



THE HISTORY OF THE O'REGAN–PIKOLI COMMISSION OF INQUIRY

10 years' struggle for safer communities

On 6 August 2013, the Minister of Police will ask the Constitutional Court to stop the O'Regan–Pikoli Commission of Inquiry, which is the result of 10 years' continuous struggle by people and organisations in poor and working-class communities.

The mandate of the O'Regan–Pikoli Commission is to investigate allegations of inefficiency at police stations in Khayelitsha, as well as the alleged breakdown in relations between the community and the police. Although the commission focuses on Khayelitsha, the organisations supporting the investigation believe it will have a profound, positive affect on poor and working-class townships and informal settlements throughout the country.



Why is SAPS trying to stop the O'Regan–Pikoli Commission?

In January 2013, Cape Town's High Court dismissed the Minister's appeal for an urgent interdict to stop the O'Regan–Pikoli Commission. Now the matter will be heard at the Constitutional Court, with the hearing set for 6 August 2013. In the end, the only part of the criminal justice system that the Premier has power over is the police. Her decision to institute the O'Regan–Pikoli Commission is in line with the Constitution and addresses an urgent need to improve policing as part of the criminal justice system.

If the O'Regan–Pikoli Commission aims to investigate and improve the criminal justice system in Khayelitsha, why is the Minister of Police working so hard to stop it? Why is the Minister of Police so opposed to the idea of a commission of inquiry that he is willing to spend time and money on a series of expensive, time-consuming court appeals?

Organisations have urged government to improve the delivery of justice, safety, and security in Khayelitsha. These include the Treatment Action Campaign (TAC), the Social Justice Coalition (SJC), Free Gender, Triangle Project, Equal Education, and Ndifuna Ukwazi.

In the history of the call for a commission of inquiry, three elements have remained constant:

- the need to create safer communities through improved infrastructure and education;
- the need to improve policing; and
- the issues affecting the broader criminal justice system.

This document will use affidavits, extracts from court judgements, and excerpts from letters between the government, the police, and the community, as well as reports by SAPS and independent human rights groups, to sketch the history of the O'Regan–Pikoli Commission. It clearly demonstrates the urgent need for the O'Regan–Pikoli Commission to restart as soon as possible and for everyone involved — including SAPS and the Minister of Police — to give their full cooperation. It also demonstrates that after 10 years of activism, SAPS and the Minister of Justice have failed to engage with the organisations. Despite a torrent of communications between the organisations and the government, and between national and provincial government, there are almost no reports of engagement from SAPS or the Minister of Justice to the organisations.

How did it come to this?

Since 1998, TAC has actively campaigned to “ensure that every person living with HIV has access to quality comprehensive prevention and treatment services to live a healthy life” ([tac.org.za/about us](http://tac.org.za/about-us)). Although its focus is on HIV and related health rights, TAC made crime, safety, and security a priority after a series of its members and their families were affected by crime.

The SJC was founded in 2008, and campaigns for improved safety in communities through its *Clean and Safe Sanitation* and *The Justice and Safety for All* campaigns. The SJC also works with other organisations by participating in broader campaigns to combat hate crimes (most notably homophobia and xenophobia), prevent corruption, and protect the supremacy of the Constitution and rule of law.

Equal Education is made up of “learners, parents, teachers, and community members” who campaign “for quality and equality in South African education, through analysis and activism” (Equal Education website). Like the SJC, Equal Education emphasises the importance of inequality and the need to address underlying problems.

Triangle Project is an established LGBTI organization in South Africa, offering a wide range of services, many of which facilitate the work of other LGBTI groups (such as Free Gender) through education and training. It aims to educate, lobby and advocate against harmful stereotypes and behaviours towards LGBTI people. Triangle Project is not based solely in Khayelitsha, but has numerous links with the community. It is not a membership based organisation but offers a number of services. It also helps established ‘safe spaces’ for LGBTI people in Khayelitsha. Triangle has supported and monitored a number of criminal cases in Khayelitsha where LGBTI people have been victims of hate-based attacks – and in many examples have struggled to receive justice.

Ndifuna Ukwazi (which loosely translates to “Dare to Know”) works closely with organisations in Khayelitsha such as the SJC and TAC. NU offers leadership training and as well as legal and research support for its partner organisations. NU also facilitates and helps to promote awareness of, and engagement in, human rights issues by hosting public talks, seminars and lectures around relevant human rights issues.

TAC campaigns for justice for Lorna Mlofana

TAC started campaigning for better policing, safety, and security in townships in 2003, after one of its members, Lorna Mlofana, was raped and murdered. TAC members regularly demonstrated at courts and in communities in Cape Town in order to draw attention to the lack of safety and security in townships.

In 2012, Mandla Majola (*pictured*) submitted an affidavit to the High Court (“Mandla’s affidavit”). He wrote on behalf of the SJC, as a member of the organisation and its campaigns’ coordinator, supporting the need for the O’Regan–Pikoli Commission. Mandla has been an activist since 1999 — starting at TAC and later co-founding the SJC. He guided TAC’s Crime Task Team until 2010 and since January 2011 has worked with SJC’s Criminal Justice Task Team.



Mandla, who was working at TAC when Lorna died, wrote about her murder and TAC’s activism surrounding the case:

“At the age of 21 Lorna Mlofana, a single-mother living openly with HIV, was raped and murdered on 13th December 2003 in Town Two Khayelitsha. She was murdered because she lived openly with HIV. She was a TAC educator and activist.

“TAC and its partner organisations in the Khayelitsha community rallied to campaign for justice for Lorna and her family. The case was to take almost six years to come to some form of completion.” (Mandla’s affidavit, para. 80.)

TAC’s campaign to achieve justice for Lorna and her family became a major struggle and consumed significant human and financial resources.

“TAC and community members struggled for about three years, following up with the police station and investigators and demonstrating at the Magistrates Court about the lack of progress on the case. It was eventually transferred to the Cape High Court, where it was heard by Judge Zondi.” (Mandla’s affidavit, para. 83.8.)

Mandla was one of many people campaigning for justice:

"I organised the campaign in relation to the murder of Lorna Mlofana. In order to keep up with progress on the case, I liaised with the Khayelitsha SAPS, including the detective on the case, as well as the prosecutor....

"In 2004 TAC campaigned around [Lorna's murder] in our e-news letters, statements and memoranda.

- First, we provided support to Lorna Mlofana's family and liaised between SAPS and her family. No victim support was provided for the family.
- We attended every hearing at the Khayelitsha Magistrate's Court where we picketed and observed the proceedings. The number of postponements and the reasons for these postponements should be available from [the police records]." (Mandla's affidavit, para. 82–83.2.)

Around the time of Lorna's case, TAC started to broaden its activism surrounding crime, policing, and gender-based violence after it became aware of other cases:

30 Oct 2004	After a 7-year-old girl is raped, TAC organises a march in Khayelitsha that is attended by 400 people.
20 Nov 2004	After a 4-year-old girl is raped, TAC organises a march in Khayelitsha that is attended by 500 people.
13 Dec 2004	TAC and <i>Médecins Sans Frontières</i> (Doctors Without Borders/MSF) organise a commemoration for Lorna, which is attended by ±1,000 activists. TAC and MSF deliver a memorandum to the Western Cape HIV/AIDS Director and the SAPS cluster commander for Khayelitsha, asking for an additional rape counselling centre in Khayelitsha.

In his affidavit opposing the Commission, Western Cape Provincial Commissioner Anton Lamoer refers to an internal police review that concluded Lorna's case had been properly investigated (The Task Team Report). However, Mandla explains that the community felt differently: "The shortcomings in the investigation and prosecution in this case alone demonstrate the systemic inadequacies in the police services and the broader criminal justice system" (Mandla's affidavit, para. 84–85).

In addition to frequent postponements, which resulted in one of the victims and the State's main witness dying before the case was concluded, the police and the prosecutors failed to communicate with Lorna's family. Eventually, on 27 November 2009, TAC learnt that one of the people convicted of Lorna's murder had successfully appealed against his conviction — but by accident, when someone from TAC saw them in the community. As Mandla explains:

"The failure of the SAPS or the prosecution to inform the victim's family of the appeal and its outcome caused great consternation and contributed to a loss of faith in the criminal justice system and particularly, the police. Personally, I was shattered and came to believe from the experience of Lorna Mlofana's case that the system is broken.

"Every postponement led to disappointment for [Lorna's] family, friends, and comrades ... and added to the tension of the family and friends of the accused. Delays, loss of evidence; failure to conduct proper forensic investigations including timeously photographing of the crime scene, all led to frustration and anger." (Mandla's affidavit, para. 84–85.)

When the accused were sentenced (16 February 2006), TAC issued a statement which said:

"Justice in this case was achieved because of the persistent activism from TAC's Western Cape staff, volunteers, and members. TAC members attended over a dozen court appearances in the last two years. Many of these were postponed causing much frustration. TAC members also assisted the police and prosecutors in every way they could.

"However, most women who experience violence in South Africa, as well as their families and loved ones, are let down by the criminal justice system. As long as it took to achieve justice for Lorna Mlofana's family, it takes much longer for most other cases of this nature. Many murders and rapes are never solved or investigated properly because of the criminal justice system's lack of resources." (Mandla's affidavit, para. 85.)

The SJC: Xenophobia, crime, and violence in the townships

While TAC was campaigning against gender-based violence in May 2008, xenophobic violence broke out across South Africa. As Mandla explains in his affidavit, this “left many immigrants, asylum seekers, refugees, and other people across South Africa dead, injured, or displaced” (para. 7). In response, Gavin, Mandla, and others founded the SJC on 16 June 2008.

Mandla describes how TAC became involved:

“On or about 10 May 2008 xenophobic violence broke out on a large scale against refugees, asylum-seekers, and immigrants in Gauteng. Between May and August 2008, more than 60 people were murdered, scores injured, property stolen or destroyed, and about 50,000 people fled to Mozambique and Zimbabwe while at least another 50,000 were displaced from communities in Gauteng, the Western Cape, the Eastern Cape, and KwaZulu-Natal.” (Mandla’s affidavit, para. 109.)

Gavin Silber, who started working at the TAC in 2008, had also spent much time in TAC’s campaigns to address gender-based violence, particularly in Khayelitsha. In his affidavit to the O’Regan–Pikoli Commission, Gavin wrote:

“On 23 May 2008 the TAC organized a march of more than 5,000 people to Parliament to demand improved policing and criminal justice interventions in Khayelitsha and across South Africa. As the march ended, we began to receive reports that the xenophobic violence that had originated in Johannesburg had spread to Cape Town, and that displaced migrants were arriving at the central train station and Caledon Square Police station. Upon inspection, we found more than 1,000 and 150 people at each location respectively.” (Gavin’s affidavit, para. 28.)

Mandla writes that TAC evacuated 3,000 people to 6 community halls, and that refugees, asylum-seekers, and immigrants (mainly from Somalia and Zimbabwe) did not trust the police:

“A lady approached and told me her Zimbabwean neighbours were hiding in their shack. It was very quiet, we knocked, and there was no reply. We called out for about

ten minutes explaining that we were from TAC and eventually they opened the door. There were three pregnant women and their families hiding in that shack. We escorted them to safety in taxis. Two women gave birth the next day, Saturday 24th May 2008." (Mandla's affidavit, para. 112, 114.)

Although the "joint action between SAPS leadership under Provincial Commissioner Mzwandile Petros and our organisations avoided the worst of the xenophobic violence experienced in other centres because of support at the highest level", "the co-operation with SAPS at the most senior levels did not last long, especially because of a breakdown between the provincial and local government" (Mandla's affidavit, para. 108).

It soon became clear that the different levels of government were unable or unwilling to resolve their differences without pressure from the community, even if this meant that victims of xenophobic violence were left without assistance.

Gavin writes:

"The xenophobic attacks — which eventually led to the displacement of more than 60,000 people in Cape Town — served to illustrate severe problems with policing and safety more generally. The overwhelming majority of those displaced lived in poor and under-developed informal settlements.... The police further failed to prevent the attacks, or stop them once they began to occur....

"We also received reports that some police officers were allowing the attacks to happen, and in some extreme cases were themselves involved in the looting of foreign-owned stores... In the absence of a response from the State, the TAC and other organisations provided relief in the form of legal and material support for a number of weeks following the violence." (Gavin's affidavit, para. 29–31.)

Crime, statistics, and people in the townships

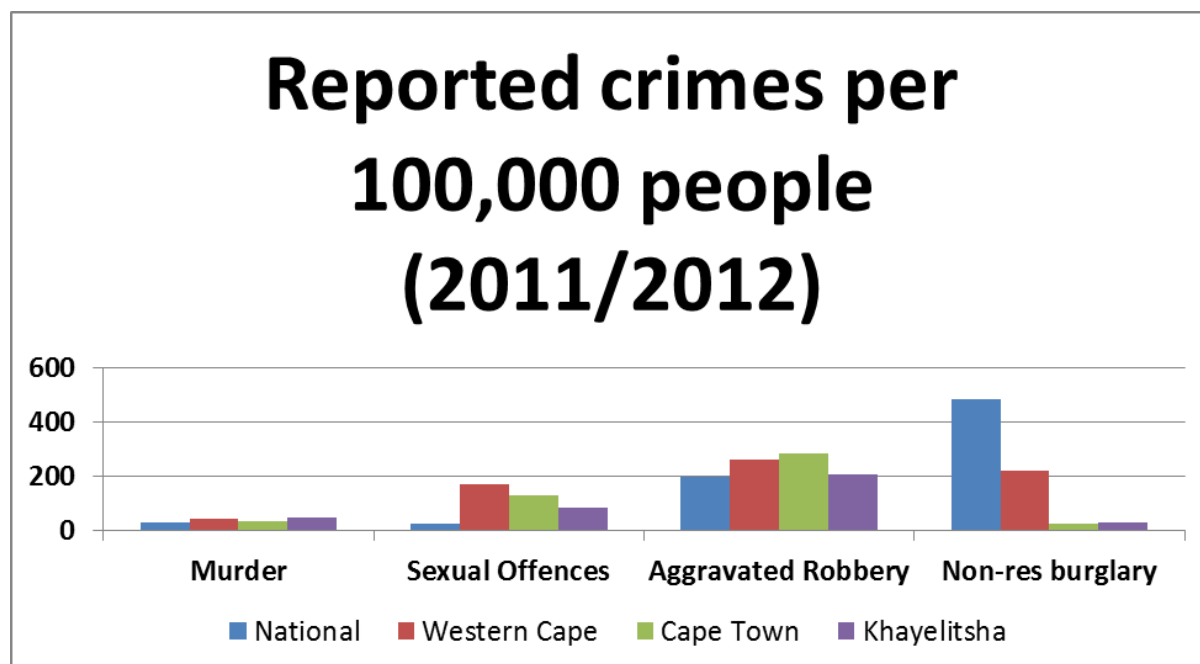
Despite some improvements, South Africa's crime statistics remain high. According to Human Rights Watch, "South Africa has among the highest rates of violence of all kinds in the world" (HRW, pp. 14).

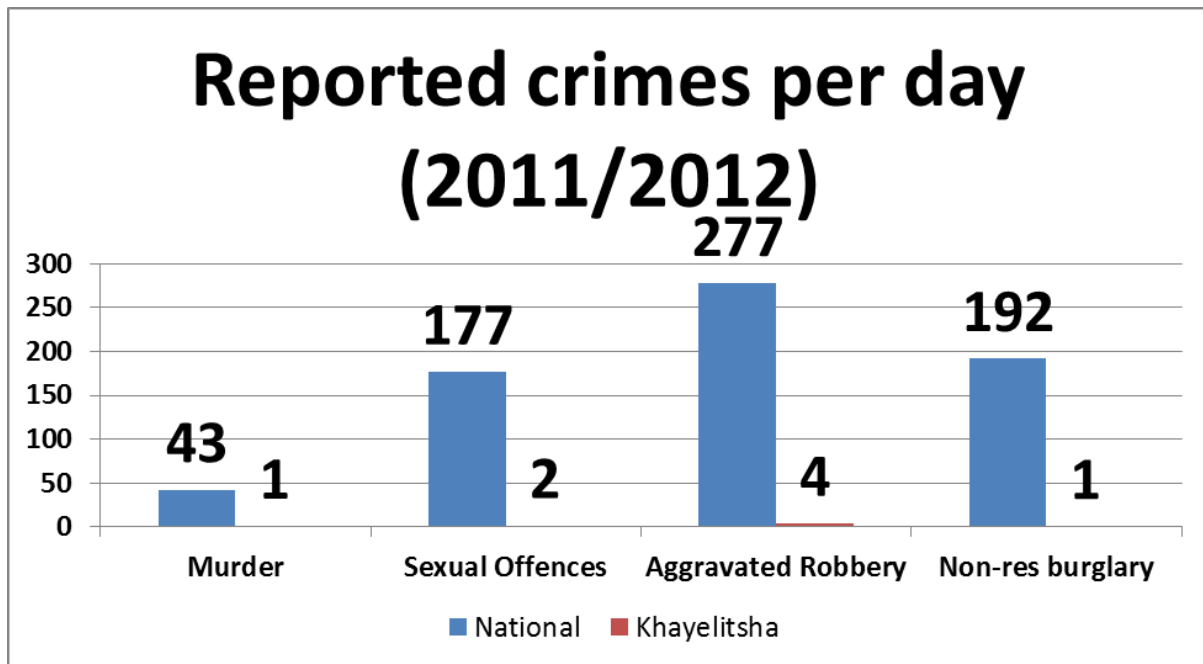
According to a Human Rights Watch report released in 2012:

“Among the countries for which statistics are available, South Africa has among the highest rates of reported sexual violence against women in a country not at war. Some estimates predict that one woman in three in South Africa can expect to be raped at least once in her lifetime, and one in four will face physical assault by her domestic partner.... Children (persons below 18 years of age) are the targets in about half of the cases of sexual violence recorded by the police” (HRW, pp. 18).

One of the problems with South Africa’s crime statistics is that they are not specific enough, and often ignore important aspects of crime. For example, in their overview of the crime statistics for 2011/2012, SAPS claimed that “All people in South Africa are and feel safe” (*Crime Statistics Overview RSA 2011/2012*). They quoted statistics that showed South Africa’s serious crime rate had gone down nationally and in each province.

But if you break these figures down according to different types of crimes and the areas where they occur, a very different picture emerges.





In his affidavit to the O'Regan–Pikoli Commission, Joel Bregman pointed to the large difference between the amount of crime in a relatively affluent area (Green Point in the Cape Town metropolitan area) and the crime statistics for townships:

"The South African Police Service (SAPS) Sea Point police station (that covers Green Point) reported five murders in 2011/2012. Not once since 2003/2004 has this police station reported more than eight murders in a given year....

"The murder rate per 100,000 is one of the most reliable ways to measure crime in a given area. The SAPS Sea Point station reported five murders in 2011/2012, equating to a murder rate of 20.8/100,000. There are three police stations in Khayelitsha. Lingeletu-West accounted for 45 murders in 2011/2012 and had a murder rate of 63.4/100,000; Harare had 154 murders and a rate of 119.5/100,000; Site B reported 161 murders and had a rate of 83.6/100,000. The three Khayelitsha SAPS stations accounted for 360 murders in 2011/2012 — a 14% increase since the previous year, and a 27% increase since 2008/2009. This data is taken from the SAPS annual crime statistics and the Institute for Security Studies' Crime Hub." (para. 15–16)

A comprehensive report that the City of Cape Town released in 2008 found that within the jurisdiction of the City, 5 of the 58 police districts accounted for over 44% of murders: in

Nyanga (13,18%), Harare (8,67%), Khayelitsha (8,47%), Gugulethu (7,58%), and Delft/Belhar (6,1%). These statistics indicate that most murders in Cape Town happen in the Cape Flats, with most of its population living in Khayelitsha.

In 2012, Statistics South Africa compiled a report based on “a countrywide household-based survey” that “focuses on people’s perceptions and experiences of crime, as well as their views regarding their access to and effectiveness of the police and justice system” (*Victims of Crime Survey*, p. 1). According to this survey, only “60% of households were satisfied with the way in which police and courts were doing their work” — much less than the 100% satisfaction rate claimed by SAPS (Stats SA, *Victims of Crime Survey 2012*, p. 3). Thus the claim by SAPS that everyone in South Africa feels safe does not reflect the opinion of people living in poor and working-class townships and informal settlements.

As the SJC noted in its memorandum of 23 September 2010:

“The threat of crime is ever-present for all people who live in South Africa. However, it is a much more dangerous and pervasive threat for people living in South Africa’s overcrowded, underserviced neighbourhoods and informal settlements.... People are assaulted, robbed, raped, and murdered daily, conducting tasks that many people living outside of informal settlements take for granted, such as using the toilet or accessing transport to work. Justice in areas such as these has become a privilege, not a right.” (“Memorandum to MEC Albert Fritz”.)

As the complainant organisations point out in their original complaint, people in these settlements are especially at risk because policing is made more difficult by continued failures in service delivery, which have failed to deal comprehensively or effectively with the legacy of apartheid-era unequal development. For example, due to the lack of accessible roads and thoroughfares and the absence of public lighting at night, police find it very difficult to protect residents or apprehend criminals and makes these areas far more dangerous than others (para. 54).

Every day 43 people are murdered nationally.

At least one of those people live in Khayelitsha.

The accuracy of the SAPS statistics are also frequently questioned. An article in *The Times* quoted University of SA criminologist Rudolph Zinn and Institute for Security Studies researcher Dr Johan Burger, who described the dramatic drops in crime as unexplained and worrying, and urged independent external audits of the statistics (quoted in News24, "Experts question validity of crime stats").

It should be noted that the statistics account only for reported crimes and therefore may not reflect the true crime rates. For certain crimes, such as rape, the actual crime rate is likely to be much higher than the reported rate. As experts point out, cases of gender-based violence are generally under-reported, and in South Africa the number of these crimes that are never reported to police is especially high (HRW, p. 18). Even property-related crimes are never reported, because many Khayelitsha residents believe there is almost no chance of being compensated or having their property retrieved.

Even if people report crimes at the police station, there is no guarantee that they will be added to the statistics — often, because police fail to open a case, or discourage people from laying a charge. There are also accounts of police officers intimidating people who lay charges, particularly of gender-based.

Police brutality, misconduct, and criminality: the statistics

According to the Independent Complaints Directorate (ICD) (now the Independent Police Investigative Directorate or IPID) 2011/2012 Annual Report, they received 4,923 new complaints and 5,450 cases of police misconduct. The report notes that "In 2011/12, the ICD had a workload of 6,026 cases, including 1,103 cases carried over from the previous year" (p. 26).

During 2011/2012, they investigated 4,923 cases, which can be broken down as follows:

- 720 cases of deaths in custody;
- 1,795 cases of police misconduct;
- 88 cases of domestic violence; and
- 2,320 cases of police criminality (*ICD Annual Report 2011–2012*, p. 22).

After the ICD investigates each complaint, it can recommend that the complaint be dismissed, treated as a disciplinary matter by SAPS, or referred to the National Prosecution Authority for trial.

The ICD reports that it referred 545 cases to the Director of Public Prosecutions for prosecution "regarding criminal matters, including deaths" (p. 29). Of these, only 43 led to successful convictions, 18 for "deaths in police custody and deaths as a result of police action, and 25 convictions were related to other criminal offences" (*ICD Annual Report 2011–2012*, p. 30).

In addition, the ICD recommended SAPS act on 1,276 cases, including 444 for misconduct, 608 for criminal offences, and 168 for deaths (*ICD Annual Report 2011–2012*, p. 30).

Members of the police were accused of a range of crimes, including serious offenses, ranging from corruption and fraud to assault with intent to cause grievous bodily harm, rape, and murder.

The ICD closed a total of 3,207 cases in 2011/12: 50% were cases of misconduct, 37% were criminal cases, and 11% were deaths in police custody and deaths as a result of police action.

The Task Team Report into the state of policing in Khayelitsha, commissioned by the National Commissioner of the SAPS, also reveals a list of basic ways in which the police fail to investigate crimes. According to the report, police officers:

- seldom ask crime scene to collect fingerprints or other forensic evidence;
- fail to take witness statements or to invite witnesses to look at mug shots;
- fail to comply with domestic violence regulations;
- fail to ensure that murder dockets were at court on a scheduled date;
- fail to register, investigate, inspect/check, or present dockets for inspection;
- fail to send charged suspects to court;
- fail to comply with instructions in case dockets; and
- wrongfully release suspects or aid them in escaping custody.

These problems are exacerbated by a lack of discipline:

- failure to report on duty/being absent from work without reason;
- failure to carry out lawful orders;
- refusal to assist a complainant; and
- shouting at a complainant.

Even in cases where investigations were declared to have been “properly investigated”, convictions can still take years. In one case of assault, rape, and murder, it took five years to get a conviction. The two suspects received sentences of 10 years (3 years suspended) and 8 years (3 years suspended). In another case, a man was stabbed to death in 2002. More than ten years later, the case is still in court.

Police shoot Adelaide Ngogwana (70) while pursuing a suspect

Among other cases of police brutality, misconduct, and criminality that the organisations reported, the case of Adelaide Ngogwana is particularly relevant. The facts of the case are summarised below (Mandla’s affidavit, para. 139.1–4).

03 Oct 2010	<p>The police in Khayelitsha’s RR Section open fire in a crowded area while pursuing criminals. Mam’u Adelaide Ngogwana, a woman in her 70s, is shot in the leg.</p> <p>The SJC lodges a complaint on Adelaide’s behalf with the ICD, now the IPID. It asks Mandla to follow this case and asks Joel to follow up with the ICD.</p>
	<p>At some point the investigation is transferred to the investigative body known as the Provincial Inspectorate (PI).</p>
April 2011	<p>Seven months after the incident at Adelaide’s home, the SJC receives a response from the PI in the form of a two-page report. The report states that the police had been returning fire, had accidentally injured Ms Ngogwana, and that the matter should be regarded as closed.</p>

As Mandla explains:

“The report offers no explanation of the Applicants’ decision to shoot and it further ignores the insensitive manner in which the police treated Ms Ngogwana following

the shooting. Ms Ngogwana, now deceased, was not contacted by the PI to inform her of the outcome of the investigation.

“There was not even an apology or an attempt to ensure that Ms Ngogwana was receiving treatment or recovering. Nor was medical assistance offered.” (Mandla’s affidavit, para. 140–41.)

Addressing the underlying problems

A year after Lorna Mlofana was raped and murdered in Khayelitsha, nearly a thousand TAC activists protested at Cape Town’s High Court. At this march on 13 December 2004, TAC handed over a memorandum that drew attention to the effects of crime, particularly on people who had been targets of gender-based violence. TAC described this as “a problem of enormous magnitude in Khayelitsha”:

“While we are determined to fight for justice in Lorna’s case, we are also aware that her case is unfortunately not isolated. Many women and children are continuously being sexually abused in Khayelitsha. We witness it constantly through our branches, support groups, and our community education work.” (TAC Newsletter: “Commemoration rally for Lorna Mlofana in Khayelitsha”.)

Four years later, despite the communities’ many attempts to engage provincial and national government and different parts of the criminal justice system, little had changed. By now, TAC had attended more than 35 court hearings in support of women who had been raped and handed over more than eight memorandums to the different police stations to highlight their concerns around gender-based violence.

During this time, the violence had continued. Thandokazi Njamela, a member of SJC, was going to school in Khayelitsha in 2007. In 2012, she submitted an affidavit to the O’Regan–Pikoli Commission that explained how violence affected children and teenagers:

“Eight learners in my school were killed in that year. Pumlani, one of my classmates, was stabbed to death in our class. We were locked in the class and the ambulance arrived too late. We were sent home for the day but received no trauma counselling.

Teachers and learners lived in fear and panic that year. I cannot understand to this day how I passed that year because it was almost impossible to concentrate on my studies. I can say that this is true for most of my fellow-learners.

“Sadly, the police did very little to prevent the violence, combat gang fights when they happened inside or outside schools, investigate how the gangs were structured, who operated them, apprehend the culprits and bring them to book. The community could not understand why the gang violence was taking place on this scale and neither could learners who did not participate in gangs.” (Thandokazi’s affidavit, para. 14–15.)

Today she says, “Criminals are effective but the police and courts are not effective. They do not patrol visibly and mostly only chase gangsters without attempting to arrest or charge them” (para. 17). She writes:

“It is as if we have no police services in Khayelitsha. I lost all hope in them a long time ago, for example, Nwabisa need not have died on that day. When she was shot she bled out but the ambulance and police took too long to get there even though the police station is not far from where we were.

“During all these extremely violent crimes committed against my friends and me, I was campaigning for safety in our communities with the SJC. This reinforced my understanding that a systemic problem exists with the criminal justice system starting with the SAPS.” (Thandokazi’s affidavit, para. 40–41.)

On 23 May 2008, TAC again marched in Cape Town to hand over a memorandum on gender-based violence:

“These acts of violence include random criminal activities, the xenophobic attacks against refugees and immigrants, and hate crimes perpetrated against lesbians and gay men. Instead of places of learning, many of our schools in poor and working-class communities are sites of danger, especially for girls. The rights to dignity, life, health, and bodily integrity are violated on a daily basis.” (“Memorandum on Gender Based Violence for march in Cape Town.”)

TAC demanded “that all other stakeholders take proper responsibility” to address the crisis in the criminal justice system. It asked the provincial government to designate an additional acute rape crisis centre to streamline facilities for rape survivors in Khayelitsha at their point of crisis, while improving uptake and coordination of services (TAC, “Memorandum”).

By now, more social justice and community-based organisations were campaigning for better safety, security, and policing. The memorandum was signed by a range of organisations, including Equal Education, LoveLife, POPCRU, Triangle Project, and Rape Crisis, as well as 23 schools.

Gender-based violence: Justice for Zoliswa

On 23 September 2010, TAC, the SJC, Equal Education, AIDS Legal Network, Free Gender, Triangle Project, and Luleka Lisizwe marched in Cape Town — this time to protest police inefficiency around the murder of Zoliswa Nkonyana. Two years after the communities had asked for greater cooperation between branches of the criminal justice system — including government bodies and parastatals — and better communication and engagement with communities, the criminal justice system continued to fail these communities.

Zoliswa lived openly as a black lesbian in Khayelitsha. She was brutally murdered by a group of men on 4 February 2006 because of her sexual orientation. Nine men, mostly under 18, were arrested for her murder, although about 20 men had reportedly participated in the hate crime.

In his affidavit, Mandla mentions that Zoliswa’s mother, friends, and comrades loved her. Zoliswa’s mother, Monica Mandindi, approached TAC to help ensure that her daughter’s killers were brought to justice. Mrs Mandindi was aware of similar assistance TAC provided to Lorna’s family and to the family of Nandipha Makeke. (Mandla’s affidavit, para. 126.)

The most important facts from Mandla’s affidavit are summarised in the following table (para. 127).

05 Feb 2008	The magistrate criticises the State for “gross negligence” for failing to ensure the presence of witnesses at the court.
20 May 2008	TAC members demonstrate outside the magistrate court. They hand over a memorandum to the state prosecutor demanding witness protection; access to information about the case; investigation of hate crimes; and a speedy trial.
23 May 2008	TAC organises a march in Cape Town against gender-based violence (attended by 5,000 people) and hand over a memorandum to the Ministers of Police, Justice, Health, and Social Development.
06 Aug 2008	Triangle Project, TAC, and other organisations march and hold an inter-faith service at St George’s Cathedral against hate crimes.
08 Oct 2009	The defence contests forensic evidence (a pair of blood-stained shoes) that the police obtained from one of the accused without permission.
16 Nov 2009	TAC and its allies again mobilise a presence inside and outside the court. The magistrate hearing the case admits the “blood-stained <i>takkies</i> ” into evidence. The defence tells the court that the police took statements from two of the defendants when they were still minors, without their parents or lawyers present.
20 Nov 2009	TAC protests outside court in support of the case.
24 Nov 2009	TAC protests outside court in support of the case.
07 Sept 2010	Two of the accused are acquitted because their confessions had been obtained unlawfully.
15 Sept 2010	Four of the accused escape from custody with the help of a police sergeant, causing enormous anger in the community. The SJC and its partners mobilise to protest against the negligence involved in the escape.
19 Sept 2010	The four escaped suspects are rearrested.
22 Sept 2010	The SJC, TAC, and Free Gender issue a press statement announcing a picket to call for a judicial commission of inquiry into the Khayelitsha criminal justice system.
23 Sept 2010	More than 600 people from the SJC, TAC, Free Gender, Equal Education, and Triangle Project picket Parliament. They hand over a memorandum to the MEC for Community Safety (Albert Fritz), the City of Cape Town Mayoral Committee Member for Safety and Security, Alderman JP Smith, the Minister of Police (Nathi Mthethwa), and the Minister of Justice (Jeff Radebe).

06 Oct 2010	After a child in the area is raped and a group of TAC members are attacked by a gang of armed men, the SJC asks for an urgent meeting with the MEC for Community Safety and the Mayoral Committee Member for Safety and Security to discuss the safety of people in Khayelitsha.
25 Oct 2010	A meeting is held where it is agreed that there would be a series of discussions between the complainant organisations and the authorities responsible for the criminal justice system in Khayelitsha
26 Nov 2010	The SJC again writes to the MEC for Community Safety, the Provincial Commissioner, and others. The letter: <ul style="list-style-type: none"> • Complains of inadequate communication between the various departments responsible for safety and criminal justice in Khayelitsha. • Notes that there was agreement in principle to establish an investigation into safety in Khayelitsha and the working of the criminal justice system in the area, to be headed by a former judge.
18 Feb 2011	In a letter, MEC Fritz indicates that the University of the Western Cape law faculty has agreed to set up an independent investigation team into the criminal justice system in Khayelitsha.
10 Mar 2011	Zoliswa's case is postponed for another month. Police had failed to verify the handwriting for one of the accused before the court date.
14 Mar 2011	Minister of Justice and Constitutional Development, Jeff Radebe, meets representatives from Free Gender and Triangle Project, and other LGBTI people from across the country regarding "corrective rape" and violence against black working-class lesbians. He promises to set up a Task Team to deal with LGBTI hate crimes.
11 Apr 2011	The case is postponed again.
03 Oct 2011	SJC, TAC, Free Gender, Triangle Project, and Ndifuna Ukwazi issue another press statement calling for a commission of inquiry.
04 Oct 2011	More than 500 activists from SJC, TAC, Free Gender, Triangle Project, and Ndifuna Ukwazi march outside the Provincial Legislature, calling on MEC Dan Plato to institute a commission of inquiry.
11 Oct 2011	Four of the accused are found guilty of Zoliswa's murder.
01 Feb 2012	Almost six years after Zoliswa's and after ±50 postponements, the four men are sentenced to 18 years in prison, of which four years were suspended.

The case demonstrated problems at every level of the criminal justice system. There were significant failures at the stages of investigation, prosecution, and correctional services.

Despite these failures, the SAPS Task Team assessing the case concluded that it had been properly investigated. This finding is patently insupportable.

Human Rights Watch report on gender-based violence

In 2011, Human Rights Watch published a report on gender-based violence in South Africa, highlighting violence and discrimination against black lesbians and transgender men (HRW, *We'll Show You You're a Woman*). The report describes the protections provided for people in the Constitution, but notes:

"Social attitudes lag: recent social surveys demonstrate a wide gap between the ideals of the constitution and public attitudes toward such individuals. Negative public attitudes towards homosexuality go hand in hand with a broader pattern of discrimination, violence, hatred, and extreme prejudice against people known or assumed to be lesbian, gay, and transgender, or those who violate gender and sexual norms in appearance or conduct (such as women playing soccer, dressing in a masculine manner, and refusing to date men). **And constitutional protections are greatly weakened by the state's failure to adequately enforce them.**" (HRW, p. 1, emphasis added.)

The people interviewed for the report describe horrific examples of sexual violence, threats, and intimidation. What often makes the situation worse is that the perpetrators of gender-based violence are not seen to be prosecuted:

"All too often ... rape survivors face the trauma of seeing their attackers at large after the attack; this also serves to intimidate the survivors and erode their already fragile confidence in the police and the criminal justice system. This problem is a common one, not limited to the rape of lesbians." (HRW, p. 37)

The report found that lesbians and transgender men do not have faith in the police, "from whom many fear secondary victimization rather than protection"; it notes that "Such concerns are not without justification; in several instances, police themselves have perpetrated abuse and violence" (HRW, p. 3).

Describing the attitudes and behaviour by members of the police, the report suggests that homophobia is still rife within the police and that little has changed:

"Of those interviewees who approached the police, most spoke of police verbally abusing and demeaning them and their friends and family. Several people said that police seemed more preoccupied with how lesbians have sex than with securing justice. Their testimonies — spanning more than a decade — suggest that there has been little improvement over time." (HRW, p. 46.)

As the HRW report points out, these negative experiences of lesbians and transgender men, added to the range of other systemic failings on the part of SAPS and the judicial system, have led to "an overwhelming lack of faith in law enforcement and in the criminal justice system as a whole" (p. 54).

The official complaint: November 2011

TAC, the SJC, Equal Education, Free Gender, Triangle Project, and Ndifuna Ukwazi lodged an official complaint with Premier Zille on 28 November 2011. The complaint was also sent to the National and Provincial SAPS, the Department of Justice and Constitutional Development, the Department of Correctional Services, and the National Prosecuting Authority.

The complainant organisations called for Premier Zille to launch a Commission of Inquiry to investigate their allegations of police inefficiency and a breakdown in relations between the police and the community of Khayelitsha. The organisations also pointed to "a plague of what appears to have been vigilante killings in which at least 13 alleged suspects were killed during the first half of the year 2012" (*Minister of Police and Others v Premier of the Western Cape and Others* (2012), para. 2). This spate of vigilante killings brought a new urgency to the need for an inquiry.

Although the organisations asked that Metro Police be included in the scope of the Commission, Premier Zille specifically excluded the Metro Police from the terms of the Commission. This represents a failed opportunity to engage within a larger context, and to

address the concerns of other marginalised communities, because similar situations also exist in poorer sections of the Cape Metropolitan Area.

The initial complaint listed eight cases that these organisations described as “only a small sample of the widespread inefficiencies, apathy, incompetence, and systemic failures of policing routinely experienced by Khayelitsha residents”. The organisations made it clear that their intention was “not to single out a particular department or organ of state, to simply criticise or place blame” but to identify “the nature and extent of the problems” that affect all the parts of the criminal justice system. They hoped the commission of inquiry would “have positive, tangible results for the community with respect to levels of safety and access to justice”.

The organisations who signed the official complaint were the TAC, the SJC, Equal Education, Free Gender, Triangle Project, and Ndifuna Ukwazi. However, by the time the Campaign for Safe Communities was officially launch at the University of Cape Town on 27 March 2013, more than 1,300 people from a variety of organisations and communities attended.

On 15 August 2012 Premier Zille and her Cabinet resolved to institute the O’Regan–Pikoli Commission of Inquiry into Khayelitsha policing, after the Premier issued a press statement on 2 July 2012 announcing her intentions. The O’Regan–Pikoli Commission was formally proclaimed in the Government Gazette of 24 August 2012.

The Minister of Police v The people of Khayelitsha

However, the work of the O’Regan–Pikoli Commission was halted after the Minister of Police and other representatives of the police issued a notice of their motion to halt the Commission on 5 November 2012. In their motion, the Minister and his fellow applicants asked the court to stop the Commission from issuing subpoenas on members of the police, to put the subpoenas already issued on hold, and to stop the Premier and the Commission from conducting the Commission “in any form whatsoever” (*Minister of Police and others v Premier of the Western Cape and Others* (2012), para. 32).

The applicants included the Minister of Police, the National Commissioner for SAPS, the Provincial Commissioner of SAPS for the Western Cape, the Civilian Secretariat for SAPS, and

the heads of the three police stations serving the Khayelitsha area (Khayelitsha, Lingeletu-West, and Harare).

The Minister claimed that Premier Zille's decision to establish the commission of inquiry was irrational, inconsistent with the Constitution, and unlawful, and asked the court to set aside her decision to establish the commission because it failed "to give effect to the principles of co-operative government and inter-governmental relations". In particular, the Minister claimed that allowing the O'Regan–Pikoli Commission to issue subpoenas against senior members of SAPS "is demeaning, undignified, and is designed to impugn the integrity of the individual members, and the South African Police Service as a whole" (Nathi Methethwa's affidavit, p. 15.)

The complainant organisations filed papers supporting the Commission. Whereas the Minister of Police argued that the Premier failed in her duties towards co-operative government, Mandla's affidavit demonstrates that the Premier's decision to appoint a commission of inquiry was preceded by a long series of communication and engagement between the complainant organisations, the Premier, and various organs of state.

A history of failed communication

As Mandla wrote in his affidavit:

"The record of the engagement between the Premier and the Applicants clearly reflects that the Applicants have set their faces against the establishment of the Commission from the outset and (with the exception of the National Commissioner) have failed to engage, or cooperate, at any stage in the process leading to the establishment of the Commission or with the Commission itself." (para. 27.)

Premier Zille repeatedly requested the Minister of Police, the National Commissioner of SAPS, and the Western Cape Provincial Commissioners of SAPS to provide input with regard to the complaint. However, despite being granted several extensions within which to respond, the Minister and Commissioners failed to provide the comment requested, either on the complaints or the procedure to be followed.

Almost seven months after the community lodged their official complaint with Premier Zille, the ANC government appointed a new National Commissioner for Police, Mangwashi Riyah Phiyega on 13 June 2012. Although she began to address the issues raised in the complaint, this opportunity was wasted — again because of poor communication and ineffective engagement with the people of Khayelitsha and our organisations.

Although the SJC described Commissioner Phiyega as “the first person to attempt to deal with the issues”, she “basically failed to report on progress of her internal investigation” (Campaign for Safe Communities, “Minister of Police and SAPS appeal to Constitutional Court to stop O’Regan/Pikoli Inquiry”). As the organisations explained later, they only learnt of the Task Team’s report and the Commissioner’s plan to deal with the Khayelitsha SAPS when these were submitted to the Court as part of the Minister’s appeal for the urgent interdict against the Commission.

The organisations would later note:

“In deciding whether to appoint the commission, in early December 2011 Premier Zille asked SAPS to respond to the organisations’ formal legal complaint by January 2012. By August 2012, after numerous extensions, Premier Zille had still not received a substantive response from SAPS to the complaint, giving her no choice but to appoint the commission — which she did on 24 August 2012.

“SAPS’s failure in this regard, in particular the failure of Minister Nathi Mthethwa, to engage the Premier or the social movements until more than six months after the formal complaint was lodged **demonstrates contempt for the people of Khayelitsha in a manner unbecoming of an organ of state.**” (Campaign for Safe Communities, “Open Letter”; emphasis added.)

Cape Town’s High Court rules in favour of the O’Regan–Pikoli Commission

Judge Yekiso, in the majority judgement delivered on 14 January 2013, explained that the Court had a duty to promote “the objects, spirit, and purport of the Constitution”. The Court noted that the SJC, TAC, Equal Education, Triangle Project, and many other partners

campaigned for “ten years against the ever deteriorating and despairing conditions of criminal activity and impunity in the greater Khayelitsha area”.

Judge Yekiso also noted that, despite numerous attempts to engage with SAPS through the Provincial Commissioner, “Ultimately, the Commission was established without any input from the office of the Provincial Commissioner” (para. 58). The first time Premier Zille received a substantive response from the National Commissioner, “it had almost been a period of nine months since the Premier first made contact with the Provincial Commissioner, the National Commissioner, as well as the office of the Minister” (para. 62). He also noted, however:

“Apart from raising the fact that the issues raised in the complaint were intricate and complex, the National Commissioner did not state what her plan of action was with regards to dealing with the matter nor the fact that she had, in the interim, established a task team with a view to advising her on the most appropriate method to deal with the complaints. Also, with regards to the National Commissioner, the Premier ultimately established the Commission without any benefit of an input from that office.” (para. 63)

The case will now move to the Constitutional Court, where it will be heard on 6 August 2013.

At present, given the uncertainty as a result of the litigation, the Commission has not rescheduled its public hearings. The Commission is continuing with its work and collecting evidence and testimony, but until the courts have provided clarity, the overall process is essentially on hold.

Support the O’Regan–Pikoli Commission of Inquiry

Given this situation, it is a disgrace that the Minister of Police and the SAPS continue to waste taxpayers’ money by fighting the Commission in the courts. Rather, they need to embrace and cooperate with the Commission — a process aimed solely at improving levels of safety and access to justice for Khayelitsha and beyond.

In December 2012 the complainant organisations wrote an open letter to President Zuma, Minister of Police Nathi Mthethwa, Premier Zille, and Cape Town's mayor Patricia de Lille. In their letter, they declared that "Delaying or not fully cooperating with the Commission serves to worsen a spiralling crisis." The organisations expressed their disappointment with the Minister and the SAPS's decision to oppose the work of the Commission, urging them to cooperate with the Commission and to help it investigate a complex and urgent issue:

"The organisations understand that addressing crime is not easy and that the police cannot do it alone. There can be no doubt that safety is also about infrastructure such as water and sanitation access, street and area lighting, and housing and employment — which is why the City of Cape Town must participate."

"However, the Minister and SAPS cannot hide behind this development imperative. Their constitutional duty is to protect the lives and property of every person in South Africa. They have a duty to prevent, combat, and investigate crime as well as to apprehend criminals."

"Instead of addressing the issues raised by the complaint substantively, the Minister has initiated a political and legal war against the Premier while people in Khayelitsha continue to experience extremely violent crime. **Minister Mthethwa's resistance and failure to cooperate with the Commission is morally untenable, legally unsustainable, and factually flawed.**" (Emphasis added.)

Justice must be done, and seen to be done.

The state has a duty to respect, protect, promote, and fulfil the rights of all the people living in South Africa — including people in poorer communities. This duty belongs equally to both the South African Police Service (SAPS) and the Cape Town Municipal Police Department ("Metro Police").

The Constitution and the Bill of Rights give people in South Africa several rights. This includes the rights to equality, human dignity, life, freedom and security of the person, privacy, movement, property, housing, access to courts, the right "to be free from all forms of violence from either public or private sources", and the right "not to be treated or punished

in a cruel, inhuman or degrading way". It also gives specific rights to people who have been arrested, detained, and accused of a crime in a court (*The Constitution of the Republic of South Africa*, sections 9–12, 14, 21, 25–26, 34–35). Other legislation extends specific rights to victims of crime, children, and people in informal and in illegal settlements (The Children's Act, No. 38 of 2005 (as amended); The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (as amended); The South African Services Charter for Victims of Crime, 2004; and the Domestic Violence Act, No. 116 of 1998.).

The Constitution also sets out the basic values and principles governing public administration, including **all elements of the criminal justice system**, which must align with the democratic values and principles enshrined in the Constitution (The Constitution, section 195(1)). As a result, these government departments should promote and maintain a high standard of professional ethics, promote efficient, economic and effective use of resources, provide services impartially, fairly, equitably and without bias, and cultivate good human-resource management and career-development practices.

However, in the experience of the organisations, their members, and other residents of Khayelitsha, these rights are regularly and widely ignored or violated.

The systemic failure of the police, including the Metro Police, to prevent, combat and investigate crime, take statements, open cases and apprehend criminals also violates the requirements for professional, ethical, impartial, effective, and efficient public administration.

The legislation cited in the initial complaint

The organisations argued that the Premier was given the power to appoint the Commission by Section 127(2)(e) of the Constitution of the Republic of South Africa, sections 37(2)(e) and 66(2) of the Constitution of the Western Cape, and section 1 of the Western Cape Provincial Commissions Act, 10 of 1998 ("the Provincial Commissions Act").

The High Court majority judgement cites section 206(5) of the Constitution, read together with section 127(2)(3) of the Constitution and section 1(1) of the Provincial Commissions Act (*The Minister of Police and Others v The Premier of the Western Cape and Others* (2012), para. 35, 41–43, 46, 48).

The Constitution defines the purpose or function of the police service as follows: to “prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law” (The Constitution, section 205(3)).

The South African Police Service Act, No 68 of 1995 (“the SAPS Act”), confers additional duties on the police:

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;
- (c) ensure co-operation between the Service and the communities it serves in the combating of crime;
- (d) reflect respect for victims of crime and an understanding of their needs...

To ensure that the various divisions of the police service deliver on these principles, legislation also creates several oversight roles within SAPS, as follows.

National: The National Commissioner appoints a Provincial Commissioner for each province (section 6(2)). The National Commissioner must determine national standards for municipal police services and the training of their members (64L(1)).

Provincial: Each Provincial Commissioner is responsible for how resources are allocated among the different areas, station areas, offices and units under his or her jurisdiction.

Local: Each municipality may ask the Executive Council for permission to establish a municipal police service (64L(1)). The executive head of the municipal police must maintain an impartial, accountable, transparent and efficient municipal police service, and is responsible for the recruitment, appointment, promotion, and transfer of members of the municipal police service, as well as discipline of the municipal police service as a whole (The South African Police Service Amendment, Act No. 83 of 1998).

Furthermore, each province is entitled:

- (a) to monitor police conduct;
- (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- (c) to promote good relations between the police and the community;
- (d) to assess the effectiveness of visible policing; and
- (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province (The Constitution, section 206(3)).

To perform these functions, a province is allowed to investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community, and must make recommendations to the Cabinet member responsible for policing (The Constitution, section 206(5)). This means that the Premier and the MEC of Community Safety have the constitutional power to appoint a commission of inquiry into policing in Khayelitsha, and to develop a plan to eliminate the problems identified, based on its recommendations.



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