paper in 2005.<sup>39</sup> Since then, restorative justice programmes for offenders have been available at most correctional facilities in South Africa as part of the rehabilitation process.<sup>40</sup> These do not involve the victim and are one of many rehabilitation programmes offered to the offender.

The CSPBs take a number of factors into account during the parole decision-making process: participation in restorative justice programmes, letters of apology for the crime, Victim Offender Mediation (VOM), and Victim Offender Dialogues (VODs), among others. The parole process also necessitates a proper risk assessment of the offender in relation to the risk of reoffending. Hence, the offender's

rehabilitation pathway is carefully scrutinised; looking at, inter alia, the offender's history of substance abuse, the seriousness of the crime, the age of the offender, support from his family, offers of employment, his educational advancement during incarceration, and his disciplinary offences while in prison.

The VOD programme, launched on 28 November 2012, adopted a broad definition of victim to include not only the family and community of victims, but those of the offender as well. In this framework, crime and wrongdoing are considered to be an offence against an individual or community, rather than against the state.<sup>41</sup> At the heart of the process are the values of **ubuntu**. It attempts to hold offenders accountable for what they have done, help them understand the real impact of their crime, take responsibility, and make amends. While the DCS Draft Policy Procedures on Restorative Justice<sup>42</sup> outlines processes and responsibilities at every level, there is still a lack of clarity on the ground on many issues. It is unclear exactly how restorative justice should be incorporated into the parole decision-making process and how much weight should be placed on whether the offender has completed a restorative justice programme or process (such as VOD), or not.

Chairpersons of parole boards have expressed the need for clarity on the following: Who is responsible for tracing the victim? Who should be facilitating a process where all participants are willing? What happens when victims cannot be found? Is VOD the same as restorative justice? 'We are not sure what details are required in terms of VOM or VOD. It would assist if we could have a policy gazette in respect of both so that inputs requested are guided by an adopted and published policy of the department.' 'Who needs to make contact with victims during cases of VOD? Is it social workers or ordinary DCS members, who are not trained to engage with victims?'<sup>43</sup>

Part of the confusion may be attributed to the fact that VODs were conceptualised as a policy and practice distinct from restorative justice and not as *one of many* restorative justice approaches that have the potential to achieve restorative outcomes for the offender and the victim.<sup>44</sup> VODs may well aim to provide victims with an opportunity to explain to offenders the real impact of the crime and get answers to their questions, as well

as an apology. The vexing question is whether the implementation of departmental policy on VODs has created release pathways for offenders or whether it has placed obstacles in the way of potentially good candidates for parole. In some instances the decision to grant parole may be negatively influenced if there is no evidence of 'restorative justice', meaning VOD, or if attempts at locating victims are unsuccessful, or if victims are unwilling to participate. Offenders may also be unduly prejudiced if there is a delay in the parole process, where all other indicators for rehabilitation are positive and the only reason for a delay in considering parole is the fact that 'restorative justice' (or VOD) has not been completed, for the abovementioned reasons.

Offenders may also believe they are entitled to be considered for parole, and granted parole, if they have participated in a restorative justice programme or process (such as VOD), even if other indicators for successful rehabilitation are negative and/or the risk for reoffending is still high.<sup>45</sup>

## Victim participation and parole

Many countries have recognised the importance of involving victims during the parole process.<sup>46</sup> On 1 August 2013, the United Kingdom's new victims' commissioner called for less secrecy surrounding parole board hearings to decide on the release of offenders. In highlighting the need for greater cognisance of victims' rights and needs, she stated that 'the criminal justice system is a blunt system which is sometimes out of touch with victims' emotional needs and must do more to involve victims in the process ... victims need to be personally reassured that the offender had been rehabilitated and that their family would be safe'.<sup>47</sup>

Since the advent of democracy, South Africa has ratified various international declarations and conventions and implemented numerous strategies and policies to highlight the needs and rights of victims in the criminal justice process. Most notably, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>48</sup> together with the Handbook on Justice for Victims, provides useful strategies and models for victim-centred responses to crime from both criminal

justice personnel and other service providers.<sup>49</sup> More detailed and practical best practice guidelines for the treatment of victims of crime were drafted in 2002.<sup>50</sup> The Integrated Victim Empowerment Policy (VEP) 'attempts to shift the emphasis of state responses to crime from conviction of the perpetrator to services for the victim'.<sup>51</sup> The Services Charter for Victims of Crime (Victims Charter), and the Minimum Standards for Service Delivery in Victim Empowerment (Minimum Standards) emphasise quality assurance in the provision of services for victims of crime. However, initiatives relating to victims go beyond merely the provision of services to promoting the participation of the victim in the criminal justice process, and include victims' contributions to decision-making; for example by means of victim impact statements around sentencing, and by making written submissions to parole boards.

The Minister of Justice and Correctional Services, Advocate Michael Masutha, played his part in shifting the lens towards victim participation when he said:

We will not approve a single application for parole where there is no evidence of some effort to locate or to engage and to involve affected victims or the community affected ...<sup>52</sup>

and

I am of the view that it is fair and in the interests of the victims and the broader community, that the families of the victims are afforded an opportunity to participate in the parole consideration process.<sup>53</sup>

This places increased pressure on parole boards to locate victims, inform them timeously of parole proceedings, and encourage their participation. In many instances parole boards do not have the capacity or the expertise for victim tracing and/or engaging with victims.

In order to facilitate the involvement of victims in parole board hearings, provision has been made in both Section 75(4) of the Correctional Services Act and S299A of the Criminal Procedure Act of 1977 (Act No. 51 of 1977). The amendment to S299A of the Criminal Procedure Act came into effect with the Judicial Matters Second Amendment Act of 2003 (Act No. 55 of 2003) on 31 March 2005, and provides

for the right of a complainant to make representation in certain matters relating to the placement of an imprisoned offender on parole, day parole, or under correctional supervision. Section 299A (4) deals with the issuing of directives by the commissioner of correctional services regarding the manner and circumstances in which a complainant<sup>54</sup> may exercise this right.<sup>55</sup>

While these directives have the same legal standing as regulations issued in terms of an act, and must be adhered to, they place an undue burden on victims. Victims are expected to register their desire to be involved in the parole consideration process. In addition they must notify the parole board in the area where the offender is being detained of their desire to make representations in writing. They must also, among others, provide information on the name of the offender, the offence committed, the case number, and the name of the court where the offender was convicted. If a victim is dissatisfied with the decision of the parole board s/he may also write to the Correctional Supervision Parole Review Board. The directives also outline some of the requirements for victims who want to make a submission against the granting of parole, for example, how the crime has affected the victim or family of the victim.

However, it remains difficult to trace victims (see discussion below) and it is likely that most victims are not aware of these provisions. In addition, even where victims can be traced, some are reluctant or unwilling to make submissions to the parole board or even participate in restorative justice processes. A possible reason for this is that victims may be assuming that participation entails meeting the offender and engaging in a process, when, in fact, there is no compulsion on the victim to participate in the parole process or meet with the offender.

## **Challenges to implementing restorative justice in parole procedures**

There are many risks to victims in the way restorative justice is currently being implemented. With inmates realising that VOD is the pathway to release on parole for them, offenders, their family members and even their legal representatives have attempted to locate

victims and put pressure on them to participate.<sup>56</sup> This can lead to harassment and secondary victimisation of the victim.<sup>57</sup>

While VODs may involve victims, there are instances where victims may wish to participate in the parole process but have nothing to do with the offender. These two aspects are often conflated and victim participation is understood to mean a VOD process with the offender.

Currently there is also no structure for victim tracing and keeping victims informed about the rehabilitation pathway of the offenders, or of upcoming parole hearings.<sup>58</sup> While some management areas have developed an interim structure within the correctional facility to trace victims, others have placed the responsibility for tracing victims on case management committee (CMC) officials, parole board members or community corrections. A centralised database of all victims of crime would not only assist in tracing victims, but also in updating the victim on the status of the offender's incarceration, possible eligibility for parole and parole release dates.<sup>59</sup>

Special Victim Service Units, with dedicated Victim Liaison Officers (VLOs), would greatly enhance services for victims. These officers would provide services such as:

- Assisting victims in their interactions with parole boards
- Collaborating with the Department of Social Development and the SAPS to trace victims
- Keeping the board informed about registered victims
- Assisting victims to develop submissions or make representations
- Providing general information and support
- Referring victims to appropriate professionals such as social workers or psychologists if the need arises
- Appointing especially trained professionals to screen and prepare victims for possible restorative justice processes

Increased public awareness programmes, as well as a dedicated website that provides victims with detailed

information on the parole process, would go a long way towards encouraging more victims to participate.

The lack of procedural protection for victims, including proper screening of cases, preparation, and a lack of information about what to expect during the process and consequent trauma if the process fails, can cause further harm to the victim. The development of practice guidelines for restorative justice in corrections, including ethical codes of conduct for all role players, complaints mechanisms for victims and offenders, and quality assurance mechanisms such as the proper monitoring and evaluation of cases, would greatly enhance victim participation during parole.

In-depth, qualitative evaluative research on all VODs conducted since the implementation of the programme is yet to be undertaken. This would assist in identifying good (and bad) practice, develop new models of practice, contribute to policymaking, develop practice guidelines and codes of conduct for restorative justice practitioners, and enhance quality assurance mechanisms through provisions for monitoring and evaluation of cases.

A number of services are available to offenders during pre-trial, trial (access to legal aid), incarceration (rehabilitation programmes, vocational/skills training, therapeutic programmes, restorative justice programmes), pre-release (pre-release programmes, including an opportunity to apologise to the victim through a restorative justice process), and post-release. However, there are minimal, if any, services available to victims. By creating a separate path to justice for victims, one that stands apart from the criminal justice system yet at the same time is linked to it at various points, the criminal justice process can ensure that victims' rights and needs are respected from the moment a crime is committed to the point when the offender is released back into the community. This would ensure services for offenders *and* victims.

## Conclusion

The move to restorative justice in South Africa may be seen as part of a larger process of redress, particularly with regard to racial discrimination and disadvantage. Restorative justice is also meant to

reduce the traditional and entrenched location of power in the criminal justice institutions in South Africa, namely, the police, the courts and corrections. The question that remains to be answered is whether restorative approaches at the parole phase such as VOD, FGC and VOM have the potential to reconcile decades of structural inequality, marginalisation, deprivation and poverty, which have had a direct bearing on the high rates of violence and victimisation in South Africa. How can these offenders/victims benefit from restorative justice, and will restorative justice processes be able to rise to the challenge? The powerlessness of offenders, victims and their families, associated with long-term incarceration and years of unresolved pain for the victim in the aftermath of the crime, cannot be ignored. Therefore it is heartening to note that the process is underway for the development of a new framework for the management of parole in the country, including 'a separate Parole Act, with guidelines and procedures on decision-making', and benchmarking against international best practice.<sup>60</sup>

Restorative approaches to corrections must be seen as part of a wider approach in corrections, where it eventually becomes part of the ethos of the correctional centre; mainstreamed within the content of orientation programmes upon entry; and incorporated into all programmatic interventions during the rehabilitation pathway and at the pre-release and release phase. Restorative justice (or VOD) is not 'a single event' at the end of the value chain, but rather a possible route for offenders to make amends and be successfully reintegrated back into their communities; and for victims to embark on a journey of psychological and emotional healing.

## Recommendations:

- S 299A of the Criminal Procedure Act provides for the right of a complainant to make a written representation in certain matters relating to the placement on parole, day parole or under correctional supervision of an imprisoned offender, or attend board hearings. However, a major challenge is that the sentencing officer has to inform the victim, who has to be present in court to receive the information. The procedure does not make provision for a situation where

the victim is not present during sentencing. The recommendation is to simplify the directives, which are both onerous and prohibitive, as they assume a level knowledge of the perpetrator's case on the part of the victim. Given the fact that many victims may be illiterate or unaware of the requirements to make an application, the victim's right is effectively denied. While the department approved the guidelines on 'Victim/ Complainant Involvement in Parole Boards' in September 2009,<sup>61</sup> these have not been widely disseminated to parole boards, correctional centres, and the public at large.<sup>62</sup>

- Appoint a national victims' commissioner/ advocate to deal with all matters relating to victims of crime throughout the criminal justice process, a person to whom victims can turn to in cases of non-compliance or unethical practice. This office would also serve an oversight function on the implementation of the Services Charter and adherence to the Minimum Standards on Services for Victims of Crime.
- Develop proper guidelines and minimum standards on restorative approaches to justice, and, especially, restorative approaches to corrections. The Restorative Justice National Policy Framework (2011) and the United Nations Handbook on Restorative Justice Programmes<sup>63</sup> can serve as useful tools. These guidelines should provide greater clarity on restorative approaches during the parole phase, while the minimum standards would go a long way to ensure that quality assurance is maintained.
- In addition, the shortage of professionally trained restorative justice facilitators is a major challenge. Correctional officers, social workers, psychologists, pastors and parole board members are regularly expected to facilitate VODs; many do so without the necessary skills or training. Proper implementation of departmental policy on VOD or victim participation necessitates the involvement of professionally trained restorative justice facilitators. Facilitators need to be trained to manage restorative justice processes, ensure that participation is voluntary and victim centred,

and that cases are properly screened for appropriateness, and participants are adequately prepared. Dedicated restorative justice units at all correctional facilities would go a long way towards addressing this gap. Such units could oversee all matters relating to restorative justice from reception to reintegration; including orientation programmes for offenders upon entry to create an awareness of the value of restorative justice, such as accepting responsibility for the harm that s/he has caused to the victim, his/ her family and the community, victim empathy and making amends, and, most importantly, the facilitation of restorative justice processes by skilled facilitators.

- Develop partnerships and collaborative arrangements with respected community elders such as retired professionals (social workers, teachers and school principals), traditional leaders and ward councillors. They are significant role players when it comes to creating and strengthening support mechanisms, not only for victims, but also for offenders returning to their communities after a lengthy period of incarceration. During parole processes they can also play an important role in public education, awareness campaigns on victims' rights, and services for victims of crime.



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## Notes

- 1 Incidents of murder increased from 16 259 in 2012/13 to 17 068 in 2013/14. See Institute for Security Studies (ISS), Explaining the official crime statistics for 2013/14, fact sheet, 19 September 2014, <http://www.issafrica.org/uploads/ISS-crime-statistics-factsheet-2013-2014.pdf>.
- 2 See L Muntingh, Sentencing, in C Gould (ed.), *Criminal (in) justice in South Africa: a civil society perspective*, Pretoria: ISS, 2009. See also Jean Redpath, Unsustainable and unjust: criminal justice policy and remand detention since 1994, *South African Crime Quarterly*, 48, June 2014.
- 3 See G Super, Twenty years of punishment (and democracy) in South Africa: the pitfalls of governing crime through the community, *SA Crime Quarterly*, 48, June 2014, 7, [http://www.issafrica.org/uploads/SACQ48\\_SuperV2.pdf](http://www.issafrica.org/uploads/SACQ48_SuperV2.pdf). See also *Mail & Guardian*, Ndebele: SA has highest prison population in Africa, 11 February 2013, <http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele>.

- 4 See L Muntingh, Punishment and deterrence: don't expect prisons to reduce crime, *South African Crime Quarterly*, 26, December 2008, 3.
- 5 See G Gaum, S Hoffman and JH Venter, Factors that influence adult recidivism: an exploratory study in Pollsmoor prison, *South African Journal of Psychology*, 36:2, 2006, 407–42, for an explanation of some of the factors that contribute to high rates of recidivism in South Africa.
- 6 Leon Marren, Department of Correctional Service (DCS), email correspondence, 27 January 2015.
- 7 D Foster, Gender, class, 'race' and violence, in CL Ward, A van der Merwe and A Dawes (eds), *Youth violence: sources and solutions in South Africa*, Cape Town: UCT Press, 2012, 38.
- 8 *Ibid.*, 53.
- 9 E Shpungin, The fluidity of victimhood, in T Gavrielides (ed.), *A victim-led criminal justice system: addressing the paradox*, Independent Academic Research Studies (IARS), London: IARS Publications, 2014, 28.
- 10 *Ibid.*, 4.
- 11 See T Emmet, Social disorganisation, social capital and violence prevention in South Africa, Human Sciences Research Council, Child, Youth and Family Development Research Programme, 2001, <http://www.unisa.ac.za/contents/faculties/humanities/sosw/docs/ASPJ-2003/ASPJ2003-1-2-02-Social-disorganisation-social-capital-and-violence.pdf>, for an analysis of the causes of social disintegration in black communities in South Africa.
- 12 Foster, Gender, class, 'race' and violence, 46.
- 13 The author has served as a member of the National Council for Correctional Services from March 2010 to the present. In terms of Chapter viii, Section 83(1) of the Correctional Services Act of 1998, the National Council for Correctional Services is a multi-disciplinary statutory body with the primary aim of guiding the minister of justice and correctional services in developing policy relating to the correctional system and the sentence-management process. However, the council is also called upon to consider the cases of all offenders serving life sentences who are eligible to be considered for parole. The council makes a recommendation to the minister, who then makes a final decision.
- 14 Work sessions were held for Gauteng, Limpopo, Northern Cape and Free State (inland regions): Benoni, Gauteng on 4–5 February 2014; Eastern Cape and KwaZulu-Natal (coastal regions): East London on 11–12 February 2014; Western Cape: Brandvlei Correctional Centre on 18–19 February 2014.
- 15 See White Paper on Corrections, 2005, Chapter 5 at 5.5.
- 16 See JD Mujuzi, Unpacking the law relating to parole, *Potchefstroom Electronic Law Journal/Potchefstroom Elektroniese Regstydskrif (PER)*, 14:5, 219, <http://dspace.nwu.ac.za/bitstream/handle/10394/4692/MujuziDOC2011%2814%295.pdf?sequence=1>.
- 17 See *Van Vuuren v Minister of Correctional Services and Others* 2010 (12) BCLR 1233 (CC); *Derby-Lewis v Minister of Correctional Services* (2009) 3 All SA 55 (GNP); *Van Wyk v Minister of Correctional Services*, unreported, referred to as [2011] ZAGPPHC 125, 26 July 2011.
- 18 Correctional Services Act of 1998 (Act 111 of 1998).
- 19 On 31 March 2011, the Constitutional Court handed down judgement in the Van Vuuren case (*Paul François Van Vuuren v Minister of Correctional Services and Others* [2010] ZACC 17).
- 20 See case summary at Polity.org.za, Legal briefs, *Van Vuuren v Minister of Correctional Services and Others* [2010] ZACC 17, <http://www.polity.org.za/article/van-vuuren-v-minister-of-correctional-services-and-others-cct-0710-2010-zacc-17-2010-09-30>.
- 21 *Cornelius Johannes Van Wyk v Minister of Correctional Services and Others*, case no. 40915/10.
- 22 DCS, *Annual report 2013/2014*, 23, <http://www.dcs.gov.za/docs/2015%20doc/DCS%20Annual%20Report%202013-14.pdf>.
- 23 From December 2012 (when cases became eligible to be considered in terms of the Van Wyk judgement) until the present, a total of 1 209 cases have been considered by the National Council for Correctional Services (information obtained from the DCS on 17 November 2015).
- 24 Correctional Services Act of 1998, Section 73 (iv).
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# *S v SN unreported, case no. 141114/14 (WCC)*

## Sentencing child offenders after they turn 18

**Carina du Toit and Zita Hansungule\***

carina.dutoit@up.ac.za  
zita.Hansungule@up.ac.za

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*This case note reflects on the approach that should be adopted by sentencing courts when imposing sentences on child offenders who turn 18 during proceedings. The Western Cape High Court recently considered the application of the sentencing principles in the Child Justice Act and section 28 of the Constitution to child offenders who turn 18 prior to their sentencing. The court confirmed that there is ‘no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood’ and concluded that the sentencing principles in the Child Justice Act are applicable to children who turn 18 prior to sentencing.*

It is established law that child offenders should be afforded special treatment and given sentences that are more lenient than those imposed on adults.<sup>1</sup> The Constitutional Court has embedded child-centred sentencing principles through its judgements by applying section 28 of the Constitution to child offenders.<sup>2</sup> In particular, the Constitutional Court has emphasised the importance of applying section 28(2), which provides that the best interests of the child are paramount in every matter concerning them and section 28(1)(g), which states that children should not be imprisoned except as a measure of last resort.

South Africa is also signatory to international and regional instruments providing for the protection of child offenders’ rights.<sup>3</sup> The United Nations Convention on the Rights of the Child<sup>4</sup> (the CRC)

\* Carina du Toit is an attorney at the Centre for Child Law and Zita Hansungule is the Project Coordinator for the Centre’s Research, Monitoring and Evaluation Project. The Centre for Child Law is a law clinic based at the University of Pretoria that aims to promote the best interests of children in South Africa through strategic impact litigation, advocacy, research and education.

makes it clear in Article 3 that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. Article 37 of the CRC provides, inter alia, that arrest, detention or imprisonment of a child should be used as a measure of last resort and should be for the shortest appropriate period of time. Article 40 encourages states parties to, inter alia, treat child offenders in a manner that promotes their sense of dignity and worth, reinforces their respect for human rights and the fundamental freedoms of others, and takes into account the age of the child offender and the promotion of their reintegration and ability to play a constructive role in society. Articles 4 and 17 of the African Charter on the Rights and Welfare of the Child (ACRWC) provide similar protections to children in conflict with the law.<sup>5</sup>

The Child Justice Act of 2008<sup>6</sup> (Act 75 of 2008, ‘the CJA’) was introduced to give effect to the principles in

the Constitution and to domesticate the international law relating to child offenders. The preamble of the CJA states that the purpose of the CJA is to establish a criminal justice system for children in conflict with the law, based on the values underpinning the Constitution. In his judgement in *S v CKM and others*,<sup>7</sup> Judge Bertelsmann described the CJA's basic tenets in the following manner:

[The CJA] represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community based programmes, the application of restorative-justice processes and reintegration of the child into the community.

The CJA embraces a wide range of appropriate sentencing options specifically designed to suit the needs of children while ensuring that they acknowledge responsibility and accountability for crimes committed.<sup>8</sup> Section 69(1) of the CJA states that the objectives of sentencing are to encourage the child to understand the implications of his or her actions and be accountable for the harm caused, as well as to promote an individualised response that strikes a balance between the circumstances of the child, the nature of the offence and the interests of society. The CJA also promotes the reintegration of the child into the family and community, and ensures that any necessary supervision, guidance, treatment or services contained in the sentence assist the child in the process of reintegration. Lastly, the CJA promotes the use of imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

In light of the above constitutional, international and legislative injunctions, this case note will consider the recent judgement of *S v SN unreported, case no 141114/14 (WCC)*. The Western Cape High Court had to decide whether the above principles were applicable in the sentencing of persons who commit

offences as children and become adults during child justice court procedures.

## A brief background

The matter concerned the sentencing of two young men who were 17 when they fatally stabbed a pupil at their school.<sup>9</sup> They both pleaded guilty in terms of section 112 of the Criminal Procedure Act of 1977 (Act 51 of 1977) and entered their guilty plea statements setting out their version of the events that led to the stabbing.<sup>10</sup> They were convicted of murder by a Child Justice Court.<sup>11</sup> The two accused were born two days apart in December 1995.<sup>12</sup> They committed the offence on 3 October 2013 and were arrested on the same day.<sup>13</sup>

Both offenders were sentenced to 10 years' direct imprisonment. The matter came before the Western Cape High Court on automatic review in terms of section 85 of the act.<sup>14</sup> Section 85 provides that if a child has been sentenced to any form of imprisonment<sup>15</sup> the sentence is subject to review by a Judge of the High Court, having jurisdiction.<sup>16</sup>

On perusal of the record, the High Court was concerned that the presiding magistrate did not seem cognisant of the fact that the two accused qualified to be treated as children for sentencing purposes, even though he was fully aware of the fact that he was presiding in a Child Justice Court.<sup>17</sup> The High Court was also concerned about the inconsistencies between the facts set out in Section 112 guilty plea statements, and the facts described by the Child Justice Court magistrate while considering the appropriate sentences.<sup>18</sup> The magistrate elected to rely on the version of the facts set out in the probation officers' report, rather than on the version provided by the accused in their plea statements. The High Court addressed queries to the magistrate on the following concerns:

- On what basis did the magistrate use the facts provided by the probation officers for purposes of sentencing when they clearly contradicted and went beyond the facts accepted on record in terms of the plea statements?<sup>19</sup>
- To what extent, if any, did the court apply section 28(1)(g)<sup>20</sup> and section 28(2)<sup>21</sup> of the Constitution during sentencing?<sup>22</sup>

This article will limit its focus to the findings of the court in respect of the second question, with the aim to contribute to discussions on the judicial application of the CJA, particularly on the issue of sentencing in terms of the CJA.

The magistrate's responses and the High Court's findings will be dealt with in the discussion on the High Court's decision below.

## Judgement of the High Court

The magistrate's response to the second question was to point out that both the accused turned 18 before they were sentenced.<sup>23</sup> In terms of section 28(3) of the Constitution, a child is a person below the age of 18 years of age. Therefore, the magistrate had concluded that section 28(1)(g) and section 28(2) were not applicable in this matter.<sup>24</sup>

The High Court rejected this reasoning and was of the view that the accused qualified to be dealt with in terms of the CJA because they were under the age of 18 when they were *arrested*. The court began its discussion on why it rejected the magistrate's reasoning by firstly affirming the importance of treating children differently from adults during sentencing. The court reiterated the principles set out in the Constitutional Court case of *Centre for Child Law v Minister of Justice and Constitutional Development*:

In *Centre for Child Law*, Cameron J, writing for the majority, explained [section 28(2)] in the context of sentencing child offenders, stating 'the constitutional injunction that "[a] child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else", but not that everything else is unimportant; the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment'.

The two fundamental issues at stake were the child's right to have his or her best interests considered paramount, and the right not to be detained except as a measure of last resort and for the shortest

appropriate period of time.<sup>26</sup> In addition, Cameron stated that children are accorded different treatment during sentencing because they are less morally capable than adults in their ill-considered actions but more capable of rehabilitation.<sup>27</sup> This was restated by Skweyiya in the Constitutional Court case of *Mpofu v Minister for Justice and Constitutional Development and Others*, where he said that:

Section 28 of the Constitution demands that children are accorded different treatment in sentencing. A failure to do so is a constitutional failure.<sup>28</sup>

The High Court then went on to discuss the CJA's definition of a child and why the above principles on treating children differently should be applied to the offenders in the case before it. The court noted that the CJA defines a child as a person below the age of 18 years and purposively extends, in certain circumstances, the meaning to include a person who is 18 or older but under the age of 21 years, whose matter is dealt with in terms of section 4(2).<sup>29</sup> Section 4(2) sets out the jurisdiction of the director of public prosecutions to deal with matters under the CJA, and includes a person who:

- Is alleged to have committed an offence when he or she was under the age of 18 years
- Is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b)

Section 4(1)(b) provides that a child will fall under the provisions of the CJA if the child was between the ages of 10 and 18 when the child was handed a written notice, served with a summons, or arrested.

Section 4(1) confirms that the important age to be considered is the age at the time of the offence and the institution of criminal proceedings.<sup>30</sup> This takes into account the fact that offenders who commit crimes when they are children will not always be children when they are in the child justice court for trial and sentencing, due to systemic problems such as delays and challenges related to the laying of charges, the apprehension of the offender and, quite simply, the inertia of the criminal justice system.<sup>31</sup> Such delays and inefficiencies in the system should not prejudice a child and cause them to lose the protection provided by the CJA.<sup>32</sup>

Section 4(2)(b) permits prosecution to be initiated in terms of the CJA against an offender who is older than 18 but under the age of 21. However, this only happens in certain circumstances as set out in the national director of public prosecutions directives.<sup>33</sup> These include, inter alia, if the offence is a schedule 1 offence; if the co-accused is a child; if there is doubt about the accused's age; and if the accused appears to be intellectually or developmentally challenged.<sup>34</sup> This provision was included to give the prosecution more flexibility in the exercise of its powers.<sup>35</sup> The provision also envisions the possibility that there could be occasions where an offender has just turned 18, is still attending school, and could benefit from diversion as set out in the act.<sup>36</sup> Lastly, the provision also takes into account that if there is more than one accused in an offence, it would be 'artificial to separate the cases of one or two who are slightly older from those of their contemporaries'.<sup>37</sup>

The court in this case found that the two accused qualified to be dealt with in terms of the CJA due to the fact that they were below the age of 18 when they were arrested, and therefore fell under the purview of section 4(1).<sup>38</sup>

The High Court goes on to point out that the above sections of the CJA confirm that there is 'no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood, but are still being processed through the criminal justice system when they turn 18'.<sup>39</sup> In this way the CJA promotes the spirit, purport and objects of sections 28(1) and (2) of the Constitution,<sup>40</sup> and avoids a 'misguidedly narrow application of the definition [of a child] in section 28(3)' of the Constitution.<sup>41</sup> Furthermore, this approach to sentencing of a child who turns 18 during proceedings would be in accordance with the Constitutional Court application of section 28(1)(g) in *Centre for Child Law and Mpofo*:

When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has resulted in their being adults when sentencing

occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of [section] 28 of the Constitution is axiomatic ...<sup>42</sup>

This approach is further affirmed by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),<sup>43</sup> which encourage the application of principles embodied in the rules to young adult offenders.<sup>44</sup> In its discussion of the Beijing Rules, the commentary to the European Rules for juvenile offenders subject to sanctions or measures acknowledges the fact that 'young adults in general are in a transitional stage of life, which can justify their being dealt with by the juvenile justice agencies and juvenile courts'.<sup>45</sup> The Recommendation Rec(2003)20 by the Council of Europe Committee of Ministers<sup>46</sup> notes the following:

Reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults.

The High Court concluded that the magistrate's reasoning during sentencing was based on a fundamentally misdirected understanding of the ambit of section 28(1)(g) of the Constitution.<sup>47</sup> The magistrate had treated the accused as youthful adult offenders and not as people who had committed the offence when they were children.<sup>48</sup> The High Court noted that the accused were placed 'on the wrong side of the "stark but beneficial distinction between adults and children" created in terms of [section] 28 of the Bill of Rights, and thus approached the determination of their punishment on the incorrect assumption that [section] 28(1)(g) was not applicable'.<sup>49</sup> This misdirection led to the failure of the magistrate to consider all the appropriate sentencing options, including compulsory residence in a child and youth care centre, in terms of section 76 of the act.<sup>50</sup>

## The order given by the High Court

In view of its findings, the court in *S v SN* made the following order:<sup>51</sup>

- The sentences of the accused were set aside, which meant that the magistrate's sentence to direct imprisonment no longer applied to the accused.
- The matter was referred back to the trial court for the urgent consideration of the sentence afresh before a different magistrate.
- The new sentencing magistrate had to take into account the guidance given in the High Court's judgement in respect of the sentencing principles that apply to children.
- The new sentencing magistrate could only sentence the accused after hearing the oral evidence from the probation officers and other relevant witnesses.
- The High Court included the additional safeguard that the matter had to be resubmitted for review by the High Court after the new sentence was imposed.

It is important to note that, in reaching its decision, the High Court was concerned that the magistrate, in his misdirected understanding of section 28, did not consider sentencing the accused to compulsory residence in a child and youth care centre (CYCC) in terms of section 76 of the CJA.<sup>52</sup> The court was of the opinion that this alone necessitated the setting aside of the sentence.<sup>53</sup>

It is interesting to note that the North Gauteng High Court had to consider a case in which an offender who had turned 18 was sentenced to a CYCC. This case will be discussed below to highlight the importance of this sentencing option in such circumstances.

## Approach of the North Gauteng High Court in a similar matter

The approach of the Western Cape High Court corresponds with that of the North Gauteng High Court when considering whether a sentence of compulsory residence in a child and youth care centre can be applied after an offender has turned 18

years old. The matter of *S v Melapi*<sup>54</sup> came before the North Gauteng High Court by way of review. The accused in question was 17 years old when he was charged with murder.<sup>55</sup> He was convicted on 28 January 2013, when he was 18 years old.<sup>56</sup> The magistrate hearing the matter indicated that he wanted to impose a sentence of detention in a child and youth care centre in terms of section 76 of the CJA.<sup>57</sup> However, the centre concerned refused to accept the placement of the child because he was 18 years old.<sup>58</sup>

Although the North Gauteng High Court ultimately found that detention was not an appropriate sentence for the accused, it also found that it was important to deal with the question of whether a sentence of compulsory residence in a child and youth care centre could be applied after an offender turned 18.<sup>59</sup>

At the outset, Judge Tolmay pointed out that section 4(1) of the CJA needs to be read with section 76, in particular section 76(2), of the CJA, which deals with the sentence of compulsory residence in a child and youth care centre.<sup>60</sup> Section 76(1) and (2) state that:

- A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre that provides a programme referred to in section 191 (2) (j) of the Children's Act.
- A sentence referred to in subsection (1) may, subject to subsection (3), be imposed for a period not exceeding five years, or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest.

Section 76(2) allows young offenders who have been sentenced to CYCCs for serious crimes to remain at the centres until they turn 21. This allows for custodial sentences to be imposed without the risk of exposing the young offenders to prison.<sup>61</sup> This promotes the principles that apply to sentencing of young offenders.<sup>62</sup>

Tolmay held that a proper interpretation of the law must promote the spirit, purport and objects of the Bill of Rights.<sup>63</sup> An interpretation of law that is constitutionally compliant must be selected over one

that is not.<sup>64</sup> An interpretation of the CJA must be one that takes into consideration the best interests of a child.<sup>65</sup> Tolmay found that reference to 'child' in section 76(1) (read with section 4(1)), must be read in a manner that includes persons over 18 years or older but under 21 years at the time of sentencing.<sup>66</sup> This interpretation applies only if the person concerned was under 18 at the time of the offence, arrest and issuing of written notice or summons.<sup>67</sup>

The court invited the Centre for Child Law to make submissions as *amicus curiae*.<sup>68</sup> The *amicus* submitted that in terms of the principle of legality everyone has the right to benefit from the least severe prescribed punishment if it changed from the time the offence was committed and the time of sentencing.<sup>69</sup> The CJA requires a less onerous sentencing regime to be applied to children than that of the regime applicable to adult offenders.<sup>70</sup> A child is advised and assisted by his legal representative, based on the sentencing principles in the CJA.<sup>71</sup> The passage of time should not render the child liable to a more onerous sentencing regime than he is given to expect at the start of his case.<sup>72</sup>

The CJA was enacted to give effect to the principles that apply to children who come into contact with the criminal justice system, and in particular to recognise the vulnerabilities and special needs of children throughout their interaction with the criminal justice system, including during sentencing.<sup>73</sup> The application of a more onerous sentencing regime after the child turns 18 goes against the objects and purpose of the CJA,<sup>74</sup> as sentencing options under the CJA will no longer be available. This prevents the court from applying sentencing options such as diversion and restorative justice forums that may be more beneficial for the successful rehabilitation of the child offender.<sup>75</sup>

The *amicus* submitted that the CJA should be applied in a manner that observes the principle of legality, which directs that a child who turns 18 during the course of proceedings should still be treated as a child until the case is concluded.<sup>76</sup> This takes into account the fact that the best interests of children have been at play since the commencement of the proceedings.<sup>77</sup> Other courts have acknowledged that children who turn 18 during the course of proceedings do not lose the protections granted to

them as children.<sup>78</sup> The *amicus* made reference to the case of *S v IO*,<sup>79</sup> in which the court anonymised the name of an accused who had turned 18.<sup>80</sup> The court also interfered with his sentence on appeal because he was a child at the time of commission of the offences.<sup>81</sup> The following reason was given by the court in *S v IO*:

It appears from a careful perusal of the learned trial judge's judgment on sentence that there is absolutely no reference therein to the imperative provisions of s 28 of the Constitution. Nor is there any trace therein of an informed and nuanced weighing of all the interlinking factors of relevance to the sentencing process, and indicative of a changed judicial mindset consonant with an awareness of the Constitution regarding the sentencing of juveniles.<sup>82</sup>

Tolmay concluded that the reference to a child in section 76(1) must be read in a manner that includes persons 18 or older but under 21 years old at the time of sentence, as long as the person was under the age of 18 years at the time of the commission of the offence, and at the time of arrest or of the issuing of a written notice or summons as set out in section 4(1).<sup>83</sup> The interpretation that the sentencing provisions in the Act do not apply to a person who turns 18 during the course of proceedings, would be untenable.<sup>84</sup> It would result in a child who committed an offence while still a minor, being sentenced as an adult.<sup>85</sup>

Tolmay confirmed that section 76 is a competent sentence for an offender who turns 18 during the course of proceedings but is under the age of 21, listing the following reasons:<sup>86</sup>

- To conclude that a child is a person who is under 18 years old during the entire course of the proceedings would cause section 4(1) of the CJA to be futile
- It would also lead to an irregular situation in which, on the one hand, a child who turns 18 during the course of proceedings is stripped of all legal protection, and, on the other hand, protection is provided to a person who qualifies as a child in terms of section 4(2)
- Making the date of conviction the relevant date when determining a sentence for a child deviates from the principle expressed by the Constitutional

Court in *Mpofu*. The Constitutional Court held that the relevant date for purposes of sentencing is the date of the commission of the offence

- Legislation must be interpreted in accordance with the Constitution, as required by section 39(2) of the Constitution

## Conclusion

It is the opinion of the authors that the decisions reached by the high courts in *S v SN* and *S v Melapi* conform with section 28(1)(g) and section 28(2) of the Constitution and with the objectives of the Child Justice Act. In confirming that the age at time of the commission of the offence is the relevant age for determining an appropriate sentence, the courts have set a precedent that we hope will be followed in future judgements and court orders. It is in this vein that Skelton notes the following:<sup>87</sup>

[J]udges of the future [are] the important upper guardians of an effective child system. Their vigilance can indeed ensure that children's best interests are protected in the child justice system, that detention truly is a measure of last resort, and, where unavoidable, that it is for the shortest period of time so that every day a child spends in prison should be because there is no alternative.

It is acknowledged that judicial precedents set by high courts only have persuasive value for high courts in other jurisdictions. This, however, does not take away from the fact that the decisions are in line with principles established by the Constitutional Court. The two courts especially conformed to the principles set out in the *Mpofu* judgements, where the Constitutional Court confirmed that the relevant age for sentencing is the age at which the offence was committed.<sup>88</sup>

## Notes



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1 SS Terblanche, The Child Justice Act: a detailed consideration of Section 68 as a point of departure with respect to the sentencing of young offenders, *Potchefstroom Electronic Law Journal*, 15:5, 2012, 436–638, 436.

2 See *Mpofu v Minister of Justice and Constitutional Development and Others* (Centre for Child Law as amicus curiae) 2013 (2) SACR 407 (CC); *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (National Institute for Crime Prevention and Reintegration of Offenders as amicus curiae) 2009 (6) SA 632 (CC).

3 The Constitution of the Republic of South Africa of 1996 (Act 108 of 1996), section 39(1)(b) compels courts to consider international law when interpreting the Bill of Rights, and section 233 requires courts to interpret domestic legislation in a manner that is consistent with international law.

4 The United Nations Convention on the Rights of the Child, 1990.

5 The African Charter on the Rights and Welfare of the Child, 1999.

6 The Child Justice Act of 2008 (Act 75 of 2008).

7 *S v CKM and Others* 2013 (2) SACR 303 (GNP) at para 7.

8 See Child Justice Act, Preamble and Chapter 10.

9 *S v SN* unreported, case no 141114/14 (WCC) at para 1.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 *S v SN* at para 2.

15 This includes detention in a child and youth care centre, see *S v FM* 2013 (1) SACR 57 (GNP).

16 *S v SN* at para 2; case law dealing with the automatic review of sentences imposed on child offenders include *S v FM* (Centre for Child Law as amicus curiae) 2013 (1) SACR 57 (GNP) and *S v LM* (Centre for Child Law as amicus curiae) [2013] All SA 110 (WCC).

17 Ibid.

18 *S v SN* at para 3.

19 Ibid.

20 Section 28(1)(g) of the Constitution states: 'Every child has the right – (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be – (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age.'

21 Section 28(2) of the Constitution states: 'A child's best interests are of paramount importance in every matter concerning the child.'

22 Ibid.

23 *S v SN* at para 4 (see sub para 9 to 12).

24 Ibid.

25 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC).

26 *S v SN* at para 5.

27 *Centre for Child Law v Minister of Justice and Constitutional Development* at para 28.

28 *Mpofu v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 407 (CC) at para 7; A Skelton, The Mpofu case: sentencing of child offenders in serious

- cases, *Article 40*, 15:1, 2013, 1–5.
- 29 *S v SN* at para 8.
- 30 Terblanche, *The Child Justice Act*, 455.
- 31 *Ibid.*
- 32 *Ibid.*
- 33 *Ibid.*; National Director of Public Prosecutions, *Child Justice Act 75 of 2008: directives in terms of Section 97(4)*, GN R252 in GG 33067 of 31 March 2010.
- 34 *Ibid.*
- 35 South African Law Commission (SALC), *Project 106: juvenile justice*, report, Pretoria: SALC, 2000, 26.
- 36 *Ibid.*
- 37 *Ibid.*
- 38 *S v SN* at para 8.
- 39 *Ibid.* at para 10.
- 40 *Ibid.*
- 41 *Ibid.*
- 42 *Ibid.*; also see Skelton, *The Mporu case*, 1–5.
- 43 The Beijing Rules are a set of minimum standards developed by the United Nations that provide guidance on the treatment of child offenders.
- 44 See Beijing Rules, rule 3.3.
- 45 Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 24 September 2003. See Council of Europe, Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, <https://wcd.coe.int/ViewDoc.jsp?id=70063>.
- 46 *Ibid.*
- 47 *S v SN* at para 11.
- 48 *Ibid.*
- 49 *Ibid.*
- 50 *Ibid.*
- 51 *S v SN* at para 28.
- 52 *Ibid.* at para 11.
- 53 *Ibid.*
- 54 *S v Melapi* 2014 (1) SACR 363 (GP).
- 55 *Ibid.* at para 1 and 2.
- 56 *Ibid.* at para 3.
- 57 *Ibid.* at para 4.
- 58 *Ibid.* at para 4 and 30.
- 59 *Ibid.* at para 43.
- 60 *Ibid.* at para 44.
- 61 Centre for Child Law, written submissions SJ Melapi and the State (Centre for Child Law as *Amicus Curiae*) RC case no. SH74/12, 26 August 2013, para 27.
- 62 *Ibid.*
- 63 *S v Melapi* at para 46.
- 64 *Ibid.*
- 65 *Ibid.*
- 66 *Ibid.* at para 47.
- 67 *Ibid.*
- 68 Centre for Child Law at para 41.
- 69 *Ibid.*; the principle of legality has been dealt with by the Constitutional Court in the following cases referred to by the Centre for Child Law: *Masiya v Director of Public Prosecutions*, Pretoria (Centre for Applied Legal Studies as *amicus curiae*) 2007 (5) SA 30 (CC) and *Veldman v Director of Public Prosecutions* 2006 (2) SACR 319 (CC).
- 70 Centre for Child Law, at para 31.
- 71 *Ibid.*
- 72 *Ibid.* at para 32.
- 73 See the Child Justice Act, Preamble; *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC) at para 36.
- 74 The Constitutional Court explained why it is necessary to treat children differently in *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC) at para 36.
- 75 Goals as set out in the Child Justice Act, Preamble.
- 76 Centre for Child Law at para 33 – 34.
- 77 *Ibid.*
- 78 *Ibid.* at para 35.
- 79 *S v IO* 2010 (1) SACR 342 (C).
- 80 Centre for Child Law at para 35.
- 81 *Ibid.*
- 82 *Ibid.*; *S v IO* at para 15.
- 83 *S v Melapi* at para 47.
- 84 *Ibid.* at para 49.
- 85 *Ibid.*
- 86 *Ibid.* at para 52.
- 87 A Skelton, *The automatic review of child offender's sentences*, *South African Crime Quarterly*, 44, 2013, 37–44, 44.
- 88 Skelton, *The Mporu case*, 4.

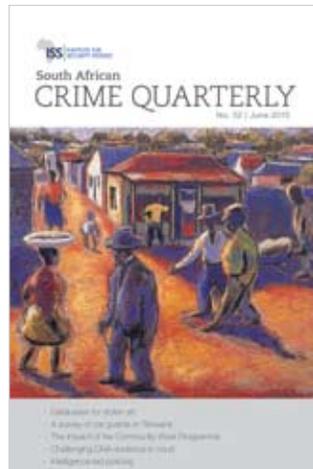


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### ISS Pretoria

Block C, Brooklyn Court  
361 Veale Street  
New Muckleneuk  
Pretoria, South Africa  
Tel: +27 12 346 9500  
Fax: +27 12 460 0998

### ISS Addis Ababa

5th Floor, Get House  
Building, Africa Avenue  
Addis Ababa, Ethiopia  
Tel: +251 11 515 6320  
Fax: +251 11 515 6449

### ISS Dakar

4th Floor, Immeuble Atrium  
Route de Ouakam  
Dakar, Senegal  
Tel: +221 33 860 3304/42  
Fax: +221 33 860 3343

### ISS Nairobi

Braeside Gardens  
off Muthangari Road  
Lavington, Nairobi, Kenya  
Cell: +254 72 860 7642  
Cell: +254 73 565 0300

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