# IN THE MARIKANA COMMISSION OF INQUIRY
## (HELD IN CENTURION)

### SUBMISSION BY ROBERT DAVID BRUCE
#### (27 October 2014)

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INTRODUCTION

1. I am an adult male freelance researcher. I wish to make a submission to the Marikana Commission on the ‘structural or systemic policing issues’ highlighted by the events in Marikana that should be addressed in order to avoid further events of this kind.

2. My focus is on the events of the afternoon of the 16th of August 2012 in which 34 people were killed and many others injured, a number of them having suffered permanent disabilities as a result.

3. In line with the Commission’s preference regarding ‘neutral’ terminology the events during the afternoon of 16th August 2012 are referred to in this submission as ‘the Marikana incident’.

4. I make this submission in my capacity as an expert on police and the use of force in South Africa. My qualifications and experience in this regard are set out below.

QUALIFICATIONS AND EXPERIENCE

5. From 1996 to 2011 I was employed at the Centre for the Study of Violence and Reconciliation (CSVR), a South African non-governmental organisation, established in 1989. I was initially employed as a researcher but was eventually promoted to the position of senior research specialist. At CSVR I worked in the Criminal Justice Programme (initially the Policing Research Programme). My main focus was on policing and violent crime and my key specialisation was on the issue of the use of force, specifically lethal force, by the police and related questions of accountability.

6. Related to my work as a researcher I have written or co-written numerous research reports, journal articles, press articles and some book chapters. A list of my publication, highlighting publications on policing and on the use of force, is attached to this submission as Annexure A.

7. I have a Masters in Management (Public and Development Management) from the University of the Witwatersrand for which I graduated with distinction in 2000. The topic of my research report towards the Masters was ‘The management of the use of force in the SAPS’.

8. During 2001 and 2002 I developed the submissions for CSVR in its role as amicus curiae in the Constitutional Court case of S v Walters which deals with the legal framework relating to the use of lethal force for arrest in South Africa. In 2011 I also developed submissions to the Department of Justice and to Parliament relating to the amendment of Section 49 of the Criminal Procedure Act, for CSVR.

9. Subsequent to leaving CSVR in 2011 I have continued to work in the field of policing and the use of force. My work in this regard has included:

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1 Ex Parte Minister of Safety And Security And Others: In Re S V Walters And Another (Cct28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002)
9.1. Assisting the African Policing Civilian Oversight Forum with the development of Police Standard Operating Procedures for the East African Community


**BASIS FOR MY SUBMISSION TO THE COMMISSION**

10. I heard about the incident at Marikana through news media on the evening of 16th August 2012. Related to my ongoing professional interest in questions about the use of force by police in South Africa I took an extensive interest in the incident. I have had an ongoing professional relationship with the African Policing Civilian Oversight Forum and was asked by them to put together an analytical piece responding to the incident. My first analysis of the incident was published on Friday 24th August. Over the following five months I published various other press articles in relation to the Marikana incident. A longer article of mine was also published on the website [www.mampoer.org.za](http://www.mampoer.org.za). I also assisted the Council for the Advancement of the South African Constitution (CASAC) with the preparation of their submission to the Marikana Commission.

11. The main focus of this work was on:

11.1. Using information that was available in the public domain, including press reports and video material available online, to try to make sense of what had happened in Marikana on the 16th of August including understanding in what ways events over the previous week might have influenced the events on that day; and

11.2. Considering ways in which the promotion by government officials of the aggressive use of force by police, including a ‘doctrine of maximum force’ that
was being put forward by then Minister of Police, might have influenced the course of events in Marikana on the 16th of August.

12. Since the beginning of 2013 I have continued to take an interest in and keep up to date with developments in the Commission.

12.1. I have followed coverage of the commission in the news media as well as engaging with some of the testimony that has been presented to the commission including reading some transcripts and some of the expert submissions to the commission.

12.2. I have read, in part or in their entirety, transcripts relating to the evidence and cross-examination of various witnesses:

12.2.1. Mr Nathi Mthethwa
12.2.2. Mr Shadrack Mtshamba
12.2.3. Mr Cees de Rover
12.2.4. Lieutenant Colonel Vermaak

12.3. I have also studied submissions by various expert witnesses to the commission including

12.3.1. The final submission of Mr Hendrickx
12.3.2. The statement and supplementary statement of Mr Cees de Rover.
12.3.3. The final submission of Mr White MBE as well as Mr White’s responses to the statements and supplementary statement of Mr de Rover and responses to written questions put to him by the SAPS.
12.3.5. The statement of Gareth Newham of the ISS.

12.4. I have also read, in part or in their entirety, written statements by some members of the SAPS including, but not limited to, those of Colonel Duncan Scott, Major-General Mpembe and Hendrich Wouter Myburgh.

12.5. I have watched audio-visual material on the Marikana incident including the film Miners Shot Down.

12.6. I have on occasions engaged with members of the legal teams or other officials associated with the commission about specific points or issues related to the work of the commission.

12.7. During 2013 I also carried out a survey of information in the public domain on ‘tactical units’ in the SAPS (the Special Task Force, the National Intervention Unit, the Tactical Response Teams).

12.8. During 2014 I have worked with professor Monique Marks on an article
on public order policing in South Africa since 1994. This process has also involved considerable reflection on the Marikana incident and to what degree it can be accounted for in terms of this history.

12.9. Whilst preparing this submission I circulated an email message to a range of South African analysts and academics with expertise in the policing field. In the email I asked for any suggestions or comments relating to the topic of the submission. I received comments from Lukas Muntingh, Monique Marks, Andrew Faull, Johan Burger and Gareth Newham. Gwenaelle Dereymaeker also sent me the draft of a paper on the subject of impunity of law enforcement officials for my consideration. I have drawn on these inputs where, in my judgement, they seem relevant to the submission. However the submission reflects my own perspective of the issues raised by the Marikana incident.

13. I would like to emphasise that I am not familiar with the totality of evidence that has been put before the commission. Nevertheless I have made an ongoing effort to keep up to date with what is happening in the commission and to take note of significant evidence and developments.

THIS SUBMISSION

14. As indicated this submission focuses on ‘structural or systemic policing issues’ highlighted by the events in Marikana that need to be addressed in order to avoid a repetition of incidents of this kind.

14.1. In paragraph 73 below I present an argument on how ‘incidents of this kind’ should be understood. It is argued that the Marikana incident raises systemic issues about the use of force by the SAPS generally and not only in relation to public order policing situations.

15. The need for systemic’ issues to be addressed was motivated for by Mr de Rover in saying that there is need to examine issues on ‘the level of how the police organises as an organisation, how it trains its personnel, what it teaches them, to what standards it holds them, how it is managed and who does the managing’ as well as to ‘go one level higher … and say that those that exercise authority over the police in government, there needs to be a structure to how police receive policy direction that goes beyond a phone call to a PC on a mobile, those are not I think the types of auditable trails you’d be looking for if afterwards you need to render account.’

15.1. In relation to Mr de Rover’s point I would like to suggest that it may be most productive to conceive of the key ‘systemic’ issues as issues relevant to the management of the use of force by the South African Police Service.

16. The Open Society Foundation for South Africa have kindly agreed to provide me with financial support in order to do this work. However the arguments and opinions

5 Transcripts, day 285, pages 36983-84
presented here are my own arguments and not those of OSFSA.

17. The purpose of this submission is not to persuade the commission as to how to interpret the facts relating to the events in Marikana in August 2012. However my analysis of the ‘structural or systemic policing issues’ that are relevant to understanding the Marikana incident is directly linked to my current understanding of evidence and information relating to the incident. I have therefore set out my understanding of the evidence in order to assess what recommendations regarding systemic policing issues may be regarded as relevant. In so far as the Commission reaches conclusions about the facts that are different from my own, or believes that the available evidence does not support my interpretation of the facts, this may affect its view on the relevance of certain recommendations that are motivated for in this submission.

17.1. Related to this point, the submission is not concerned with motivating or persuading the commission about the culpability of one or other person or party. In so far as there are arguments about culpability or responsibility they are provided because they are believed to be relevant to the analysis of ‘structural or systemic policing issues’.

UNDERSTANDING OF THE EVENTS AT MARIKANA LEADING TO THE DEATHS ON 16th AUGUST 2012

18. Linked to the information and evidence that I have been exposed to my understanding is that the following points are a reasonable assessment of what is known about the Marikana incident.

19. There were several incidents of violence from at least Saturday 11 August onwards, prior to the 16th of August including:

19.1. An incident on the 11th where a group of miners were fired at, with at least two of them being injured, by people at or near the NUM office in Marikana.

19.2. On 12th August two security guards and two mine employees at one of the shafts were killed. My understanding is that these killings are believed to have been carried out by people associated with the group of miners who were on strike though I have not encountered specific evidence on this point.

19.3. On 13th August there was a confrontation between members of the SAPS and a group of miners. Two SAPS members and three miners were killed at or near the scene of this confrontation.

19.4. On 14th August a body was discovered near ‘koppie 1’. Koppie 1 had become established as a gathering point for the miners who were on strike.

20. My impression is that these incidents of violence are relevant to understanding the course of events on the 15th and 16th of August in the following specific ways:

20.1. They are relevant to understanding the fact that the miners were heavily
armed.

20.2. They are relevant to understanding the state of mind of rank-and-file police who participated in the Marikana incident (and possibly some of those at a command level). Related above all to the killing of SAPS members, many of the rank and file police who were present at Marikana on the 16th were frightened of the miners and of having to engage with them at close-quarters.

20.2.1. This fear may have predisposed some of them to seeing (interpreting) the group of miners who were running towards them at koppie 1 as being involved in an attack.

20.2.2. In addition to fearing the miners it appears likely that attitudes of a vindictive nature also influenced the actions of the police. On a rank-and-file level these vindictive attitudes amongst police may have been an expression of fear combined with the perception that the miners were hostile towards them. This fear may also have fed into a vindictive orientation towards the miners illustrated by the alleged statement by the evidence that one of the police officers at ‘scene 2’ said that the miners ‘deserve to die’ after shooting one of them.6

20.2.3. My view that it is likely that many police were afraid of the miners and held ‘vindictive attitudes’ towards them might be seen to be linked to what Mr White refers to as ‘Evidence of a mindset which treated the crowd as a single violent entity rather than a grouping of distinct individuals’.7 (see further section 4.5 to check)

20.2.4. In relation to the state of mind of police who participated in the operation it is also worthwhile to take note of the observation that after the incident on Monday the 13th of August ‘The evidence of Major General Mpembe suggests that the “cooling-off” period was not catered for with premature psychological assessments being undertaken and SAPS members being redeployed on Thursday, 16 August 2012.8 Some of those who were redeployed may have been suffering trauma as a result of the incident on the 13th.

20.3. The incidents of violence are relevant to understanding the fact that the operation came to be defined as a ‘hybrid’ operation and related to this, the planning of the operation was taken out of the hands of the POP commanders who were at Marikana.

20.4. They are relevant to understanding how the decision to bring an end to the strike, despite the likelihood that this would result in death or injury, may have been rationalised – as opposed to the actual motivation of the decision. The word rationalisation is used here deliberately to distinguish this from the

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6 Statement of Henrich Wouter Myburgh
7 White, final, 4.1.3(c)
8 Hendricks, final, para 43 (p 21).
motivation for the decision. My understanding is that no clearly defined motivation for the decision was articulated by any senior member of the SAPS prior to the operation. The motivation for the decision appears to have been political in nature rather than based on considerations to do with the effective policing of the situation.

20.4.1. It also appears likely that vindictive attitudes also had an influence on this decision-making process. These vindictive attitudes are likely to have been given energy by a process through which the miners collectively had come to be labelled as ‘violent’ and ‘criminals’. Since at least [July] 2011 the Minister of Police had stated repeatedly that ‘violent criminals’ should be dealt with by means of ‘maximum force.’ It appears likely that the Minister would have labelled the miners as ‘violent criminals’ particularly as his communications with Mr Ramaphosa and Ms Shabangu are likely to have supported labelling them in this way.

20.5. The incidents of violence are also relevant to understanding the Lonmin decision not to negotiate with the rock drill operators. It is possible that there were a number of motivations for this (e.g. the desire to ensure that AMCU did not gain credibility and to protect the position of the NUM). The fact that some of the miners had been linked to acts of violence may therefore have served more as a rationalisation than a motivation for this decision. On the other hand Lonmin executives might have felt that it would be inappropriate to negotiate with the miners because of the violence.

21. It appears that police attempts to negotiate a resolution to the situation were obstructed partly due to the inflexible approach adopted by Lonmin management. In so far as it is true that people at a (political and/or police) leadership level held vindictive attitudes it may be noted that, notwithstanding the fact that it was to some degree Lonmin who obstructed efforts to resolve the situation, these vindictive attitudes were directed towards the miners as being ‘morally blameworthy’. Factors that resulted in the vindictive attitudes being directed towards the miners may have included:

21.1. The preceding incidents of violence, the attribution of the violence to the strikers (though they had also been victims of violence) and related perceptions that the miners as a group were ‘violent’ or ‘violent criminals’.

21.2. Related to this the fact that a number of the miners were armed.

21.3. Intelligence and other information indicating that the miners were willing to resist police efforts to disarm or disperse them.

21.4. Racial and/or class bias.

22. My understanding is that it is a necessary inference that the decision to launch the police operation on the 16th of August 2012 was influenced by and endorsed by political role-players and essentially amounted to a directive from the executive to terminate the strike.
22.1. My submission allows for the possibility that the Commission may not conclude that the decision was influenced by political role-players. In the relevant section of the submission two ‘scenarios’ are outlined one of them being consistent with what I understand to be the government and SAPS account of the decision making process.

23. Those who made the decision, and particularly the senior leaders of the police who instructed police commanders to carry out the operation on the 16th, were aware that the group of SAPS personnel in Marikana included a large group of members of the tactical units who were armed with automatic rifles. Confidence that the police would get the upper hand over the miners was partly based on the knowledge that the SAPS would be able to rely on these units. Related to this those who made this decision knew that the operation would involve a high risk that police would be involved in a confrontation with the miners and that there was a high risk of injury and loss of life. Possibly as a result of the role played by vindictive attitudes, and political considerations which created a sense of urgency around bringing an end to the situation, they did not concern themselves with or gave limited attention to the fact that other options remained open to them. The course of action that was taken was therefore guided by a reckless attitude with respect to its potential consequences rather than a careful consideration of different options and the selection of options that were least likely to result in death and injury.

23.1. Although they knew there was the likelihood of death and injury the politicians and/or senior police leaders involved probably did not anticipate the scale of loss of life and injury that ensued. They may therefore have assumed that whatever happened would be easy to justify or rationalise to the public.

24. The plan for the operation had to be developed at very short notice and was hastily put together and only very briefly discussed by those responsible for implementing the operation. There was very little or no detailed planning and preparation for the operation.

25. When the miners started moving down from ‘koppie 1’ related to the deployment of the barbed wire:

25.1. POP members fired at them with rubber bullets, tear gas and stun grenades but were unable to successfully deter the miners from moving forward.

25.2. During his evidence before the commission Mr de Rover stated that: I think that SAPS’ use of teargas and stun grenades is more aimed at maintaining that separation between police and protesters, and I see much more, like knowing that and knowing that preference from speaking to them, that I see the use of that teargas and those stun grenades there as POP members trying to have that safety barrier between them and the demonstrators.\(^9\)

25.3. My understanding of Mr de Rovers evidence is that he is saying that it is established practise for POP units to try and maintain a distance between

\(^9\) Transcripts, day 286, page 37116
themselves and protestors and the teargas and stun grenades were used for this purpose. My impression is that this is correct. However an additional motivation may have been that the police were afraid of the miners.

26. My understanding is that the actions by the POP units and police personnel in the Nyalas propelled the miners into running towards the line of TRT members and that the miners were not launching an attack on the police at scene 1.

26.1. I have tried to maintain an open mind on issues regarding the Marikana incident and remain open to arguments that this may be the incorrect interpretation. However my impression from reading the transcripts of day 285 of the Commission hearings (the cross-examination of Mr de Rover by Adv le Roux) is that this was demonstrated very persuasively.

26.2. The arguments in my submission are largely not dependent on this conclusion.

27. My impression is that some of the police who fired at the miners genuinely believed they were being attacked. However the Commission has not been presented with clear information indicating which SAPS members genuinely believed they were being attacked. It may have been very few of them or a relatively large number.

27.1. My understanding here is consistent with the statement by Mr de Rover that: ‘Due to police training, conditioning and indoctrination, discharge of a firearm by one police officer against a perceived threat to life or serious injury, may well trigger support fire from officers at the scene, without they themselves at that stage having fully perceived the threat themselves (associative threat presumption). ‘My colleague is under attack, my duty is to back him/her up, in order to protect his/her life’.

27.2. However I suspect that the ‘internal mental process’ that shapes actions of this kind in the South Africa context may also be related to thinking that ‘I may be punished or ostracised for not taking action when others were doing so’.

27.3. I also have the impression that the SAPS has developed ‘concentrated fire’ as a technique for dealing with confrontations with armed groups (notably cash-in-transit robbery gangs) and that the barrage of gunfire at scene 1 may have been an illustration of this technique being put into effect.

27.4. **Recommendation 1** – The shooting at scene 1 raises issues about SAPS practise in confrontations with groups of armed people. Legal and tactical issues raised by situations of this kind should be clarified by means of a formal policy.

28. That there were several instances of police use of force at scene 2/koppie 3 which amounted to the unlawful use of force.

28.1. My impression is that if full evidence was available on the events at ‘scene 2’ it is likely that they would reveal that there were a significant number of unlawful killings by police at scene 2. However the Commission may not be

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10 De Rover statement (initial), para 72 (p 17) – see also 77
able to reach comprehensive conclusions about the events at scene 2 due to the nature of the available evidence.

29. In the absence of clear information to the contrary it is reasonable to believe that irresponsible political rhetoric including the promotion by the Minister of Police of the use of ‘maximum force’ may have contributed to some SAPS believing that there was official backing for them to act unlawfully.

30. That the provision of medical treatment to injured miners after the incident was not prioritised (again also possibly reflecting the vindictive attitudes of the police towards the miners).

31. The Marikana incident not only gave rise to the deaths of 34 people and the injury to 78 others but in its turn has given rise to a multi-dimensional conspiracy of silence and concealment. Both at a rank and file level and at a leadership level, members of the SAPS were involved in attempts to cover-up evidence or at the very least, were less than forthcoming in providing evidence to the commission. There were a limited number of individuals who represent exceptions to this generalisation.

KEY STRUCTURAL OR SYSTEMIC POLICING ISSUES HIGHLIGHTED BY THE MARIKANA INCIDENT

32. Based on the above understanding of the facts relating to the events in Marikana it is therefore possible to reach the following conclusions about ‘structural or systemic policing issues’ that resulted in the events of the afternoon of the 16th of August that led to the deaths of 34 people.

33. South Africa’s Public Order Policing units are in a debilitated condition arising from the failure to maintain them in a sufficient state of readiness. This is reflected in the fact that there were insufficient POP members present to effect the dispersal\(^{11}\) and, in line with this, they were unable to control the group of miners who had started moving down from koppie 1. (The history leading to this situation is outlined in the submission by Dr Johan Burger.\(^{12}\))

33.1. Alongside this it appears that the senior leadership of the POP units have a type of subordinate status within the Operational Response Services division of the SAPS. This was reflected in the fact that the planning and management (‘command and control’) of the operation was taken out of their hands. This may reflect the fact that they were not regarded as the having the skills to plan and manage the operation. However it may also reflect informal dynamics within Operational Response Services, in line with government’s emphasis (most visible in the period from late 2008 to August 2012) on a ‘tough’ approach, in terms of which the ‘tactical units’ have been accorded an elevated status over

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\(^{11}\) Final statement Mr Hendrycx, page 40, par 89

and above the POP units within the ORS division. (According to Professor Monique Marks a POP commander who she spoke to recently described the POP as ‘the orphans of ORS’.)

34. The consequences of the weakness of the POP units and the lack of skills or low status of the POP leadership within ORS was at least two fold:

34.1. As indicated, the POP commanders were side-lined in relation to the planning and management of the operation. (This extended to the fact that no POP commanders were even present at the JOCCOM meeting at which the operational plan was presented). The consequences of this may be seen to have included, inter alia,

34.1.1. the fact that the operation was defined as a ‘hybrid’ operation that was not governed by policies on the policing of demonstrations, and

34.1.2. That those planning the operation had limited knowledge of the principles that are supposed to apply in relation to the policing of demonstrations.

34.2. When the operation was launched the POP units were unable to fulfil their allotted role effectively and the operation quickly became one that was reliant on the ‘tactical units’ whose range of force options was essentially restricted to uses of force at the highest level of the use of force continuum.

35. However the debilitated condition of the POP units and their ‘junior’ status within the Operational Response Service division was a necessary but not a sufficient condition for the Marikana incident. Other structural or systemic issues that are implicated in the Marikana incident include:

35.1. The ability of the Minister of Police to intervene and influence operational decisions by police management in a manner that is unaccountable.

35.2. The absence of a professional police leadership corps at senior level in the SAPS.

35.3. The shift to increasing use of ‘tactical units’ in public order operations.

35.4. The generalised use of R5 rifles in policing in South Africa.

35.5. The absence of a professional orientation towards the use of force including a clearly defined policy that specifies that police have an obligation to minimise the use of force.

35.6. The absence of meaningful accountability for the use of force within the SAPS.

36. The points above discussed in more detail under separate headings in what follows.

37. In the conclusion the submission draws together the above argument. It motivates that the SAPS adopt recommendations that will assist it in moving towards a

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professional orientation towards the use of force. It is argued that concepts of ‘demilitarisation’ and ‘community policing’ on their own are inadequate for purposes of addressing questions to do with the use of force.

THE DEBILITATED CONDITION OF THE PUBLIC ORDER POLICE (POP) UNITS

38. My understanding is that both Mr White and Mr Hendricks have in general confirmed that the public order policy framework, as it stood in August 2012, was of a relatively high quality. It therefore appears that the need is to focus on factors relevant to the ability of POP units, and the SAPS generally, to give effect to the policies and laws governing the policing of demonstrations.

39. The issue of the shortcomings of the operation, as a public order policing operation, is set out in detail in the statements of Mr White and Mr Hendricks. Issues of this kind are also alluded to by Lieutenant Colonel Vermaak during his evidence.

39.1. In Mr White’s words the ‘deficiencies in the SAPS approach’ were ‘in respect of planning, preparation, briefing and operational execution’ and ‘poor planning, poor briefing and most importantly poor decision making’.14

39.2. Mr Hendricks also emphasises that the problems with the operation on one level lay with the faulty interpretation of the situation and comprehension of the principles of crowd management, ‘a failure on the part of the SAPS leadership to understand, to appreciate and apply principles of crowd management, in particular the realities of gatherings, to the events’.15

40. While the issues of interpretation, planning, preparation, briefing and execution may in some respects be the central issues, these problems in turn need to be understood in terms of the overall debilitated state of public order policing in South Africa. These issues in turn would appear to speak to the need, referred to by Mr de Rover, to look at the broad managerial and administrative issues regarding ‘how the police organises as an organisation, how it trains its personnel, what it teaches them, to what standards it holds them, how it is managed and who does the managing’.16 These would need to be looked at within the SAPS, and more specifically within the Operational Response Services division, and the management and command structures for the POP units. If one were to deal with this comprehensively it would involve a review of a wide range of issues including:

40.1. Leadership and command structures - including questions highlighted above to do with informal dynamics affecting the overall status of POP leadership within the ORS hierarchy as well as the role of national and provincial commissioners in operational decision making.

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14 White, final, 4.1.2.
15 White, final, 4.2.23.
16 Hendricks, para 33, 15
17 Transcripts, day 285, 36983-84
40.2. Equipment including:
   40.2.1. Protective equipment,
   40.2.2. Vehicles
   40.2.3. Weaponry
   40.2.4. Communications equipment and technology
   40.2.5. Incident recording

40.3. Training including
   40.3.1. Training of commanders in the interpretation and analysis of information relating to crowd management situations
   40.3.2. Training of commanders in negotiation and conflict resolution and
   40.3.3. Training of commanders in operational command including operational communication.
   40.3.4. Operational training of members

40.4. Systems for intelligence gathering

40.5. Operational planning including the review of operational plans by members of the operational command structure.

40.6. The role of tactical units in public order operations (see further below).

40.7. The role of aerial units in public order operations

40.8. The briefing of members

40.9. Systems of post incident review

40.10. Broad SAPS systems for analysis of data relating to crowd management and the alignment between needs and resources.

41. During 2014 government has signalled that it intends resuscitating the POP units including increasing their personnel strength to 9000 and improving their equipment for which an amount of R3.3 billion has been requested from treasury.\(^\text{18}\) It is not clear to what degree this simply involves ‘throwing money at the problem’ or is based on a properly thought through approach to the current problems in public order policing.

42. What this announcement also does not engage with is the problem that in the past (around 2002 when the POP units were still at full strength) one of the issues that caused concern was that public order units were frequently underutilised. In the vast majority of demonstrations in South Africa there is no need for a highly specialised public order policing capacity to be deployed. Essentially such a capacity is only

necessary where there is a known likelihood or clearly identified risk of such violence. The fact that these units were underutilised was part of the motivation for deploying them in the ‘crime combatting’ environment. Factors that need to be kept in mind here include that:

42.1. In terms of the need to maintain highly specialised public order units there is also a need for these units to engage in training on a regular basis.

42.2. On the other hand government may be inclined to prioritise deploying them in the crime-combatting role even if this is defined as their ‘secondary function’ when they are not required for public order duties. This may be at the expense of training. In the recent period in South Africa public pressure on government to address crime encouraged government to prioritise the use of these units as ‘crime-combatting’ units and to neglect the need to maintain public order units at an adequate level of preparedness.

42.3. The point is frequently made that public order policing in South Africa places police in the position where they are forced to deal with the consequences of service delivery and poverty alleviation deficits. It is also therefore sometimes suggested that a large part of the ‘solution’ to the problem of public order, and thus of public order policing, lies in addressing the problems of state capacity that lead to these deficits. Were this to be accomplished, perhaps by determined implementation of the National Development Plan for instance, the scale of the demand for public order policing might therefore be reduced substantially. The answer to questions about the optimum configuration of public order policing in South Africa may therefore change over time.

43. **Recommendation 2**: The critical issue is that government needs at all times to recognise the importance of maintaining a public order policing capacity that is appropriately staffed and equipped and is maintained in an appropriate state of readiness. The public order policing capacity of the SAPS needs to be brought up to a strength that is appropriate in terms of the scale of the public order policing problem. For this purpose government needs to be able to assess the demand for specialised public order policing and to adjust resource allocations in this regard relative to reasonable projections of the scale at which this type of capacity needs to be maintained.

44. **Recommendation 3** – Though some role in crime combatting may be provided for in the work of these units, this should at no time take priority over the need to maintain these units as effective public order policing units.

45. **Recommendation 4** - The central role of public order policing principles, public order units, and public orders commanders needs to be recognised and institutionalised within the Operational Response Service division and within the SAPS. In line with

19 Julia Hornberger, J. “We Need a Complicit Police!: Political Policing Then and Now.” *South African Crime Quarterly* 48, no. 1 (July 17, 2014).
this steps need to be taken to try to ensure that the leadership of POP are drawn from the highest calibre personnel within the Operational Response Services division.

46. **Recommendation 5** – A systematic and detailed independent review of public order policing systems in South Africa should be carried out along the lines set out at points 40.1 - 40.10.

47. What is frequently not acknowledged is that South Africa is having widespread problems in various government departments in complying with policy prescripts. This indicates that there are problems of a systemic nature that impact on the SAPS ability to achieve the high standards of planning and command that are required in terms of existing policies. This means not only that to be useful recommendations need to be aligned with ‘the local context’ in the sense that ‘best practice is something that you can afford economically’ but also that any policy recommendations need to engage with the systemic problems in the overall public service environment.

48. I note that various ‘preliminary recommendations’ in relation to Public Order Policing are also put forward by Mr Hendrickx in his final statement.

**THE ABILITY OF THE MINISTER OF POLICE TO INTERVENE AND INFLUENCE OPERATIONAL DECISIONS BY POLICE MANAGEMENT IN A MANNER THAT IS UNACCOUNTABLE**

49. The Constitution states that

49.1. A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

49.2. The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

49.3. The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

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20 De Rover (transcript day 285, 36996)
21 See for instance von holdt, chipkin
22 Hendricks, final, paragraphs 154-159
23 Section 206 (1)
24 Section 207 (1)
25 Section 207 (2) – emphasis added.
50. An interpretation of these provisions is put forward by Mr Mthethwa, who in August 2012 was the Minister of Police, during his evidence before the Marikana Commission. Inter alia Mr Mthethwa says that:

50.1. ‘[T]he task of the Minister is to ensure that policy is being implemented and whatever is happening is done implementing the policy. So there would be no need for any pressure except the oversight over the police where people are supposed to do the job and you ask them to do the job.’

50.2. In response to the question ‘did you set about to prescribe how SAPS perhaps should manage what was unfolding in Marikana?’ Minister Mthethwa says ‘Well, that’s the how part. You as the minister, that’s not your province how operationally you have to carry your tasks. As police officers that’s your job. I don’t enter into that terrain. It’s not my terrain.

51. I do not know if there are any court judgments in South Africa on the interpretation of the Constitutional provisions. In so far as there may be judgments on these provisions I acknowledge the limitations of my knowledge. However it appears to me that at face value it cannot be said that the Constitution limits the powers of the Minister to ‘policy’ and ‘oversight’ as it explicitly, in Section 207(2), authorises the Minister to provide ‘directions’ to the National Commissioner. It seems reasonable to interpret the provision to mean that these ‘directions’ are in addition to policy (it for instance does NOT say ‘and directions issued in terms of the policy).

52. Furthermore, as a policing researcher, it is my understanding that the view that the Minister may only set ‘policy’ and not engage with ‘operational matters’ reflects what might, with respect, be called ‘conventional wisdom’ This ‘conventional wisdom’ is sometimes said to have originated from the statement of an English court that ‘the police are accountable to the law and the law alone’. The ‘conventional wisdom’ is however inconsistent with democratic principles in terms of which the executive are supposed to ensure that the departments of government act in the public interest, subject of course to the requirement that this is in a manner that is consistent with law.

52.1. This ‘conventional wisdom’ is inadequate also because it suggests that the line between ‘policy’ and ‘operational’ can be clearly demarcated.

52.2. These issues are examined in a paper by Phillip Stenning that I have attached with this submission (Annexure B). The paper is focused on the Australian context but has relevance to the South African situation linked to the fact that policing both in Australia and South Africa share a British colonial administrative inheritance.

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26 Transcripts, day 255, page 32064
27 Transcripts, day 255, page 32086
28 See Lord Dennings as quoted in Phillip Stenning (see Annexure B), p. 8.
53. The undesirable side of ‘opening the door’ to the potential of Ministerial influence over operational decision making is the concern that this influence will be used for inappropriate purposes (‘undue influence’). However what needs to be recognised here is that:

53.1. The central place of issues to do with policing in the exercise of government powers, in authoritarian or democratic societies, implies that the Minister and Commissioner are inevitably engaged with each other intensively. This relationship is very rarely, and perhaps never, organised around a neatly defined distinction between ‘policy’ and ‘oversight’. It also tends to be carried out through a high level of direct interpersonal communication, sometimes of a relatively informal nature.

53.2. In jurisdictions that have engaged with this issue, the approach that is adopted is that, rather than restricting the Minister to an authority over ‘policy’ it is preferable to try and ensure that there is transparency over any policy directives that are issued by the Minister. This can be done by

53.2.1. Requiring that any directives from the Minister to the Commissioner be reduced to writing.

53.2.2. Requiring in turn that any such directive be placed before an appropriate body, such as a committee of parliament, within an appropriate time.

53.2.3. Provisions of this kind may be found in Section 4.6 of the Queensland, Police Service Administration Act, 1990 and Sections 6 and 7 of the South Australia, Police Act, 1998.

53.3. A review carried out in the Australian state of Victoria also recommended that legislation should provide a ‘non-exhaustive list’ including, for example, decisions to investigate arrest or charge in a particular case and decisions ‘to appoint, deploy, promote or transfer individual police officers’ that defines matters on which members of the executive may not intervene.29

54. As with any provisions, if provisions of the kind outlined here were to be put in place this would not guarantee that they would be adhered to. However introducing provisions of this kind is firstly more realistic as well as being more consistent with the principles of democratic government. Essentially the approach therefore seeks to regulate the content of directives and ensure transparency so that these can be evaluated in terms of whether they are consistent with democratic norms and the public interest. Provisions of this kind can also be used

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by a commissioner who is so minded as a basis for resisting what appears to be ‘inappropriate’ or ‘undue’ influence.

55. My understanding is that it was issues of this kind that Mr de Rover was alluding to when he said that

55.1. I hope that the police are not an entity on itself, they are agents of the state. They are accountable to the executive.\footnote{Transcripts, day 286, page 37076}

55.2. ... and say that those that exercise authority over the police in government, there needs to be a structure to how police receive policy direction that goes beyond a phone call to a PC on a mobile, those are not I think the types of auditable trails you’d be looking for if afterwards you need to render account.\footnote{Transcripts, day 285, 36983-84}

56. **Recommendation 6** – Government should adopt legislation to regulate and introduce greater transparency in relation to directions issued by the Minister of the Police in terms of Section 207(2) of the Constitution.

**THE ABSENCE OF A PROFESSIONAL POLICE LEADERSHIP CORPS AT SENIOR LEVEL IN THE SAPS**

57. For the purposes of this submission it is not necessary to comprehensively define the term ‘professional police leadership’. It may for instance be assumed that such leadership should, inter alia, be fully conversant with the legal and regulatory framework governing policing as well as having a sophisticated understanding of operational policing. In relation to this submission what is of central importance is that ‘professional police leadership’ is leadership:

57.1. That is highly conscious of the risks associated with the powers and duties that police have to use force; and

57.2. That emphasises the obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

58. Implicit to this definition of professional police leadership is that professional police leadership would have recognised the risks associated with the Marikana operation and given due emphasis to the likelihood that death and injury would result from the operation in considering whether to go ahead with it or not.

59. As indicated (paragraph 22.1) this submission allows for two different ‘scenarios’ in relation to the high level decision making process that authorised the police operation that led to the Marikana incident.

59.1. **Scenario 1:** The operation that lead to the Marikana incident is the result of a directive from the Minister of Police (or other member of the executive) to
the national commissioner or provincial commissioner - this scenario is in line with my own reading of the evidence.

59.1.1. My understanding is that in this scenario, had there been professional police leadership, the relevant police official would have recognised that the operation was likely to place police officers in jeopardy as well as carrying a high risk of death or injury to others. In addition a professional police leader would have recognised that there was no urgent need to implement the operation. A professional police leader would have strongly advised the member of the executive against implementing the police action on the 16th of August. (The question whether any directives or orders that were issued would have qualified as ‘manifestly illegal orders’ under section 199(6) of the Constitution may also be relevant here).

59.1.2. In line with my own remarks in relation to Scenario 1 I also note the question posed by Mr de Rover at the end of the following passage from his evidence before the commission: [I]f I take that that is what is normal in a democratic society and therefore normal here, I would find it very hard to believe that there [was] no political [...] guidance on that decision. [...] Because a higher authority made it and gave it as an order, then you have your answer to your question as to why it was implemented and why the haste and why the day and why those 12 points in the end, although raised, did not weigh heavily enough to counter the order. And hence my question is the order, because were the ones that issued it made sufficiently aware of those 12 points and the risk [...] in going ahead[?][32]

59.1.3. I also note the following passage from Mr de Rover’s testimony: ‘[I]n the face of such overwhelming evidence as you now present and that you hold the police were aware of when they were making that decision and trying to operationalise it, why didn’t they refuse to do it[?] Because if it originated from within the police itself it would have been simple to stop that.’[33]

59.1.4. It may be assumed that, if there is a political directive or political pressure, the only police officials who are in a position to negotiate about or question it are the high level leadership (essentially the level of national or provincial commissioners). It is presumably difficult for police officials lower down in the chain of command to contest such a directive even if it appears unreasonable (though this does not negate their legal obligation not to obey it if it is ‘manifestly illegal’).

59.2. **Scenario 2:** The national commissioner or provincial commissioner was the author of the decision to implement the operation that lead to the Marikana

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32 Mr de Rover, day 286, page 37076. I have inserted square brackets to indicate modifications made to the original transcript. I have made these modifications to rectify I apparent error (the use of the word ‘weapons’ instead of ‘was’) as well as to bring out more clearly what I understand Mr de Rover to be saying.

33 Transcripts, day 286, page 37072
incident – my understanding that this scenario is consistent with the SAPS version.

59.2.1. My remarks relating to scenario 1 also imply that a professional police leadership would not have authorised the police operation on the 16th.

60. In addition to the fact that the senior police leadership responsible did not resist political pressure to implement the operation and/or themselves authorised the operation some other points that support the contention that the current police leadership is not a professional police leadership include:

60.1. The statement issued by the SAPS on August 17th 2012 under the name of the National Commissioner reflected a lack of understanding of the type of management approach that is appropriate in the aftermath of an incident of this nature. By taking these positions the National Commissioner not only prematurely exonerated the SAPS. She also placed all SAPS members who had evidence contradicting this in the unenviable position of having to expose her as completely mistaken. She therefore, even if inadvertently, in effect helped to reinforce a dynamic in terms of which SAPS members who had information which did not support the official SAPS version, faced the risk of being seen as disloyal. This in itself would have contributed to the cover-up by creating an informal dynamic obliging SAPS members to conceal information that contradicted her.

60.1.1. See the remarks by Mr White: This approach in the aftermath of the shooting incidents may have set a tone which may have discouraged proper reflection and internal examination of what had gone wrong. It potentially encouraged the adoption of a robust defensive stance. 34

60.2. The statements that the actions of the police represented ‘the best of responsible policing’ and were consistent with the police oath to ‘ensure that all South Africans remain safe’ as part of the speech by the National Commissioner on the 20th of August. For professional police leadership it would be virtually inconceivable that an operation in which police had killed 34 people could be seen as ‘the best of responsible policing’.

61. The failure of government to develop professional police leadership cohort at senior level may therefore be seen to be one of the causes of the Marikana incident as well as being implicated in the subsequent apparent police cover-up.

62. Recommendation 7 – Government and the SAPS should focus on the development of a professional senior level police leadership corps. The National Development Plan also puts forward recommendations relating to this and these should be taken account of in addressing this issue.

34 See White, final, 4.2.13
THE SHIFT TO THE INCREASING USE OF ‘TACTICAL UNITS’ IN PUBLIC ORDER OPERATIONS

63. At least two of the international policing experts appear to agree that there may be circumstances in which it is appropriate for ‘tactical units’ to be brought in to play a support function in public order policing operations.

63.1. I am not clear on Mr Hendriks view on the involvement of the ‘tactical units’ specifically in the Marikana operation. However as a general statement Mr Hendriks observes that ‘The use of tactical units trained solely or specifically in the use of deadly force in relation to public order policing should be limited and exceptional and accordingly requires special justification.’ Therefore it would appear that Mr Hendricks would agree that, in exceptional circumstances, it may be appropriate to deploy tactical units, in public order operations.

63.2. The fact that Mr White holds views that are similar to this would also appear from the statement that ‘Given that officers had already been shot and there was information to suggest that the protestors had access to dangerous weapons, the decision to engage assistance and support from various specialist branches of the SAPS cannot be criticised. However, a POP commander should have remained in control of planning the operation with support provided from other specialists.’

64. These two experts, both of whom have operational police experience, therefore do not motivate that members of tactical units should be comprehensively excluded from public order operations. They do however advise that the use of officers with specialist firearms skills should be highly selective.

64.1. The issue is further addressed in the final statement of Mr White as follows: ‘I have experience of commanding public order operations where intelligence has indicated that there may be protestors with firearms or explosive devices on the scene. In planning for such eventualities I have had cause to deploy officers who are equipped with firearms in order to provide protection from a ballistic threat. Typically this has involved deploying specialist firearms teams at either end of a public order shield line (with officers making use of the protection afforded by armoured vehicles and ballistic shields if necessary) and, depending on the topography, situating officers who are trained as snipers. In circumstances where the officers are faced with a threat to life, emanating from firearms or explosive devices, the specialist firearms officers are trained to engage an identified target in order to neutralise the threat. Through scenario-based training and intelligence-led planning, which will include the firearms teams examining potential arcs of

35 Hendrickx final, par 88 (page 40).
36 White, final, par 6.3.4, pages 62-63.
fire, and working out in advance their specific areas of responsibility, the potential for the use of lethal force will be minimised.37

65. There is limited information on the history of the use of ‘tactical units’ in public order policing in South Africa since 1994. It appears that the SAPS approach has envisaged that ‘tactical units’ may be used in public order operations for some time.

65.1. A publication issued by the SAPS in 2005 indicates that:

65.1.1. The functions of the Special Task Force to include include: Providing assistance to other divisions of the SAPS when they require the specialized skills, techniques and equipment of the unit to deal with, among other things, serious and violent crimes and major events.38

65.1.2. The functions of the National Intervention Unit include ‘Responding quickly to abnormally high levels of crime and public violence’ and ‘performing specialized duties regarding the combating of public violence in urban and rural areas’.39

65.2. The NIU was deployed at a late stage during the xenophobic riots that erupted in May 2008.

65.3. From their inception in 2009 it is also clear that a key function of the Tactical Response Teams was intended to be that of bolstering SAPS capabilities in the policing of public order.40

66. In the period from 2009 onwards there was a shift by government towards more forceful policing. This included more forceful policing of public order incidents. In line with this approach ‘tactical units’ were increasingly employed alongside POP units in public order operations. In effect, rather than addressing the debilitated state of public order policing, the official approach was that it could address the weaknesses of these units by deploying public order police alongside them.

66.1. The issue was identified as a problem in an article published in December 2011 which states that ‘An additional problem confronting those police responsible for public order policing has been the introduction of additional layers of ‘paramilitary’ police, such as the Tactical Response Units (TRU), into public order management. Many of the members of these units lack training and skills in the democratic policing of public order events.41

37 White, final, paragraph 7.5.11, page 115)
66.2. The police operation in Wesselton (Ermelo) in February 2011 reflected this approach.

67. **Recommendation 8** – The public order policing national instruction should be amended to provide guidelines and procedures to be followed in relation to the use of tactical units in public order policing. This should include explicit provision that the deployment of members of tactical units in public order operations should be under the overall command of public order commanders.

### THE ABSENCE OF A PROFESSIONAL ORIENTATION TO THE USE OF FORCE AND A CLEARLY DEFINED POLICY THAT SPECIFIES THAT POLICE HAVE AN OBLIGATION TO MINIMISE THE USE OF FORCE

68. For the purposes of this submission I would like to consider the implications of what I understand to be the SAPS account of the Marikana incident. As I understand it, in addition to accepting that all SAPS members acted in self-defence, this included accepting that the SAPS commanders classified the operation as a ‘hybrid’ operation. What is implied by this is that the operation was no longer necessarily subject to the principles and policies governing public order policing or to management by POP commanders. By taking the operation out of the ‘public order’ arena the SAPS commanders therefore took the operation out of the ambit of ‘public order policing’ and into an area of policing that is subject to the general laws and regulations governing the use of force by SAPS members.

68.1. I accept the argument that Mr Hendricks has made that it was wrong for the SAPS commanders to classify the Marikana operation as a ‘hybrid operation’ and that the Marikana operation should have been classified as a public order policing operation and should have been under the control of experienced public order officers.

68.2. However if one were to accept the SAPS version then the implication would be that the decision to classify the operation as a hybrid operation was taken in good faith and implemented with the understanding that it was a legally valid course of action to pursue.

69. This points to two questions:

69.1. If the operation was not a public order operation, what laws and policies was it governed by?

69.2. Was there any law or policy which the decision to launch the operation violated taking into account that:

69.2.1. The operation was likely to lead to confrontation and carried a high risk that it would lead to death or injury to police officers and to the people assembled on koppie 1; and that

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42 Hendrickx, final, paragraphs 48 – 70 (pages 24-33)
69.2.2. There were no pressing or urgent considerations motivating for the operation to be launched at that point; and that

69.2.3. It was apparent to police that there were other options open to them that would be less likely to lead to confrontation, death and injury?

70. Effectively the question is: would the approach and principles that were applied in relation to the operation have been valid and appropriate if the operation had not been a public order policing operation?

70.1.1. My understanding is the legal and regulatory framework governing the use of force by police is essentially defined by section 49 of the Criminal Procedure Act and Section 13(3)(b) of the South African Police Service Act as well as principles of common law relating to private defence.

70.1.2. There are also SAPS internal regulations, standing orders or instructions that are issued by SAPS management particularly following changes in the law. However these documents are essentially legally orientated in that they are orientated towards explaining the law (as defined in the Criminal Procedure Act and SAPS Act and common law) to SAPS members.

70.1.3. However the legal provisions that exist are all essentially situationally orientated. They explain what people (including SAPS members) should do if: they are (i) using force (SAPS Act) (ii) facing an attack (common law), or (iii) arresting someone who flees from or resists arrest (Criminal Procedure Act).

70.1.4. There is no law, policy or guideline that explains to police the general principles that they should apply in formulating their approach to operations or other actions. For instance there is no law or policy that says that, in deciding on a course of action or planning operations (other than public order operations) SAPS members should:

70.1.4.1. Seek to resolve the situation effectively whilst minimising the use of force;

70.1.4.2. Seek to protect human life including the lives of police officers or others.

70.1.4.3. Seek to minimise the risk of injury to police officers and others.

71. My understanding is therefore that if, for the sake of argument, one accepts (i) that all SAPS members who used force did so in private defence, and (ii) the operation was not governed by the provisions governing public order policing, then the implication would be that the SAPS had indeed not violated any law or regulation in deciding to implement the operation.

71.1. In terms of the legal and regulatory framework the primary shortcoming of the operation would then be the failure to ensure that prompt medical treatment was provided to injured people in terms of Standing Order (G) 349
dealing with the provision of medical treatment to people in custody43 (Carelessly or maliciously failing to ensure that mortally injured people receive medical treatment may also be a criminal offence).

72. However it seems clear that the decision to implement the operation was not only inconsistent with the principles of public order policing but was also inconsistent with the principles of the Constitution which places an obligation on the state to protect rights including the right to life44 and the right to ‘to be free from all forms of violence from either public or private sources’45. In terms of the approach outlined above, which is believed to be aligned with the police version, even if the operation was not governed by public order principles it would nevertheless therefore have been unconstitutional.

72.1. Essentially it should have been apparent to all SAPS members involved, including the National Commissioner, the Provincial Commission and the commanding officers that, even if it was not a public order operation, the operation would not pass muster unless it was clearly motivated that it was likely to reduce, rather than enhance, the risk of death and injury to police officers and others.

72.2. The Marikana incident therefore reflects an absence of clarity within the SAPS on questions of principle regarding the use of force. The absence of clear principles governing the use of force by SAPS members generally was then in itself a cause of the Marikana incident. The ‘systematic weakness’ that this highlights is the absence within the SAPS of an awareness of overarching principles governing the planning and implementation of actions or operations that are likely to involve the use of force especially if this is likely to involve the risk of death or injury to police officers or others.

72.3. Consistent with the definition of professional police leadership that is provided above (paragraph 57) the Marikana incident therefore also highlights the absence within the SAPS of a professional orientation towards the use of force. This involves exercising police powers in a manner that is highly conscious of:

72.3.1. The risks associated with the powers and duties that police have to use force; and

72.3.2. The obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

72.4. The need for police agencies to provide policy frameworks that provide overall guidance to police officers on the use of force is widely recognised internationally.

43 SAPS, Standing Order (G) 349: Medical Treatment and the Hospitalisation of a Person in Custody;
44 Section 11 of the Constitution
45 Section 12(1)(c) of the Constitution.
72.4.1. Use of force policies are widely used by police departments in the USA as well as in Australia. This is based on the recognition that the state laws governing the use of force by police are usually not sufficient to support a professional policing approach, inter alia, because they do not address the broad obligation of police to seek to minimise the use of force. Some police departments also chose to adopt policies that restrict the use of force more narrowly than the provisions of state law.46

72.4.2. In the SAPS the need for policy to complement the legislative framework is acknowledged in relation to public order policing but not in relation to the use of force more generally. The SAPS has resisted initiatives motivating for it to adopt a general use of force policies to inform SAPS members about principles and considerations that should apply in relation to the use of force.47

72.4.3. In the absence of clearly defined use of force policies the vulnerability of police officers to inflammatory rhetoric by politicians or others is enhanced. As stated in the CASAC submission ‘At the very least political pronouncements in favour of maximum force would have exacerbated a prevailing climate of confusion within the SAPS about the principles, which are supposed to guide members in using force.’48

73. The question that this submission is trying to address is ‘what are the structural or systemic issues’ that need to be addressed in order to ensure that incidents of this kind are not repeated? In this submission ‘Incidents of this kind’ may be understood to include not only situations classified as ‘public order’ situations but any situation where police action will unnecessarily increase the risk of harm to police officers, people who are believed to have been linked to acts of violence or other crimes, or other people.

74. In principle what is objectionable about the Marikana incident is not simply the scale of the incident related to the number of people killed and injured. The essential objectionable aspect of the incident is that it amounted to a situation where the SAPS deliberately implemented an operation that was likely to lead to confrontation, death and injury when this was not necessary. Whether or not any member of the SAPS violated any legal provision, the Marikana incident therefore constitutes an incident that from a professional policing perspective constitutes a case of ‘unnecessary force’.

75. **Recommendation 9:** The SAPS should develop a use of force policy that, inter alia, sets out the principles governing the approach that SAPS members should adopt in relation to operations or actions in which there is a likelihood that force may be used, especially if this is likely to involve the risk of death or injury to police officers or

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46 See for instance the NYPD which restricts the use of lethal force to situations of defence of life.
47 The last sentence refers to events within my own personal experience over the period 2011-2012.
48 CASAC submission, Paragraph 14 on page 32.
others. The policy should be publicised and promoted to ensure its visibility and accessibility to SAPS members.

76. **Recommendation 10:** The SAPS should review its existing mechanisms for reviewing the use of force, in particular the provision for shooting incident investigations in terms of 251, with a view to supporting implementation of the above policy and establishing a professional orientation towards the use of force within the SAPS.

77. **Recommendation 11:** The need for a professional orientation towards the use of force should also be addressed through basic and in-service training.

**THE GENERALISED USE OF THE R5 RIFLE IN POLICING IN SOUTH AFRICA**

78. My understanding is that the SAPS has already agreed that the R5 or similar weapons should not be used in public order policing and it is not necessary for this issue to be addressed in this submission.\(^{49}\)

79. However my impression is that there has been a move towards the use of the R5 by police in South Africa more generally such that many police, engaged in routine policing functions, are armed with these weapons. This is also an issue that has not been publicly documented. My impression is that these weapons are not appropriate or necessary in most contexts in which police are involved in South Africa and exacerbate the risks involved in the use of force by police in South Africa including those to ‘innocent bystanders’.

80. I note in this regard Mr de Rover’s remarks ‘I consider military assault weapons have no place in law enforcement, full stop, and that I say aware of particular problems of violence South Africa faces, but to me the solution is not in the police arming up, the police needs to arm down and smarten up.’\(^{50}\)

81. **Recommendation 12:** The SAPS should review the use of the R5 by SAPS members and restrict its use to circumstances where there is a clear and specific motivation for SAPS members to be provided with the weapon.

**THE ABSENCE OF MEANINGFUL ACCOUNTABILITY BY POLICE FOR THE USE OF FORCE**

82. The fact that there have been serious limitations in accountability is endorsed in the statements and/or evidence of all three of the international experts. The generally unsatisfactory nature of statements provided to the Commission is highlighted extensively in Mr White’s final statement. He for instance refers to ‘An overall lack of accountability and failure to accept responsibility, demonstrated by the way in which the SAPS evidence has been provided to the Commission’.\(^{51}\) The weaknesses of accountability are also implicated in (i.e. a cause of) the Marikana incident in so

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\(^{49}\) Issues in this regard are addressed in various submissions including submissions of Mr White, final, 7.5.10(e), p 113 and de Rover, at paragraphs 87-90 (page 20).

\(^{50}\) Transcripts, day 285, page 36984.

\(^{51}\) White, final, 4.1.3(a). See also at 4.2.14.
far as they reflect the fact that many SAPS members do not regard themselves as accountable for the use of force. In reflecting on this issue there are a number of factors that should be considered:

83. My understanding is that the incident exposes both the ability and orientation of many SAPS members to evade accountability. However the police ‘code of silence’ is a dimension of police culture in many countries. One issue that is of particular concern is where leadership appear complicit in efforts to conceal what has happened, or at the very least, do not actively support efforts to reveal the truth.

84. The problem is not confined to the denial and concealment of abuses of force or other offences involving police officers. Part of the underlying problem is a generalised inability to comply with official standards of performance (as reflected in performance targets) and conduct (codified in laws and regulations). In some respects the police are therefore involved in an elaborate charade that involves manufacturing the illusion of compliance with these standards. The ‘performance’ involved in pretending to be cooperating with and assisting the commission is therefore in some ways part of a general ‘way of operating’ within the SAPS.

84.1. The fact that the SAPS is involved in this type of practise at an institutional level is reflected if the SAPS annual report is juxtaposed against the report of the Khayelitsha Commission of inquiry released in August 2014. The highly sanitised version of policing in South Africa presented in the annual report, in terms of which the SAPS is constantly meeting, if not exceeding, performance targets, is starkly at odds with the picture of disarray that emerges from the report of the Khayelitsha Commission of inquiry, a picture of the reality of policing not only in Khayelitsha but in many parts of South Africa.

85. There are very serious limits on the ability of the oversight system to resolve these problems of accountability. The principal instruments of the oversight system for accountability relating to the use of force is the IPID (Independent Police Investigative Directorate) previously known as the ICD (Independent Complaints Directorate). In my work on the use of force by police I have often reflected on, and sought to explore, questions to do with the ability of the IPID/ICD to effectively investigate ‘deaths as a result of police action’ as well as (other) incidents where it is alleged that police have used excessive force. Factors limiting the ability of the IPID to investigate these deaths effectively may be seen to include:

85.1. Related to the resource and capacity constraints which they face the IPID has not always been able to attend all death scenes and even where it attends such scenes only ‘takes over’ the investigation from the SAPS when there are overt reasons for suspicion.

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52 This perspective has been shaped by correspondence with Andrew Faull.
53 Note that most deaths are reported to the IPID in terms of statutory provisions requiring that the police report these deaths. Related to this most cases of ‘death as a result of police action’ that are brought to the attention of the IPID do not involve allegations that police have acted unlawfully.
85.2. Where IPID investigators do attend the scenes at which shootings have taken place this is often after having travelled a substantial distance with the result that there is a considerable delay between the killing and the time at which the investigator gets to the scene.

85.3. Even in serious cases IPID investigators often have to work alone rather than forming part of an ‘investigative team’. (The actual ‘crime scene’ investigation at the scene of a death is done by a crime scene expert from the SAPS Local Criminal Records Centre (LCRC) and the IPID also mostly uses SAPS ballistics experts, on occasions where such experts are called to the scene and send evidence to SAPS labs for ballistic and other forensic tests).

85.4. Though legal provisions require SAPS cooperation with the IPID, this does not extend to an obligation on police members who have been involved in a shooting to provide a statement to the IPID on the circumstances or justification for the use of lethal force as police are issued with warning statements and may exercise the right to remain silent.

85.5. In practice the police also have discretion as to when exactly to call the IPID to the scene. Not only is there a factor of delay but police also in general, by virtue of their occupation, have the know-how on how to manipulate evidence in order to cover up unlawful shootings if they wish to. In interviews that I conducted with ICD investigators in 2010 several of them indicated that they believe that police practises intended to obstruct investigations including deliberate delay in the reporting of shooting incidents, planting weapons at locations where people have been killed by police, and the ‘homogenisation’ of statements by those police who were present during the incident.

85.6. A further limitation on the ability of a body such as the IPID to achieve prosecutions against police officials implicated in acts of criminality is that prosecutors generally work quite closely with police and, related to this, may be inclined to soft peddle prosecutions against some SAPS members.

85.7. As part of my work on the use of force I have taken an interest in matters related to ICD and IPID investigations of killings by police. I assume that a significant majority of these killings are carried out by police who are acting within the law and therefore do not assume that the majority of them should provide the basis for prosecutions or convictions. Nevertheless my understanding is that, though it pertains to a minority of killings, there is a consistent problem of unlawful uses of force by police ‘in the line of duty’. In reviewing reports of convictions obtained by the ICD/IPID I have come to the conclusion that it is very rare for the ICD/IPID to achieve a conviction for killings of this kind and that high proportion (likely to be the majority) of convictions obtained by the ICD/IPID are for cases where police officers have killed their wives or other romantic partner. The IPID is in general not able to secure convictions in cases where the police have acted unlawfully in the line of duty. (I have the impression that, though the IPID does not have a strong
conviction record regarding deaths resulting from unlawful police action, the requirement that it investigate deaths does have some deterrent impact in discouraging unjustified use of lethal force).

85.8. Examination of various high profile cases including the prosecution of SAPS members for the death of Andries Tatane and the case (currently still in court) of the Cato Manor Organised Crime Unit who are alleged to have been linked to a large number of extrajudicial executions, would appear to support this view. In the latter case the police were only brought to court after an expose in one of the Sunday newspapers in 2011. In interviews that I conducted in 2010 ICD investigators in KwaZulu-Natal indicated that they believed that there was a pattern of extrajudicial executions but that the police generally ‘staged’ these in such a way as to make it very difficult to prove that they had acted unlawfully.

85.9. The serious limitations on the ability of the IPID to hold police officers accountable in relation to the (non-lethal) use of force is also illustrated by the report of the Khayelitsha commission of Inquiry. Over pages 417-418 the report states, inter alia that: The Commission was provided with four box files of finalised complaints relating to the three Khayelitsha police stations for the period 1 April 2010 – 31 August 2013. In all, there were 87 closed cases relating to the period. 61 of the 87 cases had been closed by the ICD or IPID as unsubstantiated, and referred back to SAPS. [...] The Commission has not been in a position to investigate the 67 complaints closed as unsubstantiated, but a perusal of the nature of the complaints which were closed “unsubstantiated” included many complaints of alleged attempted murder, assault with intent to do grievous bodily harm, common assault and discharge of a firearm. [...] The Commission is not persuaded that these matters are being treated with sufficient care and concern. [...] The Commission accordingly concludes that the manner in which complaints relating to SAPS members at the three Khayelitsha police stations, and other issues of alleged misconduct, have been addressed in the past by the ICD, and are currently being addressed by IPID is a factor that has in all probability contributed to the breakdown in relations between the Khayelitsha community and SAPS. The Commission finds it completely improbable that 61 of the 87 matters referred to the ICD and/or IPID could properly, on the ordinary meaning of the word, be described as “unsubstantiated” [...].

86. Questions to do with the IPID are alluded to in this passage from the evidence of Mr de Rover: ‘But the prompt bringing of IPID to that scene, which is a requirement and IPID not having the resources to adequately manage that incident, ah really. That makes it really difficult because now you create a reality where you’ve done what you’re supposed to do and you’ve given it to an organisation that sends two people there to initially administer the incident on site. That is inadequate and it is unacceptable because then it would have been much better to actually realise that that would likely produce [...] I don’t know if SAPS was in a position to judge what
the resources were that IPID could make available.

86.1. My understanding of this passage is that the key point that Mr de Rover raises here is that IPID did not send enough investigators to the scene and that there was therefore no chance that the scene would be investigated effectively.

87. In the passage quoted here Mr de Rover also appears to raise a question about whether the SAPS would have been aware that the IPID would not be able to dedicate sufficient resources to the investigation. My impression, though I acknowledge that it is based on limited information, is that the tactical units tend to regard the IPID in a dismissive manner and do not take it very seriously. Therefore the fact that they anticipated an IPID investigation may have been largely irrelevant.

87.1. My understanding is that the severe limitations on the ability of the IPID to ensure police accountability in relation to the use of lethal (and other) force is accentuated in relation to specialised units and particularly in relation to ‘tactical units’ such as the STF, NIU and the TRTS. This is partly because the ‘scenes’ of fatal shootings by these units are often fairly complex. However the IPID is also dependent on the SAPS for cooperation in various forms and has to ensure that it projects itself to the SAPS as ‘reasonable’. This also serves as a constraint against carrying out more probing investigations in many cases. My impression is that factors to do with ranks and informal status considerations also become more prominent in relation to the tactical units leading to a situation where IPID members are unable to impose effective authority over members of these units in securing their cooperation with investigations. In an interview that I conducted with an ICD investigator in 2010 s/he:

87.1.1. Referred to the Special Task Force as ‘untouchables’.

87.1.2. Said that ‘They do give statements but it is difficult to insist that they give in their firearms for ballistics tests’.

87.1.3. Referring to an ICD investigations in the aftermath of a shootout with a gang of heavily armed cash-in-transit robbers s/he acknowledged that there is a ‘politics’ to how one handles these investigations which makes it difficult to investigate them properly. S/he said that ‘One would need to assess what one would achieve [by pursuing the possibility that some police might be implicated in criminal conduct] particularly when the bigger picture is of a legitimate police action against heavily armed criminals, and therefore might decide to let this one go.’

87.2. It is known that police often obstruct people who want to lay a complaint against a police officer at a police station. It appears possible that this may be additionally difficulty in relation to the ‘tactical’ units. There are at least two media reports that I am aware of that highlight difficulties that people have had.

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54 Transcripts, day 286, 37129
55 As suggested in White, final, 4.3.6
56 The following points are from my notes on the interviews compiled at that time (July 2010).
in laying complaints against TRT members.57

87.3. It may be reasonable to argue that these units to some extent function in such a manner as to be largely exempt from oversight not only from the IPID but from any other body. The information provided on the units in the SAPS annual report each year is largely perfunctory or non-existent. The problem of accountability is a characteristic problem of these kinds of units internationally.

87.3.1. I note here that during the period from 2010 onwards the SAPS has been inconsistent in describing the profile of the units in Operational Response Services. At one point the SAPS website appeared to identify TRT as part of Operational Response Services.58 As far as I understand, they are not generally identified as part of the ORS division. As far as I know since the establishment of the TRTs in 2009 SAPS annual reports have largely omitted to even mention them.

88. During his appearance before the commission Mr de Rover indicated that the impact of the IPID may be to discourage police from providing information. My understanding of Mr de Rover’s evidence on this point is the following:59

88.1. Police should be able to be relied on as ‘witnesses of truth’. This implies that ‘You’re a witness of truth and we will treat you as such and hold you to that truth’. In his work as a police officer the courts always encouraged them to give as much detail as possible. Detail, including detail regarding one’s state of mind as a police officer during the incident, is necessary to evaluate whether a shooting is justified.

88.2. Many SAPS members merely signed the warning statement provided to them by the IPID and elected not to say anything further. Where SAPS members have made statements these generally ‘fall far short’. In addition to the fact that SAPS statements are lacking in detail the SAPS members that he spoke to demonstrated ‘a general reticence to be specific with me on detail’ which he attributes to the fact that they were issued with warning statements.

88.3. From a professional point of view Mr de Rover regards it as problematic that SAPS members were issues with warning statements right at the beginning of the [overall] investigation. The reluctance of SAPS members to speak to him was also explained to him being a consequence of IPID’s involvement. He interprets this to mean that, as a consequence of the status


58 Estimated date 2011.

59 This is my own summary of the evidence of Mr de Rover as reflected in the commissions transcripts for day 286, pages 37122-37124.
that they now have as potential suspects in a crime, police officers involved in the incident ‘are no longer witnesses of truth [who] because of their public office can help you and assist you and should assist you to piece together in detail what happened’. They are now suspects ‘because these warning statements basically [...] tell them you’re a suspect of murder now and you are advised to avail yourself of legal support. You are advised of the fact that you do not have to say anything if you do not wish to do so’. Mr de Rover indicates that it is understandable that police have chosen to withhold information. ‘Now personally I think [...] if I can’t really oversee the consequences of speaking with that warning being given, I’d rather say nothing for the time being’. The impact of the IPID’s involvement (implicitly its focus on investigation in relation to the possibility that police officers have committed a crime) is to discourage police from freely and openly accounting for their actions. Essentially the fact that police are now placed in the position of being criminal suspects has the consequence that police ‘clam up, they don’t say anything’.

88.4. Mr de Rover’s view is that the preferable position (what he refers to as ‘normal circumstances’) is that there should be a delay in involving IPID. He appears to imply that they would only be involved once police officer had been asked to provide information in terms of their position as ‘witness to truth’ (‘the public official role’). This involves engaging with police officers in relation to the expectations that the police organisation should have of ‘integrity and professionalism’. ‘You’d first walk that path and if you’re not satisfied that you are getting what you need you can still change tact. If there is evidence that a police officer has committed a criminal offence a different approach is then applied in terms of which ‘we’ll call you a suspect and advise you of your rights that come with that status’.

89. My understanding is that it is likely that a number of the police officers at Marikana may be guilty of criminal offences. In making this point I am referring primarily to police officers who were involved in using force at ‘Scene 2’. (Though the point may have equal relevance to Scene 1 my understand is that the evidence seems to suggest that at least some of the police who used force at scene 1 may be regarded as being justified on the basis that they believed they were being attacked and therefore their actions amounted to ‘putative self-defence’). It is therefore possible that many of the police officers had a personal interest in concealment of the truth.

89.1. More generally I believe, whether through habit or formal or informal pressure, the approach that many SAPS members have adopted is guided by certain ‘rules’ to the effect that

89.1.1. They should not say anything that would incriminate another SAPS member and especially not any senior member, and
89.1.2. They should make sure to support the SAPS official narrative of self-defence, and

89.1.3. They should give limited detail to avoid saying anything that might result in their being 'caught out'.

89.2. I therefore do not believe that the warning statements issued by the IPID were the sole reason why SAPS members have concealed information.

89.3. Nevertheless in so far as I have correctly understood Mr de Rover’s evidence I agree with the contention that the impact of placing police officer’s in the position of being criminal suspects has the consequence of discouraging police from providing truthful accounts of shooting incidents that they were involved in. The essential point is that the way in which requirements for accountability are structured in South Africa in fact reinforces the impact of the ‘code of silence’ rather than supporting accountability.

90. The impact of the current ‘status quo’ is also, as far as I understand, to discourages police from being able to reflect on incidents in which they have been involved with a view to learning lessons and improving police practise. Alongside the problems of accountability the SAPS response to the Marikana incident has also exposed the very limited ability of SAPS members to reflect on their handling of specific incidents with a view to learning lessons. The issue is mentioned in the final statement of Mr White as well as by Mr de Rover during his appearance before the commission to the effect that ‘my reading of the responses I got in meetings where I tried to push this point’ was that ‘They equate lessons learned with mistakes made, [Page 36930] rather than saying I have an experience and I learn from that experience, and whether that was a good experience or a bad experience I seek to further the learning organisation model and I seek to improve my professional practices, and I think there has been a genuine reticence on that perception of lesson learned equals mistake made, for them to be as forthcoming as you would have wanted them to be.

91. Effectively the impact of the way in which the accountability system operates contributes to members often being very guarded in their statements, responding in a defensive manner and providing minimal information about the event. Rather than making use of the opportunity to analyse and evaluate the way the situation was handled, members give a one-dimensional depiction of events which focuses essentially on demonstrating that ‘one’s actions were reasonable, acceptable, right, and to be accepted under the circumstances’. Not only does the approach to investigation motivate the police officer to provide an account of what happened, which is intended to sanitise his or her conduct, but the need to do so also has the

60 White, final, 4.2.23
61 Transcripts, day 285, page 36929 - 36930
effect of discouraging the police officer from discussing the incident in a more open and candid way.

92. The Marikana incident therefore highlights various aspects of the current accountability system that up to this point have received limited attention. On the one hand it demonstrates powerfully the degree to which members of the SAPS, and the SAPS as an organisation, are able to resist accountability. The stark reality revealed by the incident is that the state can gun down 34 people in an afternoon without it being necessary for the officers involved to account for their actions in doing so. The incident also highlights the fact that the current accountability system appears to detract from the potential for frank discussion and assessment of incidents in which police are involved in the use of force.

93. The Marikana incident therefore raises an issue which is fairly complex: while it should be possible to rely on police officers to provide a full account of incidents in which they have been involved in the use of force in so far as they may be regarded as criminal suspects they are also entitled to the right to silence in relation to possible criminal proceedings that may be instituted against them.

93.1. It would appear that there may be ways of resolving this issue that do not undermine the rights of police members. For instance one option would be to require police officers to make full statements and/or to submit to questioning in relation to incidents in which they have been involved but to provide that statements or information provided under these circumstances cannot be used in prosecutions against them.

93.2. I have attached a chapter by Carl Klockars on this question as Annexure C

94. **Recommendation 13** – The South African Law Reform Commission should be asked to investigate questions to do with the accountability of police in relation to the use of force including the possibility that there should be some form of mandatory statement and make recommendations in this regard.

95. **Recommendation 14**: Parliament should review the existing SAPS provisions for accountability of the ‘tactical units’ and make recommendations for more systemic oversight of their functioning.

**CONCLUSION**

96. It is hoped that this submission will be of assistance to the Commission in reflecting on ‘structural or systemic issues’ that need to be addressed in order to try and ensure that incidents like the Marikana incident are not repeated.

97. Various submissions have argued that the Marikana incident is unique and if the Commission is to focus on the systemic issues then it may have to reflect on what ‘type of incident’ Marikana represents. The expert submissions by Mr White and Mr Hendricks have for instance focused on a critique of the approach applied by the
police at Marikana in terms of a professional approach to the conduct of public order operations.

98. However this submission argues that the structural and systemic issues highlighted by the Marikana incident are issues that cut across the SAPS as an organisation. In line with this it argues:

98.1. That ‘Incidents of this kind’ may be understood to include not only those situations classified as ‘public order’ situations but any situation where police action will unnecessarily increase the risk of harm to police officers, people who are believed to have been linked to acts of violence or other crimes, or other people; and

98.2. That in principle what is objectionable about the policing of the Marikana incident is not simply the scale of the incident related to the number of people killed and injured. The essential objectionable aspect of the incident is that it amounted to a situation where the SAPS deliberately implemented an operation that was likely to lead to confrontation, death and injury when this was not necessary; and

98.3. That, whether or not any member of the SAPS violated any legal provision, the Marikana incident therefore constitutes an incident that from a professional policing perspective constitutes a case of ‘unnecessary force’.

99. A key issue that the analysis contained in this submission highlights is that the current model of control and accountability for the use of force is not effective. Not only does the current system not ensure that police avoid unnecessary uses of force but it also does not ensure accountability and is also not conducive to the creation of an environment where police in South Africa can engage in critical reflection about incidents in which they, and their colleagues, are involved in the use of force.

100. In looking back at the apartheid system people tend to focus on the abuses of force by police. Despite the fact that there were widespread abuses it is nevertheless true that the formal system that was established was legalistic in nature. In the South African Police the essential mechanism for ‘management of force’ was a post shooting review, carried out by an officer, that was supposed to focus on whether the shooting was lawful or not. Issues to do with ‘minimising the use of force’ or ‘protecting life’ and with the overall handling of situations where never the subject of the review. The apartheid era system essentially remains in place except that another legalistically orientated investigation, carried out by the IPID, has been grafted on top of it. This system is inadequate because it fails to address issues to do with minimising unnecessary force.

101. In order for a police organisation to minimise the use of force effectively it needs to optimise understanding and learning about questions to do with the use of force. This cannot be done solely through the training academy but requires that mechanisms be put in place through which uses of force are evaluated, and lessons learnt from them, through the management system. In terms of this kind of approach therefore the key mechanism for ensuring that proper standards are
adhered to is the management system. Accountability bodies serve as an additional safeguard but the model does not rely on these bodies to ensure that force is used in an accountable manner, as is currently the case.

102. Effective control of the use of force can only properly be achieved through the development of an orientation towards the professional use of force within the SAPS. As indicated this involves an approach to the use of force by police that is highly conscious of:

102.1. The risks associated with the powers and duties that police have to use force; and

102.2. The obligation of the police to act in such a manner as to protect human life (including the safety of police officers) and to avoid the unnecessary use of force.

103. The key recommendations put forward in this proposal that would support the development of such an orientation are:

103.1. Recommendation 7 – Government and the SAPS should focus on the development of a professional senior level police leadership corps.

103.2. Recommendation 9: The SAPS should develop a use of force policy that, inter alia, sets out the principles governing the approach that SAPS members should adopt in relation to operations or actions in which there is a likelihood that force may be used, especially if this is likely to involve the risk of death or injury to police officers or others. The policy should be publicised and promoted to ensure its visibility and accessibility to SAPS members.

103.3. Recommendation 10: The SAPS should review its existing mechanisms for reviewing the use of force, in particular the provision for shooting incident investigations in terms of 251, with a view to supporting implementation of the above policy and establishing a professional orientation towards the use of force within the SAPS.

103.4. Recommendation 11: The need for a professional orientation towards the use of force should also be addressed through basic and in-service training.

103.5. Recommendation 13 – The South African Law Reform Commission should be asked to investigate questions to do with the accountability of police in relation to the use of force including the possibility that there should be some form of mandatory statement and make recommendations in this regard.

103.6. Recommendations 1 and 12 are also directly relevant to this issue.

104. Recommendations 2, 3, 4, 5, and 8, may be seen as intended to support such an orientation within the public order policing environment.

105. It must be emphasised that, to the best of my knowledge, the development of a professional orientation towards the use of force is highly compatible with the concern to improve the safety of the police and members of the public and to improve overall police effectiveness, legitimacy and credibility. My understanding is
that it would also support much greater accountability by police for the use of force.

106. While I believe that militarisation/demilitarisation are useful concepts for analysing police reform in South Africa I do not believe that it is useful to define a programme for the way forward simply in terms of concepts of demilitarisation and community policing. It is evident that one of the challenges that is faced by police in South Africa is in relation to the use of force. This is partly an issue that relates to questions of police safety. Police are also obliged to intervene in the public interest in some situations through the use of force. It is important that police be supported in the optimum way in doing so. There is a need for people who are engaged with police reform to be sensitive to the challenges that police face in relation to the use of force.

107. There is therefore a need for those involved with police management and police reform in South Africa to deepen their engagement with questions to do with the police use of force. The approach is consistent with what may be regarded as a ‘professional policing’ orientation. While the ‘community policing’ paradigm has value, it does not provide a basis for addressing questions to do with the use of force and, in the past, has led to questions of this kind being neglected.

108. Whatever measures may be put in place to bring about justice or reparation, the terrible events of August 2012, will not be undone by the Commission or by any other process. If the legacy of Marikana is to be addressed however one way in which this will need to be done is by focusing on ‘deep level’ lessons that the incident holds for policing in South Africa. It is hoped that this submission may be of assistance in helping to reflect on how these lessons should be understood.

END OF SUBMISSION: David Bruce, 27 October 2014.