A Duty to Answer Questions?
The Police, the Independent Complaints Directorate and the Right to Remain Silent

by

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Abstract

One of the obstacles which the Independent Complaints Directorate ("ICD") has experienced in the performance of its functions, has been the refusal of SAPS members whose actions are the subject of investigation, to answer questions put to them by ICD investigators. This has been a particular obstacle in the investigation of deaths as a result of police action, and deaths in police custody, where there are frequently no non-police witnesses and potentially no witnesses other than the police officers whose actions are the subject of investigation. In considering policy options, this paper focuses on police accountability in the context of police powers. Mechanisms to compel police co-operation in internal investigations, and with the ICD in its investigations are considered within the context of the current Constitutional framework. Amendments to the Police Act which would set out the circumstances in which police officers might be obliged to answer questions in both ICD and internal SAPS proceedings.

I Introduction

The Independent Complaints Directorate (ICD) is an independent body established in terms of section 50 of the South African Police Service Act 68 of 1995 ('the Police Act').[1] Section 53(2) of the Police Act empowers the ICD to investigate:

(a) any misconduct or offence allegedly committed by a member;
(b) any death in police custody or as a result of police action; and
(c) any matter referred to it by the Minister or a provincial executive.

The ICD may investigate matters "*mero motu* [on its own initiative] or upon receipt of a complaint". An analysis of the constitutional and statutory provisions relating to the ICD

suggests that the main function of the ICD is to ensure that investigations relating to possible offences and misconduct committed by members of the South African Police Service (SAPS) are carried out effectively and efficiently.[2] Thus the ICD may carry out investigations itself or perform an oversight role, taking steps to ensure that police investigations of members are carried out properly, including supervising or monitoring such investigations. However while sections 53(2)(a) and (c) provide the ICD with a discretion in selecting which cases to investigate, in terms of section 53(2)(b) it is mandatory that the ICD itself investigate all police custody and police action deaths.

The ICD's role therefore primarily concerns the investigation, supervision and monitoring of cases where the actions or alleged actions of SAPS members are the subject of investigation. Questions have been raised as to whether the ICD has been provided with sufficient powers in order to carry out this role effectively. One area which has received particular attention is the fac that the ICD only has the power to make recommendations to the SAPS, Attorney-General or Minister of Safety and Security but has no power to ensure, for instance, that action, such as the instituting of disciplinary charges, is actually taken against SAPS members, where it believes this is appropriate.[3]

Even in terms of exercising its investigative powers the ICD has encountered certain obstacles in the performance of its functions. Sometimes these have related to the failure of SAPS members to co-operate with its investigations despite the fact that, in terms of section 53(6)(d) of the Police Act, the Executive Director of the ICD is empowered to 'request and obtain the co-operation of any member as may be necessary to achieve the object of the directorate'. Particular difficulties have arisen when police officers who are the subject of investigation ('subject officers')[4] have refused to answer questions put to them by ICD investigators, often attempting to invoke a right to silence.

It is notably in relation to the obligation to investigate police custody and action deaths that the refusal of members of the SAPS to answer questions provides particular grounds for concern. It is a feature of the circumstances in which these deaths occur that frequently the only witnesses, if any, are members of the police service themselves. Often these members will be the very members who have been involved in the fatal shooting of a person. Considering the serious nature and consequences of police actions of this kind it would appear reasonable to argue that police members should be fully accountable in relation to them. If members of the SAPS have access to a right to remain silent in such circumstances the implication is that members of the SAPS can kill people without being required to give any explanation for it. Furthermore, if the SAPS members involved in the fatal incident are the only witnesses to it and choose to remain silent the ICD may be unable to carry out a satisfactory investigation of the death.

Members of the SAPS are public servants who exercise powers not available to ordinary members of the public, including powers to use force and arrest. In general therefore it appears reasonable to require that the police be fully accountable for their actions, particularly if these are performed in the course of their duties. This would appear to imply that members of the SAPS should be regarded as having a duty to answer questions during an ICD or internal disciplinary investigation or inquiry, particularly in instances in which death or serious injury arises. However any duty of accountability which is placed on SAPS members must also accord with the provisions of the Constitution.

In the case of Magmoed v Janse van Rensburg[5] Corbett JA stated that:

> Lwane's case made it clear that the rationale underlying the privilege against self-incrimination is the encouragement of persons to come forward to give evidence in courts of justice by protecting them as far as possible from injury or needless annoyance in consequence of doing so (see at 438G and also 444E). While this reason is pertinent in the case of the ordinary citizen, it is less appropriate in the case of a police officer who is obliged by virtue of his office to give evidence concerning matters arising from the execution of his police duties, particularly where the incriminating questions relate to the propriety and/or lawfulness of the manner in which he performed those duties. Of course, if he refuses to answer the questions, the court must perforce uphold his privilege to do so. But in the event of his answering such questions (not having been cautioned) there is less reason in his case than in other cases to exclude the evidence. Moreover, the propriety of police conduct is a matter of public concern, and public policy requires that such conduct should, as far as possible, be open to scrutiny in the courts. This factor, where applicable, also tends to countervail the rationale for excluding self-incriminating evidence. These considerations lead to the conclusion that, contrary to the view of the trial Judge, there were sound reasons for holding the evidence in question to be admissible; and that it serves the due administration of justice to do so.

There is therefore support in our own case law for applying different standards to members of the SAPS in relation to questions of the admissibility of statements made by them. However the question which the report aims to address is not merely whether statements made by SAPS members should be admitted in court in the absence of their having been cautioned but whether SAPS members should be regarded as having a specific duty to answer questions put to them by ICD investigators who are investigating incidents in which they were involved even where the answers to such questions may be of an self-incriminating nature. Effectively the paper aims to evaluate whether it is appropriate for SAPS members to have recourse to the right to remain silent when they are subject to investigation by the ICD. Potentially the questions at issue are also of relevance to whether SAPS members should be understood to have to a duty to answer questions in relation to internal investigations and disciplinary hearings. The paper looks at potential mechanisms which may be put in place to compel SAPS members to answer questions as well as examples of foreign jurisdictions where police members may be compelled to answer questions. In our conclusion we suggest a way forward on the issue. We also locate the questions raised within broader debates about mechanisms intended to assist in addressing the problem of police misconduct, police support for Human Rights, and the problem of the "culture of silence' within police services.

II The legal position

(a) ICD investigations

(i) Nature of ICD investigations

In terms of section 53(6) of the Police Act the Executive Director of the ICD may 'submit

the results of an investigation to the attorney-general for his or her decision' ((53(6)(f)), 'make recommendations to the [SAPS] Commissioner concerned' (53(6)(i)) and "make any recommendation to the Minister or a member of the Executive Council which he or she deems necessary regarding any matter investigated by the directorate …' (53(6)(j)).

Section 40 of Police Act provides that disciplinary proceedings may be instituted against members of the police service accused of misconduct.[6] Derived from the conclusion that that the ICD's role primarily relates to the investigation of alleged offences and misconduct by members of the SAPS is the inference that the power to make recommendations to the relevant SAPS Commissioner in part relates to the potential that the ICD may wish to recommend disciplinary action against specific SAPS members. ICD investigations may therefore lead to a case being submitted to the Attorney General in relation to possible criminal charges or to a recommendation for disciplinary action.

Investigations into custody and action deaths may also generate evidence that is relevant to a subsequent inquest.[7] Furthermore as has been argued 'the making of recommendations aimed at dealing with the causes of misconduct has far greater potential as a means of reforming police conduct than does the mere taking of action against individual offenders'.[8] Even if it is accepted that the ICD's role primarily concerns the investigation of alleged police offences and misconduct it may therefore be the case that the ICD may make recommendations relating to for instance "training programmes and the implementation of policies aimed at curbing police misconduct".[9]

While deaths in police custody or as a result of police action, and complaints concerning the conduct of a member of the police service, are primarily investigated to determine whether there exists sufficient evidence of police misconduct, the outcome of ICD investigations is not limited to these types of findings. ICD investigations may lead either to criminal prosecution and/or internal police disciplinary proceedings and/or an inquest and/or the making of recommendations relating to procedures within the police service or ministerial policies.

An ordinary ICD investigation may therefore have consequences which are both criminal and disciplinary in nature although this may not be determinable at the initial stages of the investigation. When findings or recommendations are handed over to the relevant Police Commissioner, with disciplinary action proposed, the ICD's investigation may be indistinguishable from an internal police investigation. However ICD investigations may also be precursors to criminal prosecution. Due to this fact members of the SAPS who are the subject of investigation should have at least the same rights as would any other person in the course of a criminal investigation and possible trial, unless there are compelling arguments to the contrary.

As has been noted the investigation of police custody and action deaths are not necessarily related to any allegation or suspicion of criminality. The ICD investigation in such a case may primarily serve to confirm that the actions of the police members involved have been lawful. In this respect, rather than being linked to any subsequent process such as a disciplinary hearing, criminal trial or inquest, the ICD investigation may be understood as primarily concerned with ensuring accountability of members of the police service for their actions and the exercise of their powers. However in so far as the investigation is concerned

to ensure accountability this purpose will be defeated if members of the SAPS do not answer questions put to them relating to the incident.

If members of the ICD make use of any 'police' powers to investigate an offence, to arrest suspects, and hand over findings to the office of the Director of Public Prosecutions, the ICD investigation has elements of an ordinary criminal investigation. It would therefore appear that ICD investigations are comparable to criminal investigations but more diverse in their nature. Classification of such investigations may however ultimately be a mere formalistic exercise.[10] Ultimately what matters is not the nature of these investigations but the powers of the ICD in relation to the special powers that are held by members of the police service, and how the exercise of these various powers impact on the constitutional rights of subject officers and other persons.[11]

(ii) The powers of the ICD to obtain co-operation

Provisions of Section 53(6) permit the Executive Director of the ICD 'to request and obtain information from any Police Commissioner or police official as may be necessary for conducting any investigation' (53(6)(b)) and, as indicated to 'request and obtain the co-operation of any member' as may be necessary to achieve the objectives of the directorate. (53(6)(d)).[12]

In terms of the 'traditional' approach to statutory interpretation, if there was a duty to co-operate, an explicit statutory provision to this effect would have been expected. The power of the Executive Director to 'request and obtain the co-operation of any member' is therefore open to the interpretation that the Executive Director of the ICD is merely competent to get the co-operation of members, but that there is no obligation on police members to co-operate.

However, whether a duty to co-operate may be derived from the Police Act or not, what appears absent is an effective sanction to ensure that members comply with this duty. A member's refusal to co-operate with the ICD may constitute misconduct which may result in the ICD recommending disciplinary action against the recalcitrant member to the relevant police Commissioner. The 'threat' of recommending disciplinary action, is however too remote to assist the ICD in compelling co-operation in that the ICD cannot compel the police service to institute such internal disciplinary proceedings against a member.

It may also be debated whether section 47(1) of the Police Act possibly provides the ICD with such a power. This provision requires that 'a member shall obey any order or instruction given to him or her by a superior or 'a person competent to do so' and may be open to an interpretation that the ICD or its investigators constitute 'a person competent' as envisaged by the Act. The fact that the Police Act stipulates that the ICD functions independently of the police service would suggest that members of the ICD are not the 'superiors' of members of the police service though they may arguably be persons 'competent to do so'. If this interpretation were to be relied upon, it would entitle the ICD to 'order or instruct', as does a superior officer. However, a definitive answer in this respect turns on the interpretation of the Police Act. There would appear to be compelling reasons for clarifying the scope of these provisions through legislative amendment.

Section 53(3)(a) of the Police Act does provide that the Minister, upon the request of the Executive Director of the ICD, may permit members of the ICD to 'exercise those powers and perform those duties conferred on or assigned to any member' of the Service in terms of the Police Act or other law.[13] Members of the ICD may therefore be accorded the same powers as ordinary members of the police service during the course of their investigations. This provision is however not specific in detailing what these powers are and whether these powers include the power of a superior officer to give instructions which must be obeyed in terms of section 47(1) of the Act. Nor does the provision specify any consequences for those obstructing ICD members in exercising such powers.

The issue of "co-operation" by SAPS members with the ICD is a broader issue than that of the issue of the duty of subject officers to answer questions and does not necessarily raise potential issues of conflicts with Constitutional principles. There appears to be no real statutory mechanism currently in place which expressly enables the ICD to compel cooperation from members of the police service or other government institutions. Irrespective of the conclusions which we reach on issues concerning a possible duty of members of the SAPS to answer questions put to them by ICD investigators it is therefore recommended that the ICD be provided with the necessary powers to compel police co-operation in its investigations. The absence of such a provision clearly limits the capacity of the ICD to perform its functions effectively.

(b) SAPS internal disciplinary and other inquiries

(a) Internal disciplinary inquiries

Can SAPS members be compelled to answer questions in internal disciplinary enquiries? May there be any negative consequences for them if they refuse to answer such questions?

An internal disciplinary inquiry is a form of professional, as opposed to public accountability. Such proceedings are administrative in nature and the fairness of such proceedings must be determined with reference to the constitutional right to just administrative action[14] and the Labour Relations Act.

The prevailing practice of the SAPS appears to be not to require a subject officer to co-operate during an internal investigation or subsequent disciplinary hearing. According to an internal SAPS document for instance,

> The Discipline Regulations provide in regulation 11(3)(b) that the accepted rules of privilege will apply during all disciplinary proceedings. This means that a member cannot be compelled to give self-incriminating evidence at a disciplinary hearing. If a member therefore decides not to give evidence at a disciplinary hearing because he/she might incriminate him or herself for the purpose of the criminal hearing, the refusal is of his or her own free choice and not because he or she has been compelled to do so. Even if the employee testifies during the disciplinary hearing, he or she can still refuse to give self-incriminating evidence, and this cannot be held against the employee because he or she is exercising a fundamental right.[15]

The understanding within the SAPS would therefore appear to be that a member may choose to remain silent in a disciplinary enquiry or to refuse to answer specific questions on the basis that he or she may incriminate him or herself in later criminal proceedings. Particularly because the standard of proof in disciplinary hearings is on a balance of probabilities, an accused member at a disciplinary hearing may therefore disadvantage him or herself by remaining silent and therefore failing to present an alternative version of events to that which is presented to the enquiry. While in a case where a member is silent or refuses to answer specific questions a finding may therefore be made against the member, the specific fact that he or she has chosen to remain silent cannot be held against him or her.

This approach would appear to be consistent for instance with the judgment in *Davis v Tip NO and Others*[16] which dealt with a case where a disciplinary enquiry was held relating to the same circumstances being investigated by the police for the purpose of criminal charges. The employee alleged that his right to remain silent during his criminal trial would be violated if the inquiry proceeded. The court held that, while there was no compulsion on the employee to disclose information at the disciplinary hearing, he still had a choice as to whether to testify at the disciplinary proceeding or not. If he lost his employment as a result of failing to testify at the disciplinary hearing, and therefore failed to contest evidence given against him, this was a result of his own choice not to testify. The potential that he might face a criminal trial at a later point could not be used by him to protect himself against facing a disciplinary hearing.

Beyond this however it would appear that regulation 113(b)[17] (referred to in the SAPS document) relating to the rules of privilege is not required or implied by the Constitution which merely implies that self-incriminating evidence obtained under compulsion cannot be admitted for the purpose of a criminal prosecution.[18] The Constitutional Court for instance held in *Bernstein v Bester NO*,[19] that evidence obtained under compulsion may be used in subsequent civil proceedings against a person. It is unlikely that the rights of an alleged offender in a disciplinary inquiry will be interpreted to provide greater protection than the right to a fair civil trial provided for in section 34 of the Constitution.[20]

Although never confirmed by a court, it would appear that the right to just administrative action[21] does not preclude the use of evidence obtained under compulsion in a disciplinary inquiry. Given the wide powers held by members of the SAPS, it would appear that to compel co-operation by a member in an investigation and subsequent disciplinary inquiry, even to the extent of answering potentially self-incriminating questions would not be unreasonable or contrary to the provisions of the Constitution. In this respect therefore the disciplinary regulations may be unnecessarily liberal and limit the potential for the SAPS to require accountability of its members.[22] An alternative, and apparently preferable option would be for members to be required to answer questions in disciplinary proceeding but for such evidence in so far as it is self-incriminating to be regarded as compelled evidence which may not be admitted in criminal proceedings against the member who gave it.[23]

(b) The appointment of special committees of inquiry

Regulation 900[24] details the powers of the National commissioner to to appoint a special committee of inquiry in terms of s34(1) of the Police Act Act. Witnesses are then required

to produce articles relevant to the inquiry and are competent and can be compelled to answer all questions regarding the matter being considered by the inquiry. Failure without good cause to attend, to produce a required article, or to answer questions constitutes an offence. In terms of practise within the SAPS, as is the case with disciplinary enquiries, the right against self incrimination is likely to be regarded as cause for refusing to answer questions in such an inquiry.

(c) The Constitution

The ICD is defined as an 'organ of state'[25] and as such is bound in terms of section 8(1) of the Constitution by all of the provisions of the Bill of Rights. The Bill of Rights provides protection to and in certain instances will limit the protection offered to members of the police force. The Constitution thus sets limits to the approaches or mechanisms which may be considered in relation to the potential to impose an obligation on SAPS members to answer questions.

The implications of three sets of rights will be considered: the fair trial rights; the right to silence; the right to freedom of the person.[26]

(i) The fair trial right against self-incrimination (section 35).

The fair trial rights afford protection to 'accused' persons. Generally, therefore, these rights only apply from the moment a person is formally charged by the state. This means that, in principle, the fair trial rights may not be relied upon by a subject officer in an ICD investigation. However, the fairness of a trial may be jeopardised by conduct prior to the trial. For example, the extraction of incriminating evidence under compulsion during an investigation will violate the right to a fair trial right if the incriminating evidence may be used against the examinee in subsequent criminal proceedings.

Section 35(3)(j) provides that:

Every accused person has the right to a fair trial, which includes the right – not to be compelled to give self-incriminating evidence.

The Constitutional Court has confirmed, in three decisions, the constitutional validity of statutory compulsion to provide evidence – including self-incriminating evidence - in investigative inquiries.[27] A statutory compulsion to co-operate, to provide documents, to speak and even the compulsion to provide self-incriminating evidence, is therefore not problematic. It is any 'links' between the investigation and a criminal trial that may create later difficulties.

In *Ferreira v Levin NO*,[28] the Constitutional Court held that the right to a fair trial (particularly s 35(3)(j)) will be violated when self-incriminating evidence is obtained under compulsion from an examinee in an investigative inquiry and the evidence is then used against that examinee in subsequent criminal proceedings. What was decided in Ferreira v Levin NO, if read together with *Bernstein v Bester NO* is that:

1. Any person may be required to produce any book, paper or document and to answer

any question put to him or her at an investigative examination, notwithstanding that the book, paper or document or the answer to the question might tend to incriminate him or her.

2. No incriminating evidence given pursuant to statutory compulsion may be used against the person who gave the evidence in criminal proceedings against such a person other than when that person stands trial on a charge relating to the administering or taking of an oath or affirmation, or the giving of false evidence, or a failure to provide books, papers or documents, or a failure to answer lawful questions fully and satisfactorily.

The standard manner of avoiding any violation of the right against self-incrimination is to ensure that incriminating evidence obtained in the inquiry may not be used in subsequent criminal proceedings against the examinee. However, the section 35(3)(j) right only precludes incriminating evidence obtained from one person to be used against that same person in subsequent criminal proceedings. Therefore evidence obtained from a person may be used against any other person in subsequent criminal proceedings.

It is only 'incriminating' evidence, or evidence which points to the guilt of the accused, which may not be used in subsequent proceedings against the examinee. But in practice this would amount to all the evidence given by the accused in the inquiry that is 'relevant' for purposes of obtaining a conviction in the criminal proceedings.

Section 35 (3)(j) only precludes evidence directly obtained in the inquiry from a person to be used in subsequent criminal proceedings against the examinee. So-called 'derivative evidence', that is evidence obtained as a result of the disclosures made by the same person during the inquiry, may, in principle, be used in subsequent criminal proceedings against the examinee. In Ferreira v Levin NO,[29] Ackermann J expressed the view that the presiding officer in the subsequent trial is best placed to decide on the admissibility of such derivative evidence. The judge held that the trial judge must ensure a fair trial and must decide whether the admission of derivative evidence would undermine the Constitution's commitment to a fair trial on the facts of the case before him or her.[30]

The Constitutional Court's decision in this regard therefore makes derivative evidence obtained under compulsion (that is whenever an examinee is forced to speak with help of a legal sanction) admissible in principle, unless the admission of the evidence would make the trial unfair. An investigatory mechanism may not therefore be used to build up a case against the examinee, by forcing him/her to speak and disclose information which is then used to find more evidence against such person. It is likely however that such evidence would only be excluded, if there was an intention to undermine the fair trial rights of the accused. In principle therefore, statements given by an examinee to the ICD may be used to gather further evidence against that examinee as long as the mechanism is not used to circumvent the fair trial rights of the examinee.

It is clearly possible therefore in the context of a body such as the ICD which is intended to ensure police accountability, to develop a mechanism which requires the disclosure of information without violating the constitutional protection against self-incrimination contained in the Bill of Rights.[31]

In the following part of this section we suggest that there are grounds for imposing limitations under the limitations clause of the Constitution, on the right to remain silent. It would appear that the type of limitation proposed would not be understood as a limitation on the right against self-incrimination as the latter right has been interpreted thus far by out courts.

(ii) The right to silence

Section 35(1)(a) provides for 'everyone who is arrested for allegedly committing an offence' to remain silent. Section 35(3)(h) protects the accused person's right to remain silent while facing trial.

It may be argued that the constitutional term 'arrest' does not have the same meaning as the term 'arrest' in s 39 of the Criminal Procedure Act 51 of 1977. It is possible to argue that the rights of an arrested person are triggered (including at least the right to remain silent) whenever the criminal investigation focuses on a particular person as a suspect in connection with the commission of a particular offence.[32] In particular, it is hard to avoid the conclusion that any pre-trial compulsion that focuses on suspects (or subject officers) to produce books and answer questions, violates or at least limits the right to remain silent.

The right to remain silent is grounded in the adversarial system where the accused is not obliged to assist the state to prove or disprove his or her guilt. The right to remain silent is essentially a right of a person to refuse to co-operate with the investigators of a criminal offence against him or her. This right, and indeed the adversarial system, will mean little if offenders may generally be compelled to co-operate with investigators before they technically become 'arrested' and 'accused'.

Nevertheless the right to remain silent need not be an obstacle to the adoption of legislation which compels the police to answer questions in ICD investigation. Unlike the right against self-incrimination or the presumption of innocence, the right to silence is frequently limited in open and democratic societies particularly in relation to the holding of hearings (such as in inquisitorial systems on the European continent). The Constitutional Court has said nothing about the right to silence and would not necessarily find a duty to answer questions to be unconstitutional and invalid. The Court may elect to adhere to the approach adopted in cases such as *Nel v Le Roux NO*, in which it was held that the right to silence is only triggered when there is 'an arrested' person or 'an accused' person facing a criminal trial. The accused may then only object to the introduction of incriminating evidence at the trial if the evidence was obtained under compulsion before the trial. This was the approach of the Constitutional Court in Nel v Le Roux NO[33] in which it was stated that:

> … the recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of section 189(1) [of the Criminal Procedure Act] is not, in my view, an 'accused person' for the purposes of the protection afforded by section 25(3) of the Constitution … . The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee.

As indicated ICD investigations may be seen as potentially having multiple purposes and concerns.[34] One approach to this issue would therefore potentially be to provide that during investigations conducted by the ICD subject officers should not be provided with a right to remain silent in so far as the investigation is concerned with a purpose other than potential criminal charges.

An alternative approach may be to recognise that the right to silence is intruded upon if there is a duty to answer questions, but that the limitation is, in the case of ICD investigations, justified under Section 36 of the Constitution - the general limitations clause. The courts would be unlikely therefore to sanction legislation that generally compels persons including those suspected of offences to co-operate with the investigators of crime. An approach which is likely to be more acceptable to the courts is one in which the right to silence is limited for specific purposes and in accordance with specific procedures. This would also be consistent with a view that police possess extraordinary powers and should be accountable for them.

There are compelling reasons for limiting the right to silence in respect of criminal investigations against members of the police. Reasons for limiting the right to silence in certain instances could include the notion that members of the police force need to be held specially accountable for their actions, given the unique powers which they have, and that it would not be in the public interest that they be entitled to invoke the right to silence. Particular difficulties are encountered in relation to ensuring police accountability as police organisations are generally characterised by a 'culture of silence' which is used by members to protect each other against the scrutiny of others. At the same time the police members whose actions are subject to investigation are frequently the only witnesses to the events which are in question. As with the investigation of serious economic offences (under the National Prosecuting Authority Act), the cooperation of witnesses, including suspects is necessary. It may reasonably therefore be argued that there should be a "higher standard of accountability" for police. The right to remain silent of police members should therefore be limited in relation to actions performed in the course of their duties.

If such argument are accepted, it may not only be legitimate to compel police officers to answer questions in so far as the ICD investigation is concerned with a purpose other than potential criminal charges but even to limit the rights of police officers to remain silent in relation to inquiries which are related to potential criminal investigations. As illustrated in the following section one type of mechanism that might be used is provided for in s 28 of the NPAA.[35]

(iii) The right to freedom of the person

Section 12 provides that:

Everyone has the right to freedom and security of the person, which includes the right –
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial …

For these rights to have been breached it has to be decided first whether a person has been deprived of their 'physical' freedom. This is the threshold inquiry under s 12. Physical

freedom may not be deprived without a just cause (substantive aspect) and without a substantial degree of procedural fairness (procedural aspect).

The right not to be deprived of freedom arbitrarily is relevant to questions of the approaches which may be taken to compelling a member of the police service to answer questions. Broadly two possible types of approaches exist in this regard.

The first is to empower the presiding officer at an inquiry to order that a penalty, including possible detention, be imposed on an examinee who refuses to co-operate. This type of approach has been substantially invalidated by the Constitutional Court in *Coetzee v Government of the Republic of South Africa*[36] and partially invalidated by the Court in *De Lange v Smuts NO*.[37] Both decisions were based on the right to freedom. In both the shortcomings were of a procedural nature. In Coetzee v Government of the Republic of South Africa one of the central shortcomings were that no personal notice had to be served on the examinee. Also, the approach placed an onus on the examinee to explain why he or she should not be committed. In De Lange v Smuts NO the Constitutional Court invalidated the approach to the extent that it did not provide for a judicial officer to preside over the hearing in circumstances in which the deprivation of the freedom of the examinee was at stake. While there may be potential for this type of approach to be used if it is accompanied by a high degree of procedural fairness it also has a coercive quality which might be seen to motivate against it being adopted.

The second type of approach is to make the failure to co-operate a criminal or disciplinary offence.[38] Potentially there may be a concern that this type of approach may be less effective than the first partly as the threat of disciplinary or criminal prosecution may appear too remote, for instance in light of the notorious delays in the progress of prosecutions.[39] However in practise, from the Constitutional Court's point of view, this approach has proved to be far less problematical than the first. In so far as it provides for the potential deprivation of freedom as punishment for committing an offence, the recalcitrant examinee is afforded a fair trial before being deprived of his or her physical freedom. In so far as the approach involves possible disciplinary procedure the sanction which may be imposed would not involve incarceration but would be occupationally related including the possible termination of employment.

This effectively addresses any procedural fairness concerns there may be about the approach, restricting challenges to the substantive aspect of the freedom right. In this regard, the Constitutional Court has stated that the statutory compulsion placed on witnesses to provide information for purposes of liquidation inquiries,[40] insolvency proceedings[41] and criminal prosecutions[42] constitute a just cause for the deprivation of freedom. It is likely that the Court would consider the purposes of an investigation by the ICD to be at least as compelling as the purpose of any of these enquiries.

III Current statutory provisions which require the answering of questions.

Two statutory mechanisms currently exist in South Africa which are used to ensure the co-operation of persons, including the answering of questions, in specific circumstances. Both of the mechanisms in question relate to procedures, or the investigation of offences, of a criminal nature.

(a) Mechanism 1: Section 205 of the Criminal Procedure Act

The first mechanism is contained in section 205 of the Criminal Procedure Act (CPA) 51 of the 1977 which allows a judge of the supreme court, a regional court magistrate or a magistrate to call a person who is likely to give material or relevant information (by answering questions or producing any book, paper or document) as to any alleged offence, whether or not it is known by whom the offence was committed, to appear before him or her in order to be questioned by the Attorney-General or a public prosecutor. If the person provides the information required to the satisfaction of the Attorney-General or public prosecutor before the date of appearance, such person does not have to appear.

If in a Section 205 procedure or in criminal proceedings a witness refuses to answer (other than self-incriminating) questions the court is empowered to hold a summary enquiry in terms of section 189. Such enquiries are not trials but they are still judicial proceedings and the witness has the right to a fair opportunity to prepare for the proceedings as well as legal representation.[43] In terms of section 205(3) the witness is not compelled to answer any self-incriminating questions. If the persons does not have a just excuse for refusing to answer he or she may be sentenced to a term of imprisonment.

The constitutionality of this mechanism has already been confirmed by the Constitutional Court in Nel v Le Roux NO.[44] The Constitutional Court held that the Criminal Procedure Act met the requirements of procedural fairness since the persons who are authorised to take evidence at s 205 proceedings are either judges of the High Court or magistrates. The subpoena to attend must be authorised by the Attorney-General. It is acceptable that the proceedings do not have to be public since the section 205 procedure is merely an evidence-gathering mechanism and the examinee is not giving evidence at a criminal trial. In section 205 proceedings the person can only be sentenced to imprisonment if the judge is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order. The caveat of a 'just excuse' builds in the possibility for the examinee to explain a failure to perform. After listing these safeguards, the Constitutional Court held that the section 205 provision complied with the freedom right's standard of procedural fairness.

As it stands section 205 may in any event be used, if necessary, to compel members of the SAPS to provide evidence before an Attorney-General or Prosecutor. Potentially it may be argued that a mechanism similar to section 205 could be incorporated into the Police Act or its regulations, so as to ensure that members of the police force answer questions and co-operate with ICD investigations. However, for such a mechanism to be implemented and accepted by the courts would presumably require that it be combined with appropriate procedural safeguards. Furthermore, as discussed below its major value is in obtaining evidence from reluctant witnesses and it would be of limited use against subject officers.

(b) Mechanism 2: Section 28 of the NPAA

The second mechanism is contained in section 28 of the National Prosecuting Authority, Act 32 of 1998 (NPAA). The NPAA empowers Investigating Directors to hold inquiries in respect of certain specified offences and to summon any person who is believed to be able to furnish any information on the subject of the inquiry or to have in his or her possession

or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified by the summons, to be questioned or to produce that book, document or other object. The *Investigating Director* or a person designated by him or her may then question that person under oath and examine or retain for further examination or for safe custody any book, document or other object. These provisions were originally contained in the Investigation of Serious Economic Offences Act 117 of 1991. They now form part of the NPAA, but they remain substantially the same and are aimed the investigation of serious economic offences.

The Act expressly provides that a person may claim that he/she is not obliged to give evidence in a criminal case in a magistrate's court (claim "privilege"). A person is not entitled however to refuse to answer any question on the ground that the answer would tend to expose him or her to a criminal charge. No evidence regarding any questions and answers obtained by way of this mechanism is admissible in any criminal proceedings (except in specified circumstances). It is an offence in terms of the Act to fail to appear, to fail to answer fully any question lawfully put to him or her, or to give false evidence knowing that evidence to be false or not knowing or not believing it to be true.

(c) Comparison of the two mechanisms

Both mechanisms envisage the deprivation of physical freedom. In terms of section 205 of the CPA, freedom may be deprived immediately by means of a summary trial when an examinee fails to comply with the provision. As we stated at the outset, the procedural guarantees required by the freedom right (s 12) makes the s 205 procedure difficult to incorporate into the Police Service Act.

In terms of section 28 of the NPAA, freedom may be deprived only after the examinee has been convicted of committing the offence of not complying with his or her statutory obligations. An examinee is only guilty of an offence if he or she fails to appear 'without sufficient cause' or fails to answer fully and to the best of his or her ability any question 'lawfully' put to him or her. The Investigating Director may not order the detention of an examinee for failing to comply with his or her obligations under the statute but an ordinary court must convict the examinee. Thus, the examinee is entitled to a trial, including all the section 35(3) safeguards, before he or she may be penalised for not fulfilling his or her obligations under the statute.

Both the mechanisms contained in section 205 of the CPA and section 28 of the NPAA comply with section 35(3)(j) of the Constitution (the right against self-incrimination). In neither case may incriminating evidence, obtained during the inquiry, be used against a *person* in subsequent criminal proceedings. By contrast both section 205 of the CPA and section 28 of the NPAA effectively imposes limitations on the right to remain silent.

Under section 205 of the CPA a witness may not be forced to incriminate him or herself unless the state offers the witness transactional immunity (see section 204) on the condition that the witness answers frankly and honestly all questions put to him or her. In other words, if the witness answers frankly and honestly, the witness may not be prosecuted for any offences he or she admits to if he or she has been given transactional immunity. If the witness does not answer frankly and honestly, he or she sacrifices their transactional immunity, but then obtains a use immunity. In other words the evidence given in the section

205 examination may then not be used against the examinee in subsequent criminal proceedings. If the transactional immunity is not offered the witness may refuse to answer incriminating questions.

By contrast under section 28 of the NPAA, an examinee *may be forced to incriminate him or herself* but no evidence regarding the questions and answers may be used in subsequent criminal proceedings.

In so far as these mechanisms are used to obtain information from examinees who are the suspects in the cases concerned, it can be said that they limit the right to remain silent. Arguably however section 205 is of limited use against examinees who are suspects unless they are offered immunity against prosecution. The primary purpose of section 205 is not to solicit information from suspects themselves, but to obtain evidence from recalcitrant witnesses who refuse to make statements to the police.

In the case of section 28 of the NPAA, the limitation on the right to remain silent is however regarded as justified under section 36 of the Constitution. Firstly no evidence regarding the questions and answers of the examinee in the investigative inquiry may be used against the examinee in any criminal proceedings. Secondly there is a motivation to limit the right which appears "reasonable and justifiable in an open and democratic society". Section 28 only applies to certain specified offences, namely serious economic offences where the state will find it extremely difficult to conduct a proper investigation without the co-operation of witnesses, including possible offenders. Often the state will not be able to obtain the necessary information from sources other than the suspected offenders themselves. Also, if the issues in dispute in these types of criminal cases are not limited, they can become extremely lengthy and costly. The Investigating Director may only extend the inquiry to include other offences when he or she considers it desirable to do so in the interest of the administration of justice or in the public interest. In addition other safeguards apply including the fact that a person appearing may be assisted at his or her examination by an advocate or an attorney.

The mechanism represents a recent attempt by the legislature to comply with the demands of the Constitution while ensuring that an investigation can be properly undertaken and the relevant information obtained. A mechanism similar to s 28 may be incorporated into the Police Service Act. The NPAA provisions are not as complex as those of the CPA and this type of mechanism would be relatively easy to incorporate into the Police Act or its regulations.

IV Experience in foreign jurisdictions

There are a number of foreign jurisdictions where it is accepted that police officers may be compelled to answer questions even of a self-incriminating nature.[45] This applies particularly to internal disciplinary inquiries. In some cases external oversight bodies are also empowered to compel police cooperation of this kind.[46]

(a) Internal disciplinary inquiries

In some jurisdictions where police officers are required to answer questions in relation to

internal investigations the requirement is applied during the investigation of alleged misconduct while in others the requirement is enforced in disciplinary hearings. In Oakland, California witness officers and officers charged with misconduct are required to give truthful statements to the Internal Affairs section.[47] In terms of section 7(5) of the (Australian) Federal Police Act, a member of the Investigation Division may direct a police officer to furnish information, produce a document or other record, or answer any question that is relevant to the investigation of the complaint.[48] The Act expressly states that the police officer may not invoke privilege or claim that disclosure, which may make him/her liable to a penalty or result in self-incrimination, is not in the public interest. In Victoria, Australia the common law right to remain silent is not available for matters involving discipline offences and section 86Q(1) of the Police Regulation Act gives the Chief Commissioner (the Inspector or officer of higher rank to whom he has delegated such power) or Deputy Ombudsman power to: 'direct any member of the Force to furnish any relevant information, produce any relevant document or answer any relevant question'.[49] An officer who fails to comply with such a direction is guilty of a further disciplinary offence.

In Canada it appears that a police officer who fails to answer questions which would implicate that constable in respect of a discipline offence would be regarded as guilty of insubordination.[50] In Chicago, the duty to answer questions is based on a duty of obedience (to a superior) rather than a principle of accountability. A superior officer can order a junior to answer questions in a disciplinary inquiry. Failure by an officer to answer questions put to him/her in the course of complaint investigations constitutes the disciplinary offence of disobedience of an order.

There appear to be no jurisdictions where a police officer can be compelled to answer questions and such compelled evidence can subsequently be used in criminal proceedings against the officer. In Chicago proceedings in terms of which a police officer is compelled to answer questions can only be instituted if the investigation has indicated that the accused will not be charged with a crime. In other jurisdictions however the position is that compelled statements cannot be admitted in evidence against the police officer in criminal proceedings without his or her permission.[51] One issue which is recognised a presenting some difficulty is that of "derivate evidence" as

> 'Evidence may be derived from the statements compelled during the discipline investigation, and this derivative evidence may in itself be sufficient to establish the requisite grounds for a criminal charge'.[52]

Another factor which is regarded by some as being of relevance to the need to ensure accountability relates to potential Post Traumatic Stress that may be suffered by police officers who have been involved in shooting or other traumatic incidents.[53] The practise in New York for instance, in terms of which officers are not required to give statements for 48 hours after an alleged misconduct or shooting, may be understood as incorporating concern of this kind into procedures for the investigation of such incidents. The system has been criticized as the time delay enables officers to "homogenize" their statements where a number have been involved in an incident.

(b) Independent oversight mechanisms

As indicated in Victoria, Australia the power of the Chief to require members to answer questions is also accorded to the Deputy Ombudsman. Other oversight mechanisms with the authority to compel police officers to answer questions include the Police Review Commission (PRC) in Berkeley, California. An administrative procedure has been agreed on between the city manager, the police chief and the PRC. An accused officer who refuses to appear for an interview with the PRC is subject to disciplinary action, including termination of employment, for refusing a direct order of the chief.[54]

Since 1953 New York City has had a review board, Civilian Complaint Review Board (CCRB), to investigate complaints by members of the public against police officers. The Police Department is required to co-operate with the CCRB and to provide all relevant records which may be disclosed by law. Police officers called for interviews are required to answer questions and risk disciplinary action against them or dismissal if they refuse. Their compelled testimony may not be used against them in any criminal proceedings.[55]

The Ontario Police Services Act establishes a Special Investigations Unit which is a public agency set up to investigate instances of serious injury or death committed by police officers. Police officers are required to co-operate fully with the Special Investigations Unit and its investigators, but no document prepared as the result of a complaint is admissible in a civil proceeding, although it is admissible at a disciplinary hearing. A 1996 report strongly motivated giving consideration to a duty to answer questions in relation to Special Investigation Unit investigations in Ontario. In this report the view was expressed that it may be appropriate "to clarify and strengthen an officer's duty to account in a regulatory discipline context" and that this would probably best be done by way of regulation rather than legislative amendment. The report stated that in the case of "witness" officers, the privilege against self-incrimination would be protected by use-immunity statements and derivative evidence but that they should be mandated to co-operate and give statements, with disciplinary consequences if they do not.[56]

V Conclusion: accountability, police support for human rights, effective management and the culture of silence.

There are potentially three types of considerations in terms of for the ICD, or the SAPS itself, might wish to create an obligation on the part of members of the police service to answer questions:

- The first motivation concerns police officers who are witnesses or otherwise have information regarding actions which are the subject of investigation who for reasons, other than the potential that they may incriminate themselves, are unwilling to answer questions.
- Secondly, and this has been the primary concern of this paper, police officers may be reluctant to answer questions put to them by ICD investigators, or in a disciplinary investigation or hearing, where their own actions are the subject of the investigation or other proceedings. The answers to the questions may potentially incriminate the police officers concerned as having committed a criminal offence and may also be evidence which would be relevant to disciplinary charge against

them.

- Thirdly there may be motivations for wishing that members of police services answer questions which are not primarily concerned with possible criminal or disciplinary procedures and which related more to other considerations such as accountability, effective performance of the police service and good management.

The three types of considerations are discussed in what follows.

(a) The issue of cooperation by members of the police service with the ICD.

In carrying out its own investigations the ICD serves as a check against police misconduct and can serve to provide independent verification as to the existence or absence of such misconduct. The ICD also performs an oversight function in ensuring that internal police investigations are conducted in an effective and efficient manner. The ICD's role becomes important is ensuring that appropriate steps are taken against members of the police service, whether in the form of prosecution, disciplinary measures or some other form of corrective action.

As indicated the provisions of the Police Act in terms of which the ICD Executive Director may 'request and obtain the cooperation of any member' are of limited impact partly as there are no sanctions attached to non-compliance with these provisions nor mechanisms which enable sanctions to be applied. The issue here primarily concerns members of the SAPS who are not the subject of ICD investigations but who refuse or otherwise fail to cooperate with the ICD in the process of its investigations. While within the SAPS the issue would appear largely to be addressed by the duty of a member to obey the orders of a senior member no clarity exists in relation to the ICD's capacity to compel cooperation.

The powers of the ICD urgently need to be specified with regards to ensuring the cooperation of members of the police service, including the power to obtain answers to questions, in its investigations. A failure by such members to answer questions should presumably be dealt with in terms of sanctions which need to be established in terms of a general duty of cooperation by SAPS members with the ICD.

(b) Subject officers

In relation to subject officers it should firstly be emphasised once again that, in terms of the Constitution it is not necessary that members of the SAPS be provided with the privilege against self-incrimination in internal disciplinary hearings. The risk that they may incriminate themselves in subsequent criminal proceedings may relatively easily be averted by recognising that evidence given in disciplinary proceedings should be regarded as compelled testimony and therefore as inadmissible in criminal proceedings without consent by the accused.

Due to the fact that ICD investigations have potential consequences in the form of criminal proceedings they raise issues of the Constitutional rights of subject officers. Effectively the implications of the Constitution would appear to be as follows:

- The right against self-incrimination would appear to allow that a subject officer may

be compelled to produce documents or article and to answer any question. However incriminating testimony provided by the subject officer may not be used against that examinee in subsequent criminal proceedings.

- In order to hold the police accountable for the exercise of their special powers it is appropriate and not contrary to the provisions of the constitution to compel police officers to answer questions in so far as this does not relate specifically to the institution of criminal charges against them. It may also be argued that it is it is legitimate to limit the right to remain silent in terms of pre-trial proceedings for members of the police service due.
- A failure to comply with an obligation to answer questions may therefore potentially become a criminal or disciplinary offence. The implication of the right to freedom and security of the person is that, in so far as members may be sanctioned for such failure this needs however to comply with standards of procedural fairness particularly in so far as there is a threat of incarceration.

It may therefore be legitimate to establish a mechanism similar to that provided for in section 28 of the NPAA for this purpose. While members of the police service may be provided with a general obligation to answer questions put to them by ICD investigators, is so far as there are potential sanctions for any refusal to answer questions this needs to be in terms of procedures which are procedurally fair. Legislation for instance may therefore specify that SAPS members are under an obligation to answer questions put to them by ICD members which are relevant to investigations which they are conducting. Where SAPS members refuse to answer such questions and it is deemed appropriate to compel them to do so a similar mechanism to that detailed in section 28 of the NPAA could be employed.

Any evidence or statements obtained through such a mechanism would expressly have to be stated to be inadmissible for purposes of any criminal prosecution instituted against a subject officer. There appears to be no reason as to why any such statements could not be admissible in internal disciplinary inquiries.

The effect of such a provision would be to allow the ICD to summon a member of the police force to an inquiry, at which such member would be required to answer questions under oath. Where there appears to be grounds for a criminal prosecution the evidence obtained would be handed over to the prosecuting authority. The prosecuting authority would then decide whether to prosecute (or to proceed with a disciplinary action) and also decide which evidence it is permitted to use.

Where a member refuses to answer questions in such an enquiry it would be necessary that sanctions should be imposed. This however would have to be in terms of a formal procedure which could either be a criminal or disciplinary prosecution. In the event that the disciplinary route is taken it would be appropriate that conviction should result in termination of employment, particularly where the questions relate to matters of a serious nature.

Members of police services have extraordinary powers as well as intimate knowledge of the legal process. In situations where they exercise their powers there may be few other persons present. Particularly where this exercise involves a fatal shooting or other fatal incident the police officers involved may be the only surviving witnesses. However police organisations are known to be characterised by a culture of secrecy which protects members against legal

and disciplinary process.

The measures suggested here may therefore be motivated for on the basis of the special powers which are possessed by members of the police service and the consequent special interest that society has in ensuring that the police be accountable for their actions. Even where evidence cannot be admitted in criminal proceedings it should still be admissible in disciplinary proceedings as this supports the interest of society in having a disciplined and effective police service.

There would therefore appear to be powerful motivation for placing special compulsions on police officers to ensure their accountability. Towards this end it would appear legitimate to limit their access to the right to remain silent. This is done already by Section 28 of the NPAA for the purpose of investigating serious economic offences and an examination of the Constitutional and legal issues and practise in relation to police services in foreign jurisdictions supports the idea that it may be done in relation to investigations by the ICD.

While the argument has merit there are however considerations which can be seen to motivate for this being seen as a potentially problematic approach. In particular difficulties are currently being encountered in building the SAPS into a police service which performs its work according to the standards appropriate for a police service in a democracy. One of the difficulties here concerns winning respect and support for the Bill of Rights from members of the service. In such a context depriving police members of the very rights which are provided to ordinary citizens and which they are supposed to uphold may have problematic implications. Members of the police service might have difficulty recognising the legitimate motivation for a procedure which denies them a right to remain silent while expecting them to uphold it in relation to (suspected) criminals.

While there is an in principle an argument for implementing procedures which limits such rights, there may therefore be problematic implications which result relating to the legitimacy of such measures and in relation to promoting police support for human rights. The issue of implementing an NPAA type procedure should therefore potentially be approached with a degree of caution. However such caution should not be seen to provide any motivation for not subjecting police officers to a duty of full accountability in relation to internal procedures.

Any proposed amendments to the powers and functioning of the ICD, together with the status accorded to statements or answers given by members of the police service to ICD investigators, would therefore need to be properly negotiated and consulted with the relevant role players so as to ensure the legitimacy of any such proposed amendments. If accepted, such amendments would ultimately contribute to the development of a police force which is respected, credible and accountable.

(c) Management practise and the culture of silence

There is a further issue here however which is perhaps more fundamental in its nature. Ultimately what may in many ways discourage accountability and promote the culture of silence within police services is the punitive orientation of measures which are intended to promote proper police conduct.

Particularly in relation to the use of force by the police, both in South Africa and internationally, systems for managing the use of force are in many ways punitive in their orientation being primarily concerned with whether or not uses of force conform to legal standards. More effective approaches to the managing and controlling the use of force by police would be ones which 'make it possible to … discuss the use of force … freed from the threat or fear of punishment'.[57] Rather than focusing on the need to compel police officers to answer questions what is suggested is that mechanisms need to be employed which contribute to the creation of an environment within police agencies where the potential for discussion of these issues is not governed by the CYA ('cover your ass') syndrome or the culture of silence.

But these issues are not necessarily mutually exclusive. It would appear fair and reasonable to impose on police officers a high standard of accountability and to use appropriate mechanisms to do so. However measures should also be explored which, rather than reinforcing the culture of silence, hold out the potential to create space within police organisations where questions can be asked and information exchanged without needing to rely on the threat of sanctions.

Notes:

[1] Section 50(2) provides that the ICD 'shall function independently from the police service.' Regarding the issue of independence debates exist over the location of the ICD. Some believe that the ICD can maintain operational independence as currently located though it is to some extent subject to the Minister of Safety and Security. Others consider that the ICD should be for instance be located under the Minister of Justice or the office of the Deputy Public Prosecutor or have a fuller independence as is the case with the institutions such as the Human Rights Commission provided for in terms of chapter nine of the South African Constitution. See B Manby'The Independent Complaints Directorate: An Opportunity Wasted?' (1996) 12 SAJHR 419, 444; NJ Melville *The Taming of the Blue: Regulating Police Misconduct in South Africa* 1999, 59.

[2] While the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) is no longer in operation it remains relevant to the interpretation of section 53(1)(a). Section 53(1)(a) of the Police Act provides that the principal function of the directorate shall be the achievement of the object contemplated in section 222 of the Constitution. Section 222 of the interim Constitution provides that the object of an envisaged independent complaints mechanism is to ensure that 'complaints in respect of offences and misconduct allegedly committed by members' of the SAPS 'are investigated in an effective and efficient manner'. However the ICD is required in terms of section 53(2)(b) of the Police Act to investigate all deaths in police custody or as a result of police action. The latter investigations are not necessarily linked to complaints. Presumably the motivation for investigating these deaths relates to the fact that they are possible cases of crime or misconduct. (See Centre for the Study of Violence and Reconciliation (1997) Policy Guidelines on the Establishment and Functioning of the Independent Complaints Directorate. Unpublished report.) Furthermore section 53(2)(c) of the Police Act appears wider in its scope providing that the ICD may investigate 'any matter' referred to it by the Minister or the provincial member of the Executive Council. However in its sole reference to the ICD the 1996 Constitution (Act 108 of 1996) states that 'On receipt of a complaint

lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province'. Effectively therefore, while the Minister or provincial executive may refer 'any matter' to the ICD, the ICD may investigate any of these matters but is only obliged to investigate complaints emanating from a provincial executive is so far as they relate to alleged misconduct or offences committed by members of the Service.

[3] See for instance: B Manby (note 2 above) 422-424; NJ Melville (note 2 above) 95-98.

[4] Particularly, as is the case in investigations into deaths in police custody and action deaths, where there is not necessarily any allegation or suspicion of criminality, we regard it as preferable to use the term 'subject officer' as opposed to 'suspect' or 'accused' when referring to the police members whose actions are the subject of investigation.

[5] 1993 (1) SACR 67 (A) 110.

[6] Regulation 2086 (Regulation Gazette No. 5827 of 27 December 1996) provides that a commander, who reasonably suspects that an employee under his or her command has committed serious misconduct, shall immediately initiate an investigation. The commander must ensure that statements are taken from all persons who may reasonably be suspected to be able to give evidence in regard to such misconduct and must take steps to preserve such evidence before handing it over to the disciplinary officer. The evidence is also given to the employee who then has 14 days to make written representations to the disciplinary officer. Regulation 11(d) provides further that 'the accepted rules of privilege will apply during all disciplinary proceedings'.

[7] As a result of the provisions of the Inquest Act 58 of 1959, the police must also investigate deaths, and thus police custody and action deaths, which are not a result of natural causes. The Act provides that where no criminal prosecution is to ensue, a matter must be referred to a magistrate. What is unclear is whether ICD investigations in terms of section 53(2)(b) are intended to substitute police investigations, although in practice it appears that the police force in most cases conducts its own investigation. Serious practical difficulties can arise as a result of this dual investigation process, including for example a duplication of statements.

[8] Melville (note 2 above) 96. Investigations by the ICD may also be characterised as fact-finding to the extent that the findings form part of the report that must be given every year to the Minister of Safety and Security and to Parliament. Section 53(6) suggests that recommendations emanating from investigations may be made to any one of a number of persons and are not necessarily of concern to the Minister.

[9] Ibid.

[10] See Didcott J in *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) at para 121.

[11] In Ferreira v Levin NO, 1996 (1) BCLR 1; 1996 (1) SA 984 (CC) a private liquidation

inquiry, set up in terms of sections 417 and 418 of the Companies Act, was held to violate the right to a fair trial despite the fact that the inquiry clearly did not amount to a criminal investigation.

[12] Section 50(4) of the Police Act provides that all organs of state shall accord such assistance as shall be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the directorate in the exercise and performance of its powers and functions. To this extent government institutions and the officials of such institutions are under a duty to co-operate with the ICD. Section 53(6)(f) particularly provides that the Executive Director may request and obtain information from the Attorney-General's office in so far as that information is necessary for the investigation, but that the Attorney-General may on reasonable grounds refuse to accede to such a request.

[13] Section 53(3).

[14] Section 33 of the Constitution.

[15] P van Vuuren. 'Criminal Proceedings and Disciplinary Inquiries.' Undated Internal SAPS Memorandum. Office of the National Disciplinary Officer.

[16] *Davis v Tip NO and Others* 1996 (1) SA 1152 (WLD). Note that the disciplinary enquiry here was not a police one.

[17] Regulation 2086 (note 6 above)

[18] See for instance *Ferreira v Levin NO* (note 13 abpve). The case is discussed further below.

[19] *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) paras 107-123.

[20] See further note 24 (26?) below.

[21] Section 33 of the Constitution.

[22] It is sometimes said that the common law right against self-incrimination entitles a person to refuse to answer incriminating questions in disciplinary proceedings. But the right to refuse to answer is then meant to protect the examinee against possible criminal consequences and not to protect the examinee against disciplinary action.

[23] See the discussion of Constitutional provisions in part (c) of this section and in particular (c)(i). There appears little question that evidence led in a criminal court may be used in subsequent disciplinary proceedings against a member of the Service. There is no constitutional right against the use of statements made in a criminal court in subsequent civil or internal disciplinary proceedings. The constitutional right merely protects an accused person in a criminal trial against the use of incriminating evidence obtained or given by him or her before the trial. The right against self-incrimination is therefore said to

translate into an 'use immunity'. This 'use immunity' of course becomes irrelevant when the criminal trial is over and the accused has been convicted or acquitted. There is therefore no reason why the evidence given in a criminal trial may not be used against the accused in subsequent civil or disciplinary proceedings. The status of evidence given by witnesses would appear to be similar. Whilst similar restrictions on the admissibility of witness statements could be made in respect of criminal proceedings, there appears to exist no basis for prohibiting such statements or evidence from resulting in disciplinary action taken against such witness.

[24] Regulation 900 (Government Gazete 18099) 4 July 1997.

[25] In terms of section 239 of the constitution any functionary of an institution which exercises a public power or performs a public function in terms of legislation is an organ of state.

[26] We would like to suggest that the arguments provided in this section also address the other right which is of direct relevance to the issues covered in this paper, the right of an arrested person in terms of 35(1)(c) 'not to be compelled to make any confession or admission that could be used in evidence against that person'. Three other sets of rights, the right of access to information (section 32), the right to just administrative action (section 33), the right of access to courts (section 34), may also have a certain, though perhaps more tangential relevance to the issues discussed in this paper. In relation to the first two, a couple of recent Acts may also be of relevance. The Promotion of Access to Information Act, 2 of 2000, is intended to give effect to the right to information provided for in section 32 of the 1996 Constitution. The Promotion of Administrative Justice Act, 3 of 2000, is intended to give effect to the right to just administrative action provided in section 33 of the 1996 Constitution. Section 34 of the constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. One question which arises is whether the information obtained in an ICD investigation may be disclosed to the victims of police misconduct or their relatives who may use it to institute civil proceedings. (Section 53(7) of the Police deals inter alia with the disclosure of information by the ICD.) In *Bernstein v Bester NO* (note 19 above, 107-123) the Court held that there is no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality. It must be noted, however, that *Bernstein v Bester NO* was decided under the interim Constitution, which did not explicitly guarantee the right to a fair civil trial. Despite the provision in the 1996 Constitution, it is unlikely that the courts would arrive at a different conclusion. Given the absence of a provision to the contrary, it would appear that there is currently nothing to prevent the ICD disclosing information obtained during an investigation to persons who may then use the information to institute civil proceedings against examinees. Other than as in this footnote the potential relevance of the latter three sections of the Constitution is not considered here.

[27] *Ferreira v Levin NO* (note 13 above); *Bernstein v Bester NO* (note 19 above); 1996 (2) SA 751 (CC); *Nel v Le Roux NO* 1996 (4) BCLR 592 (CC); 1996 (3) SA 562 (CC).

[28] See the order of the Court in *Ferreira v Levin NO* (note 13 above) para 156.

[29] See *Ferreira v Levin NO* (ibid) para 153. The majority of the Court at para 187 appears to agree with this view of Ackermann J.

[30] *Ferreira v Levin* (ibid) para 153. In *Parbhoo v Getz NO* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) the Constitutional Court invalidated s 415(5) of the Companies Act on exactly the same basis. See also *Wehmeyer v Lane NO* 1994 (2) BCLR 14 (C).

[31] The other key fair trial right concerns the presumption of innocence which appears not to be directly relevant here. Section 35(3)(h) provides that 'Every accused person has the right to a fair trial, which includes the right – to be presumed innocent, to remain silent, and not to testify during the proceedings'. It is difficult to see how the presumption of innocence can be violated in an ICD investigation. The presumption of innocence requires the prosecution to prove all the elements of an offence beyond a reasonable doubt. If a statute permits a conviction despite the existence of a reasonable doubt, the presumption of innocence is breached. Normally, statutory provisions that govern an investigation do not affect the burden of proof in subsequent criminal proceedings.

[32] This was the view taken in *S v Sebejan* 1997 (8) BCLR 1086 (T); 1997(1) SACR 626 (W).

[33] See also the approach of the Cape High Court in *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C). The Court held that s 5 of the Serious Economic Offences Act 117 of 1991 (the predecessor to National Prosecuting Authority Act) did not violate the right to remain silent. At 163 D the Court stated that 'The Constitution therefore deals with the right to silence in a narrow and precise fashion and limits it to arrested persons and to accused persons during plea proceedings and trial. It does not lend itself to a wider general interpretation applicable to investigations and criminal proceedings of arrest and trial.' The Court went on to find that evidence obtained in the inquiry, including derivative evidence, may not be used at a subsequent criminal trial against the examinee.

[34] See section II(a)(i) above.

[35] Act 32 of 1998.

[36] *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC).

[37] *De Lange v Smuts NO* (note 12 above).

[38] Existing mechanisms in South Africa which make use of the latter approach are discussed further in the following section.

[39] See Didcott J in *De Lange v Smuts NO* (ibid) para 121.

[40] *Bernstein v Bester NO* (note 19 above).

[41] *De Lange v Smuts NO* (note 12 above).

[42] *Nel v Le Roux NO* (note 26 above).

[43] JJ Joubert (ed) *Criminal Procedure Handbook* 3 ed, 211, 1998.

[44] *Nel v Le Roux No* (note 26 above).

[45] In one comparative study on the investigation of complaints against the police, seven of the 30 jurisdictions examined had some requirement that police officers answer questions. These seven jurisdictions are: the Australian Federal Police, Queensland, Victoria, Tasmania, Ireland, Berkeley and New York. Anthony Williams 'The Investigation of Complaints against the Police: A Comparative Study' (1996) MSc in Criminal Justice Studies (University of Leicester) 78.

[46] Certain jurisdictions such as Ontario, the Australian Federal Police, and Northern Ireland also provide for informal complaint resolution procedures. All these jurisdictions appear to provide that no statement made during an attempt at informal resolution is admissible in any proceedings against the officer including disciplinary hearing, except with the consent of the person who made the statement. No such informal dispute resolution procedure currently exists either legislatively or otherwise in South Africa in relation to complaints lodged relating to police misconduct.

[47] In *Garrity v New Jersey* 385 US 493 (1967).the US Supreme Court has held that officers who refuse to cooperate with internal investigations can be disciplined or even fired. Cited in DW Perez and WK Muir 'Administrative Review of Alleged Police Brutality', in W Geller and H Toch (Eds) *Police Violence: Understanding and Controlling Police Abuse of Force* (1996) 213, 215.

[48] A direction made under section 7(5) has no effect unless the person giving the direction states that it is given in terms of this section, specifies the substance of the complaint or matter being investigated, if practicable is given in writing with a copy given to the police officer.

[49] A particularly significant judgement on the issue would appear to be that of the Australian High court in *Police Service Board v Morris* (1985), 156 CLR 397, 58 ALR 1(HC).

[50] P Ceyssens *Legal Aspects of Policing* 1996, 5-40.

[51] In the case of *Matt v Larocca* (1987) 71 NY2d 154 a civil servant was dismissed for insubordination for refusing to answer questions at a hearing on misconduct charges. The court held that this dismissal did not violate fundamental fairness or the employee's privilege against self-incrimination even though the employee was not advised that his constitutional right to immunity attached automatically by law or that his answers would not be used in criminal prosecution.

[52] P Ceyssens (note 49 above) 5-46. See the discussion of *Ferreira v Levin NO* (note 13 above) in section II(c)(i) above.

[53] See for instance C Jones Jr. *After the Smoke Clears: Surviving the Police Shooting – an analysis of the Post Officer-Involved Shooting Trauma*, (1981).

[54] Perez & Muir (note 46 above) 217.

[55] Amnesty International *Police Brutality and Excessive Force in the New York City Police Department*. (June 1996), 56.

[56] Mcleod, Roderick M QC 'A report and Recommendations on Amendments to the Police Services Act respecting Civilian Oversight of the Police' November 1996, Toronto, Ontario 30.

[57] C Klockars "A Theory of Excessive Force and Its Control" in W Geller and H Toch (Eds) *Police Violence: Understanding and Controlling Police Abuse of Force* (1996) 1, 19. See also D Bruce 'The management of the use of force in the South African Police Service' (2000). Research report submitted to the Faculty of Management, University of the Witwatersrand.