

**AN EVALUATION OF THE TRAINING OF SOUTH AFRICAN POLICE
SERVICE OFFICIALS ON THE USE OF LETHAL FORCE AFTER
THE AMENDMENT TO SECTION 49 OF THE CRIMINAL
PROCEDURE ACT (No. 51 of 1977)**

By

RAJMONEY MOODLEY

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Supervisor: Prof. A. deV. Minnaar

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DECLARATION FORM

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TABLE OF CONTENTS

COPYRIGHT.....	i
DECLARATION BY STUDENT.....	ii
ACKNOWLEDGEMENTS.....	x
NOTES.....	x
EXECUTIVE SUMMARY.....	xi

Chapter 1: MOTIVATION FOR RESEARCH

1.1 Introduction.....	1
1.2 Rationale for research.....	2
1.3 An overview.....	3
1.4 Problem statement.....	4
1.5 Aims of research.....	8
1.6 Definition of concepts.....	8
1.6.1 Lethal Force.....	8
1.6.2 Police official.....	9
1.6.3 Criminal Procedure.....	9
1.6.4 Reasonable force.....	10
1.6.5 Case law.....	10
1.6.6 Schedule 1 offences.....	10
1.6.7 Training.....	11
1.6.8 Unit Standards.....	11
1.7 Value of the research.....	11
1.8 Layout of dissertation.....	12
1.9 Summary.....	12

Chapter 2: RESEARCH METHODOLOGY, SAMPLING OF TARGET

POPULATION AND DATA COLLECTION.....	13
2.1 Introduction.....	13
2.1.1 A note on the station and areas selected.....	13
2.2 Research design.....	14
2.3 Sampling of target population.....	14
2.4 Data collection and data capture.....	17

2.5	Data analysis	19
	2.5.1 Some shortcomings experienced.....	20
2.6	Validity and reliability of data collection.....	20
2.7	Ethical considerations.....	21
2.8	Research problems.....	21
	2.8.1 Legal challenges.....	21
	2.8.2 Availability of candidates.....	22
	2.8.3 Geographical difficulties.....	23
	2.8.4 Getting off the topic.....	23
	2.8.5 Language usage.....	24
	2.8.6 Miscommunication with SAPS hierarchy.....	24
	2.8.7 Transcription challenges.....	25
	2.8.8 Selection criteria for candidates.....	25
2.9	Summary.....	26

Chapter 3:	OVERVIEW OF THE USE OF LETHAL FORCE TRAINING IN THE BASIC TRAINING LEARNING PROGRAMME OF THE SOUTH AFRICAN POLICE SERVICES (SAPS).....	27
3.1	Introduction.....	27
3.2	Background on use of lethal force in the SAPS.....	27
3.3	Overview of the Basic Training Learning Programme in the SAPS in relation to the use of lethal force from July 2004 to June 2006.....	30
	3.3.1 South African Police Service (Overview): Unit Standard 11974.....	32
	3.3.2 Principles of Policing.....	33
	3.3.3 Regulatory framework of policing.....	34
	3.3.3.i General Principles of South African Criminal Law: Learner's Guide. Unit Standard 11977: Identify and explain specific and Statutory Offences.....	34
	3.3.3.ii Specific Crimes: Learner's Guide. Unit Standard 11977: Identify and explain specific and Statutory Offences.....	39
	3.3.3.iii Law and Policing: Learner's Guide. Unit Standard 11979: Identify and apply relevant knowledge about the law in general related to policing.....	42
	3.3.3.iv Statutory Law: Learner's Guide. Unit Standard 11977:	

	Identify and Explain Specific and Statutory Offences.....	57
3.3.3.v	Criminal Procedure: Learner's Guide. Unit Standard 11978: Identify and apply sections of the Criminal Procedure Act..	60
3.3.4	Fitness and street survival.....	65
3.3.4.i	Use of Force: Presenter's Guide. Unit Standard 14131: Use appropriate force to uphold and enforce the law and Protect people and property.....	65
3.3.4.ii	Use of Force: Workbook. Unit Standard 14131: Use appropriate force to uphold and enforce the law and protect people and property.....	66
3.3.4.iii	Move tactically in pairs during police operations. Unit Standard 14125: Move tactically in pairs during police operations.....	73
3.3.4.iv	Physical control of suspects. Unit Standard number not listed. No title.....	74
3.3.4.v	Crowd management: Learner's Guide. Unit Standard number not listed. No title.....	74
3.3.4.vi	Weapon skills: Study Unit 1-Z88.....	76
3.3.4.vii	Weapon skills: Study Unit 2-RAP 401.....	76
3.3.4.viii	Weapon skills: Study Unit 3 - Musler 12 Gauge Shotgun.....	76
3.3.4.ix	Weapon skills: Study Unit 4- R5 Rifle.....	76
3.4	Regulation of use of lethal force training	77
3.4.1	What is SAQA?	77
3.4.2	The National Qualification Framework.....	77
3.4.3	Outcomes Based Education	78
3.4.4	The Safety & Security Sector Education & Training Authority.....	80
3.4.5	Overview of functions/responsibilities of SASSETA.....	80
3.5	Summary.....	81

Chapter 4:	SOUTH AFRICAN LEGAL FRAMEWORK/REGULATION OF THE USE OF LETHAL FORCE IN THE SOUTH AFRICAN POLICE SERVICE.....	83
4.1	Introduction	83
4.2	Brief history of Human Rights	83

4.3	Commentary on international perspectives on human rights	85
4.4	An overview of Chapter 2 of the Bill of Rights of the Constitution of South Africa, 1996 (Act 108 of 1996).....	88
4.5	The South African Police Service Act, 1995 (Act 98 of 1995) Section 13 (1).....	89
4.5.1	National Instructions	89
4.6	An analysis of case laws on the use of lethal force in SAPS.....	90
4.6.1	<i>Matlou v Makhubedu</i> 1978 (1) SA 946 (A).....	92
4.6.2	<i>Macu v Du Toit</i> 1983 (4) SA 629 (A) (at 635).....	93
4.6.3	<i>Tennessee v Garner</i> 471 US (1) 1985.....	94
4.6.4	<i>S v Barnard</i> 1986 (3) (SA) 1 (A).....	95
4.6.5	<i>S v Martinus</i> 1990 (2) all SACR 568 (A).....	97
4.6.6	<i>Government of the Republic of South Africa v Basdeo and Another</i> 1996 (1) S.A. 355 (5).....	98
4.6.7	<i>Raloso v Wilson and Others</i> 1998 (1) BCLR 26 (NC).....	100
4.6.8	<i>Govender v Minister of Safety and Security</i> 2001 (4) SA 273 (SCA).....	101
4.6.9	<i>Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another</i> 2002 (4) SA 613 (CC).	104
4.7	Comment on how the courts view the use of lethal force	108
4.7.1	View of society and the people of a democratic order	108
4.8	Summary.....	110
 Chapter 5: EXPLORING DIFFERENT OPINIONS ON THE INTERPRETATION OF THE NEW S49.....		
5.1	Introduction.....	112
5.2	Old versus new legislation on S49 and how it impacts on operational police officials.....	112
5.3	The old s49 of the Criminal Procedure Act, Act 51 of 1977	113
5.4	The new s49 of the Criminal Procedure Act, Act 51 of 1977	115
5.5	Exploring different opinions on the new s49.....	116
5.6	A discussion on the “grey areas” of the new s49: Why do we need clarity?.....	123
5.7	Summary	127

Chapter 6:	RESEARCH ANALYSIS AND FINDINGS.....	128
6.1	Introduction	129
6.2	Analysis of the questionnaire responses and interpretation of findings.....	129
	Questions 1-31.....	129-180
6.3	Major research findings.....	181
6.3.1	Majority of the operational police officials have not received training on the use of lethal force and its legal implications	181
6.3.2	Majority of the operational police officials did not receive Human Rights training	182
6.3.3	Overall negative perceptions and disposition to the amendment to s49 and the use of lethal force	182
6.3.4	Some operational police officials delay their response to serious and/or violent crime for fear of using their firearms.....	185
6.4	Summary	187
Chapter 7:	RECOMMENDATIONS AND CONCLUDING REMARKS ON IMPROVING THE TRAINING OF OPERATIONAL POLICE OFFICIALS ON THE USE OF LETHAL FORCE IN THE SAPS.....	189
7.1	Introduction.....	189
7.2	Summary of Chapters	190
7.3	Recommendations: What is needed in the SAPS	192
7.3.1	Dire need for clarity on the “grey areas” of the new s49	192
7.3.2	Introduce a specific use of lethal force training programme for operational police officials.....	193
7.3.3	Upgrade the Basic Training Learning Program to include specifically the correlation and/or differences between Private Defence and the use of lethal force when effecting an arrest.....	199
7.3.4	Upgrade the Basic Training Learning Programme.....	199
7.3.5	Improve the morale and poor perceptions on the use of lethal force in the SAPS	201
7.4	Summary.....	202

LIST OF REFERENCES.....	204
BOOKS, PUBLICATIONS AND JOURNALS.....	204
CASE LAWS: SOUTH AFRICA	210
CASE LAWS: UNITED STATES OF AMERICA.....	210
STATUTES: SOUTH AFRICA.....	211
SAPS BASIC TRAINING LEARNING PROGRAMME (2004-2006) MODULES	211
INTERNET WEBSITES	212
LIST OF INTERVIEWS.....	215
ANNEXURES.....	216
Annexure A: Map of Sasolburg Policing Area.....	217
Annexure B: Map of Vaal Rand Policing Area	218
Annexure C: List of Schedule 1 offences, Criminal Procedure Act, 51 of 1977.....	219
Annexure D: Cover letter for questionnaire	220
Annexure E: Interview Schedule of questions.....	221
Annexure F: Permission request letters to conduct research in SAPS.....	228
Annexure G: Theoretical and foundational knowledge on the use of lethal force	231
Annexure H: Overview of SAPS Basic Training Programme: July 2004 to June 2006....	237
Annexure I: Special Service Order relating to the Use of Force in Effecting an Arrest...	244
Annexure J: Constitutional Court Judgement on Section 49 of the Criminal Procedure Act, 51 of 1977	249
LIST OF TABLES	
Table 1: Overview of SAPS Basic Training Programme from July 2004 to June 2006	31
Table 2: ICD Report on Domestic Violence: January to June 2007	54

Table 3:	Ages of Sample Population.....	129
Table 4:	Division of Sample of Population	130
Table 5:	Year of Basic Training of Respondents who forgot case laws	134
Table 6:	Extent of formal Human Rights Training received by Respondents.....	138
Table 7:	No. of Respondents who received in-service Training on amended s49 after Basic Training	141
Table 8:	No. of Respondents who attended a workshop on amended s49 after Basic Training.....	144
Table 9:	How behaviour was modified after the Amendment to s49.....	146
Table 10:	Recommendations for use of lethal force training on amendment to s49	150
Table 11:	Additional recommendations for UOLF training on Amendment to s49....	151
Table 12:	No. of respondents who used lethal force in the last 5 years.....	153
Table 13:	Results of Injuries in 10 reported UOLF cases.....	154
Table 14:	Life/Death outcome of 10 reported UOLF cases	155
Table 15:	Disciplinary/Criminal outcome of 10 reported UOLF cases.....	158
Table 16:	Analysis of 18 related incidents: Types of crimes	159
Table 17:	Breakdown of crimes where lethal force was used	159
Table 18:	Year of Basic Training: Respondents involved in shooting incidents	161
Table 19:	Year of Basic Training: All respondents in sample	162
Table 20:	Analysis of Explanation: Differences between Private Defence and UOLF during Arrest	164

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NOTES

For the purpose of this study and for ease of reference, where the police official is referred to as “he”, it shall serve to represent both male and female police officials. Therefore all references to police officials are in the male sense, shall include women.

EXECUTIVE SUMMARY

The aim of this study was to explore whether operation police officials are adequately trained to make use of lethal force decisions in accordance with the legal requirements, particularly after the amendment to s49 (in 2003) of the Criminal Procedure Act, Act 51 of 1977. To answer this question, the researcher set about to firstly, review the Basic Training Learning Programme (July 2004 to June 2006) of the South African Police Service (SAPS), specifically those aspects that dealt with the use of lethal force training in the SAPS and secondly, to review some decided case laws on the view held by the courts, on the use of lethal force.

During the research, it was discovered that the amendment to s49 and the inadequate (in some cases lack of) training is a real cause for concern for operational police officials, both personally and professionally. This was prevalent amongst the seasoned police officials, i.e. those who served in the SAPS for more than 12 years. The research highlights some of the concerns in Chapter 6.

There were many training related questions that arose. Recommendations are put forward in Chapter 7. In summary, what is being put forward in terms of use of force training in the SAPS is, in brief, the following:

- an alignment of SAPS training on the use of lethal force to the amended legislative requirements (amended s49 and Constitution); and
- a seamless framework in the training and education of police officials between those that served in the SAPS prior to the arrival of the new Constitution (Act 108 of 1996) and those that have enrolled after the changes made to the legislation (amended s49 and Constitution).

It is postulated that if the above suggestions are considered and/or implemented, it would give impetus to creating a new breed of police officials who are needed to meet the new challenges facing a fairly new democratic country.

Chapter 1

MOTIVATION FOR RESEARCH

1.1 Introduction

Modern-day policing involves the practice of protecting and preserving human rights and lives. The acceptance of the Constitution of South Africa (Act 108 of 1996) sparked a new era in the field of policing in the Republic of South Africa. One of the founding provisions of the Constitution is that it is the supreme law of the Republic and therefore any law or conduct that is contrary to the Constitution, is invalid (Constitution 1996, Act 108 of 1996). Within the framework of the Constitution lies the Bill of Rights (Chapter 2) which affords and reinforces basic human rights to all citizens of the Republic irrespective of race, creed, sex or age. This concept was never before included in the history of policing in South Africa.

Prior to 1996, before the Constitution came into effect, the police were familiar and accustomed to using lethal power to take lives even if there was no imminent life-threatening danger to themselves or others. This situation was provided for by the old Section 49 of the Criminal Procedure Act (Act 51 of 1977) which dealt with the use of lethal force when undertaking an arrest of a suspect. This piece of legislation clashed with the ideals and provisions of the new Constitution of South Africa.

Over the last five years this situation has changed. Naturally, in the midst of these changes, the embattled Section 49 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as s49) and the police conduct touching on its provisions have come under close scrutiny.

Section 49 (2) of The Criminal Procedure Act (Act 51 of 1977), which dealt with the use of lethal force has had to be amended to satisfy the new democracy on which the foundation of the Constitution rests. Due to these changes, the South African Police Service (SAPS) is faced with the challenges of keeping abreast and in line with the constantly changing legal environment.

The police official is expected to protect the lives of all citizens of the country and themselves from life threatening danger. Furthermore, he or she must not act *ultra vires*, i.e. outside the scope of the law, specifically constitutional law. In the case of the use of lethal force this would entail that a police official is well trained in the proper handling of a firearm (skill) and is familiar with the legal requirements (theory) of using his/her firearm. Accordingly, the aim of this study is firstly, to review specifically the use of lethal force training in the South African Police Service's Basic Training Learning Program to establish its appropriateness. Secondly, a comparison of the use of lethal force in the Basic Training Learning Program will be made against the data obtained from the fieldwork research (survey questionnaire and interviews) administered to a selected sample of current operational police officials. The disparity or synonymy between the Basic Training Learning Program and the use of lethal force and the actual use of lethal force by operational police officials will also be explored. The foregoing discussion serves to describe the present state of affairs.

1.2 Rationale for research

In 1998, two years after the birth of the Constitution, Parliament called for the amendment to section 49 (Maepa, 2002:12). This amendment, in fact, only came into effect on 18 July 2003 – nearly five years later. At the time, it had become necessary to amend s49, since it was contrary to the principles enshrined in the new Constitution. The main reason for such revision being that, whilst section 11 of the Constitution protected the fundamental right to life, in contrast, section 49 (2) of the Criminal Procedure Act allowed for a fleeing person who was suspected of committing a Schedule 1 offence (refer to Annexure C for a detailed list of offences) to be shot at in order to secure the arrest (apprehension) of such a person whether he was fleeing or resisting arrest. At that time the use of lethal force in the SAPS was largely directed by s49 in the Criminal Procedure Act, 1977 (Act 51 of 1977). Human Rights principles did not form a significant part of this legislation whereas the Bill of Rights, Chapter 2 of the Constitution, forms part of the very framework of the Constitution. Correspondingly, the Constitution advocated a democratic community orientated form of policing – again this was a completely new concept in policing in the Republic of South Africa.

Prior to the introduction of the new Constitution, if the suspect was fatally shot by police as he/she attempted to flee from a Schedule 1 offence, no criminal charges were brought against the police official if the incident complied with the requirements of 'justifiable homicide' (see old version of s49 below). The conduct of the police official was rarely scrutinised. The mere allegation on the part of the police official that the suspect was fleeing from a Schedule 1 offence appeared to have been an adequate justification and defence of the resulting action. Joubert (2001:244) confirms this and provides that s49 (2) (old version), "...in certain limited circumstances... justifies the killing of a suspect who resists an arrest or who flees".

However, section 13(3)(b) of the South African Police Service Act, 1995 (Act 68 of 1995), provides that police officials may use minimum force when on official duty, as authorised by law and that such force is to be 'minimum and reasonable' under the specific circumstances of the incident (Joubert, 2001:17).

This research study will examine whether the police official understands the scope of their authority and the consequences of their actions when lethal force is to be used. A starting point then to be: just what is the status presently on the understanding of the use of lethal force as experienced by operational police officials? Furthermore, have police officials received adequate training, if any, after s49 was amended? If yes, are they in a position to make reasonable, informed use of lethal force decisions in order to protect themselves and the citizens of the country? This research accordingly sets out to explore aspects of these questions.

1.3 An overview

It must be borne in mind that this research is limited strictly to the use of lethal force only and not the use of force in general. In other words, the primary focus was on the use of firearms in policing and not the use of minimum force during policing or the use of such aids (equipment) as pepper spray, tonfa baton, handcuffs, etc.

In order to determine the extent of practical and knowledge based training and exposure of police officials to the requirements for use of lethal force, semi-structured interviews were conducted with operational police officials in two provinces, namely: Gauteng (Vaal Rand area) and the

Free State (Sasolburg area). The use of semi-structured interviews as a means to gather data was adopted. See discussion on page 19 at section 2.4 further on.

It would have been insufficient to merely compare the laws of s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and the Constitution of South Africa, 1996 (Act 108 of 1996), without the inputs from the grassroots level of ordinary police officials on the street. Their views and perceptions on the use of lethal force play a vital role in understanding how they protect and serve the country, as well as how they interpret and act (policing) within the parameters of s49.

The researcher interviewed 19 operational police officials in the Free State and 10 in the Gauteng province respectively. A total of 29 interviews were conducted. A great deal of information and insight was obtained from these interviews. At the time of the interviews, all of the respondents were operational police officials from three different units, namely: Flying Squad (10), Crime Prevention (9) and Community Service Centre (10).

In addition, the researcher has extensive experience in the field of policing having performed duties as an operational police official in the Durban Flying Squad from 1991 to 2002. She was a Commissioned Officer who was also later a trainer in the SAPS and was responsible for overseeing the co-ordination of Basic Training nationally, as well as managing the Firearm Training Section at Protection and Security Services, SAPS National Head Office. Hence the choice of topic was in line with her field of interest.

1.4 Problem statement

The key question that was focused upon in the study was the following:

Are operational police officials presently adequately trained to make use of lethal force decisions and act in line with legal requirements?

Whilst the Constitution came into effect in 1996, the amended section 49 of the Criminal Procedure Act only came into effect on 18 July 2003 after the case of *Govender* (SALR, 2001:286) and *Walters* (SALR, 2002:615) challenged the constitutionality of the old s49(2).

Consequently, the Constitutional Court ruled that the old s49 was contrary to the Constitution and it therefore needed to be amended.

Four years down the line, the researcher undertook this research in order to see how the police have rolled out these legislated changes to grassroots level, i.e. to operational police officials who are engaged more frequently in situations where they are exposed to the likelihood of using their firearms.

The authority to shoot at another person is powerful if not potent. One would expect that the person with this authority is indeed a professional who has been trained in line with the relevant knowledge, skills and attributes. Their decisions then would be fair, reasonable and justifiable in an open and democratic society.

For these reasons, there is a dire need for this type of research. As far as the researcher is aware, besides the Mistry, Minnaar, Redpath and Dhlamini (2001)¹ study on use of force in Gauteng – which was completed before the changes to s49 were implemented – studies of this nature have not been done in South Africa before.

Moreover, for members of the SAPS, uncertainty and indecision around the use of force, is indeed a worrisome situation. Whilst the Department of Justice welcomed the new legislation on the use of force, the Ministry of Safety and Security were particularly wary of it, in fact quite non-supportive and to a certain extent obstructive. This view is supported by Bruce (2002:4d), where he submitted that the amendment was “resisted, most notably by the SAPS and Minister of Safety and Security”.

The confusion was perpetuated by the delay in the Presidency in ratifying the new legislation as a result of the concerns raised by both the Departments of Justice and Safety & Security. However, in terms of our new democracy, if the Constitutional Court decides that a “bill is constitutional, the president must sign it” (Motala, 2002:180).

¹ Full report can be viewed at www.crimeinstitute.ac.za and is also available on the Independent Complaints Directorate’s website at www.icd.gov.za.

The delay (five years) was as a result of concerns from the Ministry of Safety and Security and the National Commissioner of Police, Jackie Selebi. National Commissioner Selebi indicated in 2002 that the SAPS was “not ready” for the amendment (Maepa, 2002:12).

On the other hand, the amendment brought along confusion and misconception as police officials believed their policing powers had now been limited. The reason for the confusion was that firstly, whereas previously (before the implementation of the new Constitution in 1996), the police could shoot at a suspect who was fleeing from a Schedule 1 offence. Secondly, in 1998 Parliament debated the issue and called for an amendment, whilst simultaneously the legality of Section 49 as opposed to the Constitution was being tested in court (*Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)* and *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)*).

Bruce (2000:2) indicates that in South Africa, there is “... high levels of violent crime and large numbers of attacks on and murders of police members”². Whilst Masuku (2002:5-6) points out that violent crime levels increased throughout the country, especially crimes like vehicle hijacking, robberies, assault with intent to do grievous bodily harm and attempted murder. Such a situation put police officials on the ground under tremendous pressure to respond to criminals likewise by using lethal use of force as an almost immediate reaction. However, with the uncertainty about its use in the minds of operational police officials the issue became even further complicated.

Statistics reveal that crime stabilised at unacceptably high levels during the period 1991 to 2001.³ It is suggested therefore that the debacle around the use of force during this period contributed to the high crime levels as police officials were uncertain as to the circumstances during which they may or may not use their firearms in the performance of their day-to-day duties.

² Minnaar (2003) maintains that per 100 000 of the population South Africa has one of the highest if not highest in the world rates of the killing of police officials.

³ For detailed analysis of the South African crime statistics and rate per 100 000 of the population see www.saps.org.za.

However, amidst this changing landscape, the right to shoot remained if a suspect threatened the life of the police official or any other person. This situation was not initially realized by operational police officials and contributed to the confusion around the amendment to Section 49.

This view is supported by a research report of case studies from seven policing areas in Gauteng which was undertaken in 2001 by the Institute for Human Rights & Criminal Justice Studies at the Technikon SA at the request of the Independent Complaints Directorate (ICD) (Mistry, Minnaar, Redpath & Dhlamini, 2001).

In this research report it was revealed that some police officials felt powerless because the circumstances during which force may be applied were restricted whilst suspects get away (literally) ‘with murder’ when it comes to the use of force. Some police officials interviewed for this report believed that suspects have more rights than they (police officials) do (Mistry *et al.*, 2001:47). The new Section 49 came into effect on 18 July 2003, and although the research for the Mistry *et al.* report was conducted in 2001, the research for this study will show that there are still operational police officials who have received no formal training on the legal application on the use of lethal force when effecting an arrest. Research conducted in this study, apart from other findings, demonstrates that similar beliefs and perceptions (as revealed in the Mistry *et al.* report), still exist. (See Chapter 6 for more detail).

According to Bruce (1999), ordinary members of the public, as well as the police official, have the right to use lethal, deadly force when their lives or property are threatened – even the highest court in this land does not possess the authority to impose such a harsh sanction.⁴

In a new democracy with a supreme Constitution that espoused basic human rights such as dignity, respect and more importantly the right to life, there was no question that s49 of the Criminal Procedure Act had to be amended so that it fell in line with the changing needs of the country.

⁴ In 1995, in a landmark judgement, the South African Constitutional Court struck down the death penalty.

1.5. Aims of research

The purpose of this research will serve:

- to examine the training curriculum on the use of lethal force in basic police training (July 2004 to June 2006) and comment on the content of the use of lethal force (Chapter 3);
- to align that part of the training curriculum focusing on the use of lethal force with the decided case laws which played a key role in shaping the new s49 (Chapter 4);
- to highlight and or explore ‘grey areas’ in the new Section 49 on the use of lethal force and identify shortcomings (Chapter 5) and;
- to compare the above with the results of the data obtained from the sample group of operational police officials (Chapter 6)

It is believed that this research shall contribute to encouraging a culture of making responsible lethal force decisions in line with legal Constitutional requirements.

With a view to gaining insight and a better understanding of this dynamic field of policing, a recommendation shall be tendered which may contribute to effective and professional service delivery.

The research shall strive to highlight the problems, fears and concerns faced by operational police officials in the transition on the use of lethal force in policing thus far, as well as suggest solutions to these concerns. The following terms are defined in order to provide clarity on issues to be discussed.

1.6. Definition of concepts

The key concepts used in the study are as follows:

1.6.1 Lethal Force

For the purpose of this study, lethal force (also commonly referred to as deadly force), shall mean the use of a firearm by a police official in the execution of his duties for the purposes of, but not limited to, the effecting of an arrest. Hall & Whitaker (1999:393) describe deadly force as that “*which is likely to cause death or great bodily harm...*”.

1.6.2 Police official

Section 1 of the Criminal Procedure Act defines “*peace officer*” as including any “magistrate, justice of the peace, police official, any member of the Department of Correctional Services and a peace officer appointed in terms of section 334 of the Criminal Procedure Act” (Joubert, 2001:21).

More appropriately, the South African Police Service Act 68 of 1995, Section 5(a) provides that the “Service shall consist of all persons who immediately before the commencement of this Act were members” (Butterworths, 2000:129).

A police official for the purpose of this study shall mean a person appointed in terms of any of the above provisions to serve in the South African Police Service (after or while undergoing the requisite training in policing).

1.6.3 Criminal Procedure

The understanding of criminal procedure may be aptly explained as follows. Our law has two major divisions namely; public and private law. Public law relates to the “*relationship between the state and the subject of the state,*” whilst private law refers to the “*relationship between individual and individual*” (Introduction to the Theory of Law, Study Guide, Unisa 2002:25). This explanation is in concurrence with Kleyn and Viljoen’s (1996:102) submission which provides that Criminal Procedure “*prescribes*” the way in which a person suspected of having committed an offence should be prosecuted. Whilst Joubert (2001:7-8) explains that Criminal Procedure falls under formal law (adjective law) and refers to codified statutory law. Therefore, we shall interpret criminal procedure as a part of public law that regulates and prescribes the procedure to be followed when criminal law has been violated. This procedure is contained in the Criminal Procedure Act, Act 51 of 1977. This research will deal specifically with the use of lethal force issue as contained in Section 49 of the abovementioned Act – an Act that authorises police officials to use lethal force in limited circumstances in order to carry out their duties. Importantly, Joubert (2003:3), justifiably points out that these criminal procedural rules are “*subject to the supremacy of the Constitution of the Republic of South Africa Act 108 of 1996*”, and are therefore jointly married with common law and constitutional rights.

1.6.4 Reasonable force

Reasonable “*suggests a rational basis for police action which can be tested objectively*” (Pike, 1985:115). In my opinion, this definition is too vague. Branford (1994:36), provides that it means “*having sound judgement .ready to listen to reason*”. On the other hand, according to the English Dictionary force means “*power, strength, .military strength*” (Branford, 1994:361). For the purposes of this research study, reasonable force shall mean the degree of power and strength needed to effect an arrest after arriving at a sensible, logical and sound decision based on a set of given facts and acting in accordance with this insight.

1.6.5 Case law

According to Joubert (1999:7), case laws are “*court decisions which interpret both common law and statutory provisions and adjust those provisions to fit the realities of the day*”.

A review of appropriate and/or relevant case laws allows for courts to change old laws to suit the needs of present day society, (e.g. section 49 of the Criminal Procedure Act had to be amended to remove power of persons to use lethal force against fleeing suspects who do not pose a danger to anyone). Case law forms an invaluable source of law because, firstly it allows us to understand and interpret the law properly. Secondly, so that the law may be justifiably and effectively enforced.

1.6.6 Schedule 1 offences

The Criminal Procedure Act 1977 (Act 51 of 1977) has seven schedules. These schedules consist of a “*combination of offences*”. These offences are grouped together into schedules. The reason for this is that these groups of offences are relevant to certain sectors in the Criminal Procedure Act – this prevents repetition of offences when sections are being discussed.

Schedule 1 offences are grouped specifically for sections 40, 42 and 49 of the Criminal Procedure Act. Schedule 1 offences are treason, sedition, public violence, murder, culpable homicide, rape, indecent assault, bestiality, robbery, kidnapping, childstealing, assault when a dangerous wound is inflicted, arson, malicious injury to property, etc. (see attached list as per Annexure C) (Joubert, 2001:408).

1.6.7 Training

Training according to Erasmus & Van Dyk (1999:2) “....*can be regarded as a systematic and planned process to change the knowledge, skills and behaviour of employees in such a way that organisational objectives are achieved*”.

1.6.8 Unit Standards

According to the Firearm Competency Assessment and Training Centre website (accessed on 15 January 2009), a “*unit standard requires a learner to demonstrate competency / skills in specific outcomes*”. Both formative and summative assessment methods are used to assess the competency and skills against specific outcomes (<http://www.fcac.co.za/standards/standards.htm>). For the purposes of this research, reference to a unit standard shall mean a registered statement that contains the required education, specific outcomes and assessment criteria, as well as other administrative needs, that are to be completed in order to be deemed competent and qualified in a particular learning field.

1.7 Value of the research

The necessity of this type of research cannot be over-emphasized. The research provides recommendations and suggestions on future training needs on the use of lethal force for operational police officials. These proposed solutions, if implemented by the SAPS, may *inter alia*:

- serve to eliminate uncertainty experienced by operational police officials by providing an interpretation on the new section 49;
- contribute towards implementing a learning programme for operational police officials on the use of lethal force;
- identify gaps at this moment in time on use of lethal force training in SAPS and assist in determining the way forward; and
- promote/encourage professional service delivery in the SAPS.

The following synopsis will explain the chapters that follow.

1.8 Layout of dissertation

Chapter 2 explains and outlines the research methodology employed, as well as the sampling techniques used for research data collection. Problems encountered during the research are also detailed. Chapter 3 explores the present state of affairs with reference to the training in the Basic Training Learning Program on the use of lethal force, and also reviews the use of lethal force training provided to new recruits of the SAPS. In conclusion, a brief overview of the regulation of the use of lethal force training by the Safety & Security Sector Education & Training Authority (SASSETA) is provided. Insights into the legal framework on the use of lethal force are introduced in Chapter 4. These touch on the Constitution, the Criminal Procedure Act, decided case laws and the SAPS Act.

An exploration of differing opinions on the interpretation of the new s49 is contained in Chapter 5, whilst Chapter 6 serves to summarise the research findings of twenty-nine (29) respondents who were interviewed between March and April 2006. A statistical analysis of the data that was collected follows. Chapter 7 concludes with recommendations on future training on the use of lethal force in policing, which focus on overcoming current concerns.

1.9 Summary

It is firmly felt by the researcher that a study of this nature will benefit the government, citizens of the Republic of South Africa, the SAPS and police officials in general. The responsibility of protecting human rights is the responsibility of every inhabitant of our country. Therefore, organisations such as the SAPS, South African Human Rights Commission (SAHRC), Independent Complaints Directorate (ICD), Business Against Crime (BAC), personnel at the Ministry of Police, learning centres such as UNISA and the people of our country, will be enlightened and sensitised to the need for more comprehensive and detailed police training on the use of lethal force. A study of this nature will add value and benefit all these role players. It may create awareness on shortcomings presently experienced and instil confidence in both the police and the public.

Chapter 2

RESEARCH METHODOLOGY, SAMPLING OF TARGET POPULATION AND DATA COLLECTION

2.1 Introduction

The method used to obtain information in this research study was through qualitative methodology by means of semi-structured, one-on-one interviews. A literature review was undertaken. In addition, a review of the training material⁵ used at the Police Training College (Pretoria West) was incorporated as part of the overall research thrust. Most of the information that the researcher will introduce during this study has been gleaned from the in-depth one-on-one interviews held with operational police officials in the Vaal Rand Flying Squad and the Sasolburg policing area. In some cases these interviews went on for over an hour since the research was of an exploratory nature.

2.1.1 A note on the station and areas selected

Gauteng has a total of 130 police stations⁶ under its jurisdiction. These police stations are grouped into eight areas, of which the Vaal Rand is one area. Further, the Vaal Rand area⁷ in turn comprises of 13 (of the 130) police stations under its area of jurisdiction. They are Boipatong, De Deur, Ennerdale, Evaton, Kliprivier, Lenasia South, Meyerton, Orange Farms, Sebokeng, Sharpeville, The Barrage, Vanderbijlpark and Vereeniging.⁸ Nine respondents in the sample population of this study, are responsible for operational policing duties in these areas.

The Free State Province has a total of 109 police stations under its jurisdiction.⁹ SAPS Sasolburg¹⁰ is one of the police stations in the Free State Province (www.saps.org.za). Nineteen

⁵ Refer to Chapter 3 for detail on SAPS Basic Training Learning Programme and the Reference list of sources consulted.

⁶ Refer to http://www.saps.gov.za/statistics/reports/crimestats/2008/_provinces/gauteng/gauteng.htm for more detail.

⁷ See map of Vaal Rand area as per Annexure A.

⁸ See http://www.saps.gov.za/statistics/reports/crimestats/2008/_provinces/gauteng/gauteng.htm.

⁹ See http://www.saps.gov.za/statistics/reports/crimestats/2008/_provinces/freestate/free_state.htm for detail.

¹⁰ See map of Sasolburg as per Annexure B.

respondents in this study, were drawn from the Community Service Centre and Crime Prevention units of SAPS Sasolburg.

2.2 Research design

The researcher used qualitative research methods since, unlike quantitative methods, evaluation of the current SAPS Basic Training Learning Programme occurred in “*natural settings*” (Mouton, 2001:161). In this way, the researcher gained the confidence and trust of participants. This empirical research was conducted in the form of exploratory questions. An empirical question, like the topic of this research, addresses a real life problem. Quantitatively, in order to improve the validity and objectivity of the research, an analysis of data took the form of a thematic coding system in which statistical data could be drawn. It is believed that this allowed for a more holistic approach to the study.

2.3 Sampling of target population

In this qualitative study, police officials engaged in operational duties at station level were approached for the purposes of conducting semi-structured interviews. A probability sample in the form of simple random sampling was used. In such a probability sampling, any member of the population has an equal chance of being included in the sample (Welman & Kruger, 2000:52). The plan entailed the use of three groups of participants. They were as follows:

- operational police officials at the Community Service Centre (CSC)
- operational police officials at the Crime Prevention unit (CP)
- operational police officials at the Vaal Rand Police Emergency Services (PES) hereafter referred to as the Flying Squad.

A letter requesting permission to undertake the research was drafted and sent to Assistant Commissioner G. E. Moorcroft, The Head: Strategic Management, SAPS (see Annexure J). On receipt of approval a presentation was made to the SAPS Sasolburg Management team (research site area). The Area office at Vaal Rand was contacted and a meeting with the commander of the Emergency Response Services (Flying Squad) was held.

The questionnaire and entire process was explained. Copies of the letter of approval for the training etcetera were provided to those attending the meeting. In addition input and suggestions from the team were invited and encouraged. A date was set down to indicate the start of interviews pending their inputs/feedback/problems from the SAPS team. Shift rosters for the Community Service Centre (CSC), Crime Prevention and Flying squad were obtained. A random sample (every fourth person and so on) was drawn off the prepared lists. There were approximately 10 persons drawn per unit. These lists were communicated to the respective commanders at Sasolburg and Emergency Response Services (Flying Squad).

The interviews were arranged and co-ordinated according to the shift roster – where the members were off sick or on vacation leave or unavailable, the researcher adopted the name that was one up or one down on the list (whoever was available at that time). The interviews were conducted at SAPS Sasolburg, the offices of the researcher in Sasolburg and at the offices of the Flying Squad. The duration of each interview was between one to one-and-half hours. The interviews were audio-tape recorded and supplemented by handwritten field notes.

The whole interview and transcribing process in fact proved to be a very lengthy and difficult process for the following reasons:

- language barriers;
- inaudibility of tapes (outside interference/noises);
- poor understanding of certain questions by the respondents;
- the unavailability of shift workers or police officials always working outside of their offices (operational);
- service delivery could have been compromised if patrol vehicle drivers or Community Service Centre workers were taken off their duties;

With that in mind, the researcher set about to interview 29 respondents (operational police officials) by means of in-depth one-on-one interviews. The respondents were drawn by a random sampling technique and each respondent had an equal chance of being selected. The research population was from the Sasolburg, Free State province (accounting for 19 of the respondents) whilst the other respondents were from the Vaal Rand Police Emergency Services (the remaining

10) which is situated in the Gauteng province. These semi-structured interviews were recorded on audio tape. The audio cassette was transcribed verbatim and categorised thematically. A total of 34 questions were posed to each respondent. The analysis of the information proved to be challenging since 21 of the questions were a simple arithmetic (numerical) exercise of counting up the numbers and/or responses. However, the remaining 13 questions had to be thematically coded by the researcher manually. The procedure of analysis took the form of a manual system for both the statistical and thematic coding of responses. The responses of each interview were cross checked and anomalies were identified. A pattern was thus identified, categorised and coded. In addition the interviewer compiled field-notes during the interview. The notes were consulted to cross check and verify information. The information was then coded and analysed accordingly.

This involved reading the response of each respondent for each question many times over to identify common themes. These themes were then listed and the interviews were then re-read and the responses grouped according to the respective themes. Many of the respondents got off the topic and this caused variations to be added and its relevance considered. As a result, after analysis in some cases, a re-analysis had to be done to revisit the themes themselves and group them as well.

Essentially, the semi-structured interviews were then analysed in two ways:

- Firstly, statistically by coding responses e.g. Yes =1, No = 2 etc., and;
- Secondly, patterns and trends in open-ended questions were thematically coded.

The researcher managed to complete (and record) twenty-nine interviews, hereafter the researcher proceeded to transcribe and analyse all 29 interviews (ten from the Gauteng Province (Vaal Rand area) and nineteen of the Free State Province (Sasolburg)).

There were a total of 34 questions in the interview schedule of which 21 were numerically coded and 13 were thematically (categories) analysed and then coded. The latter questions were read and re-read so that common themes could be identified and grouped. This thematic coding process was long and fraught with language problems, poor understanding, poor speech, etcetera,

emanating from the respondents answers/responses. To overcome this challenge the tape extracts had to be repeatedly listened to and cross-checked with the handwritten field notes to improve the integrity and accuracy of the information collected.

Upon analysis of the information collected, the researcher drew certain conclusions on the research hypothesis and interpretation.

2.4 Data collection and data capture

As indicated earlier, data was collected by means of in-depth, semi-structured interviews with the three identified groups namely the community Service Centre, the Crime Prevention Unit and the Flying Squad. Welman & Kruger (2000:166), provide that semi-structured interviews are a versatile way of collecting data. The reasons for this method of data collection are that subjects of different levels and backgrounds may be accommodated. This method was appropriate because vague responses could be probed for elaboration or clarification (Welman & Kruger 2000:167).

From the outset it was evident the sample population would involve police officials of different age groups with varying degrees of experience in policing. Consequently, in order to cull information from the diverse population, the in-depth one-on-one interview was decided upon to draw on individual experience of each interviewee.

Whereas in structured interviews, the interviewer is restricted to a schedule of questions, in semi-structured interviews, an interview guide was compiled. This interview guide focused on various aspects of training in the correct use of lethal force such as individual responses by police officials, perceptions, understanding, etc.

By using this method the researcher interacted with the individual and experienced their life world without suggesting responses or influencing answers (Welman & Kruger, 2000:196). In this way first-hand experience of the participant on the use of force was focused upon. A mini tape recorder was used in the interview with the audio recording being transcribed at a later stage. Transcripts of all interviews are discussed in the analysis section of this study and are available upon request.

The interview guide also comprised of aspects related to theoretical training on the use of lethal force. All the respondents were asked the same question (Welman & Kruger, 2000:167). In some instances the interviewer adapted the question to suit the background of the respondent.

According to Welman (2000:167), semi-structured interviews offer versatility, which is the very reason why the researcher chose this method for data collection. Only those police officials working operational at the time or period the researcher conducted the interviews, were interviewed. This was convenient for all parties and cost effective. The units of analyses (sample of the population) were readily available for research purposes in terms of geographic location. In addition, it was convenient and economical for the researcher, who is a resident in the Free State area.

The interviewer (researcher) took special care not to influence the responses of the respondents in any manner. This entailed that no leading questions were asked, and body language, tone of voice, facial expressions etc. of both interviewee and interviewer, were taken into consideration. Every effort was made to create a conducive environment in order to conduct the interview.

When the first interviews were carried out, the interference of external stimuli, e.g. police sirens, radio playing and office movements impacted negatively on the interviews. The sounds were picked up by the tape recorder and transcribing of these recordings became difficult and challenging because of the background noise. Therefore after the first four interviews, permission was obtained to move the interviews away from the Sasolburg Police Station and conduct them at the researcher's office.

Saturation levels (repetition of responses) in terms of information collected were reached after approximately 15 interviews had been conducted.

In this study, the semi-structured interviews were recorded on tape. The audio cassette was transcribed verbatim and clustered into categories (same theme). During the interviews, detailed handwritten field-notes were taken. During the transcription process the interview was typed out

based on the audio tape recordings. The handwritten notes were used to cross check and confirm in order to minimise error.

In terms of the legal framework, data on current legislative requirements on the use of force in respect of the Criminal Procedure Act, 1977 (Act 51 of 1977) and the Judicial Matters Second Amendment Act, 1998 (Act No 122 of 1998) were consulted. This included relevant decided case laws from 1995 to 2003 that pertain to the use of lethal force. The aim was to provide a possible interpretation of the amended Section 49 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

So too, the curriculum of the Basic Training Learning Programme of the South African Police Service (SAPS) from July 2004 to June 2006 was obtained and specifically those aspects dealing with the use of lethal force training were reviewed. Crime statistics for the years 2001 to 2007 are reviewed and presented.

2.5 Data analysis

Data analysis began after the 29 interviews had been concluded. In the analysis phase, an “appropriate statistical procedure” was chosen to analyse the data (Welman and Kruger, 2000:201).

The procedure of analysis took the form of a manual approach. Statistics were compiled after the answers received from the respondents were thematically coded. Twenty-one questions out of thirty-four in the interview schedule were coded numerically and placed on an excel sheet (e.g. Yes =1, No = 2, not applicable = 3, etc.) Simple arithmetic was used to total the numbers per response.

These totals were then divided into the number of respondents and the percentage was calculated (e.g. if 10 answered yes, $10/29$ respondents $\times 100\% = 34\%$.) Therefore 34% of the sample population answered in the affirmative.

However, the remaining thirteen questions were dealt with differently. A thematic coding system was employed. The individual responses of the 29 respondents for each of the questions were read and re-read. Common patterns and themes were identified, categorised and coded. The coded themes were listed, the 29 responses for that question was read again and coded accordingly. Again to minimise error in the findings, uncertainties were cross checked against the field notes and audio tape. After this thematic coding system was applied, the thirteen questions were then analysed in the same method as the numerically coded questions where percentages were worked out based on responses received. Some results are explained with the aid of tables, graphs and figures. This system of analysis allowed for findings and data to be properly interpreted. The main findings could be highlighted, both negative and positive.

2.5.1 Some shortcomings experienced

The process used in the analysis was very challenging and a long process. It was also time consuming.

Language barriers and dialect interfered with communication. The mini-tape recorder used was not functioning optimally during the last three interviews. As a result the researcher relied heavily on the handwritten notes for these interviews.

2.6 Validity and reliability of data collection

In the interests of trustworthiness and authenticity, the transcripts of the interviews were cross-checked against the handwritten notes. The anonymity of the respondents was guaranteed. An interview guide was used in the one-on-one semi-structured interviews. Again, to ensure validity and reliability, the researcher did not use leading questions, ambiguous or double-barrelled questions. The same questions were put to all participants, adapting the approach to match the participants' background and education level (Welman & Kruger, 2000:167). The researcher took care not to influence respondents by way of body language, tone of voice and expression. The researcher conducted the interviews in a relaxed environment and explored the opinions of police officials interviewed.

Only operational police officials were interviewed, i.e. those police officials who are attending to complaints and are more frequently called upon to use force in the execution of their duties. Police officials involved in management, administration and investigation were excluded from the study. For the purposes of the study, only those operational police officials attached to rapid response units were interviewed. The data that was collected from the interviews were analysed and compared with SAPS statistics and annual reports.

A study of (8) South African case laws and one case law of the United States, on the use of lethal force, from the period 1978 to July 2002 were examined (see Chapter 4). These methods were employed to ensure validity and reliability of the proposed study.

2.7 Ethical considerations

The researcher adhered to the ethical code of conduct regarding research as prescribed by the University of South Africa (Unisa). Further, the ethical Code of Conduct, as mentioned in articles 70 and 71 of the SAPS Act, Act 95 of 1998 were adhered to as well as the requirements of the South African Police Services National Instruction 1/2006 with respect to conducting research in the police service.

As is recommended by Welman, (2000:164) the researcher dressed discreetly so as not to detract or impact on the respondents responses. All role-players were informed that their participation was not obligatory but voluntary. Their consent to participate was requested and obtained before the interview progressed. The identity of the respondents used in the sampling was protected by anonymity and information received was handled confidentially. Victims of police shootings were not interviewed.

2.8 Research problems

2.8.1 Legal challenges

There has been no decided case law on the present amended version of s49 so that it can be interpreted. A decided case law decision on the amended version (new s49) may provide better insight in recommending the implementation of an appropriate training programme for SAPS

officials. In order to overcome this, the researcher reviewed decided cases on the use of lethal force since 1994, although it was difficult to draw the ideal interpretation on the new s49.

The reasoning in these decided case laws was interpreted. One of the questions pondered upon was: how does the police official determine “*substantial risk*” as mentioned in the new section 49? Each situation is unique and different people respond differently to certain situations. To overcome this, the researcher highlighted the precedents as set by the courts in the various cases dealing with this matter. In other words each case is judged on its own merits before reaching a decision. (See Chapter 5 for a detailed discussion on these).

2.8.2 Availability of candidates

The nature of this study – an examination of the use of lethal force – required that operational police officials who are more frequently exposed to life threatening situations be interviewed. In all cases they were the first to respond to incidents of crime. The selected sample of respondents was therefore not always available. Although interviews were authorised and scheduled well in advance, the candidates were not always available to attend.

The shortage of manpower at the Community Service Centre was a challenge in that dates had to be re-arranged on several occasions. In some instances, e.g. the Community Service Centre (CSC), there was only one patrol vehicle available to attend to crime incidents. The researcher could not conduct the interview as this would mean that the only patrol vehicle would not be available to attend to complaints that could possibly have been of a life threatening nature, and the community at large would have suffered the consequences.

The initial interviews at Sasolburg SAPS were conducted on the first floor at the police station. At daily temperatures in the Free State reaching 38 degrees celsius, there was no air-conditioning or fan so the windows had to be kept opened during the interviews. Consequently, sirens, police vehicles hooting, shouting, talking, screaming across the parking lot, the sound of police vehicles entering and leaving the police premises, etcetera had a major impact on the process of transcribing the first five interviews. This interviewing environment was extremely uncomfortable and not conducive for that purpose.

Further, all candidates interviewed worked shifts. In the Sasolburg area in the Free State Province where the majority of the interviews were held (19), some of the respondents worked 'seven-to-seven' shifts (12 hours a day) whilst others worked eight-hour shifts.

It was, therefore, a challenge to co-ordinate arrangements and in most instances the researcher turned up only to be asked to re-schedule because the respondent was on leave. Therefore many of the interviews had to be conducted after hours or off peak periods. In one instance on 4 February 2006, a Saturday afternoon, the researcher turned up to conduct interviews at the SAPS Sasolburg but was turned away as a result of the shortage of manpower, alternate arrangements had to be made for the second time. The researcher had to be very patient and understanding because the research population was engaged in duties and the needs of the public had to be put first.

2.8.3 Geographical difficulties

The initial research proposal indicated that the sample would be drawn from the Pretoria area. However, during the course of the study the researcher took up a new job (left the SAPS) and relocated to the Sasolburg, Free State area before the field research could be undertaken. Consequently the sample of respondents was drawn from this area to which the researcher had relocated. In order to gauge police perceptions in both areas and widen the exploratory research, the researcher also drew a sample from the Gauteng area, across the Vaal River in Vanderbijlpark, the home of the Vaal Rand Police Emergency Services (Flying Squad). The researcher had to travel about 50 kilometres return to conduct these interviews.

2.8.4 Getting off the topic

On many occasions the respondents would evade the question and relate incidents that did not directly address the question asked.

This was especially prevalent for questions they did not appear to have an answer for because there were long pauses before making a response (if at all). The researcher encouraged them by saying that there was no right or wrong answer and that they should explain how they perceived the situation (the specific issue/situation the question was addressing).

An example of this would be for Question 29: *Were you ever trained regarding the correlation and/or differences between the use of lethal force during arrest and acting in private defence?* In these situations the respondents were gently prompted and the question was rephrased for a response. It is possible that the questions were not phrased in simple enough English. This problem was addressed by rephrasing the question so that the respondent could understand its main thrust.

2.8.5 Language usage

Language barriers posed a major challenge. The popular ethnic language spoken by the majority of the respondents in the Sasolburg area was Xhosa whilst the rest of the candidates communicated in Afrikaans, which is their first language. The researcher's first language is English but she is literate in Afrikaans although she had seldom (infrequently) used Afrikaans (coming from KwaZulu-Natal) over the past 15 years. After the first interview the researcher went over the interview schedule and edited it in Afrikaans so that it could be correctly communicated to the Afrikaans-speaking respondents.

Some of the questions in the interview schedule were too difficult for the respondents to understand so it had to be explained in simpler terms. The interview questions were not asked in simple English and this sometimes posed a problem. Fortunately, the use of semi-structured interviews allowed for the researcher to break down the questions in simpler terms, one-on-one with the respondent.

2.8.6 Miscommunication with SAPS hierarchy

After receiving permission to conduct the research from SAPS Head Office the researcher requested and received permission from the Area commissioner to address a management meeting at SAPS Sasolburg. At this meeting the research proposal was presented to those police officials present. Questions, feedback and suggestions from the management team were invited. The researcher requested to start interviews on 2 February 2006 and was told that there would be no problems. At 15h15 on 1 February 2006 (day before the interviews were scheduled to start), the Station Commissioner's secretary informed the researcher that the Commissioner had a "problem" and the interviews could not go ahead as scheduled. No communication in respect of

the same was received before this date. The Commissioner then impolitely referred the researcher to the SAPS Provincial Commissioner in Welkom. The Sasolburg Station Commissioner, further stated that only if the Provincial Commissioner grants his/her permission will the researcher be allowed to undertake the interviews to continue.

The Station Commissioner informed the researcher that she just needed to “cover” herself. After numerous calls to SAPS National Head Office: Strategic Management and to the Provincial Commissioner, the researcher managed to get the go ahead. The Provincial Commissioner was extremely helpful and requested documentation (*inter alia* Head Office permission letter) submitted previously to the Sasolburg Commissioner’s office. He perused the same and at about 17h00 on the 1 February granted and approved the conducting of interviews for the next day.

2.8.7 Transcription challenges

Towards the end of the interviews, i.e. from interview 25 onwards, the mini tape recorder was not functioning properly. At certain times it did not tape the respondent’s complete responses to the questions. The researcher had to then rely heavily on the detailed notes made in order to transcribe the information accurately for these interviews. In some instances the respondents spoke too softly and/or inaudibly.

2.8.8 Selection criteria for candidates

Only operational police officials were interviewed. Operational police officials from two provinces were chosen to draw a sample from, namely: Free State (SAPS Sasolburg) and Gauteng Province (SAPS Vaal Rand: Police Emergency Services).

Respondents from three divisions were drawn, namely:

- Community Service Centre
- Crime Prevention
- Police Emergency Services (Flying Squad)

Again the shortage of manpower and responding to complaints (calls of duty) were naturally a priority for this particular group of respondents. (See availability of candidates as mentioned above.)

2.9 Summary

Language barriers posed some problems and respondents may have had difficulty in understanding the questions. The gap in this research would be that this study focussed primarily on the use of lethal force (largely the use of firearms in situations where responding to complaints or crime incidents) as opposed to the use of minimum force in general, i.e. restraining techniques, take down holds, practical officer survival techniques, self defence and hand-to-hand combat. Accordingly the aspects of the use of minimum force and its associated tactics and techniques could be further explored in a later study.

The methodology used to conduct research into this field from start to finish provided valuable insight for the researcher. The setbacks/delays and limitations were eventually overcome. For example the poor co-operation received from some officials, to working after hours and off peak periods to keep appointments and interview times. To improve reliability and validity of the research information during the transcribing, cross-checking between audio tape and handwritten notes was done throughout the process. The researcher adopted a versatile approach, from dressing down to working after hours, to trying to create a comfortable (interview conducive) environment and ensure that those selected were actually interviewed. The data collected from the interviews were supplemented by the in-depth review of the Basic Training Learning Programme on the use of lethal force used by the SAPS. Further, the findings on the decided case laws were compared to the Basic Training Learning Programme to verify any correlation. The review of the Basic Training Learning Programme, case laws, and data obtained from interviews and various other writings informed the recommendations made in Chapter 7.

Overall, this chapter has attempted to provide the reader with a better understanding into the methods used, the manner (how) and the circumstances under which the research was undertaken.

Chapter 3

OVERVIEW OF THE USE OF LETHAL FORCE TRAINING IN THE BASIC TRAINING LEARNING PROGRAMME OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)

3.1 Introduction

Operational police officials are daily placed in challenging situations in the execution of their duties. Having recently joined the democratic order of nations, South Africa as a country did not formally recognise human rights prior to the implementation of the interim Constitution of 1993 and the new Constitution of 1996. This sentiment is shared by Joubert (2001:10) who maintains that in the “*greater part of the twentieth century South Africa’s government lacked legitimacy...., the police were seen by many as the upholders of Apartheid,.....*”. The use of lethal force is contrary to the fundamental right to life as stated in the 1996 Constitution of South Africa. Keeping in mind the fact that the Constitution is the supreme law of the land (section 2 of Constitution) the following sections in this chapter deal with a review of the content of the Basic Training Learning Programme that was adopted by the SAPS for the period from July 2004 to June 2006. However, at the time this research was conducted the old curriculum was in the process of being reviewed. It must further be borne in mind that the Basic Training Learning Programme has subsequently been reviewed and changed in certain aspects of content.

3.2 Background on use of lethal force in the SAPS

Prior to the 1996 implementation of the new Constitution, human rights were not a major policing priority. The Criminal Procedure Act, Act 51 of 1977 allowed for the use of a firearm (e.g. firing of a warning shot, or threat to use to subdue, etcetera) to affect an arrest on a suspect escaping from an alleged commission of a Schedule 1 offence (see Appendix C for full list of offences).

Previous to the amendment, section 49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provided the following in terms of use of force:

“Use of force in effecting arrest. –

(1) If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,

The person so authorised may, in order to affect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) if the suspect committed or was reasonably suspected of having committed a Schedule 1 (serious) offence, the arrestor was authorised to kill the suspect if the arrest could not be effected in order to prevent the suspect from fleeing (Criminal Procedure Act, 1977 (Act 51 of 1977) s49 (1-2)).¹¹

Prior to the amendment to s49(2), police officials were entitled to use their firearms on a fleeing suspect who was allegedly wanted for the suspected commission of a Schedule 1 offence (see definitions). Police shootings, where a suspect for a Schedule 1 offence/s was fleeing from arrest and that which resulted in fatalities, could be deemed justifiable homicide (Joubert, 2001:245).

After the introduction of the Constitution, the old section 49 (2) of the Criminal Procedure Act, 1977 (Act 51 of 1977) was called into question especially after various case laws and the intervention of the Constitutional Court. In 1998 parliament called for the amendment of s49 but which only took effect on 18 July 2003 – nearly five years later. The delay was as a result of concerns from the then Minister of Safety and Security, Steve Tshwete and the National Commissioner of Police, Jackie Selebi. National Commissioner Selebi indicated in 2002 that the SAPS was “*not ready*” for the amendment (Maepa, 2002:12). The amendment brought with it confusion and misconception as police officials believed their policing powers had now been limited. They felt threatened because they “no longer” had the legal right to shoot to kill a suspect fleeing from a Schedule 1 offence and thought that they could no use a firearm assist in

¹¹ Subsection 2 was declared inconsistent with the Constitution and invalid – Constitutional Court Order – *Government Gazette*, 23453 Government Notice No R. 745, 31 May 2002.

making such an arrest. However, the amended s49 still allowed that if the suspect threatened the life of the police official or any other person, the police official had the right to shoot such suspect. Based on the research conducted, it is the opinion of the researcher, that this distinction was not initially realised and contributed to the misconception around the amendment to section 49. The research, which was conducted four years after the amendment to section 49, concurs with the earlier submission that there is a great deal of confusion and misconception around the use of lethal force in policing.¹²

Coming back to the events leading to the amendment to s49, Joubert (2001:245) succinctly pointed out at that stage that whilst the Constitution upheld the right to life, s49 (2) “*appears to be unconstitutional*”. While these parliamentary, government department and legal debates were carrying on the SAPS had to introduce training in human rights (as advocated by the Constitution) into the Basic Training Curriculum for new recruits. In addition, training measures needed to be introduced to address the management of change and transformation in the organisation as a whole.

The ensuing review of the Basic Training Learning Program (2004-2006) is limited to those aspects regarding the use of lethal force. An overview of those modules in the program that related specifically to the use of lethal force, will be discussed. This discussion will then reflect on the information obtained in the data collection phase, i.e. the review of the relevant use of lethal force training material in the Basic Training Learning Programme will be juxtaposed with that of the data obtained from the in-depth one-on-one interviews held with the sample population as extracted from the 29 respondents interviewed in the Sasolburg, Free State Province and Vaal Rand Police Emergency Services, Gauteng province respectively.

The present Basic Training Learning Programme, which came into effect from July 2006, will not be included.

The researcher undertook a review of the Basic Training Program from April 2006 to September 2006. The purpose was to firstly, establish the gist of the specific training provided on the use of

¹² 24% of the research population believe that suspects have more rights than they do, 34% of the sample believe that the rights of police officials have been limited whilst 24% are unhappy and/or angry with the situation around the amendment to s49. See Chapter 6 - 6.3.3 for perceptions on the use of lethal force in police.

lethal force, and secondly, to investigate the alignment of such training to the physical reality and experiences of operational police officials on the street. However, during September 2006 while this review was being undertaken it was discovered that the Basic Training Learning Programme of the SAPS had again been revised.

Consequently only the Basic Training Learning Programme before July 2006 was reviewed. The old Basic Training Learning Programme during the above-mentioned period comprised of the following: 32 Unit Standards; 42 Modules; 48 Assessment Instruments; and 2 Portfolios of Evidence.¹³

The foregoing discussion will provide a review of the Basic Training Learning Programme in the SAPS implemented for the period July 2004 to June 2006.

3.3 Overview of the Basic Training Learning Programme in the SAPS in relation to use of lethal force as from July 2004 to June 2006

By way of introduction it needs to be mentioned here that in the Basic Training Learning Programme of the SAPS a learner needs to demonstrate the specific outcomes embodied in unit standards. According to Erasmus and Van Dyk (1999:4), Outcomes Based Education (OBE) is a *“results-orientated approach to learning and is learning-centred”*. OBE focuses on outcomes versus the *“traditional curriculum-driven education and training”*. In other words, the learner must demonstrate the outcome (in practical terms) of the training. In the context of this study this is an important point since the study reviews whether an operational police official was able to implement (put into practice) any of the principles and practical measures supposedly taught and learnt in the Basic Training Learning Programme for when dealing with use of force.

The Basic Training Learning Programme is introduced first by way of an overview of the SAPS and basic Principles of Policing. However, for the specific purposes of this research, four themes related to use of lethal force (which comprised of thirteen modules) were reviewed.

¹³ This information compiled from slide presentation done by L Stephen: SAPS Division Training (undated). (See Annexure H).

During March 2006 the researcher requested a copy of all learning material handed to learners from the SAPS Basic Training College in Pretoria West.¹⁴ The researcher obtained 62 modules/handouts which fall into eleven subjects/themes. They were reviewed and are illustrated diagrammatically as follows:

**TABLE 1: OVERVIEW OF SAPS BASIC TRAINING PROGRAMME
FROM JULY 2004 TO JUNE 2006**

NO	OF		NO	OF
		TITLE OF THEME		H/OUTS
1		CRIME INVESTIGATION		12
2		REGULATORY FRAMEWORK OF POLICING (consisting of five handouts: <i>General Principles of South African Criminal Law</i> ; <i>Specific Crimes</i> [38 crimes discussed]; <i>Law and Policing</i> ; <i>Statutory Law</i> [17 crimes]; and <i>Criminal Procedure</i>).		10
3		FITNESS AND STREET SURVIVAL (consists of five handouts: <i>Use of Force</i> ; <i>Move tactically in pairs</i> ; <i>Physical control of suspects</i> ; <i>Crowd management</i> ; and <i>Weapon skills</i>).		8
4		COMMUNICATION		6
5		CRIME PREVENTION		6
6		COMMUNITY SERVICE CENTRE		5
7		INFORMATION AND SYSTEM MANAGEMENT		5
8		SELF MANAGEMENT [Incl. HIV handout]		5
9		PROFESSIONAL CONDUCT		3
10		PERFORMANCE MANAGEMENT		1
11		SAPS OVERVIEW (consists of an <i>Overview</i> and <i>The Principles of Policing</i> handouts).		1

¹⁴ A copy of all modules in the SAPS Basic Training curriculum was requested and obtained from Snr Supt Callie Schultz at the SAPS training College in Pretoria West in March 2006. A detailed excel sheet with diagrammatic layout is attached as per Appendix G.

All 62 handouts were reviewed and three relevant themes were identified with 12 handouts relating to the use of lethal force training – these 12 are further indicated in brackets in the table above. Specific and relevant to this dissertation on the use of lethal force, the following aspects were focused on: Fitness and Street Survival (five modules) and the Regulatory Framework which includes Law (five modules). The researcher surveyed the rest of the curriculum and believes that, although relevant to Basic Training of a police official, not all the modules relate specifically to the training on the use of lethal force. (See overview of research in Chapter 1 – 1.2.)

In terms of the number of modules handed out to the students, the subject of Crime Investigation appears to have been given the most attention (12 handouts) followed closely by Regulatory Framework (for policing) (ten handouts) whilst Fitness and Street Survival has the third highest number of handouts. Collectively, three subjects (12 modules) relevant to this study will be discussed, namely: An overview of the SAPS and the Regulatory Framework. The following discussion will start with an overview of SAPS (two modules), as background to the field of policing, followed by the Regulatory Framework (ten modules).¹⁵

3.3.1 South African Police Service (Overview)

Unit Standard 11974: 2004. This module outlines the legislative and regulatory framework which provides the mandate for policing. The module goes on to provide that this mandate lies in the following documents:

- The Constitution of South Africa, 1996 (Act 108 of 1996) particularly Section 205
- Green Paper on Safety and Security (1994)
- White Paper on Safety and Security (1999 -2004)
- South African Police Service Act, 1995 (Act 68 of 1995)
- Regulations under the SAPS Act, 1995 (Act 68 of 1995)
- Police Standing Orders

¹⁵ In order to avoid confusion as to author referencing, i.e. multiple references to SAPS, 2004 etc., references used in this section are to the title of the actual module from which the information used was taken.

This module also outlines the functioning of the SAPS within government, i.e. within the Department of Safety and Security with oversight (monitoring of behaviour and conduct etc.) provided by the Independent Complaints Directorate (ICD). In addition, the eleven rank structures, line of communication and reporting structures are introduced. Police symbolism and insignia such as the purpose and/or meaning of the aloe, star, sword, staff, hexagon etcetera are communicated. The module deals effectively with “discipline” which means training, education and teaching.

Recruits are given background knowledge on the rules (regulatory framework) that govern SAPS behaviour. If these rules are transgressed, disciplinary action may result. Basically the module expects recruits to behave in a professional and responsible manner that is acceptable to the community and the SAPS as an organisation (South African Police Service (Overview), 2004:37).

3.3.2 Principles of Policing

Unit Standard: (not listed): Title: Apply Crime Prevention Principles in Crime prevention related duties (not dated). This module takes the recruit through the twelve policing principles as cited in Van Heerden (1982:78-79). Principle 2 interestingly talks of police authority. It is mentioned that *“police have no legislative or judicial powers”* therefore they cannot determine guilt or innocence (Principles of Policing: nd:11). Abuse of this authority may occur through excessive use of force. Principle 5 deals with *‘Public Consent and Approval’*. In order to best attain this, it is stated that the recruit needs to be courteous and friendly, i.e. be *“ready to make personal sacrifices in order to save lives”*. Principle 6, appropriate to this study, discusses the use of force. Geldenhuys (1997:194) as quoted in the module, touches on the principle of subsidiary, namely *“if an alternative to force is available, no force may be used”*. Minimum force is also mentioned and defined to mean that in most cases no force at all should be used. The module further provides that the history of policing *“has been characterised by a dynamic search for the means by which to optimise the use of legitimate force: using it as necessary to maintain order, but not to the extent that it is excessive and abusive”* (Principles of Policing, nd:17). Accordingly, when the law is to be enforced police officials should act swiftly, consistently and with impartiality.

However, the field research revealed that operational police officials are unhappy with the amendment to s49 since many of the respondents believe that their powers have been limited¹⁶. Principle 5 on public consent and approval where the police official is called upon to “*make personal sacrifices*” to save lives was not in much evidence in the interviews.

In one of the interviews an inspector, with about thirteen years of service, commented that “*I have heard policemen say if I respond to serious cases of armed robbery, I will take my time if I can’t use my firearm....if they shoot someone they get into serious trouble....they avoid a situation that get into trouble for it*” (2006, Interview 5). (See Chapter 6, 6.3.3 for further discussion on the overall negative disposition on the use of lethal force as revealed in the research undertaken).

3.3.3 Regulatory framework of policing

For this section of the training the student receives a total of ten handouts of which only five were related to this research and only these five are reviewed here. They are discussed as below.

3.3.3.i General Principles of South African Criminal Law: Learner’s Guide

Unit Standard 11977: Identify and explain specific and statutory offences. 2004. This module consists of eight chapters. Chapter 1 is an introduction to Criminal Law while Chapter 2 deals with the elements of a crime and the principle of legality. Chapter 3 goes on to explain an act as any “*voluntary human conduct which conforms to the definition of the act contained in the definition of the crime*” (General Principles of South African Criminal Law: 2004:12).

Importantly for the purposes of this research, Chapter 4 deals with unlawfulness. Appropriately, the chapter indicates that “*unlawful*” means against the law. An act becomes unlawful if it is prohibited by law and conversely failure to act where there is a legal duty to act positively may also be deemed to be acting unlawfully (own emphasis) (General Principles of South African Criminal Law: 2004:24).¹⁷

¹⁶ See full discussion in Chapter 6 at Question 31.

¹⁷ Research indicates that police officials delay their response to serious and violent crime because they fear using their firearms. Refer to chapter 6 for detail at 6.3.4.

Operational police officials have a duty to act positively and if they fail to act they are acting against the law and may therefore be prosecuted. Interestingly in the interviews for this study the interviewees were generally saying that they delay their responses to serious crime for fear of using their firearms. In such a situation the question goes begging: are they breaking the law? While they have a legal duty to act positively, are they necessarily acting unlawfully if they fail to act/respond positively and promptly to violent crime? Interviewee 20 of the Flying Squad stated that:

“.....that’s why I’m telling youI’m not using my firearm anymorelike some of the members say, they can take the firearms away ... because what’s the use you got a firearmyou’re not allowed to use it Use it and you’re in trouble”.

(See Chapter 6 for a more detailed discussion of these and other aspects of the use of lethal force).

In certain instances, a person’s conduct may conform to all the requirements of an offence and yet his/her conduct may be deemed lawful. In these cases the person may be justified in his/her conduct although he/she commits a prohibited act. Chapter 4 of this module reviews in more depth and deals with the grounds of justification. A police official’s conduct is expected to be reasonable and in the interests of the public. When a police official is called upon to use lethal force in the execution of his/her duties, it is expected of him/her to contravene a legal rule, i.e. shoot at (and possibly take the life of or seriously injure) a person, in order to protect the life of another. In other words, as a result of certain circumstances, the police official has had to contravene a legal rule (not kill a person). The police official, under these circumstances, may rely on the principle ‘grounds of justification’ for his/her action.

Some of these grounds of justification have come up frequently before and the courts have had to lay down guidelines for these situations. Some of these grounds for justification are Private Defence, Impossibility, Consent, Right of Chastisement, Acting upon an Order, Official Capacity, etc. See further comment on obedience to orders and the power of authority in Chapter 4 at 4.7.1.

Important to this study on lethal force, is the ground of justification of 'Private Defence', or as sometimes commonly referred to as 'Self Defence' (General Principles of South African Criminal Law, 2004:25-37).

According to the module mentioned above, private defence is a ground of justification upon which a person can rely if he/she protects his/her own or another's interests against an unlawful attack which has commenced or is imminent at the time he/she protects the interests. The requirements for Private Defence are also outlined, namely:

- the attack may consist in a positive act or an omission;
- the attack must be unlawful;
- the attack must be directed at one or other legal interest;
- the attack must have commenced or be imminent (General Principles of South African Criminal Law, 2004:24).

Each of these requirements is discussed more fully in the module. They are tailored to address private defence firstly in terms of the attack or threatening attack; and secondly, the defensive action. The guide gives clear indication that although in most cases a person acts to protect his/her life or bodily integrity, a person may also act to protect some other legal interest as well.

Some of the case laws quoted in the module to illustrate this and the principle of the 'protection of property' are *Ex parte Minister van Justisie in re S v Van Wyk v 1967 (1) SA 488(A)* and *S Mogholwane 1982 (2) SA 587 (T)*. The *Mogholwane* case appears to have been presented in depth in the module. For defamation of another person's wife in public the case of *S v Van Vuuren 1961 (3) SA 305 (ECD)* is used; where private defence was used as a justification against an unlawful arrest the case of *R v Nomahleki 1928 GWL 8*; for intrusion in a home, *R v Mahomed 1906 NLR 396*; and in the case of trespass where private defence was used the case of *S v Botes 1966 (3) SA 606 (O)* is cited (General Principles of South African Criminal Law, 2004:27).

Interestingly, *S v Mokoena 1976 (4) SA 162 (O)* was also quoted to indicate that a person may act in private defence to protect another person, although there is no relation between the person

who acted and the person whose interest was threatened (General Principles of South African Criminal Law, 2004:27).

The study indicated otherwise. When asked if there is any correlation and/or difference between the use of lethal force during arrest and acting in private defence, many of the police officials interviewed understood the use of private defence to be associated with the use of force whilst off duty. It appears that the use of term “private” refers to the use of lethal force whilst police officials are off duty. It may also imply that operational police officials understand private defence to be applicable to those circumstances where they (police officials) use lethal force to protect their families, i.e. there must be a relationship between the person who acted and the person whose interest was threatened. But, as provided for in the module under discussion this is clearly not what acting in private defence is about. A detailed discussion on this interpretation of private defence appears at Question 30 in Chapter 6.

Also, important to this study, the defensive action for Private Defence embodies the requirement of acting with reasonableness. This means that the police official acting in Private Defence may not cause more harm than is necessary to ward off an attack. So logically a person may not kill another for merely stealing a pencil.

In addition, the principle of proportionality is brought into the explanations namely the “*threatened interest*” must not outweigh the “*violated interest*” (General Principles of South African Criminal Law, 2004:29). These private defence case laws used in the module are supplemented with X and Y character scenarios that allow for simple and easy understanding of the concepts mentioned. Together with this module a handout containing questions and scenarios was given to the learner. An example of a question posed in this section being: What is private defence?

This is important for police officials to understand so that they may continue with policing while understanding their limitations and their own and another person’s right to life.¹⁸

¹⁸ Police officials interviewed in the research did not differentiate between use of lethal force in effecting arrest and the use of force in private defence. See chapter 6 for details – questions 29 and 30.

An example (see below) provided in Scenario No. 1 in Chapter 4 of the module provides that causing the death (killing) of another (murder) is prohibited. The scenario is if X causes Y's death in order to save his/her own life. For example, where Y was about to kill X, we cannot maintain that X acted unlawfully. Unlawfulness is absent because there is a ground of justification, i.e. private defence (General Principles of South African Criminal Law, 2004:25). Also studied in this part of the Basic Training Learning Programme is the use of lethal force in the police, (as per National Instruction 18/5/1 over 1/1/4/1 (5) dated 2003-07-18). This instruction does not detract from the provisions of the use of force in private defence as mentioned in the module. A brief look into the National Instruction confirms the amendment to s49 by the Judicial Matters Second Amendment Act, 1998 (Act 122 of 1998) which came into operation on 18 July 2003 (about five days after the issue of this instruction). The National Instruction is two-fold and informs on the following:

- Principles not affected by the amendment to s49 to wit, private defence and use of force which is not likely to cause death or serious injury i.e. use of minimum force which is reasonable and proportional to the circumstances;
- Changes as a result of the amendment to s49, i.e. use of force that is intended or may cause death or grievous bodily harm to the person to be arrested (SAPS, 2003:1-3).

The instruction requested police members to take note that the discharging of a firearm at a person is regarded as the use of force which is likely to cause death or grievous bodily harm. Further, there is a promise that the Office of the National Commissioner will issue further comprehensive instructions on the use of force.

In brief, three guidelines are issued under the banner of changes brought about by the amendment to s49. They are as follows:

- Firstly, when a member reasonably believes that his or another persons life is in imminent or future death or grievous bodily harm, or that there is substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed or, if such

offence is in progress, of a serious in nature, involving life threatening violence or there is a strong likelihood of grievous bodily harm;

- Secondly, if the use of such force mentioned above is necessary to overcome the resistance of the suspect, then such force must be proportional to the degree of the resistance encountered;
- Thirdly, in light of the above, and where it is inevitable that force is to be used, the member must issue clear warning that lethal force is to be used unless the suspect submits to police custody. Where appropriate the member must fire a warning shot first if it is safe to do so. This requirement does not apply to instances where the member acts in private defence (SAPS, 2003:1-3).¹⁹

This national instruction was written after the watershed decision made in the *Walters* (South African Law Reports, 2002:615) and *Govender* (The South African Law Reports, 2001:286) cases respectively. These decided cases now limited the use of lethal force by the police when effecting arrests. When compared with the research findings in this study, only four police officials briefly explained the use of lethal force when acting in private defence and when using lethal force in making an arrest.

As discussed earlier, the understanding of private defence by operational police officials, which has a close relationship with the use of lethal force and is one of the situations in which the use of lethal force may be justified, needs to be revisited by the SAPS. Within the theme of the Regulatory Framework, the following module on specific crimes was provided to learners.

3.3.3.ii Specific crimes: Learner's Guide

Unit Standard 11977: Identify and Explain specific and Statutory Offences: 2004).

This module deals with crimes committed against a person, property, the state and public administration and lastly crimes against the community. A total of 38 crimes are discussed in five chapters. Chapter 2 deals with crimes against life. Specific to this research mention is made in the guide that the use of lethal force may result in death and a police official could be charged with murder.

¹⁹ Refer to Annexure I for copy on National Instruction 18/5/1 over 1/1/4/1(5) dated 2003-07-18.

Chapter 3 in this module deals with bodily integrity and dignity, while Chapter 4 has a section which addresses offences and crimes against morality. Specific to this research is the crime of rape which is defined as occurring “when a male intentionally and unlawfully has sexual intercourse with a female without her consent” (Specific crimes: Learner’s Guide, 2004:36). It is interesting to note at this point that in the module on General Principles of South African Criminal Law: Learner’s Guide, (2004:26) discussed in point 3.3.3 (i), it is indicated that one can act in private defence to prevent rape, arson, and *crimen injuria*.

So too, Chapter 5 handles crimes against property. One of the requirements of private defence is that one may use force that is reasonably necessary to protect his/her interest therefore one’s property may be defended or protected against unlawful attack. Chapter 5 also addresses crimes such as theft, arson and robbery, etcetera (Specific crimes: Learner’s Guide, 2004:44-78). This module is supplemented by a workbook which provides questions and role plays regarding selected crimes. These are relevant in order to sensitise the learners to the practical problems of policing and dealing with these when policing on the ground.

The research into the legal framework on lethal force indicated that the right to life is protected by the Constitution. Private defence to protect property or even in the case of *crimen injuria* may therefore in the context of the lethal use of force, come under scrutiny. Accordingly, the police official needs to be made aware that the principle of proportionality is to be applied in every situation.

At this stage it is necessary to briefly discuss the principle of proportionality. The Constitution, 1996 (Act 108 of 1996) affords all citizens basic human rights as contained in Chapter two (also known as the Bill of Rights) (Murray & Soltau, 1997:5-17). The rights of citizens can, however, be limited in certain circumstances as provided for in Section 36 (1) of the Constitution, which states that the rights contained in the Bill of Rights may be lawfully limited only if the limitation is:

- contained in the law of general application; and
- is reasonable and justifiable in an open and democratic society based on the principles of human dignity, equality and freedom (Joubert, 2001:23).

When we speak of the limitation of the right being reasonable, the President of the Constitutional Court found in *S v Makhwanyane and Another 1995 (2) SACR 1 (CC)*, that the reasonableness of the limitation of a right must be determined on the basis of the principle of proportionality. Joubert (2001:24), correctly asserts that the degree to, and manner in which a right is limited must be proportionate to the purpose of the limitation.

One of the gaps identified is that the module under review does not unpack the principle of proportionality adequately. What does it mean to act or be “in proportion” to something? The South African Concise Oxford Dictionary (2002:936), defines “in-proportion” as “*according (or not according) to a particular relationship in size, amount or degree*”. Therefore it is submitted that when police officials need to limit a right of a suspect or accused, the limitation (such as the use of lethal force which limits the right to life) must be aligned with the seriousness of the offence for which the suspect or accused is to be arrested.

This means that to shoot at an unarmed, fleeing suspect, who is suspected of having committed a minor offence, would be acting in conflict with the principle of proportionality.

When determining whether the limitation of a person’s rights were proportionate and thereby reasonable, the court takes the following factors into consideration as explained in Murray and Soltau (1997:14):

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- relationship between the limitation and its purpose;
- whether there are less restrictive means to achieve the purpose.

When we look at proportionality in terms of the use of lethal force, police officials are now required to weigh the seriousness of the offence that was committed against the life of the suspect. This practice however, is not new to police officials. Section 13 (3) (b) of the South African Police Service Act 68 of 1995, provides inter alia, that force may only be used by an official provided that such a member uses only the minimum force that is reasonably required in

the circumstances. When we examine the concept of “*reasonableness in the circumstances*”, Nel and Bezuidenhout (1997:201) explain that only the minimum use of force that is reasonable and necessary should be used to achieve the purpose.

3.3.3.iii Law and Policing: Learner’s Guide

Unit Standard 11979: Identify and apply relevant knowledge about the law in general related to policing, 2004

This module consists of four chapters. Chapter 1 introduces the law to wit: “*Law is made for the people by the people*” (Law and Policing: Learners Guide, 2004:1). It goes on to describe/classify South African National Law and appropriately “*Police Law*”.

In this module police officials are urged to have a good understanding of Public Law which deals with the “*relationship between the state as an authoritative power and subjects of the state...*” (Law and Policing: Learner’s Guide, 2004:7). Two branches of formal law are also very important namely the Law of Criminal Procedure and Law of Evidence, since they describe the responsibilities of police officials in the execution of their duties. The fields of law that are collectively referred to as Police Law consists of:

- Constitutional Law;
- Criminal Law;
- Law of Evidence;
- Administrative Law; and
- Law of Criminal Procedure.

This study module goes on to provide a brief history of South African law. Relevant to this study is the discussion in the module on case law and the Constitution (Law and Policing: Learner’s Guide, 2004:13-14). Aptly, the study module indicates that “*courts must also take into account their **previous judgements** in similar cases because they are bound to the approach followed in the past. The reason for this lies in the system of judicial precedent...*” (Law and Policing: Learner’s Guide, 2004:13).

It is necessary at this point to briefly discuss “precedence” and its relevance to this study. The South African Concise Oxford Dictionary (2002:918) defines “precedent” (own emphasis) as “*a previous case or legal decision that may be or must be followed in subsequent similar cases*”.

In South Africa, sources of criminal law include legislation (common law and statutory law), the Constitution and judicial decisions (case laws). Snyman (1991:11) explains that “*a lower court is in principle bound to follow the construction placed upon a point of law by a higher court, and a division of the Supreme Court is in principle also bound by an earlier interpretation of a point of law by the same division*”. This in essence is referred to as the principle of judicial precedence and confirms the judicial hierarchy of the South African courts. Lower courts are bound by the decisions of the higher courts with respect to interpretations of the law.

It is for this reason that Chapter 4 in this study focuses on previously decided case laws on use of lethal force. In the module the supremacy of the Constitution is touched on (Law and Policing: Learner’s Guide, 2004:15). Chapter 2 in the module introduces the criminal justice system, i.e. the role of a police official to reporting and investigation of a complaint/crime, prosecution, trial and post trial. In this module, emphasis is placed on the need of police officials to have a “*working knowledge*” (Law and Policing: Learner’s Guide, 2004:21) of the system.

Although 41% of the research population had forgotten case laws studied during basic training, three out of the twelve police officials (who did remember), had completed their training in 2002 and 2004 respectively. They also could not recall any Constitutional or Appellate division case laws. This is a poor reflection on the interpretation of the law by many of the operational police officials.

Chapter 2 of the Basic Training Learning Programme also gives an overview of the mandate for the role of policing in the criminal justice system. Policing powers in terms of section 205 (3) of the Constitution, the SAPS Act, Act 68 of 1995, the SAPS Code of Conduct and National Orders and Instructions are mentioned. Below, for purposes of clarity, each one according to the study module, is outlined with a brief discussion.

Section 205 (2) of Constitution

“National legislation must establish the powers and functions of the Police Service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the Provinces” (Law and Policing: Learner’s Guide, 2004:22).

SAPS Act 68 of 1995

As set out in the Constitutional provision above, the South African Police Service Act, 1995 (Act 68 of 1995) was enacted to ensure the safety and security of all citizens within the country and protects the basic rights of persons (as provided for in the Constitution). The specific relation to the use of lethal force and training is outlined in three sections of this Act, namely:

- Section 13(1)

A police official may exercise such powers and carry out such duties as bestowed upon him, subject to the Constitution and with due respect to every person’s basic human rights (Law and Policing: Learner’s Guide, 2004:23).

- Section 13 (3)(b)

A police official who is **duty bound** to carry out such duties, must perform these duties in a fitting and reasonable manner. Moreover, where a police official is authorised by law to use force, *“he or she may use only the minimum force which is reasonable in the circumstances”* (Law and Policing: Learner’s Guide, 2004:23).

- Police Regulations: Section 24

This provision in the SAPS Act allows for the Minister of Safety and Security to put measures into place to regulate inter alia:

- the conduct of police officials in the execution of their duties;
- **“training conduct** and conditions of service”
- The management and **maintenance** of the SAPS; and importantly
- **“standards of physical and mental fitness”** [own emphasis added] of police officials (Law and Policing: Learner’s Guide, 2004:23).

In the context of this study it was discovered that there are many shortcomings in reality when compared to this learning material. There also appears to be a lack of the practical implementation of these learnings.

In Question 14 in the research survey used in this study, the following responses are most revealing of the situation on the ground, namely, 69% of the respondents could not adequately explain or define properly 'Human Rights and policing', while 59% indicated that they had not received any specific training on the subject at all (see Chapter 6 for more detailed discussion of this point). It is evident that more needs to be done in regulating and implementing a practical aspect to the basic training programme in the SAPS.

The research conducted revealed that the majority of operational police officials interviewed were not trained on Human Rights. So how are they going to be protective of the basic rights of others in a new democracy like ours? The common thread emerging in the interviews was that some police officials deliberately delay their response when attending to serious and violent crime for fear of using their firearms. How then could the operational police officials be acting responsibly and duty bound? See Section 13 (3) (b) above.

SAPS Code of Conduct

A Code of Conduct for the SAPS reflects police commitment to safety and security is made by SAPS members to, amongst others:

- render a **responsible and effective service** with integrity;
- uphold and **protect the basic human rights** of every person;
- exercise the powers bestowed upon police officials in a responsible and controlled manner (saps.gov.za/saps).

In the handout the learner is cautioned that any detraction from the provisions of the Code of Conduct may result in disciplinary action taken against him.

National Orders and Instructions

In order to render an accountable and efficient police service, the National Commissioner of the SAPS, from time-to-time, issues National Orders and Instructions. These may be repealed by way of a Consolidation Notice (Law and Policing: Learner's Guide, 2004:24).

Provincial orders (Section 26 of SAPS Act) issued from the offices of the Provincial Commissioner have to be consistent with the issued National instructions, although they apply only to those police officials working in that specific province. An appropriate example would be the National Instruction 18/5/1 over 1/1/4/1(5) dated 2003-07-18).

Chapter 2 concludes by identifying all the role-players in the criminal justice system, namely: SAPS, Department of Justice (including the National Prosecuting Agency) and the Department of Correctional Services. Chapter 3 in this module goes on to explain the structure of the Constitution. Interestingly, mention is made that in the judicial system in South Africa, the Constitutional Court "*is the highest court in all Constitutional matters*" (Law and Policing: Learner's Guide, 2004:26). Here the doctrine of precedent is brought in. Refer to discussion above on judicial precedent.

Chapter 4 of the module is of importance to this study as it contains a discussion on 'human rights', which is linked to Chapter Two of the South African Bill of Rights as contained in the Constitution. The influence of human rights and the Bill of Rights on law is discussed with reference to case law of *S v Makwanyane 1995 (3) SA 391 (CC)* (in which the death penalty was declared unconstitutional). In this part of the module (Law and Policing: Learner's Guide, 2004:31-50), the learning outcomes are that upon completion of this chapter (Chapter 4 of the Basic Training Learning Programme) the learner is expected to:

- explain Human Rights according to Chapter 2 of the Constitution;
- explain the Constitutional supremacy in relation to other laws; and
- explain the lawful limitation of rights (section 36 of the Constitution) and how it operates.

This chapter is important to this study because it allows the use of lethal force to infringe upon the right to life (section 11 of the Constitution). Police officials are empowered to limit that right when they are called upon to effect arrests to protect other lives as well as their own.

The decision to use lethal force is then contradictory to the provision of a fundamental right in the Bill of Rights (Chapter 2 of the Constitution). The authority vested in police officials stems from the right they have to limit certain human rights. Now, although the Bill of Rights affords basic human rights to all, it also empowers police officials to limit these rights under certain circumstances. Joubert (2001:22) correctly points out, as does the module, that three provisions in the Bill of Rights significantly influence policing powers, namely: the limitation clause; the exclusionary rule; and the right to just administrative action. A look at each, as discussed in the module of Law and Policing: Learner's Guide, (2004:13), will be undertaken in the following sections.

The first provision in the Bill of Rights that influences police powers is the limitation clause, i.e. Section 36 (1) of the Constitution. Learners are advised that human rights are not absolute and may be limited. However, any limitation of certain rights must be reasonable, fair and in line with equality, freedom and dignity. Rights in the Bill of Rights may be limited:

- in terms of the law of general application (this means law that is found in either common or statutory law). An example is given here in both Joubert (2001:23) and the module (Law and Policing: Learner's Guide, 2004:40), of a person who defends himself and kills his assailant during an armed attack. The person who defended himself therefore limited the right to life of the assailant but he can rely on private defence (found in common law) to justify his actions;
- provided, it is reasonable, justifiable in an open and democratic society based on the principles of human dignity, equality and freedom. Some attempt is made to explain both "reasonable" and "justifiable" in the module. "Reasonable" is very briefly illustrated by issuing a J175.²⁰ Instead of arresting a person in order to secure his attendance in court.

²⁰ J175 – a summons containing the charge and date of appearance in court at a particular date and time (Joubert,

“Justifiable” is explained as the learner must be able to explain his actions to a court afterwards.

- Further, the module then provides that to act in line with being reasonable and justifiable when limiting a right, the learner must apply the proportionality test.²¹
- As provided in section 36(1) of the Constitution, the factors to be considered when limiting a right are the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose (Law and Policing: Learner’s Guide, 2004:40-41).

The role of the limitation clause is the “link” between the Constitution and other laws that empower police officials (Joubert, 2001:25). Learners are cautioned to familiarise themselves with law and the limitations when they need to limit people’s rights (Law and Policing: Learner’s Guide, 2004:43).

The second provision in the Bill of Rights that influences police powers is the Exclusionary rule found in section 35 (5) of the Constitution which provides that “*Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*” (Murray & Soltau, 1997:14). The module points out the consequences of wrongful police action and its implications, e.g. the inadmissibility of evidence by a court, criminals will walk free and the increase in crime in the country. Trainee police officials are encouraged to use credible investigative methods to obtain evidence or run the risk of allowing possibly guilty parties of being set free (Law and Policing: Learner’s Guide, 2004:44).

Joubert (2001:25) provided a better angle in that although previously police officials who obtained evidence unlawfully, were criminally, civilly and/or departmentally prosecuted, section 35(5) of the Constitution now provided that this evidence may be totally excluded from the trial.

2001:226).

²¹ Refer to earlier discussion on proportionality in this chapter at 3.3.3.ii Specific crimes: Learner’s Guide, for more detail on principle of proportionality.

This specific research into the use of lethal force did not explore the adducing of evidence as such. The third provision in the Bill of Rights that influences police powers is the right to just administrative action in terms of section 33(1) of the Constitution, i.e. “*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*” (Murray & Soltau, 1997:12).

The module points out that a police official therefore represents the state and as such all his/her “*official actions are administrative actions that must be consistent with the requirements of the Constitution...*” (Law and Policing: Learner’s Guide, 2004:45). The module also illustrates this with an example of section 38 of the Criminal Procedure Act 1977, (Act 51 of 1977) which prescribes the four methods of securing the attendance of an accused in court.

It is mentioned in this module that in terms of securing the attendance of an accused in court, police officials previously had “no obligation” to use the “least severe” means and that police actions were not “strictly prescribed” in terms of this act i.e. to achieve the purpose of ensuring the attendance of an accused before court.

It is interesting to note that s38 of the Criminal Procedure Act, 1977 (Act 51 of 1977) prescribes four methods for securing the court attendance of a suspect. These four are:

- summons (prepared by the prosecutor – secures the attendance of the accused in a lower court);
- written notice to appear (prepared and handed over to accused by a peace officer –applies to minor offences where a certain amount is prescribed as per Government Gazette. Accused can pay an admission of guilt without appearing in court);
- an indictment (this applies to cases that appear at a “*superior court*” (Joubert, 2003:86). This is drawn up by the Director of Public Prosecutions);
- arrest of accused. According to Joubert (2003:86), the arrest of a person is the “*drastic infringement of the rights of an individual*”. Joubert goes on to add that wrongful arrest may give rise to claims and the police official may be held liable (Joubert, 2003:87).

And yet, none of these four methods are expressly mentioned or listed anywhere in this basic training module. This means that in the past, police could arrest a person for a minor transgression instead of for example issuing a written notice to appear or serving an indictment upon the accused to secure his/her attendance in court.

Joubert (2001:229) indicates that arrest seriously infringes upon an individual's right to privacy and human dignity. Police need to use this tool (arrest) with care and need to weigh the situation between the interest of the individual and interest of community.

Importantly, and for the purpose of this research, the researcher is of the opinion that since the use of lethal force stems from the need to arrest and incarcerate an accused or suspect, operational police officials should be well versed in the alternatives available to ensure the accused stands trial. Notwithstanding the fact that s38 refers to an accused person whilst s49 involves the use of force when effecting the arrest of either an accused or a suspect, the four methods in s38 should have formed part of the study.

It is clear then that no prescription existed which compelled police officials to use the least restrictive means (of the four mentioned alternatives) to secure the attendance of an accused in court. Could this have been the situation when it came to the use of lethal force? Did the absence of clear prescription to or no obligation on police officials to use the "least restrictive means" allow for the abuse of lethal force when effecting arrests?

The researcher postulates that this was probably the case. Research conducted indicates that operational police officials are unhappy with the amendment to s49. Further, that the amendment has "limited" their rights as police officials and disempowered them.²²

An interesting notion to consider would be whether these feelings arose because the majority of police officials interviewed have not had the relevant training on the amendment to s49 or whether some police officials are disappointed that they could no longer shoot at suspects fleeing from serious offences whom they needed to arrest, or both, is an interesting question.

²² For a detailed discussion on Findings see question 31 in Chapter 6.

With the advent of the Constitution the kaleidoscope of policing was impacted on to a great extent. For the first time in the history of South Africa, there was a sovereign law that protected every individual's right to life (Murray & Soltau, 1997:6). Police officials are now obliged to use minimum force to secure the arrest of a suspect or to use the least restrictive means to secure the attendance of an accused in court. The Constitution imperatively posed challenges to the old version of s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) which authorised police officials to shoot to kill, not only at violent suspects but those who were unarmed and escaping from police after committing offences that were not of a life threatening nature e.g theft of motor vehicles. The use of lethal force is to be used in very limited circumstances only.²³

The guide goes on to discuss 'administrative action' and the police official (section 38 of Criminal Procedure Act, 1977 (Act 51 of 1977)) as follows:

- liability for wrongful action (unlawful arrest and excessive use of force are given as examples) (Law and Policing: Learner's Guide, 2004:46);
- state liability (the police official is a servant of the state and the state can be held liable if the police official acted within the scope of his/her duty – two case laws are quoted, namely *Minister of Police v Gamble 1979 (4) SA 759 (A)* and *Minister van Polisie v Ewels 1975 (3) SA 590 (A)* (Law and Policing: Learner's Guide, 2004:47) ;
- personal liability (the police official may be charged criminally, the state may recover expenses incurred by the police official and he/she may face internal disciplinary hearings) (Law and Policing: Learner's Guide, 2004:47);
- criminal liability (the police official may himself be found guilty of committing a crime) (Law and Policing: Learner's Guide, 2004:48); and
- civil liability (consists of actions by and against the state as a result of any police action) (Law and Policing: Learner's Guide, 2004:48).

²³ See case law *Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)* – Chapter 4 for detail.

Interestingly, in Question 31 of the research survey (see Chapter 6 for detail), the comments by respondents revealed that as police officials they are fearful of the impact and consequences (liabilities) of possibly using lethal use of force when policing and responding to crime or domestic violence incidents in terms of job loss, losing their homes (economic impact if placed on suspension or dismissed), break-up of families (divorce or other emotional impact of divorce) etcetera.

The chapter goes on to mention the Independent Complaints Directorate (ICD) and its pivotal role in policing (Law and Policing: Learner's Guide, 2004:49-50). In this module there is also a section on victims' rights which includes information on women and domestic violence, and rape.

The guide indicates that the victim must be treated with "extra dignity and care" and sensitivity. The police official is also guided towards acting professionally, impartially and responsibly, especially when dealing with the issue of domestic violence (Law and Policing: Learner's Guide, 2004:56).

In this research study, police responses to such situations like domestic violence where women were victims and where there was the possibility of the use of lethal force, were tested. A specific set of three related scenarios was developed and put to respondents at the end of the research survey questionnaire (see Annexure E). These scenarios and questions were posed to all respondents in the study in order to test the effectiveness of the legislation on domestic violence and to probe the conduct of police officials when attending to domestic violence complaints.

Further, the researcher wished to explore the conduct and behaviour of operational police officials in cases of domestic violence that warranted and/or carried the possibility of the use of lethal force.

Incidentally, the training of police officials on the Domestic Violence Act, 1998, Act No. 116 of 1998 commenced during 2003 (SAPS, 2004:40). It appears from the research conducted that this training failed to provide practical training on when and how to deal with actual violence. In the

research study conducted, when faced with Scenario 1 (see Annexure E) that involved dealing with a suspect in a domestic violence situation, who was **unarmed** and had badly beaten up his wife prior to police arrival and who was **resisting** and **attempting to flee** to avoid arrest, one respondent indicated that:

“.....you have to give a first warning to a person, if he does continue....then you have to, you have to shoot to a person but to injure him so thatcan overcome the....the....running.....but no to, to place his life under death (sic)....just to injure a person so that you can overcome the resisting of arrest.” (2006, Interview 14).²⁴

Clearly, this is not a constitutionally and procedurally acceptable way of dealing with this complaint. Neither the complainant nor the police official in the scenario was placed in imminent life threatening danger. The police official (above) also appears to be confused on his understanding of the use of lethal force. The use of lethal force is the use of a firearm *“which is likely to cause death or great bodily harm...”* (Hall & Whitaker, 1999:393).²⁵

The police official cannot be absolutely certain that the split second decision he arrived at, to shoot at suspect, will result in the suspect being fatally wounded or just wounded. Therefore the use of lethal force is to be considered as potentially fatal. In this scenario the identity of the suspect has been established and his arrest could be executed by proper investigative procedure.

The victim may have been placed at a place of safety.²⁶ The police official is required in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) to assist the complainant to find suitable shelter and obtain medical treatment.

The use of lethal force would have been excessive in this situation and disproportionate in the circumstances. The police official's use of lethal force would have been justified if the suspect had threatened his life or the life of another at that immediate moment in time. Naturally these circumstances could change depending on how the scenario changes (i.e. whether the violence level in the situation escalates).

²⁴ See discussion under 3.3.3 iv below and Chapter 6 for more detail.

²⁵ See 1.6.2 in Chapter 1 for definition on lethal force.

²⁶ Refer to Domestic Violence Act, 1998 (Act 116 of 1998) Section 2a at http://www.acts.co.za/dom_viol/index.htm

In support of this submission above, *The Citizen* newspaper in 2008 reported that the police were not complying with the Domestic Violence Act, 1998 (Act 116 of 1998). It was stated in the news article that 65% of police stations countrywide fail to treat domestic violence victims as prescribed by the law (SAPA, 2008). The Independent Complaints Directorate report²⁷ to Parliament's portfolio committee was reviewed and the following statistics were revealed for the period January to June 2007. The results are tabulated as follows:

Table 2: ICD Report on Domestic Violence: January to June 2007

Province	Number of cases of non-compliance to Domestic Violence	Number of cases where police officials were suspects for Domestic Violence
Gauteng	24	3
Western Cape	18	0
Kwa-Zulu Natal	5	3
Eastern Cape	3	3
Limpopo	3	2
Mpumalanga	2	1
North West	5	1
Free State	5	2
Northern Cape	1	3

In their report (undated but released in 2007) the ICD stated that the SAPS is making progress in adhering to the Domestic Violence Act, 1998 (Act 116 of 1998) and that “continues (sic) training is needed to maintain the professionalism” in the SAPS Community Service Centres. In the first six months of 2007, it is illustrated that 18 police officials were themselves suspects of domestic violence.

This is all the more reason for improved training on Domestic Violence for operational police officials. In 2002 an ICD Report on Domestic Violence training of police officials, pointed out “...for as long as the SAPS management continues to preclude the ICD from assisting in identifying the weaknesses at certain stations, civilians will continue to receive poor and

²⁷ See www.icd.gov.za – Report: Domestic Violence Report to Parliament for the period January to June 2007.

insensitive service from untrained members".²⁸ In fact, as early as 2002 the then Minister for Safety and Security, Minister Charles Nqakula, had tabled an earlier ICD report in Parliament on 13 November 2002 wherein the ICD had indicated they were of the opinion that "*an in-depth training intervention would in fact assist the SAPS to understand the social complexity of domestic violence*" (ICD, 13 November 2002).

It is therefore evident that the SAPS were aware of the need for in-depth training on the handling of domestic violence complaints as early as 2002. Research conducted by Smythe (2004:19),²⁹ focused on the use of weapons in incidents of domestic violence as was reflected in protection order applications in three Western Cape jurisdictions. She discovered that weapons are often used in domestic violence and stated that if the police and magistrates make full use of their powers to seize weapons, it will certainly pro-actively protect women and the broader public.

The article in *The Citizen* (SAPA, 2008), pointed out that in 2008 (six years down the line) police are still not complying fully with the Domestic Violence Act, 1998 (Act 116 of 1998). Why has this training intervention (if any), therefore not filtered down to operational police officials?

The research conducted for this study revealed that some police officials would shoot at a fleeing domestic violence suspect. In the scenario³⁰ put forward in the interviews, the suspect was armed (suspect did not produce/draw the weapon), but attempted to flee without posing an imminent life threatening danger to the police official or any one else. Under the same scenario circumstances, three of the respondents stated that they would shoot the fleeing suspect in the leg.

This would be acting contrary to legal provisions. In the Walters case, the judge provided guidelines to arresting officials (South African Law Reports, 2002 (4): 616 at G). Pertinent to this scenario, the eighth guideline provides that under ordinary circumstances the shooting of a

²⁸ <http://www.icd.gov.za/reports/2002/16days2.htm> - (ICD's Report on the 16 days of activism of no violence against women (25 November to 10 December 2001).

²⁹ See *SA Crime Quarterly*, 10. December 2004 for full report .

³⁰ See scenario 3 in Chapter 6 for detail.

suspect merely to carry out an arrest is not permitted unless the suspect/s poses a threat of violence to the arrestor or other persons or is suspected of having committed or threatened to commit an offence of serious bodily harm and there are no other means to carry out the arrest, at that time or later (own emphasis). In the scenario provided, there were other means to ensure the appearance of the suspect in court. The accused could well be arrested later. His identity is known and he could be easily traced by a detective. The victim may also be placed at a place of safety after she receives medical attention.

Further, the respondents were asked if they had received any in-service training on the amendment to s49 after they had undergone Basic Training. An overwhelming majority (86%) indicated that they had not. See Question 15 in Chapter 6 for detail. These findings reveal that operational police officials are insufficiently trained to make use of lethal force decisions in line with legal requirements. The understanding here is that additional training (refresher training) on lethal force after the amendment to s49 would upskill operational police officials to make decisions on the appropriate use of lethal force.

It is therefore clearly evident that the training on domestic violence, which as illustrated is a violent crime which may warrant the use of lethal force, has made very little or no impact on operational police officials.

These shortcomings of the training on the Domestic Violence Act, 1998 (Act 116 of 1998) support the findings which are relevant to this study that looks at how and when to use lethal force.³¹

This module then concludes with the rights to a fair trial as per Section 35 of the Bill of Rights. The accused has a right to be presumed innocent and that the state has to prove its case “*beyond reasonable doubt*” (Law and Policing: Learner’s Guide, 2004:62).

Interestingly the conclusion in the module appropriately states that as from 1994 policing in South Africa has changed from policing in an apartheid era to focusing, with the arrival of a new democracy, on human rights. It goes on to add that the apartheid era, with its widespread

³¹ See Chapter 6 on research findings based on the scenarios on attending a domestic violence complaint.

violation of human rights, is in the past and that no police official is above the law, or can act with impunity, especially in terms of such issues as the misuse of the use of force option when policing crime. Therefore a police official's actions must be respectful and in support of human rights as per the South African Bill of Rights.

3.3.3 iv Statutory Law: Learners Guide

Unit Standard 11977: Identify and Explain Specific and Statutory Offences, 2004

The module for Statutory Law comprises a discussion of 17 statutory offences. Below is a list of the statutory offences as described in the module. Learners are expected to explain the elements of these offences as per the learning outcomes. It was deemed unnecessary to fully define each crime for the purpose of this study.

- a) Intimidation, e.g. the threat to assault or injure another person;
- b) Domestic Violence, e.g. physical, sexual, emotional abuse in a domestic relationship;
- c) Corruption, e.g. giving/offering a benefit to someone else to whom it is not legally due with the intention to unduly influence the person;
- d) Stock theft, e.g. stealing of stock/produce belonging to another person;
- e) Liquor, e.g. the illegal sale of liquor or the sale of liquor at unauthorised times;
- f) Drugs and Drug Trafficking, e.g. unlawful use or possession of a prohibited drug;
- g) National Road Traffic Act, 1996 (Act 93 of 1996) e.g. driving under the influence of alcohol;
- h) Trespass, e.g. to occupy a land or building without the permission of the owner thereof;
- i) Inquest Act, 1959 (Act 58 of 1959) e.g. authority of police to investigate unnatural deaths;
- j) Child care, e.g. crimes against children such as assault, unlawful removal and sexual abuse;
- k) Sexual offences, e.g. rape;
- l) Animal protection, e.g. police authority to put down a diseased or injured animal;
- m) Labour relations, e.g. explains the police official's rights in terms of Labour law with regard to strikes and lockouts;

- n) Mental health, e.g. duty of police official to apprehend/detain mentally ill persons who pose a threat to themselves or others;
- o) Dangerous weapons, e.g. it is an offence to possess a dangerous weapon;
- p) Explosive Act, e.g. prohibits the possession of explosives; and
- q) Firearms Control Act, 2000 (Act 60 of 2000), e.g. the possession of ammunition or an unlicensed firearm.

The examples above were based on the Basic Training Learning Programme module under review (Statutory Law: Learner's Guide, 2004:1-175).

The learner was required to be able to explain the elements of these statutory offences upon completion of this module. For the purposes of the research we will focus on the Domestic Violence Act, 1998 (Act 116 of 1998). The discussion in 3.3.3 iii on domestic violence above reiterates the reason for this focus. In addition, the South African Police Services Strategic Plan for the period 2005 to 2010 identifies crimes against women and children as a focus area. The strategic priority of the SAPS is to reduce the incidence of crimes against women and children, expressly domestic violence (SAPS, 2004:39).

In order for this priority to be realised, the Domestic Violence Act, 1998 (Act 116 of 1998) must be effectively implemented. Although the SAPS has taken steps to address this focus area by rolling out a comprehensive prevention of domestic violence training program, research and studies as outlined above, illustrate that these attempts are missing the mark, hence the choice of focussing on domestic violence in this study.

So too, the Basic Training Learning Programme module slants heavily towards the Domestic Violence Act, 1998 (Act 116 of 1998) – it is discussed in a total of 44 pages. The module goes on to add that the SAPS is committed to prevent/combat crimes against women and children – which have been identified as a policing priority. The National Instruction 7/1999 is quoted and gives a clear indication on responding to Domestic Violence as well as obligations placed upon the police official in responding to this type of priority crime.

The definitions in the Domestic Violence Act, 1998 (Act 116 of 1998) include domestic relationships, certain myths that have over the years arisen in dealing with domestic violence, e.g. that the police should not get involved in dealing with any domestic violence and the victim should leave the aggressor, (i.e. get out of the house and end the relationship). The conduct of the police official when responding to a domestic violence complaint is also discussed, e.g. physical, sexual, damage to property, economic abuse, emotional, verbal, psychological abuse, harassment, intimidation, stalking etc. Police officials are taken through the whole process of responding to a case of reported domestic violence from the receipt of a domestic violence complaint, dispatching of a vehicle to the responsibility of a Community Service Centre (at the police station). This is followed by mention of other aspects such as the securing of the scene of domestic violence, conduct on arrival to dealing with the complainant and the aggressor (Statutory Law: Learner's Guide, 2004:8-24).

In the research study conducted and during the interviews, when posed with Scenario 1 (see Annexure E) that involved dealing with a suspect who was unarmed but had threatened to shoot the complainant in a domestic violence complaint, 48% of the operational police officials interviewed indicated that they would call for backup to arrest the suspect who attempted to flee.

In this scenario, the police official and his colleague could very well have executed the arrest without backup because it had been confirmed that the suspect was unarmed at that stage. Is the call for backup rather more as a call for advice on how to proceed in cases of domestic violence where a weapon is involved? Are police officials unsure and/or improperly trained on how to deal with domestic violence complaints where a weapon is involved?³²

In addition, this module deals with the seizure of firearms and other dangerous weapons. In any situation where an element of violence is present the police official is encouraged to inter alia:

- Search any person and seize any arm/ammunition from any person who: -
 - displays the intention to harm himself or another; or
 - is inclined to violence, has a mental condition or/and is dependent on drugs/liquor(Statutory Law: Learner's Guide, 2004:24).

³² See Chapter 6 for detail.

The module goes on to discuss Section 102 of the Firearms Control Act, 2000 (Act 60 of 2000) which allows the registrar to declare a person unfit to possess a firearm if the Registrar receives information provided in a statement under oath/affirmation. Moreover a person, against whom a final protection order in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) is issued, may be declared unfit to possess a firearm.³³

This module goes on to state that the police official may arrest any person who is in a domestic relationship and who is suspected of having committed an offence with the element of violence. Section E goes on to describe the rendering of assistance to the complainant (Identify and Explain Specific and Statutory Offences, 2004:28).

The trainee police official is taken through the proactive measures initiated in terms of the proactive charge policy whereby the SAPS has received evidence of violence in a domestic violence case and can proceed without the complainant (pressing charges), i.e. the police official can proceed with registering a criminal case without necessarily having to rely solely on a complainant laying charges and indicating that the police should continue with investigation of the case) to the procedure whereby a complainant is assisted with possibly going on to the witness protection programme; an application for a protection order; collection of personal property (if they have left the joint residence or ended the domestic relationship ecetera) and proper record keeping for each domestic violence incident reported to the police (Statutory Law: Learner's Guide, 2004:31-35). All this is highly indicative of the priority status afforded to the crime of domestic violence and it is in line with the new 1996/1997 prioritisation of certain crimes.

The module ends with the police official being reminded that the police are not above the law and should a police official fail to comply he/she will be subjected to the disciplinary process.

3.3.3 v Criminal Procedure: Learner's Guide

Unit Standard 11978: Identify and apply sections of the Criminal Procedure Act, 2004.

The module has six chapters. Chapter 1 deals extensively with search and seizure with various

³³For more detail on the declarations of persons unfit to own or use a firearm see Minnaar & Mistry, 2003 and Mistry & Minnaar, 2003.

case laws being referred to and quoted. The module goes on to provide that minimum force which is reasonable under the circumstances may be used during search and seizure. Chapter 2 discusses methods to secure the attendance of an accused in court. The object of arrest as well as the requirements for a lawful arrest, are also discussed (Criminal Procedure: Learner's Guide, 2004:40).

This chapter touches on the use of force in effecting arrest and states that there “*should be no need for the use of force*” unless it is necessary and then such necessary force to be used should still be reasonable. It also points out that a police official who uses force which cannot be justified, should expect to be dealt with severely (Criminal Procedure: Learner's Guide, 2004:55).

In this module the important section 49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is introduced. This section is the one that provides for and allows a police official to use force in order to overcome resistance by a person who has been placed under arrest. The use of force under these circumstances may be justified provided that the police official considers the human rights afforded to every individual as enshrined in Chapter 2 of the Constitution (see later section for more detailed discussion of the implications and case law on section 49 of the Criminal Procedure Act, 1977 (Act 51 of 1977)).

The module (Criminal Procedure: Learner's Guide, 2004:45) goes on to describe the Constitution Section 12(1)(c) to (e) is quoted, namely the individuals right to freedom and security, including the right:

- not to be subjected to violence;
- not to be tortured in any way; and
- not to be treated in a cruel, inhumane or degrading way.

Section 11 of the Constitution, which addresses the right to life – is also discussed in some detail as well as section 35 (3) (h) – right to a fair trial and being presumed innocent. Within this rights context the guide cautions the police officials about the use of force (need to use) when effecting an arrest (Criminal Procedure: Learner's Guide, 2004:50).

The learner is advised that Section 49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) was amended by the Judicial Matters Second Amendment Act, 1998 (Act No 122 of 1998). Reference to the National Instruction 18/5/1 over 1/1/4/1(5) dated 2003-07-18 is quoted and learners are informed that their prescribed book contains the old section. A handout of the amended version of s49 was given to the students.

Chapter 2 goes on to discuss the principles not affected by the new s49. The two principles are listed as:

- Private Defence; or
- the use of force that does not cause death or serious injury (Criminal Procedure: Learner's Guide, 2004:56)

In this module Private Defence is dealt with in greater detail and is explained as:

- Any member who finds himself or herself in the situation in which his/her life or the life of another person is in danger and in which there is no other reasonable manner in which he/she can remove the threat against his/her life or against the life of such person, may use any means (including his/her firearm) to defend himself/herself or such other person (Criminal Procedure: Learner's Guide, 2004:57).

When dealing with situations where the use of lethal force may be used, the learner, having foreseen the possibility that by resisting arrest the suspect may endanger the life of the police official or other person/s, the police official must be extremely careful and be ready to use his/her firearm if that is reasonably necessary, to protect his/her (police official's) life and the life of another.³⁴

The principles that remain in effect are mentioned such as section 13 (3) (b) of the South African Police Service Act, 1995 (Act 68 of 1996), i.e. the use of minimum force must be reasonable according to the specific circumstances. The Criminal Procedure Act, 1977 (Act 51 of 1977) section 39 is quoted in terms of arrest, i.e. where a person subjects (willingly or without

³⁴ However, the research in this study appears to indicate otherwise. The research findings show that generally police officials are afraid to use lethal force. Eighteen of the 29 respondents interviewed were either confused or could not explain private defence (see Question 29, Chapter 6)

physically resisting) him/herself to the arrest, no force is to be used against such person (Criminal Procedure: Learner's Guide, 2004:40).

During the arrest, only reasonable force necessary under the circumstances must be used to overcome any resistance. In addition, the use of force must be proportional to the seriousness of the offence committed. In order for the use of force to be "*proportional in the circumstances*" it must comply with the following:

- the police official has reasonable grounds to believe that force is necessary;
- this belief is based on facts that existed at the time when force was used, e.g. the conduct and/or words of the person to be arrested or information received by the police official. Any other person in the position of the police official should arrive at the same decision when presented by the same position for one to act reasonably; and
- the "*type and degree of force*" applied during the arrest was "proportional to the seriousness of the crime that was committed" (Criminal Procedure: Learner's Guide, 2004:58).

Important to this study on the use of lethal force, the foregoing discussion regarding the changes brought about by the new section are discussed in more detail.

The learner is told that the new s49 relates to the "*use of force that is intended or likely to cause death or grievous bodily harm to the person to be arrested*". The module further explains that the discharging of a firearm at a person is regarded as use of force which is likely to cause death or grievous bodily harm, irrespective of the part of the body aimed (Criminal Procedure: Learner's Guide, 2004:58).

The SAPS Legal Services guidelines to which police officials must adhere with regards to the use of force were provided to the student as a handout. These are provided below in full detail as they are extremely important being the only real guidelines of how to interpret and act in accordance with the new (amended) s49:

The decision to use a firearm could result in the death or grievous bodily harm of the person to be arrested. This decision must therefore be based on reasonable grounds. Reasonable grounds are based on the following provisions:

- a) force to be used is immediately necessary to protect the police official or other person lawfully assisting the police official from imminent or future death or grievous bodily harm
- b) Substantial risk exists that should the arrest be delayed, the suspect will cause imminent or future death or grievous bodily harm to another; or
- c) The offence is in progress, of a serious nature, and life threatening violence or grievous bodily harm may be the result if the suspect is not arrested immediately (SAPS Special Service Order, 2003:3 – also see Annexure I).

According to the module (Criminal Procedure: Learner's Guide, 2004:58), if force is to be used, it should be only such force that is reasonably necessary to overcome the resistance of the suspect and force used must be directly proportional to the degree of resistance. When it becomes necessary to use lethal force to effect an arrest, a police official should, if it is reasonable to do so, issue a warning to the suspect that lethal force is to be used unless he/she submits to the arrest.

Where it is appropriate and/or safe to do so, a warning shot must be fired first before firing at the actual body of the person. The module gives no prescription or precaution as to and how the warning shot should be fired, e.g. into the air or ground. This requirement is not necessary if the police official is acting in private defence when his/her life or the life of another is in imminent danger (Criminal Procedure: Learner's Guide, 2004:59).

The prescribed book titled *Applied Law for Police Officials* (Joubert, 2001), contains the old section 49 (2) since it was printed in 2001 before the amendment was introduced. It does, however, discuss the following relevant use of lethal force case laws:

- *S v Martinus 1990 (2) SACR 568 (A)* (deals with private person using a firearm to effect an arrest and how his/her actions will be judged);
- *Matlou v Makhubedu 1978 (1) SA 946 (A)*;
- *Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)*;
- *Ex Parte; Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)*;
- *S v Barnard 1986 (3) (SA) 1 (A)*; and
- *Macu v Du Toit 1983 (4) SA 629 (A) (at 635)*.³⁵

The six case laws mentioned above as well as others, are discussed in detail in Chapter 4 of this research study.

In the Basic Training Learning Programme, Chapter 3 dealt with ascertaining bodily features of an accused and holding an identification parade, whilst Chapter 4 deals with the right to legal assistance. Chapter 5 addresses pleas and other trial related matters. Chapter 6 concludes the module with procedures applicable to a police official in court when trials are conducted.

This brings to an end the review on the Regulatory Framework of Policing theme in the Basic Training Learning Programme. Below we turn to the third theme of the Basic Training Learning Programme to be reviewed, namely: fitness and street survival.

3.3.4 Fitness and street survival

In this theme six of the handouts received by the student constable are reviewed (relating to the use of lethal force). They are discussed as below.

3.3.4.i Use of Force: Presenter's Guide

Unit Standard 14131: Use appropriate force to uphold and enforce the law and protect people and property, 2004

³⁵ It must be noted here that the module does provide that other alternatives to use of force to be considered to detain a person to be arrested.

3.3.4.ii Use of Force: Workbook

Unit Standard 14131: Use appropriate force to uphold and enforce the law and protect people and property, 2003

One of the specific outcomes of this module is to prepare the student constable to make use of force decisions that meet legal organisational and public requirements. Another interesting specific outcome is to enable the police official to communicate tactically in order to resolve conflict and to prevent the use of physical force. The introduction sets the pace with reflection on statistics that reveal that police officials are largely attacked (and killed) off duty when visiting shebeens or travelling to and from work.³⁶ The police official is encouraged to identify risks in their own environment and be proactive in addressing them.

The module is based on six fields relevant to any operational task. The writer states that these six use of force and survival principles will assist the learner police official to make good use of force decisions, contribute to “*officer safety*” and make appropriate “*use of force*” decisions. This section is discussed in detail because it is pertinent to the study.

As per review of this module (from pages 5 to 29) the six principles are conveyed through the acronym – AITEST which refers to the following: A – Alert; I – Initiative; T – Techniques; E – Equipment, S – Scale of use of force and shooting decisions; and T – Teamwork, tactics and techniques (Use of Force: Workbook, 2003:5-29). The module consists of four group discussions, one practical, three role-plays and five scenarios.

The following is a summary of the AITEST.

A – Alert

Police officials are encouraged to be aware of risks, and amongst others, to develop the ability to anticipate danger and be prepared at all times for its presence in every situation. Being alert embraces information gathering, avoiding dangerous situations, the “*plus-one rule*” (the suspect to be suspected of not being alone, i.e. operates with an accomplice at all times) and tactical breathing (in a tense situation).

³⁶ For more detail and statistics on the murder of police officials see Minnaar, 2003.

I – Initiative

Safe progression and the OODALOOOP decision making model – this model is referred to as the “*continuous planning process*”. The ideal response of the police official would be to get into the “*suspect’s OODALOOOP and take over the initiative*” (Use of Force: Workbook, 2003:12). OODALOOOP is illustrated as a flow chart circle with the operational terms of: Observe, Orientate, Decision and Action. A study of the module did not explain the latter part of the acronym termed “*LOOP*”. A practical example of the implementation of the flow chart circle being an armed robbery where the police official is advised to take down details and call for back up before attempting to arrest the suspect/s.

T – Techniques of tactical communication

Police officials are discouraged from using arrogant body language. The learner is encouraged to be tolerant and open. Tactical communication involves asking questions, working towards a win-win situation and being aware of non-verbal communication (body language) as it amounts to 60% of communication. The section on tactical communication is complemented by two role plays, one of which involves the learner police official being expected to intervene in a violent domestic violence complaint and resolve the conflict (Use of Force: Workbook, 2003:14).

E – Equipment

The writer indicates that it is the employer’s responsibility to provide the worker with the appropriate equipment in order to do his/her job properly, and goes on to state that “*optimal use of uniform and equipment is an important aspect of tactical survival*” (Use of Force: Workbook, 2003:20).

S – Scale for use of force and shooting decisions³⁷

(This is outlined in more detail in the Deadly force decision making model – discussed in a later section below) (Use of Force: Workbook, 2003:22). All the above principles may be effectively used to retrain operational police officials or to provide refresher training on the use of lethal force.

³⁷ Particular attention is paid (within the context of the research) to this 5th principle in Chapter 7 under recommendations, since it deals with use of lethal force.

While the Constitution precedes national legislation, the latter is enacted in order to enable police officials to carry out their tasks. Some of these laws (as previously mentioned) are the South African Police Service Act, 1995 (Act 68 of 1995) the Criminal Procedure Act, 1977 (Act 51 of 1977) and Regulation of Gatherings Act, 1993 (Act 205 of 1993). Naturally the power to search, seize property, arrest and the use of firearms are included in the obligation or authority to police. Accordingly this learning guide deals with the prescriptions of the legislation regarding policing inter alia the use of force. It starts off with the objectives of the Service which are stated (as per Section 205 of the Constitution) as being:

- preventing, combating and investigating crime;
- maintaining public order; and
- protecting and securing the inhabitants of the Republic and their property and upholding and enforcing the law.

The Criminal Procedure Act, 1977 (Act 51 of 1977) (containing as it does Section 49) bestows on the police official “*far reaching powers and authority...*” to use force in exercising their powers (Use of Force: Workbook, 2003:23). The Regulation of Gatherings Act, 1993 (Act 205 of 1993), Sect 9 (1) and (2) is referred to where the police official is empowered to use force, including firearms, to disperse crowds. The South African Police Service Act, 1995 (Act 68 of 1995) Sect 13 (3) (b) provides that: “police officials who are authorised by law to use, may use only minimum force which is reasonable in the circumstances (Use of Force: Workbook, 2003:24).

In order to perform these functions and according to the writer of the module, the police official has to exercise discretion.

In order to act with discretion the police official needs to be familiar with possible alternative actions he/she can take. The writer goes on to provide that added to the “*complexity of the ‘use of force’ decisions*”, the concept of “*reasonableness*” has to be considered. Appropriately, the concept as adapted and discussed in the guide as being that a person has reasonable grounds of use of force if:

- the police official really believes or suspects that there is imminent danger;
- he/she bases the belief or suspicion on facts;
- any reasonable person in the same position as the police official under the same circumstances would arrive at the same belief or suspicion (Use of Force: Workbook, 2003:23).

The Use of Force, Presenter's guide module states that "*the reasonable man test will be used to test reasonableness of all use of force decisions*". The Presenter's Guide handout goes on to discuss private defence. The police official needs to know the requirements for justification for private defence. Private Defence in the guide is defined as: "*Defence of self or somebody else against an unlawful attack on life, body, property or person*" (Use of Force: Presenter's Guide, 2004:43-48).

The conditions for private defence in terms of the actions of the attacker:

- the attack must be unlawful;
- attack must still be threatening;
- the attack can be against a third party and not the person responding (Use of Force: Presenter's Guide 2004:48).

Requirements of the person acting in defence:

- must be the only way out;
- must be no more damage than what is necessary to overcome the attack (Use of Force: Presenter's Guide 2004:48).

The Use of Force Workbook module urges police officials to "*master the principle of appropriate use of force*". Learners are encouraged to measure the use of force against the limitations set by the Code of Conduct, community policing principles, ethical principles and the law (Use of Force: Workbook, 2003:24).

The Use of Force Workbook module begs the question as to who the "*appropriate/exact*" police official or person is that has to make use of force decisions. In this context the guide proceeds to state that the police official must:

- have an extensive knowledge of police powers given by law;
- with second nature, act in private defence as ground of justification in terms of common law;
- be committed to upholding the constitutional parameters;
- be committed to complying with the parameters set by the South African Police Service Act, 1995 (Act 68 of 1995) and SAPS Code of Conduct;
- understand the dynamics of the society that he/she serves and the root causes of crime in that society;
- be able and committed to complying with the ethical principles of the SAPS and in doing so serve the Constitution and the Code of Conduct (Use of Force Presenter's Guide, 2004:25).³⁸

The module provides that police officials need to have a good understanding of social norms, dynamics and ethics as this will contribute to good use of force decisions.

Deadly force decision making model

The Use of Force Workbook module reviews the deadly force decision-making model which is discussed under the Scale for “*use of force*” and shooting decisions. Learners are cautioned that incorrect use of lethal force decisions may result in civil claims, criminal prosecution, poor community/police relations as well as “*ruined professional and personal lives*”.

The writer goes on to add the following as being necessary for police officials to make “*confident*” use of lethal force decisions:

- knowledge of legal restrictions;
- excellent weapon handling skills;
- a simplified decision making model; and
- a dynamic outcomes based learning program based on the AI-TEST (Use of Force: Workbook, 2003:26).

³⁸ Many of these guidelines were not displayed or evident in the interviews conducted for this study. Responses were very defensive and emotional (see Chapter 6 for detail on their responses).

According to the writer (Use of Force Workbook module), the deadly force decision making model allows for private defence as the only “*rational decision*” for the use of lethal force. The police official is told that he/she can only rely on self defence as a ground of justification for the use of lethal force (Use of Force: Workbook, 2003:26).

The “*deadly force triangle*” is described as an equilateral triangle with three factors, namely, ability, opportunity and jeopardy. The presence of all three factors may justify the use of deadly force (Use of Force: Workbook, 2003:27).

The module discusses the three factors as follows:

Ability: The suspect’s physical ability to harm another – includes personal physical ability, i.e. a powerfully built man or a martial art practitioner.

Opportunity: Refers to suspects’ ability to kill/seriously injure another. Opportunity does not exist if a suspect is far off or has taken cover.

Jeopardy: This is when the suspect uses his/her ability and opportunity to place another in immediate life threatening danger (Use of Force: Workbook, 2003:26-27). (In the guide a role-play with three scenarios follows the above).

With specific reference to the principle of “*T – Teamwork Tactics and Techniques*” in the AITEST, the student police official is guided towards identifying himself as a member of a team since survival on the streets (as an operational police officer responding to crime) depends on it. Moreover, police officials are encouraged to develop skills to communicate with team members. Those skills are acquired by regular practical scenario/team training.

However, this ‘*regular*’ training appears only to be important during the Basic Training Learning Program and is conspicuously absent when police officials are assigned to operational police work at the police stations. Of all the research interviews conducted, 66% believe that practical training is essential. This is one of the gaps identified in the training of police officials on the use

of lethal force in the SAPS. (See Question 23 in Chapter 6 for a detailed discussion).

Out of the 29 respondents interviewed, none of the candidates had undergone any form of regular use of lethal force training from the SAPS. Therefore police officials in general lack proper skills in lethal force training to effectively carry out their duties.

In terms of tactics and techniques, thorough training in basic team movement skills such as leopard crawl, taking cover, cat crawl etcetera, are taught in the Basic Training Learning Programme. It is also pointed out that “*high competency*” (see above) in these techniques will reduce the risk of an attack on police officials. The police official is encouraged to adhere to the AI-TEST principles when off duty as well (Use of Force: Workbook, 2003:29).

The following five scenarios were reviewed in the section (Use of Force: Workbook, 2003:31-32). They are discussed as follows:

Scenario 1: Fraud

- * the police official encounters a violent suspect who attacks him with a knife (investigating a fraud incident);

Scenario 2: Vehicle stop

- * a vehicle stop with two alternatives
 - escaping bank robbers
 - drunk armed passenger with an emergency situation

Scenario 3: Bank Robbery

- * Bank Robbery – the police official arrives at the scene as suspects are fleeing – three variations:
 - opens fire on police
 - armed suspects surrender
 - suspect vehicle leaves some of their accomplices behind upon police arrival on scene

Scenario 4: Suspect vehicle

- * Suspect vehicle at roadside – two possibilities
 - armed suspects want to hijack the vehicle
 - innocent persons returning from a party

Scenario 5: People on foot wanting help

- * 2 possibilities
 - hijackers staging an ambush
 - innocent person genuinely in need of help

This part of the Basic Training Learning Programme is very encouraging in that it is in line with helping a police official make proper and appropriate (situational) use of lethal force decisions. In conclusion, the module summary reflects on the difficult task of policing. It is said that split second decision-making is complex. The writer indicates that police officials are “*generally average citizens, rather than highly qualified academics. Abstract theory and concepts can therefore not work in practice*” (Use of Force: Workbook, 2003:33). Further, the writer claims that by using the model of the acronym AI-TEST, complicated practical skills and knowledge can be simplified and provide for outcomes based learning (OBL) to take place. The writer goes on to state that the practical based scenarios will prepare police officials for real life scenarios.

It is further proposed that all policy actions be measured in line with AI-TEST to determine if the level of force used was reasonable (Use of Force: Workbook, 2003:33).

3.3.4.iii Move tactically in pairs during police operations

Unit Standard 14125: Move tactically in pairs during police operations, 2004. This module deals with practical based tactical policing. It is accompanied by photographs and the workbook assessment is linked to observation checklists. The module is therefore focussed more on skills.

There are seven study units as follows:

- Study Unit 1: The fundamentals of tactical movement;
- Study Unit 2: Tactical communication in support of tactical movement;
- Study Unit 3: The use of cover;

Study Unit 4: Climbing techniques;

Study Unit 5: The tactical approach of objects in pairs;

Study Unit 6: Moving tactically in pairs in and around buildings; and

Study Unit 7: Reacting tactically to attacks

In terms of competence, the learner demonstrates foundational, practical and reflective competence. Related to use of force, Study Unit 7 deals with reacting tactically to attacks. The OODALOOOP is referred to and the learner is advised to use the OODALOOOP to conduct a “*situational analysis*” (Move tactically in pairs during police operations, 2004:2). When the police official has made a decision, he/she is at the action stage. A note in the module cautions the police official that any action to be taken must comply with the principles of legality around the use of force. The police official will therefore have to take accountability for his/her own actions.

3.3.4.iv Physical control of suspects

Unit Standard number not listed: No title, 2004. This module prepares the learner to take physical control over the person (suspect) to be arrested. Weapon retention techniques, grappling and unarmed defence tactics are introduced. This type of training and preparedness is relevant because the police official does not rely only on his/her firearm to effect an arrest. He/she will consider alternatives to take control of suspects for the purposes of arrest. This is in line with the Constitution of South Africa, 1996 (Act 106 of 1998), the South African Police Service Act, 1995 (Act 68 of 1995) and other related legislation such as s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

3.3.4.v Crowd management: Learner’s Guide

Unit Standard number not listed: No title, not dated. The goal relevant to this study on use of force is to understand the principles in relation to the use of force tactics for crowd management. One of the specific outcomes of the study is to comply with legal requirements when deciding to use force against crowds.

This workbook outlines the so-called “*Five C Stairs*”, and discusses this in terms of “*Crowds in perspective*” with crowds described as being “*dangerous ...in a group, individuals become primitive, aggressive and may even become violent*” (Crowd management: Learner’s Guide, nd:23).

The workbook also deals with the legal framework which starts with policing and basic human rights. Here the right to life is emphasised and “*shall be protected by law*” and good police practice is identified as “*lethal use of force by police when it is in accordance with the law, strictly necessary, and proportionate to the situation*”. Human rights are discussed in detail in the guide. The module goes on to discuss the authority of police as bestowed upon them by the Constitution of South Africa, 1996, (Act 108 of 1996) s205(3); the Criminal Procedure Act, 1977 (Act 51 of 1977); the South African Police Service Act, 1995 (Act 68 of 1995) (Crowd management: Learner’s Guide, nd:47). By this legislation the SAPS is enabled to disperse crowds to the extent that lethal force may be used where necessary. However, the student is cautioned and urged to consider all options and to exercise discretion (Crowd management: Learner’s Guide, nd:53-55).

Discretion is described in the Crowd management Learner Guide as the student police official asking the following questions:

- Do you have the power?
- Is it reasonable and justifiable to act?
- What about the Constitution?
- What about the Code of Conduct and SAPS Act?
- Don’t you have professional ethics as a police official? (Crowd management: Learner’s Guide, nd:55).

The concept of reasonableness is also discussed. The reasonable person’s test must be used for all use of force decisions. Section 36 of the Constitution of South Africa, 1995 (Act 108 of 1996) dealing with lawful limitations of rights as mentioned in the Bill of Rights is here also discussed as well as the SAPS Code of Conduct and the South African Police Service Act, 1995 (Act 68 of 1995) section 13 (3) (b). The discussed ethical principles include:

- Integrity;
- respect for diversity;
- obedience to the law;
- service excellence; and
- public approval (Crowd management: Learner's Guide, nd:60).

All of these principles must be considered in order to make appropriate use of force decisions.

Community policing and Crowd Management: AI-TEST and Crowd Management

The AI-TEST as mentioned earlier is also applied to crowd management – based on a balanced view (by the police official) on human rights and the powers of the police. In the guide this is introduced via the five “*C Stairs*” and links up with the AI-TEST (Crowd management: Learner's Guide, nd: 22). The following handouts listed were very similar in content and reviewed together.

They are listed as follows:

3.3.4.vi Weapon skills: Study Unit 1-Z88

3.3.4.vii Weapon skills: Study Unit 2-RAP 401

3.3.4.viii Weapon skills: Study Unit 3 - Musler 12 Gauge Shotgun

3.3.4.ix Weapon skills: Study Unit 4- R5 Rifle

The introduction of the weapons skills units prepare the learner by again mentioning the murder/assault on police officials in the country. The learner is told “*firearms don't kill people, people kill people*”. Caution is advised in the use of firearms with the learner warned that “you will have to bare [sic] with the consequences of wounding or killing another person” (Weapon Skills: Study Unit 1. 2000:2).

In the first phase of the Basic Training Learning Programme for firearm training, the student police official undergoes training on the safe/accurate handling of two pistols, namely the Vektor Z88 and RAP 401. The Musler 12 gauge shotgun and R5 Rifle is also included. The student is then developed further in terms of practical skills at the College for Advanced Training Maleoskop (north of Pretoria).

Safety precautions and dealt with in depth. Maintenance and operation, stance, practical work and range procedure are also discussed. According to Study Unit 2, the RAP 401 was designed for daily tasks. Study Unit 3 – dealt with the use of the Shotgun whilst Study Unit 4 addressed the use of the R5 rifle. This study unit is similar to the module, Use of Firearms in a Policing Environment compiled in 2003 on General Firearm Safety (Use of Firearms in Policing Environment, 2004).

3.4 Regulation of use of lethal force training

The Use of Force training is regulated by the South African Qualifications Act, 1995 (Act 2 of 1995).

3.4.1 What is SAQA?

The South African Qualifications Authority (SAQA) is a body of 29 members who are appointed by the Minister of Education and the Minister of Labour. These members' responsibilities are twofold namely:

- To oversee the development of the National Qualification Framework (NQF) which includes monitoring and auditing of standards;
- To oversee the implementation of the National Qualification Framework which includes registration and accreditation against national standards and qualifications.³⁹

These members also act as advisors to both Ministers. SAQA's structure comprises of two "arms". Firstly, the Standard Setting Body which comprises twelve National Standards Bodies (NSB's) and, secondly, the Standards Generating Bodies (SGB's). These bodies generate and recommend standards and qualifications for registration on the National Qualification Framework (NQF).

³⁹ See <http://www.saqa.org.za>

The second extension of SAQA is the Quality Assuror's leg. It comprises of the Education and Training Quality Assurance (ETQA's) and the Service Providers. This body is accountable for the providers of education and qualifications which are registered on the NQF.⁴⁰

3.4.2 The National Qualification Framework

The National Qualification Framework (NQF) is a framework set up to “*monitor qualifications and assure quality*”⁴¹ while the quality assurer body in South Africa is the South African Qualifications Authority (SAQA).

The objectives of the NQF as mentioned in the South African Qualifications Authority Act, 1995 (Act 2 of 1995) are as follows:

- create a national framework for learning achievements;
- facilitate mobility and progression in education and training;
- to enhance the quality of training and education;
- to accelerate the redress of unfair discrimination in education, training and employment opportunities; and
- contribute to full development of each learner.⁴²

The NQF comprises of eight levels and three bands. The three bands are General Education and Training (GET), Further Education and Training (FET) and Higher Education and Training (HET). There are 12 fields of the NQF namely:⁴³

- Agriculture and Nature Conservation;
- Culture and Arts;
- Business, Commerce and Management Studies;
- Communication studies and languages;
- Education, Training and Development;
- Manufacturing, Engineering and Technology;
- Human and Social Studies;

⁴⁰ See <http://www.saqa.org.za>.

⁴¹ See <http://tutor.petech.ac.za>

⁴² See <http://www.saqa.org.za>.

⁴³ Obtained from website <http://tutor.petech.ac.za/educsupport/html/probsolv/slide2.html>

- Law, Military Science and Security;
- Health Sciences and Social Services;
- Physical, Mathematical, Computer and Life Sciences;
- Services; and
- Physical Planning and Construction.

As mentioned earlier, the Standards Generating Bodies (SGB's) are responsible for generating criteria towards obtaining qualifications for registration on the NQF. A unit standard is a statement that prescribes education and training required towards achieving a desired qualification. This education and training is holistic in that it embodies the knowledge, skills and attributes necessary towards achieving the outcome in the unit standard. The learner is expected to demonstrate competency and skill in the specific outcome.

In terms of the regulating of use of force training the Unit Standards prescribe/guide the development and facilitation of such training and allied training that impacts on the actual use of force. Some of the allied/ancillary unit standards consulted in this research were those on the Use of a handgun (10748); Use primary weapons for medium to high-risk assault team operations (115319); To assess the compliance of various bodies with Human Rights and democratic standards (123435); Describe the relevance of Human Rights and democratic practices in South African society (119662); and Handle and use a handgun (119649).

3.4.3 Outcomes Based Education

In the Basic Training Learning Programme of the SAPS a learner needs to demonstrate the specific outcomes embodied in unit standards. According to Erasmus and Van Dyk (1999:4), Outcomes Based Education (OBE) is a “*results-orientated approach to learning and is learning-centred*”. OBE focuses on outcomes versus the “traditional curriculum-driven education and training”. In other words, the learner must demonstrate the outcome (in practical terms) of the training.

3.4.4 The Safety & Security Sector Education & Training Authority⁴⁴

The SAPS Division Training situated in Pretoria, is responsible for research, development and training in the SAPS. They therefore need to form a relationship with the Safety & Security Sector Education & Training Authority (SASSETA) (former POSLEC-SETA) as part of the policing field. This SETA was established in March 2000 in terms of Section 9 (1) of the Skills Development Act, 1998 (Act 97 of 1998). The aim of the POSLEC-SETA (SASSETA as from 2005)⁴⁵ was to contribute to the South African economy by developing skills and redress the education inequalities of the previous years.⁴⁶

3.4.5 Overview of functions/responsibilities of SASSETA

SASSETA is governed by a council comprising of seven chambers namely:

1. Legal;
2. Investigation and Private Security Activities;
3. Policing;
4. Correctional Services;
5. Justice;
6. National Intelligence Agency and South African Secret Services; and
7. Department of Defence.

In essence the responsibilities of the chambers are inter alia:

- to assist SASSETA in meeting targets on strategic issues;
- facilitate skills planning and development;
- identify the need for learnerships, skills programmes, standards and qualifications;
- to ensure quality assurance in education and training; and
- oversee grants and finances.⁴⁷

⁴⁴ The acronym POSLEC SETA stands for the Police, Private Security, Legal, Correctional Services and Justice Sector Education and Training Authority.

⁴⁵ 1 July 2005, POSLEC SETA and the Diplomacy, Intelligence, Defence and Trade Education and Training Authority) (DIDTETA) amalgamated and this union resulted in what is known today as SASSETA.

⁴⁶ DIDTETA's mission similarly was to promote multi-skilling and lifelong learning in its sector. SASSETA now collectively represents the fields of Safety and Security SETA in South Africa. See <http://www.sasseta.org.za>.

⁴⁷ See <http://www.sasseta.org.za>.

The chambers of the SASSETA are therefore pivotal in ensuring skills development strategies are effectively carried through in their respective areas of responsibility. The policing chamber has 25 representatives.⁴⁸ The overall responsibility for basic training and the setting of unit standards in the SAPS is therefore in the hands of these representatives of the Policing Chamber. They are tasked with identifying education and training needs in the policing field, for example the training needs in respect of the use of lethal force in the SAPS.

3.5 Summary

In this chapter the researcher reviewed the Basic Training Learning Programme curriculum as was implemented in SAPS training during the period July 2004 to June 2006. During the time of this research, the Basic Training Learning Programme was being revised. Be that as it may, the review of this Basic Training Learning Programme was compared to the research data obtained from the interviews conducted as per Chapter 6.

The training content was juxtaposed with the legal framework (Chapter 4) and research findings. The content was compared to these two constructs to identify gaps and anomalies. From the research conducted it is evident that the majority of police officials have not received appropriate use of lethal force training in line with legal requirements. The current information in the Basic Training Learning Programme reviewed was tested against the responses of the operational police officials.

Some overall comments on the Basic Training Learning Programme under review with specific reference to the use of (lethal) force are:

- The Criminal Procedure module indicated that a handout on the new s49 will be given to students. The handout introduces the changes brought about by new s49 in 1996⁴⁹ – promising that further comprehensive instructions from SAPS Legal Services will be communicated on the use of lethal force. The second communication from Legal Services was sent out in 2003⁵⁰ (see Annexure I).

⁴⁸ See <http://www.sasseta.org.za/about-chambers.html>, accessed on 11 March 2005.

⁴⁹Instructions Relating to the Use of Force in Effecting an Arrest: Special Service Order dated 1996-08-14 – Ref 31/1/1/5/3

⁵⁰National Instruction 18/5/1 over 1/1/4/1 (5) dated 2003-07-18.

- This means that those police officials who attended training during this period would have only received the second communication after they had completed their basic training. The research revealed that 86% of the police officials interviewed did not receive any in-service training (See Chapter 6, Question 14), whilst 79% did not attend a workshop on the use of lethal force (See Chapter 6, Question 17). It appears that the second communication (or the guidelines) of the 2003 Special Service Order was merely a formal communication and not meant to be followed up with re-training. It may be pointed out that the majority of the sample population attended basic training before 1996 and before the amendment to s49. But the question would then be: Why have the majority of operational police officials who completed basic training before and after the amendment to s49, not received any type of training after the law was amended?
- The handout refers to the principles not affected by the new section – it falls short by not explaining those aspects that were affected by the new s49. Some of these aspects that were not fleshed out are:
 - the principle of proportionality;
 - the Schedule One offences that formed a major part of old s49 does not appear in the amended version and how this impacts on the use of lethal force in policing. This meant that police officials could no longer shoot at suspects fleeing from Schedule 1 offences; and
 - what is meant by terms such as “substantial risk” and “future death”.

On the other hand, it needs to be pointed out that the module on Street Fitness and Survival is concise and has a good combination of knowledge, skills and behaviours (provided role-plays). Survival tools for effective operational policing included the AITEST, and the Deadly Force Decision-making model. In addition, this section is coupled with group discussions and practical scenarios. This type of training is also in line with outcomes based education where a learner demonstrates the outcome of the training – see 3.4.2 above. Further gaps and anomalies are identified and discussed in more detail in the findings in Chapter 6. The following chapter explores the legal framework on the use of lethal force.

Chapter 4

SOUTH AFRICAN LEGAL FRAMEWORK/REGULATION OF THE USE OF LETHAL FORCE IN THE SOUTH AFRICAN POLICE SERVICE

4.1 Introduction

Before 1994 criminal procedure was “*subject to the sovereignty of parliament and the whims of the executive,*” (Steytler, 1998:1), which allowed the government of the day to enforce its discriminatory laws on the citizens of the country. However, the new Constitution of 1996 (incorporating the Interim Constitution of 1993) brought with it a new democratic order. Chapter 2 of the Constitution contains the Bill of Rights which has made a significant impact on criminal procedure and policing in South Africa. One can then assume that the purpose of the Bill of Rights is to protect the individual human rights of persons who come in contact with organs of the state, by enforcing certain restrictions and responsibilities on for example police officials who are empowered to use lethal force under certain circumstances (Steytler, 1998:1).

The police are empowered by many statutory powers that impact on the rights of individuals afforded by the Bill of Rights. This study on s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (which is statutory law) deals with the use of lethal force which is in direct contradiction to the right to life (section 11) of the Constitution. This chapter looks at the regulatory framework on the use of lethal force, the protection of human rights by the Bill of Rights, a commentary on international perspectives on human rights, specifically the right to life as well as decided case laws on the use of lethal force. Naturally, the progression of human rights and the Constitution led to the new amended s49, which will be introduced and commented upon in the next chapter. The next chapter will also elaborate on an interpretation of the new s49 and explore different opinions.

4.2 Brief history of Human Rights

According to Nel & Bezuidenhout (1997:3), the term “*Human Rights is in effect only two centuries old*”. Prior to 1948 and the Universal Declaration of Human Rights adopted by the

United Nations in that year, human rights was an important concept that grew progressively more powerful. A study of these earlier eras will provide an in-depth understanding of its development. However, some of the following developments culminated in the respect for human rights in the world as we know it today.

The Magna Carta of 1215 granted certain rights and privileges only to the English nobility. The Habeas Corpus Act of 1679 passed by the English parliament, provided for similar rights for ordinary citizens. Any person who has arrested another was ordered to produce such a person in court to determine the legality of such an arrest. The Period of Enlightenment (16th and 17th century), saw in the “*independence of man*” (Nel & Bezuidenhout, 1997:8).

President Franklin Delano Roosevelt of the USA in his 1941 “*Four Freedoms Speech*”,⁵¹ provided the backdrop for human rights as epitomised in the Universal Declaration for Human Rights of 1948.

In South Africa, the Orange Free State’s (Boer Republic) Constitution of 1854 contained a list of fundamental rights (Nel & Bezuidenhout, 1997:11). Unfortunately, in 1910 these rights were excluded from the Constitution. Black resistance to this situation gave birth to the African National Native Congress in 1912, ironically in Bloemfontein, the former capital of the Orange Free State Republic. The victory of the National Party in 1948 elections allowed for further inhumane and unjust apartheid laws to be adopted such as the Group Areas Act, 1950 (Act 41 of 1950) and the Separate Amenities Act, 1953 (Act 49 of 1953) etc.

The African National Congress (ANC) during this time steadfastly held onto the Freedom Charter, which was an important human rights document drawn up and adopted in Kliptown (south-east of Johannesburg in the black township of Soweto) in 1955. In 1986, the Law Commission was asked to draw up a report on human rights. The findings “*caught the government unawares*” (Nel & Bezuidenhout, 1997:13). It called for the protection of human

⁵¹ The four freedoms mentioned in United States President Franklin D. Roosevelt’s state of the union address delivered to the United States Congress on January 6, 1941, proposed four fundamental freedoms humans in the world ought to enjoy. They were the freedom of speech and expression, the freedom of religion, the freedom from want and the freedom from fear. See <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> accessed on 19/1/09

rights as opposed to the protection of group rights. Nelson Mandela was released from imprisonment in 1990 and after multi-party negotiations, the present Constitution Act 108 of 1996 was signed by President Mandela and came into effect on 4 February 1997. According to Nel & Bezuidenhout (1997:14), South Africa has only (in 1997) passed “*the standard-setting phase*”. Accordingly the post-1996 new Constitution challenge for South Africa would be the implementation phase and planning for the future towards international respect for human rights.

Our current Bill of Rights of the Constitution calls for the following:

- the protection of the rights of individuals;
- places certain restriction on police and judiciary; and
- imposes a duty on the state to “*respect, protect, promote and fulfil the rights in the Bill of Rights*” (section 7 (2) of the Constitution).

It contains firstly the general provisions that impact on policing and criminal procedure. For example the right to life which is especially significant to this research on the use of lethal force by the SAPS. Secondly, it contains provisions that guide criminal justice, for example rights of an arrested, detained and accused persons.

Moreover, section 39 (2), provides that every court, tribunal or forum must give due consideration to and promote the spirit of the Bill of Rights. This means that the purpose of the Bill of Rights must be consulted and legal decisions are to be complimentary to its provisions. In specific relation to this research the right to life is afforded to every person and the use of lethal force during arrest may result in causing of the death of such a person.

4.3 Commentary on international perspectives on human rights

According to Steytler (1998:13), the South African Bill of Rights was influenced by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Bill of Rights was also extensively influenced by the Canadian Charter in that the limitation clause is modelled on Section 1 of the Charter (Steytler, 1998:13). However, the Bill of Rights does not replace the CPA. It does serve as a “*safety net*” and guides the interpretation of other laws (Steytler,1998:3). The right to life (section 11) of our Constitution is synonymous with many Human Rights’ guidelines and conventions.

Universal Declaration of Human Rights (UDHR) of 1948 comprises of a preamble and thirty articles. Article 3 states that: “*Everyone has the right to life, liberty and security of the person*”⁵²

The United Nations International Covenant on Civil and Political Rights (ICCPR) comprises of a Preamble with fifty-three articles contained in six parts. Part III of Article 6 (1) provides that: “*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life*”.⁵³

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Section 1 which deals with Rights and Freedoms, Article 2 (1) provides that: “*Everyone’s right to life shall be protected by law. No one shall be deprived of his/her life intentionally save in the execution of a sentence of a court following his/her conviction of a crime for which this penalty is provided by law*”.⁵⁴

Interestingly, Subsection 2 of Article 2 (below) is apposite to South Africa’s new amended version of s49 (2) in that it allows for the use of lethal force in certain circumstances. Subsection 2 of ECHR’s Article 2 states that: “*Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary (when):*

- a) *in defence of any person from unlawful violence;*
- b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (and)*
- c) *in action lawfully taken for the purpose of quelling a riot or insurrection.”*

⁵² See <http://www.unhchr.ch/udhr/lang/eng.htm>.

⁵³ See <http://www.hrweb.org/legal/cpr.html>.

⁵⁴ See <http://conventions.coe.int/treaty/EN/treaties/html/005.htm>.

Firstly, in respect of unlawful violence, Article 2 Subsection 2 (a) is similar to Section 49 (2) (a) of the CPA which allows for the use of deadly/lethal force:

- if it is necessary to protect the arrestor or any person from imminent or future death or grievous bodily harm; and
- if the arrest is delayed there is risk that the suspect may cause imminent or future death or grievous bodily harm.

Secondly, with respect to lawful arrest, Article 2 Subsection 2 (b) of ECHR, is similar to Section 49 (2) (c) of the Criminal Procedure Act, 1977 (Act 51 of 1977), in that the latter allows for the use of deadly/lethal force under the following conditions:

- when conducting a lawful arrest for a crime which is in progress and of a serious and forcible nature where life threatening violence exists or there is a strong likelihood that such an offence may result in grievous bodily harm.

As illustrated, these four are considered major international Human Rights instruments and they have had major influence on the Bill of Rights in the Constitution in South Africa.

The Canadian Charter of Rights and Freedoms, section 7, recognises everyone's right to life. The rights afforded to Canadian citizens may be subjected to "*reasonable limits*" and would have to be justified in a democratic society as in South Africa.⁵⁵

So too, the African Charter on Human and Peoples' Rights, Chapter 1, Article 4 also protects the right to life.⁵⁶ The basis of human rights in South Africa is therefore very much in line with those of the international arena. As we turn our attention back to the South African situation, human rights is contained in our new Constitution and below a discussion on these follows.

⁵⁵ See <http://www.efc.ca/pages/law/charter/charter.text.html>.

⁵⁶ See http://www.diplomacy.edu/africancharter/acharter_rights.asp.

4.4 An overview of Chapter 2 of the Bill of Rights of the Constitution of South Africa, 1996 (Act 108 of 1996)

The Constitution of the Republic of South Africa, 1996 comprises of a preamble, 14 chapters, seven schedules and an index. Section 11 which relates to this study protects the right to life. This research deals with the use of lethal force which may directly result in the loss of life. Further, the Table of Non-derogable Rights embodied in section 37 of the Constitution stipulates that the right to life (section 11) is protected entirely and may not be limited.

Paradoxically, section 36 of the Constitution indicates that certain rights may be limited in terms of the law of general application (such as the Criminal Procedure Act, 1977 (Act 51 of 1977) and section 49(2) thereof) provided it is justifiable in a democratic society (The Constitution of South Africa, 1996 (Act 108 of 1996). Moreover, section 49(2) authorises the use of lethal force, albeit under limited circumstances, which deprives the person of his/her right to life which the Constitution states is entirely protected. Clearly, every police official needs to understand the conditions of those limited circumstances thoroughly in order to arrive at an informed decision on the use of lethal force.

However, the research conducted for this study indicates otherwise. In light of the illustrated conflicting provisions and research results, it may be assumed that the Basic Training Learning Programme is clearly not achieving its outcomes. (See research findings in Chapter 6.)

4.5 The South African Police Service Act, 1995 (Act 98 of 1995) Section 13 (1)

Section 199 of the Constitution provides for the establishment of a security service for the Republic of South Africa. The South African Police Service is established by virtue of this provision. The police service is regulated by the enactment of the South African Police Service Act, 1995 (Act 68 of 1995) and comprises three main aspects namely powers, duties and functions of police officials, Regulations of the Service and Orders and Instructions (Joubert, 2001:15). Joubert goes on to explain that the preamble sets out the objectives of the Service as follows:

- to ensure that all persons in the country's national territory are safe and secure;
- to protect the rights of every individual as guaranteed by the Constitution;
- to combat crime by working closely with the community it serves;
- to have respect for victims of crime and consider their needs; and
- to function under civilian supervision.

It is not necessary to discuss the entire Act but very relevant to this research are sections 13 (1), (3) and section 25. In terms of powers, duties and functions, section 13 (1) states that police officials must exercise their powers and duties with due regard to the rights of every individual and subject to the provisions of the Constitution. As discussed earlier, the human rights provisions are contained in Chapter 2 which is the Bill of Rights in the Constitution.

In addition, section 13 (3) regulates the actions that are to be taken by the police official. It cautions that these actions must be reasonable and where police officials are authorised to use lethal force in the execution of their duties, they may use minimum force which is reasonable in those circumstances.

4.5.1 National Instructions

Within the legal framework it is necessary to take note also of section 25 (Orders and Instructions) of the South African Police Service Act, 1995 (Act 98 of 1995).

It authorises the National Commissioner of SAPS to issue National Orders and Instructions as may be appropriate for the Service to ensure that the service fulfils its requirements in terms of Section 205 of the Constitution. Annexures I and J respectively, are the National Instructions titled Special Service Order Relating to the Use of Force in Effecting an Arrest (dated 18/07/2003) and Constitutional Court Judgement on Section 49 of the Criminal Procedure Act, 1977 (Act No 51 of 1977) dated 24/5/2002, are such examples. In terms of the South African Police Service Act, 1995 (Act 68 of 1995), we find that the use of lethal force is not to be taken lightly. Decided case law and precedent also guides the use of lethal force. Below a few which played a key role in the re-shaping of s49, are reviewed and examined.

4.6 An analysis of case laws on the use of lethal force in SAPS

Joubert (2001:7) explains case laws as “*court decisions [from] which we interpret both common law and statutory provisions and adjust these provisions to fit the realities of the day.*” For our purposes, decided case law allows courts to change old laws to suit the needs of present day society, for example section 49 of the Criminal Procedure Act had to be amended to remove the power of persons to take the lives of fleeing suspects who do not pose a danger (imminent threat) to anyone. So why do we need to study case laws in this study? Studying case law is important because by doing so we can see how the practical day-to-day concerns of operational police officials may be resolved and more importantly, it allows one to understand and interpret s49 appropriately. (Please note that while case laws are discussed in this section and reference to old and new s49 is made the actual full content, wording and provisions of s49 (old and new) will only be discussed in Chapter 5 wherein the full provisions of both old and new versions are outlined).

The need for amendment of the existing s49 was as a consequence of the new Constitution and the changing needs of the new democratic South African society. When the law is challenged during criminal proceedings, the court’s findings in the form of case laws or court decisions are studied in order to interpret the meaning of the law. Whereas previously the courts had no power to question the content and implementation of legislation, today the South African Constitutional Court (set up by the new Constitution and the first ever of its kind in South Africa) is empowered to do just that.

This ensures that citizens are protected against unjust and discriminatory laws (Van Niekerk and Le Roux, 2000:148). The old section 49 (2) of the Criminal Procedure Act discriminated against the constitutionally protected fundamental right to life (section 11) including the right to freedom and security (section 12) as mentioned in the Constitution of the Republic of South Africa, 1996 (Murray & Soltau, 1997:6).

Since the inception of the Constitution, various court decisions tested the constitutionality of the use of lethal force in South Africa. In these cases both South African and international case law had an influence on the decisions taken. An example of this is Tennessee v Garner case

mentioned in the Govender case (which case will be briefly discussed later in this section). The reasoning for the foregoing discussion is that the correct interpretation would lead to correct application of the new s49 of the Criminal Procedure Act, 1977 (Act 51 of 1997).

The following nine decided case laws played an important role in the amendment of section 49. To contextualise the resulting research findings a brief synopsis and the decision made in each of the following are discussed.

- 4.6.1 *Matlou v Makhubedu* 1978 (1) SA 946 (A)
- 4.6.2 *Macu v Du Toit* 1983 (4) SA 629 (A) (at 635)
- 4.6.3 *Tennessee v Garner* 471 US (1) 1985
- 4.6.4 *S v Barnard* 1986 (3) (SA) 1 (A)
- 4.6.5 *S v Martinus* 1990 (2) all SACR 568 (A)
- 4.6.6 *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) S.A. 355 (5)
- 4.6.7 *Raloso v Wilson and Others* 1998 (1) BCLR 26 (NC)
- 4.6.8 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA)
- 4.6.9 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC).⁵⁷

The two main cases which played a pivotal role in re-shaping the amendment to Section 49, were the Govender v Minister of Safety and Security 2000 (1) SA 959 D & CLD and Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC) cases. In both these cases the courts provided clear guidelines on the use of force. (Both these decisions will be looked at in greater detail after the other cases.)

To contextualise the resulting research findings a brief discussion and the decisions made in each of the above listed cases are outlined. The cases are arranged by year dates for ease of reference as well as to understand the logical outflow of each of the previous decisions.

⁵⁷ The reference for all nine case laws are from the South African Law Reports and are quoted in full in the List of References.

4.6.1 *Matlou v Makhubedu 1978 (1) SA 946 (A)*

In this case a constable attempted to arrest a suspect who was fleeing. The police official believed that the suspect was escaping from the offence of being in possession of suspected stolen property (SALR, 1978:947). The suspect was shot in the back. The suspect survived. It was established that no warning shot was fired (SALR, 1978:947).

The *Matlou v Makhubedu* case dealt with the reasonableness of the arrestor's conduct. The case law gave guidance on the arrest of a suspect based on the following grounds:

- the use of lethal force must be weighed against the “*seriousness of the suspected offence*”
- the arrest could not have been affected in any other way, i.e. no other lesser force could have been used to arrest the suspect;
- a verbal (oral) warning should be given;
- a warning shot should be fired into to ground or air, depending on the circumstances; and
- if the suspect still does not submit to arrest, the arrestor may shoot the suspect in the legs (SALR, 1978:947).

Furthermore, the judgement in this case emphasised that a weapon (firearm) should be considered for use only after an arrestor has given a verbal warning and if the suspect failed to submit to the arrest then the arrestor may fire a warning shot. It also provided that, in general, a firearm may not be used unless a warning shot was fired. In any event, the *Matlou* case impressed the need to judge each case on its own merits. However, it is the opinion of the researcher that these guidelines were not appropriate in the current South African context. Firstly, shooting at a fleeing suspect is contrary to the provision of the Constitution which protects the right to life (Section 11). Secondly, the provisions of the amended s49, do not provide for the use of lethal force unless the life of the arrestor or another person's life is in imminent life-threatening danger.

In addition, the amended s49 also allows for the use of lethal force if the suspect will (is thought potentially to) cause future death or grievous bodily harm if the arrest is delayed or if the offence

for which the suspect is wanted is in progress and of a serious nature. The amended Section 49 also introduces the principle of proportionality. This means the amount of force that is to be used must be weighed against the degree of force a police official decides to use. Therefore shooting at a fleeing suspect for being in possession of suspected stolen property would, in these circumstances, be deemed to be excessive use of force. The use of lethal force in the Matlou case may not be justified in the current legal context in South Africa.

4.6.2 *Macu v Du Toit 1983 (4) SA 629 (A) (at 635)*

In this case, the appellant was caught stealing sheep from the respondent's farm. When the appellant was arrested, he managed to break free and flee. The respondent then fired at the appellant, hitting and wounding him three times. He (the appellant) then approached the court in an action for bodily injuries. His appeal was unsuccessful for the following reasons:

- Firstly, the appellant was aware that there was a clear attempt being made to arrest him (he broke free and fled);
- Secondly, the force applied must be reasonably necessary. Based on the facts of the case in point, the court took into consideration that both respondents were middle aged and unfit and could not have chased the appellant and it was highly likely the appellant was carrying a knife as he was stealing sheep (to cut their throats) (SALR, 1983:651).

Under these circumstances, the court held that it was unreasonable to expect the respondents to find alternative means to arrest the appellant. This means that the suspect could escape arrest, therefore the judgment condoned the shooting of the fleeing suspect wanted for stock theft. I am of the opinion that after the introduction of the Constitution of South Africa, 1996 (Act 108 of 1996) and the amendment to the Criminal Procedure Act's s49 (use of lethal force), this judgement would be both unconstitutional and considered to be contrary to the provisions of the amended s49.

The Constitution (1996), which is a supreme law, protects the right to life (section 11), as well as the right to bodily and psychological integrity (section 12) (Murray and Soltau, 1997:6).

The amended section 49 introduces the principle of proportionality. Basically this entails weighing the type and degree of force to be used as compared to the right that is being infringed upon or the seriousness of the offence that was committed.

Furthermore, offences listed as per Schedule 1 in the old section 49 do not appear in the amendment to s49. When this case (*Macu v du Toit*) came before court, stock theft was listed as a Schedule 1 offence.⁵⁸ This meant that police officials (and private persons) could shoot at a suspect fleeing from a Schedule 1 offence. After the implementation of the Constitution of South Africa, 1996 (Act 108 of 1996) and the amendment to s49, this is no longer the case.

This view is supported by Chapter 1, section 2 of the Constitution of South Africa, 1996 (Act 108 of 1996) which states that “All law that was in force when the new Constitution took effect, continues to be in force, subject to –

- (a) any amendment or repeal; and
- (b) consistency with the new constitution” (Murray & Soltau, 1997:3).

Here it becomes evident that all laws are subject to the Constitution. Where there are inconsistencies (such as old s49) these laws shall be amended to fall in line with the Constitution. In comparison to the *Govender* case law (discussed below), it is evident that the actions of the respondent in the *Macu v du Toit* case (SALR, 1983), would be deemed unlawful.

But a great influence on South African courts was initially the judgement reached in a US Supreme Court case, namely, *Tennessee v Garner* 471 US (1) 1985.

4.6.3 *Tennessee v Garner* 471 US (1) 1985

The approach of our courts in terms of these decided cases (the *Govender* and *Walters* case), refer to a decision of the United States Supreme Court in the case of *Tennessee v Garner* 471 US (1) 1985. A Tennessee statute provided for where a police official gave notice to arrest a suspect and the suspect flees or forcibly resists “*the officer may use all the necessary means to effect the arrest*”. A Memphis police official shot and killed Garner’s son after he had been ordered to halt.

⁵⁸ See Annexure C for a list of Schedule 1 offences.

He was suspected of burglary and fled over a fence at night. The police official was “*reasonably sure*” the suspect was unarmed and ± 17 years old. The father claimed damages for violation of his son’s constitutional rights. The District Court found the police official’s actions to be constitutional whilst the Appeal Court found the Tennessee statute to be unconstitutional because it allowed for the use of deadly force on an unarmed suspect. It was further decided that such lethal force may only be used to prevent escape when the police official reasonably believes that the suspect threatened death or serious physical injury to the police official or others.

The judge in this case, Judge White, stated in his judgment that: “*we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects*”. He went on to add “*a police officer may not seize an unarmed, or dangerous suspect by shooting him dead*” (*Tennessee v Garner, 1985*). Consequently, the Tennessee statute having a bearing on this case was considered unconstitutional since it authorised the use of deadly force against fleeing (non-violent) suspects. Barak (2000:244) is in agreement with this view, and accordingly states that the use of force may be justified when a suspect:

- resists arrest and threatens a police official or others;
- is committing a “*forcible felony*” (e.g. armed robbery); or
- is fleeing from a “*forcible felony*” and is in possession of a weapon and posing a threat to the police official or others.

The decision by the United States Supreme Court has played a very important role in re-shaping the South African interpretation on the use of lethal force. The following case study looks at another important requirement for the use of lethal force.

4.6.4 *S v Barnard 1986 (3) (SA) 1 (A)*

In this case the deceased discovered that his bakkie could make explosive noises if he switched his vehicles engine on and off whilst he was driving. He, together with a passenger, decided to drive through the streets of Pietermaritzburg one evening whilst causing his vehicle to make these explosive noises. A short while before, there had been a terrorist attack on the

Pietermaritzburg court building and a police official heard the vehicle making explosive noises near the court building.

The police official proceeded to the court building believing that the terrorists were getting away in the bakkie (that was letting off the explosive noises). The police official (appellant in the matter) gave chase – when the deceased in the bakkie failed to stop and react to police signals, the appellant opened fire on the driver, fatally wounding him.

The driver died as a result of the shooting. The police official relied on the old s49 (2) to justify his use of lethal force to effect the arrest. The court found that it must be clear to the person to be arrested that an attempt to arrest him is being made. In this case the deceased appeared to be unaware that he was being pursued when the police official fired upon him. The police official was convicted of culpable homicide in the matter.

The police official appealed the matter. Upon appeal, Judge Van Heerden stated that there must be a clear attempt by an arrestor to arrest a person – this was not the case in this matter. The fleeing person must then flee with the intention of foiling the attempt to arrest him. Further to this, the appeal court also found that it was unreasonable for the police official to believe that the terrorists had returned to the scene after the police had (certainly) been notified (SALR, 1986:3).

The police official in this case was not sure that the deceased was indeed involved or responsible for the terrorist attack earlier in the day. In addition, the Judge in the appeal case again emphasised the fact it had not been apparent to the deceased that the police official wished to arrest him. The use of lethal force under these circumstances was therefore in this case proclaimed to have been unlawful. Again the bottom-line for the use of lethal force in the South African context must be in line with the Constitution and the amended version of s49.

Accordingly the Appeal Court further held, on the basis of the facts put forward, that:

- The police official did not make it clear to the driver that he was going to arrest him (the driver); and

- Further if the deceased had become aware of this intention of the police official to arrest him, he must have sought (deliberately) to flee.

As a result the conviction of the police official for culpable homicide was upheld in this matter. In the present climate and within the context of the amended s49, the police official could also face criminal and civil charges.

The police official's conduct would be contradictory to the provisions of the new s49 and the Constitution. (The *Govender* case discussed (further on in this section) will shed further light on this aspect of the issue of the use of lethal force.)

4.6.5 *S v Martinus 1990 (2) all SACR 568 (A)*

On 5 January 1986, the complainant (Dr Graham Monteith) was wounded in the face by a rubber bullet fired from a shotgun by the appellant (Martinus). The complainant was in a canoe on the Crocodile River going towards the Hartebeespoort Dam (west of Pretoria). The appellant (Martinus) had tried without success to keep canoeists off his riverside property and establish his rights in respect of the river which extended to the mid-line of the river.

He had come to the conclusion that canoeists had no rights in respect of the river and that they were guilty of trespass. He then further concluded that he was empowered by s 49(1) (old version), to use force to effect an arrest should the arrestee resist and flee. The appellant was charged with attempted murder after he shot the complainant in the face. He was found not guilty of attempted murder because it was found that he lacked the intention to kill the complainant. Instead he was found guilty of assault with intent to do grievous bodily harm and fined R800,00 or six months imprisonment, which was suspended for four years. The magistrate further found that he (the appellant) went beyond the scope of s49 (1) by using excessive force to prevent the complainant from fleeing. The appellant appealed. The conviction was altered to one of common assault with a fine of R200,00 or two months imprisonment. The appellant again appealed. However, it was held that the appellant clearly exceeded the bounds of force permitted by s49 (1). The court further held that “*the use of a firearm in an attempt to effect such an arrest should be resorted to with even greater caution*” (SALR, 1990:644). Furthermore, it was stated in the

judgement that the test for the reasonable use of force is objective and this provides a “*salutary safeguard*” against unreasonable use of force when effecting an arrest (SALR, 1990:646). The appellant used an unreasonable degree of force and therefore acted unlawfully. The appeal was dismissed.

This case is an example of how the old s49 allowed for the gross violation of the human right to life. In this case the complainant did not threaten the life of the appellant. Arguably, he may have been guilty of trespass but is it justifiable that he pay for this minor crime with his life? The appellant most definitely acted unlawfully and exceeded the bounds of his authority. It is for these reasons that the principle of proportionality is communicated to police officials and private citizens alike. Although the above mentioned case involves a private person’s use of lethal force, both the private person and the police official are compelled to use lethal force with utmost caution. The use of lethal force should only be permitted in limited circumstances where there is an imminent threat to life (SALR, 1990:644).

4.6.6 *Government of the Republic of South Africa v Basdeo and Another 1996 (1)* **S.A. 355 (5)**

It must be borne in mind, that although the above case involves a soldier, it is necessary for police officials to heed the decision taken when they perform duties at road blocks. So too, police officials must consider whether others may be injured before they shoot, and act in accordance with such insight.

In the *Basdeo* case (South African Law Reports, 1996:450), a road block had been set up by the Defence Force at the border between South Africa and Transkei (one of the former so-called self-governing homelands/independent Bantustans). Vehicles coming from the Transkei were searched. Occupants in a Ford Sierra were travelling in the opposite direction towards the Transkei. They passed the “*roadblock ahead*” sign and with the intention of having some fun at the expense of the soldiers, made a U-turn and sped toward the border. The soldiers then heard the screeching of tyres and the southern stopper group believed that the vehicle and its occupants were now entering South Africa from the Transkei. Attempts to stop the vehicle by two soldiers failed when the driver drove straight towards them forcing them to jump out of the way. One

soldier fired a shot with his rifle aiming at the left-hand tail light. The bullet struck the tarred surface, ricocheted and penetrated the vehicle and struck the passenger in the left front seat. He died a week later. Trial court held that the soldier was negligent and had caused the deceased's death.

The soldier, the court held, should have reasonably foreseen that there could be a passenger in the vehicle who might be injured if he had fired. The driver of the vehicle was held to be contributory negligent.

The judge in this case, Judge Hefer, in his judgement pointed out that "*Section 49 (2) invests arresting officers with the power of taking human lives even on a mere (albeit reasonably held) suspicion. Such an awesome power plainly needs to be exercised with great circumspection and strictly within the prescribed bounds.Section 49 (2) should not, and indeed cannot, be regarded as a license for the wanton of killing people*" (SALR, 1996: 469).

I am in agreement with this submission/decision by the judge. Every suspect/accused is innocent until proven guilty. The question that is posed: Why should a suspect be (wantonly) killed before reasonable steps are taken to properly arrest, charge and convict him in a court of law? Where a suspect poses no immediate threat to the life of others and flees, he should not be subjected to (or expect) lethal force.

The "*standard of reasonableness*" outlined in the same judgement indicated that:

"If a reasonable man placed in the circumstances of the defendant, he would have foreseen that his conduct might endanger or prejudice the lives of others in regard to their legally protected interests, the defendant is then deemed to have been under a legal duty toward such others to exercise appropriate care" (SALR, 1996: 469).

The judgement followed the reasoning that the soldier should have realised that others may be injured if he shot at the departing vehicle (without being able to see whether there was a passenger inside, i.e. on the left – the side of the vehicle at which he shot – and therefore should have acted in accordance with such insight.

The *Basdeo* case judgement was given in 1996, the new Constitution already being two years old.

In the Mistry *et al.*, (2001:49) research report (five years after the *Basdeo* judgment) it was stated by a flying squad member interviewed in the study, that if suspects refuse to stop while in a vehicle chase with police “*we will use a firearm and aim at the wheels.*” The Mistry *et al.*, (2001) study clearly indicates that even with a five-year gap operational police officials remain largely uninformed on these matters and interpret or exercise their power incorrectly (or even unlawfully), i.e. some police officials still believe that they may shoot at a fleeing vehicle when their lives are not threatened. This judgement provides that when police officials exercise the powers granted to them in terms of section 49, they need to exercise extreme caution and consider the consequences of their actions carefully.

4.6.7 *Raloso v Wilson and Others 1998 (1) BCLR 26 (NC)*

Another important decision regarding the amendment to s49 is found in the *Raloso* case law (SALR, 1998). The applicant’s ten-year-old son was shot and killed by a policeman, Lance Sergeant Wilson, on the roof of a building at 18:50 at night. On arrival both police officials heard people running on the roof. A verbal warning was issued. The police official (Wilson) was unaware that both suspects were children as it was dark. He saw someone pass the window whilst in a crouching position. He had fired a shot at the person, which was fatal. The police official in question relied on section 49 (2) to justify the killing.

Because the incident occurred eleven days before the Interim Constitution, 1993 (Act 200 of 1993),⁵⁹ came into effect, the applicant, acting in public interest, requested the matter be referred to the Constitutional Court to determine the validity of the section. It was submitted that section 49 was not in line with the Constitution.

⁵⁹ South Africa operated under the Interim Constitution, Act 200 of 1993, from 27 April 1994 to 4 February 1997. It allowed time for the Constitutional Assembly to draft a new constitution under a government of national unity. For more info go to <http://41.208.61.234/uhtbin/cgiisirs/20090112044215/SIRSI/0/520/S-CCT23-96> as well as <http://www.constitutionalcourt.org.za/site/theconstitution/history.htm#1993>. Website accessed on 19/1/2009.

However, though Judge Buys agreed with the submission, he refused the referral to the Constitutional Court. At the time of the request, the matter was still to be debated upon in Parliament and had to follow the legislative process (SALR, 1998:369). This again indicates clearly, how policing power on the use of lethal force may lead to negligence and abuse.

The following case (*Govender v Minister of Safety and Security 2001*) provides a clearer indication to police officials wherein they are cautioned that a firearm may not be used to prevent an unarmed suspect from fleeing.

4.6.8 *Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)*

The *Govender* case is one of the most defining cases in South Africa in the whole debate around section 49. On 16 June 1995, the plaintiff's son, one Justin Govender, was a suspect and occupant in a suspected stolen motor vehicle which was involved in a high speed vehicle chase with police. The vehicle crashed and both suspects got out, abandoned the vehicle and attempted to flee on foot.

Whilst fleeing from the scene, one of the policemen (Sergeant Cox) chased Govender on foot and aiming at his legs, fired a shot. The bullet struck the suspect in his back, paralysing him. The trial court incorrectly held that the use of force was reasonable and proportionate to the crime of theft of motor vehicle and therefore held that the policeman had been justified in terms of section 49(1). The plaintiff (father of Justin) sought damages and disputed the reasonableness of the conduct of the police in this case.

The father also submitted that section 49 in its entirety, violated section 9, 10 and 11 of the then Interim Constitution, 1993 (Act 200 of 1993) which was in effect from 27 April 1994 to 4 February 1997 – the period during which the *Govender* case was brought to trial). (See footnote above in *Raloso* case.) Justin Govender's father therefore challenged its constitutional validity. The defendant pleaded that section 49(1) did not violate the Interim Constitution, 1993 (Act 200 of 1993) whilst section 49(2) was irrelevant to the specific case.

The trial court's Judge Booysen found section 49(1) to be constitutional and valid. He also found that the validity of section 49(2) was not relevant in the case because the suspect had not in fact been killed. However, on appeal, The Supreme Court of Appeal (Judge Olivier) deemed the shooting unlawful. The case qualified for damages.

In the *Govender* case s49 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) was interpreted to mean that although the use of reasonable force in effecting arrest may be necessary in order to prevent the person from fleeing, such force excludes the use of a firearm unless the person to be arrested:

- poses an immediate threat to the arrestor or any other member of the public. In this case Justin was fleeing (and apparently unarmed) – he was far from posing any immediate or imminent threat to policeman Cox;
- has committed a crime of grievous bodily harm where an open wound was inflicted. The facts in the case showed no evidence that Justin had committed any such a type of crime.

The finding of the Appeal Court therefore stated (held) that a firearm should not be used in circumstances where there is no immediate threat of serious bodily harm. Deadly force or a firearm may not be used merely to prevent the escape of an unarmed suspect. Basically, this meant that Sergeant Cox should not have used his firearm on an unarmed suspect who posed no threat to him or any other person. The *Govender* case resulted in the following circumstances where a firearm may be used in an arrest, being outlined:

- Actual crime – where the person to be arrested endangered the life of anybody and caused serious bodily harm; and
- Threatened crime – where the person to be arrested committed a crime during which he/she threatened physical/bodily harm to another.

Accordingly the *Govender* case limited the use of deadly force on a suspect fleeing from an offence where the life of a police official or any other person is not threatened. In such situations all factors must be considered before the use of a firearm can be considered. In other words the use of force must be proportional to the crime committed. This decision is consistent with that reached in the *Tennessee v Garner* case.

When the findings of the trial judge and the appeal court judge are juxtaposed it becomes evident that (with respect to the implementation of the Interim Constitution during this time) the right to life and physical integrity is far more valuable than that of protecting of one's property. In support of the opinion above, this significant distinction stems from the following:

The trial court judge found that:

“in my view, the force used was reasonable and necessary and proportionate to the offence of motor vehicle theft. The public interest involved in the use of deadly force as a last resort to arrest a fleeing car thief relates primarily to the serious nature of this crime, its increasing prevalence throughout this country and the public's interest in the apprehension, prosecution and punishment of car thieves. In the result, in my view, the shooting was justified by s49 (1)” (SALR, 2001:279 at F).

The judge in this case had weighed the collective interests of society, the escalation of this type of crime (to wit theft of motor vehicles and hi-jackings) in the country against the interest of the plaintiff (Justin). However, upon appeal, the appeal judge found to the contrary. He (Judge Olivier) stated that:

- the principle of proportionality should be expanded to include consideration of the nature and degree of force used and the threat posed by the fugitive to the safety and security of the police officers and society;
- there is no allegation of hi-jacking or other type of physical violence committed by Justin (the now appellant). Nor was there any threat or danger to the police officials or the public.

- Furthermore, the judge provided that there was no “*pressing*” interest of society that justified the “violation of Justin’s physical integrity”. Can it be said that in our law the protection of property (via the criminal law system) is invariably more important than life or physical integrity? Surely not. The respondent also failed to show that had Justin not been shot at, his arrest could not have been by other means such as fingerprinting, witness accounts and further investigation (SALR, 2001:286 at C).

Incidentally this distinction did not come out too clearly in the review of the Basic Training Learning Programme. Research conducted in this study reveals that 38% of the respondents in the sample are not familiar with the new s49, whilst 27% did not modify their behaviour when it came to the new amended version of s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977). Regrettably, three years after the *Govender* judgement and its finding, operational police officials are still exceeding the bounds when it comes to the use of lethal force. The research conducted further reveals that an operational police official and his colleagues fired upon suspects fleeing from a theft of motor vehicle scene sometime in 2004 (one suspect shot in the leg) (Interview 20). It is evident that there is inadequate or no use of lethal force training taking place in the SAPS. Moreover that operational police officials are not adequately trained to make use of lethal force decisions in line with the legislative requirements (SALR, 2001).⁶⁰

4.6.9 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)*

Whilst the *Govender* case dealt primarily with the constitutionality of s49 (1), the *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)* case directly challenged s49 (2). An interesting point in this case being that the deceased was shot and killed by civilians and not police officials. This was the decisive case on the constitutionality of s49 (2) and it made reference to the events leading up to the amendment to s49.

⁶⁰ See also question 28 of findings in Chapter 6 for detail.

In brief the facts of the case being that in a shooting incident in Lady Frere, two accused, a father and son, shot and wounded a burglar fleeing from their bakery. The suspected burglar's wounds were fatal which resulted in a murder charge being laid against them. The two accused relied on s49(2) as a defence and the trial court referred the matter to the Constitutional Court with reference to the validity of s49(2). Appeal Court Judge Kriegler held that the provisions of s49(2) authorise the use of force against persons and justifies homicide.

This is contradictory to three fundamental elements of the Bill of Rights to wit, the right to life, the right to human dignity and bodily integrity. It must be borne in mind that during this time there was a great deal of uncertainty, concern and insecurity amongst functional police officials on the street regarding the use of the provisions of s49, particularly within the new human rights oriented policing framework and community policing principles being adopted and implemented by the SAPS. The tactful Judge Kriegler went on to reiterate that the lives and personal safety of police officials must be protected and is "*in no respect diminished*". In his finding, he reassured the police that these judgements do not mean that if a police official's life is threatened, that reasonable proportionate force may not be used to defend him or herself from life threatening danger. Put simply the judgement means that one may not shoot at a fleeing suspect merely because they will get away and cannot be arrested. A firearm may therefore only be used (fired at suspect) to arrest a suspect under certain very limited circumstances.

According to the Constitutional Court, the Govender case interpretation on s49 (1) (b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) is "*constitutionally sound*" and the Constitutional Court supported the Supreme Court of Appeal's general warning against using a firearm to prevent the escape of a suspect who poses no threat to life or bodily harm (SALR, 2002 (4):615 at D).

The following comments made by the Constitutional Court in the *Walters* case, are of import to this study:

- one needs to give serious consideration before risking the lives of suspects and using a firearm or some other form of potential deadly force merely to prevent escape of such suspect (SALR, 2002:615 at G);

- The right to life, human dignity and bodily integrity are both individually and collectively the foundation of the value system upon which the Constitution is based. If this very foundation is compromised then “*the society to which we aspire becomes illusionary*” (SALR, 2002:631 at G);
- It can be reasonably assumed that police officials have been trained on the use of firearms and have a basic understanding of the legal requirements for effecting an arrest (SALR, 2002:633 at A);
- The “*crux*” of the problem is how to strike a balance between public interest and limitation of certain rights when s49 is put into operation (SALR, 2002:632 at E);
- The Constitutional Court indicated that there is a need for “*proportionality when sanctioning deadly force to perfect an arrest*” (SALR, 2002:637 at G);
- Succinctly put by Judge Kriegler: “*There is a glaring disproportion in depriving an unarmed fleeing criminal of life merely in order to effect an arrest there and then*” (SALR, 2002:638 at G) and with reference to the *Govender* case, there is a disproportion between the rights of the suspect to be infringed as apposed to the interests the arrestor wished to promote (SALR, 2002:639 at E)

The research analysis and findings in Chapter 6 explores how these court findings and comments differ greatly from the research findings of this study.

Additionally in his judgment, Judge Kriegler further tabled nine clarifying judgment points to provide a clearer understanding and guidelines for police officials.

They are as follows:

1. The purpose of arrest is to bring persons suspected of having committed offences before court for trial;
2. Arrest is not the only means of achieving this purposed, nor is it always the best;
3. Arrest may never be used as punitive measure;
4. Where it is necessary to arrest, only necessary force may be used to effect the arrest;
5. Where force is necessary, only minimum force to effect the arrest may be used;
6. The degree of force to be used must be proportional to the threat of violence to the arrestor or others and the nature of the crime the suspect is suspected of having committed;
7. The shooting of a suspect merely to arrest is permitted in very limited circumstances only;
8. Under ordinary circumstances such a shooting is not permitted unless the suspect/s poses a threat of violence to the arrestor or others or is suspected of having committed or threatened to commit an offence of serious bodily harm and there are no other means to carry out the arrest, at that time or later; and
9. These limitations have no effect on an arrestor acting in self-defence or in defending the life of another (SALR, 2002:616).

This judgment in particular led the South African Constitutional Court to declare s49 (2) to be inconsistent with the Constitution and therefore invalid. In the *Walters* case the Constitutional court upheld the decision in the *Govender* case as being correct.

The Umtata High Court, before which the murder trial started, was criticised because they refused to follow the decision in the *Govender* case and instead criticised the *Govender* decision (SALR, 2002:617).

4.7 Comment on how the courts view the use of lethal force

Hosten, Edwards, Bosman and Church (1995:414) submit that precedents (as set by previous court decisions) have a “*binding quality rather than persuasive value*”. However, it must be borne in mind that decisions made in these cases are based on a particular set of facts (situational context).

Often the reasons for a certain judgement would refer to a particular case with a certain set of circumstances. The courts view is confined only to the facts in a particular case. Caution is exercised so that decisions are not generalised and applied to all situations. So too, when considering foreign law since different countries have different laws, contexts and situations. Accordingly some degree of circumspection should be used.

From the perspective of the courts, a person is presumed to be innocent until proven guilty. The police official who unjustifiably oversteps his/her powers and “*punishes*” a suspect before the suspect is arrested, charged and taken to court, must be held accountable for his/her actions. We do have a “*fair and just*” criminal justice system in South Africa and we all believe that ours is a civilised society. The Department of Justice has a responsibility to the people of the country. The courts may be seen as an institution that creates balance and stability rather than disorder and chaos. The inhabitants of South Africa are, accordingly, promised a safe and secure environment.

4.7.1 View of society and the people of a democratic order

The citizens of South Africa are protected by the Constitution of South Africa, 1996 (Act 108 of 1996). The Bill of Rights (Chapter 2 of the Constitution) enshrines the right to life (section 11). Furthermore, the Constitution protects citizens against the infringement of these rights.

The police official by virtue of the office he holds (official capacity as policeman) and by virtue of the fact that he/she is allowed to use lethal force (acting upon an order or provision as per legislation), is therefore empowered to take the life of another human being. Although his/her actions may be legally permissible it may also allow for police officials to abuse power and the authority vested in them. The Milgrim experiments⁶¹ of 1961, measured the willingness of participants to obey an authority figure who gave them an instruction to perform an act which conflicted with their moral values and conscience. The study found that adults are very willing to “*go to almost any lengths on the command of an authority*”. Interestingly, an ordinary person who is not generally hostile can “*become agents in a terrible destructive process*” (Milgram, 1974). It was found that very few people had the resources (will or mental strength) to resist authority, although the instruction went against their moral beliefs. Related to this study, one of the findings of Milgrim’s research was that the power of authority dramatically increased compliance and obedience.

In another interesting study led by Psychology Professor Zimbardo in 1971 and called the Stanford Prison Experiment,⁶² a team of researchers undertook to explore the impact of situational factors on the behaviour of participants. Participants had to play the role of prison guard or a prisoner in a prison environment created by the researchers. They were given the authority of prison guards and prisoners were subjected to fingerprinting and prison routines. The experiment grew out of hand when participants quickly began stepping beyond their roles. Prisoners were humiliated and treated sadistically. Prison guards became increasingly cruel. As a result the experiment was halted. At the time it was postulated that the experiment showed that people were obedient when provided with a “*legitimizing ideology and social and institutional support*.” (http://en.wikipedia.org/wiki/Stanford_prison_experiment). What the experiment did indicate was that the situation that one is placed in will greatly influences one’s behaviour – and what the Stanford Prison Experiment also revealed was the underlying human aggression that came to the fore.

⁶¹ Milgram, S. (1974). Obedience to authority: An experimental view. Harpercollins: See <http://psychology.about.com/od/historyofpsychology/a/milgram.htm> accessed on 2009-10-02.

⁶² See http://en.wikipedia.org/wiki/Stanford_prison_experiment: accessed on 2009-10-02.

It is important to note that the police may legitimately use lethal force and have social and institutional support as well. The above discussion then suggests that this may become a disastrous recipe which can feed human aggression in police use of (lethal) force situations.

If use of lethal force by police officials is not restricted or regulated, they would, in all likelihood, possibly abuse of these powers. The police were on a number of occasions before 1994 guilty of this – in a period when human rights were not protected or guaranteed by any constitution or legislation. As a result, police brutality remains an extremely sensitive issue in South Africa. The police have a responsibility to act fairly and responsibly. The interpretation of case laws on the use of lethal force plays a crucial role for effective policing. Such case law may be viewed as a guide and directive on the future use of force when affecting the arrest of suspects in our country.

4.8 Summary

The South African legal framework should, and must, form the basis and starting point for any police training on lethal force. Decided case laws, precedents, human rights and internal perspectives play a pivotal role in this process. Essentially a firearm cannot be used to prevent a suspect from fleeing if there is no threat of serious bodily harm or life threatening danger. Nel & Bezuidenhout (1995:21) succinctly point out that the police as an institution, moved from a colonial essentially repressive institution to a more democratic model of policing. Presently, police management needs to communicate and/or enlighten its operational police officials on limitations and powers of police on the use of lethal force.

Arguably, in my view, in the case of the whole amendment, implementation and training of police officials in the nuances of the new s49, the police were not afforded time to digest the fundamental (use of force applications to specified situations) changes of such magnitude. The implications and impact would of necessity have had to involve re-training, workshops, seminars, correspondence, etc. This did not happen on a sufficient scale especially since the police had to continue with normal policing duties and commission of crimes obviously continued.

The historical kaleidoscope of human rights violations and apartheid era policies coupled with drastic legislative changes and precedent-setting case law could not, in my opinion, be cleared up merely by sending out Standing Orders, National Instructions and/or circulars. However, although the issue around the use of force is central to a number of aspects of policing and irrespective of the case law, it is an understatement to say, that especially here in South Africa, urgent intervention on lethal force is necessary and relevant.

Policing must take place within the parameters of the law. In a democratic country, accountability in policing is necessary. This chapter touched one of the important aspects of policing within the legal framework when the need to use lethal force arises.

A multi-faceted approach with the involvement of the government, the Ministry of Safety and Security and Civil Society (Civilian oversight such as the Community Police Forums etcetera), serve as a lever or control to ensure that the SAPS exercise their powers in a justifiable and responsible manner.

Chapter 5

EXPLORING DIFFERENT OPINIONS ON THE INTERPRETATION OF THE NEW S49

5.1 Introduction

Ours is a society that is in a period of rapid transformation and transition, with persons encroaching on each other in many ways – politically, socially, economically, morally and physically (Eldefonso, 1968:5). Over forty years later, this sentiment echoes in modern day policing. Historically, the uniform of a police official may be viewed as a symbolic license to judge and to punish, representing on one level as it does, the right to arrest and most importantly it lends itself to the role of disciplinarian. However, in reality the enactment of laws and judging and punishment of offenders are outside of the scope of the South African Police Service.

Essentially the old s49 allowed for police officials to take the life of a person on mere suspicion of having committed a crime. In the newly democratic South Africa the revision of the old s49 was inevitable, especially with the arrival of the new rights-based Constitution coupled with the political support of international human rights conventions. Much has been written about this controversial topic since the revision of s49 in 2003. There have been differing views on its interpretation as well. This chapter will explore some of these views.

It must be borne in mind that the requirements and/or right to private defence in terms of common law are not disputed in this research. This chapter will rather explore different opinions in an attempt to appropriately interpret the new s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

5.2 Old versus new legislation on s49 and how it impacts on operational police officials

None of the police officials interviewed explained or conveyed an understanding of the previous nor the current legislation on the use of lethal force. In fact 97% of the respondents interviewed

indicated that they had not received any training (whether in basic training, specialist survival training afterwards, or field training at the police station) on the use of lethal force. The responses of the majority of the research sample population do not measure up or meet the use of lethal force requirements as outlined in the Basic Training Learning Programme (as reviewed for the implementation curricula period of July 2004 to June 2006).

More specifically, as indicated in the Basic Training Learning Programme in Chapter 3 (3.3.4. Use of Force, 2003), the police official is expected to use appropriate force to uphold and enforce the law and protect people and property.

The research results indicate that operational police officials in the sample do not possess the relevant knowledge on the amended s49 nor the skills and attributes necessary to apply use of force correctly in order to prevent or combat crime. The majority of police officials interviewed therefore are ‘untrained’ and cannot make appropriate use of lethal force decisions to effectively police by fighting serious and violent crime.

In terms of its current impact on operational police officials, the change from the old s49 to the new s49 has not been an easy or comfortable transition, nor fully (or even partially) understood by the majority of the operational police officials interviewed in this study. This statement is substantiated in Question 31 by the fact that 79% (23 respondents) revealed inter alia that their rights have been limited, suspects have more rights than they do and that they are unhappy and/or angry with the current situation. Incidentally the balance of 21% (six respondents) gave no response on this question. The following section examines the major points of contention between the old and the new s49.

5.3 The old s49 of the Criminal Procedure Act, Act 51 of 1977

As a starting point it is first necessary to look at the provisions of the old s49 (before making comparisons to the new s49). The old Section 49 states that if a person who is suspected of committing a certain offence and then flees or resists arrest and cannot be arrested and prevented from escaping by means other than by killing the person who is fleeing or resisting, such killing shall be deemed in law justifiable homicide (Du Toit *et al.* 1997:5-23).

More importantly and related to this research the old section 49 (2) provided that where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he/she is reasonably suspected of having committed such an offence, and the person authorised to arrest him under this Act or to assist in arresting him cannot arrest him or prevent him fleeing by any other means than by killing him, the killing shall be deemed to be justifiable (Du Toit *et al.* 1997:5-24). (For ease of reference a copy of Schedule 1 list of offences is attached as per Annexure C).⁶³

On this point I concur with Du Plessis, (2001:3), who submits that the following criticisms can be levelled against s49 (2). Firstly, Schedule 1 includes many minor offences, for example the theft of a bicycle or a loaf of bread from a bakery. According to the old s49(2), a police official may shoot at the suspect fleeing on the bicycle he stole in order to secure the arrest.

The suspect may be fatally wounded and could lose his/her life, and that over a mere bicycle. It is constitutionally unacceptable to mete out this type of punishment without affording the suspect the right to a fair trial as well as to protect his/her right to life. Moreover, the death penalty was declared unconstitutional (*S v Makwanyane* 1995 (3) SA391 (CC)), way before s49 was in fact amended and the change implemented). The question then that arises: how is it possible that police officials are granted this immense power without the suspect being afforded the opportunity to a fair judicial process?

Secondly, the old s49 (2) justified the use of lethal force by police officials although there was no life threatening danger to themselves or any other person. Naturally, there was a need to bring s49 in line with the new Constitution and human rights.

This legislation allowed for the police official to arbitrarily and unilaterally make an on the spot decision which could well end with fatal consequences.

⁶³ This subsection (s49 of the Criminal Procedure Act 51 of 1977) was declared inconsistent with the Constitution and invalid as set out in the Constitutional court order in Government Gazette 23453 of 2002/05/31.

As appropriately put by Bruce (2002b) this previous legislation (old s49) was “... *created by the apartheid government to give the police maximum freedom to kill people, whilst disguised as operating under the rule of the law*”. Later we will explore further reasons that led to the change of this legislation. The following amendment came into effect in July 2003, and it closely reflects where the country currently is in terms of the law on the use of lethal force in policing.

5.4 The new s49 of the Criminal Procedure Act, Act 51 of 1977

Below the amended version of s49 of the Criminal Procedure Act is set out (as in National Instruction 18/5/1 over 1/1/4/1(5) dated 2003-07-18).

“49. (1) For the purposes of this section-

- (c) “*arrestor*” means any person authorised under this Act to arrest or to assist in arresting a suspect; and
- (d) “*suspect*” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he/she believes on reasonable grounds–

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong

likelihood that it will cause grievous bodily harm (National Instruction 18/5/1 over 1/1/4/1(5) dated 2003-07-18).⁶⁴

The amendment to s49 (Criminal Procedure Act, 1998 (Act 122 of 1998) came into effect on 18 July 2003 after the *Govender* and *Walters* case as discussed in Chapter 4, challenged the constitutionality of the old s49(2). The new s49 had to be revised and it then introduced concepts such as the principle of proportionality, imminent or future death or grievous bodily harm and substantial risk. However, at the time the SAPS indicated that the new s49 was somewhat vague (Bruce, 2003b:2). Bruce further submits that the South African version is similar to Canadian legislation but that the South African version is “*more clumsily formulated*” (Bruce, 2003b:2). So, was it necessary for s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) to be amended and if so, why was it so necessary? Let us examine some differing opinions.

5.5 Exploring different opinions on the new s49

In his memorandum⁶⁵ (submitted to the Parliamentary Portfolio Committee on Safety & Security at the time of public submissions when the amendment was being discussed), Bruce (2002d), submits that the new s49 “*suffers from a number of major flaws*”. He goes on to say that it has been “*resisted most notably*” by the SAPS. In fact the Ministry of Safety and Security and the Department of Justice at the time did not see eye-to-eye on the amendment.

In his article⁶⁶ Becker (2002:8) similarly refers to the “*bitterness between the SAPS and the Department of Justice...*”. Becker goes on to list a number of practical implications on the use of force in effecting arrests as per the new s49 as follows:

1. Although previously the court placed the onus for justification for the use of force on the arrestor, the new section does not implicitly indicate this. Becker believes it to be an “*onerous task*” if the state/arrestor was called up to lay a basis for its defence;

⁶⁴ Copy of instruction to SAPS members attached as per *Special Service Order Relating to the use of force in effecting arrest*, dated 18 July 2003. Annexure H.

⁶⁵ *The Legal Framework on the Use of Lethal Force in Effecting Arrest – a new Section 49?*

⁶⁶ The utilization of firearms within the DSO environment: A legal perspective.

2. An additional requirement of the new s49 is that the force applied should be proportional to the seriousness of the crime committed (own emphasis); and
3. The new section does not mention Schedule 1 offences (See Annexure C) – the whole of s49 (2) has been replaced. The use of deadly force is permitted in limited circumstances such as when the life of the arrestor or anyone else is in imminent/future (danger of) death or grievous bodily harm.

Interestingly the opinion of John Welch in his article⁶⁷ on the revised s49 is more to the point. He alluded to the “*conflicting interpretations by many*” on the amendment to s49, but would appear to have added to the confusion (Welch, 2003:1). Welch (2003) is of the opinion that the scrapped s49(2) was called into question and criticised because it did not advocate the principle of proportionality between the extent of force and the crime committed.

The new s49 allows for the use of lethal force only when the arrestor or another person is in immediate/future life threatening danger or when serious bodily harm takes place or is threatened. Of course private defence is not affected by this amendment. Welch too, like Becker (2002:8), concurs that the former s49 differs in two important ways from the new version (Welch, 2003:3).

Firstly the principle of proportionality is introduced, i.e. the type of offence versus the degree of force to be used. Secondly, the circumstances under which lethal force may be used are limited. In other words it can be used only when the life of the arrestor and/or other person is in imminent/future (danger of) death or grievous bodily harm.

The first part of s49(2) is limited to the use of non-lethal force such as pepper spray, physical force, etc. where the suspect is to be confined and taken into custody. In relation to this study, the second part of s49(2) which addresses the use of lethal force that may cause death or grievous bodily harm, is more closely examined.

⁶⁷ Revised S49 : Before and after 18 July 2003.

The new s49 provides for the use of lethal force in limited situations only. Before arriving at the decision to use lethal force the police official has to have arrived at a belief (decision to make use of (lethal) force) which is based on reasonable grounds.

The court will then examine this belief of the police official to determine reasonableness. What this essentially means is that the mere opinion of the police official only is therefore no longer adequate. It has to be backed up/supported by a set of facts. Each subsection of the amended version of s49(2) is elucidated separately below.

Subsection 2 (a)

This is very closely related and or linked to the definition of private defence. Welch (2003:5) points out that the provision of this subsection becomes complicated with the words “*future death*”. I agree with this submission because the police official would not always be in a position to determine whether or not the suspect may cause future death.

On the one hand a suspect who has shot someone and flees with his/her firearm may (potentially) cause a “*future death/s*”. On the other hand how can one be sure that a suspect who commits an armed robbery and who did not fire a shot at the scene but escapes with his/her firearm, is not intending to cause a “*future death/s*”? This line of thought is reciprocated by Geller and Scott (1992:255), where it is put forward that nobody within the criminal justice policy community, has yet demonstrated the ability to predict a person’s “*future dangerousness*” by even a fifty percent accuracy.

This situation points to the very real practical problem of police officers in such situations having to make split-second decisions on the situation and whether such “*danger*” warrants the use of force. Therefore it is reasonable to believe that the poorly defined legal framework and very little or no guidance from SAPS management leaves operational police officials exposed to prosecution (if they make the wrong use of force decision) and possibly vulnerable to attacks by criminals (if they hesitate because the situation does not lend itself to clarity for quick decision making in order to respond to a perceived threat or danger from criminals).

What impact does this have on the effectiveness of the criminal justice system and safety and security in the country? Police officials are too afraid to use their firearms (as indicated by the research) and delay their response to crimes in progress.

Joubert (2001:57) indicates that when private defence is raised as a ground of justification by the accused, the *onus* is upon the state to prove (beyond doubt) that the actions of such accused cannot be justified. Would a police official who invokes private defence when he/she uses lethal force then not possibly incriminate himself if the *onus* is placed upon him/herself to testify/justify the (lethal) force used in a specific situation?

Getting back to subsection 2(b), Welch (2003:5) succinctly points out that this subsection is *“based on the vague concept of a ‘substantial risk’ that the suspect ‘will (not may) cause imminent or future death or grievous bodily harm’ if the police official delays the arrest.”*

What exactly is *“substantial risk”*? This concept is not specifically discussed or explained/clarified in the Basic Training Learning Programme reviewed by the researcher -nor do any of the case laws either (see Chapter 4). Substantial risk may then only be determined on a given set of facts for a particular case. One has to assume that the belief of such a risk would fall within the boundaries of reasonableness as well.

The Criminal Procedure module in the Basic Training Learning Programme (2004:58) mentions that the decision to use lethal force depends on whether *“substantial risk”* exists that the suspect will cause imminent or future death. Again, no further elaboration or clarity is given to the police learner on this aspect.

So the question here is: How does the police official determine *“substantial risk”* as mentioned in the new section? Each situation is unique and different people respond differently to certain situations. Precedent as set by the courts is often followed, where each case is judged on its own merit. The absence of guidelines for operational police officials on *“substantial risk”* is a great concern to many police officials and other observers (See Chapter 6: Question 31 for detail).

In my opinion “*substantial risk*” is too wide a concept and allows for too many possibilities. Without a clear framework/guideline each facilitator on Basic Training Learning Programme may provide his/her own version and understanding of the term, however appropriate it may seem. As a result police officials will therefore not have a common understanding and cannot apply the law consistently on the ground (operationally).

In subsection 2 (c) of the new s49 (adapted from the amendment to s49 Act 122 of 1998), the use of lethal force during arrest is permitted if the police official on reasonable grounds believes:

- i. the offence is in progress;
- ii. the offence is forcible and of a serious nature;
- iii. there is the use of life threatening violence; or
- iv. a strong likelihood of grievous bodily harm.

So, the police official’s response to a complaint with an element of violence alone, is not sufficient reason for such police official to decide to use lethal force (for example as in the *Govender* case). The situation must have escalated to the next level, namely it must then be accompanied by life threatening danger and the intention of grievous bodily harm, for the police official to justify the use of lethal force.

The provisions of the new s49 therefore do not detract from the common law provision for private defence.

When compared to the Basic Training Learning Programme (for the training period 2004 to 2006) the module on the Use of Force (2003) strongly emphasises inter alia that police officials must “*master the principle of appropriate use of force*” apart from having extensive knowledge of police powers conferred upon the police official by law. The module introduces the deadly force decision-making model, namely: Ability, Opportunity and Jeopardy. This is introduced via the ‘S’ in AITEST which represents “*Scale for use of force and shooting decisions*”.

The presence of all three – Ability, Opportunity and Jeopardy – may justify the use of lethal force. I am of the opinion that the deadly force decision-making model may be appropriately

used to explain subsection 2(c) of the new s49 (2) and must be considered in future training and development of operational police officials (refer to Chapter 7 for detail).

Welch (2003:6) indicates that “*Ordinary mortal beings, believing in justice, will certainly become victims of justice if they kill or seriously injure a criminal unless they strictly comply with the new law*”. Further, Welch in an article⁶⁸ dealing with justifiable homicide poses the question as to why it was necessary to replace s49 to wit, “*Did our courts interpret the existing section wrongly?*” (Welch, 1999:1-9).

He mentions that “*Some court decisions clearly indicate that the court expected almost the impossible from policemen*” (and others involved in the arrest of alleged criminals) (Welch, 1999:9).

He goes on to add that the ratio (reasoning/rationale) for the amendment to s49 may be located in the *obiter dictum* in the *Makwanyana* case (*supra*) quoted as follows:

“*Greater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional State which respects every person’s right to life. Shooting at a fleeing criminal in the heat of the moment is not necessarily to be equated with the execution of a captured criminal*” (Welch, 1999:9).

But, if one of the consequences of this judgement might be to render the provisions of section 49 (2) unconstitutional, the Legislature will have to modify the provisions of the section in order to bring it into line with the Constitution (SALR, *S v Makwanyane* 1995 (3) SA391 (CC)).

Yet Welch is not convinced that the old s49 was unconstitutional. He is of the opinion that some courts may not have interpreted the law correctly and it did not necessarily mean that the law was wrong. Furthermore, Welch indicates that the new law is “*everything but clear*” (1999:9).

I do not agree with Welch that the old s49 was constitutional. I believe that the courts

⁶⁸ Justifiable homicide: A critical analysis of Section 49 of the Criminal Procedure Act, 1977.

interpretation has been consistent in their approach and that the enforcers of the law, namely police officials, applied the law as per its provisions. The previous s49 did not provide for the right to life in that it allowed persons to shoot to kill fleeing suspects, those not yet convicted by a competent court, even though the lives of the arrestor or anyone else for that matter, was not in any immediate danger.

How can this be considered as being constitutional? In fact, I am of the opinion enforcers of the law, i.e. police officials, abused and exploited this powerful piece of legislation. It may have allowed arrestors (police officials) to suspect, convict and impose the death penalty sanction – all at once – on suspects they encountered in the line of their policing work.

This view is supported by Bruce (1999), who pertinently put it that ordinary members of the public, as well as the police official, have the right to use lethal, deadly force when their lives or property were threatened – even the highest court of this land does not possess the authority to impose such a harsh sanction (with the 1995 ruling by the Constitutional Court that the imposition of the death penalty is unconstitutional in South African law). For the sake of argument, if the law was correct and its meaning was clear, the debate and subsequent amendment to s49, would not have arisen in the first place. I am of the opinion that the old s49 was unconstitutional because it allowed for police officials to abuse the use of lethal force in certain circumstances.

This view is supported by Judge Kriegler in the *Walters* case to wit:

“an enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible” (SALR, 2002:6393 at H).

I submit that the arrival of the Constitution of South Africa, 1996 (Act 108 of 1996) warranted the amendment to s49. In addition, that the South African s49 and the use of lethal force requirements needed to be comparable with other democracies such as Germany, France,

Canada, the Netherlands and some jurisdictions in the United States of America (SALR, 2002:628 at E). (See also Chapter 4 – 4.2 on Brief History of Human Rights).

Yet I tend to agree with Welch when he asserts that the law is unclear. As I intimated earlier terms like “*imminent or future death*” as mentioned in s49 (2)(a), or “*a substantial risk that the suspect will cause imminent or future death or grievous bodily harm*” as per s49(2)(b) are too wide and may be interpreted in different and contrasting ways. Significant changes were introduced with the amendment to s49. For example, the Schedule 1 offences were not mentioned and/or included in the Amendment. So too, the principle of proportionality is a new introduction brought about by the amendment to s49.

I therefore submit that the absence of clear guidelines and lack of clarity contributed to the lack of any comprehensive and practical police training/re-training on the whole matter and implementation of the new s49.

Apart from Bruce’s (2003b:2) submission that the amendment is “*clumsily formulated*”, he also believes that it (the amendment) will “*perpetuate the existing confusion over the extended period of time that it takes for the courts to clarify its meaning through case law*”. I have to agree that case law on the present amendment would significantly assist the police and other enforcement agencies in interpreting the new law appropriately. So too, the police may then be in a better position to drive a training program towards the use of lethal force when arrests need to be effected.

5.6 A discussion on the “grey areas” of the new s49 : Why do we need clarity?

Notwithstanding the earlier indication that the new s49 was unclear, (Welch, 1999:9), this section will tentatively propose that clarity on certain aspects will provide for an improved interpretation on the new s49. The parts referred to as “grey areas” are aspects that need definition and these will be commented upon. They are, namely: the principle of proportionality, imminent or future death or grievous bodily harm and substantial risk (as introduced by the new s49).

At the time this study was undertaken, the absence of a decided case on the amended s49 (2) made it a challenge for legal experts to provide clear guidelines on the correct and/or interpretation and application on the new version. As indicated by Bruce (2002b), “...*the police and others have also expressed concerns about difficulties of interpreting the 1998 legislation.*” On the basis of this study in terms of the research interviews, decided case laws and the Basic Training Learning Programme of 2004 to 2006, the following section will attempt to highlight those areas that need urgent clarity to assist operational police officials to conduct their duties more effectively and correctly (properly) within the framework of the law.

Whilst the language used in the new s49 may appear simple, certain concepts are wide and it becomes difficult to draw the ideal interpretation. Comparatively, the new s49 differs from the old provision in two respects.

Firstly, the new s49 introduces the principle of proportionality, i.e. the force used must be reasonable and proportional to the crime committed. Whereas, the old s49 allowed for police officials to shoot to kill suspects fleeing from violent and serious offences this is clearly not the case today. When attacked, the defence response must not be more than is necessary to ward off the attack.

Although the research conducted for this study reveals that police officials are aware that they cannot shoot a fleeing suspect for theft – as they had done in the past, the research also revealed that police officials are afraid to make use of their weapons at all. With the majority (86%) not having attended and/or received training/workshops, it is clear that they are unfamiliar with the new s49 legislation and the use of lethal force.

As far as case laws are concerned in respect of the principle of proportionality and protecting property, the cases of *Ex Parte Minister of Justice: In re S v Van Wyk 1967 (1) SA 488 (A)* and *S v Mogohlwane 1982 (2) SA 587 (T)*,⁶⁹ may here be referred to and unpacked (SALR, 1967 and 1982 respectively). In the *Van Wyk* case, after repeated break-ins, a shopkeeper rigged a shotgun so that it would fire upon an unsuspecting intruder. An intruder was duly shot and killed during a

⁶⁹ These cases are not discussed in detail – refer to South African Law Reports for detail – see reference list.

break-in. The shopkeeper was accordingly charged with murder but was acquitted. The court found that lethal force may be used to protect property in exceptional circumstances. A similar decision was taken in the *Mogohlwane* case.

However, as from 1996, the “*constitutional democracy turned our legal system on its head*” (Du Plessis, 2004:2). These case laws are contrary to the right to life (section 11) as guaranteed by the Constitution.

It is clear that under these circumstances, our courts would not arrive at a similar decision today. Operational police officials need to familiarise themselves with the decisions taken by the courts in the past and how our new legal order impacts on them today. Today’s case laws such as the *Govender* case, clearly points out that lethal force can only be used when the suspect is an immediate threat to the arrestor or other member of public. The *Walter* case confirms the same standpoint as that of the *Govender* case.

It is evident, that the debate and confusion within the rank and file of the police as well as within the authorities like the Department of Justice, SAPS Legal Services and the Ministry of Safety and Security, has impacted on the delivery of training to police officials on this matter. As long as this situation prevails, i.e. in the absence of clear guidelines on the use of lethal force, operational police officials will find themselves victims of this legal quagmire.

This situation cannot afford to be left unchecked. The use of force in the old s49 was not proportional to the seriousness of the crime. There is consequently no distinction between Schedule 1 offences and other offences with the new s49. The right to protect property needs to be balanced with the suspect’s right to life. Du Plessis, (2004:3) succinctly points out that the “...*right to life cannot be arbitrarily infringed, allowing for lethal force only in situations where lives of innocent persons require protection*”.

Secondly, the new s49 (2) (b) introduces the new terms: “*substantial risk*” and “*future death or grievous bodily harm*”. There is a further urgent need for clarity on these aspects of the new s49 for operational police officials. (See also the Welch submission above).

S49 (2) limits the use of deadly force to cases where it is necessary to protect the arrestor or other person from death or serious injury either immediately or in the future. Whereas previously (old s49) the life of the arrestor need not be threatened by death or serious injury, i.e. a harmless fleeing suspect may be shot and killed merely for escaping after allegedly being involved in a Schedule 1 offence.

The new s49 says there must be “...*substantial risk that the suspect will cause imminent or future death or grievous bodily harm.*” The grey area being: How does the police official determine “*substantial risk*”? This is a very vague concept, and are there degrees of “*substantial*”? The police official must be able to convince the court objectively that force was necessary. Each situation is unique and different people respond differently to certain situations.

As far as the application of Judge Kriegler’s nine points are concerned (from the *Walters* case judgment (see Chapter 3), it is clear that only minimum force may be used and the use of force must be proportional to the threat of violence or the nature of crime committed. This means no lethal force (firearm) may be used in an arrest for minor crimes such as trespassing, damage to property, theft, etc.

Perhaps, the most important reason for clarity is that in the midst of the vagueness the existing confusion and uncertainty surrounding s49 is being perpetuated. In the meantime, the “*police will face a choice of shirking their responsibilities or possibly standing trial for murder, not because of deliberate malfeasance on their part but because of the vagueness of the law*” (Bruce, 2003b:2). The corollary to this comment lies in the payouts made by police (claims by victims of illegal use of force by police officials) for the period 2005 to 2008. The police paid out claims which arose from wrongful arrest, assault, car accidents and shooting to the tune of R3.7 billion (Carter, 2008). It appears that the types of incidents the police were held accountable for, arise from the changes in the judicial system and South Africa’s dramatic change in its political landscape. Substantial police re-training is a necessity if the police want to curb such unnecessary financial losses – these monies could very well have been ploughed into training and re-training. In respect of malfeasance (wrongdoing by the police official), this research also

revealed that some police officials deliberately delayed their response to serious and violent crime, either in fear of (the consequences) or to avoid using lethal force.

5.7 Summary

Nevertheless, on the basis of the foregoing discussion, and the research conducted for this study, it is clearly evident that police management needs to urgently implement and drive an outreach program to enlighten its operational police officials on the use of lethal force.

Whilst the old s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) has been in existence for over 165 years (Kriegler in *S v Walters*, 629: 2002), Nel (1995:21) succinctly points out that the police as an institution moved from a colonial to a democratic model of policing. This phenomenal change needs to be guided and actively pursued throughout the SAPS. As it stands, with the amendment being almost five years old, one cannot overemphasise the urgency for this type of intervention for operational police officials.

Chapter 6

RESEARCH ANALYSIS AND FINDINGS

6.1 Introduction

The focus of this research was to establish:

- whether operational police officials were adequately trained on the new s49 to make use of lethal force decisions and act in line with existing legal requirements; and
- to compare the Basic Training Learning Programme outcomes on the use of lethal force with the present understanding of current operational police officials on the use of lethal force. (See Chapter 1 for the full motivation for this study and the problem statement).

With that in mind, the researcher set about interviewing 29 respondents (operational police officials) by means of in-depth one-on-one interviews.

The procedure of analysis for the transcribed interviews took the form of a manual system for both the statistical and thematic coding of responses. The responses of each interview were cross checked and anomalies were identified. A pattern was thus identified, categorised and coded. In addition the interviewer compiled notes during the interview.

The notes were consulted to cross check and verify information. The information was then coded and analysed accordingly. A copy of the questionnaire used in the interview is attached as per Annexure E.

The foregoing discussion will present the findings of the research. A comparative analysis between the Basic Training Learning Programme and the research findings are woven into this chapter as the findings are unpacked per question.

6.2 Analysis of the questionnaire responses and interpretation of findings

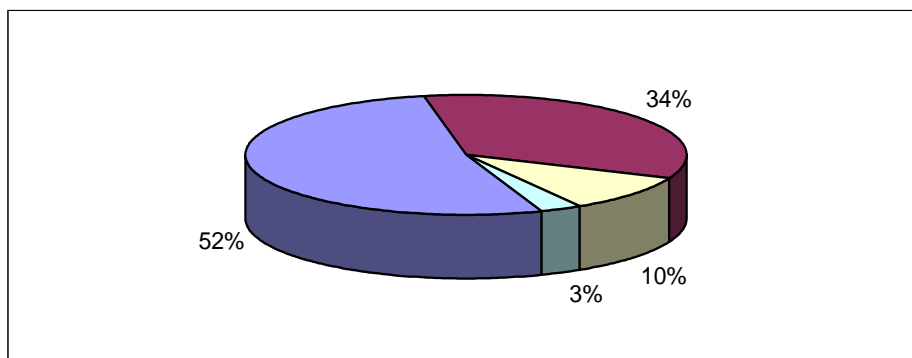
Question 1: *What is your gender?*

The research population was dominated by males (97 %) and of the 29 respondents interviewed only one female was drawn from the sample and interviewed. Basically this is a clear indication that operational policing in the SAPS is currently dominated by the male gender. The one female interviewed also did not have much operational experience and worked mainly indoors.

Question 2: *How old are you? (years)*

Fifty-two percent of the research population were 35 years or older, i.e. 15 of the 29 interviewed. A further 34% of the sample (10 respondents) were between 30 to 35 years old, whilst only 10% accounted for those respondents aged between 25 to 30 years of age. Only one respondent interviewed was between 20 and 25 years (3%). It can be assumed that the majority of operational police officials in these two provinces are in the early to mid-thirties.

Table 3: Ages of sample population



Question 3: *How long have you been in the SAPS (number of years)?*

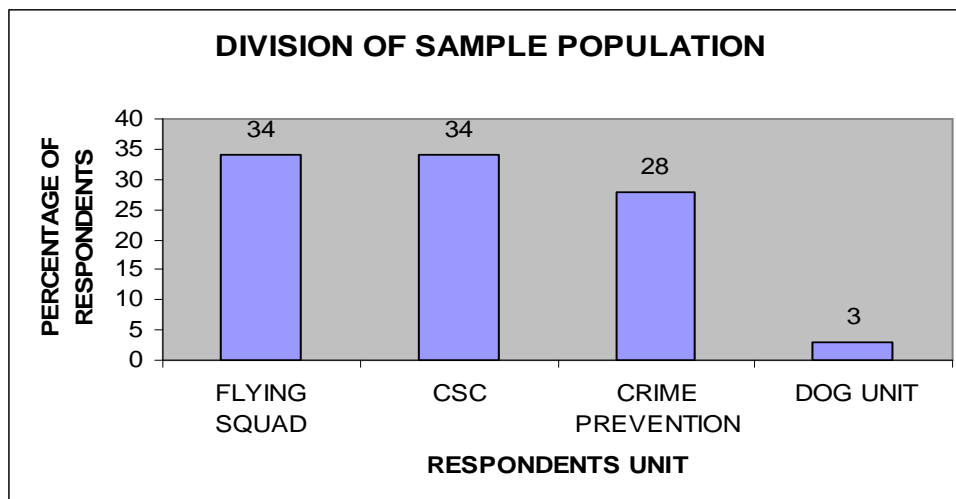
Thirty-eight percent (38%) of the respondents (11 respondents) have between 10 to 15 years policing experience. Thirty one percent (nine respondents) have over 15 years of service in the SAPS whilst 17% of respondents (five respondents) served five years or less. Fourteen percent (four respondents) had between 5-10 years of service in the SAPS.

The majority of police officials interviewed did not attend the Basic Training Learning Programme during the training periods of 2004–2006. Therefore they had not been exposed to the specific Basic Training Learning Programme reviewed in this study. In terms of the short period that had elapsed (2004-2006) and the interviews it would not have been possible to have all those who passed out during the years 2004 to 2006 to already be operational police officials. In general terms this means that the majority of operational police officials serving the country may have undergone Basic Training prior to the new Constitution and the amendment to s49. (This is all the more reason for urgent training interventions for s49.)

Question 4: *In which unit do you currently serve?*

The Vaal Rand area (Gauteng Province) comprises of 13 station areas (www.saps.gov.za). From this area, ten respondents were selected, i.e. 34%. From the Sasolburg SAPS (Free State Province), ten respondents of the Community Service Centre (34%), eight respondents of the Crime Prevention unit (28%) and one respondent of the Dog Unit (3%) were selected.

Table 4: Division of sample population



Statistics from 2001 to 2005 reveal that the following reported cases of violent crimes in South Africa increased or stabilised at high levels:

- robbery with aggravated circumstances;
- robbery of cash in transit;
- House-breaking;
- drug related crime;
- rape; and
- indecent assault⁷⁰

Over this period, the illegal possession of firearms and ammunition and theft of motor vehicles and motorcycles dropped, but not significantly. The crime statistics from 2001 to 2007 for the Vaal Rand area, which falls under the jurisdiction of the Gauteng province, shows a steady escalation in robberies at business premises, robbery of cash-in-transit and illegal possession of firearms (www.saps.gov.za). The majority of the incidents where lethal force was used (see Question 28) by those operational police officials interviewed in the study, appeared to be during theft of motor vehicles in progress, armed robbery and vehicle hi-jacking, as well as housebreaking-in-progress complaints. Apart from robbery at residential premises which falls under housebreaking,⁷¹ the other crimes have slightly dropped during this period, although ‘stabilising’ at high levels.

The crime statistics from 2001 to 2007 for the Sasolburg area which falls under the Free State province for jurisdictional purposes, show a steady escalation in ‘robberies at business premises’.

Robbery with aggravating circumstances increased from 2006 to 2007, so did stock theft and malicious damage to property (www.saps.gov.za). The levels of crime in the Gauteng Province are significantly higher than that of the Free State – Sasolburg area. The sample population was extracted from both provinces.

⁷⁰ Detailed crime statistics can be viewed at www.saps.gov.za.

⁷¹ Technically the term ‘housebreaking’ – a direct translation of the Afrikaans term ‘huisbraak’ – refers to burglary but is widely used in South Africa.

Question 5: *When did you receive your Basic Training at the SAPS Training College?*
(passing out month & year date); and

Question 6: *In your Basic Training did you receive any formal training on the use of force and the provisions/requirements of Section 49 (use of force to effect an arrest) of the Criminal Procedure Act, 1977 (Act 51 of 1977)?*

Collectively the majority of the respondents completed their Basic Training before 1995, i.e. a total of 69% (20 respondents). Nine respondents (31%) completed their Basic Training between 1995 and 2005. Again, it must be borne in mind the Basic Training Learning Programme of June 2004 to June 2006 was reviewed in this research. These statistics reveal too, that most of the operational police officials policing the streets of the Gauteng and Sasolburg areas received basic police training prior to the Constitution of South Africa, 1996 (Act 108 of 1996) and the amendment of s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977). Yet, when questioned as to whether they had received training on the use of lethal force and section 49, 97% (28 respondents) indicated that they did whilst one respondent could not remember.

Question 7: *Did the training include reference to the applicable decisions by the Appellate Division and/or the Constitutional Court; and*

Question 8: *If yes, briefly describe the extent of the training*

Here, 66% of the respondents indicated that their Basic Training did in fact include references to applicable decisions by the Appellate Division and/or the Constitution. However, when asked to briefly describe the extent of the training, 41% (12 respondents) had forgotten - their exact year date of when they had undergone their basic training. Below is the year date (of those who could remember) of when they underwent their Basic Training, as well as their current age.

1984= 1 (46 years old)

1985 = 1 (41 years)

1987 = 2 (39 years and 41 years)

1988 = 1 (38 years)

1991= 1 (36 years)

1992= 1 (32 years)

1993 = 2 (32 years and 35 years)

2002 = 1 (32 years)

2004= 2 (31 years and 28 years)

In respect of the 12 who had forgotten, five (5) respondents completed basic training in the mid-to late 1980s – their ages being 46, 41 (2 respondents), 39 and 38 years respectively. Four (4) respondents completed basic training in the early 1990s – their ages being 32 (2 respondents), 35 and 36 years old respectively.

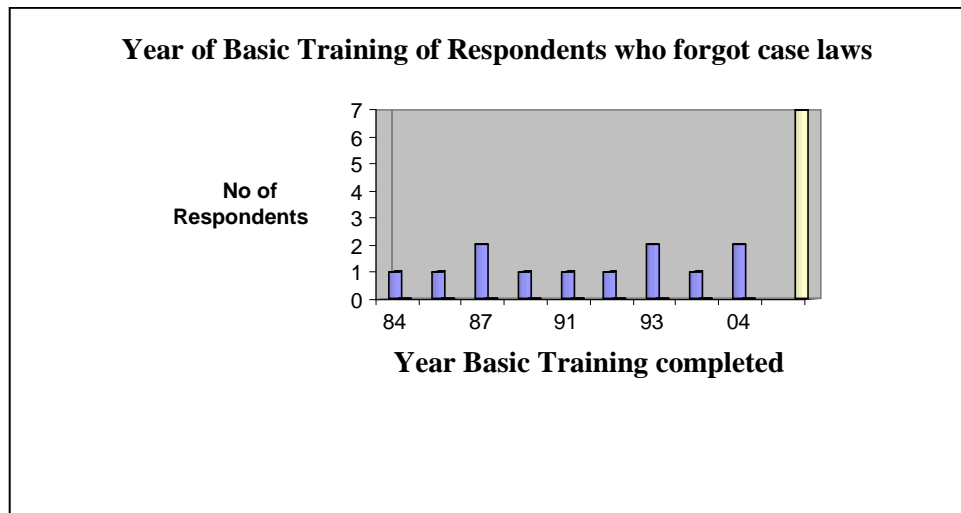
Three (3) respondents completed basic training in the early 2000s – their ages being 28, 31 and 32 years old respectively. The response of the latter three respondents is disappointing. Their training certainly included constitutional matters and the right to life, etc.

This research on the selected sample of 29 police officials in the Gauteng and Vaal Rand area reveals that many police officials are unsure and doubtful about the circumstances under which they may use lethal force. When asked whether their basic training included reference to case laws, 66% answered affirmatively.

However, 41% (12 respondents) had forgotten. None of the respondents referred to any of the appropriate case laws (see questions 7 and 8 below). It must be taken into account that 86% of the sample did not receive any in-service training on the use of lethal force (see Question 16). Many of the police officials interviewed indicated that they were just asked to sign the national instruction.

Whilst it may be argued that the basic training learning program for this period was not reviewed (this research reviewed the Basic Training Learning Programme from July 2004 to June 2006), the question arises, then why have those police officials who completed their Basic Training Learning Programme before the changes to s49 not been recalled/retrained in line with the changing face of the democracy and major difference in the policing environment?

The amendment to s49 was introduced only in 2003. Only two candidates could have had exposure and/training on the new law. The following diagram illustrates the situation.



Ten out of the twenty nine respondents who forgot, all attended a Basic Training Learning Programme before the revision period of this research and two fall into the revision period of this particular study on the Basic Training Learning Programme in 2004.

It had a major impact on the use of lethal force when effecting an arrest which in turn led to the amendment to s49 in the Criminal Procedure Act, 1977 (Act 51 of 1977). Can the police afford to find themselves in such a situation?

The Basic Training Learning Programme that was reviewed in Chapter 3, to wit Law and Policing embodies an important unit standard. It calls for the identification and application of relevant knowledge about the law in general, related to policing.

In this module, case law and the Constitution are discussed. The research results, however, indicate that operational police officials do not have a “working knowledge” of the legality around the use of lethal force when effecting arrests.

Six respondents, 21% provided an irrelevant scenario/discussion and not a single appropriate case law was quoted let alone explained or discussed. Four of the respondents (14%) discussed the use of lethal force, however, only two of these discussions dealt with the use of lethal force during arrest. Their discussion is as follows:

Interview 3

The respondent has three years’ service in the SAPS and is patrol van driver. He completed his Basic Training in September 2003. He referred to an incident where two on duty police officials tried to stop a vehicle in order to search it on a highway. The vehicle failed to stop and the police officials “*shot from behind*” (2006, Interview 3). According to the respondent the police officials (his colleagues) should have called back up to stop the fleeing suspects somewhere ahead of them.

He rightfully indicated that the police officials should have employed other means before they decided to use lethal force. The review of the Basic Training Learning Programme in this research covered the later period between June 2004 and July 2006 – a year earlier than the period the respondent attended training.

Interview 5

The respondent works at the Community Service Centre, has 13 years of service in the SAPS and is aged 38. The respondent indicated that he thinks “*quite a lot*” of a case discussed in college where a man entered his bedroom and found his wife with another man. The husband “immediately shot” the other man and he did not walk away first and then come back, so he acted immediately in the situation described as “*noodweer*” (2006, Interview 5). This had nothing to do with the use of lethal force during an arrest.

Interview 16

The respondent has 15 years service and is aged 38. The respondent briefly mentions an incident where police chased a vehicle, police were shot at and they returned fire (2006, Interview 16). No further details could be remembered.

Interview 22

The respondent has served for 12 years and is 33 years of age. He recalled a case involving a private person where the “*people was at home*” (sic) and a beggar knocked. The owner “*just took out a gun and fired shots through the door*”. The owner was charged. When asked how he (the respondent) personally interpreted this scenario he indicated that he does not “*condone what the owner did*” (2006, Interview 22).

Only two of the respondents explained/quoted the use of lethal force during arrest. None of the watershed cases, Govender or Walters, or any other of the cases discussed in Chapter 5 were mentioned. One may ask the question, so what does this imply? This means that the majority of operational police officials are uninformed and/or not in a position to correctly or appropriately make informed use of lethal force decisions in line with legal requirements. This is the requirement in the Basic Training Learning Programme reviewed in Chapter 3 as per Unit Standard 11978 where the police official is expected to identify and apply sections of the Criminal Procedure Act, 1977 (Act 51 of 1977) (Criminal Procedure: Learner’s Guide, 2004).

Question 9: *In your Basic Training did you receive any formal training on the Amendment to Section 49 (Judicial Matters Second Amendment Act (No. 122 of 1998))?*

Question 10: *In your Basic Training did you receive any formal training on the topic of Human Rights & Policing?*

After s49 was amended 76% (22 respondents) of the group interviewed indicated that they received no formal training whilst only 21% (6 respondents) had some form of training on the amendment.

South Africa has signed on with UNHRC and other human rights groups yet 38% (11 respondents) claim that they did not receive training on Human Rights and Policing. Human Rights is the important part of the Constitution namely Chapter 2. On the other hand, 62% (18 respondents) have received training on Human Rights and Policing.

Question 11: *If yes, what was the extent of the training?*

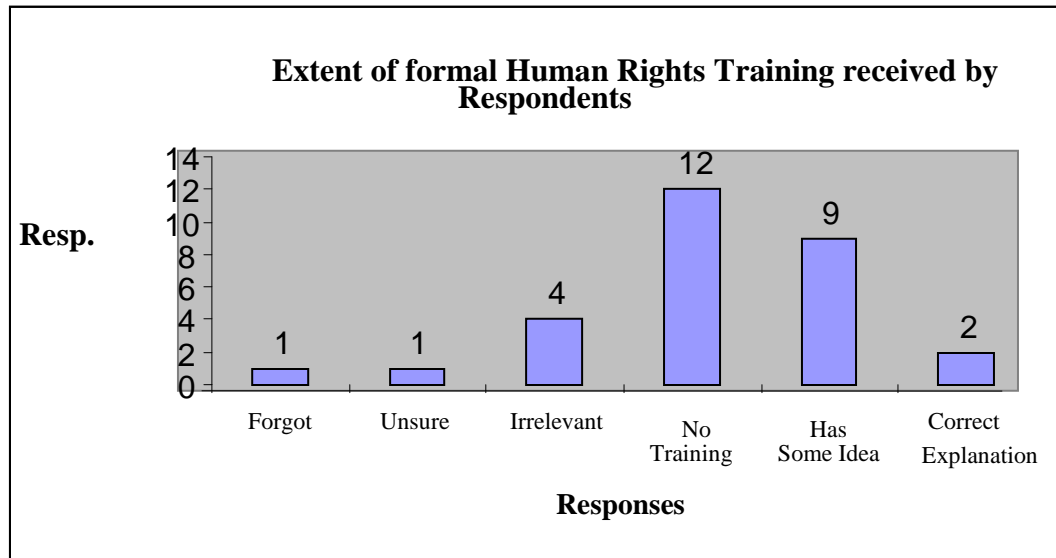
The respondents were then requested to describe/explain the extent of any formal training on the topic of Human rights and policing in their Basic Training program. Three percent had forgotten if they received human rights training, 3% are unsure, 31% made a poor or inadequate attempt or had some idea, whilst 14% provided an irrelevant discussion. That is a total of 51% of the respondents.

If one adds the number of respondents who indicated that they did not receive any training on human rights (38%), it can be assumed that 89% of the sample population do not have appropriate knowledge on human rights and policing in general. One respondent indicated that he received poor training but was included in the percentage of those who had forgotten.

The use of lethal force during arrest as indicated earlier has a major impact on human rights in policing. The use of lethal force may result in death whilst the right to life is protected by the Constitution of South Africa, 1996 (Act 108 of 1996) and the Bill of Rights.

When asked to explain the extent of formal training on human rights in Basic Training, the following results were obtained:

Table 6: Extent of formal Human Rights Training received by Respondents



The research indicates that 62 % of the sample population are not well informed. The figure is the total of those respondents that forgot, unsure or irrelevant (21%) and those who claim to have received no training at all (41%). These results are surprising if not troubling. Human Rights is the cornerstone of the Constitution and yet it appears that its importance has been overlooked.

Only two respondents (7%) provided a relevant Human Rights discussion. Their responses are discussed as follows:

Interview 22

The respondent indicated that human beings must be respected. Every person has the right of movement, be informed of his rights when arrested, has a right to privacy and the right to apply for bail. The respondent is a Captain with 22 years of service and attended Basic Training in 1984 (2006, Interview 22).

Interview 26

The respondent learned during Basic Training that other humans are to be respected whether they are suspects or complainants.

They deserve dignity and should not be treated badly. This respondent attended Basic Training in 1993 (2006, Interview 26). A few of the 31% (nine respondents) made an attempt by mentioning the Bill of Rights and that everyone had rights. Some of the respondents discussed the Limitation clause and the right of the police to use maximum force. Another respondent of the crime prevention unit indicated that the extent of his training on human rights provided how to handle a suspect. He indicated that although minimum force must be applied *“I’ll have still to bear in mind, he is still a person although he’s still a criminal”* (2006, Interview 16).

Question 12: *Since receiving your Basic Training, have you attended any WORKSHOP OR IN-SERVICE TRAINING on the topic of Human Rights & Policing - specifically related to the Bill of Rights and the importance of the limitation clause (Section 36 of the Constitution Act 108, 1996).*

Question 13: *If yes, when did you receive this in-service training or attend the workshop (month and year date)?*

The respondents were asked if they attended a Workshop or In Service Training on Human Rights and Policing relating to Bill of Rights or the Limitation Clause after they had completed their basic training. The majority (55%, i.e. 16 respondents) did not attend any such training whilst 45% (13 respondents) acknowledged in the affirmative.

Many of them could not remember when the training took place so the training could not have been followed up to peruse the content. Of those who could remember the year (45%), 24% attended a Workshop or In-Service Training on the Bill of Rights between 2001 and 2005 whilst 17% underwent training of this nature between 1996 to 2001 (five respondents).

Question 14: *If yes, what was the extent of this training?*

However, when those respondents who did attend further training (45%, 13 respondents) were asked to elaborate on the extent of the in-service training/workshop on Human Rights and Policing especially the Bill of Rights and Section 36, the thematic analysis revealed the following:

- 59% (17 respondents) had no Human Rights training – this figure increased from 55% (see question 13 above) when originally asked whether they had attended training;
- 7% forgot;
- 3% did not understand the question;
- 10% provided a relevant discussion; and
- 21% made a very basic or poor attempt in responding to this question.

In totality therefore, 69% of the respondents interviewed did not contribute meaningfully to the question on Human rights and Policing, of which 59% claimed to have received no training on the subject at all.

Interestingly, of the respondents who had no Human Rights Training: (59%; 17 respondents) further analysis revealed:

- The majority 24% (seven) were enlisted between 1990 and 1995;
- 7% (two) were enlisted between 1995 and 2000;
- 17% (five) were enlisted in early 2000; and
- 10% (three) were enlisted in 1980 or before.

Equally troubling were two respondents (7%) who did not understand the question despite attempts in the interview to rephrase the question. The following can be deduced from this analysis:

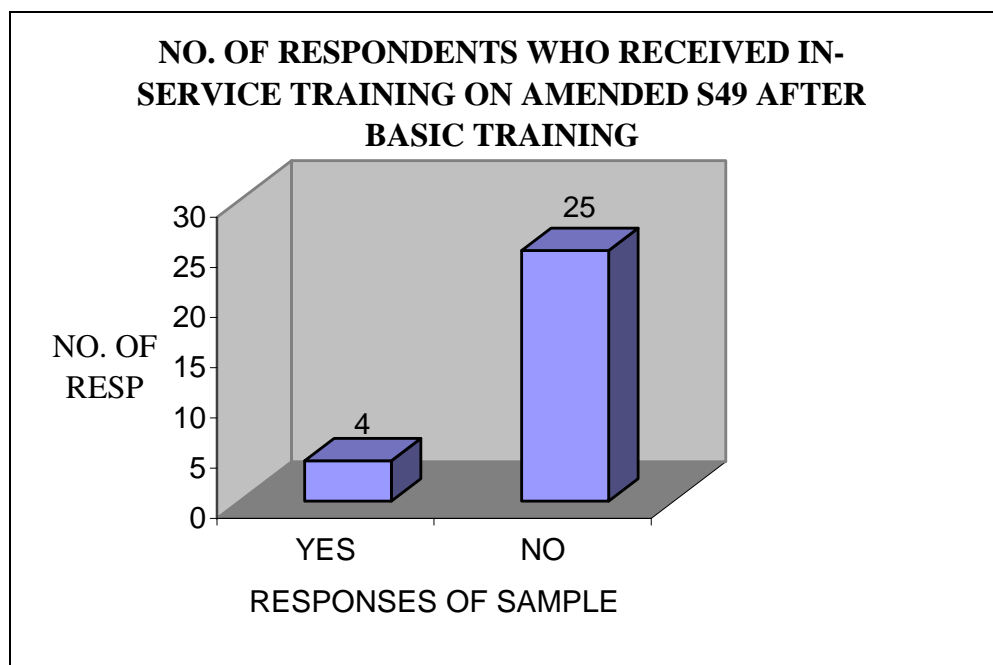
- that the majority of the operational police officials who attended Basic Training up to and including 2000 indicated that they did not receive any Human Rights Training, i.e. 59%.

It therefore appears, by the research conducted, that prior to 1996 and the Constitution, Human Rights was not at the forefront of policing.

Question 15: *Since receiving your Basic Training have you received any IN-SERVICE TRAINING on the Amendment to Section 49 (Judicial Matters Second Amendment Act (No. 122 of 1998)? If NO, proceed to Question 17.*

The total sample of respondents (i.e. 29 respondents) were asked if they had received any in-service training on the amendment to s49 after passing out of Basic Training. Only four respondents (14%) claimed to have received in-service training whilst an overwhelming majority of the respondents (86%, i.e. 25 respondents) stated that they did not receive any in service training.

Table 7: No. of Respondents who received in-service Training on amended s49 after Basic Training



The research conducted indicates that police officials were called upon to sign an acknowledgment of the new instructions and the receipt of a copy of the new s49. This submission is synonymous with the instruction as per Annexure I. The signed copy serves to confirm that he/she understands the contents thereof and is to be filed on the police official's personal file. Yet, the research indicated that they are not sure – but they complied with the instruction and signed the document.

In accordance with the new instructions a police official will be held liable for and need to justify his/her actions when he/she uses lethal force (firearm). But if the research sample is any indication of the state of affairs regarding training on use of force in the SAPS then, since the change in the law (new amended s49), police officials (86% of the sample – see Question 15) are not being properly trained (or have this explained to them) on when it is authorised to use lethal force in the execution of his/her duties. Suffice to say, it's no wonder they feel confused and unsure of what they should do in use of force situations.

A point in instance being a respondent from the SAPS Sasolburg Community Service Centre who recalled an incident where a fellow police official had used his firearm. It had taken two to three years to finalise the matter. He went on to say:

“Dis hoekom... [ek my] vuurwapen nog nooit gebruik nie, nooit nie”.

“Hierdie vuurwapen kan jy hom nie so maklik gebruik nie.....maak seker as jy hom gebruik... .dis beter om.... jy skiet hom seker dat hy doodgaan... dat hy daar nie ander storie kan praat...” (laughs) (2006, Interview 1).

Another respondent had this to say about the matter:

(Explains a scenario where he (respondent) could shoot at a fleeing armed robbery suspect):

“While I'm still running, I can shoot them to the back. So I know that thing is there. So I feel bad. ...because they will send you to jail. I know, I got two friends, the other is here in this jail.” (2006, Interview 4).

Another respondent shared his views in general saying:

“the reality is that suspects don’t hesitate to shoot... training needs to be intensified... guys don’t know when to shoot – you have a split second to make a decision, ...you have to protect yourself and the civilian, you can’t protect them if you are too scared. I have policeman say if I respond to serious cases of armed robbery, I will take my time if I can’t use my firearm. Police officers are too scared to use firearms, me too” (2006, Interview 5).

Question 16: *If yes, briefly describe the extent of the in-service training you received.*

Four respondents briefly mentioned that inter alia, a police official could no longer shoot at a suspect fleeing from a schedule 1 offence and that minimum force must be used to arrest a suspect.

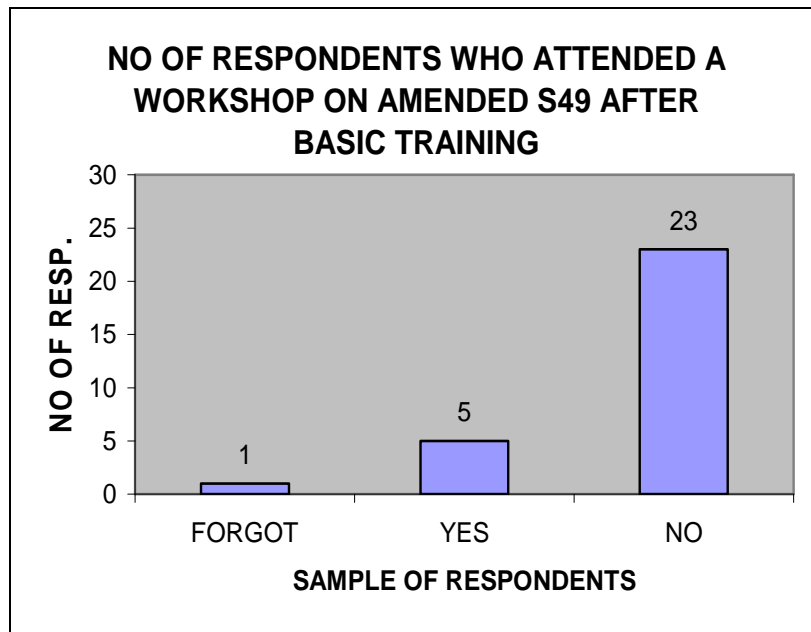
Question 17: *Since receiving your Basic Training, have you attended any WORKSHOP in which you were informed of the Amendment to Section 49? (If NO, proceed to Question 19.*

Question 18: *If yes, when did you attend this workshop? (Month and year date)?*

When asked if they attended a workshop on the amendment to s49, 17% (five respondents) confirmed having attended whilst 79% (23 respondents) of those interviewed did not attend any workshop of this nature with 3% (one respondent) indicating that he does not know or remember.

Of those that attended (17%), none of them could remember the date or month of such learning intervention. Similarly Question 15 supra indicated that 86% did not receive any in-service training on the subject either.

Table 8: No. of Respondents who attended a workshop on amended s49 after Basic Training



The amendment came into effect on 18 July 2003, while the research was conducted in 2006 – three years down the line and ten years after the birth of the country’s Constitution and democracy. Irrespective of these timelines, 82% of the police officials in the study, who are engaged in operational policing in the SAPS, did not attend any workshop on the use of lethal force after the amendment to this all important (in policing terms) piece of legislation.

Question 19: *If you have received training on both the former and current Section 49 of the Criminal Procedure Act 51 of 1977, did it lead to any changes in the way you behave(d) regarding the use of lethal force during arrest?*

Eighteen (18, i.e. 62%) of the respondents stated that they have changed the way they behave when it comes to using lethal force whilst eleven respondents (38%) stated that their behaviour had not been impacted upon.

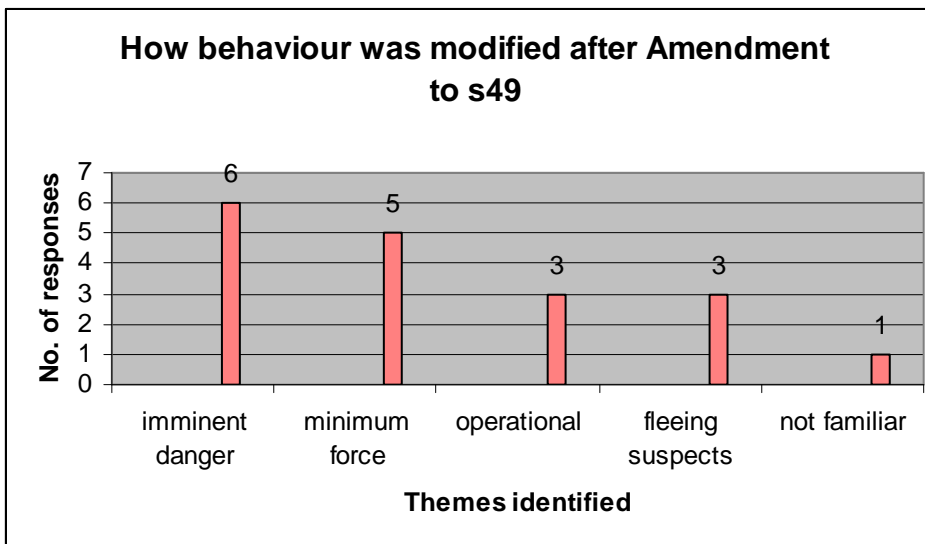
These responses are disturbing, to say the least. There has been significant changes to the use of lethal force when effecting arrests in policing. The in-depth discussion into the legal framework (Chapter 4) and legal opinion (Chapter 5) point out these changes. Despite the groundswell in discussion and opinion on the controversial topic, 38% (11 respondents) did not change and/or modify the way they behave when using lethal force to effect arrests.

Question 20: *If yes, explain how you modified or will modify your behaviour in a situation as described in Section 49- if you need to use lethal force.*

Those 18 (62%) respondents who answered in the affirmative on Question 19, i.e. said that their behaviour, with reference to use of lethal force, did change, were asked to explain how or in what way they had modified or will modify their behaviour if they need to use lethal force. Their responses were analysed further and categorised as follows:

- Six of the 18 respondents will only use lethal force when their lives or someone else's life is in imminent danger;
- Five of the 18 respondents will consider using minimum force first. Could this be that they are fearful of using their weapons?;
- Three of the 18 respondents will not shoot at fleeing suspects;
- Three of the 18 respondents related operational tasks that were affected by the new s49 and the use of lethal force, such as not shooting for property crimes and not firing warning shots.
- One respondent, who although indicating that he did modify his behaviour, could not say how.

Table 9: How behaviour was modified after Amendment to s49



An in-depth look into the themes identified revealed that although the operational police officials interviewed modified their behaviour (to a certain extent), some are bitter or perceive the lethal force changes negatively. An extract of some of the interviews follows:

- “Ja, to me I see restricting police members a lot to such extent that it puts them in danger, ...this amendment put (sic) person in danger...” (Interview 9, 2006);
- “...you were supposed to shoot when your life was in danger, but now things have changed even so much, even if your life in danger (sic), you can’t just pull out firearm...” (Interview 19, 2006).

This is a mistaken belief. Police officials are not restricted in using lethal force if their lives are in danger. The *Special Service Order relating to the Use of Force in Effecting an Arrest* (18/07/2003) as per Annexure I, points out that the new s49 does not limit the use of lethal force when acting in private defence. If the life of the respondent above, was placed in danger, he could act in private defence to protect himself. This is one of many such misconceptions regarding the amendment to s49 prevalent in the interviews. The Basic Training Learning Programme also addresses this in the module: Regulatory framework of policing. (See 3.3.3 i in Chapter 3 for more detail.)

- *“....the new section 49 ...we police feel inferior about it, because we think that it covers more to..., it falls more to cover the suspect than you....”* (Interview 22, 2006);
- *“...that’s why I say...not satisfied about s49 ...cause you use a firearm these nowadays... you lose your job ...you involved in a accident or ...shooting or ...any arrest, they don’t ask you how’s your life, they ask about the firearm first ...this is the only thing that I hate ...its only firearm that’s working here at the ...SAPS ...nothing else...”* (Interview 27, 2006).

The Bill of Rights in the Constitution ensures that every person has the right to life – police officials included. However, the use of lethal force limits that right. Where a decision is made to use lethal force, the police official must be held accountable to justify its use.

An interesting point to consider is: Do police officials believe that s49 is “inferior” and dissatisfactory because:

- it restricts them in terms of when and how lethal force is to be used; or
- they may no longer shoot at fleeing suspects as was allowed by the old s49?

There is obviously a dire need to drill use of force principles and decision-making down the ranks in the SAPS and to specifically take the changes to s49 to operational police officials.

- *“...you too scared to do your job,you can’t do your job...you have to use force to arrest the guys and on the end the criminal is getting the... ...they take his side, the policeman is the one that have to go stand in court and have to please explain there for doing your job right... I had an incident about ten months [ago]...get charged for murder, ja, I’m still waiting for that case... you can’t really do your job...”* (Interview 29, 2006).

The common theme in all the responses received from those respondents who attempted to explain how they modified their behaviour was that they were synonymous with fear. This means that they modified their behaviour out of fear and not out of a deeper understanding of the changes in the political and social landscape or to the legislation (on s49).

On the other hand it is evident that some police officials will consider using lethal force when their lives or another person's life is in imminent danger. But is this enough and can the SAPS afford to let the situation go unchecked?

Question 21: *If no to Question 15, would you be interested in attending a course or workshop on the use of lethal force, specifically on the new Section 49?*

Encouragingly, 100% – all 29 respondents – indicated they would be very keen and interested in attending. There did not appear to be any lack of enthusiasm or desire to be trained on s49.

Question 22: *Do you think a learning program or in-service training on the use of force is necessary to prepare police members for policing on the streets?*

Likewise, in the following question, Question 22, 100% of the respondents (29) indicated that a learning programme on the use of lethal force is necessary to prepare police officials for policing on the streets.

The Basic Training Learning Programme reviewed (2004 to 2006), confirms that new recruits undergo use of lethal force training. Did police officials who underwent police training before 2000 receive refresher or in-service training to keep up with legislation? In this research sample of 29 respondents, 23 respondents had done their Basic Training prior to 2000.

From these responses it would appear that operational police officials – the primary respondents to crime – especially those trained before 2000, facing the possibility of using their firearms are largely not trained in the correct use of force options or have not been taught situational analysis and how to come to a decision of under what circumstances they can make use of lethal force

(i.e. draw and fire their firearms). This is a shortcoming the SAPS can ill afford. The Minister of Safety and Security is urged to put measures into place to regulate the training conduct and standards of physical and mental fitness of police officials as per the SAPS Act, section 24.

Question 23: *From your experience what kind of use of lethal force training would you recommend be provided to police members?*

Responses from respondents were varied and they were categorised as follows:

- 66% (19) stated training on where and how to use firearm (practical inclusive of shooting practice)
- 31% (9) stated training on when and how to use firearm (theory)

The combination of the above two responses would effectively improve the knowledge, skills and behaviour of operational police officials and equip them to effectively carry out their duties. There is a clear request and need for the abovementioned interventions.

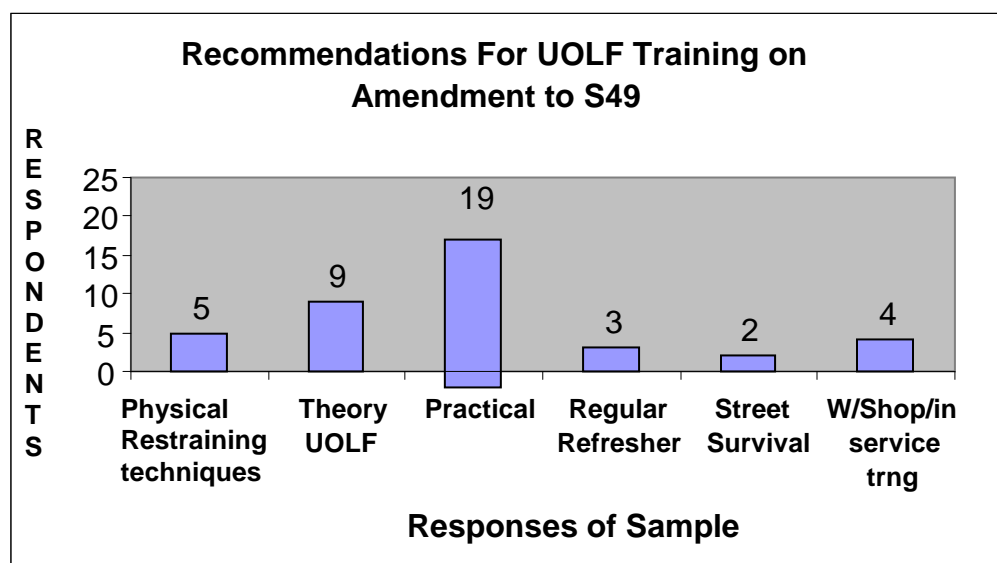
- 17% (5) cited self-defence training i.e. physical restraining techniques;
- 7% (2) stated street survival training on use of lethal force; and
- 3% (1) cited minimum force training (e.g. tonfa, handcuffs, pepper spray, restraining techniques, e.g. headhold or arm behind back).

The new s49 as well as the SAPS Act (Section 13 (3), Act 98 of 1995) calls for the use of minimum force which is reasonable in the circumstances in order to effect an arrest.

The use of physical restraining techniques will enable police officials to use minimum force instead of having to resort to the use of a firearm.

- 10% (3) stated regular refresher training;
- 7% (2) stated that workshops on the use of lethal force should be considered; and
- 7% (2) stated in-service training on the use of lethal force is necessary;

Table 10: Recommendations for use of lethal force training on amendment to s49



It is strongly recommended that the use of lethal force training be approached with a combination of theory and practical aspects. This type of intervention will allow for operational police officials to acquire skills, knowledge and techniques and equip them to render a quality, professional service.

One of the questions in this context that goes begging is whether there is any obligation on the SAPS as an organisation to institute regular firearm shooting practice? The brief answer to this question is “Yes”.

In terms of the Police Regulations in the SAPS Act, section 24 provides for the Minister of Safety and Security to put measures into place to regulate inter alia:

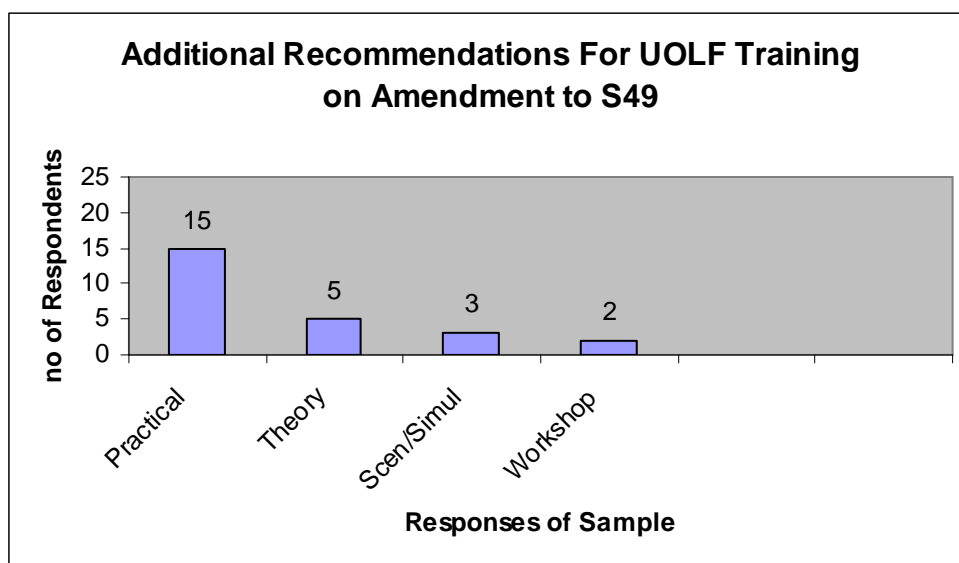
- the conduct of police officials in the execution of their duties;
- “**training conduct** and conditions of service”;
- The management and **maintenance** of the SAPS; and importantly
- “**standards of physical and mental fitness**” of police officials. (Own emphasis).

Despite the concerns it raised before the amendment to s49, the Ministry of Safety and Security now need to urgently roll out workshops and/or in-service training on the use of lethal force to operational police officials. As is evident in this research study, the majority of operational police officials interviewed have not been upskilled/trained after the amendment – see questions 15 and 19 above.

Question 24: *From your experience are there any changes or additions you would recommend be implemented or added for improving the training on the use of lethal force and Section 49 in the SAPS?*

This question overlaps with Question 23 and the results of the analysis is similar to Question 24. However, the additional recommendations brought out the suggestion of simulation training (14% - 4 respondents).

Table 11: Additional recommendations for UOLF training on Amendment to s49



The majority of the police officials did not appear to have given questions 23 and 24 much thought previously. Is it possible that the impact and/or severity of the lack of or poor training

has not dawned on them yet? The perception of the researcher is that they are reactive in responses, i.e. “*if I can’t change it, [I] accept it*” or “*I only do what I am told to do*”. There appears to be no participation in the process – they feel disempowered and are therefore probably not committed. And yet paradoxically, 100% indicated in Question 22 that training on the use of lethal force is very necessary and they are willing to be trained. See 7.3.4 in Chapter 7 for further discussion.

Question 25: *When responding to any serious crime situation do you make a conscious effort to keep:*

1. *Use of lethal force training in the back of your mind?*
2. *Training regarding fundamental human rights, in the back of your mind?*

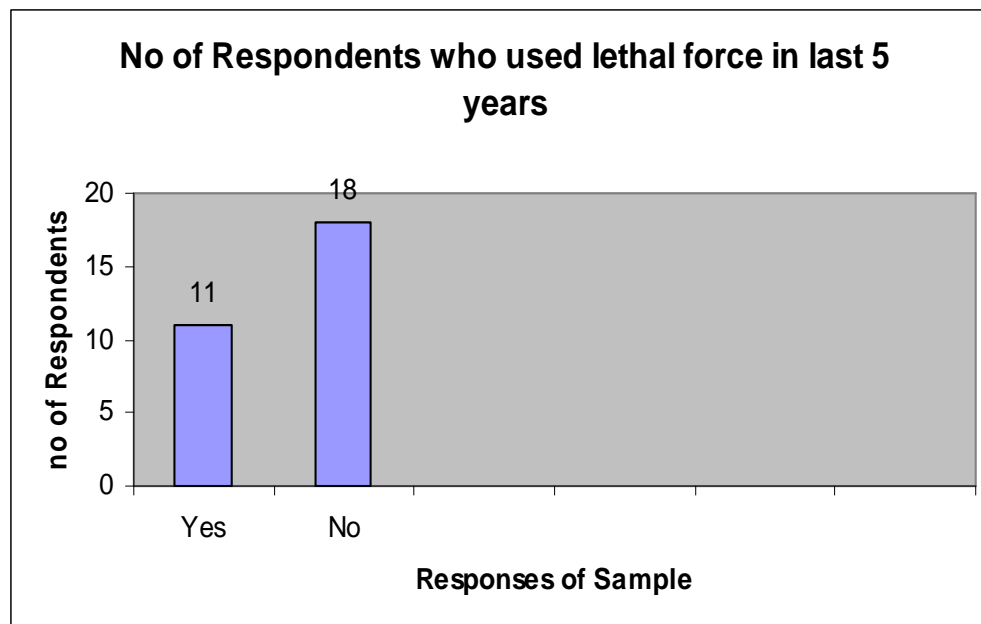
All of the respondents answered in the affirmative.

The second part of the question was whether they keep training on Human Rights in the back of their minds and 26 respondents out of 29 indicated “yes”. Three respondents honestly indicated that they do not keep any thoughts about possible human rights – violations of them or upholding of them – when entering a potential use of force situation.

Question 26: *Within the last five years have you had occasion to make use of your FIREARM while performing your police duties? (If NO, proceed to Scenario 1).*

Respondents’ feedback is illustrated as follows.

Table 12: No. of respondents who used lethal force in the last five years



Eleven (11) respondents (38%) had previously used lethal force whilst 18 respondents (62%) did not use lethal force. The following question elicited further information on those cases. It must be pointed out that the number of respondents who personally used lethal force decreased from 11 to 9 when the details of these questions were probed.

The number of separate incidents, however, increased to 18 incidents which were related by 14 respondents.

This included personal use of lethal force and those respondents who were witness to or present when lethal force was used (see Question 28).

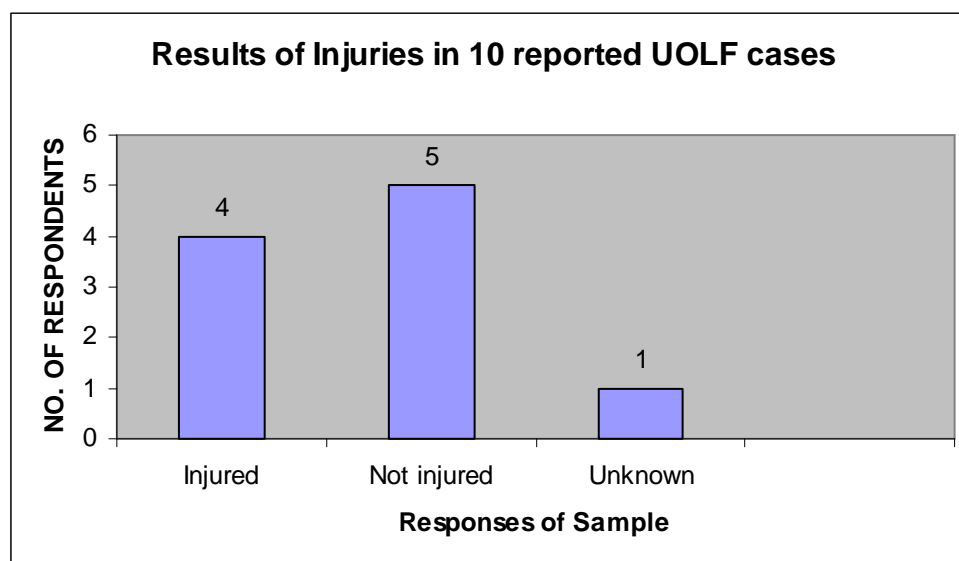
Question 27: *What were the outcome/s and result/s of the above event? (insert tick here) in the applicable boxes – there can be multiple ticks or none.*

Arrest and detention of suspect		Injury to suspect/s	
Injury to bystander/s		Death of suspect/s	
Death of bystander/s		Criminal charges	
Suspension from duty		Conviction on charges	
Internal disciplinary hearing		Discharge from SAPS	
Any other (describe/list e.g death of a fellow police official)			

The outcome/s and result/s of the above events are discussed as follows. In this question ten respondents (34%) from the sample stated that they were involved in shootings.

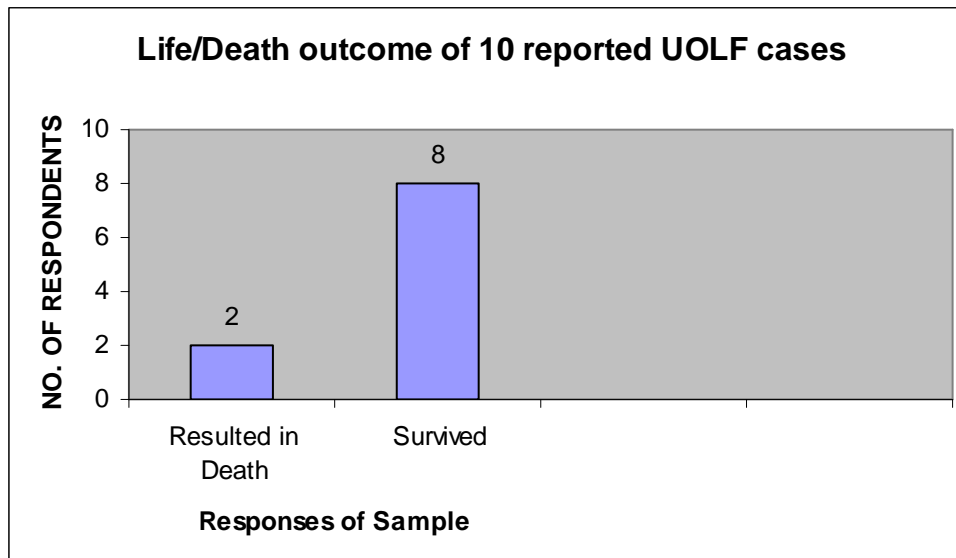
In these ten cases it was established that four suspects were injured, five were not injured and in one case the injuries were unknown. However, when probed further (Question 28), it was established that only nine police officials personally used lethal force.

Table 13: Results of injuries in 10 reported UOLF cases



There were two cases in which deaths had resulted. The following is an illustration of the ten respondent's feedback in terms of the deceased and survivors:

Table 14: Life/Death outcome of ten reported UOLF cases



The two cases that resulted in death are summarised and discussed as follows:

- In the first case the respondent related two shootings in which he was involved – the first incident took place between 1991 and 1993. In this incident it was alleged that two suspects tried to rob the police official of his firearm. The police official fired a warning shot and when the second suspect approached him with a knife, he (the police official) shot and killed the attacker. The year of the second incident is unknown (respondent could not remember precise date). The police official stated that he had responded to a break-in at a store, he saw suspects fleeing, gave chase on foot and one of the suspects tried to stab him with a broken bottle. The police official then shot the suspect. When asked to point out where the suspect had been shot, he pointed out to the researcher the back of the right thigh below the buttock. The police official apparently did not face disciplinary action but was charged with attempted murder. The criminal charge was later dropped and according to the respondent, the charge was withdrawn by the state prosecutor (Interview 4, 2006).

The first incident appears to be a case of private defence and in any event the old s49 was in effect at the time. The shooting may have been deemed justifiable homicide. The legality and circumstances around the second incident is questionable. There was no date or year of the incident provided so it cannot be properly contextualised. However, this scenario in present day policing may not necessarily result in a suspect being shot at. The crime of breaking into a business premises is a property crime. In terms of the principle of proportionality (that is, the degree of force used must not outweigh the seriousness of the crime) the courts may hold the view that a person should not have to surrender his life merely because he committed the crime of theft. The Constitution of South Africa, 1996 (Act 108 of 1996) upholds the right to life. The use of lethal force limits the right to life.

However, in terms of section 36 (limitation of rights) of the Constitution, the police may limit this right if his life or the life of another is in imminent (immediate) danger. The scenario above, the suspect was shot from behind. The question is: How could the suspect have been shot at from behind if he was attempting to stab the police official?

This is an example of how police officials will be held accountable for their decisions to use lethal force after the amendment to s49 came into effect. Incidentally, prior to the amendment, and when the old s49 was in effect, this shooting would also have been deemed justifiable homicide because the suspect would have been fleeing from a Schedule one offence.

- In the second incident, which took place in June 2005, the respondent and his colleagues chased a BMW motor vehicle which was towing a stolen Golf bakkie. Although the police allegedly turned on the sirens and blue lights, the suspects sped on, and almost bumped into other police vehicles. The respondent indicated that he *“heard a shot.....saw a flash from the left side.....of the BMW”* and that’s when he and his colleagues *“started shooting the tyres of the vehicles...”* (Interview 29, 2006). The suspects lost control of the BMW and stopped. The suspects got out and fled the scene. The respondent saw one suspect still sitting in the bakkie and when he tried to get him out, the respondent realised he was bleeding and had sustained a gunshot wound to the back of the head. The firearms of the shottists (total of

four operational police officials) were still at SAPS ballistic experts for testing at the time this interview was conducted.

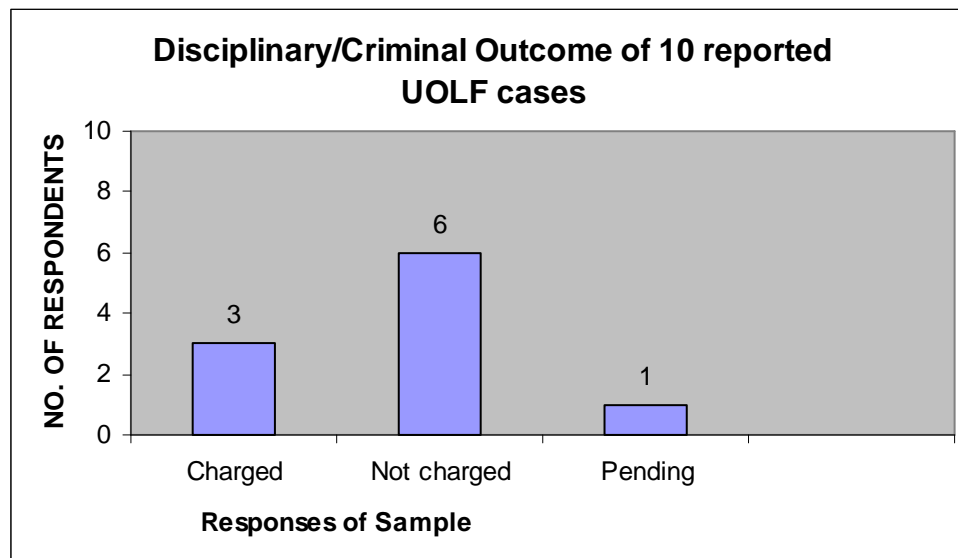
Is the use of lethal force legitimate under these circumstances? The answer would be yes. The new s49 provides that when the police official reasonably believes that his life or the life of another is in imminent danger, he may use the necessary reasonable force to protect himself or another. Further, s49 also states that there must be a “*substantial risk*” that the suspect will cause imminent or future death or grievous bodily harm. Lastly, the offence committed by the suspect must be in progress and of a violent and serious nature. This scenario appears to have fulfilled these requirements.

The crime of theft of motor vehicle had escalated to attempted murder when the suspects fired upon the pursuing police. In terms of the principle of proportionality, the seriousness of the offence (attempted murder of police officials) is to be weighed against the life of the suspect. (See Chapter 3 – Specific Crimes at 3.3.3. ii for more detail.)

In addition, the Use of Force module which introduces three factors in the Deadly Force Decisionmaking Model, apply to this scenario. The factors are Ability, Opportunity and Jeopardy. In this scenario the suspects had the ability to harm the police officials, they had the opportunity to kill or seriously injure the police and the suspects used their ability and opportunity to place the lives of the police officials in danger. According to the module, the presence of all three factors may justify the use of lethal force (Use of Force: Workbook, 2003:27). See 3.3.4 i for more detail. Therefore the use of lethal force by the police officials may be justified.

The following is a look at the results in terms of the disciplinary and criminal cases of the ten respondents who were involved in use of lethal force cases. The reported cases were handled in the following manner.

Table 15: Disciplinary/Criminal outcome of ten reported UOLF cases



Nine (9) cases reported no disciplinary action taken whilst eight (8) respondents were charged but not convicted in criminal court. One case was pending at the time research was conducted.

Question 28: *If yes, briefly describe the event/situation where this occurred.*

In this question the respondents were asked to describe the incident/s wherein lethal force was used. These incidents were not restricted to situations where only the respondents used his/her firearm but to incidents where the respondent was present or was witness to incident/s where the use of lethal force occurred. The diagram and categories introduced further on will illustrate the respondents' role when lethal force was used in the incident described.

The total number of separate incidents where use of lethal force was reported amounted to 18 (related by 14 respondents).

These 18 related cases are summarised as follows:

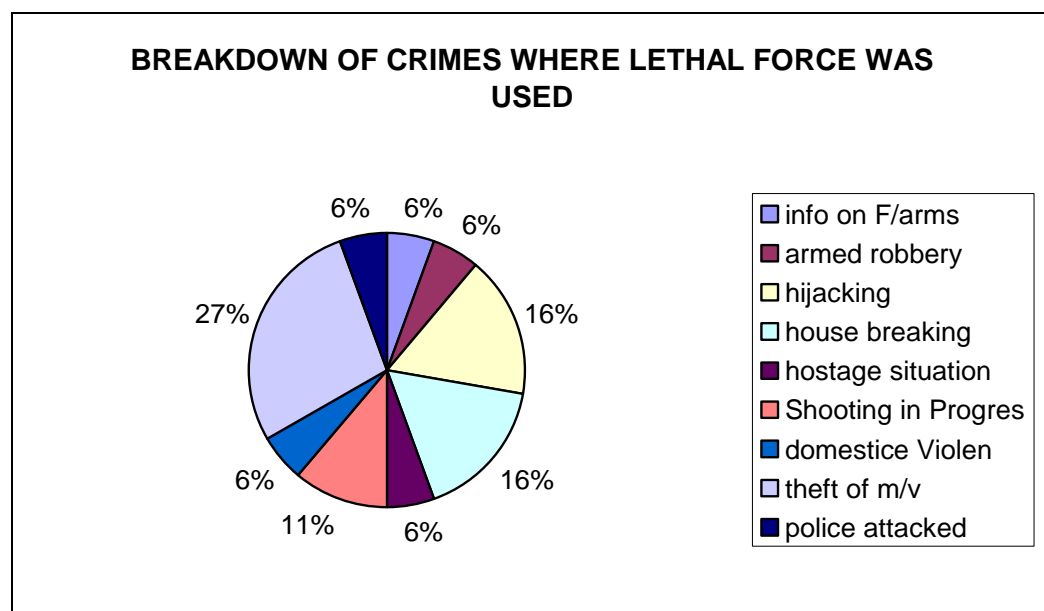
- Eleven (11) separate incidents were related where nine (9) respondents personally used their weapons and fired shots;
- Three (3) separate incidents were related where colleagues of respondents used their weapons and fired shots; and
- Four (4) separate incidents were related where respondents attended to serious incidents where the use of firearms were imminent but no shots were fired.

Table 16: Analysis of 18 related incidents: Types of crimes

6%	6%	16%	16%	6%	11%	6%	27%	6%
1	1	3	3	1	2	1	5	1
Info on f/arms	Armed robbery	Hi-jacking	House break-Ing	Hostage situation	Shooting incident in progress	Domesti c violence	Theft of m/v	Police attacked

These cases can be illustrated as follows:

Table 17: Breakdown of crimes where lethal force was used



It is evident then that the majority of cases where lethal force was used by the respondents interviewed occurred when they were responding to theft of motor vehicles in progress (5/18 = 27%).

When asked to describe the situation where he used lethal force recently, the respondent in Interview 20 related how he and his colleagues fired upon suspects wanted for theft of motor vehicle in Bloemfontein. He indicated that they approached the “*bakkie*” (which was confirmed stolen (via a check on the registration plate number) by police), with their blue lights flashing but the suspects had failed to stop “.....*they then went into the field and they jumped....and we shot, first warning shots, and then direct on the suspect....one of the suspects, I think it was in the leg or in the back, I can’t remember...*” (Interview 20, 2006).

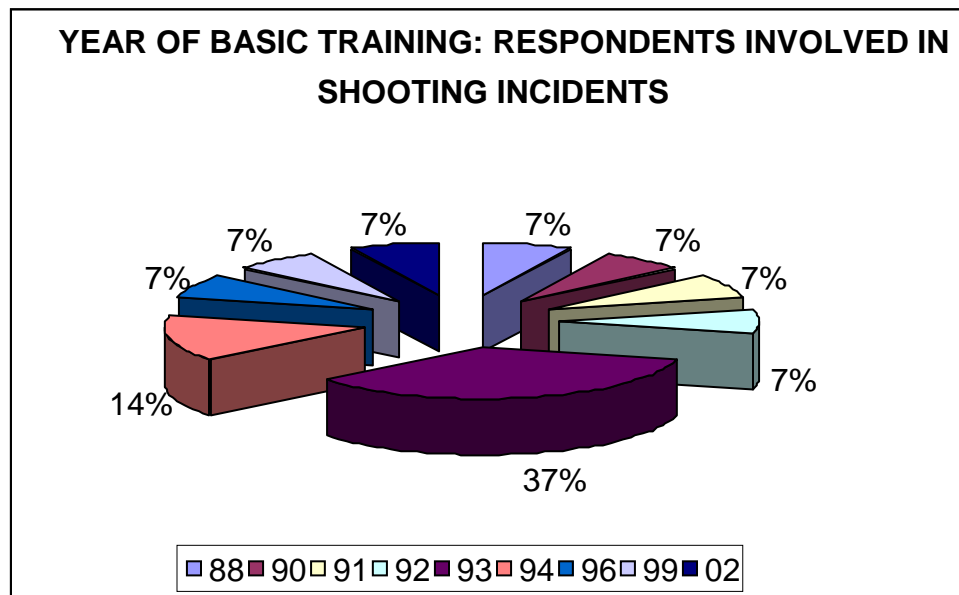
According to the respondent, this incident occurred sometime in 2004. The circumstances here are very similar in description of the sequence of events as had occurred in the *Govender* case of 2001 (discussed in detail in Chapter 4 of this research).

The essence of the judgement being that the right to life and physical integrity is far more valuable than that of protecting of one’s property.

Three years after the *Govender* judgement and its finding, operational police officials are still exceeding the bounds when it comes to the use of lethal force. The research conducted clearly indicates that operational police officials are not adequately trained to make use of lethal force decisions in line with the legislative requirements. The top three specific crimes in which lethal force was used in this sample population were Theft of motor vehicle in progress (27%), Armed Robbery and Hi-jacking (24%) and House-breaking in progress (16%).

An examination into the year that the fourteen respondents, that related use of lethal force incidents, had completed their Basic Training was then looked at. This revealed the following interesting situation.

Table 18: Year of Basic Training: Respondents involved in shooting incidents

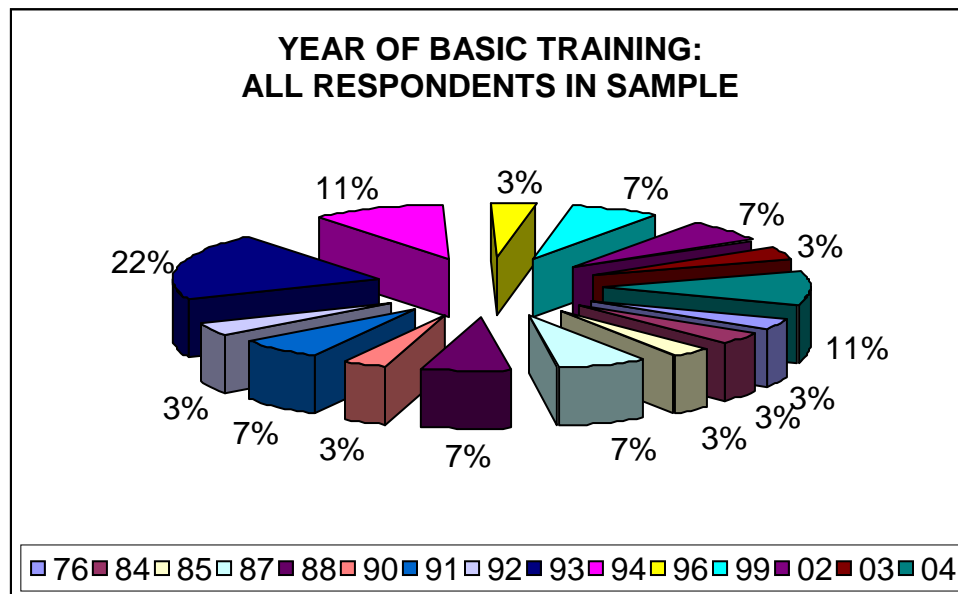


As illustrated, 37%, i.e. five (5) of the respondents, attended Basic Training in the year 1993. Two respondents attended in 1994 and the rest of the respondents seem to be spread out from the years 1988 to 2002.

The Basic Training Learning Programme that was reviewed fell into the period from July 2004 to June 2006.

Incidentally when compared to the overall sample population in terms of the year Basic Training was attended, there is a similarity. In both the pie charts, the one immediately above (year of Basic Training Learning Programme of respondents involved in shooting incidents) and the one immediately below (year of Basic Training Learning Programme of all respondents), the year 1993 had the most number of respondents who had attended Basic Training. The largest number of respondents (five (5)) who were involved in shooting incidents came from the year 1993, whilst the largest number of respondents in this sample population (six (6)) attended Basic Training in 1993. When this particular group of respondents was further compared, it was discovered that in three of the five cases, the respondent himself fired his weapon.

Table 19: Year of Basic Training: All respondents in sample



Interestingly, none of the 14 respondents who related use of lethal force incidents attended the Basic Training Learning Programme that was discussed at length in Chapter 3 of this research. This means that the majority of operational police officials fighting crime on the streets attended Basic Training prior to the changes that occurred in the Criminal Procedure Act and specifically s49 (2).

It also means that Human Rights training and the Constitution of South Africa, 1996 (Act 108 of 1996) did not play a major role in their basic training and yet they are policing communities that demand such rights. This disparity is a further concern regarding the use of force in the SAPS.

This concern is reinforced by results in Question 15 where it was indicated that 25 of the 29 respondents claimed they did not receive any in-service training on the amended s49(2). There appears to be very little or no alignment between the Bill of Rights, afforded to South African citizens in the Constitution of South Africa, 1996 (Act 108 of 1996) and the actual provision of a policing service in line with these rights of citizens.

Although Chapter 3 (overview of the Basic Training Learning Programme 2004 to 2006) encompasses human rights and the changes to the use of lethal force legislation, the disparity is

that the majority of operational police officials who are serving communities have as yet not attended and received the same Basic Training.

As early as September 2001, the Mistry *et al.* report had recommended inter alia:

- Basic and Refresher training for police officials in Human and Constitutional rights;
- The roll out of s49 workshops;
- Training on restraining techniques;
- Simulation training; and
- Refresher courses.

The interviews in this study were undertaken in 2006 – five years after the Mistry *et al.* report. And yet it appears that the same situation has prevailed. As mentioned earlier in Chapter 5, the SAPS paid out R3,7 billion in civil claims for the period 2005 to 2008 (Carter, 2008). The delays in retraining are proving to be costly, in money and possibly and potentially, in lives too.

The dramatic change that the country has gone through since 1994 points to the need for urgent intervention with reference to the training and equipping of police officials in order to police more effectively in a new democracy and s49 specialised training being one of the important components of the overall thrust of improving the levels of professionalism and conduct of operational police members.

Question 29: *Were you ever trained regarding the correlation and/or differences between the use of lethal force during arrest and acting in private defence?*

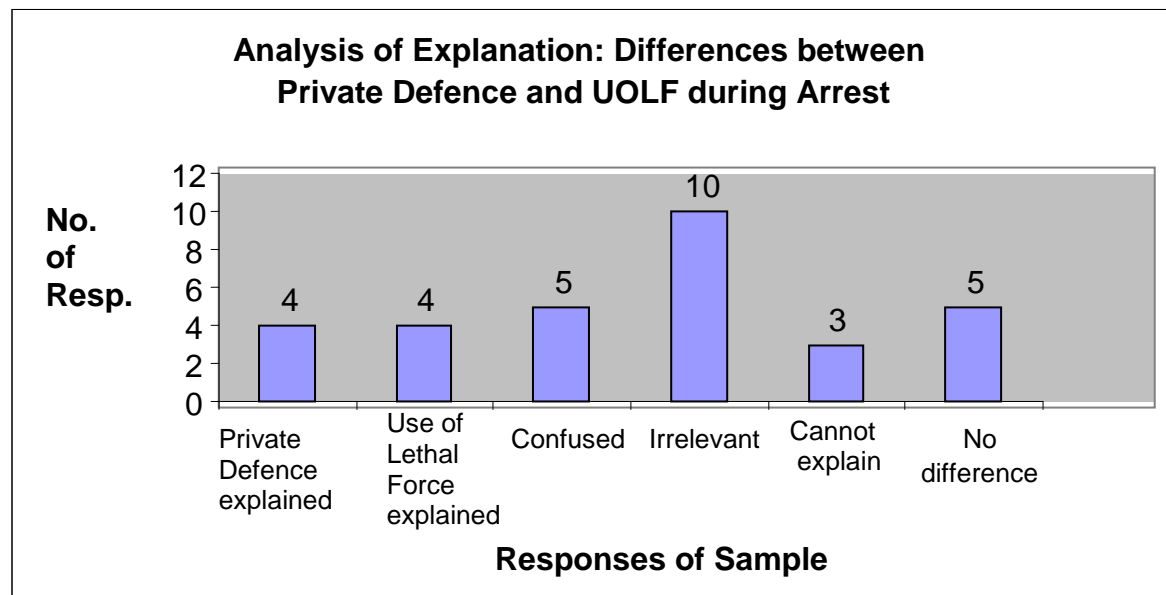
This question was analysed as follows:

- 69% answered in the affirmative – having received training in correlation and differences (20 respondents);
- 24% claimed not to have received training (seven respondents); and
- 7% did not provide an answer (two respondents).

The following question sought to unpack the understanding on private defence and the use of lethal force during arrest.

Question 30: *If yes, briefly explain the extent of this training.*

Table 20: Analysis and Explanation: Differences between Private Defence and UOLF during Arrest



The study indicated that many of the respondents understood the use of private defence to be associated with the use of lethal force whilst off duty. The distinct impression on the researcher was that private defence implied the use of lethal force to protect the police official's family, after work hours.

On the question of explaining the correlation and/or differences between the use of lethal force during arrest and private defence, the following responses were collected from the interviewed respondents:

"...private defence as in? ...soos by die huis is dit private defence?" (seeks approval of the interviewer). *"Ja hulle het vir ons gese daar er ...hoe kan ek se ...dis moeilik nou om te beskryf"* (Interview 11, 2006).

“I can use pepper spray ...use the tonfa ...only if the culprit resisting an arrest ...not a firearm” (Interview 12, 2006).

“....er ...say for instance I am at homeI’m on rest days and somebody breaks into my house ...then it puts my life or my wife’s life or any of the persons inside the house in danger ...I can use my firearm ...to stop him” (Interview 13, 2006).

“I don’t understand acting in Private defencewhen ...when er...er ...I’m in a very serious situation. I have to use my firearm, I cannot say it is private defence, actually, I’m defending my life, it’s not about the privacy, it’s about protecting life” (Interview 16, 2006).

Interviewee 18 initially asked the researcher to explain private defence then went on to say:

“er ...with private defence, I would like when I’m, I don’t use my firearm and make an arrest ...is it um ...more like when I use my pepper spray to arrest the guy?” (Interview 18, 2006).

These responses reflect that there is apparently a poor understanding in respect of the following:

- Firstly of private defence;
- Secondly, role of lethal force when acting in private defence; and
- Thirdly, the relationship between private defence and use of lethal force when effecting arrests.

The reason for asking this question in the interview was to establish whether police officials identified the correlation and/or difference between using lethal force when acting in private defence and the authority the new s49 afforded them in preventing a suspect from causing future death and grievous bodily harm.

It is tentatively submitted that the distinction between private defense and the use of lethal force in terms of the new s49 is as follows:

- Private defence authorises the use of lethal force when the life of the police official or other person is threatened; whereas
- S49 authorises the use of lethal force both when the life of the police official or any other is threatened (private defence) and also to prevent a suspect from causing future death or grievous bodily harm.

The submission made by the researcher stems from a contentious issue, admittedly that of the use of lethal force to prevent a suspect from causing future death or grievous bodily harm. This research discovered this provision (the second point) in the explanation above is not well understood by operational police officials.

When deciding to use lethal force to effect an arrest, how can a police official predict that a suspect can cause future death? Does the action of the police official then depend on a reasonable set of facts put before court to justify why he believed the suspect had the potential to cause future death? As mentioned earlier, nobody within the criminal justice policy community has been able to determine the “*future dangerousness*” of a person by even a fifty percent accuracy (Geller & Scott, 1992:255).

This situation points to the very real practical problem of police officials in such situations having to make split-second decisions.

See further discussion in Chapter 5 for differing opinions on the matter. What is evident is that clarity and training on this distinction between the use of lethal force when acting in private defence and when effecting arrests, need to take place. It will also provide some respite in an already untenable situation.

The following three scenarios were posed to all twenty-nine respondents. These scenarios dealt with the crime of domestic violence. The reason for the focus on domestic violence was that crimes against women and children were identified as a priority in the SAPS Strategic Plan for 2005-2010.

However, the ICD reported to Parliament in 2006⁷² that “*the extent of SAPS’s non-compliance with the Domestic Violence Act is still atrocious*” (ICD, 2006:50). The research hoped to highlight the need to focus on this social ill.

The first scenario entailed attending to a domestic violence complaint where the wife of a suspect has been badly beaten up. The victim identifies the suspect and when the police official tries to place the suspect under arrest, he flees. The interviewed police official was asked to explain how he would respond in this instance where a suspect for Domestic Violence resists arrest and attempts to flee.

Scenario One

You attend a domestic violence complaint and find that the wife of the suspect has been badly beaten up. The husband/suspect is outside the property. The victim identifies/points him out to you. You approach him, place your hand on his shoulder and inform him that you are placing him under arrest. He pushes you away and flees down the road. How would you respond in a situation such as this where a suspect for Domestic Violence resists arrest and attempts to flee. Would you attempt to arrest him and how would you carry out the arrest?

It is encouraging to note that 20 of the respondents (69%) intimated that they would give chase after the suspect and arrest him. Fourteen respondents (48%) indicated that they would call for backup/assistance in order to arrest the suspect. It seems unreasonable to call for back up and/or assistance to place one suspect under arrest who is clearly attempting to escape (i.e. not physically directly resisting arrest). These fourteen respondents could be either unsure and/or overtly cautious.

More encouragingly 21 respondents (72%) indicated that they would not use their firearms to carry out the arrest of the fleeing suspect (as described in Scenario 1). The remaining 8 respondents (28%) stated that they would use minimum force and not their firearms.

⁷² Full article may be accessed at http://www.icd.gov.za/reports/domestic_violence/dvr0606.pdf
Titled: Domestic Violence Report to Parliament for the period January to June 2006

However, one respondent (3%) indicated that he would fire a warning shot to stop the suspect from fleeing. Interviewee 14 stated that:

“He continue er ...running away, you have to make a warning to him... then by shooting to a person, you have to give a first warning to a person, if he does continue ...then you have to, you have to shoot to a person but to injure him so that ...can overcome the ...the ...runningwith his continue, continuing of running away....” (Interview 14, 2006).

Four respondents (14%) indicated that they would return later if the suspect runs away. Six respondents (20%) indicated that they would advise the complainant of relevant action that she could take.

Scenario Two

*In the same scenario, you are attending the complaint of domestic violence and find that the wife of the suspect has been badly beaten up. The husband/suspect has a firearm on the premises but it is **not** on his person. According to his wife, prior to your arrival, he threatened to shoot her. He is standing outside the property. The victim identifies/points him out to you. You approach him, place your hand on his shoulder and inform him that you are placing him under arrest. He refuses to consent to the arrest and does not co-operate. Explain what you would do next. (Section 49 (2) (b).*

In the same scenario, the wife of the suspect has been badly beaten up. The husband/suspect has a firearm on the premises but it is not on his person. According to the wife the suspect did threaten to shoot her. The suspect refuses to consent to the arrest and does not co-operate. The police official had to explain what he would do next.

An overall majority of 25 respondents (86%) indicated that they would not use their firearm but use minimum force to arrest the suspect. Further, 24 respondents (83%) indicated that they will definitely arrest and charge the suspect. Twenty (20) respondents (69%) indicated that they would seize the firearm. These results are encouraging and in line with the Domestic Violence Act, 1998 (Act 116 of 1998) requirements which *inter alia* provide for the following:

- Section 3 of the Domestic Violence Act, 1998 (Act 116 of 1998) authorises a peace officer to arrest a suspect for domestic violence at the scene of the incident without a warrant; and
- Section 9 of the Act provides for the seizure of arms in domestic violence incidents.

In terms of s49, the police official is authorised to arrest the suspect, using the reasonably necessary and proportionate force to overcome any resistance because there is substantial risk that the suspect may cause future death or grievous bodily harm to the victim. Moreover, the crime of domestic violence did involve life threatening violence.

Five respondents (17%) indicated that they would try to get an enquiry be held (instituted) to determine whether the suspect is fit to possess a firearm. The Domestic Violence Act, 1998 (Act 116 of 1998) (section 9) outlines that affidavits may be put before court regarding the suspects state of mind or mental condition and his/her inclination to be violent to show that the suspect is not a suitable candidate to be in possession of an arm. As indicated in the Mistry, Minnaar Redpath and Dhlamini report (which looked at the role of the criminal justice system in excluding unfit persons from firearm ownership) (2002:13),⁷³ in terms of the Arms and Ammunition Act (Act 75 of 1969), section 11, the SAPS may declare a person unfit to possess an arm if the person “threatened or expressed the intention to kill or injure him or herself or any other person”.

Scenario Three

You attend a domestic violence complaint and find that the wife of the suspect has been badly beaten up. The husband/suspect is outside the property. The victim identifies/points him out to you. She also informs you that he has a firearm and, prior to your arrival, has threatened to use it. You place a hand on his shoulder and inform him that you are placing him under arrest. He pushes you away and attempts to flee. How would you respond in an instance like this where an armed suspect for Domestic Violence resists arrest and attempts to flee. Would you arrest him and how would you carry out the arrest. Explain briefly.

⁷³ Full report can be viewed at <http://www.smallarmsnet.org/issues/regions/gunfreerep.pdf>

In the same scenario, the wife/victim informs the police official that her husband has a firearm and, prior to police arrival, had threatened to use it. The suspect pushes the police official aside and attempts to flee. The police official was accordingly asked to explain how he/she would respond in such an instance where an armed suspect in an incident of Domestic Violence resists arrest and attempts to flee.

The analysis of this question was challenging as the responses were varied. Each category is calculated from the total number of respondents of the sample population (i.e. $10/29 = 34\%$ and so on). In other words, some respondents gave two different responses and each response was counted separately.

- Ten (10) respondents (34%) will shoot if the suspect draws with 2 respondents willing specifically to shoot to kill if the suspect draws his/her firearm (interviews 11 and 13)
- Ten (10) respondents (34%) indicated that they will approach suspect with their weapon drawn;
- Nine (9) respondents (31%) will not use their firearm and opted to use minimum force to arrest the armed suspect;
- Eight (8) respondents will arrest and charge the armed suspect
- Eight (8) respondents (28%) will wait to be shot at before they shoot;
- Seven (7) respondents (24%) will call for backup;
- Seven (7) respondents (24%) will fire a warning shot;
- Six (6) respondents (21%) will not shoot the armed suspect for Domestic Violence
- Four (4) respondents (14%) will shoot at the armed fleeing suspect
- Three (3) respondents (10%) will shoot suspect in the leg.

The significance and interpretation of these responses are discussed as follows. The expected 'correct' response to Scenario 3 being that the police officials would pursue the suspect with their own weapon drawn.

However, in this scenario it would be advisable for the police officials not to shoot at the fleeing suspect unless their lives or anyone else's life was in immediate, life threatening danger. Moreover, the suspect is known and can be traced and arrested at a later stage. The arrest of this suspect is necessary but minimum force should be considered first in order to effect the arrest. The wife should be removed (from the home to a place of safety) and a formal case registered. It is not advisable to fire a warning shot at the suspect. The suspect should not be shot under these circumstances at all yet in the responses four respondents indicated they would have decided to do just that.

Scenario 3 is the scenario that outlines a case where aggravated Domestic Violence – wife beaten – assault with intent to do grievous bodily harm has been committed and she was threatened with a firearm. There is no imminent (immediate life threatening) danger. Whilst it may be argued that substantial risk exists or that perhaps the suspect may cause future death, the researcher is still of the opinion that minimum force should first be applied before the decision to use a firearm is taken. Judge Kriegler in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)* tabled nine points for clarity to police officials when use of lethal force is to be considered (see Chapter 4 (SALR, 2002) for more detail on these nine points).

In Scenario 3 the following specific points of the *Walters* judgement apply:

- where it is necessary to arrest, only necessary force may be used to effect the arrest;
- where force is necessary, only minimum force to effect the arrest may be used (in this scenario therefore minimum force should first be considered);
- the degree of force to be used must be proportional to the threat of violence to the arrestor or others and the nature of the crime the suspect is suspected of having committed;
- the shooting of a suspect merely to arrest is permitted in very limited circumstances only;

- under ordinary circumstances such a shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected of having committed or threatened to commit an offence of serious bodily harm (the suspect is not a threat to police officials but has committed a crime of serious bodily harm).

The judgement in the *Walters* case meant that a police official may not shoot at a fleeing suspect merely because they (the suspect) will escape and get away and not be arrested. Furthermore, that a firearm may be used to effect an arrest only under certain very limited circumstances.

Question 31: *Is there any other information about the use of lethal force and Section 49 you would like to add?*

The feedback and analysis of this question was an eye-opener because it revealed the respondents true feelings and thoughts in respect of the changes on the use of lethal force during arrest. The thematic coding for this question was a challenging task since, being an open-ended question, the responses were very varied. A summary of the responses to this specific question is provided below:

- 24% (seven respondents) believe that people (ordinary citizens) and (criminal) suspects have more rights than the police; and
- Four (4) respondents related incidents where their colleagues had used lethal force in the execution of their duties and as a consequence, they themselves had been negatively affected.

To establish why the use of force is viewed so negatively, a review of each response is given as follows:

- The respondent related an incident where two of his colleagues (police officials) shot at suspects in an ATM robbery – the incident left three suspects dead. Both police officials have been charged, convicted and imprisoned as a result of the shooting. The respondent indicated

that he “*feel bad about s49*” (sic) (Interview 4, 2006). It appears that the respondent fears that if he became involved in such a situation, he too, may be arrested and incarcerated.

- The respondent related that a colleague attending a complaint was shot, and in another incident, a colleague was robbed of his service pistol with a toy gun. In the latter incident, the police official was also shot (with his own firearm after it had been taken from him). The respondent also related an incident where a colleague was robbed of his state vehicle and his service pistol in Zamdela, Sasolburg in 2001. According to the respondent the police official in the latter incident was too afraid to use his firearm (Interview 6, 2006). It appears that the respondent believes that police officials are victims and/or helpless to tackle crime. They feel that they cannot defend themselves.
- The respondent and his colleagues came under attack. Police returned fire. This incident left one police official and one suspect dead. The respondent is aggrieved that senior officers attended the scene and treated the respondent and his colleagues poorly (dismissively and with suspicion) at the scene (Interview 17, 2006). It appears that the respondent believes that the use of lethal force is frowned upon by senior ranks in the SAPS. He possibly also feels like operational police officials are not backed by senior officers when lethal force is used.
- Respondent related a story where reservists attended a scene prior to his arrival. When the respondent arrived at the scene, the complainant fired upon the respondent and his colleague. When interviewed, the complainant stated that the reservists had told him that “*if there’s anything moving in your yard, you can shoot it....*” (2006, Interview 20). Respondent believes that police officials are not properly trained.

Further to this point the responses also revealed that 7% (two (2) respondents) indicated that the police are “*not covered*” or are not protected by the amended S49 when they use lethal force in the execution of their duties. Some comments regarding this aspect are given below:

- A respondent indicated that “*...people think that now they got more power than us... sometimes ...I feel that they have more rights than me myself because now people are*

more protected than us.” When commenting on the Bill of Rights, the respondent stated that “....you have to think humanlybut what about me, I deserve to be treated like human (sic)” (Interview 2, 2006).

- Another respondent on the same point reflected that “*die wet net ‘n bietjie wordmeer verander....as jou as ‘n polisieman er....hoe kan ek se, te cover*” (Interview 11, 2006).

It appears that police officials feel that the new s49 (legal aspect) does not afford them the necessary “*protection*” or “*cover*” to effectively perform their tasks.

- 34% (ten (10) respondents) believe that the rights of the police have been limited by the amended S49;

The following discussion complements the above discussion where police officials indicated that they do not feel that s49 protects them when they need to police effectively. Some of the responses to this question are quoted and discussed as follows:

- One of the responses was that suspects have more power and more rights than police officials (Interview 2, 2006).
- “*Most of police members in the service, they will say they are unhappy, their hands have been cut by thethe new laws, they will tell you also, their hands have been cut because we cannot act, even though if you have to interrogate the suspect ...you can not even...what do they call it...choke him or what...ja, the suspect...if he is nice, he will deny it, you can never force him to speak the truth...most police officials...our hand has been cut...detainees have more rights than the police officials....ICD will take steps against the police officials...*” (Interview 8, 2006).

It appears as if the police official feels that because he can no longer choke a suspect to speak the “*truth*”, his rights as a police official has been limited. It is a gross violation of the suspect’s constitutional rights if he needs to be “*choked*” to speak the truth. See Chapter 3 overview.

- One respondent stated that “*parliament must try to be secret things (sic) when its come to cases like this...government must see the danger of that*” (Interview 9, 2006). The respondent further stated that it is useless to carry a firearm because you can never use it. It seems that by going public with the amendment to s49 and the introduction of the Constitution to the nation, the respondent believes that the rights of police officials have been restricted.
- Another respondent intimated that “*dis moelik, hierdie human rights maak dit baie moelik....*” (Interview 11, 2006). Human rights is the cornerstone of the Constitution, considering the chequered political past of South Africa and its gross violation of human rights, it is of concern that the respondent sees the protection of human rights as restrictive. (See detailed discussion on Human Rights at 4.2 in Chapter 4 of this study.)
- “*I would say this s49 is more of a burden ...it protects the criminal not the policeman....*”. This respondent further stated it was like s49 was “*Putting me in handcuffs...like er...I dont the use why we carry guns with us...might just help to give us tonfa and say hey go out and do your work...*” (Interview 15, 2006). Clearly the feeling here is that the police official feels helpless and frustrated with the new s49. Again, the issue of the suspect being protected by the new law and not the police official, comes up.
- When asked why he felt “*bad*” about the amended s49, one respondent stated that the new s49 has “*handcuffed*” him. He related that when called to attend a complaint at a tavern where a woman was assaulted, he had been provoked by the patrons. They told him to “*Shoot! Or are you afraid to shoot....but you’ve got the firearm?...that is why I say I hate that amendment total...er..section 49*” (Interview 19, 2006). The police and policing operations have come under scrutiny in the new democracy and the Constitution. These are one of the experiences police officials have to be equipped to deal with, namely changes regarding the use of lethal force and focus on Human Rights.

- Another respondent also felt quite strongly about the rights of police being limited by s49. He said:
“I think it’s a bunch of crap because the police member’s hands are tied behind their backs and the suspects know that. All the people outside know that we’re not allowed to shoot...that’s why the crime is so high because they haven’t got any respect for the police because the police hands are tied behind their back...sometimes I’m scared to use my firearm....I’m not familiar with...the...the...fine print of s49...that’s why I’m telling you...I’m not using my firearm anymore...” (Interview 20, 2006).

This discussion above reflected on some of the concerns the respondents shared as to why or how they feel limited by the new s49. The following are other findings in the study.

- Seven percent (two (2) respondents) display an “us versus them” (own emphasis) understanding of the situation;
- Six (6) respondents are in fear of losing their jobs if they use lethal force;

A consistent theme that emerged was of both fear and anger. Some examples are:

- *“I’m gonna be charged with murder...I may lose my job...whose gonna feed by kids at home....”* (Interview 15, 2006).
- *“I’m afraid to use my firearm because there’s so much...problems after that, all the investigations and maybe discharge....”* (Interview 18, 2006). This respondent was very uneasy during his interview. He said that *“I had reason to use but I didn’t use it because of this bloody s49 – so my life was in danger but I didn’t want to lose my job”*. He went on to say the *“Problems lie with judges...we need to educate the judges to find in favour of police officials because you can’t argue with a man who wants to kill you. I am not his doctor, I’m there to stop him from committing a crime. Judges are condemning police officers acting in line of duty”*. (The respondent appeared to be visibly angry and upset) (Interview 28, 2006).

- The following respondent indicated that: *“....on the end of the day, you gonna lose your job for them, for another person’s stuff....it’s not about....doing the right thing anymore, its about getting the policeman out of a job or getting a loop hole in what he did wrong...policeman is also just a normal person, you can only take...(expletive)...up to a point”* (Interview 29, 2006).

These comments are emotionally charged and expressed a sense of frustration, helplessness but also fear and anger. It appears from these responses that the use of lethal force has had a wide spectrum of influence on their lives, both professionally and personally.

Seven (7) respondents stated they were too scared to use their firearm;

- *“police officers are too scared to use firearms, .me too”* (Interview 5, 2006);
- *“..I know people who have died because they....they were afraid to use their firearms”* (Interview 6, 2006);
- *“...my life is worth more to me than the arrest...I’ll try to catch him later...it’s interesting to see how it works so....performance.....”*(long pause) (Interview 15, 2006). The researcher got the distinct impression that the respondent wanted to convey that perhaps his life was of more importance than making the arrest and that he is not prepared to sacrifice his life to fight crime. Also that perhaps the lethal force situation has had a detrimental effect on his desire to fight crime.

The inextricable link from these responses is that although crime might be escalating or staying at unacceptably high levels, the commitment by police officials to effectively police, has waned. Could these beliefs and perceptions be reflected in poor service delivery and delayed response to complaints? The following findings also reflect dissatisfaction and a fear to use lethal force.

Eleven (11) respondents stated they have become negative and appear demoralised, while two (2) respondents fear that they will go to jail if they used their firearms. It is noteworthy that the

ICD reported the following statistics for SAPS members who were charged criminally over the last three years as follows:

- In 2005/2006, a total of 1 643 police officials were charged criminally (ICD, 2006:69);
- In 2006/2007 a total of 1 787 police officials faced criminal charges (ICD, 2006:69); and
- The 2007/2008 ICD Annual Report showed that 2 101 police officials faced criminal charges (ICD, 2008:58).

These reported statistics of the ICD reflect that there has been an annual increase in the number of police officials facing criminal charges. It is reasonable then to assume that the respondents are fearful that their actions, if contrary to the law, may result in their prosecution.

Four (4) respondents stated that the service will suffer because they will delay their response to serious complaints;

Twenty-one percent (six (6) respondents) gave no response to Question 31 (*Is there any other information about the use of force and Section 49 you would like to add?*)

So the question is: what do these responses illustrate? The majority of operational police officials in the sample population indicated that the new s49 is “*limiting*”; does not protect or “*cover*” them; is a “*burden*”; and that it (mainly/only) protects criminals. They feel vulnerable and fear reprisals such as criminal charges and dismissal and/or suspension or even have any promotions blocked – all of which may result if they use lethal force. It is evident also that commitment to policing in this type of culture has been seriously affected.

It appears that the majority completed their basic training well before 2000. The breakdown of the year the sample population attended Basic Training, as illustrated below:

- 24% (7 respondents) were enlisted between 1975 and 1990
- 45% (13 respondents) were enlisted between 1990 and 1995
- 10% (3 respondents) were enlisted between 1995 and 2000
- 21% (6 respondents) were enlisted between 2000 and 2005

Therefore the majority of the sample of respondents underwent Basic Training well before the amendment to s49.

This knowledge coupled with results from Question 15, which indicated that 86% did not receive in-service training on the use of lethal force, means that the majority of operational police officials who completed their basic training after 1995, are largely untrained on aspects of the amended s49 and the use of lethal force. The country was dramatically reformed in 1996 with the arrival of a democracy and a new Constitution. The impact of having the majority of operational police officials who have not been re-trained after the amendment to the use of lethal force, policing in a new democracy which intensely focuses on human rights and which has amended the use of lethal force, is indeed disconcerting.

The Basic Training Learning Programme for SAPS has had to be reconstructed in line with policing in a democracy with its new laws. However, police officials who policed in the old era have not had re-training and any requisite skills development of any significance, as is clearly illustrated in this research. This assertion is supported by the responses to questions 15 and 18. As follow up research it would be interesting to explore how this sample population group results would fare when compared to other policing areas in the country.

This line of thinking generated some interesting questions. Are the majority of police officials on ground level facing the same predicament? What can be done to address this situation? Could this situation be linked to the reason for the unacceptably high crime levels in our country? Is it easier for criminals to commit serious and violent crimes and get away with perpetrating them because they know their right to life is protected and the police cannot shoot at them when they are escaping? Are criminals using (exploiting) this situation to their advantage?

In terms of the use of lethal force, the new s49 also speaks of “*substantial risk*” (s49 (2)(b)) that the suspect will cause immediate or future death if the arrest is delayed. So the question here is: How does a police official determine ‘*substantial risk*’ as mentioned in the new section? And doing or making that judgment call ‘on-the-spur-of-the-moment’.

Each situation is unique and different people respond differently to certain situations. Precedent as set by the courts is often followed, where each case is judged on its own merit. The response from the respondent in Interview 4 challenges exactly that. He stated that:

“While I’m still running, I can shoot them to [in] the back. So I know that thing is there. So I feel bad. If I’m going for armed robbery, I think about what if I shoot that guy, or that guy shoot me while he was running towards that direction then I’m came at the back (sic). Then....er...I’ll be a loser then he will be a winner...because they will send you to jail. You lose the job. You were doing the job but you lose the job, you go to jail” (2006, Interview 4).

He cannot be exactly sure that his course of action in the heat of the situation is the correct one, which is compounded by the fact that there is no room for human error. The absence of guidelines for operational police officials on “*substantial risk*” is a great concern to many police officials and other observers.

Another interviewee related an incident where he believed he could have used lethal force stating that: *“I had reason to use but I didn’t use it because of this bloody s49 – so my life was in danger but I didn’t want to lose my job”* (Interview 28, 2006).

The same respondent indicated that:

“Problems lie with judges.....we need to educate the judges to find in favour of police officials because if criminal (sic) is armed and has been shot because you cant argue with a man who wants to kill you. I am not his doctor I’m there to stop him from committing a crime. Judges are condemning police officers acting in line of duty” (2006, Interview 28).

A complete overview of the analysis of the research results led to the identification of three main areas of concern. They are introduced below.

6.3 Major research findings

The research focus was on evaluating the training of operational police officials in SAPS after the amendment to s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977). Apart from the actual training requirements as provided by and compared to the Basic Training Learning Programme (June 2004 to July 2006), other areas for concern were also identified. These findings were grouped together and are discussed as follows.

6.3.1 Majority of the operational police officials have not received training on the use of lethal force and its legal implications

The majority of the respondents did not meet the requirements for the use of lethal force as outlined in the Basic Training Learning Programme. More specifically, as referred to firstly in Chapter 3 (3.3.3 v), Criminal Procedure: Learner's Guide (2004) where the police official is expected to identify and apply sections of the Criminal Procedure Act, 1977 (Act 51 of 1977) (own emphasis).

Secondly, in Chapter 3 (3.3.4.i), the Use of Force Presenter's Guide (2004), where the police official is expected to use appropriate force to uphold and enforce the law and protect people and property.

Although this may be logical because the curriculum could not have remained the same over the years, it is obvious that the changes in respect of the Constitution and lethal force have not been filtered down to the grassroots of the SAPS. Research results indicate that the majority have not received re-training on the use of lethal force after the amendment to s49 in 2003. Eighty-six percent of the population did not receive any in-service training whilst 79% did not attend a workshop or other training intervention (see question 15 and 17). One of the specific outcomes is to make use of force decisions that meet legal organisational and public requirements.

So too, not one of the respondents quoted a single relevant applicable case law that dealt with the use of lethal force (see questions 7 and 8 of analysis above). Moreover, 86% have not attended any in-service training and 82% have not attended any workshop on the use of lethal force after the amendment to s49.

Interestingly, 100% (all respondents) stated that training on the use of lethal force is necessary and 100% indicated they will be willing to attend this training.

Practical firearm training (66%) and training on theory (31%) on the use of lethal force was suggested by respondents. Chapter 1 of this research study provides that the concept of training “....can be regarded as a systematic and planned process to change the knowledge, skills and behaviour of employees in such a way that organizational objectives are achieved” (Erasmus & Van Dyk, 1999:2).

The terms “substantial risk” (s49(2)(b)) needs urgent clarification. Police officials are not trained or inadequately trained on this requirement. The research results indicate that operational police officials in the sample do not possess the relevant knowledge on the amended s49 nor the skills and attributes necessary to use lethal force to combat crime. Many of the police officials interviewed were unable to make a split-second decision based on the aspect of ‘*substantial risk*’ and to further consider its implications in their response to violent crime.

The majority of police officials interviewed are therefore untrained and cannot make appropriate use of lethal force decisions to effectively police by responding to violent crime. This is a marginal gap in the information on the use of lethal force between the content in the Basic Training Learning Programme and the knowledge of the operational police officials interviewed.

It must, however, be noted that the majority of operational police officials in the sample attended/received basic training before 2004. In addition, 69% of the research population have served in the SAPS for over ten years (see Chapter 6 – Question 3). Now with the Constitution being 12 years old, the amended version of s49 being five years old and the Basic Training Learning Programme that was reviewed for this study being two years old, one can assume that the up-skilling of this majority of operational police officials has been seriously neglected. The situation is unacceptable and in conflict with the Constitution of South Africa, 1996 (Act 108 of 1996) and the rights afforded to citizens of the country.

This means that there is great disparity in the constitutional needs of the country and the actual skills and expertise of operational police officials. They are clearly not in a position to deliver a quality, professional service under these circumstances.

6.3.2 Majority of the operational police officials did not receive Human Rights training

The research results revealed that training on Human Rights and Policing has been neglected. The analysis of the results from questions 11 and 12 confirm this finding. In totality, 89% of the respondents interviewed did not contribute meaningfully (51%) to the question on Human rights and Policing, of which (38%) claimed to have received no training on the subject at all. Four respondents (14%) indicated in their responses to Scenario 3 that they would shoot the armed suspect although the suspect posed no direct threat or did not cause imminent life threatening danger as he attempted to flee. The suspect was known and could be arrested later.

Operational police officials need training on how to make use of lethal force decisions by striking a balance between the interests of society and extent to which he or she limits certain rights when s49 is put into operation. This research revealed this factor to be a major deficit between the Basic Training Learning Programme and the responses of the operational police officials.

Human rights are the cornerstone of the Constitution – it is a concept that cannot be separated from policing. Urgent intervention is required in this area (see recommendations in Chapter 7).

6.3.3 Overall negative perceptions and disposition on the amendment to s49 and the use of lethal force

The general perceptions of the respondents interviewed regarding the use of lethal force are very negative. There appears to be apathy, discontent and fear if not anger in some cases.

The analysis of the findings from the responses to Question 31 substantiates this position. An extract of some of the perceptions and beliefs are as follows:

- “*suspects have more rights*”;
- its “*us versus them*”;
- “*rights of the police are limited*”;
- “*police are not covered*” (not “covered”, i.e. legally or organisationally protected by s49 if they use lethal force);
- fear of job loss;
- “*unhappy*” or “*angry*” with the amendment to s49;
- too “*scared to use firearm*”;
- have become “*negative*” and “*demoralised*”;
- fear of being jailed if they use their weapons;
- say Service will “*suffer*” because they will “*delay*” their response to serious crime.

It is evident that this situation needs urgent intervention. The overwhelming impression gained from the interviews is one of a feeling of helplessness and being unable (prevented from) to act decisively a feeling of having their ‘hands tied’). It appeared as if the interviews provided a much-needed opportunity for interviewees to vent their frustrations with the system as well as with those who interact with the legal system.

In support of these findings, the Mistry *et al.* report of 2001, also on the use of force by members of the SAPS that was conducted in seven policing areas in Gauteng, also revealed that:

- “*criminals have more rights than the police*”
- “*our hands are tied by the law*”
- The Constitution “*is like a rope around the police’s neck*”
- Some of the respondents fear “*getting into trouble*” (Mistry *et al.* 2001, 47-51).

The key question then would be: Is there any correlation between these negative perceptions, poor morale and fears and the crime statistics and police response times to serious and violent crime? Clearly the absence of support and guidance (maybe even resources) may have led to the feeling of helplessness amongst those who are expected to enforce the very law they could be prosecuted by. The unfortunate result of these fears and perceptions means that many of the operational police officials interviewed have invested very little commitment and passion in their duties and policing responsibilities to combat violent crime. This circle of uncertainty carries with it the tendency to blame others such as police management, the public, the system and so on – one wonders who takes responsibility eventually? The reality appears to be that operational police officials are not coping with fulfilling the duties they are empowered to carry out, as expected of them by society.

6.3.4 Some operational police officials delay their response to serious and/or violent crime for fear of using their firearms

The research findings in this study indicate that 34% (ten respondents) believe that the rights of the police have been limited by the amended s49. Six respondents are in fear of job loss if they use lethal force. Seven respondents stated they were too scared to use their firearms. Eleven respondents stated they have become negative and demoralised. Two respondents fear that they will go to jail if they used their firearms. Four respondents stated that the service will suffer because they will delay their response to serious complaints. One respondent stated the following:

“Those people that writing this new law.....they must go out into the field and see how its working outside.....its easy to sit behind the desk and write down a new law something like that...if I know for instance that the suspect is armed or suspiciously armed....and at the end of the day....you might say no let him go...my life is worth more to me than the arrest....I’ll try to catch him later....its interesting to see how it works so....performance...”(long pause). When asked by the researcher if this was a general feeling or did the respondent himself hold these views, the respondent stated that it was a general feeling and that his colleagues “...talk about it all the time” (Interview 15, 2006).

Another respondent on the same note stated:

“...policemen say if I respond to serious cases of armed robbery, I will take my time if I can’t use my firearm...s49 in some cases made service delivery bad especially because guys don’t know what to do on s49...if they shoot someone they get into serious trouble. They avoid a situation than get into trouble for it” (Interview 5, 2006).

Police officials need to make split second decisions – so he/she needs to be well versed in s49 and its provisions to make decisions in line with the law – yet 86% have never received training on new s49, while 79% did not even attend a workshop on the new law (see above Question 15 for detail).

This situation is unacceptable and criminal. In all the modules of the Basic Training Learning Programme reviewed, the back page has a copy of the SAPS Code of Conduct. The first bullet of the Code of Conduct provides that the police official shall serve:

- with integrity, render a responsible and effective service of high quality which is accessible to every person and continuously strive towards improving this service.⁷⁴

From the research conducted it does not appear to be so – police officials are in fear of arriving at a serious, violent complaint where it may be inevitable to use their firearms – they believe that wrongful action on their part may lead to a severe impact on their careers, salary, rank, status, livelihood, families, etcetera. The impression gained from the responses indicates the majority feeling of: ‘why risk using your firearm when you have so much to lose’. Rather arrive late at the incident when there is no serious risk – perhaps the suspect will already have escaped – the detective can follow up and investigate the case later. Just where does that leave the victim in the scope of things? What about the fundamental rights of the victim?

This type of callousness/fear/insecurity of the police official may result in the loss of life or serious injury of the victim. Can the SAPS afford to go on this way? The Code of Conduct also

⁷⁴ From the research this does not appear to be so (see later discussion of research findings and recommendations).

mentions the police's undertaking to uphold and protect the fundamental rights of every person. Research reveals that this is far from the case.

In the *Walters* case the Constitutional Court held that the right to life, human dignity and bodily integrity are both individually and collectively the foundation of the value system upon which the Constitution is based. If this very foundation is compromised, then “*the society to which we aspire becomes illusory*” (SALR, 2002:631 at G).

6.4 Summary

In the responses there are overall perceptions of fear, hence the delay in response to serious crime, the expression of uncertainty (about s49 provisions) and general apathy. Clearly this research indicates that police officials do not know when and how to use their firearms when faced with dangerous, life threatening situations.

The majority of police officials interviewed are afraid to use their firearms. There is fear of reprisals such as fear of being charged, jailed, job loss and/or being killed.

This negative disposition of the majority of the police officials interviewed is of concern. The research conducted has indicated that many operational police officials clearly delay their response to serious crime for fear of reprisals if they use the firearms. As discussed in Chapter 3 (3.3.3.i), the failure to act where there is a legal duty to act positively may also be deemed to be acting unlawfully.

Police officials who therefore fail to immediately respond to serious, life threatening crime are acting unlawfully and may be prosecuted. So too, their conduct would be contradictory to the provisions of Section 205 of the Constitution of South Africa, 1996 (Act 108 of 1996).

A further general perception arising from the research results is one of discontent. There was not one respondent who was positive about the changes (to s49) and the future of the police. There was generally a poor response to the changes in the Criminal Procedure Act, 1977 (Act 51 of 1977) and the amendment to s49.

What is troubling is the delayed response that some are engaged in when they have to respond to serious and/or violent crime. There seems to be a perception with most of the respondents that if police management is not concerned with their safety/training, why should they place their own lives in danger or be concerned with protecting others. The existing data and research conducted supports this view.

Operational police officials are not adequately trained to use lethal force. The fact that the majority of operational police officials in the sample were “older” or served for over ten years was a surprise. In Chapter 7 a number of recommendations, generated by the findings in this chapter, will be put forward for consideration.

Chapter 7

RECOMMENDATIONS AND CONCLUDING REMARKS ON IMPROVING THE TRAINING OF OPERATIONAL POLICE OFFICIALS ON THE USE OF LETHAL FORCE IN THE SAPS

7.1 Introduction

The purpose of this research was firstly, to evaluate the training of operational police officials on the use of lethal force in the SAPS. In order to arrive at a reasonable conclusion to answer this question with some fairness, the researcher set about examining the legislation (s49) and the Basic Training Learning Programme content and juxtapose that with what the “new” law prescribes.

An in-depth study directed at answering the research question involved inter alia:

- a review of the Basic Training Learning Programme (June 2004 to 2006) on the use of lethal force;
- a review of the legal framework on the amended s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and
- the interviewing of 29 operational police officials extrapolated from two provinces by one-on-one interviews.

The focus was to determine whether they were adequately trained to make use of lethal force decisions in line with legal and organisational requirements. The study revealed some shortfalls such as the complete absence on the use of lethal force of operational police officials. By implementing these recommendations it is hoped that the training needs of operational police officials will be addressed and the service delivery in the SAPS will be improved.

The research is valuable because it provides recommendations on future training needs on the use of lethal force for operational police officials. Furthermore, it served to identify a gap in the knowledge and skills of operational police officials. Suggestions on the way forward are recommended accordingly. This study will benefit the government, citizens of the country and operational police officials in general.

This chapter provides a summary of the chapters together with recommendations based on the interpretation of the data. It encompasses the opinions of the researcher based on the information obtained in the study, as well as the views of operational police officials (the respondents). These recommendations therefore serve as a guideline only.

7.2 Summary of chapters

Chapter 1 introduced the rationale for the research. The new democratic order heralded significant changes in the South African legal order. One such change was the birth of the Constitution. The arrival of the Constitution of South Africa, 1996 (Act 108 of 1996) caused a ripple effect of change throughout the South African legal system. An example would be that whilst the Constitution of South Africa, 1996 (Act 108 of 1996) protected the right to life, the Criminal Procedure Act, 1977 (Act 51 of 1977) s49 (2) allowed for a fleeing suspect to be shot at (with the attendant possibility of killing such fleeing suspect) in order to secure his/her arrest for future appearance in a court of law.

In Chapter 2, the research methodology employed in the study was described. The qualitative study involved the use of semi-structured, one-on-one interviews with operational police officials in the Gauteng and Vaal Rand areas. Twenty-nine respondents took part in the in-depth interviews which took between 1 to 1 ½ hours for each interview. In the probability sampling (random), any member of the population (target group) had an equal chance of being included in the sample. An interview guide was compiled which focused on various aspects of training on the use of lethal force. The data was analysed both statistically and thematically. Various research problems arose and were effectively dealt with.

Chapter 3 dealt with the review undertaken of the Basic Training Learning Programme that was implemented at the SAPS Training Institution, Pretoria, for new police recruits for the period July 2004 to June 2006. The review focussed specifically on use of lethal force training provided to recruits. Some of the learning material was discussed in detail namely the Regulatory Framework (Law and Policing) and Fitness and Street Survival (use of force). Included in this chapter are the unit standards provided for by SASSETA.

Chapter 4 looked into the South African legal framework on the use of lethal force. It provides a backdrop on the history of Human Rights and comments on international perspectives. Chapter 2 of the South African Constitution of South Africa, 1996 (Act 108 of 1996) (Bill of Rights) is discussed and this leads to the South African Police Service Act, 1995 (Act 68 of 1995) which also guides use of lethal force in policing. A few groundbreaking case laws on the use of the lethal force are discussed. These influenced and impacted on the changes to s49 of the Criminal Procedure Act, 1977 (Act 51 of 1977). The chapter ends with a discussion on how the courts view the use of force.

Chapter 5 compares the old s49 to the new section. It explores different opinions on the use of lethal force and these are linked to the Basic Training Learning Programme. In particular the deadly force decision making model is discussed as well as the “grey areas” in the legal arena on s49.

Chapter 6 summarised the data collected in the one-on-one interviews. Various themes were identified in the process, namely:

- changes in behaviour of operational police officials when responding to serious crime after the amendment to s49;
- recommendations to improve/introduce use of lethal force training for operational police officials;
- results of real life use of lethal force situations experienced by police officials;
- training on human rights and use of lethal force; and
- general perceptions on the amendment to s49 and the use of lethal force.

The analyses and interpretation of the responses were done simultaneously. The results of the interviews were compared to the Basic Training Learning Programme use of lethal force requirements and the legal framework to establish whether the theory was supported or rejected by the data. Chapter 7 introduces recommendations.

7.3 Recommendations: What is needed in the SAPS?

This research had a problem-centred approach to the use of lethal force in the SAPS, i.e the use of lethal force was the dominant concern of operational problems by a specific group (operational police officials). If properly diagnosed and high level skills are identified – the concerns around the use of lethal force after the amendment to s49 may be successfully addressed.

7.3.1 Dire need for clarity on the “grey areas” of the new s49

The grey areas referred to here are the following:

- The principle of “proportionality”;
- “future death”; and
- “substantial risk”.

As discussed in Chapter 5, how does a police official determine whether a suspect will cause “future death”. Future “*dangerousness*” (threat of causing a death) of a suspect cannot be accurately predicted (Gellar & Scott, 1992:255). Both the Police and the Department of Justice need to seek, obtain, agree and communicate clarity on the areas of concern.

Whilst the delay from 1998 to 2003 (five years) may have been unavoidable for various reasons, the last four years after the amendment to s49 should have warranted an intensive drive to address these issues. Ready or not, delays like these are not beneficial to both the ministries of Justice and Safety and Security. Neither is it fair or beneficial to police officials. The importance of the role of inter-departmental agencies is crucial in order to serve and protect the country.

It appears that the amendment has been finalised – appropriate or not. Immediate inter-departmental support is needed to drive alignment and serve the needs of government and its people. Urgent training intervention on the part of the SAPS is required to do what is necessary to provide training and up-skilling of its members to conform to the new law.

Legal experts need to clarify the legislation and propose an interpretation so that operational police officials can be up-skilled as soon as possible. In this way, valuable and appropriate training on the legal stance can take place with immediate effect.

This recommendation must first be implemented. When finalized and/or addressed, it will support the following suggestions on improving the Basic Training Learning Programme and the Use of Lethal Force Training Program which follows below.

7.3.2 Introduce a specific use of lethal force training programme for operational police officials

A gap was identified between the Basic Training Learning Programme requirements in respect of use of lethal force and the actual training of operational police officials on use of lethal force. This research reflects that the use of lethal force training in the SAPS is disjointed. The misconception that practical skills coupled with the Act and a copy of its amendment (s49) are adequate to train operational police officials how to make decisions using the appropriate levels of force in a given situation. This fallacy may be costly, not only to the police services but to ordinary citizens.

The content of the Basic Training Learning Programme on the use of lethal force was juxtaposed with the legal framework on lethal force. It is evident that the Basic Training Learning Programme is too vague and the “grey areas” are not unpacked, clarified or fully discussed. This could be as a result of the absence of an appropriate interpretation of the new s49. An operational police official cannot arrive at a sound decision on whether or not to use his/her weapon in the absence of such clarity. Hence, the general negative disposition in the sample population. (See Chapter 6 for detail).

Further, the majority of operational police officials interviewed attended Basic Training before the amendment but they were not re-trained by way of In-service training or attending a Workshop on the amendment to s49. Based on information received from the respondents, no practical or theoretical training material was disseminated to police officials other than a (legalistic) National Instruction on the matter. It is evident that drastic measures need to be implemented to address this situation in order to effectively provide those police officials who attended training before 2003, with the relevant knowledge and skills on how and when to use lethal force in line with organisational and legal requirements.

The research conducted has revealed that most of the police officials interviewed attended basic training before the arrival of the 1996 Constitution and subsequent amendment to s49 in 2003. And yet they have not received training and development to bring them up to speed with the changed political and legal landscape. Coupled to this situation was the “.....*profound changes in the training and development field in South Africa....*” (Erasmus & Van Dyk, 1999:xv). These changes being the promulgation of the South African Qualifications Authority Act, 1995 (Act 2 of 1995), outcomes based education and unit standards, etc.

Secondly, an investigation conducted by the Independent Complaints Directorate (ICD) undertaken in 2002 indicated that police readily use their weapons to stop fleeing suspects whilst not under imminent life threatening danger (Annual Report, 2002-2003). According to Adv. K. MacKenzie, the then Head of the ICD, it was the belief of the ICD “*that the lack of training on how to implement this Act*” (s49), has contributed to the high number of deaths. The ICD went on to add that refresher firearm and “*simulation*” training was necessary. The research for this study revealed that the majority of the respondents (all operational police officials) are not appropriately or inadequately (lack of) trained on the amendment to s49. (The results indicated that 86% did not receive in-service training whilst 79% did not attend a workshop on the amendment either).

Thirdly, the results of the research conducted in this study, has confirmed that there is a general lack of training on the use of lethal force.

The aforementioned discussion is supported by Leggett (2003:1) who appropriately states that “*to expect a civil service to undergo transformation without substantial retraining is very unrealistic*”. Inevitably, it is predicted that improved training would boost confidence, alleviate fear and the uncertainty presently so prevalent in policing.

The benefits of training, as described by Erasmus & Van Dyk (1999:33), ensures that the enterprise (organisation) and the employee benefit as a whole. The police service would benefit and probably save on legal and civil expenses if their approach to this situation changed.

It is suggested that in order to close the gap identified between operational police officials who were trained before and after the amendment to s49, a Use of Lethal Force Training Programme should be introduced. This training must include the entire scope of the use of lethal force. This means that in addition to the current training of the legal requirements, scenarios and limited practical skills, operational police officials need training on how to write statements and present evidence in court to justify the level of force they applied and under what circumstances.⁷⁵

It would be advisable to target those police officials who passed Basic Training Learning Programme before 1996. The research revealed that development in the following important subjects is necessary:

- Human rights and policing;
- Theoretical study on the use of lethal force;
- Practical training on the use of lethal force;
- Simulation Training; and
- Statement writing and testifying on the decision to use lethal force.

⁷⁵ Refer to article Integrated use-of-force training program – Focus on Training in: *The FBI Law Enforcement Bulletin* for more detail. See reference list. http://findarticles.com/p/articles/mi_m3197/is_n8_v36/ai_11199334, November 1996.

It is suggested that the SAPS employ several methods to conduct a training needs analysis to identify the organisation's training needs. This will ensure that the needs of crime fighting police officials are valid. In addition, unnecessary expenditure on training and other resources could then be avoided. It is suggested that the Nadler's model for training, also called the "*critical events model*", be considered for this process (Erasmus & Van Dyk, 1999:41).

Whilst it may be advisable to provide this type of training to the entire service, those units that respond to crime as first responders, such as the Flying Squad, Community Services Centre personnel and the Crime Prevention Unit should be considered to receive this new training (and re-training) first.

Theory based approach to training

In terms of a more theoretical based study, the relevant unit standards from the SAQA approved learning programme related to Human Rights and the use of lethal force should be extracted. Minor alterations and additions need to be made to customise the program according to specific policing needs. A program is then designed to achieve competency in the identified unit standards for human rights and the use of lethal force. The inputs from the legal experts on a proposed interpretation on s49 to be included in the theory part of the program. The introduction of such a program with a focus on police safety and clarity on legal framework as per Chapter 4, will serve the interests of the service well. Bruce, (2002d:5) informs that in the United States the killings of police declined with the improvements in police safety.

Scenario-based role-playing

The training programme also needs to be based on the previous decided case laws (Chapter 4). Actual scenarios based on these cases, as well as actual shooting incidents of operational police officials, need to be discussed and reviewed (a case study approach to training with trainees role-playing in simulation exercises of incidents and events drawn from the South African context).

The challenge here could be that there is no case law on the present interpretation on the new s49 since its amendment. The “grey areas” referred to earlier, have not been tested in court. It is difficult to train police officials on the use of force without a definite, clear interpretation. But, this could be resolved by the proposed interpretation of role-players suggested above. However, case decisions on the amended version may well also provide added support in implementing a training program.

Practical and/or simulation training

The physical fitness standards of the operational police official, is of utmost importance. Standards for acceptable levels of fitness need to be set. These fitness standards may be linked to the SAPS Performance Enhancement Process and accompanied by regular competency tests. Further, it is suggested that this process is measured and performance be rewarded or incentive based. In terms of the Use of Lethal Force Training Programme, training in unarmed combat and restraining techniques is also necessary. Police officials need to be equipped to use minimum force before considering the option of making use of their weapons if the situation warrants (last resort option).

There is a dire need to develop simulation training. For the purposes of this research, simulation training essentially means setting up mock scenarios and training police officials to make split second decisions by responding in line with legal and Human Rights provisions is a necessity. The SAPS cannot afford to ignore the need for this type of intervention on use of lethal force. Simulation training on the use of lethal force will allow the police official to perform his/her task on a high standard in an actual situation. This will positively contribute to his/her competency levels. In an article, Sanow (2001:64-68) discusses different training courses in controlled and survival force that are offered by the United States National Standardized Training Association (USNSTA).⁷⁶ The USNSTA developed a national training standard for the use of force that starts at physical force and escalates to lethal force. The training is varied from hand-to-hand combat to the use of lethal force.

⁷⁶ View complete article at www.controlledforce.com/articles/article16.pdf

One of the training methods used in the program that involves the use of force from physical to lethal force, is the Firearms Training Simulator training. This training program is a computerised simulation programme that allows police officials to “respond” to a range of life threatening situations. The Mistry *et al.* report (2001:69) on the use of force also strongly recommended Simulation Training to help police officials to “*inculcate split-second decision making and critical assessment of life-threatening situations*”.

Simulation training will combine the theory (knowledge) and practical training (skills) of the operational police official when he decides (attributes) whether or not to use his/her weapon in a simulated scenario. This process is termed “*applied competence*” (Erasmus & Van Dyk, 1999:149). It is suggested that the top ten crimes (gleaned from the crime statistics) per province are extrapolated and training scenarios on each are developed accordingly. All operational police officials in the respective province then to be trained in line with the greatest risk he/she may face when on duty.

Police officials who do not meet with the standards in respect of the theory, practical and simulation training should perform duties indoors for a limited period. He/she may then be allowed to re-train and retest to meet with the competency requirements.

It is suggested the Use of Lethal Force Training Programme be linked to relevant unit standards and the National Qualification Framework. Police officials should be awarded credits upon successful completion of the program (which can be taken into account for promotion purposes, and towards further higher education study).

In support of the above recommendation, the ICD (2003:56) recommended that s49 workshops are needed for “*clear and concise explanation and definitions of the whole Section 49*”. It was further suggested that these workshops deal with practical aspects such as case studies, role-playing, simulation training and weapons handling training.⁷⁷

⁷⁷ View full report at <http://www.icd.gov.za/documents/2003/annualreport03.pdf> (accessed 1/3/2009).

7.3.3 Upgrade the Basic Training Learning Programme to include specifically the correlation and/or difference between Private Defence and the use of lethal force when effecting an arrest

When asked if there is any correlation and/or difference between the use of lethal force during arrest and acting in private defence, many understood the use of private defence to be associated with the use of force whilst off duty. It appears that the use of the term “private” refers to the use of lethal force whilst police officials are off duty. It may also imply that operational police officials understand private defence to be applicable to those circumstances where they (police officials) use lethal force to protect their families, i.e. there must be a relationship (private and personal/family link) between the person who acted and the person whose interest was threatened. But, as provided for in the module under discussion this is clearly not what acting in private defence is about. A detailed discussion appears at Question 30 in Chapter 6. In *S v Mokoena* (1976:162), was also quoted to indicate that a person may act in private defence to protect another person, although there is no relation between the person who acted and the person whose interest was threatened (General Principles of South African Criminal Law, 2004:27). An intervention that clarifies the use of lethal force and its relationship to private defence and effecting arrests will provide some relief to any misunderstandings.

7.3.4 Upgrade the Basic Training Learning Programme

The following recommendations are made towards improving the Basic Training Learning Programme of June 2004 to 2006. This section complements the recommendation made above in 7.3.2.

Of the total of 11 themes referred to in Chapter 3, only four themes relating to the use of lethal force were reviewed in detail. They are the overview of the SAPS (background), the Principles of Policing, Regulatory Framework of Policing and Fitness and Street Survival.

In the Principles of Policing (Chapter 3), the fact that the police have no legislative or judicial powers needs to be driven home in order to clarify how they see their role in the crime fighting process.

However, the research revealed that operational police officials feel powerless in that they

perceive that they cannot protect themselves appropriately – their idea of appropriately seems to be that they are not allowed to use their weapons like they previously (pre-1994) did. However, they need to understand and adapt by changing their way of policing to fall in line with a more human rights orientated and respect for the law approach.

The Regulatory Framework addresses the General Principles of South African Criminal Law. In it the failure to act where there is a legal duty to act positively may also be deemed to be acting unlawfully, is mentioned.

From the research conducted in this study it is clearly evident that police officials are afraid of using their weapons, use of which becomes a highly likely occurrence when they need to respond to serious crime. They deliberately do not respond promptly to emergencies where firearms are used, e.g. armed robbery, violence, etcetera. Surely such a failure to act promptly is contrary to what is expected of a police officer on duty. Police officials are duty bound to act/respond to emergencies yet the research findings of this study conveyed attitudes of apathy and an intentional delayed reaction due to the police officials' fear of reprisals or sanctions (legal and disciplinary by the organisation itself).

When compared to the Basic Training Learning Programme (for the training period 2004 to 2006), the module on the Use of Force (2003) strongly emphasises *inter alia* that police officials must “*master the principle of appropriate use of force*” apart from having extensive knowledge of police powers conferred upon the police official by law. The module introduces the deadly force decision-making model, namely: Ability, Opportunity and Jeopardy. This is introduced via the ‘S’ in AITEST which represents ‘Scale for use of force and shooting decisions’. The presence of all three – Ability, Opportunity and Jeopardy – may justify the use of lethal force. I am of the opinion that the deadly force decision making model may be appropriately used to explain subsection 2(c) of the new s49(2) and must be considered in future training and development of operational police officials.

This issue needs to be addressed in future training and intervention. The onus to respond is upon the police official, failure to respond must result in prompt disciplinary action. So too, the onus to clarify the issue around the amended s49, is upon senior management of the SAPS.

The “grey areas” discussed in Chapter 5 of this research, also need to be unpacked and clarified in more detail. The Basic Training Learning Programme reviewed did not effectively illustrate the principle of proportionality, substantial risk, future death, etcetera. Six case laws were cited in the program that dealt with lethal force and this is encouraging. These case laws should be presented as scenarios and enacted by simulations for inclusion in the Basic Training Learning Programme. The AITEST and its principles were very relevant. It addresses officer safety and assists police officials in making appropriate lethal force decisions as it includes scenarios such as armed robbery. However, a clear understanding that the use of lethal force must be strictly necessary and unavoidable does not come through with enough emphasis.

The reason for this could be that the amendment was only signed into law in 2003, one year before the Basic Training Learning Programme had come into effect. Nevertheless, this does little to justify the absence of any form of training on the subject of the majority of operational police officials interviewed in the research. I am not sufficiently convinced that the Basic Training Learning Programme addresses the needs of police officials engaged in operational work.⁷⁸

7.3.5 Improve the morale and poor perceptions on the use of lethal force in the SAPS

It is recommended that senior management in the SAPS address the general negative perception/attitude of operational police officials on the use of lethal force (see Chapter 6).

In addition, the researcher is of the opinion that there is an urgent need to boost the confidence of police officials presently and alleviate fear and uncertainty in respect of the use of lethal force, a phenomenon that is evidently prevalent in current policing in South Africa.

⁷⁸ The review of the Basic Training Programme in Chapter 3 refers.

It is the opinion of the researcher that the poor handling of the amendment to s49 in the upper echelons of the government, may have contributed to this situation. The controversy on the use of lethal force coupled with a national instruction which states that a signed copy is to be placed on the member's personal file (Annexure I) stating his/her acknowledgement of receipt and reading of the instruction (but without receiving any formal practical training), may be perceived as intimidating to police officials with reference to their understanding of its (s49) implications and implementation at ground level.

It appears that many are not applying for the position of the "sacrificial lamb" or wanting to have their name on the next decided case law. The morale of the police officials interviewed was low and their general disposition indicated that the majority of them have a negative view to the changes to s49. It is suggested that a forum is created to allow the free exchange of ideas. An internal process such as an information hotline may be set up to receive such queries. The centre may then advise and/or counsel police officials on how to deal with their concerns around the implementation of the amended s49 and other practical problems that they may be experiencing.

7.4 Summary

If the recommendations are implemented, it will prevent operational police officials from contravening the very laws they are responsible for upholding, which resulted in the *Govender* case in the first place. Furthermore, the SAPS may save on expensive legal battles and use this money to invest in one of their most important human capital, i.e. operational police officials.

The research objective was to explore whether operational police officials are adequately trained to make use of lethal force decisions in line with legal and organisational requirements. As illustrated, this research question was tested by evaluating the Basic Training Learning Programme (June 2004 to 2006), exploring the legal framework and engaging in one-on-one interviews with operational police officials. The comparison analysis clearly identified a gap and further illustrated that the majority of operational police officials in the sample group are presently not adequately trained to make use of lethal force decisions that are in line with legal requirements.

In order to tackle this concern, it is recommended that SAPS management urgently take note and implement corrective action to retrain and up-skill operational police officials, especially those who entered the service before 1996. Future areas for research into this situation could include an investigation into cases where police officials used lethal force after the amendment to s49. Court decisions may also be used to periodically re-evaluate the training on the matter.

In addition, the poor morale of police officials could be researched to determine its root cause and take corrective action to address it.

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LIST OF INTERVIEWS

- Interview 1: Sasolburg SAPS. 02/02/2006. Sergeant. Community Service Centre. Free State Province.
- Interview 2: Sasolburg SAPS. 02/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 3: Sasolburg SAPS. 02/02/2006. Constable. Community Service Centre. Free State Province.
- Interview 4: Sasolburg SAPS. 02/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 5: Sasolburg SAPS. 03/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 6: Sasolburg SAPS. 09/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 7: Sasolburg SAPS. 09/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 8: Sasolburg SAPS. 23/02/2006. Captain. Community Service Centre. Free State Province.
- Interview 9: Sasolburg SAPS. 23/02/2006. Constable. Community Service Centre. Free State Province.
- Interview 10: Sasolburg SAPS. 23/02/2006. Inspector. Community Service Centre. Free State Province.
- Interview 11: Sasolburg SAPS. 09/02/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 12: Sasolburg SAPS. 09/02/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 13: Sasolburg SAPS. 09/02/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 14: Sasolburg SAPS. 09/02/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 15: Sasolburg SAPS. 09/02/2006. Inspector. Crime Prevention Unit. Free State Province.

- Interview 16: Sasolburg SAPS. 16/03/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 17: Sasolburg SAPS. 16/03/2006. Sergeant. Crime Prevention Unit. Free State Province.
- Interview 18: Sasolburg SAPS. 16/03/2006. Constable. Crime Prevention Unit. Free State Province.
- Interview 19: Sasolburg SAPS. 16/03/2006. Inspector. Crime Prevention Unit. Free State Province.
- Interview 20: Vaal Rand SAPS. 03/03/2006. Inspector. Police Emergency Services: Flying Squad. Gauteng Province.
- Interview 21: Vaal Rand SAPS. 03/03/2006. Inspector. Police Emergency Services: Flying Squad. Free State Province.
- Interview 22: Vaal Rand SAPS. 09/03/2006. Captain. Police Emergency Services: Flying Squad. Free State Province.
- Interview 23: Vaal Rand SAPS. 09/03/2006. Constable. Police Emergency Services: Flying Squad. Free State Province.
- Interview 24: Vaal Rand SAPS. 09/03/2006. Inspector. Police Emergency Services: Flying Squad. Free State Province.
- Interview 25: Vaal Rand SAPS. 14/03/2006. Inspector. Police Emergency Services: Flying Squad. Free State Province.
- Interview 26: Vaal Rand SAPS. 14/03/2006. Sergeant. Police Emergency Services: Flying Squad. Free State Province.
- Interview 27: Vaal Rand SAPS. 21/03/2006. Sergeant. Police Emergency Services: Flying Squad. Free State Province.
- Interview 28: Vaal Rand SAPS. 21/03/2006. Constable. Police Emergency Services: Flying Squad. Free State Province.
- Interview 29: Vaal Rand SAPS. 21/03/2006. Inspector. Police Emergency Services: Flying Squad. Free State Province.

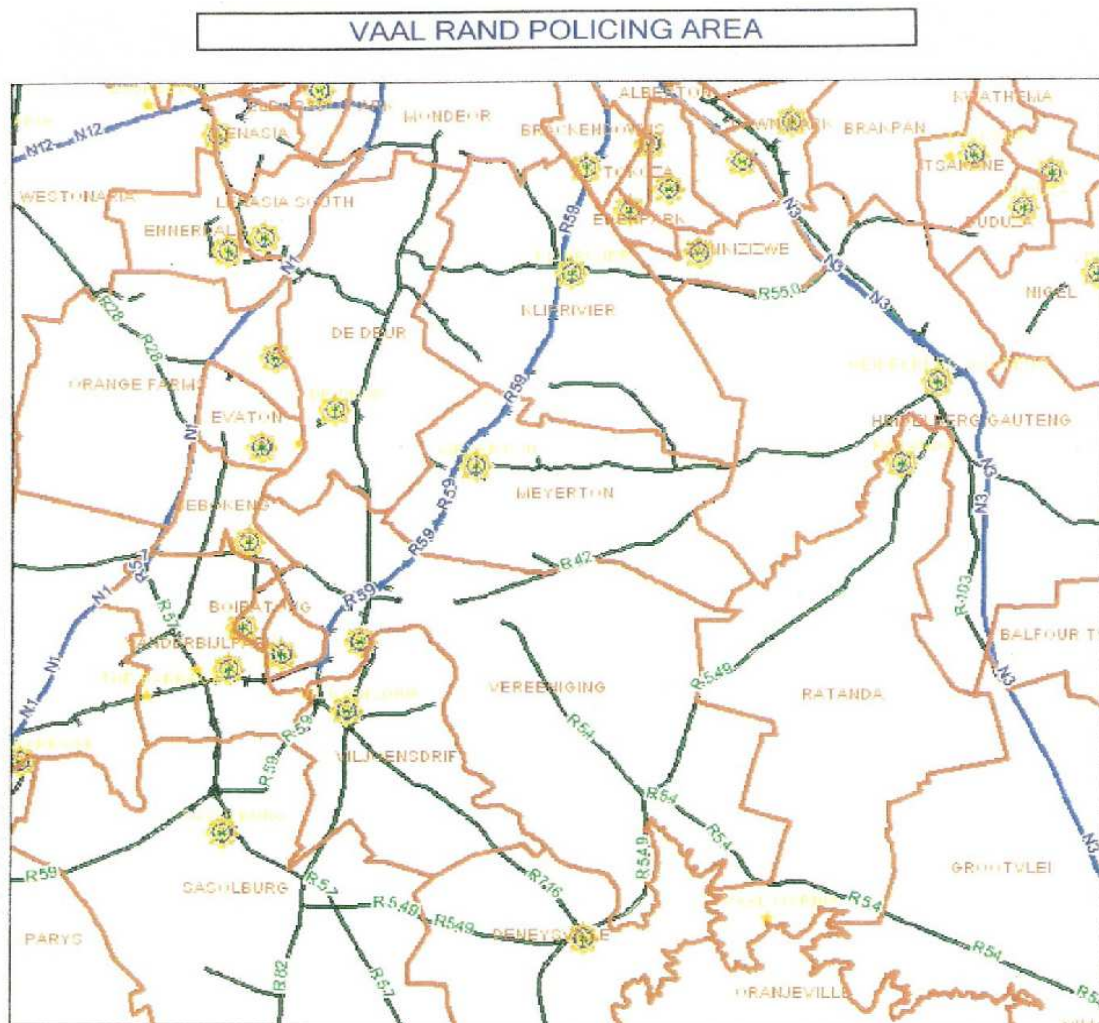
ANNEXURES

- Annexure A: Map of Sasolburg Policing Area. Source: Crime Information Analysis Centre, SAPS. 2009/01/28.
- Annexure B: Map of Vaal Rand Policing Area. Source: Crime Information Analysis Centre, SAPS. 2009/01/28.
- Annexure C: List of Schedule 1 offences, Criminal Procedure Act, 51 of 1977. Source: Joubert, C. 1999. *Applied Law for Police Officials*: 444. Florida: Technikon SA.
- Annexure D: Cover letter for questionnaire
- Annexure E: Interview Schedule of questions
- Annexure F: Permission request letters to conduct research in SAPS
- Annexure G: Theoretical and foundational knowledge on the use of lethal force. <http://www.saseta.org.za/docs/Whats-new/THEORETICAL-AND-FOUNDATIONAL-KNOWLEDGE.pdf>.
- Annexure H: Overview of SAPS Basic Training Programme – July 2004 to June 2006. SAPS. Undated. Superintendent L Stephen.
- Annexure I: Special Service Order relating to the Use of Force in Effecting an Arrest dated 2003-07-18 (Ref 18/5/1 over 1/1/4/1(5)).
- Annexure J: Constitutional Court Judgement on Section 49 of the Criminal Procedure Act, 1977 (Act No 51 of 1977). 24/05/2002. Ref 26/5/1(K).

ANNEXURE A: MAP – SASOLBURG POLICING AREA



ANNEXURE B: VAAL RAND POLICING AREA



**ANNEXURE C: LIST OF SCHEDULE 1 OFFENCES, CRIMINAL PROCEDURE ACT,
51 OF 1977**

ADDENDUM

ADDENDUM

[Relevant Schedules to the Criminal Procedure Act, 1977 (Act 51 of 1977)]

Schedule 1

(Sections 40, 42, 49)

- Treason.
- Sedition.
- Public violence.
- Murder.
- Culpable homicide.
- Rape.
- Indecent assault.
- Sodomy.
- Bestiality.
- Robbery.
- Kidnapping.
- Childstealing.
- Assault, when a dangerous wound is inflicted.
- Arson.
- Malicious injury to property.
- Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
- Theft, whether under the common law or a statutory provision.
- Receiving stolen property knowing it to have been stolen.
- Fraud.
- Forgery or uttering a forged document knowing it to have been forged.
- Offences relating to the coinage.
- Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine.
- Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.
- Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Source: Joubert, C. 1999. *Applied Law for Police Officials*. Technikon SA: Florida.

ANNEXURE D: COVER LETTER FOR QUESTIONNAIRE

Dear Respondent

Thank you for your time. I am a student with UNISA, completing a masters degree in Police Practice.

TOPIC: AN EVALUATION ON THE TRAINING OF SAPS POLICE OFFICIALS ON THE USE OF FORCE AFTER THE AMENDMENT TO SECTION 49 OF THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977.

This research has been approved at Head Office Strategic Management, the Divisional Commissioner and UNISA. You have been selected by a random sample for the purpose of having a semi-structured interview on the chosen topic. Your view on the matter is important.

Your participation is voluntary, your service number and name are not recorded anywhere on the questionnaire. You and your responses are COMPLETELY anonymous. The information obtained during this interview is strictly confidential. The data received will be processed and categorized in manner that would make it impossible to identify a particular person's response. You are therefore urged to be totally honest.

Please keep the following in mind:

- Lethal force shall refer to force that necessitates the use of a firearm.
- Training shall include practical, theoretical and simulation training.

It is envisaged that this research will be used to make a positive contribution to policing and your input will be valued. If you have any questions about the interviews, please contact Rita Moodley on 082 8040 253.

Thank you for your time and effort.

Rita Moodley.

ANNEXURE E: INTERVIEW SCHEDULE OF QUESTIONS

QUESTIONNAIRE: MTECH RESEARCH PROJECT ON USE OF FORCE & S49 TRAINING

Please indicate your answer with an (X) in the appropriate box provided. Where a written answer is required please write in the space provided. If you need to write more than what can fit in the space please attach a separate sheet of paper with the question number above your written response.

PLEASE NOTE! ALL RESPONSES WILL REMAIN ANONYMOUS SINCE YOU ARE NOT REQUIRED TO PROVIDE ANY IDENTIFICATION OR YOUR NAME

SECTION 1: **BIOGRAPHICAL INFORMATION**

QUESTION 1: What is your gender?

Male	Female

QUESTION 2: How old are you? (years)

--

QUESTION 3: How long have you been in the SAPS (number of years)?

--

QUESTION 4: In which unit do you currently serve?

--

QUESTION 5: When did you receive your Basic Training at the SAPS Training College? (passing out month & year date).

Month	Year

QUESTION 6:

In your Basic Training did you receive any formal training on the use of force and the provisions/requirements of Section 49 (use of force to effect an arrest) of the Criminal Procedure Act (No 51 of 1977)?

YES	NO	IF NO, PROCEED TO QUESTION 8

QUESTION 7:

Did the training include reference to the applicable decisions by the Appellate Division and/or the Constitutional Court?

YES	NO

QUESTION 8: If yes, briefly describe the extent of the training

--

QUESTION 9:

In your Basic Training did you receive any formal training on the Amendment to Section 49 (Judicial Matters Second Amendment Act (No. 122 of 1998)?

YES	NO

QUESTION 10:

In your Basic Training did you receive any formal training on the topic of Human Rights & Policing?

YES	NO

QUESTION 11: If yes, what was the extent of the training?

--

QUESTION 12:

Since receiving your Basic Training, have you attended any WORKSHOP OR IN-SERVICE TRAINING on the topic of Human Rights & Policing - specifically related to the Bill of Rights and the importance of the limitation clause (Section 36 of the Constitution Act 108, 1996).

YES	NO

QUESTION 13:

If yes, when did you receive this in-service training or attend the workshop (month and year date)?

MONTH	YEAR

QUESTION 14: If yes, what was the extent of this training?

QUESTION 15:

Since receiving your Basic Training have you received any IN-SERVICE TRAINING on the Amendment to Section 49 (Judicial Matters Second Amendment Act (No. 122 of 1998)? If NO, proceed to Question 15.

YES	NO

QUESTION 16: If yes, briefly describe the extent of the in-service training you received.

QUESTION 17:

Since receiving your Basic Training, have you attended any WORKSHOP in which you were informed of the Amendment to Section 49? (If NO, proceed to Question 19.

YES	NO

QUESTION 18: If yes, when did you attend this workshop? (Month and year date)?

DATE	MONTH	YEAR

QUESTION 19:

If you have received training on both the former and current Section 49 of the Criminal Procedure Act 51/77, did it lead to any changes in the way you behave(d) regarding the use of lethal force during arrest?

YES	NO

QUESTION 20:

If yes, explain how you modified or will modify your behavior in a situation as described in Section 49 – if you need to use lethal force.

QUESTION 21:

If no to Question 15, would you be interested in attending a course or workshop on the use of lethal force, specifically on the new Section 49?

YES	NO

QUESTION 22:

Do you think a learning program or in-service training on the use of lethal force is necessary to prepare police members for policing on the streets?

YES	NO

QUESTION 23:

From your experience what kind of use of lethal force training would you recommend be provided to police members?

QUESTION 24:

From your experience are there any changes or additions you would recommend be implemented or added for improving the training on the use of lethal force and Section 49 in the SAPS?

--

QUESTION 25:

When responding to any serious crime situation do you make a conscious effort to keep:

1. Use of lethal force training in the back of your mind?

YES	NO

2. Training regarding fundamental human rights, in the back of your mind?

YES	NO

QUESTION 26:

Within the last five years have you had occasion to make use of your FIREARM while performing your police duties? (If NO, proceed to Scenario 1).

YES	NO

QUESTION 27:

What were the outcome/s and result/s of the above event? (insert tick here) in the applicable boxes – there can be multiple ticks or none.

Arrest and detention of suspect		Injury to suspect/s	
Injury to bystander/s		Death of suspect/s	
Death of bystander/s		Criminal charges	
Suspension from duty		Conviction on charges	
Internal disciplinary hearing		Discharge from SAPS	
No injuries sustained after shooting incident			

Any other (describe/list e.g death of a fellow police official)

--

QUESTION 28: If yes, briefly describe the use of lethal force event/situation where this occurred.

QUESTION 29:

Were you ever trained regarding the correlation and/or differences between the use of lethal force during arrest and acting in private defense?

YES	NO

QUESTION 30: If yes, briefly explain the extent of this training.

SCENARIO ONE

You attend a domestic violence complaint and find that the wife of the suspect has been badly beaten up. The husband/suspect is outside the property. The victim identifies/points him out to you. You approach him, place your hand on his shoulder and inform him that you are placing him under arrest. He pushes you away and flees down the road. How would you respond in a situation such as this where a suspect for Domestic Violence resists arrest and attempts to flee. Would you attempt to arrest him and how would you carry out the arrest.

SCENARIO TWO

In the same scenario, you are attending the complaint of domestic violence and find that the wife of the suspect has been badly beaten up. The husband/suspect has a firearm on the premises but it is **not** on his person. According to his wife, prior to your arrival, he threatened to shoot her. He is standing outside the property. The victim identifies/points him out to you. You approach him, place your hand on his shoulder and inform him that you are placing him under arrest. He refuses to consent to the arrest and does not co-operate. Explain what you would do next. (Section 49 (2) (b)).

SCENARIO THREE

You attend a domestic violence complaint and find that the wife of the suspect has been badly beaten up. The husband/suspect is outside the property. The victim identifies/points him out to you. She also informs you that he has a firearm and, prior to your arrival, has threatened to use it. You place a hand on his shoulder and inform him that you are placing him under arrest. He pushes you away and attempts to flee. How would you respond in an instance like this where an armed suspect for Domestic Violence resists arrest and attempts to flee. Would you arrest him and how would you carry out the arrest. Explain briefly.

QUESTION 31: Is there any other information about the use of lethal force and Section 49 you would like to add?

THANK YOU FOR PARTICIPATING IN THIS QUESTIONNAIRE!

ANNEXURE F: PERMISSION REQUEST LETTERS TO CONDUCT RESEARCH IN SAPS

10/05 05 TUE 07:32 FAX +27114713752
05/05/2005 12:37 0123933178

TECHNIKON SA
S

PAGE 001

South African Police

Guid Arikanse Polisie

Private Bag

X94

Fax no

(012) 393 3178

Privaatsak

Faks no

REFERENCE

3/34/2

OFFICE OF THE HEAD
STRATEGIC MANAGEMENT
PRETORIA
0001

ENQUIRIES

S/Supt Schnetter
Supt Vuma

TELEPHONE NO (012) 393 3232

22 APRIL 2005


The Divisional Commissioner
TRAINING

Attention: Asst Comm Phahlane

REQUEST FOR PERMISSION TO CONDUCT RESEARCH: TRAINING

1. Attached please find research proposal as well as the questionnaires from R Moodley of UNISA regarding the evaluation of the training of South African Police Official on the use of force after the Amendment to Section 49 of the Criminal Procedure Act (No. 51 of 1977).
2. This office recommends the proposals.
3. For your consideration and final approval.


ASSISTANT COMMISSIONER
HEAD : STRATEGIC MANAGEMENT
GE MOORCROFT

APPROVED / NOT APPROVED 


ASSISTANT COMMISSIONER
AD-BASIC TRAINING
DIVISIONAL COMMISSIONER
K PHAHLANE
TRAINING

South African Police Service



Suid-Afrikaanse Polisiediens

Private Bag	X94	Fax no	(012) 393-3178
Privaatsak		Faks no	
REFERENCE	3/34/2	OFFICE OF THE HEAD	
ENQUIRIES	S/SUPT SCHNETLER	STRATEGIC MANAGEMENT	
	SUPT VUMA	PRETORIA	
		0001	
TEL	(012) 393 3177/3232	05 MAY 2005	

Antony Minnar
UNISA

RE: REQUEST FOR PERMISSION TO CONDUCT RESEARCH

1. Your e-mail dated 09 March 2004 refers.
2. Student Rita Moodley is hereby given permission to conduct research on Evaluation of the Training of South African Police Service on the use of force after the Amendment to Section 49 of the Criminal Procedure Act (No. 51 of 1977).
3. These request was referred to Divisional Commissioner: Training for their consideration and final approval. The study is approved by Assistant Commissioner Phahlane.
4. Standing Order 88 is applicable which state inter alia that the SAPS must receive copies of the final research documents.
5. Copy of this letter must be submitted to Rita Moodley to conduct the study.

f/ SIGNED _____ SUPT
HEAD : STRATEGIC RESEARCH
JULIA VUMA



DEPARTMENT OF SECURITY RISK MANAGEMENT
SCHOOL OF CRIMINAL JUSTICE
COLLEGE OF LAW
Prof. Anthony Minnaar
Tel: (+27) (0)11-471 3654
Cell: 083 8949 485

Fax: (+27) (0)11-471 2016
e-mail: aminnaar@unisa.ac.za

Florida (Roodepoort) Campus
Cnr. Christian de Wet Road &
Pioneer Avenue, Florida
P/Bag x6, Florida 1710
Gauteng, South Africa

30 November 2005

TO WHOM IT MAY CONCERN

This is to confirm that **Ms RITA MOODLEY** is a registered student at the University of South Africa (UNISA) and is currently busy completing her research studies for an MTech: Policing with a dissertation title: *An evaluation of the training of South African Police Service officials on The Use Of Force after the Amendment to Section 49 of the Criminal Procedure Act (No. 51 Of 1977).*

Her choice of topic obviously would necessitate interviews with active (operational) members of the South African Police Service (SAPS). Permission to undertake this research in the SAPS has been obtained from the relevant authorities in the SAPS. It would be appreciated if staff selected by Ms Moodley for interviewing at the selected police stations would provide her with all assistance and provision of research information as required.

Any queries concerning this MTech research can be directed to me as her study supervisor.

A handwritten signature in dark ink, appearing to read "A. de V. Minnaar".

(Prof.)

A. de V. Minnaar
Professor of Criminal Justice Studies
Senior Researcher/Postgraduate Co-ordinator
Department of Security Risk Management
School of Criminal Justice, College of Law
University of South Africa

Tel: +27-(0)11-471 3654
Fax: +27-(0)11-471 2016
Cell: 083 8949485
e-mail: aminnaar@unisa.ac.za

ANNEXURE G: THEORETICAL AND FOUNDATIONAL KNOWLEDGE ON THE USE OF LETHAL FORCE

THEORETICAL AND FOUNDATIONAL KNOWLEDGE

The following **MUST** be contained in the learner manual:

1. Safety Rules (At least 4).
2. Safe direction – A safe direction must be explained/defined.
3. Parts and Functions – Labeled diagrams are required for all firearm disciplines.
4. An explanation of Safe Carry Conditions;
 - ❖ An explanation of Safe Transportation;
 - ❖ An explanation should include safe storage when not under your direct control.
 - ❖ An explanation of lethal force
 - ❖ An explanation of reasonable force
 - ❖ A specific cautionary note should be included in the material that when in doubt, Private Citizens should not use force

explanation on “*use*” of a firearm as per *Specific Outcome 2, “Outcome Range”*:

5. An explanation of the Constitutional Court’s guidelines, parameter limitations, the State versus Edward Joseph Walters and Marvin Edward Walters Case, Case CCT 28/01

At least four(4x)realistic scenarios that are applicable to Private Citizens and are representative of Sections 47 and 49(2) with specific reference to a Private Citizen’s right to arrest third parties where:

- ❖ The offender has only committed a minor statutory offence;
 - ❖ The offender is known o the person, who wishes to make the arrest;
 - ❖ The offender resists the arrest with lethal force; and
 - ❖ The South African Police Service’s request a person to assist them in the arrest of an offender
6. Common Law – At least 4 Scenarios –with specific reference to a Private Citizen’s right to defend him/herself and or third arties where:
 - ❖ Robbers steal possessions from a person’s home, but do not threaten people with lethal force
 - ❖ Unarmed persons enter upon a property at night ,without the owner’s permission thereto; and

- ❖ Visibly armed persons forcibly enter a person's home, without the owner's permission thereto

An explanation of the common law doctrine of private defense, with specific reference to the lethal prescriptions concerning

- ❖ An unlawful and lethal attack
- ❖ A lawful defense against lethal force
- ❖ The relationship between an unlawful attack and a lawful defense against a lethal attack; and
- ❖ The use of lethal force in defense of property and animals

Providers who are developing their own material (with reference to the scenarios on the legal aspect as required by the specific unit standards) are to obtain competent legal opinion to verify and validate the authenticity, correctness, currency and integrity of the contents of their submissions

Website references

http://www.saps.gov.za/statistics/reports/rural_safety/eng/pages/no19e.htm

<http://www.constitutionalcourt.org.za/site/judgements/judgements.htm>

7. Target Identification – An explanation regarding Target Identification when a firearm is used during off-range situations or in a public place.
8. Ammunition – A labeled diagram listing the 4 basic components (Handgun and Rifle) or 5 basic components (Shotgun);
An explanation of how ammunition works;
An explanation of how to identify the correct calibre of ammunition for your firearm.
9. Qualifying Shoot – A detailed explanation of what is required of a learner to complete the Qualifying Shoot as per *Specific Outcome 2, Assessment Criteria 6*.
10. An explanation of malfunctions and how to correct them.
11. Fundamentals of shooting must include an explanation of unsupported shooting as per *Specific Outcome 2, Assessment Criteria 9*.
12. Safety Inspections – An explanation of how to carry out a Safety Inspection.
13. Cleaning and Maintenance:

An explanation of the equipment required for cleaning;
An explanation of how to clean the relevant firearm;

14. An explanation of the danger of having oil or any other obstruction in the barrel.
15. An explanation of basic Range Rules (in order to accommodate the Essential Embedded Knowledge portion of the unit standard).
16. Eye and Ear protection – an explanation of why eye and ear protection is important in order to satisfy the Embedded Knowledge portion of the unit standard).

OBSERVATION CHECKLIST

The following must be contained on the Observation Checklist:

As practical exercises to be addressed during your assessment on your Observation Checklist the learner must:

1. Identify a Safe Direction.
2. At all relevant times keep the finger off the trigger.
3. Load the relevant firearm while maintaining a safe direction with the finger off the trigger.
4. Unload the relevant firearm while maintaining a safe direction with the finger off the trigger.
5. Make the relevant firearm safe from an unknown or loaded condition.
6. Demonstrate how to load their own/relevant firearm to a safe carry condition.
7. Demonstrate the fundamentals of shooting.
8. Perform an ammunition identification task.
9. Successfully complete the Qualifying Shoot.
10. Identify and rectify simulated malfunctions (Assessor to simulate malfunctions with the learner's firearm using dummy ammunition and/or empty cases).
11. Carry out a Safety Inspection.
12. Explain the dangers of oil or other obstructions in the barrel while explaining or demonstrating the correct method of cleaning/maintaining the relevant firearm.

Notes

- Dummy ammunition/drill rounds must be used when live ammunition is not required.
- No live ammunition may be permitted in a classroom environment while handling firearms (The learner should at no time be permitted to load live ammunition into a firearm in a classroom environment).
- While live ammunition is being handled, firearms should not be present.

In the interest of safety, the intention of the 3 points above is to ensure that accidents are prevented by limiting access to live ammunition and firearms by the learner in a classroom environment.

In order for an accident to happen, 3 things need to be present:

- A learner;
- A firearm;
- Live ammunition

Please ensure that the only time that you allow the learner, the firearm and a round of live ammunition to come together, is on a Shooting Range, under expert supervision.

ASSESSOR GUIDES

1. The Assessor Guide is to clearly explain where each Assessment Criteria has been addressed in the learner manual. (See Assessment Matrix)
2. The Assessor Guide is to clearly show evidence of how reflexive competencies are addressed and where the Critical Cross Field Outcomes are achieved.

Example

During an Observation (Practical):

The learner is to identify a safe direction (assessed – practical skill). The Assessor can now tell the learner that the safe direction which they have chosen is no longer available or safe because a person now moved into that area. The learner is to move the muzzle of the firearm to a different safe direction. Having achieved this will be an example of how to assess a reflexive competency (the learner's ability to apply knowledge under changing conditions).

Reflexive competencies can also be tested by altering the sequence of events during loading/unloading malfunction drills, etc.

3. A course time table clearly indicating the course duration.

CRITICAL CROSS FIELD OUTCOMES

Critical Cross Field Outcome – Identify and solve problems can be assessed during scenarios involving Section 49 and Common Law as well as during observation when identifying and rectifying malfunctions, etc.

All Assessors using the Assessor Guide must have a clear understanding of every step or procedure to be followed under every heading on the Observation Checklist (step-by-step breakdown).

Every Assessor using the Assessor Guide must have a clear understanding of when and how to assess:

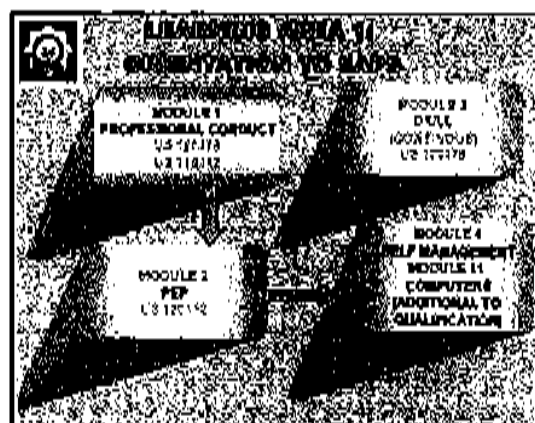
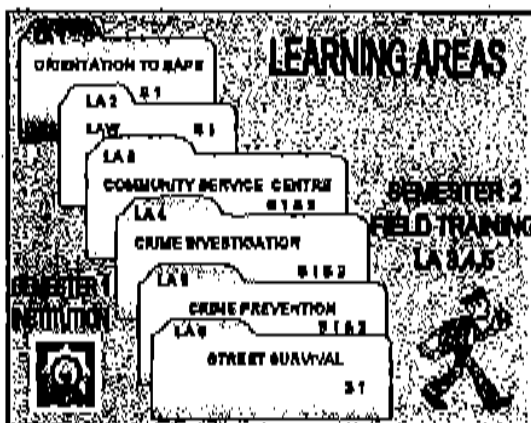
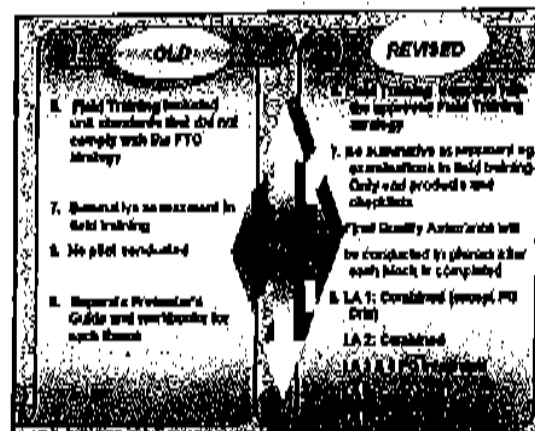
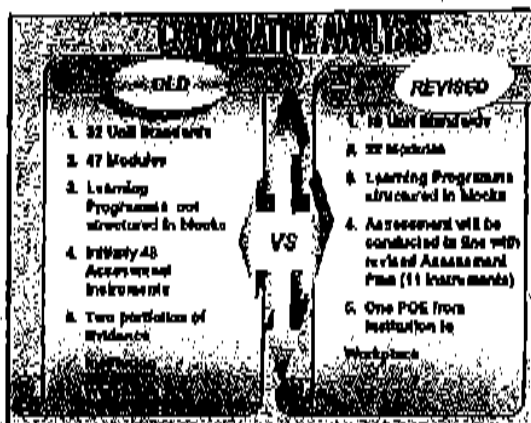
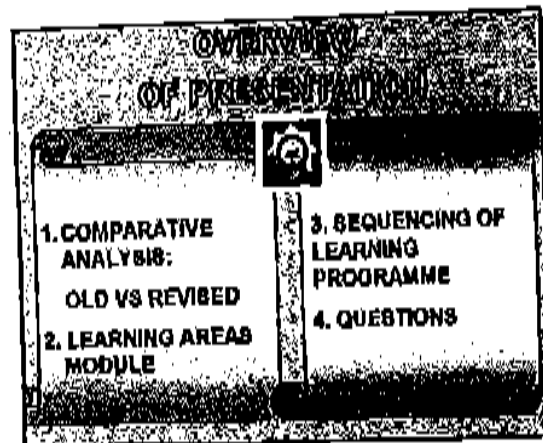
- Theory (Foundational)
- Practical (Observation/Skills)
- Reflexive Competencies (During Theory and Practical)
- How Critical Cross Field Outcomes are achieved.

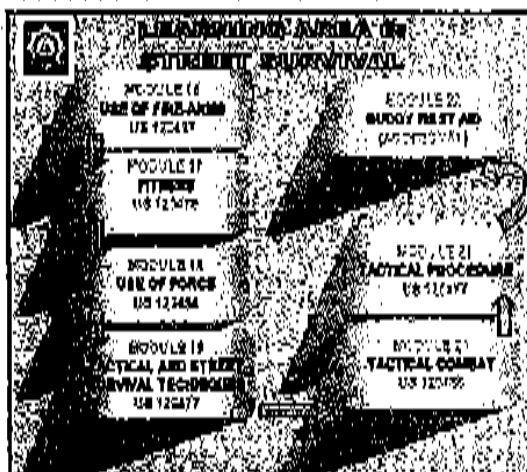
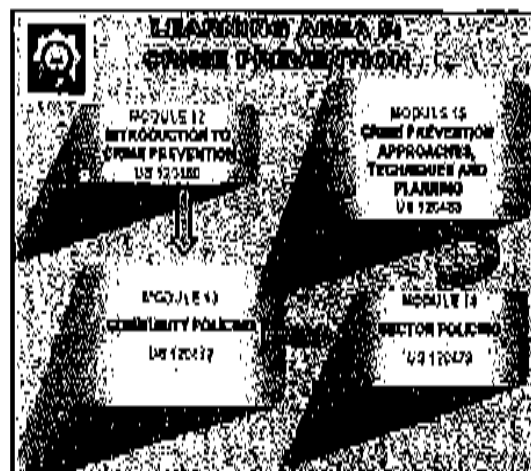
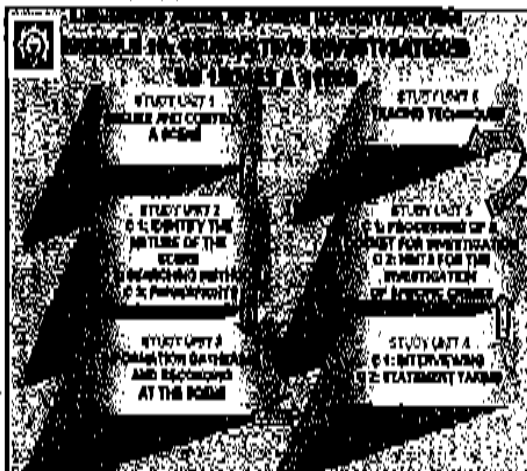
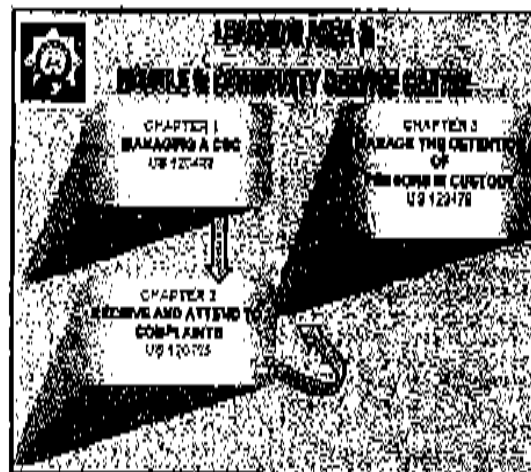
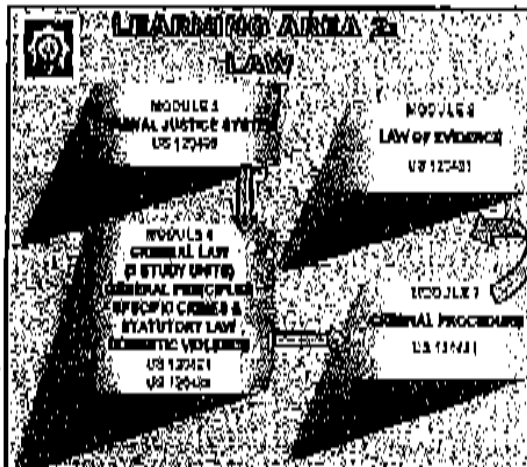
END

Source Theoretical and foundational knowledge on the use of lethal force.
<http://www.sasseta.org.za/docs/Whats-new/THEORETICAL-AND-FOUNDATIONAL-KNOWLEDGE.pdf>.

6

ANNEXURE H: OVERVIEW OF SAPS BASIC TRAINING PROGRAMME – JULY 2004 TO JUNE 2006





LEARNING AREA 6: SELF-DEFENSE SURVIVAL

BLOCK	LEARNING AREA	UNIT NUMBER	UNIT TITLE
1	LA 1	120479 (NO 120)	INSTITUTION
2	LA 2	120487 (NO 120)	INSTITUTION
3	LA 3: CSC	120487, 120479	FIELD TRAINING: EVIDENCE COLLECTION
4	LA 4: CRIME INVESTIGATION	120487, 120479	FIELD TRAINING: EVIDENCE COLLECTION
5	LA 5: CRIME PREVENTION	120487, 120479	FIELD TRAINING: EVIDENCE COLLECTION

LEARNING AREA 7: CRIME PREVENTION

LEARNING AREA 8: CRIME PREVENTION

LEARNING AREA 9: CRIME PREVENTION

LEARNING AREA 10: CRIME PREVENTION

LEARNING AREA 11: CRIME PREVENTION

LEARNING AREA 12: CRIME PREVENTION

LEARNING AREA 13: CRIME PREVENTION

LEARNING AREA 14: CRIME PREVENTION

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LEARNING AREA 94: CRIME PREVENTION

LEARNING AREA 95: CRIME PREVENTION

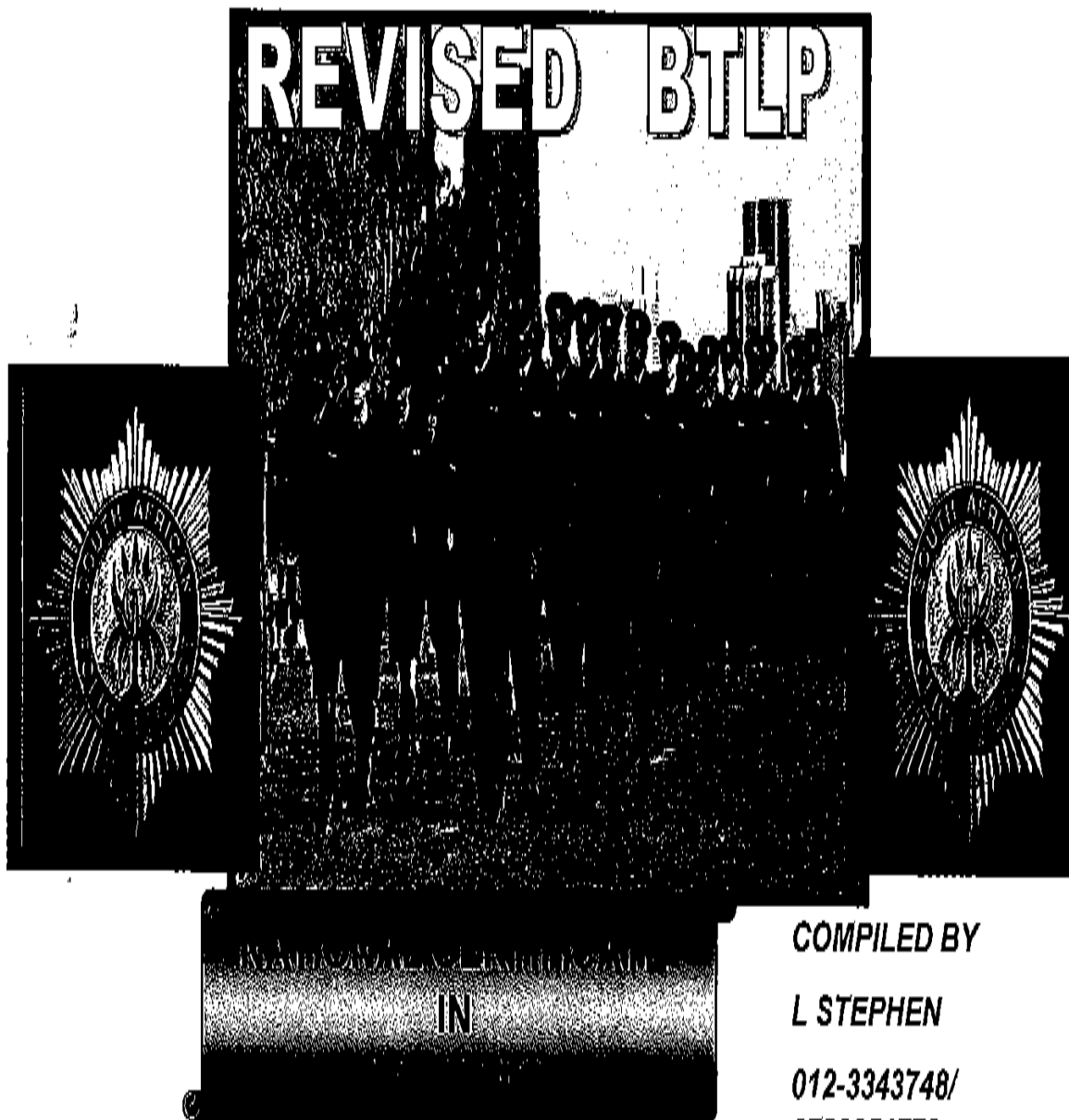
LEARNING AREA 96: CRIME PREVENTION

LEARNING AREA 97: CRIME PREVENTION

LEARNING AREA 98: CRIME PREVENTION

LEARNING AREA 99: CRIME PREVENTION

LEARNING AREA 100: CRIME PREVENTION



COMPILED BY

L STEPHEN

012-3343748/

0720251772

ORIENTATION TO SAPS

LA 2 S 1

LAW S 1

LA 3

COMMUNITY SERVICE CENTRE S 1 & 2

CRIME INVESTIGATION S 1 & 2

LA 5

CRIME PREVENTION S 1 & 2

STREET SURVIVAL S 1

LEARNING AREAS

STREET 2 FIELD TRAINING LA 2, 4, 5

LEARNING AREA 1

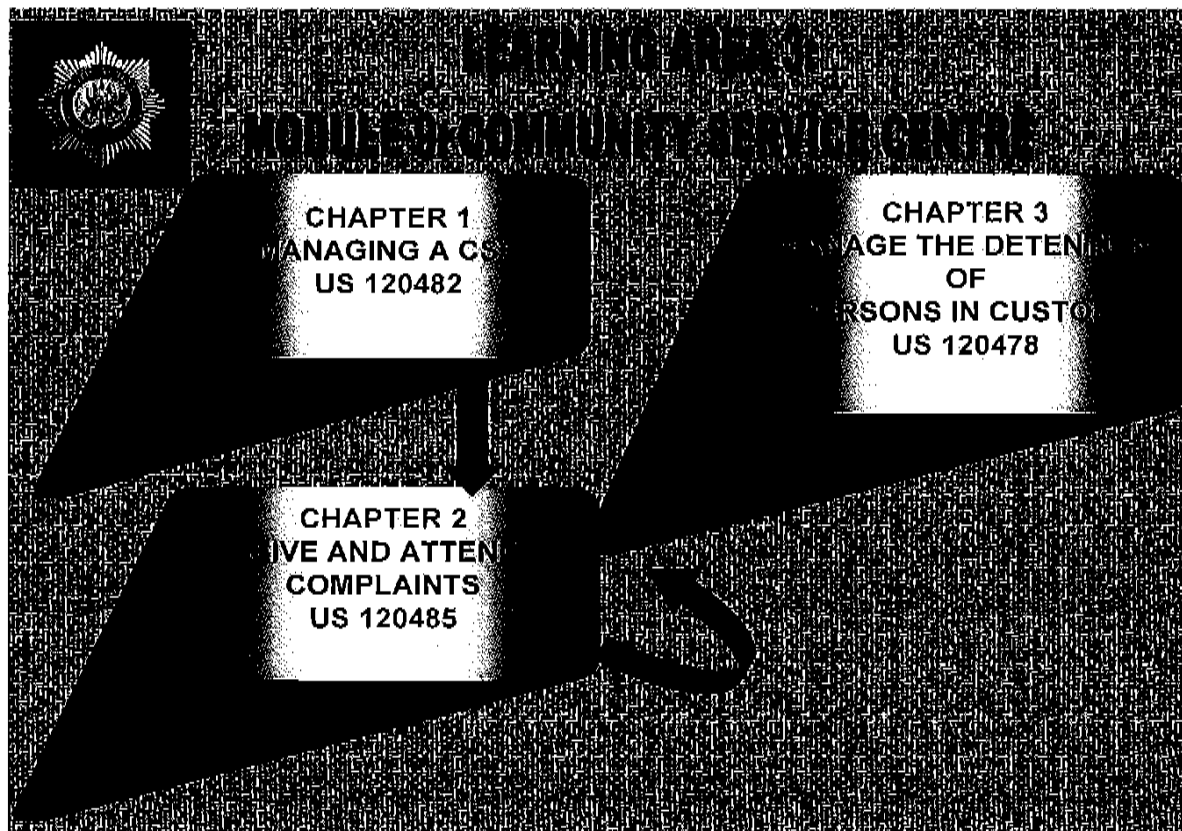
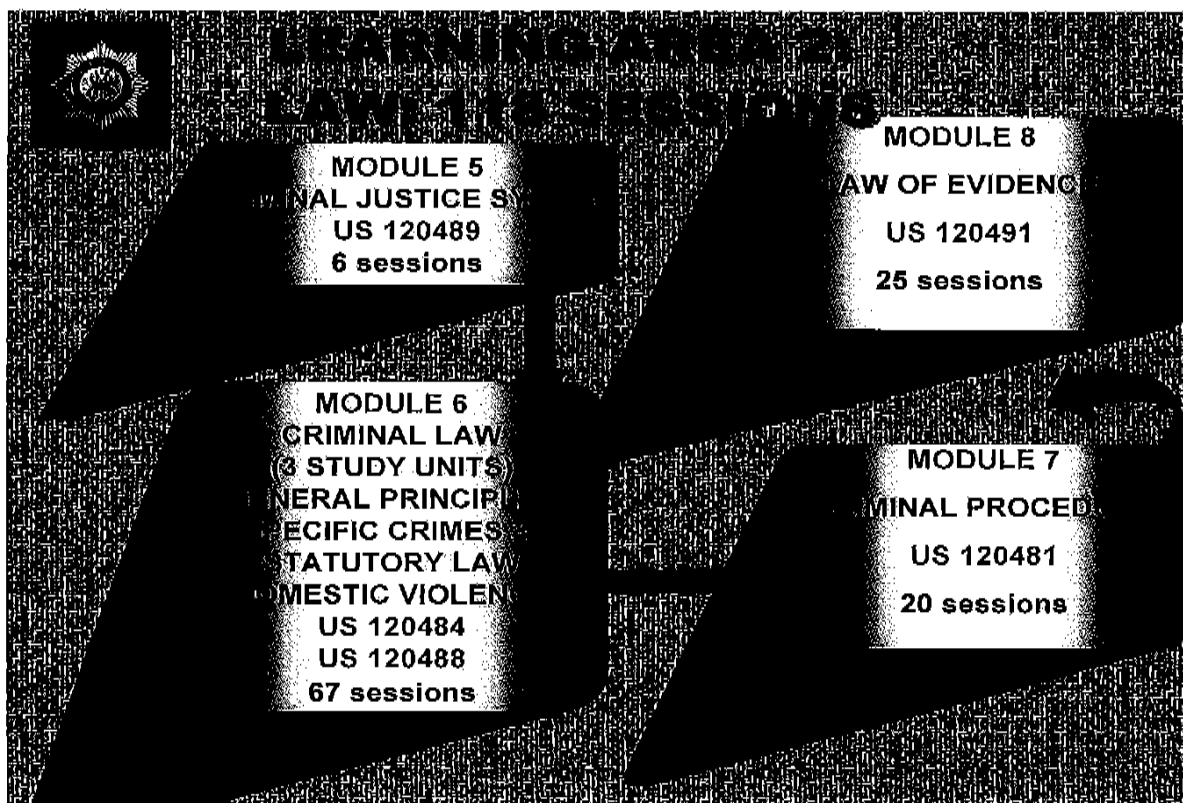
ORIENTATION TO SAPS 12 SESSIONS

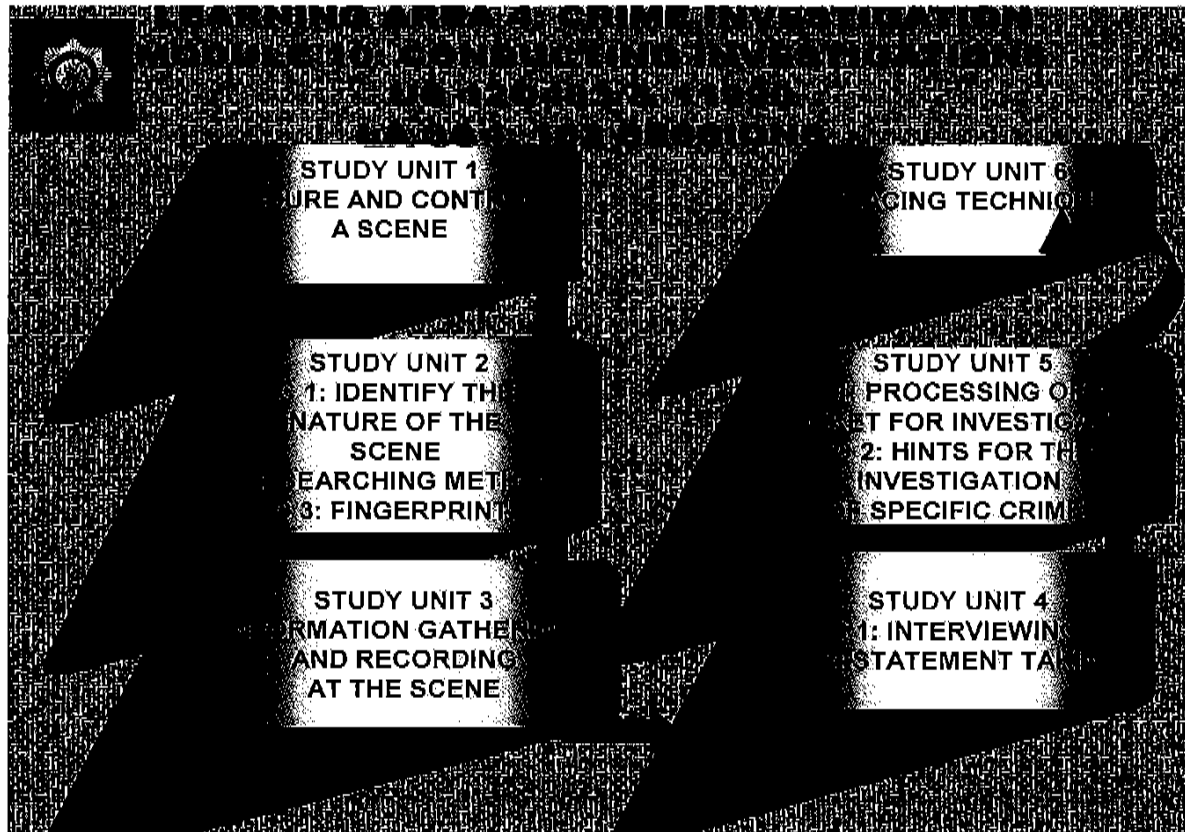
PROFESSIONAL CONDUCT
US 120476
US 119342

MODULE 2
PEP
US 120492
11 sessions

MODULE 3
DRILL
(CONTINUOUS)
US 120476
50 sessions

MODULE 4
SELF MANAGEMENT
45 sessions
MODULE 11
COMPUTERS
(ADDITIONAL TO QUALIFICATION)
33 sessions





ANNEXURE I: Special Service Order relating to the Use of Force in Effecting an Arrest

(012) 339 1748

18/5/1
1/1/4/1(5)

Asst Comm T Geldenhuys

(012) 339 1370/2279

2003-07-18

- A. All Divisional Commissioners
HEAD OFFICE**
- B. ALL PROVINCIAL COMMISSIONERS**
- C. ALL HEADS: LEGAL SERVICES**
- D. ALL SECTION HEADS
HEAD OFFICE**
- E. ALL COMMANDERS
SAPS COLLEGES AND TRAINING CENTRES**
- F. ALL DEPUTY NATIONAL COMMISSIONERS**

**SPECIAL SERVICE ORDER RELATING TO THE USE OF FORCE
IN EFFECTING AN ARREST**

A - E. 1 Section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) has been amended by the Judicial Matters Second Amendment Act, 1998 (Act No. 122 of 1998). The amendment comes into operation on 18 July 2003. The wording of the new section 49 is attached to this Order as Annexure A.

2. PRINCIPLES NOT AFFECTED BY THE NEW SECTION:

- **Private defence**
- **The use of force which is not likely to cause death or serious injury**

All members must take note of the fact that the following principles that were in effect before the coming into operation of the new section, have not been affected by the new section.

Private defence

The principles relating to private defence (which include self defence and defence of any other person) are not affected by the provisions of the new section. Any member who finds himself or herself in a situation in which his or her life or the life of another person is in danger and in which there is no other reasonable manner in which he or she can remove the threat against his or her life or against the life of such other person, may use any means (including his or her firearm) to defend himself or herself or such other person.

A member who attempts to arrest a person for a serious offence but foresees the possibility that the person may resist the attempt to arrest him or her and foresees that the person may, while resisting the arrest, endanger the life of the member or of another person, is not required to cease the attempt to arrest the person. In such a case, the member is entitled to proceed with the attempt to effect the arrest, but must exercise extreme caution and remain ready to use any means (even his or her firearm) where this is reasonably necessary in order to defend himself or herself or the other person if the need for it should arise.

The use of force which is not likely to cause death or serious injury

Before the coming into operation of the new section 49, a member had been entitled to use such force as was reasonably necessary in the circumstances in order to effect an arrest where such force was not likely to cause the death or serious bodily injury of the person to be arrested. This principle did not change with the coming into operation of the new section 49. In this regard, members are reminded that the following principles applied and therefore still apply:

- (1) In terms of section 13(3)(b) of the South African Police Service Act, 1995 (Act No. 68 of 1995), a member must, where the use of force is authorised by law, use only the minimum force which is reasonable in the circumstances.
- (2) In this respect it must be remembered that force need not necessarily be applied during an arrest. If the person, who is to be arrested, subjects himself or herself to custody, no force may be applied to effect the arrest (see section 39 of the Criminal Procedure Act). Force may only be applied against a person who is to be arrested, if such person resists the attempt to arrest him or her or flees to escape the arrest and cannot be arrested without the use of force. The purpose with the use of force in such circumstances may only be to confine the body of the person.
- (3) A member, who is by law authorised to arrest a person, may, in order to effect the arrest, where the person resists the arrest or flees in order to

escape the arrest and cannot be arrested without the use of force, use such force **as may in the circumstances be reasonably necessary** to overcome the resistance or to prevent the person from fleeing: Provided that **the force so used, must be proportional in the circumstances.**

- (4) The use of force will only be “proportional in the circumstances” **if the member believes on reasonable grounds that the use of force is necessary to effect the arrest.** Such a belief must be based on facts which exist at the time when the force is used and of which the member concerned is aware at that time. Such facts may include the conduct of the person to be arrested, words used by him or her when he or she became aware of the intention to arrest him or her, information at the disposal of the member concerned, etc. These facts must also be such that any reasonable person would, when faced with the same facts, conclude that the use of force is necessary. A member may afterwards be required to explain what the facts were upon which he or she based the conclusion that the use of force was reasonably necessary.
- (5) Once a member has concluded that the use of force is reasonably necessary in the circumstances to effect the arrest, such member must consider whether the use of the **type and degree of force**, which will be necessary to effect the arrest, is proportional to the seriousness of the offence committed by the person to be arrested.

3. CHANGES BROUGHT ABOUT BY THE NEW SECTION

The only changes brought about by the new section 49 relate to the **use of force that is intended or likely to cause death or grievous bodily harm to the person to be arrested.** In this regard members must take note that discharging a firearm at a person is regarded as the use of force which is likely to cause death or grievous bodily harm, irrespective of the part of the body aimed at.

This office intends issuing comprehensive instructions regarding the use of this kind of force. In the interim, members must adhere to the following guidelines:

- (1) Force (such as the use of a firearm), which could result in the death or grievous bodily harm of the person to be arrested ***may only be used*** if the member believes on reasonable grounds —
 - (a) that the force is immediately necessary for the purposes of protecting the member, any person lawfully assisting the member or any other person from imminent or future death or grievous bodily harm;
 - (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
 - (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life

threatening violence or a strong likelihood that it will cause grievous bodily harm.

- (2) If the use of such force (as set out in the previous paragraph) is reasonably necessary to overcome the resistance of the suspect, the degree of the force used must be proportional to the degree of resistance. In this regard it is reiterated that private defence is not affected by the new section.
 - (3) If a member believes on reasonable grounds (as set out in subparagraph (1) above) that the use of force (such as a firearm), which could result in the death or grievous bodily harm of the person to be arrested, will be necessary to effect an arrest, such member must, where it is reasonable in the circumstances to do so, issue a clear warning to the person who is to be arrested that force will be used against him or her unless he or she submits himself or herself to custody. In such an event the said warning should inform the person to be arrested that lethal force will be used (eg that he or she will be shot at) unless he or she submits to the arrest. Furthermore, where a member reasonably believes that it will be necessary, in order to effect the arrest, to fire a shot at the person to be arrested, a warning shot must precede any shot fired at the person, unless the firing of a warning shot may endanger the lives of other people or could reasonably be expected to have the result that the person will escape the arrest. This does not apply to instances of private defence where the life of a member or of another person is in immediate danger and immediate action is necessary to ward off the danger.
- 4. Existing Standing Orders which are inconsistent with the instructions contained in this circular, are hereby repealed to the extent that they are inconsistent therewith.
 - 5. The instructions set out above must be implemented with immediate effect.
 - 6. All Divisional and Provincial Commissioners must **IMMEDIATELY** bring the contents of this circular to the attention of each member under their command. Every member must sign a copy of this circular to confirm that he or she understands the contents thereof. The signed copy of the circular must be filed on the personal file of the member.

- F 1. For your information.

NATIONAL COMMISSIONER: SA POLICE SERVICE

ANNEXURE A

“49. (1) For the purposes of this section —

- (a) **‘arrestor’** means any person authorised under this Act to arrest or to assist in arresting a suspect; and
- (b) **‘suspect’** means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds —

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.”

ANNEXURE J: Constitutional Court Judgement on Section 49 of the Criminal Procedure Act, 51 of 1977

4612035
CPJ. du Preez
FNB

Fax 012-3392165

26/5/1(K)

Commissioner Selebi
012-3391514

2002-05-24

- A. ALL PROVINCIAL COMMISSIONERS
- B. All Divisional Commissioners
HEAD OFFICE
- C. All Section Heads
HEAD OFFICE
- D. All Commanders
SAPS TRAINING INSTITUTIONS
- E. ALL DEPUTY NATIONAL COMMISSIONERS

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CONSTITUTIONAL COURT JUDGEMENT ON SECTION 49 OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT NO 51 OF 1977)

1. On 21 May 2002 the Constitutional Court delivered judgment in the case of S v Walters (CCT 28/01). This judgment concerned the constitutionality of section 49(1) and (2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
2. In its judgment the Constitutional Court declared section 49(2) of the Criminal Procedure Act unconstitutional and held that this decision will only apply to future actions and that anything done before 21 May 2002 is not affected by the decision.
3. The Constitutional Court also decided that its decision does not affect the use of force in self defence or private defence. This means that the principles relating to private defence (which include self defence and defence of any other person) are not affected by this judgment. Any member who finds himself or herself in a situation in which his or her life or the life of another person is in danger and in which there is no other

reasonable way in which he or she can remove the threat against his or her life or against the life of such other person, may use his or her firearm to defend himself or herself or such other person.

4. The Constitutional Court further decided that section 49(1) of the Criminal Procedure Act is constitutional and must be interpreted to authorise a member to shoot at a suspect in order to effect an arrest in certain limited circumstances only. In this regard the Court stated (on pages 45 - 46) the following:

"In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.*
- (b) Arrest is not the only means of achieving this purpose, nor always the best.*
- (c) Arrest may never be used to punish a suspect.*
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.*
- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.*
- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.*
- (i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person."*

5. The judgement states clearly (on pages 41 - 42) that —

"It also needs to be emphasised that the lives of policemen and -women are not endangered by the constitutional interpretation of Section 49(1) by the SCA (the Supreme Court of Appeal) in Govender (Govender v Minister

*of Safety and Security 2001 (4) SA 273 (SCA)), nor by a striking down of subsection 49(2) pursuant to the finding in this case. Nothing said in either judgement and nothing that flows from them can contribute one iota to the dangers that these brave men and women have to face in the performance of their often thankless task ... **The right - and indeed the duty - of police officers to protect their lives and personal safety and those of others is clearly endorsed and in no respect diminished**".*

6. Existing Standing Orders which are inconsistent with this judgment, are hereby repealed to the extent that they are inconsistent therewith.
7. The guidelines as set out in the judgment and outlined above must be implemented with immediate effect.
8. All Divisional and Provincial Commissioners must **IMMEDIATELY** bring the contents of this circular to the attention of each member under their command and are held personally responsible to see that this is done. Every member must sign a copy of this circular to confirm that he or she understands the contents thereof. The signed copy of the circular must be filed on the personal file of the member.

NA
PO
JS

TIONAL COMMISSIONER : SOUTH AFRICAN
LICE SERVICE
SELEBI

Am. Beets Insp.
2001.03.17