Centre for the Study of Violence and Reconciliation

Submission to

The Department of Justice

Re: The draft Criminal Procedure Amendment Bill containing proposals on the amendment of Section 49 of the Criminal Procedure Act

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Introduction to the Centre for the Study of Violence and Reconciliation

1. The Centre for the Study of Violence and Reconciliation (CSVR) is an independent, non-profit organisation founded in 1989. The primary goals of CSVR are to contribute to the building of violence-free societies and to promote sustainable peace and reconciliation in South Africa, across the African continent and globally. In addition to staff involved in managerial and administrative functions CSVR include researchers, community facilitators, psychologists and social workers. CSVR has a website www.csvr.org.za which provides information about the organisation and free access to CSVR publications.

2. This submission has been developed by the Criminal Justice Programme at CSVR. The Criminal Justice Programme is concerned with democratic criminal justice, namely criminal justice which is responsive to the people of South Africa and which conforms to the norms of the Constitution. The Criminal Justice Programme has a history of work in the criminal justice arena in South Africa which goes back to the early 1990s and includes in depth engagements in the policing and correctional arenas. It has been engaged with questions to do with the use of lethal force by police, and the legal regulation thereof, for much of this period.

3. CSVR is grateful for the opportunity to make this submission on the draft bill. We of course reserve our right to make further submissions once the Bill, in its current or a revised form, is submitted to Parliament. Nevertheless we welcome the opportunity to input at this preliminary stage in the process.

Structure of submission

4. After briefly clarifying our use of terminology this submission addresses the following:

a. Our understanding of the current Section 49.

b. The key principles which should inform legislation on the use of lethal force.

c. The retention of defence provisions in Section 49(2)(a) of the draft bill.

d. The use of the word 'future' in Section 49(2)(a) of the draft bill.

e. The relevance of the 'future danger principle' to interpreting Section 49(2)(b) of the draft bill.

f. The risk of error in using lethal force for arrest;

g. Concerns relating to section 49(1)(a) and Section 49(1)(c) of the bill.

5. We have included a proposal on the wording of Section 49 which would meet with the concerns raised in this submission which is attached as **Annexure A**.

Terminology

6. In this submission we use the following terminology:

a. **Defence provisions** – where a legal provision provides for the use of lethal force against an immediate or imminent[1] threat we define such a provision as a **defence provision**.

b. **Arrest provision** – where a legal provision allows for the use of force against a fleeing suspect (effectively to prevent the flight of the person) we refer to such a provision as an **arrest provision**.

c. **Future danger principle –** the principle that lethal force may be used to prevent the flight of a person ('for arrest') who is likely to kill or seriously harm other people in the future is referred to as the '**future danger**

[1] We understand the word imminent as meaning 'about to happen' and therefore as being similar in meaning to the word immediate.

principle'. The future danger principle is therefore a principle which justifies certain type of **arrest provisions**.

Understanding of current Section 49

7. This section of the submission outlines our understanding of the current Section 49 as this is directly relevant to our comments on the draft bill. This understanding is that:

    a. The current section 49 is in many ways a 'defence' provision in that most of what it does (in sections 49(2)(a), (b) and (c)) is to authorize the use of lethal force to defend the 'arrestor' or other people against direct threats of death or grievous bodily harm. This observation is in line with paragraph 1.6 of the Memorandum on the Objects of the Draft Bill which indicates that one of the criticisms of the current section 49 is that it equates 'the use of force for the purpose of effecting arrest to the established common law principles of self-defence, including acting in defence of others'. We believe that 49(2)(a), (b) and (c) essentially repeat the point that lethal force is justified for 'defence' against immediate or imminent threats. This repetitiveness is one of the ways in which we believe the current section 49 is lacking in clarity.

    b. However we do not agree with the view attributed to Snyman in the memorandum to the effect that Section 49 provides a generalized 'right to flee'. Our view is that, by virtue of the use of the word 'future' in Sections 49(2)(a) and (b), these parts of the current section 49 do constitute 'arrest provisions'. As we understand it the law authorizes the arrestor to use lethal force to prevent the flight of the suspect if, in his or her reasonable judgement, the fleeing person poses *a threat of 'death or grievous bodily harm' which extends in time beyond the arrest situation.* Section 49(2)(a)

and (b) in this respect repeat the same point reinforcing the problem of repetitiveness referred to above. However our main objection to the use of this concept is not its repetitiveness but the difficulty in interpreting it. CSVR has in the past published a number of documents motivating that Section 49 of the Criminal Procedure Act in its current form is unsatisfactory largely because we believe that this term makes the law relating to the use of lethal force for arrest inherently unclear.[2] We return to this issue in the following sections as it is relevant to both section 49(2)((a) and (b) of the draft bill below.

Principles relating to the use of lethal force

8. The use of lethal force by police amounts to the exercise of an extreme power. When the use of lethal force causes the death of a person, or a crippling physical injury, its consequences are irremediable. At the same time, though they must be subject to legal accountability, the police, who are charged with the responsibility of using lethal force, should not be placed unnecessarily in legal jeopardy even where they endeavour to uphold the law when they use lethal force. This has a number of implications including that:

    a. The law relating to the use of lethal force by state officials should be based on the highest principles. The principles which we believe should govern the use of lethal force are discussed further in this section of this submission.

    b. Legal provisions which govern the use of lethal force should be recognised as provisions of a unique nature and not equated with other provisions of the Criminal Procedure Act, or any other law. This is

[2] See for instance Bruce, D, (2003) *Killing and the Constitution – arrest and the use of lethal force.* SAJHR, Vol 19, Part 3; Bruce, D (2003) Raising the bar? New lethal force law may set standards even higher than the constitution. In *Business Day*, 17 September 2003, under the title: Clarity needed on use of lethal force.

because the consequences of the use of lethal force cannot be corrected by a subsequent process of review. Error in relation to the use of lethal force has entirely different implications to what it has in relation to the exercise of other powers by the police. The latter issue is discussed further below.

c. That the law relating to the use of lethal force should be expressed in very clear terms.

9. In terms of the principles which should inform the use of lethal force - our understanding is that the central issue is whether such use of lethal force is used to protect human life (against death or serious injury). This extends to:

    a. The use of lethal force against an immediate or imminent threat of death or serious bodily harm; and

    b. The use of lethal force to prevent the flight of a person who is likely to harm others in the future if he or she escapes.

10. We therefore believe that in essence lethal force is only justified against a person who may be judged to pose a current (immediate or imminent) or future danger of death or serious bodily harm to others. *We therefore support the principles which are embodied in the current Section 49 but believe that they need to be expressed in more concrete terms.*

Section 49(2)(a) of the draft bill: implications of retaining a defence provision in the draft bill

11. We believe that there is widespread confusion within the SAPS and general public about the law relating to the use of lethal force. For this reason it is preferable that Section 49 should continue to contain a 'defence provision' as long as this are clearly formulated. However it should then be accepted *that Section 49 is a general provision regulating the use of lethal force rather than merely a provision*

regulating the use of lethal force for arrest. This notwithstanding the fact that it is located within Chapter 5 of the Criminal Procedure Act which deals with arrest.

12. Subject to our concerns about the word 'future' which are discussed below we regard Section 49(2)(a) of the draft bill as a defence provision. Such a provision applies whether or not the situation is an arrest situation as it is equivalent to the common law provisions of the same kind. We think that the law would be clearer if it was clear that this provision is not subject to the 'preamble' at the beginning of Section 49(2) ("If an arrestor attempts to arrest a suspect' etc).

13. In this respect we think that a useful model is the *structure* of Section 25 of Canadian Criminal Code which has:
    a. A section dealing with general authority to use lethal force in 'defence (section 25(3))
    b. A separate section dealing with the use of lethal force against a fleeing suspect (section 25(4)).[3]

14. Our emphasis on clearly differentiating 'defence' and 'arrest' provisions is motivated partly by our concern about the clarity of the draft bill, but also by our concerns relating to the risk of error (which are discussed below). We believe that the issues of 'standard of belief' should be understood as entirely different in relation to 'defence' and 'arrest' provisions.

The word 'future' in Section 49(2)(a) of the draft bill

15. In the draft bill Section 49((2)(a) is largely a 'defence provision' except that it includes the word 'future'. We believe that the word 'future' should be removed from the draft bill as it serves no useful purpose, creates confusion about when lethal force may be used, and detracts from the clarity of the draft bill. The inclusion of the word 'future' therefore perpetuates the problems of the current

[3] See http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf pages 41-42.

Section 49 and undermines the objective of creating a legal provision which is clear and relatively easy to interpret.

16. As indicated in the next section of this submission, Section 49(2)(b) of the draft bill contains what, in terms of its derivation, is a test of 'future dangerousness'. The effect is that the inclusion of the word 'future' in Section 49(2)(a) makes Section 49(2)(a) and (b) repetitive. As we will indicate below the way in which the principle is expressed in Section 49(2)(b) is to be preferred because it is concrete rather than abstract in nature. The word 'future' in Section 49(2)(a) therefore adds nothing of value to the draft bill and merely represents an abstract formulation of the provision which is contained in Section 49(2)(b).

The relevance of the future danger principle to interpretation of Section 49(2)(b) of the draft bill

17. As indicated above we believe that lethal force is only justified against a person who may be judged to pose a current (immediate or imminent) or future danger of death or serious bodily harm to others. We believe that the issue of an immediate or imminent threat is addressed by Section 49(2)(a) of the draft bill (subject to the word 'future' being deleted). In this section of the submission we address the question of how the future danger principle should be addressed in our current law.

18. The 1985 US Supreme Court judgement in the case of *Tennessee v Garner* is cited with approval in both the leading judgements of the Supreme Court of Appeal (*Govender v Minister of Safety and Security*, 2001) and Constitutional Court (*S v Walters*, 2002) on the use of lethal force for arrest. The key quotation from the US Supreme Court judgment which is cited by the SCA starts as follows:

> 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so ... Where the officer has probable cause to

believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'

19. The essential test which is put forward by the US Supreme Court in this passage is therefore one of the dangerousness of the suspect. There is no justification for using lethal force where a suspect poses no immediate threat to the police officer and no (implicitly immediate or future) danger to others. The justification for using lethal force to prevent the escape of the suspect is where the suspect poses a threat of serious physical harm to the police officer or others.

20. The US Supreme Court judgment then proceeds in the following words

> 'Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been give.'

21. This second part of the passage may be understood to represent a more concrete articulation of the principles embodied in the first part of the passage quoted above. The 'test' articulated by the US Supreme Court for whether a suspect might be said to pose a threat of the type referred to is:
    a. Firstly 'if the suspect threatens the officer with a weapon', and
    b. Secondly that there [are reasonable grounds] to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm'.

22. In the draft bill Section 49(2)(b) uses wording which is similar wording to that used in the last quoted phrase i.e. ‘that the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm’. Section 49(2)(b) may therefore be understood to incorporate a standard which the US Supreme Court put forward as a proxy standard for distinguishing those suspects who might be regarded as posing a (future) danger to members of the public.

23. Subject to the remarks which we make in the following section of this submission relating to the risk of error, our understanding is therefore that, in terms of its derivation at least, section 49(2)(b) of the draft bill contains a formulation which is intended as a test of dangerousness. We believe that this formulation should be retained because we believe that it is the most viable way of expressing the future danger principle in concrete and clear terms.

24. We would like to acknowledge however that this formulation may better be seen as a ‘rule of thumb’ rather than a rigorous test so that there may be situations where lethal force is used in terms of this test, where the person in reality does not present such a ‘future danger’. In some ways therefore the acceptance of this formulation is a pragmatic choice based on our concern that, while the law should embody high principles, these should nevertheless be expressed in concrete terms and that the alternative (the use of the word ‘future’) would make the law inherently unclear.

The risk of error in using lethal force for arrest

25. The power which is exercised in terms of Section 49 is of an extreme nature. While there are exercises of authority which are comparable (such as judgments made by hospital officials relating to access to live-saving equipment) there is no

other authority provided to anyone in our society to, on the spur of the moment, terminate someone's life and their ability to exercise any and all of the rights which accrue to them in terms of the Constitution. Relating to the circumstances in which it is exercised there is a major potential for it to be misused (whether deliberately or as a result of error). Furthermore the nature of South African society is that the police officers who exercise this power are not necessarily very highly trained or well equipped to exercise good judgment in relation to the use of lethal force compounding the potential for error.

26. The risk of error was one of the factors emphasised in the judgement of the Constitutional Court dealing with the death penalty (*S v Makwanyane*) emphasising that even after the thorough deliberation which characterises judicial processes there is still the potential for error.[4] On the streets, where police officers are required to make split second judgments, the potential for error is undoubtedly many times greater. With respect we would therefore like to suggest that the failure to engage with the potential for error is a serious shortcoming of the Constitutional Court's *Walters*' judgement.

27. While there is a risk of error in relation to any decision the question of the risk of error in relation to Section 49 is therefore entirely different in character from any other error which might be made in terms of powers provided by the Criminal Procedure Act in that, where the use of lethal force results in death or permanent disability, it is irreversible.

28. The potential for error was illustrated in a number of cases last year where police officers allegedly shot people who were innocent.

    a. In the case of Olga Kekana who was killed on 11 October 2009 police officers allegedly opened fire on the vehicle in which she was travelling

[4] At para 54

which they mistook for a vehicle that they were looking for which had been taken in a hijacking.

b. In the case of Atlegang Phalane, a three year old boy who was killed on 7 November 2009, press reports indicated that the police officer allegedly believed that he saw someone pointing a gun at him from within the vehicle in which Phalane was seated. The police officer fired into the vehicle thinking that he was acting in self-defence.

29. It should be recognized however that these errors are of a different kind. In the latter (Phalane) case the error is a mistake about the existence of a threat when no threat exists. If the press reports on the issue are accurate, the police officer believed that he was on the point of losing his life and thought that he was acting to defend himself. The potential for errors of this kind (associated with perceived 'defence' situations) can potentially be reduced by more rigorous screening of new recruits and better police training but it is essentially not something which can be addressed by section 49.

30. In the former (Kekana) case however the error in question is of a different kind. Here the error concerns whether the person (in this case the people assumed to be in the car) is linked to an offence involving the infliction or threatened infliction of serious bodily harm.[5] It may be noted that there are two similar types of error which might characterize this type of situation:

a. On the one hand the police officers may believe that the person who they are shooting at is person X when in fact the person is person Y. This would be the type of error in the Olga Kekana case. This is an **error of identification**.

[5] Note that press reports also raise other questions about the shooting such as whether any effort was made to stop the vehicle and arrest the suspects prior to the use of lethal force.

b. On the other hand the police officers might have correctly identified the person who is apparently fleeing from them as person X whom they suspect of having committed a crime involving the infliction or threatened infliction of serious bodily harm but person X is in fact innocent of this crime. This is an **error of suspicion** i.e. the person is wrongly believed or suspected of having committed the offence.[6]

31. In relation to the latter type of error (**errors or suspicion**) it must be emphasised that the law does not set an exceptionally high standard for reasonably believing or suspecting that a person has committed an offence.[7] For instance in the 1986 Appelate Division judgement in *Duncan V Minister of Law and Order* the court stated that in order to justify arrest it is not necessary that an arrestor should have sufficient evidence which would enable a person to be brought to court. It is obviously not justifiable for the law to provide that a person who would later be released by the police on the basis that they are demonstrably innocent or because there is no substantial case against them, should be shot dead by the police because they at the time believe suspect that person has been involved in an offence.

32. The concern here is about the degree of certainty or standard of belief that should be expected of police that the person who they are shooting at is indeed the person whom they think it is (i.e. that the person is correctly identified) and that this person is indeed responsible for offences of the kind referred to in Section 49(2) of the draft bill (i.e. that the belief in the person's guilt is based on very firm grounds). If one is going to use lethal force there must be a high level of certainty about their identity and that there is strong evidence against them. It is completely unacceptable that police should be able to use lethal force for arrest without a very

[6] Another case of this kind was one in August 2008 in Meyersdal, Alberton where a couple who were reversing out of their driveway after robbers opened fire on them from within their house were in turn fired on by police. They were seriously injured but fortunately not killed.
[7] Note that the terms 'reasonable suspicion' and 'reasonable belief' are generally understood to mean the same.

high degree of certainty that the person that they are shooting at is connected to an offence of the kind identified in Section 49(2)(b).

33. In terms of addressing this issue we believe that there are broadly two options:

    a. **Option 1**: Establish a higher standard of belief – this would involve a formulation such as:

        i. ‘That the suspect is known to have committed a crime involving the infliction or threatened infliction of serious bodily harm’;

    b. **Option 2:** At the very least, retain the reasonableness test but insert wording which sensitises people acting in terms of the law to the risk of error, such as :

        i. The arrestor, on the basis of direct knowledge or other firm and clearly justified grounds, reasonably believes that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.

34. Some precedents for this can be found in policies of the police in Kansas City and Atlanta in the United States which 'required police officers to have direct personal knowledge that someone had committed a crime'.[8] There may be other precedents for this but nevertheless we believe that there is a need for creativity in addressing this issue in South African law. It is unavoidable that the issue be addressed if government and the legislature are serious about protecting innocent people against unjustified uses of lethal force by the police. The intention of introducing such wording would be to reduce the risk of shootings such as that in the Olga Kekana case.

[8] LW Sherman 'Reducing Police Gun Use: Critical Events, Administrative Policy, and Organisational Change' in M Punch (ed) Control in the Police Organisation' (1983) 108.

Other concerns –Section 49(1)(a) and Section 49(1)(c) of the draft bill

35. The definition of arrestor in Section 49(1)(a) of the draft bill should be changed to restrict the use of lethal force for arrest to police officers. This would mean that civilians are only authorised to use lethal force for defence. Though we acknowledge that there are shortcomings in policing in South Africa we do not think that we should seek to compensate for this by providing civilians with the authority to use lethal force for arrest. Civilians are not trained in the same way that police are and there is an even higher probability of them acting in error.

36. The definition of deadly force in Section 49(1)(c) should be changed to exclude the words 'intended' to kill so that it reads 'deadly force means force that is likely to cause death or serious bodily harm". In this regard we note that:

    a. In defence situations the force that is justified is force that is intended to bring an end to the threat which is posed by the 'suspect'. In certain defence situations this will involve using lethal force in a manner which is highly likely to be fatal such as by aiming at the centre of mass (the chest

area) of the 'suspect'. [9] Nevertheless the higher level purpose of the use of force is to stop the threat rather than being explicitly to kill.

b. Likewise in arrest situations the chances of hitting the fleeing person are accentuated if one aims at the centre of mass and so this would be the preferred target particularly if the fleeing person is some distance away. Nevertheless the intention of the use of lethal force particularly in this situation is to prevent the suspect's flight and it is not correct to say that the intention is to kill the suspect. Defining deadly force as that which is intended to kill the suspect therefore misrepresents its purpose.

Our suggestion for revising section 49

37. We have taken the liberty of putting forward a proposal for Section 49 which builds on the framework provided by the draft bill and also responds to the concerns which we have raised in this submission. This is attached as Annexure A.

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[9] The reason for this is that situations involving the use of lethal force are often life and death situations. By aiming for the 'centre of mass' (the chest) one is more likely to be able to hit the assailant and neutralize the threat which they pose. Police aiming at legs or arms are highly like not to hit their opponents. In this regard note the statement by the Seattle (USA) police 'Police officers are taught that their paramount duty is to ensure public safety by protecting themselves and others from harm. When confronted by persons who are armed and dangerous, the officers' goal is to stop these persons before they can harm others. In Seattle as in other law enforcement agencies, officers are trained that the most certain and effective way to stop armed and dangerous assailants is to aim for their "center of mass". Movies and television programs make it seem that shooting at a person's arm or leg is easily done. In real life, such a shot is both improbable and risky. Deadly force incidents evolve in seconds, often presenting officers with limited opportunities to intervene. In light of this, officers are trained to take the high percentage shot, which is center of mass.' (http://www.cityofseattle.net/police/publications/Policy/UseForce/default.HTM). Also see the comment 'We are trained to use whatever force is reasonable to stop the suspect. If we need to use lethal force we are trained to fire center mass (i.e. the chest). It is the largest part of the body and much easier to hit then an arm or a leg especially on a suspect that is moving around. We also fire as many rounds as needed to stop the suspect. For example if a suspect is coming at me with a knife and I fire two rounds and strike him in the chest and he falls down then I don't keep shooting him until he dies. I would stop shooting and proceed to take him into custody (call for an ambulance, notify my supervisor, etc.). In other words we are not trained to shoot to kill, we shoot to stop.' (http://answers.yahoo.com/question/index?qid=20080910204651AAlEeaG).

Conclusion

38. Once again we would like to express our thanks for the opportunity to make this submission. We would like to emphasise that we would welcome any opportunity for further engagement around this issue.

Annexure A: Suggested new Section 49

49. (1) For the purposes of this section—

(a) 'arrestor' means a peace officer authorised under this Act to arrest or to assist in arresting a suspect;

(b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

(c) 'deadly force' means force that is likely to cause death or serious bodily harm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing.

(3) Subject to subsections (4), a person is not justified in using deadly force unless the person believes on reasonable grounds that it is necessary for the purposes of protecting the person or any other person from death or serious bodily harm.

(4) An arrestor is justified in terms of this section in using deadly force only if he or she knows [alternatively: on the basis of direct knowledge or other firm and clearly justified grounds, reasonably believes] that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.