

# POLICING POWERS, POLITICS, PRAGMATISM AND THE PROVINCES

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## Revitalising policing oversight in the Western Cape<sup>1</sup>

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*The draft Western Cape Community Safety Bill, introduced in the provincial legislature in February 2012, is part of a broader provincial government initiative to tackle issues of safety in the province. The Bill sets out to concretise the powers allocated to provincial governments by the Constitution. Specific provisions reflect the wish to give effect to Section 206(1) of the Constitution in terms of which provinces are to be consulted in the formulation of national policing policy. But the main focus of the Bill is on provincial policing oversight powers. In line with the Civilian Secretariat for Police Service Act, the Bill aims to formalise the role of the provincial Department of Community Safety as distinct from the provincial secretariat. The Bill provides for inspections to be carried out at police stations by Community Policing Forums (CPF). This aspect of the initiative has the potential to redefine the relationship between CPFs and the police. It is also envisaged that a provincial ombud's office will be created, in line with provisions of the Constitution, authorising provinces to investigate complaints against police. The Bill is of interest as it provides a model for fuller engagement by provincial governments in policing matters. At the same time the introduction of the draft Bill raises questions about potential political interference that the Bill does not address.*

One of the characteristics of the South African Constitution is the clear language in which it is written. But one section that consistently causes confusion is Section 206. This deals with the distribution of powers between the national and provincial governments over policing matters.<sup>2</sup> The section is the product of contestation during the negotiations that preceded the formal transition to democracy over whether police should be controlled at national or provincial level.<sup>3</sup> Ultimately political authority over the SAPS lies with the national Minister of Police who is 'responsible for policing' and 'must determine

national policing policy', though s/he must do this 'after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives'.<sup>4</sup>

In Section 206 terms such as 'overseeing', 'assessing', 'monitoring' and 'promoting' are used to define provincial powers. This is generally taken to indicate that the powers that may be exercised by a province fall short of the authority to directly intervene in operational decision making. In this respect the constitutional provisions are consistent with democratic norms, which broadly provide that police should be

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protected from interference in operational decision making but should be accountable to democratically elected governments for their actions and performance.<sup>5</sup>

At the same time there is admittedly a large element of ambiguity in Section 206. For instance, it is not self-evident as to what the parameters of the authority to 'promote good relations between the police and the community' might be. As with any authority to intervene in policing matters, these provisions may therefore also be abused to provide cover for political interference in operational decision making. Indeed, though the most pressing current concerns about inappropriate interference in policing matters relate to issues at the national level,<sup>6</sup> there have also been instances of alleged inappropriate interference by provincial governments in policing matters. In 2005, for instance, a police raid on the City of Cape Town's procurement offices was allegedly carried out at the behest of the provincial Premier and was believed to be related to a factional dispute within the Western Cape African National Congress (ANC).<sup>7</sup>

To what degree provincial political interference in policing matters is a consistent problem is largely unknown. From the perspective of provincial governments the problem that has most frustrated them has been that the authority conferred on them by Section 206 is not recognised by the SAPS. In a 2004 paper Mistry and Klipin indicate that provinces frequently depend on the 'goodwill of people and on effective interpersonal relations' in securing 'good working relations' with the South African Police Service (SAPS).<sup>8</sup> Subsequent reports confirm that this continues to be a problem. Thus requests for crime statistics or other information are frequently denied,<sup>9</sup> notwithstanding the fact that the rights of provincial government, including the right to receive reports from the police,<sup>10</sup> are recognised in Section 206.

It is partly in response to the latter problem that, in February 2012, the Western Cape provincial government published for comment a draft

Western Cape Community Safety Bill (henceforth 'the Bill').<sup>11</sup> A principal purpose of the Bill is to comprehensively outline the oversight powers of the provincial government in terms of section 206 of the Constitution. The Western Cape provincial government has interpreted Section 206 of the Constitution as authorising it to perform the following police 'oversight' functions:<sup>12</sup>

1. Monitoring police conduct<sup>13</sup>
2. Overseeing the effectiveness and efficiency of the police<sup>14</sup>
3. Promoting good relations between the police and the community;<sup>15</sup> and
4. Dealing with complaints against the police about inefficiency or a breakdown in relations between the police and community<sup>16</sup>

The Bill is of considerable interest in that it represents an attempt by the provincial government to remove ambiguities about the policing powers that it exercises. Some of the key features of the Bill include provision for mandatory reporting by the police to the provincial government,<sup>17</sup> the inspection of police stations<sup>18</sup> that is envisaged will be carried out by CPFs, the creation of a provincial 'Ombud's office', and the deployment of oversight teams to observe and record police conduct at demonstrations.<sup>19</sup>

After outlining the political context that forms the background to the Bill this article will focus on four issues raised by the Bill that are relevant to the nature of civilian oversight of police and the architecture of police accountability in South Africa. These relate to the implications of the Bill for:

- Optimising the provincial contribution to police policy making
- Provincial institutional arrangements
- The function of CPFs
- Mechanisms for dealing with complaints by civilians against the police

In conclusion the article returns to the question of political interference.

## POLITICAL CONTEXT

It is common cause among the major political parties in South Africa that issues of crime and safety are one of the biggest concerns of the electorate. In response, national government has, over the past ten years, annually increased the number of police personnel and the size of the police budget. The SAPS is now one of the largest national police services in the world<sup>20</sup> with a staff complement of 194 201, including 152 830 operational police officers<sup>21</sup> and a budget amounting to R65 billion in the 2012-2013 financial year.<sup>22</sup>

In the Western Cape the total staff complement of the SAPS is 24 304, representing 12.5% of the national total, including 19 653 operational police officers.<sup>23</sup> The Western Cape SAPS therefore constitutes a substantial body of personnel, utilising several billion rands of public money. Notwithstanding this substantial investment in policing, crime continues to be a serious problem in the Western Cape. For many years the province has recorded one of the highest murder rates in the country.<sup>24</sup> In 2010-2011, for instance, the official murder rate in the province was at 44,2 per 100 000, second only to that of the Eastern Cape.<sup>25</sup> The province also has a prominent gang culture.

From 1994 to 2009 the Western Cape provincial government was controlled by the ANC but in the 2009 elections the ANC was defeated by the Democratic Alliance (DA), with the DA winning 22 seats in the 42 seat provincial legislature.<sup>26</sup> Since then the DA has published a programme of action that includes initiatives focused on 'increasing safety' in terms of 'Strategic Objective 5'.<sup>27</sup> This includes optimising its use of constitutional police oversight powers as well as other initiatives to increase the provincial government's overall contribution to safety (see box). The Bill is intended to advance this broad objective. In addition to improving provincial oversight of the police the Bill provides for the accreditation of neighbourhood watches, partnerships with community organisations, the registration of private security organisations, and the establishment of a Provincial Safety Advisory Board.

### Strategic Objective 5 – the Western Cape provincial government's plan to improve safety in the province

The draft Bill forms part of a broad-ranging initiative by the provincial government in terms of 'Strategic Objective 5' (SO5) of its 2010 strategic plan. SO5 focuses on strengthening the provincial government's contribution to safety. Other initiatives under SO5 include: (i) Efforts to improve the overall contribution to safety, and the efficiency of security spending, of all departments of the provincial government; (ii) improving traffic enforcement and the contribution of traffic enforcement to overall crime prevention; (iii) identifying innovative strategies for reducing opportunities to commit crime with a focus here on adapting and piloting technological or other strategies.

Initiatives under SO5 therefore appear strongly orientated towards policing and situational crime prevention rather than addressing the more deep rooted causes of crime.<sup>28</sup> Though not a prominent feature of the Bill there is however some space for community or developmental crime prevention. The Bill envisages that the provincial member of the executive council (MEC) responsible for safety<sup>29</sup> will have the authority to enter into contracts with organisations for the design, finance or operation of community safety initiatives.<sup>30</sup> The envisaged Provincial Safety Advisory Board would possibly also play a role promoting this type of policy orientation. Those who are looking for more evidence of developmental crime prevention should also take into account initiatives under other provincial government 'strategic objectives', including those targeted at job creation and improving education, health and 'social cohesion'. For instance, plans to improve 'social cohesion' include substance abuse programmes and special programmes for children 'at risk of falling into a life of crime'.<sup>31</sup>

The DA is not only a political presence in the Western Cape but constitutes the main opposition to the ANC in the national parliament, and wishes to present itself as a credible alternative to the ANC at national level. It may therefore be assumed that the Bill is motivated by the DA's desire to optimise its leverage to intervene in the policing and safety arena, not only with a view to improving safety in the province but also, presumably, to win credibility with the broader

South African electorate. As such, the Bill may be seen as an expression of a broader political strategy and may for this reason be contested by the DA's political opponents. Lynne Brown, the ANC leader in the Western Cape, has already criticised the Bill, stating that it will turn the province into a police state and draw the province into a constitutional crisis.<sup>32</sup>

No doubt in anticipation of criticism of this kind the Bill is explicitly framed within the parameters of the Constitution and of co-operative government. The Bill is also consistent with provisions of a new ANC discussion document that motivate that the roles and responsibilities of provinces 'be legislated so as to remove any uncertainty and disputes' and that the powers and functions of provinces be strengthened.<sup>33</sup> The explicit purpose of the Bill is to strengthen oversight over police and the suggestion that it will turn the province into a police state is unfounded. Nevertheless the ANC criticism may be valid in so far as it emphasises the point that the consolidation of provincial powers provided for in the Bill may enhance the risk of political interference or influence.

This is also not the first time that a provincial government has sought to comprehensively re-orientate its safety and security strategies. In 2006 the Gauteng Provincial Government developed a 'Gauteng Safety Strategy',<sup>34</sup> which had much in common with the Western Cape initiative. One significant difference was however that the Gauteng strategy included a focus on shaping the police response to armed robbery<sup>35</sup> and arguably therefore involved direct intervention in aspects of operational policing. The Gauteng strategy was driven by the MEC for Safety and Security at the time and lost impetus once the MEC was moved to another portfolio. On the one hand this highlights the point that the future prospects for the Western Cape strategy may depend on the electoral fortunes of the Democratic Alliance in the province. But unlike the Western Cape initiative, the Gauteng strategy did not involve provincial legislation. Unless it is subsequently repealed it will therefore not only be an instrument of the current government but also of governments that succeed it.

Unlike the current Western Cape initiative, the Gauteng initiative was undertaken by an ANC-led provincial government at a time when the national political leadership of the police and the national secretariat was largely dormant. Since then the political environment has changed, with the national secretariat having been revitalised and involved in its own initiative to define the policing policy environment in the form of a White Paper review that is expected to be published shortly.<sup>36</sup> A question that is therefore yet to be answered is how policy measures provided for in the Bill will compare to those in the White Paper review. With this currently unanswerable question in mind this article now turns to an examination of specific provisions of the Bill.

## THE BILL

### Police reporting and provincial policy making

Section 15 of the draft Bill provides for mandatory reporting by the SAPS provincial commissioner to the provincial government on a number of prescribed matters, including lost or stolen police firearms, arrests and convictions, and service delivery complaints received by the police.<sup>37</sup> This is intended to ensure that police cooperate with provincial government requests for information. Surprisingly, however, reportable matters listed under Section 15 of the Bill do not include crime statistics, though there is a clause allowing for the MEC to require that reports be provided on 'any other matter as may be prescribed'. The omission of crime statistics appears to reflect a strategic decision on the part of the provincial government to avoid the inclusion of provisions that are likely to bring it into open conflict with national government around the Bill. In so far as this may jeopardise the potential for provincial access to up-to-date crime statistics, it may have negative implications for oversight. Current information on reported crime is fundamental to timely oversight of police service delivery.

The provisions that require police to provide information to the province are supposed to assist it to make better use of its right to be consulted in

the determination of policing policy by the national minister. As mentioned earlier, Section 206(1) of the Constitution requires that the minister must take into account 'the policing needs and priorities of the province as determined by the provincial executive' in formulating national policing policy. Information received from the SAPS as well as from other sources (see the discussion of station inspections below) will be fed into an 'integrated information system' also provided for in the Bill, that is intended to be used to analyse provincial needs and priorities.<sup>38</sup> In turn this will provide the basis for an annual report on policing in the province<sup>39</sup> that will inform the determination of policing needs and priorities by the provincial cabinet.

It is not clear how the national minister will respond to an attempt to increase the role of the province in shaping policing policy. One commentator suggested that the Bill is likely to have little effect since the national minister needs only to be able to demonstrate that he has 'consulted' the provinces, and 'taken into account' their views, but he or she can nevertheless 'do whatever he likes'.<sup>40</sup>

In late 2011 the Western Cape government made an initial foray into this area, calling for specialised gang and drug police units to be reinstated in the province.<sup>41</sup> A subsequent press report indicated that a decision had been made not to re-establish the units. A meeting had been held between the national minister and the provincial premier, the MEC for Safety and the SAPS Commissioner, at which it had been decided not to 'impose' on the operational level, with the minister indicating that he had been informed by the provincial commissioner that 'right now, there is no need for a gang unit'.<sup>42</sup> The incident illustrates the limitations of provincial powers to shape policy. Whether or not provincial policy proposals are taken seriously may depend very much on the whims of the national minister. In addition, if the national minister is not engaged with the policing portfolio,<sup>43</sup> or is otherwise hostile to provincial proposals, this may have the effect of neutralising provincial policy contributions.

## Provincial secretariats and institutional arrangements

In order to fully understand the implications of the Bill it is necessary to mentally disentangle the ideas of 'provincial secretariat' and provincial 'Department of Community Safety'.<sup>44</sup> Since the mid-1990s when they were established there has been a tendency for these entities to be conflated. This is illustrated by a sign previously outside the Western Cape Department of Community Safety which included the words 'Provincial Secretariat for Safety & Security' under the name of the department, indicating that the names were, in effect, interchangeable. It was not seen as necessary to differentiate between them, as provincial secretariats were believed to be 'independent of the national secretariat' and primarily accountable to the MEC.<sup>45</sup>

The provisions for a 'police civilian secretariat' in terms of Section 208 of the Constitution indicate that this is a national entity to be provided for by 'national legislation' and to take direction from the Minister of Police. Though the Constitution makes no reference to the provincial secretariats, these are now defined by the 2011 Civilian Secretariat for Police Service Act<sup>46</sup> (the Secretariat Act) as arms of the national secretariat that are responsible for fulfilling its 'objects'. These include, amongst others, oversight over the police and advising the minister on policies.<sup>47</sup> Though subject to the 'principles of co-operative governance and intergovernmental relations contained in Chapter 3 of the Constitution',<sup>48</sup> each provincial secretariat must 'align its plans and operations' and 'integrate its strategies and systems' with those of the national secretariat.<sup>49</sup>

In terms of the Secretariat Act the provincial secretariats are in their entirety instruments for giving effect to the 'objects' of the national secretariat for police. They have nothing to do with the powers of oversight, conferred on the provinces, in terms of Section 206. Provincial governments that wish to give effect to their powers in terms of Section 206 and engage in other safety initiatives, and wish to avoid conflicts of authority with the national secretariat, must

therefore establish the provincial 'community safety' department as an entity which is entirely separate from the provincial secretariat. The Western Cape Bill therefore defines the provincial Department of Community Safety as an agency of the provincial government for giving effect to its Section 206 powers.<sup>50</sup> This appears to be consistent with the Secretariat Act, which institutionalises the distinction between the provincial department and the provincial secretariat with the heads of the two agencies defined as different from each other.<sup>51</sup>

There may however be some duplication of functions between the two agencies. One of the nine 'objects' of the civilian secretariat provided for in the Secretariat Act is 'civilian oversight' and some of the wording used in Section 17(2) of the Act resembles wording in Section 206(3) of the Constitution on the powers of the provinces. For legal purposes this is purely incidental and does not mean that the provincial secretariats are instruments for giving effect to the provisions of Section 206(3).<sup>52</sup> But in practice, if the provincial secretariat does give effect to these provisions in the Western Cape, there may be a duplication of functions with the provincial Department of Community Safety. As a result there is likely to be a need to rationalise and coordinate these functions. In principle this should not be a problem, as the Secretariat Act and draft Bill both emphasise the need for cooperation between the provincial government and the Secretariat.<sup>53</sup>

One point of difference between the Secretariat Act and the Bill concerns the appointment of the head of the provincial secretariat. According to the Secretariat Act this may only be done by the MEC 'in consultation with' the national minister.<sup>54</sup> The Bill confirms this provision, indicating that this must be done 'in consultation with' the national Minister of Police. But the Bill adds that the provincial premier must also be part of this consultation. In this respect therefore the Bill modifies the Secretariat Act and reasserts provincial authority within the appointment process. This would appear to be compatible with the intention that the provincial secretariats are not exclusively instruments of the national

secretariat but also instruments of 'co-operative governance'.

## CPFs and provincial inspections

When Community Policing Forums (CPFs) were first established in South Africa in the mid-1990s, it was envisaged that they would function to hold the police accountable at local level.<sup>55</sup> In practice, however, they have proved largely unable to perform this function. This is because of the power imbalances between CPFs and police, since police are not subject to CPF authority. In addition, related to the fact that CPFs are composed of non-specialist voluntary personnel, they often lack the capacity to make inputs into policing matters at station level that the police regard as credible.<sup>56</sup> The Western Cape initiative now intends to re-emphasise and re-instate the accountability function of CPFs, but as instruments of provincial rather than local level accountability.

The provincial government envisages that inspections (in terms of Section 4(1)(c) of the Bill) will be carried out by CPFs.<sup>57</sup> This approach is informed by and mirrors to some extent the operation of the Independent Prison Visitors System of the Judicial Inspectorate of Prisons.<sup>58</sup> It is envisaged that a standardised check-list will be provided to the CPFs. In return for conducting the inspections and providing the province with the data gathered the CPFs will receive a monthly financial allocation. They may distribute up to 60% of this to members to reimburse them for costs, or use it to pay members a stipend. CPFs will submit the results of each inspection electronically and these data will be analysed, along with other data, in the assessment of provincial needs and priorities.

It is envisaged that these inspections will be carried out up to ten times per month at each of the 149 police stations in the province. This implies that 1490 inspections will be carried out each month in the province.<sup>59</sup> This is far more extensive than any existing system of inspection and may prove to be excessive. For instance, the National Secretariat's 2011/2012 performance plan

envisages that a total of 100 inspections will be carried out each year nationally.<sup>60</sup> The province may also find that if there are stations that consistently perform well against the aspects listed on the check-list, the focus of inspections may need to be changed as they will quickly become redundant.

The effect of these measures will therefore be that, at least in carrying out these functions, CPFs will operate as mechanisms of provincial accountability rather than local accountability, sometimes thought to be a key aspect of their responsibilities. In reality this will result in very little change since CPFs only function to hold police accountable at local level in a limited manner and are in general not equipped to perform this function independently of outside support and assistance.<sup>61</sup> Some analysts who have in the past argued that accountability at local level needs to be strengthened, now argue that this must be a local government function rather than a function of CPFs.<sup>62</sup>

In so far as the inspections may contribute to strengthening provincial oversight over the police, and result in decentralisation of police accountability, these measures may prove to be positive.<sup>63</sup>

However, the inspections may negatively impact the partnership role of CPFs. Many CPFs provide support to police that is intended to improve the effectiveness of station responses to crime. This partnership role is facilitated by cordial relationships between the police and CPF members. By subjecting police more overtly to scrutiny, CPF inspections may destabilise these relationships. Police are typically resistant to efforts to extend scrutiny over them and some resistance to these inspections may be anticipated. In so far as station commissioners value their partnerships with the CPF it will be in their interests to support the CPF inspections. If the partnership role played by CPFs is undermined, police may have less direct support from community members. Harmonious police-community relations may therefore increasingly depend on mutual respect, as opposed to CPFs playing a lap-dog type of role.

This aspect of the Western Cape government's initiative is likely to contribute to reconfiguring the interface between police stations and CPFs. In principle the initiative is correct in seeking to 'promote good relations' more holistically by addressing issues of misconduct by police and improving their overall effectiveness. Addressing police-community relations is much broader than simply a question of whether the police and CPF members enjoy an amicable relationship. During an interview in preparation for this article, UCT academic John Cartwright argued that giving CPFs greater authority would be likely to increase their sense of self respect. Many of them would be performing a more productive role, and be less subordinate to, and dependent on the police than they have been in the past.<sup>64</sup> CPFs themselves may end up having a less cordial relationship with the police. But in so far as the inspections enhance accountability they may ultimately contribute to greater overall community confidence in the police and improved police-community relations more broadly.

It is not as yet clear how CPFs themselves will respond to this new approach to their role. Due to the fact that CPFs will now receive a regular, though modest, financial allocation it might be assumed that they will welcome this initiative. However, if CPFs choose to allocate a proportion of this income to reimburse members who are involved in inspections this may prove divisive and demotivating to those who are not paid. The financial allocations may therefore detract from the ability of CPFs to mobilise local voluntary energy. In addition, the Bill may result in CPFs and police being forced to renegotiate their relationships with each other. It remains to be seen how this will work in practice.

## The Ombud and service delivery complaints

In addressing complaints against police and police misconduct, representatives of the Western Cape provincial government have indicated that a major part of their emphasis will be on strengthening the functioning of existing mechanisms. One of the anticipated uses of the integrated

information system is for tracking and monitoring complaints that are lodged by members of the public at police stations.<sup>65</sup> Section 15(1)(e) of the Bill provides for the police to report to the MEC on complaints received. Station inspections carried out by CPFs will include checking to what degree the registers provided for in terms of SAPS Standing Order 101<sup>66</sup> are being used to record complaints against police, and what processes are in place to follow up on these complaints. It is also envisaged that the revitalised CPFs will play more of a role in mediating complaints if they are amenable to being addressed in this way.

Nevertheless, the draft Bill provides for the establishment of an Ombuds<sup>67</sup> office as an additional channel for the investigation of complaints. This is in line with Section 206(5)(a) of the Constitution, which authorises provinces to investigate complaints 'of police inefficiency or a breakdown in relation between the police and any community'.<sup>68</sup> It is envisaged that the Ombud will also act to identify systemic problems<sup>69</sup> and the Ombud will be required to submit a report to the MEC each year on complaints received. Where the Ombud is of the opinion that complaints, or a specific class of complaints, may best be dealt with by a commission of inquiry the Ombud may also make a recommendation in this regard to the provincial premier. The Ombud may therefore serve as a mechanism for activating the constitutional powers of the provincial government to establish such commissions.<sup>70</sup>

One question is whether the creation of the Western Cape Ombud is actually necessary. In addition to internal police complaints mechanisms and CPFs there is also the Independent Police Investigations Directorate (IPID), that has offices in each of the provinces. But although the IPID's predecessor, the Independent Complaints Directorate (ICD), dealt with service delivery complaints, these are not part of the IPID's mandate, which is focused on serious criminal matters.<sup>71</sup> There is a gap in the oversight architecture, with no formally defined external body for addressing service delivery related complaints pertaining to the SAPS. In some other provinces, such as Gauteng, the

Department of Community Safety plays a role in this regard. The Ombud is comparable to this. But instead of locating this function within a complaints monitoring unit within the provincial department, the Ombud will be external to the Department of Community Safety and therefore serve as a distinct and identifiable mechanism for dealing with complaints. It is envisaged that matters investigated will include 'serious complaints',<sup>72</sup> though in terms of the Bill any person may submit a complaint to the Ombud.<sup>73</sup>

On paper the jurisdiction of the Ombud is defined by Section 206(5)(a) and is distinct from that of the IPID. However it is not clear what types of cases will be regarded, for instance, as dealing with a 'breakdown in relations' between the SAPS and the community. The term may potentially include virtually any matter contributing to dissatisfaction on the part of one or more community members. This may imply that there are few limitations on the type of complaints that the Ombud can deal with. However, though Ombuds personnel will have a range of powers<sup>74</sup> they will not have the full powers of criminal investigation provided to IPID members. It may make sense for the Ombud to refer complaints of serious crimes to the Western Cape IPID and monitor IPID progress in addressing these. The Ombud will also be able to refer matters to other agencies, including the SAPS Provincial Commissioner, where appropriate.

Particularly if it can effectively coordinate its activities with those of these other agencies the Ombud may add substantially to the capacity to engage with complaints against police within the province. But in so far as the Ombud's mandate does overlap with that of the IPID, or other bodies, this may feed into confusion on the part of members of the public about whom to turn to when they have complaints against police. There will be a need for publicly accessible information that guides complainants on these questions.

## **CONCLUSION – THE LIMITS OF PROVINCIAL POWERS?**

It has been argued elsewhere that there is a need to amend Section 206 of the Constitution in order to

spell out the powers of the provinces more clearly. The current provisions are unnecessarily restrictive, even when considering that provinces have the potential to misuse their powers over police. Provinces could have a 'subordinate' policy-making authority, allowing them to develop policy as long as it does not conflict with national policies. The requirement that provinces can only shape national policy through the national minister has a number of disadvantages, not the least being that it makes the policy-making process unnecessarily cumbersome and limits the potential for responsiveness in policing policy.<sup>75</sup>

Rather than advocating for constitutional change, the route being followed by the Western Cape provincial government is the more pragmatic one of clarifying its powers, and seeking to optimise its contribution to safety and security, whilst working within the current constitutional and legislative framework. The draft Bill is of considerable interest partly because of the extensive consideration that has been given to how to optimise the provincial safety contribution within this framework. As such the initiative provides a sophisticated model for provincial governments to increase their role in promoting safety and security. Along with other Western Cape provincial government initiatives it has the potential to deepen the provincial government's contribution to policing and safety, and may have considerable value. Interventions in policing matters have up to this point been highly centralised and focused at national level. More substantive engagement by provincial governments holds the potential to contribute to a greater degree of flexibility, innovation and responsiveness within the South African policing system.

However, as indicated above, any authority to intervene in policing matters may potentially be abused to provide cover for political or other interference in policing, as has recently become a problem at national level. It may therefore be appropriate for the Bill to set out a 'non-exhaustive list',<sup>76</sup> including, for example, decisions to investigate, arrest or charge in a particular case' or decisions 'to appoint, deploy, promote or transfer individual police officers'. This list will define in

which matters members of the provincial government may not intervene. The Bill could also include provisions to ensure greater transparency in provincial government dealings with the police. It could, for instance, require that any instruction or request from the provincial government to the police is set out in writing, with a copy subsequently presented before the provincial legislature within a specified time frame. This has been done in some Australian jurisdictions.<sup>77</sup>

Should it become law, the Bill will define the powers of the current Western Cape government as well as any other government that may succeed it. It will be strengthened considerably if it not only sets out the powers of the provincial government on policing matters, but also clearly sets out the limits on these powers.



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## NOTES

1. This article was commissioned by the ISS at the request of the Western Cape Department of Community Safety. The Western Cape provincial government facilitated research for this report by paying for one night's accommodation in Cape Town as well as transport in Cape Town whilst interviews were conducted. The content and analysis were not subject to review by the Western Cape Department of Community Safety and reflect the author's own views and assessment. Thanks are due to Chandré Gould of the ISS and an anonymous reviewer for assistance and direction with this paper.
2. See for instance Duxita Mistry and Judy Klipin, *Strengthening civilian oversight over the police in South Africa: the national and provincial secretariats for safety and security*, ISS Paper 91, 2004, 18. They state that the mandate given to the provincial executive by the Constitution 'is a source of tension and misunderstanding', available at <http://www.issafrica.org/uploads/91.PDF> (accessed 21 March 2012). See also Janine Rauch, *The role of provincial executives in safety and security in South Africa: a policy analysis*, Johannesburg: Centre for the Study of Violence and Reconciliation, 1998, available at [http://www.csvr.org.za/index.php?option=com\\_content&view=article&id=1472%3Athe-role-of-provincial-executives-in-safety-and-security-in-south-africa-a-policy-analysis&Itemid=2](http://www.csvr.org.za/index.php?option=com_content&view=article&id=1472%3Athe-role-of-provincial-executives-in-safety-and-security-in-south-africa-a-policy-analysis&Itemid=2), (accessed 16 April 2012); Gareth Newham and David Bruce, *Provincial Government Oversight of the Police*, research report written for the Gauteng Legislature, 2004, available at <http://www.csvr.org.za/docs/policing/provincialgovernmentoversight.pdf> (accessed 16 April

- 2012). Also see D Bruce, G Newham and T Masuku, In service of the people's democracy – an assessment of the South African Police Service, Johannesburg: Centre for the Study of Violence and Reconciliation & Open Society Foundation for South Africa, 2007, 46, <http://www.csvr.org.za/wits/papers/papsaps.htm>, (accessed 21 March 2012).
3. Mark Shaw, Point of order: Policing the compromise, in Steven Friedman and Doreen Atkinson (eds), *South African Review 7 – The small miracle: South Africa's negotiated settlement*, Johannesburg: Ravan Press, 1994, 216.
  4. Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Section 206(1).
  5. Philip Stenning, Governance of the police: independence, accountability and interference, Ray Whitrod Memorial Lecture, 2011, 9-10.
  6. See for instance Gareth Newham, Crime intelligence head saga reveals a growing threat to the rule of law in South Africa, ISS Today, Institute for Security Studies, 11 April 2012, available at [http://www.iss.co.za/iss\\_today.php?ID=1463](http://www.iss.co.za/iss_today.php?ID=1463) (accessed 16 April 2012); Glynnis Underhill, Hawks' Mdluli probe finds second secret slush fund, *Mail & Guardian*, 4 May 2012, <http://mg.co.za/article/2012-05-04-mdluli-probe-finds-second-slush-fund> (accessed 7 May 2012).
  7. Bruce, Newham and Masuku, In service of the people's democracy, 49.
  8. Mistry and Klipin, Strengthening civilian oversight, 20.
  9. Dan Plato, Wet wil alle W-Kapenaars veiliger maak, *Die Burger* (letter), 18 February 2012. Interview, Gideon Morris, Chief Director: Safety and Security, Department of Community Safety, Western Cape. See also Bruce, *et al*, In service of the people's democracy, 60.
  10. Constitution of the Republic of South Africa, Section 206(3)(b).
  11. Draft Western Cape Community Safety Bill, 16 February 2012, available at [http://www.westerncape.gov.za/2012/2/provin12ex3lang\\_exgaz6953eax.pdf](http://www.westerncape.gov.za/2012/2/provin12ex3lang_exgaz6953eax.pdf) (accessed 14 March 2012). The deadline for comment was 15th May 2012, following which comments on the draft would be considered and a final Bill tabled in the Western Cape legislature.
  12. Department of Community Safety, Western Cape, undated, 'Oversight of policing by provincial government' – Strategic objective 5: Increased safety, 9.
  13. See Constitution of the Republic of South Africa, Section 206(3)(a).
  14. *Ibid*, Section 206(3)(b) and (d).
  15. *Ibid*, Section 206(3)(c).
  16. *Ibid*, Section 206(5)(a).
  17. Draft Western Cape Community Safety Bill, Section 15.
  18. Draft WC Community Safety Bill, Section 4(1)(c).
  19. Draft WC Community Safety Bill, Section 4(1)(a)
  20. Bruce, Newham and Masuku, In Service of the People's Democracy, 24.
  21. Profile: SAPS National, South African Police Service, [http://www.saps.gov.za/\\_dynamicModules/internetsite/buildingBlocks/basePage4/natMP.asp](http://www.saps.gov.za/_dynamicModules/internetsite/buildingBlocks/basePage4/natMP.asp) (accessed 12 April 2012).
  22. Murray Williams, R65bn crackdown to put criminals away, *Cape Argus*, 23 February 2012, <http://www.iol.co.za/capeargus/r65bn-crackdown-to-put-criminals-away-1.1241263> (accessed 12 April 2012).
  23. 'Profile: SAPS WesternCape', South African Police Service, [http://www.saps.gov.za/\\_dynamicModules/internetSite/buildingBlocks/basePage4/BP441.asp](http://www.saps.gov.za/_dynamicModules/internetSite/buildingBlocks/basePage4/BP441.asp) (accessed 12 April 2012).
  24. See for instance Ted Leggett, What's up in the Cape – Crime rates in Western and Northern Cape provinces, *SA Crime Quarterly*, 7, 2004, 15-20, <http://www.issafrica.org/uploads/CQ7Leggett.pdf> (accessed 13 April 2012).
  25. South African Police Service, The Crime Challenge Facing the South African Police Service, Annexure to the South African Police Service Annual Report, 2011-2012, 28 [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_report/2010\\_2011/10\\_crime\\_challenge\\_saps.pdf](http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2010_2011/10_crime_challenge_saps.pdf) (accessed 12 April 2012).
  26. Western Cape, Wikipedia, [http://en.wikipedia.org/wiki/Western\\_Cape](http://en.wikipedia.org/wiki/Western_Cape), (accessed 12 April 2012).
  27. Provincial Government of the Western Cape, 2010, Building the best-run regional government in the world, 54, available at [http://www.westerncape.gov.za/Text/2011/2/dsp\\_12\\_building\\_the\\_best\\_run\\_regional\\_government.pdf](http://www.westerncape.gov.za/Text/2011/2/dsp_12_building_the_best_run_regional_government.pdf), (accessed 14 March 2012).
  28. Situational crime prevention focuses on reducing opportunities to commit crime.
  29. The Western Cape government had adopted a policy of referring to MECs as 'Ministers'. This article however uses the term MEC, which is generally used to refer to members holding this portfolio.
  30. Draft WC Community Safety Bill, Section 7(1)(c).
  31. Provincial Government of the Western Cape, 2010, Building the best-run regional government in the world, 54.
  32. Jan Gerber, 'DA maak Wes-Kaap 'n polisiestaat – ANC praat oor wetsontwerp', *Die Burger*, 17 February 2012, 6.
  33. African National Congress, Legislature and Governance – Policy Discussion Document, March 2012, 13, available at <http://www.anc.org.za/docs/discus/2012/legislaturek.pdf>.
  34. See for instance the speech by Gauteng MEC for Community Safety Firoz Cachalia at the launch of the Gauteng Safety Strategy and the 'Take Charge' Campaign, Walter Sisulu Square of Dedication, Kliptown, available at <http://www.polity.org.za/article/cachalia-launch-of-gauteng-safety-strategy-and-039take-charge039-campaign-30032007-2007-03-30>, (accessed 14 April 2012).
  35. See for instance Gareth Newham, Cops and Robbers: A new approach – The Gauteng Aggravated Robbery Strategy, *SA Crime Quarterly*, 29, 2009, 3-8.
  36. Civilian Secretariat for Police, Annual Performance Plan – 2011/12, 4, available at [http://www.police-secretariat.gov.za/downloads/Secretariat\\_APP\\_2011-2012.pdf](http://www.police-secretariat.gov.za/downloads/Secretariat_APP_2011-2012.pdf), (accessed 14 March 2012).
  37. Section 16 provides for similar reports to be submitted by municipal police services.
  38. Draft WC Community Safety Bill, Section 8.
  39. Draft WC Community Safety Bill, Section 17.
  40. Mike Wills, The Cape safety bill has a massive hole in it, *Cape Argus*, 22 February 2012.

41. Esther Lewis, Province gives OK for key policing units – Drug-related crime out of control', *Cape Argus*, 23 November 2011, 9.
42. Sibusiso Nkomo, Police put gangs 'under pressure' – targeting of drug turfs 'is leading to feuding', *Cape Argus*, 12 December 2011, 4.
43. A 2007 report for instance indicated that 'there is no distinctive policy direction provided by the Minister to the SAPS'. Bruce, Newham and Masuku, In Service of the People's Democracy, 46.
44. Note that not all provinces have a 'Department of Community Safety'. For instance the Free State has a Department of Police, Roads and Transport.
45. Mistry and Klipin, Strengthening civilian oversight, 19.
46. Civilian Secretariat for Police Service Act 2011 (Act 2 of 2011), available at <http://www.info.gov.za/view/DownloadFileAction?id=146470> (accessed 21 March 2012).
47. Legal provisions governing the provincial secretariats prior to the Civilian Secretariat for Police Service Act 2011 (2 of 2011), were ambiguous as to their functions. See sections 2(1)(b) and 3(5) of the South African Police Service Act 1995 (68 of 1995). Section 2(1)(b) for instance provided that the establishment of provincial secretariats by provincial governments was at their discretion.
47. Civilian Secretariat for Police Service Act, 2011.
48. Civilian Secretariat Act, Section 17(1).
49. Ibid. See also Section 17(2).
50. Draft WC Community Safety Bill, Section 1.
51. Civilian Secretariat Act, Section 1.
52. This is because the provincial secretariats are not subject to the provincial government and cannot be regarded as an instrument for exercising provincial powers even if their functions are described in a way that is in some respects similar to those of the provincial government.
53. In the Secretariat Act this is addressed in Section 17(1). The introduction to the Bill provides that the Bill is intended to provide for 'the support of and cooperation with the Secretariats'. Section 2(c) indicates that the purpose of the Act includes supporting the objects of the national and provincial Secretariat. Section 3(v) provides that the functions of the MEC include facilitating 'close cooperation between the Department, the Civilian Secretariat, the Provincial Secretariat and the police in the performance of the functions in terms of this Act'. Section 8(c) provides for the Secretariats to be consulted in establishing the integrated information system.
54. Civilian Secretariat Act, Section 18(1)
55. David Bruce, Unfinished Business – The architecture of police accountability in South Africa, African Policing Civilian Oversight Forum, 2011, 6-7, available at [http://apcof.org.za/File\\_uploads/File/APCOF%20Brief%202%20Unfinished%20Business%20WEB.pdf](http://apcof.org.za/File_uploads/File/APCOF%20Brief%202%20Unfinished%20Business%20WEB.pdf) (accessed 21 March 2012).
56. Ibid.
57. Section 5 of the Bill provides for regulation of community police forums (CPFs) by the provincial government. However Section 5 is not in itself an adequate guide to provincial thinking on the role to be performed by CPFs.
58. Jacqui Gallinetti, Report of the evaluation of the independent prison visitors (IPV) system, Civil Society Prison Reform Initiative, 2004, available at <http://www.csprri.org.za/publications/researchreports/Report%20of%20the%20Evaluation%20of%20the%20Independent%20Prison%20Visitors%20%28IPV%29%20System%20%28Research%20Paper%20No.%205%29.pdf> (accessed 21 March 2012).
59. Email message, Gideon Morris, 14 March 2012.
60. Civilian Secretariat for Police, Annual Performance Plan, 30.
61. Anthony Minnaar, Community policing in a high crime transitional state: The case of South African since democratisation in 1994, in D Wisler & I Onwudiwe (eds), *Community policing – International patterns and comparative perspectives*, CRC Press, 2010, 33. David Bruce, Unfinished Business – The architecture of police accountability in South Africa, 6-7.
62. Mark Shaw, *Crime and policing in post-apartheid South Africa – Transforming under fire*, Cape Town: David Philip, 2002, 144.
63. Ibid; Bruce, Unfinished business.
64. Interview John Cartwright, 8 March 2012.
65. Draft WC Community Safety Bill, Section 8(4(e)).
66. Standing Order 101 provides instructions to police stations for addressing complaints from members of the public who are dissatisfied with the service they have received from the SAPS or how they have been treated by SAPS personnel.
67. Draft WC Community Safety Bill, Section 9. The bill refers to an Ombudsman but staff of the Western Cape provincial government indicated that the gender neutral term Ombud would be preferred. Interview Gideon Morris and Mireille Wenger, 7 March 2012.
68. Draft Western Cape Community Safety Bill, Section 11.
69. Interview Gideon Morris and Mireille Wenger, 7 March 2012.
70. Constitution of the Republic of South Africa, Section 206(5)(a).
71. See section 28 of the Independent Police Investigations Directorate Act 2011 (Act 1 of 2011). The ICD became the IPID on 1 April 2012 when the Act came into operation.
72. Department of Community Safety, Western Cape, Section 15.
73. Draft WC Community Safety Bill, Section 12(1).
74. In terms of the Section 14 of the Bill they will be authorised to direct people to submit affidavits or declarations, to appear before the Ombud to give evidence, and to produce documents. Section 4 of the Bill also provides for persons authorised by the MEC to have the authority to enter police buildings or other property.
75. Bruce, Unfinished business, 8-11.
76. Victoria, Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues (2001) (John C. Johnson, Chair) *Report* (Melbourne: Department of Justice) quoted in Stenning, Governance of the police, 12.

77. For example see Section 4.6 of the Queensland Police Service Administration Act, 1990, and Sections 6 and 7 of the South Australia Police Act, 1998, cited in Newham and Bruce, Provincial Government Oversight of the Police.