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

by

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Executive Summary

This memorandum examines issues relating to the legal framework on the use of lethal force in effecting arrest. It argues that the proposed Section 49 of the Criminal Procedure Act as amended by Section 7 of the Judicial Matters Second Amendment Act, 122 of 1998 (see Annexure A) suffers from a number of major flaws.

The amended section 49 has not been implemented which means that the old section 49 is still in force. Assuming that the old section 49(2) is unconstitutional, would mean that the current legal position would be defined by the Supreme Court of Appeals reading of section 49(1) in the case of *Govender v Minister of Safety and Security*. This memorandum argues that *Govender* represents a preferable legal position to the amended section 49 provided for in Section 7.

While the position put forward in *Govender* is preferable to that put forward in Section 7 of the Judicial Matters Amendment Act, the *Govender* framework could be improved through legislation which distinguishes situations of 'pure flight' from situations of resistance to arrest and introduces wording which draws attention to the risk of error, and which emphasises the need for the arrestor to base his or her actions on firm and clear grounds in relation to such situations.

Possible wording for a legal framework which takes these concerns into account, is provided in Annexure D with an explanatory memorandum on this attached in Annexure E.

Introduction[1]

This memorandum has been written in response to the current impasse over the legislative framework dealing with the use of lethal force for purposes of arrest as provided for in the amendment to Section 49 of the Criminal Procedure Act, provided for in Section 7 of the Judicial Matters Amendment Act, 122 of 1998 (henceforward Section 7 of the JMSAA).

The fact that Section 7 has given rise to some controversy is not itself problematic as

amendments of this kind and restrictions on the power of the police are often controversial and debate may ultimately feed into greater understanding, by the public and the police, on the issues at stake. However as a result of the controversy there has been a lengthy delay in bringing the legislation, which regulates the use of lethal force for purposes of arrest, into operation, and it is now a matter of urgency that an appropriate legal framework be finalised and implemented.

This memorandum is written in order to contribute to forward movement on this issue. It is intended to assist in achieving the following:

1. Clarity on the key issues of principle which are at stake and the implications of amending the legal framework in terms of these issues;
2. That the legal framework which ultimately prevails provide an effective framework for regulating the use of lethal force in South Africa;
3. That the long impasse over this issue be urgently resolved and that the relevant legislation be implemented in the near future.

This memorandum gives emphasis to a concern that legislation should be realistic. This means that it must be formulated in a manner which reflects who will be exercising the powers conferred by it, and how accountability in relation to the exercise of these powers will be maintained. The framework put forward in this document is consistent with these concerns. At the same time it would bring the legal framework in South Africa in line with our own Constitutional, as well as international, norms.

Background

Events which forms the background to this document are as follows:

- Section 7, which is intended to amend section 49 of the Criminal Procedure Act, 51 of 1977, was passed by Parliament as part of the Judicial Matters Second Amendment Act, in November 1998 (act 122 of 1998) (The proposed Section 49 as provided for in Section 7 can be found at Annexure A).
- However the implementation of Section 7 has been resisted, most notably by the SAPS and Minister of Safety and Security, and Section 7 has not as yet been brought into operation.
- In mid-February following announcements that Section 7 would finally be coming into effect, the implementation was once again called off and indications were given that the amendment of Section 49 was to be the subject of further discussions between the Department of Justice and the South African Police Service.

Parallel to the process in government have been a series of developments in the courts:

- In June 2001, the Supreme Court of Appeal judgment in the case of *Govender v Minister of Safety and Security*, 'read down' Section 49(1) of the Criminal Procedure Act in order for it to conform to the Constitution;
- In July 2001 in the case of *S v Walters* and another, the Transkei Division of the High Court rejected the *Govender* judgment and declared that both Section 49(1) and Section 49(2) are unconstitutional.
- The Walters case, and thus the Constitutionality of both Section 49(1) and Section 49(2) are thus currently before the Constitutional Court.

The implications of the above in terms of the current legal situation is discussed below (see 'Current legal situation').

The Core Issues in Debating the Legal Framework

It must be emphasised that in debating issues to do with the use of lethal force for purposes of arrest the right to self defence (or private defence) is not in dispute in any way. The core issues are effectively:

> (a) Are there any circumstances where it should be justifiable to shoot a fleeing person in order to prevent their flight; and (b) If there are such circumstances, how these circumstances should be defined in law.

These issues, which relate to questions of police effectiveness in upholding safety and securing arrests, are the focus of this memorandum.

The Issue of Self Defence or Private Defence and Police Safety

In the debate about Section 7 of the JMSAA one issue which has been the focus of concern is that of police safety. However the objections regarding Section 7 of the JMSAA which are put forward in this document, do not focus on the issue of police safety, but focus on general issues to do with the meaning of the legal framework.

It should be emphasised however that the position which is supported in this document is entirely compatible with improved police safety. In the United States the adoption of a similar position was followed by declines, rather than increases in, the killings of police. Furthermore the legal framework suggested in this document is entirely compatible with all the components of the existing SAPS strategy to reduce the number of attacks on and killings of police members.[2]

Relevance of the forthcoming Constitutional Court judgment in the case of S v Walters

The case of *S v Walters and another*, dealing with the Constitutional validity of the old section 49, was heard before the Constitutional Court in November last year, and judgement on this issue is still pending. It is expected that the judgment of the court will have implications for the legal position. However one consequence of the judgment may be to confirm the current legal position as set out below.

Current Legal Position

It would appear that the current situation with regard to the legal framework is that the old section 49 as per the Criminal Procedure Act of 1977 (that is the position prior to the passing of the JMSAA) is still on the statute books and is still in force except that:

1. Section 49(i) needs to be interpreted in terms of the provisions of the judgment of the Supreme Court of Appeal in the case of Govender v Minister of Safety and Security,[3] which states in paragraph 24 that

   > section 49(1) of the Act must generally speaking be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorized to arrest, or assist in arresting, a fleeing suspect has

reasonable grounds for believing (1) that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or (2) that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.[4]

2. Section 49(2) is contrary to the constitution and, subject to confirmation by the Constitutional Court, in term of the doctrine of objective invalidity is therefore invalid.[5]

   Assuming that section 49(2) is unconstitutional it would appear that the current legal situation in relation to the use of lethal force for purposes of arrest, whether resulting in death or injury, is therefore governed by the framework for reading section 49(1) as set forward in the Govender judgment.[6]

Evaluation of section 7 of the Judicial Matters Second Amendment Act, 122 of 1998

If we accept that the above provides a fair representation of the current legal position then it is valid to ask whether the implementation of Section 7 of the JMSAA would represent an improvement on this position. The position taken in this memorandum is that Section 7 has a number of flaws and does not represent an improvement in relation to the current legal position as set out above:

1. Effectively Section 7 of the JMSAA provides for the use of lethal force:
   (a) In terms of section 49(2)(a), (b) and (c) where the use of force is necessary for purposes of private defence (defence of self or another) against death or grievous bodily harm; and also
   (b) In term of sections 49(2)(a) and (b) where there are reasonable grounds to believe that the person poses a danger of '*future death or grievous bodily harm*'.

2. However Section 7 states this in a highly complex and confusing way which does not serve the purpose of legal clarity. Thus it would appear that section 7 does not add anything to the provisions of the model deadly force policy of the International Association of Chiefs of Police (IACP) which states that

   "Law enforcement officers are authorized to use deadly force to:

   a. Protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm; and/or
   b. To prevent the escape of a fleeing violent felon who the officer has [reasonable grounds] to believe will pose a significant threat of death or serious physical injury to the officer or others.

   Thus it is not clear whether or not section 7 provides for the use of force in any circumstances which are not provided for in the IACP policy and that (i) the IACP policy is clearer, more concise and easier to interpret, and (ii) also contains the clarification that the person who is the target of the use of lethal force must not only appear on reasonable grounds to pose a risk of death or serious physical injury in the future *but also* be a fleeing violent felon. (The full IACP policy is attached as Annexure B).[7]

3. The lack of clarity in Section 7 relates particularly to the reference to '*future death or grievous bodily harm*' in sections 49(2)(a) and (b) of the amendment.
   (a) Geller and Scott argue that 'as is well known within the criminal justice policy community, nobody – forensic psychologists, psychiatrists, parole boards, seasoned police officers – has yet demonstrated an ability to predict a given individual's future dangerousness with anything approaching even 50 percent accuracy'.[8]
   (b) The provision has implications for persons, particularly members of police services, who may be faced with a need to perform their legal responsibilities under an ill-defined legal framework which requires them to make a judgment as to whether or not the fleeing person is likely to cause death or serious bodily harm in the future, without providing any guidance as to how such future dangerousness is to be evaluated, and thus expose themselves to an enhanced risk of criminal prosecution.
   (c) Such a provision is also complex to enforce for the bodies responsible for imposing accountability in relation to shootings under section 49 as it compels them to evaluate the shooting in terms of a speculative abstraction. The current situation is that there are severe limitations in terms of the accountability imposed on people exercising powers in terms of Section 49 both by the SAPS (where non SAPS members are involved in Section 49 shootings, as well as in non-fatal shootings involving SAPS members) and ICD (in relation to the investigation of deaths as a result of police action). Placing such a provision on the statute books may be to create enhanced difficulty, for those investigating shooting incidents, in making concrete findings, and therefore undermine the performance of this accountability function. Countries like Canada, where the future danger principle is part of law, not only have lower levels of use of force by the police, but also are better able to maintain administrative mechanisms which can impose accountability in relation to such a standard.
   (d) Arguably the principle put forward in Section 7 (where persons pose a danger of death or serious injury and cannot be apprehended by other means the law should make provision for the use of lethal force for purposes of arresting them) is the only viable principle on which to base the law relating to the use of lethal force for purposes of arrest (i.e. in addition to the private defence principle). However the law should go beyond a mere statement of the principle and should provide more concrete guidance on when lethal force is justified (a proposal in this regard is provided in Annexure D below).
   (e) Such laws also have potential implications for the state in terms of civil liability particularly in situations where police officers act in good faith in terms of the law but are held in court to have acted in a manner which falls outside the legal parameters.

4. By referring at 49(2) to the fact that the arrestor must '*believe on reasonable grounds*' the section fails to acknowledge the potential for error in situations of the use of force. As will be dealt with in more detail below, in relation to the issue of standard of belief, this is inappropriate particularly to situations where the arrestee is fleeing and there is no direct danger to the arrestor.

5. Other concerns relating to Section 7 include
   (a) Aspects of the wording of the amended section 49(2) which imply that lethal force can be used against a fleeing person for the purposes of killing them as opposed to stopping them from fleeing and escaping. While death may be a likely and even probable outcome in many situations where lethal force is used,

where the suspect flees and poses no direct or imminent threat to the arrestor or a third person, the arrestor should not be permitted to shoot with the direct intention of killing.[9]
(b) The impression is created that, apart from the provisions relating to 'future death or serious bodily harm,' the provisions appear to be a restatement of provisions relating to private defence and questions which this raises.
(c) Whether the resulting legal position relating to the use of lethal force in relation to suspects in cases of rape will actually be clarified as rape is sometimes committed without the infliction or threatened infliction of death or grievous bodily harm.
(d) It is unclear what is meant by 'that the force is immediately necessary … *for the purpose of protecting [a person] from … future death* and whether or in what way this is different from the situation referred to at s49(2)(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*".

6. Section 7 of the JMSAA therefore suffers from a general lack of clarity. The general situation in South Africa currently includes high levels of crime, and high levels violence against and use of force by the police and lethal force is therefore used relatively frequently by the police. A high degree of clarity is also necessary in light of the fact that the law in South Africa, unlike the law in many other countries, also authorises the use of lethal force by private citizens for the purpose of arrest, and is not confined to police officers. Clarity is of exceptional importance in relation to laws dealing with the issue of lethal force which authorise actions which may result in death, permanent disablement, and serious injury.

7. This lack of clarity also may be seen to contradict principles of respect for human life which are put forward in the Constitution. Referring to a judgement of the Hungarian Constitutional Court, our own Constitutional Court said in the Makwanyane judgment that

> Two factors are stressed … . First, the relationship between the rights of life and dignity, and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease. [at 84]

A vaguely formulated provision cannot be seen to be the most effective way for the law to uphold these principles.

Comparison of Current Legal Position as Opposed to Section 7 of the Judicial Matters Second Amendment Act

Arguably the formulation in the *Govender* judgment which is quoted above and particularly the provision 'that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm' is a preferable formulation to the 'future death or grievous bodily harm' formulation as it is more concrete and is not

speculative.

Furthermore it can be argued that the Govender formulation would give expression to the same principle as that contained in Section 7 as people who engage in crimes of violence and the threat of violence may in general be seen to pose a risk of being involved in such crimes in the future.

Bringing Govender closer to the 'future danger' principle?

In addition, if there is a concern to bring the formulation in Govender closer to the future danger principle it would be possible to qualify it in certain ways. One example of such a qualification is that provided in the IACP model policy which states that a police officer may use deadly force:

> To prevent the escape of a fleeing violent felon who the officer has [reasonable grounds] to believe will pose a significant threat of death or serious physical injury to the officer or others.

Alternatively it may be preferable to express the qualification in the negative by stating for example

> The arrestor [on reasonable grounds] does not believe that the suspect (i) is unlikely to commit further acts of serious violence or serious violations of bodily integrity or (ii) be arrested by less drastic means prior to committing further acts of this kind.

The advantage of expressing the principle in the negative would be that:
(a) The law gives overt expression to the concern that the primary justification for the use of lethal force for arrest is to prevent the flight of persons who are likely to pose a danger to members of the public and/or police in future; but that
(b) If in court the arrestor has to prove on a balance of probabilities that he or she complied with the requirements of section 49, proving that s/he did not believe that the person would be *unlikely* to commit further acts of serious violence or serious violations of bodily integrity would be less onerous than proving that *s/he did believe* that the person would be likely to commit further acts of serious violence or serious violations of bodily integrity, particularly if the basis for the belief is a 'normative' (see below) test of belief on reasonable grounds.

While on balance it appears preferable to state the qualification in the negative (as otherwise the legal provision will merely reproduce the key problems of Section 7) it appears that neither of the options outlined above appear to substantially promote clarity in the law.

Rather than focusing on improving *Govender* by bringing it closer to the 'future danger' principle, it may be preferable to focus on the issue of standard of belief, particularly in relation to the high risk of error.

The Issue of Standard of Belief

It should be noted that the use of the term 'believes on reasonable grounds' as used in Section 7 of the JMSAA has been criticised in an article in the SA Journal of Criminal Justice by Jonathan Burchell[10] as well as in a paper presented by Anton du Plessis at a

Technikon SA Conference in Durban.[11] The wording 'believes on reasonable grounds' also occurs in reformulation of the Section 49(1) of the Criminal Procedure Act put forward in the Govender judgment

The argument put forward by Burchell focuses on the words 'believes on reasonable grounds' in the amended Section 49(2) proposed by Section 7 of the Judicial Matters Amendment Act. Burchell's argument is that the provision unfairly discriminates against police officers (though he omits to mention that private citizens may be similarly affected if acting in terms of Section 49), if they kill someone whilst genuinely, but incorrectly, believing that they conformed to the conditions laid down in Section 49(2), as they would not have access to the protection afforded by Section 49(2) if the belief is held not to have been 'reasonable' by the court (in terms of the 'reasonable man' - or reasonable person – test).[12]

Essentially the motivation put forward by Burchell is that a person acting in what s/he mistakenly believes is a situation of private defence, if s/he persuades the court that she mistakenly but genuinely believed that s/he was under attack, may be acquitted on a charge of murder or assault on the basis that mens rea (and therefore the factor of blameworthiness) is absent.[13] However if such a person seeks to rely on the protection afforded by Section 49 s/he may be convicted of murder, even if he or she persuades the court that his/her belief was genuinely held, if the court decides that the reasonable person would not have held such a belief.

Burchell therefore appears to favour the idea of 'psychological fault' (which would be encapsulated by the words 'believes') as opposed to 'normative fault' (encapsulated by the words 'believes on reasonable grounds').[14]

A police officer or other person who is compelled to defend him or herself may always appeal to the common law doctrine of private defence in his or her defence in court. But section 49 deals with people who use the authority of law to arrest other people and who use lethal force in the process of doing so. It would be unconscionable for police or private persons to regard themselves as having the authority to use lethal force for purposes of arrest without feeling that they have to be able to justify their actions in terms of some standard of reasonableness.

The requirement that an arrestor should be able to demonstrate that he or she 'believed on reasonable grounds' should therefore definitely be maintained in relation to the arrestor as it is one means of imposing greater accountability, and emphasising that arrestors must be able to justify shootings in which people are killed or injured.

Sensitising Arrestors to the High Risk of Error

As indicated both Section 7 and the Govender judgment put forward the test of 'believes on reasonable grounds' as an appropriate test to be contained in legislation dealing with the use of lethal force for purposes of arrest.

While the argument put forward in this memorandum is that the standard put forward in the Govender judgment (and therefore the current legal situation) is a more concrete, succinct, and viable framework than that put forward in Section 7, its one major flaw is in not giving acknowledgement to the high risk of error in situations of the use of lethal force.

The Constitutional Court has already expressed its concern about the possibility of error in relation to the death penalty, stating that the death penalty is 'irreversible' (*S v Makwanyane* 1995 (3) SA 391(CC) at para 54). Even in countries whose judicial systems conform to standards of due process, there are numerous documented instances where the death penalty has been passed, and carried out, in error. As can be imagined the potential for lethal force to be used in error is far greater than is the case with the death penalty as lethal force is often used on the spur of the moment and not after months of deliberation.

The possibility of error should be seen as a greater concern in relation to decisions which may result in the irreversible denial of the right to life than it would be in situations where there is no a risk of loss of life. Particularly in circumstances where a person is fleeing and poses no direct and immediate danger to anyone, the standard of '*believes on reasonable ground*' on its own does not adequately engage with the risk of error.

The standard of 'believes on reasonable grounds' is a standard that is regarded as an acceptable standard for the purposes of a wide range of administrative decisions. However there is no positive administrative decision, apart from the use of lethal force, which can irreversibly result in the denial of the right to life (and thus of all other rights). Decisions regarding the use of lethal force are therefore in a special class which distinguishes them from other administrative decisions made on '*reasonable grounds*'.

Furthermore decision to use lethal force may also be taken by civilians who are not specially trained, while existing provision for training of police, including in-service training, leaves a lot to be desired, particularly because of shortages of resources.

Situations where police and other persons shoot and kill people in error are not uncommon. The wording of section 49 should sensitise potential shooters to this risk and emphasise that their belief needs to be based on particularly firm grounds.

The argument here does not necessarily concern changing the legal basis for evaluating the reasonableness of the beliefs which form the basis of the decision to use lethal force, but that, if legislation is to be revised, it should contain wording which at least alerts the arrestor to the risk of error, and emphasises the need to for the arrestor to take exceptional care when acting in such situations.[15] Examples of such wording would be that

> The arrestor, on the basis of direct knowledge or other firm and clearly justified grounds, reasonable believes …

Arguably this should focus specifically on situations where the arrestor is shooting at a fleeing person and therefore, if there is to be new legislation, it may be preferable that it deals with these situations separately from situations which amount to situations of self-defence.

It is therefore submitted that, where a fleeing suspect poses no direct or imminent threat to anyone legislation should, at the very least, contain wording which draws attention to the risk of error, and emphasises the need for shootings during the course of arrest to be based on firm grounds.

The Need for the Legislative Framework to be Amended

Subject to the forthcoming judgment of the Constitutional Court in S v Walters we believe that the current legal framework as outlined above represents a preferable position to that contained in Section 7 of the Judicial Matters Second Amendment Act except that

> (a) The law should preferably distinguish situations of 'resistance to arrest' where there may be a danger to the arrestor, from 'pure flight' where there is no imminent danger to the arrestor or other person and the immediate purpose of the shooting is to prevent the suspect from getting away; and
> (b) Highlight the risk of error by emphasising that belief must be on firm grounds particularly in relation to the latter situation;

There may therefore be value in further amending the law to give expression to these concerns. Following the Canadian Criminal Code in Annexure C, Annexure D puts forward possible wording for a legislative provision which gives expression to the principles outlined in this document. This is supplemented by explanatory notes which are to be found in Annexure E.

It is suggested that the proposal is a realistic one considering the constraints of the South African context

Annexure A: Proposed Section 49 of the Criminal Procedure Act as per section 7 of the Judicial Matters Second Amendement Act, 122 of 1998

If an 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 B: International Association of Chiefs of Police (IACP) Model Policy on the Use of Force

Model Policy:
Use of Force

Effective Date:
August 2001

Reevaluation Date:
August 2002

I. Purpose

The purpose of this policy is to provide law enforcement officers of this agency with guidelines for the use of deadly and non-deadly force.

II. Policy

It is the policy of this law enforcement agency that officer use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and others. It must be stressed that the use of force is not left to the unfettered discretion of the involved officer. This is not a subjective determination. The use of force must be objectively reasonable. The officer must only use that force which a reasonably prudent officer would use under the same or similar circumstances.

III. Definitions

- ***Deadly Force:*** Any use of force that is reasonably likely to cause death.
- ***Non-deadly Force:*** Any use of force other than that which is considered deadly force. This includes any physical effort used to control or restrain another, or to overcome the resistance of another.
- ***Objectively Reasonable:*** This term means that, in determining the necessity for force and the appropriate level of force, officers shall evaluate each situation in light of the known circumstances, including, but not limited to, the seriousness of the crime, the level of threat or resistance presented by the subject, and the level to the community.

IV. Procedures

A. Use of Deadly Force

1. Law enforcement officers are authorized to use deadly force to

c. Protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm; and/or d. To prevent the escape of a fleeing violent felon who the officer has probable cause to believe will pose a significant threat of death or serious physical injury to the officer or others. Where practicable prior to discharge of the firearm, officers shall identify themselves as law enforcement officers and state their intent to shoot.

B. Deadly Force Restrictions

1. Officers may use deadly force to destroy an animal that represents a threat to public safety, or as a humanitarian measure where the animal is seriously injured, when the officer reasonably believes that deadly force can be used without harm to the officer or others.
2. Warning shots may be fired in an officer is authorized to use deadly force and only if the officer reasonably believes a warning shot can be fired safely in light of all circumstances of the encounter.
3. Decisions to discharge a firearm at or from a moving vehicle shall be governed by the use-of-force policy and are prohibited if they present an unreasonable risk to the officer or others.

C. Use of Non-Deadly Force

1. 1. Where deadly force is not authorized, officers may use only that level of force that is objectively reasonable to bring an incident under control.
2. 2. Officers are authorized to use department-approved, non-deadly force techniques and issued equipment to

    a. Protect the officer or others from physical harm;
    b. Restrain or subdue a resistant individual; and/or
    c. Bring an unlawful situation safely and effectively under control.

D. Training

In addition to training required for firearms qualification, officers shall receive agency-authorized training designed to simulate actual shooting situations and conditions and, as otherwise necessary, to enhance officers' discretion and judgement in using deadly and non-deadly force in accordance with this policy.

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Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact

of varied agency resource capabilities, among other factors.

Annexure C: Section 25 of the Canadian Criminal Code

25 (1) Every one who is required or authorised by law to do anything in the administration or enforcement of the law

(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorised to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorised by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

(5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the Corrections and Conditional Release Act, if

(a) the peace officer believes on reasonable grounds that any of the inmates

of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and

(b) the escape cannot be prevented by reasonable means in a less violent manner.

Annexure D: Possible Framework for Law on the Use of Lethal Force for Arrest [Note A, Note B]

(1) For the purposes of this section- **[Note C]**

(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) In all circumstances where force is used which threatens death, disability or grievous bodily harm this must be the minimum force which is reasonable in the circumstances.

(3) Subject to subsection 4, if an arrestor attempts to arrest a suspect and the suspect resists the arrest, the arrestor will only be justified in using force that is likely to cause death, disability or grievous bodily harm if s/he **[Note D]** believes on reasonable grounds that it is immediately necessary for the purposes of protecting the arrestor or any other person from death, grievous bodily harm or a serious violation of bodily integrity **[Note E, F, G]**.

(4) Any person authorised under this Act to arrest or to assist in arresting a suspect is justified in using force that is likely to cause death or grievous bodily harm to a person to be arrested **[Note H, I]**, if
(a) The arrestor is proceeding lawfully to arrest the suspect, and
(b) The suspect takes flight to avoid arrest, and
(c) The flight cannot be prevented by reasonable means in a less violent manner **[Note J]**, and
(d) The arrestor, on the basis of direct knowledge or other firm and clearly justified grounds, reasonable believes that the suspect has committed a crime which involves the infliction or threatened infliction of death or grievous bodily harm or serious violation of bodily integrity **[Note K, L]**. (**References to Note A, B etc in square brackets are references to explanatory points in Annexure E**).

Annexure E: Explanatory Notes Regarding Annexure D

A. The provision combines aspects of:

- Section 7 of the Judicial Matters Amendment Act (see Annexure A);
- Section 25 of the Canadian Criminal Code (see Annexure C)
- The Govender judgment (and the relevant aspects of Tennessee v Garner which this is based on); and takes into account the possibility of error as raised in the Makwanyane judgement as well as concerns raised in various heads of argument including those of the 1st and 2nd Intervening Party.

B. It may be preferable to develop a legal framework which regulates the use of lethal force both in relation to private defence and for arrest as is done in section 25 of the

Canadian Criminal Code. An earlier version of this proposed wording was constructed as an overall law regulating the use of lethal force both for arrest and for private defence. However this version is merely a law on the use of force for arrest and does not deal with private defence issues outside arrest situations.

C. Section 1 is derived from Section 7 of the Judicial Matters Second Amendment Act. Words in square brackets which are crossed out are deleted from the original.

D. The approach here is from the Canadian Criminal Code which treats the law relating to use of lethal force against a fleeing person (referred to in 4) as an 'exception' to the general provisions relating to private defence. However here section 4 is an exception to the provision relating to self defence during arrest which is contained in section 3.

E. The words 'on reasonable grounds' would be deleted from section 3 if the reasoning followed by Burchell and Du Plessis (see pages 14 – 16 dealing with the standard of belief) is applied. However while this approach is appropriate to the law regarding private defence it is not appropriate to a legislative provision related tot the exercise of powers of arrest and the use of force therein.

F. The words 'death or grievous bodily harm' are the same as used in the Judicial Matters Second Amendment Act at 2(a) and (b) and 'grievous bodily harm' is also used in 2(c). Some may prefer the words 'serious bodily harm' in that they are less legalistic.

G. However the words 'serious violation of bodily integrity' are an addition which are intended to make it explicit that the types of offences referred to include rape and attempted rape (including male rape) even where this does not involve the infliction or threatened infliction of serious bodily harm (the Govender, Tennessee v Garner test). (see point 5(c) on page 11).

H. As indicated at Note D the approach followed here follows that in the Canadian Criminal Code. This sub-section is therefore intended to deal with the use of lethal force in arrest situations where, unlike the situation outlined in sub-section (3), the justification for the use of force has nothing to do with immediate private defence.

I. However this section is different from the Canadian Criminal Code in that the provisions relating to lethal force in 'pure arrest' situations apply only to 'peace officers in Canada'. The issue has not been debated in South Africa but presumably the justification for retaining a civilian right to use lethal force for purposes of arrest would relate to (a) the shortcomings of the exsiting law enforement mechanisms in upholding the law (b) the high levels of crime, and (c) and the fact that, considering for example, levels of training and literacy in the police service higher levels of 'professionalism' cannot necessarily be expected from the police than can be expected from other persons. However it is submitted that as a result of this factor, and the general high potential for error in situations of the use of lethal force, the law should make explicit that a standard of belief which is higher than an ordinary 'reasonably belief' is called for.

J. Subsections 4(a),(b) and (c) are the same as subsections 25(4)(a), (c) and (e) of the Canadian Criminal Code except that the words arrestor are substituted for 'peace officer' and 'suspect' substituted for 'person to be arrested'.

K. The phrase 'on the basis of direct knowledge or other firm and clearly justified grounds, reasonable believes' is intended to indicate that this is essentially the 'believes

on reasonable grounds test' but to emphasise to persons acting in terms of this provision that there is a high risk of error and to emphasise the need for particular care when acting under it.

L. The wording 'that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm or serious violation of bodily integrity' builds on the test put forward in the Govender case (which is derived from Tennessee v Garner) with the words 'or serious violation of bodily integrity' inserted. As indicated in note G this is intended to clarify that the offences referred to include rape and attempted rape even where this does not involve the infliction or threatened infliction of serious bodily harm.

M. While this is not motivated for in this memorandum, if there was a desire to bring the Govender test closer to the 'future danger principle' the following words could be inserted following 4(d): - 'and

> (e) The arrestor does not believe that the person is unlikely to commit further acts of serious violence or serious violations of bodily integrity; and
> (f) The arrestor does not believe that the person is likely to be arrested by less drastic means at some future point in time prior to committing further acts of this kind.'

The wording, including the use of the word believes (i.e. a 'psychological test of fault') would therefore meet the concerns set out in the memorandum above (SEE PAGES XXXX) in not placing an onerous burden of proof on the arrestor in demonstrating the strengths of his or her belief relating to the risk of future danger. However the 'normative' test is still retained in section 4(d). However this approach is overall not favoured in the memorandum because of the level of complexity which it would impose on the law.

Notes:

[1] This memorandum has been compiled by David Bruce, a senior researcher at the Centre for the Study of Violence and Reconciliation. Acknowledgements to Piers Pigou, Amanda Dissel and Gareth Newham for comments on earlier drafts.

[2] The issue of police safety is discussed in more detail in affidavits submitted by R D Bruce on behalf of the Centre for the Study of Violence and Reconciliation in the case of S v Walters which was heard before the Constitutional Court on 16 November 2001. The affidavits can be found at:
http://www.concourt.gov.za/courtrecords/2001/walterscr.shtml

[3] This would mean that the Transkei High Court was wrong in rejecting the Supreme Court of Appeal judgment in Govender.

[4] This follows the approach taken by the US Supreme Court in its 1985 judgment in the case of Tennessee v Garner which states, inter alia, that 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious bodily harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given'.

[5] This would mean that the Transkei High Court was correct in declaring Section 49(2) to be unconstitutional so that Section 49(2) may be regarded as having been invalid since the Bill of Rights came into effect on April 27 1994.

[6] It should be noted that in cases where section 49 is raised as a defence the court case would follow the following sequence. In a criminal case the state would first have to prove beyond a reasonable doubt that the accused has intentionally or negligently killed or intentionally injured someone. The accused person would then carry the burden, on a balance of probabilities, of proving that he or she conformed to the criteria set down in section 49. Similarly in a civil action, the case against the accused would first have to be proved on a balance of probabilities, and the defendant/respondent would then also have to prove on a balance of probabilities that he or she was acting within Section 49. This approach is criticised by Du Plessis in 'The use of force in the furtherance of Justice: Section 49 of the South African Criminal Procedure Act 51 of 1977.' Paper presented at the Technikon South Africa 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, International Conference Centre, Durban, 3-7 December 2001.

[7] It must be emphasised that the motivation in this document is for a position based on that taken in the Govender judgment. This is not a motivation in favour of adoption of the IACP model policy but merely indicates that it is a more succinct formulation of the principles put forward in 1998 amendment. In this regard note may be made of the statement at the end of the IACP policy to the effect that 'law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment … . In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency *resource capabilities*, among other factors. (emphasis added)

[8] Geller, W. & Scott, S. (1992 *Deadly Force: What We Know. A Practitioners Desk Reference on Police-Involved Shootings*. Washington: Police Executive Research Foundation. p. 255.

[9] The wording is to the effect that [where] 'the suspect … flees … an arrestor is justified in terms of this section in using *deadly force that is intended* … to cause death … to a suspect, only if he or she believes on reasonable grounds - that there is a substantial risk that the suspect will cause … future death or grievous bodily harm if the arrest is delayed'.

[10] See Burchell, J 'Deadly force and fugitive justice in the balance: The old and the new face of section 49 of the Criminal Procedure Act' SACJ, 13 (2000). See particularly page 208 under (d) 'Normative' versus 'psycholigical fault'.

[11] Di Plessis, A. 'The use of force in the furtherance of Justice: Section 49 of the South African Criminal Procedure Act 51 of 1977'. Paper presented at the Technikon South Africa 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, International Conference Centre, Durban, 3-7 December 2001.

[12] Note that the error being referred to here is an error as to the facts of the situation. The situation being referred to here is not one where the arrestor misunderstands the law.

[13] Though the person who has killed would still be likely to be held guilty of culpable homicide.

[14] Both of these tests relate to subjective beliefs. However the 'normative fault' test is a 'semi- objective subjective test' which relates to what the reasonable person would have believed while 'psychological fault' is a purely subjective test which depends on the accused being able to persuade the court about his or her bona fide and genuine beliefs at the time.

[15] Alternatively it may be argued that a higher standard of believe should be inserted into the legislation such as direct knowledge or verified information.