

# 9

## THE ROSE THAT GREW FROM CONCRETE: THE COMMISSION OF INQUIRY INTO POLICING IN KHAYELITSHA, SOUTH AFRICA

*Meetalı Jain\**

---

### 1 Introduction

The Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations Between the South African Police Services and the Community of Khayelitsha (Khayelitsha Commission or Commission), established in 2012 and concluded in 2014, examined patterns of a systemic breakdown in policing in one of South Africa's poorest townships. Unusual in that it was constituted as a result of persistent and pro-active calls from civil society rather than a response to a specific event, the Khayelitsha Commission created an enormous archival footprint that shed much-needed light on 'policing the post-colony'.<sup>1</sup> Further distinguished by the almost exclusive forward-looking orientation of its inquiry, the Khayelitsha Commission managed to facilitate discussions with all affected parties including, perhaps most notably, with the South African Police Services (SAPS), an institution known for its opaque internal administrative culture. However, even with what may be described as near optimal circumstances with regard to the structure, composition and operations of the Commission itself, the impact of the Commission remains elusive, largely because of the party-political squabbling that haunted its establishment and continues to haunt its implementation.<sup>2</sup> It nevertheless remains a powerful case study of the contribution commissions of inquiry can make, when properly constituted

\* This chapter is based upon interviews and documentary research conducted in Cape Town in March and April 2016. The research team also included Anyango Yvonne Oyieke.

1 E. van der Spuy 'Inquiries into Commissions of Inquiry into Policing' *South African Crime Quarterly* 53 (2015) p.3.

2 'On the Record with Judge Kate O'Regan' *South African Crime Quarterly* 53 (September 2015) p.59.

and run, to broader processes of accountability for violations of the right to life.

## 2 Background to the Commission

Khayelitsha, or ‘new home’ in isiXhosa, is a township located on the south-eastern edge of Cape Town, approximately 30 kilometres from the city centre. Khayelitsha was established in 1983, the last area of the city to be formally set aside for African residents during the period of apartheid. Situated on the margins of the Cape Town metropole, it is burdened by its lack of access to the most basic services, including water, sanitation, electricity and safety. For example, 28 per cent of the residents of Khayelitsha lack access to water, and 38 per cent of the residents have no access to a flush toilet connected to a sewage system.<sup>3</sup> Even when considered against South Africa’s high crime statistics, Khayelitsha’s crime statistics are shockingly high: a murder rate of 90 per 100 000 people compared to a national rate of 31 per 100 000.<sup>4</sup> In 2014/15, Khayelitsha had more serious crimes committed than any SAPS precinct in South Africa.<sup>5</sup> This disparity revealed an observable pattern, inviting the conclusion that it amounted to a failure on the part of the state to protect life. Compounding this alarmingly high rate of crime is the fact that, at a national level, the police is perceived to be among the most corrupt institutions in South Africa, particularly following high-profile incidents of corruption and of police brutality, including the fatal police shootings of service delivery protestors and striking mineworkers.<sup>6</sup> In this regard, it is notable that in September 2012 President Zuma issued a proclamation establishing the Marikana Commission of Inquiry into the deaths of 34 mineworkers on 16 August 2012 at the Marikana mine and surrounding areas.<sup>7</sup> Whereas the Marikana Commission focused on public order policing, examining the police response to a large public gathering, the

3 *Towards A Safer Khayelitsha: Report of The Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations Between SAPS and the Community of Khayelitsha* (2014) (Final Report) ch.4, para.32.

4 Official population data from the City of Cape Town (2012/13), as reported in Social Justice Coalition *Our Struggle for Safety and Justice in Khayelitsha: The O’Regan-Pikoli Commission of Inquiry into Policing in Khayelitsha* (January 2014) available at: <https://d3n8a8pro7vhmx.cloudfront.net/socialjusticecoalition/pages/251/attachments/original/1472933532/Our-StruggleFinal3Small.pdf?1472933532> p.13.

5 Ndifuna Ukwazi *Safety, Justice and People’s Power: A Companion to the O’Regan-Pikoli Commission of Inquiry into Policing in Khayelitsha* (2016).

6 P. Wambua AfroBarometer, Dispatch 56 (2 November 2015). Fifty-three per cent of South Africans believe that most or all of the police are corrupt.

7 Proclamation 50, 2012, Establishment of a Commission of Inquiry Into the Tragic Incident at or Near the Area Commonly Known as the Marikana Mine in Rustenburg, North West Province, South Africa (21 September 2012).

Khayelitsha Commission was charged with examining everyday township policing that responded to the high levels of crime noted above.

The Khayelitsha Commission was chosen as one case study in this research project because, unlike most of the other African commissions constituted around right to life violations, it did not respond to a specific event or series of events. Instead it was established to respond to longstanding systematic patterns of police inefficiency in Khayelitsha alongside a breakdown in relations between SAPS and community members. Although it ultimately did make findings on the cases of the individual complainants who brought a petition against the provincial government, its primary focus was to provide policy recommendations for reconstructing the relationships between communities and the police. As Judge O'Regan later highlighted, '[t]he Khayelitsha Commission looked at systemic issues. It was not a fact-finding inquiry around specific events. The original cases were illustrative in explaining the underlying issues.'<sup>8</sup>

## **2.1 Genesis of the Commission**

For years, since the early 2000s, community-based organisations in Khayelitsha had held more than 100 demonstrations, pickets and marches and submitted numerous petitions and memorandums to various levels of government in an effort to improve the policing in the township. Indeed, the documentary recently made about by one of the parties to the Commission – *People's Power: The Khayelitsha Commission of Inquiry* – interviews the activists who for over a decade had doggedly but fruitlessly persisted in pursuing case after case of unresolved crime in Khayelitsha.<sup>9</sup>

In 2010 a coalition of non-governmental organisations (NGOs), including the Social Justice Coalition, Free Gender, the Women's Legal Centre, Equal Education, the Treatment Action Campaign and the Triangle Project, took a different approach to issues of crime and security in townships – they called for a commission of inquiry into criminal justice to be established to investigate the situation in Khayelitsha. The call was unusual in that it emerged proactively from civil society to the state before the emergence of a high-profile crime in Khayelitsha or, it may be argued, after too many low-profile crimes failed to capture much

8 Interview with the author, March 2016.

9 Social Justice Coalition *People's Power: The Khayelitsha Commission of Inquiry* (17 August 2017) available at: <https://www.youtube.com/watch?v=he35ffrgRJE>. The Social Justice Coalition was one of the civil society organisations that called for the establishment of the Commission. This documentary video tells a story about the Commission from the perspective of some of the activists and community members in Khayelitsha.

public attention: the activists accepted their task was to re-cast these issues as a national priority. Civil society alleged in an official letter of complaint to Premier Helen Zille that there were ‘widespread inefficiencies, apathy, incompetence and systemic failures of policing in Khayelitsha’.<sup>10</sup> They contended that poor investigation of crime, a failure by the police to provide feedback to complainants, insufficient visible policing (especially in informal settlements) and discourteous and even contemptuous treatment of the public by the police, resulted in mob justice whereby suspected criminals were being killed by vigilante groups due to a lack of trust in the police.<sup>11</sup> The organisations requested that Zille establish a commission of inquiry, and also sent their letter to national and provincial SAPS, the Department of Justice and Constitutional Development, the Department of Correctional Services and the National Prosecuting Authority.<sup>12</sup> Annexed to the letter was a list of eight individual cases that civil society felt typified the systemic nature of the policing problems they had identified.<sup>13</sup> The letter (‘the complaint’) emphasised that its intention was not for a commission to focus primarily on making individualised findings, but on investigating patterns and practices. The complainants wished to see a commission of inquiry focused on ‘the nature and extent of the problems’ as opposed to assigning blame.<sup>14</sup>

At first, the Western Cape provincial government did not heed the call until further protest action in October 2011 and a ‘plague of vigilante killings’ led to the Premier reconsidering their request.<sup>15</sup> In 2012, after a failed attempt at communication with SAPS, she decided to institute the Commission.<sup>16</sup>

A long series of failed communication and engagement between civil society organisations, the Premier and various organs of state ensued, arguably catalysed in part by the fact that the Democratic Alliance (DA), which was the primary opposition party to the African National Congress (ANC) at national level, had unseated the ANC in 2009 in the Western Cape, at provincial level.<sup>17</sup> Premier Zille repeatedly requested the Minister of Police, the National Commissioner of SAPS, and the Western Cape

10 Final Report, ch.1, para.1.

11 *Ibid.*

12 Social Justice Coalition, *Our Struggle for Safety and Justice in Khayelitsha*, p.43.

13 *Ibid.*

14 *Ibid.*, p.43f.

15 Final Report, ch.1, para.3.

16 *Ibid.*, p.7.

17 G. Walliser ‘The Geopolitics Behind the DA Win in Cape Town’ *Thought Leader, Mail & Guardian* (12 June 2009).

Provincial Commissioners of SAPS to provide input into the complaint and the procedure to be followed, but never received a response.<sup>18</sup> A new National Commissioner for Police, Riah Phiyega, was appointed in June 2012, and while she did start to address the issues raised in the complaint, she did so by commissioning an internal task team in July 2012 whose findings – commonly referred to as the Tshabalala Report – were not communicated to the other parties until later submitted in a court case.<sup>19</sup> In the course of the court proceedings it emerged that Phiyega had commissioned her own investigation into the concerns contained in the complaint through a five-day fact-finding exercise in Khayelitsha, and on the basis of the findings, had planned to set up an independent police panel to investigate the police, which never occurred.<sup>20</sup> Finally, in August Premier Zille and her cabinet resolved to establish a commission without any input from the offices of the provincial or national commissioners of police.<sup>21</sup>

## **2.2 Operation of the Commission**

The Khayelitsha Commission of Inquiry was established by the Premier of the Western Cape, Helen Zille, by Proclamation on 24 August 2012 pursuant to section 1 of the Western Cape Provincial Commission Act 10 of 1998.<sup>22</sup> Premier Zille appointed two commissioners: retired Constitutional Court of South Africa justice Catherine O'Regan (Chairperson) and Advocate Vusumzi Pikoli (commissioner).<sup>23</sup> Advocate Nazreen Bawa and Advocate Thembalihle Sidaki were appointed as evidence leaders and Amanda Dissel was appointed as the secretary of the Commission. The commissioners and staff were all South Africans.

The Commission was mandated to investigate

complaints received by the Premier relating to allegations of (a) inefficiency of the South African Police Service stationed at Site B, Bonga Drive, Khayelitsha; Steve Biko Road, Harare, Khayelitsha and Makabeni Street, Lingeletu West, Khayelitsha and any other units of the South African Police Service operating in Khayelitsha, Cape Town; and (b) a breakdown in relations between the Khayelitsha community and members of the South African Police Service

18 Social Justice Coalition, *Our Struggle for Safety and Justice in Khayelitsha*, p.50.

19 *Ibid.*

20 Final Report, ch.1, para.2.

21 Social Justice Coalition, *Our Struggle for Safety and Justice in Khayelitsha*, p.44.

22 Final Report, ch.1, paras.2, 4.

23 *Ibid.*, ch.1, para.5.

stationed at the aforesaid police stations in Khayelitsha, or operating in Khayelitsha.<sup>24</sup>

The Commission then was required to compile a written report containing its findings and recommendations as to how any inefficiency in the delivery of police services or a breakdown in relations between the community of Khayelitsha and SAPS, if found, could be alleviated or remedied. The Commission was initially given six months to complete its mandate but, as discussed below, that deadline was extended several times.<sup>25</sup>

The Commission began its work shortly after its establishment. Its first order of business was to issue a notice of its working methods, emphasising that it was conducting an enquiry, and ‘not a trial’, and that any evidence submitted to it would not be used in any subsequent civil or criminal proceeding.<sup>26</sup> The investigation focused on the three Khayelitsha police stations and the Khayelitsha Family Violence, Child Protection and Sexual Offences Unit, as these were the units of SAPS in respect to which the complaints related. The Commission collected evidence (documentary record, documents and statements) from the SAPS, the complainant organisations, the Department of Community Safety (DOCS) in Western Cape, the City of Cape Town, the Independent Police Investigative Directorate (IPID) and the Civilian Secretariat for Policing Service. More than 100 witnesses testified before the Commission. The Commission completed its work and handed over its final report and recommendations to the Premier of the Western Cape on 25 August 2014.<sup>27</sup>

The Commission stated in its report that policing in Khayelitsha was profoundly challenging. Its geographic location, deep levels of poverty, poor infrastructure and very high crime rates make it a particularly difficult place for SAPS to operate. The Commission concluded that there were inefficiencies at the three police stations and at the Khayelitsha Family and Child Services (FCS) unit. Also, there was a breakdown in relations between the Khayelitsha community and the SAPS stationed in Khayelitsha.

Although South Africa has a rich history of 44 commissions of inquiry with a specific focus on policing dating back to 1910, the Khayelitsha Commission was the first to use a public forum to examine

24 Sec.4 of Proclamation 9 of 2012 published in Provincial Gazette (Western Cape) 7026 (24 August 2012).

25 Final Report, ch.1, para.5.

26 *Ibid.*, ch.1, para.6.

27 *Ibid.*, ch.1, para.11.

the systemic challenges facing policing *at a local level*, especially in areas that are difficult to police.<sup>28</sup> Moreover, from an international human rights law perspective, this Commission was notable in that its focus was not on the excessive use of force by the police, or only on the dereliction of the police's duty promptly to investigate and provide remedies for crimes by its own members, but also on its due diligence responsibilities to prevent killings by private citizens and to protect the right to life of particularly vulnerable individuals and groups.<sup>29</sup>

### **3 Features of the Commission**

#### **3.1 Terms of reference, the mandate of the Commission, and its contestation**

A complicating feature of the Khayelitsha Commission was its legal authority within the Constitution. Whereas commissions of inquiry in South Africa are established by the President of South Africa as per section 84(2)(f) of the 1996 Constitution and governed by the Commissions Act of 1947, the Constitution also gives power to the provincial premiers to appoint commissions of inquiry per section 127(2)(e). The provincial constitutions and Western Cape Provincial Commissions Act of 1998 govern these commissions which, similar to the national legislation, generally are established to investigate matters of public concern. What civil society brought to Premier Zille's attention in its call for a commission to be established was that she was empowered by section 206(5) of the Constitution to establish a commission of inquiry into 'any complaints of police inefficiency or a breakdown in relations between the police and any community' because of the provincial power under 206(3) to 'monitor police conduct, oversee the effectiveness and efficiency of the police service, and to promote good relations between the police and the community'. Although the interim Constitution had identified policing as a provincial competency, this competency was excluded from the final Constitution with provinces being given only a policing oversight function.<sup>30</sup> This complaint initiated by civil society marked the first time in

28 A. Kok & E. van der Spuy 'South African Inquiries into Policing, 1910-2015' *South African Crime Quarterly* 53 (Supplement) (2015) pp.1-2. The authors of this study categorised the 44 commissions into four areas of policing concern: administrative matters, including resourcing, capacity, efficiency, and community policing; corruption; police collusion in political violence; and police conduct in the context of disturbances, protests and riots.

29 See African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015) paras.7, 9, 11.

30 Compare ch.14, paras. 217–219 of Act 200 of 1993: The Constitution of the Republic

South Africa that a community had used section 206 in the Constitution as a means of insisting on investigation into police misconduct.<sup>31</sup>

To ensure that the Commission's legal authority was legitimate, the Premier framed the terms of reference to mirror the provincial competency as outlined in the Constitution. The Khayelitsha Commission thus was mandated to 'investigate complaints received by the Premier relating to allegations' both of inefficiency of the SAPS stationed at Khayelitsha; and of the breakdown in relations between the Khayelitsha community and members of the SAPS stationed at police stations in Khayelitsha. Its investigation, beyond the allegations themselves, was to investigate the reasons for, and causes of, the inefficiency and breakdown in relations. The Commission was to compile a report containing the findings and recommendations to alleviate and remedy the concerns.<sup>32</sup>

Although the complainants had specifically requested the inclusion of certain provincial and city-governed bodies, the Metro Police and Anti-Land Invasion Unit, both entities that work closely with SAPS across Cape Town, ultimately Premier Zille excluded them from the terms of the Commission.<sup>33</sup> An academic with a focus on criminology suggested that the narrowness of the terms of reference was important so that the Commission could focus on only one institution, namely, the SAPS.<sup>34</sup> Some members of civil society, however, felt that by limiting the terms of reference to the text of the Constitution, the Commission missed an opportunity to look at policing in Khayelitsha in a more holistic manner, as a last resort for the state.<sup>35</sup> Finally, some of the complainants felt that the Premier should have conducted a public consultation about the terms of reference instead of setting them politically.<sup>36</sup> By not holding leaders to account, community members felt that they missed an opportunity to influence the content of the terms of reference.<sup>37</sup> The exclusion of the Metro Police and the Anti-Land Invasion Unit, both local entities that

of South Africa, 1993 with ch.11, arts.206(3), (4) of The Constitution of the Republic of South Africa, 1996.

31 The Agenda 2030 for Sustainable Development and Goal 16: Case Studies of Social Justice from South Africa to Blend Policy and Practice, Open Society Foundation South Africa (2016) pp.22–23.

32 Sec.4 of Proclamation 9 of 2012 published in Provincial Gazette (Western Cape) 7026 (24 August 2012).

33 Social Justice Coalition, *Our Struggle for Safety and Justice in Khayelitsha*, p.43; see also Ukwazi, *Safety, Justice and People's Power*, p.ix.

34 Interview with author, March 2016.

35 Interview with author, April 2016.

36 *Ibid.*

37 *Ibid.*

undertook some significant policing responsibilities in Khayelitsha and which the complainants had requested to be included in the inquiry, a local government official suggested, revealed a political motive to exclude local entities from oversight and therefore remained an Achilles heel for the Commission, with national government and community groups in Khayelitsha refusing to fully engage with the Commission process.<sup>38</sup>

### **3.1 Challenging the terms of reference**

That this Commission was located at the constitutional intersection of national and provincial roles,<sup>39</sup> coupled with the party politics that have haunted the relationship between the Western Cape province and the Republic of South Africa since the Democratic Alliance seized control of the City of Cape Town in 2006, ensured that it was born into political conflict. Indeed, although the Commission was launched in 2012 its work was delayed for approximately a year by a court application by the Minister of Police and other representatives of the police at national, provincial and local levels challenging the Commission's establishment and powers. They asked the Western Cape High Court to stop the Commission from issuing subpoenas, arguing that the Commission was 'irrational, inconsistent with the Constitution, and unlawful', and that it failed 'to give effect to the principles of co-operative governance and inter-governmental relations'.<sup>40</sup> The Minister of Police, Nathi Mthethwa, went further to describe the subpoenas against senior leadership of SAPS as 'demeaning, undignified, and ... designed to impugn the integrity of the individual members, and the SAPS as a whole'.<sup>41</sup>

The High Court upheld the validity of the Commission, noting the lack of engagement forthcoming from senior members of the police.<sup>42</sup> Noteworthy, however, is the dissenting opinion in that judgment, in which Judge Vincent Saldanha concluded that the parties had not exhausted their respective constitutional obligations of cooperative governance to engage one another and 'explore appropriate means of avoiding or resolving the dispute between them and in respect of the complaints'.<sup>43</sup> Indeed, sections 41(1)(h)(vi) and 41(3) together underscore a constitutional reticence for organs of state to engage in legal proceedings against one another,

38 Interview with author, March 2016.

39 'On the Record with Judge Kate O'Regan', p.61.

40 *Minister of Police & Others v Premier of the Western Cape & Others* (2012) para.32.

41 *Ibid.* See Nati Mthethwa's affidavit, p.15.

42 *Minister of Police & Others*.

43 *Ibid.*, para.92.

except in situations of last resort.<sup>44</sup> Whether this actually was one of those instances was an arguable matter.

The Minister of Police then appealed the judgment to the Constitutional Court. In October 2013 Deputy Chief Justice Dikgang Moseneke, writing on behalf of a unanimous court, determined that the Premier's decision to establish the Commission was constitutional and affirmed the Commission's right to issue subpoenas against the police.<sup>45</sup> Justice Moseneke stated that the Constitution established 'a general framework for oversight [of the police service] as well as specific mechanisms through which a province may exact accountability'.<sup>46</sup> The complainants, Moseneke continued, 'sought to invoke these oversight mechanisms, which will be best served by a commission entrusted with powers of subpoena over members of the Police Service'.<sup>47</sup>

These legal proceedings did not materially change the structure of the Commission, except to affirm its subpoena powers and to end speculation about whether parties would have to comply with subpoenas issued by the Commission. However, the legal battle did slow down the momentum of the Commission, delaying proceedings for one year and in the process souring national-provincial relationships. As one commissioner noted, it set the stage for the space of the Commission to be occupied by 'intense political contestation'.<sup>48</sup>

### 3.2 Independence and impartiality

To lead the inquiry, the Premier appointed two highly-experienced commissioners: former Constitutional Court Justice Kate O'Regan (as Chairperson) and former head of the National Prosecuting Authority, Advocate Vusi Pikoli. She also appointed four additional staff members to support the commissioners: Advocates Nazreen Bawa and Thembalihle Sidaki (evidence leaders); Amanda Dissel (secretary); and Khangelani Rawuza (office administrator). The combination of evidence leaders

44 Sec.41(1)(h)(vi) of the Constitution of the Republic of South Africa states that '[a]ll spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by avoiding legal proceedings against one another', and sec.41(3) states that '[a]n organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute'.

45 *Minister of Police & Others v Premier of the Western Cape & Others* [2013] ZACC 33.

46 *Ibid.*, para.52.

47 *Ibid.*

48 Interview with author, March 2016.

brought different strengths to the team, including Advocate Sidaki's intimate knowledge of Khayelitsha.<sup>49</sup> In addition to this core team, the Commission hired eight pupils (trainee advocates), who managed the Commission's office and took witness statements for a small stipend.<sup>50</sup>

In all the contentious political squabbling over the Commission, no one has materially disputed the impartiality of O'Regan and Pikoli, and academics and civil society organisations alike referred to the two commissioners as 'fair and impartial'.<sup>51</sup> Indeed, Justice O'Regan confirmed that she had accepted the assignment on the condition that the Commission would be 'organisationally completely autonomous', to which the Premier agreed.<sup>52</sup> Vusi Pikoli occupies a notable place in South African history as the person who was discharged from his position as the head of the NPA allegedly to shield corruption within the police structure. He refers to himself as 'not pliable' and 'motivated by his commitment to his office'.<sup>53</sup> Adding credibility to the impartiality of the Commission team, one of the evidence leaders had previously worked on a well-known commission of inquiry that the Premier herself had challenged.<sup>54</sup>

Although the widespread perception of the commissioners was that they were impartial choices, the reaction was mixed in regard to the independence of the Commission. Indeed, much of the political squabbling that haunted the Commission from inception to the present day has been rooted in a perception that it was a political ploy orchestrated by the DA to 'shift the blame game' and criticise the ANC for the DA's failure to deliver policing services at a provincial level.<sup>55</sup> While the commissioners made every effort in the course of the Commission to side-line these concerns, describing them as distractions from the serious concerns at issue, the exclusion by Premier Zille in the terms of reference of the Commission of the Metro Police and Anti-Land Invasion Unit, both entities that work

49 Interview with Commission staff, April 2016.

50 *Ibid.*

51 Interviews with author, March-April 2016.

52 'On the Record with Judge Kate O'Regan', p.59.

53 M. Verwoerd 'Vusi Pikoli: Society is in Danger When Politicians Meddle in NPA Affairs' *EWN News* (26 June 2016) available at: <http://ewn.co.za/2016/06/21/Vusi-Pikoli-Society-is-in-danger-when-politicians-meddle-in-the-affairs-of-the-NPA>.

54 Interview with Commission staff, April 2016. The Commission, which was known as the Erasmus Commission, was set up by then Premier Ebrahim Rasool to investigate certain unlawful activities in the City of Cape Town, but was forced to close after a High Court ruling found it 'politically motivated'. See, e.g., 'Commission of Inquiry into spy saga named' *Mail & Guardian* (30 November 2007); 'Court Rules That Erasmus Commission is Unconstitutional' *Mail & Guardian* (1 September 2008).

55 J. Evans 'ANC Accuses Zille of Playing the "Blame Game"' *News 24* (10 August 2015).

closely with SAPS across Cape Town,<sup>56</sup> remained the proverbial elephant in the room that lent credulity to these concerns of independence of the terms of reference. In her response to the recommendations contained in the Commission's final report, National Commissioner Phiyega was able to highlight that elephant again, stating that 'provincial as well as local government tasked to deliver an enabling policing environment should have also been roped in as subjects of the commission inquiry'.<sup>57</sup>

Although nearly all respondents emphatically confirmed the independence of the manner in which the Commission operated, one local government official emphasised the continuing resistance to the Commission, attributing it to the way in which party politics appeared to have manipulated the Commission's mandate. Sometimes there is a shift in political attitude towards the Commission but, the official indicated, this support is often 'not genuine' and 'becomes a tool' that people use to galvanise support in their favour.<sup>58</sup>

### 3.3 Financing and resources of the Commission

Inspired by the New Zealand Standing Commission Secretariat, which establishes a centralised secretariat for all commissions of inquiry, Commissioner O'Regan decided to establish a Secretariat for the Khayelitsha Commission. With a secretariat in place, the Commission had the benefit of having a secretary and an office manager, and had capacity to build a website (proposed to remain live until 2022<sup>59</sup>) on which all procedures and reports were to be published.<sup>60</sup> The Western Cape Department of Community Safety provided the Commission with administrative and financial support, and the province and city furnished security for the Commission staff.<sup>61</sup> Some community organisations received funding from donors to facilitate the testimony of community members by transporting them to and preparing them for the hearings.<sup>62</sup> The total estimated budget for the Commission (with additional resources allocated at one point by DOCS) was a little more than R13 million (approximately \$1 million), a figure criticised by the ANC government

56 Social Justice Coalition, *Our Struggle for Safety and Justice in Khayelitsha*, p.43; see also Ukwazi, *Safety, Justice and People's Power*, p.ix.

57 'SAPS Response to Khayelitsha Commission's Recommendations – Riah Phiyega' Politics Web (8 June 2015).

58 Interview with author, March 2016.

59 See [www.khayelitshacommission.org.za](http://www.khayelitshacommission.org.za).

60 'On the Record with Judge Kate O'Regan', p.60.

61 Interview with Commission staff, March 2016.

62 Interview with civil society organisations, March-April 2016.

as 'a shame'.<sup>63</sup> By way of reference, the Marikana Commission, which had simultaneously been undertaken to examine public order policing in the wake of the Marikana massacre of 34 miners, cost more than R150 million (approximately \$11,2 million).<sup>64</sup>

### **3.4 Investigatory powers**

In many ways the constitutional challenge to the Commission's legitimacy arose as a result of the Commission's issuance of subpoenas to the provincial police commissioner, the station commanders of three Khayelitsha police stations, and to the IPID.<sup>65</sup> The Constitutional Court very clearly affirmed the legitimacy of the Commission's subpoena powers. After judgment was handed down, the Commission did not have to exercise this power, as SAPS and other parties readily provided testimony and documents to the Commission. Given that the origin of the constitutional challenge to the Commission had been SAPS's initial intransigence to hand over documents to the Commission, the Commission confirmed that subpoena powers remained a stick it could wield if necessary. Additionally, over two days in late January 2014 the commissioners, along with legal counsel for the complainants, SAPS, DOCS and the City of Cape Town, conducted *in loco* inspections across Khayelitsha. They visited all three police stations under review, the cluster command office and several informal settlements.<sup>66</sup>

Although the Commission possessed investigatory powers to carry out its inquiry, it bears recalling that it was not engaged in the task of determining civil or criminal liability for particular incidents. As such, it did not make findings of fact where conflicts in testimonies arose. Rather, it was focused on identifying patterns of failures and challenges so as to be able to find solutions. In that regard, its extensive investigatory powers were useful to the extent that it had complete and unfettered access to all data generated by SAPS. Given SAPS's prior experience with a large number

63 W. Meyer 'ANC Sees Red Over R13m Inquiry Cost' *IOL* (20 August 2014). According to the MEC for Community Safety in the Western Cape, Dan Plato, that figure was directed towards the payment of legal costs incurred due to the constitutionality challenge of the Commission, the cost of which was ordered to be partially recovered from the police as per the court ruling; payment for the services of the commissioners, the evidence leaders and the secretariat; and payment for logistics and general administrative costs.

64 'Marikana Inquiry Cost R153m – Report' *News24* (5 July 2015) available at: <https://m.news24.com//SouthAfrica/News/Marikana-inquiry-cost-R153m-report-20150705>.

65 'Police to Challenge Cape Commission' *News24* (31 October 2012) available at: <https://www.news24.com/SouthAfrica/Politics/Police-to-challenge-Cape-Town-commission-20121031>.

66 Ukwazi, *Safety, Justice and People's Power*, p.xi.

of adversarial commissions of inquiry involving particular incidents involving the police, it perhaps is not surprising that it was institutionally slow to adapt to this Commission's different approach. Justice O'Regan remarked in a later interview that while the Commission presented itself as non-adversarial, 'it took some time for that penny to drop' with SAPS and the other complainant organisations.<sup>67</sup>

### 3.5 Participation in the Commission

You come and go and leave us with these crises ... After 23 years of democracy, we're still in the same position.<sup>68</sup>

Through both phases of the Commission, over 100 witnesses testified and 170 statements from individuals laying complaints against SAPS with the Commission were documented and included in the Commission's record.<sup>69</sup> The Khayelitsha Commission on more than one occasion has been referred to as 'a people's commission',<sup>70</sup> something that members of its staff took to have been 'a first' for South Africa's new constitutional dispensation.<sup>71</sup>

#### 3.5.1 Outreach and the politics of gatekeepers

Well before the Commission held its first public hearing, it set up an office in Harare, Khayelitsha.<sup>72</sup> Its staff distributed 200 000 pamphlets in isiXhosa and English, began taking statements from community members, and met with a range of government agencies and community-based organisations, journalists, radio presenters, and widely disseminated media appearances, press statements and posters publicising the existence and mandate of the Commission.<sup>73</sup> These outreach activities were critical to the Commission's staff as a way of legitimising the Commission's work and also, importantly, in avoiding a situation in which 'gatekeepers of the community'<sup>74</sup> dominated the Commission.

67 'On the Record with Judge Kate O'Regan', p.61.

68 Wiseman Mpepo, activist and community member in Khayelitsha. See N. Pertovsky & T. Ntongana 'Khayelitsha Residents Debate Policing With Members of Parliament' *Groundup* (6 April 2017).

69 Final Report, Summary, ch.7, para.3.

70 Interview with focus group of Khayelitsha residents, April 2016.

71 Interview with Commission staff, April 2016.

72 Final Report, ch.3, para.5.

73 *Ibid.*, ch. 3, para.8.

74 Interview with Commission staff, April 2016.

Despite the Commission's best efforts, however, some civil society organisations were indeed seen to be gatekeepers, with some others reflecting that the Commission's outreach processes had been 'superficial'.<sup>75</sup> Conflict ensued between some of the complainants and other organisations that also wanted to be a more active part of the process. According to some civil society organisations, some organisations that were seen to exert more local authority over Khayelitsha, and that were politically aligned to the ANC, felt as though they were not properly consulted in this process.<sup>76</sup> Frustration with the Commission's processes was palpable, and Commission staff confirmed that on occasion they received threats to their personal security.<sup>77</sup> A focus group of Khayelitsha residents confirmed that while a feeling existed among many residents that 'ordinary people were not heard', some of the most powerful testimonies were given by those people without an organisational affiliation who came into the Commission offices 'on their own accord'.<sup>78</sup>

The Commission also started issuing provisional working methods, setting down dates for the public hearings, and sending letters to the National Commissioner of Police, the Western Cape Provincial Commissioner and the three Khayelitsha station commanders, requesting their cooperation, as well as documents and other information. The Secretariat drove this process by issuing notices, outlining the manner in which the Commission would work, its timeframes, and expectations of affiants.<sup>79</sup>

The Commission thoroughly set the stage for grand political theatre at its best.

### **3.5.2 Hearings**

Between January and May 2014 the Commission held two phases of public hearings at Lookout Hill in Khayelitsha. The Commission heard closing arguments on 25 May 2014. Commissioner O'Regan affirmed the importance of holding hearings in the very community the Commission was investigating, and in a venue that was welcoming to the public. Apparently a lot of time went into finding a suitable venue with these considerations in mind. Commissioner O'Regan spoke of the Commission's desire to 'facilitate a conversation in which people could genuinely speak and hear one another' in contrast to the silencing that

75 Interviews with author, March 2016.

76 *Ibid.*

77 Interview with author, April 2016.

78 Interview with focus group of Khayelitsha residents, April 2016.

79 Final Report, ch.3, paras.16–34.

often occurs as a result of social conflict and would counter the perceptions of bias in the Commission.<sup>80</sup> Sometimes, she opined, ‘asking questions in an even-handed manner is a process of accountability itself’.<sup>81</sup>

Commissioner O’Regan spent much time reviewing best practices from commissions of inquiry around the world in an effort to determine how to ‘act fairly, both in competency and in process’.<sup>82</sup> The Commission was careful in relation to witnesses and clearly highlighted the powers it had in order to manage the public’s expectations. Further, the Commission was careful about exposing people to ‘new victimisation’, and entered into partnerships with civil society to provide counselling services to those who needed it.<sup>83</sup>

The hearings were consistently well attended by a large audience of mostly community members and media, as well as representatives of the various parties to the Commission. According to one civil society organisation, both the commissioners and the initial activists who testified instilled a sense of confidence in the audience.<sup>84</sup> In the back of the hall, an exhibition about Khayelitsha’s history was set up for people to visit, with one of the township’s original residents on hand to answer questions.<sup>85</sup>

Civil society organisations not only assisted in the efforts to collect statements from community members, but they also published and disseminated helpful booklets about the structure, processes and findings of the Commission. These materials were also translated into isiXhosa in order to be accessible by most community members. According to one of the complainant organisations, many funders of public interest legal work in South Africa could see the utility of the Commission and earmarked additional funding to these NGOs so that they could take up this work of supporting the Commission’s investigations.<sup>86</sup> A Commission staff member pointed out that many experts were retained at low cost, or offered their services *pro bono*, to provide inter-disciplinary expertise in helping commissioners to understand the context of Khayelitsha, the internal structures of SAPS, and the intricate web of social services linked to effective policing that also needed to be considered.<sup>87</sup> Another staff

80 ‘On the Record with Judge Kate O’Regan’, pp.60–61.

81 Interview with Judge Kate O’Regan, March 2016.

82 *Ibid.*

83 *Ibid.*

84 Interview with author, March 2016.

85 Ukwazi, *Safety, Justice and People’s Power*, p.xi.

86 Interview with author, March 2016.

87 *Ibid.*

member confirmed that there was an ‘incredible amount of goodwill’ from many parts that led to many wanting ‘to be part of the policing solution’.<sup>88</sup>

One academic we spoke to with an expertise in policing felt that an assessment of the testimony presented to the Commission revealed some missing voices of dissent, particularly from actual structures that affect social control in Khayelitsha, including leaders of lynch mobs, taxi drivers and others, perhaps because of their fear of criminal prosecutions.<sup>89</sup>

Despite some critiques of gatekeeping and a sense from one journalist who extensively covered the Commission that the hearings were ‘too juridified’,<sup>90</sup> there was an overwhelming sense that the Commission successfully infused fairness, mutuality and dignity into the hearings and truly approached the issues involved as an inquiry. As one academic who had testified as an expert witness in the Commission stated, ‘it allowed all truths to participate’, and the Commission ‘received multiple narratives’.<sup>91</sup> A member of civil society suggested that the hearings facilitated a kind of ‘reconciliation’ that proceeded from ‘a common understanding’ of the problem.<sup>92</sup>

### **3.5.3 SAPS’s participation**

Perhaps one of the most telling features of the Commission was its ability to influence SAPS representatives to buy into and participate in its processes. The Commission was regarded with a lot of distrust and suspicion at its inception, particularly during the constitutional challenge to its mandate. The subsequent attitudinal change may be ascribed at least in part to the Commission’s repeated assurances during hearings that its task was not to assign blame or to shame, but to investigate inefficiencies and the breakdown in trust within the community. In total, the Commission estimated that it received over 50 000 pages of documents from SAPS, including 400 police dockets.<sup>93</sup> Twenty-three SAPS witnesses from local, provincial and national level testified.<sup>94</sup> The Commission’s constructive mission in finding solutions to longstanding challenges was further highlighted by its ready acknowledgment of the particular difficulty of providing social services, such as policing, in a community with so few

88 Interview with author, April 2016.

89 Interview with author, March 2016.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 Final Report, ch.10, paras.1, 9.

94 Final Report, ch.11, para.2.

resources.<sup>95</sup> Once the Commission forged a good working relationship with the provincial police inspectorate, it was provided access to hundreds of police dockets that it was able to review together with SAPS.<sup>96</sup>

Evidence of this attitudinal change can be found in the testimony of the provincial police commissioner before the Commission:

My management accepts and welcomes any intervention from anybody to better the service to the community and we really look forward to the outcome of this Commission so that we can see and evaluate how can we better the service to the various communities that we serve because we will not only use the outcome of this Commission for the three police stations but we will look broader in the Western Province itself to all 150 police stations ... I am prepared to apologise for the lack of services rendered to address the crime problems in the Khayelitsha area.<sup>97</sup>

According to one Commission staff member, the fact that the provincial police commissioner tendered this apology and promised to have a ceremony to concretise the apology with family members of killed victims, coupled with the fact that top SAPS officials were asked to explain their practices to the community and could be asked questions, palpably changed the mood in the hearings.<sup>98</sup>

However, the Commission was not able to reach the rank and file membership of SAPS who are assigned to the three Khayelitsha police stations, who may have not felt at liberty to share their personal perspectives of working in Khayelitsha. In retrospect, Commissioner O'Regan reflected that she would have liked to gain some understanding of how these individuals felt about the work they do and about the mandate of the Commission.<sup>99</sup> One civil society organisation with expertise on policing, however, felt that it was not clear that a survey or focus group would have achieved obtaining this candour, without an investment of time into building the trust of rank and file police officers.<sup>100</sup> What was echoed in several interviews with Commission staff, retired police and some civil society organisations was that there perhaps should have been someone

95 'On the Record with Judge Kate O'Regan', p.61.

96 Interview with Judge Kate O'Regan, March 2016.

97 Lieutenant General Arno Lamoer, SAPS Provincial Commissioner Western Cape, 1 April 2014; Final Report, ch.11, para.250.

98 Interview with author, April 2016.

99 'On the Record with Judge Kate O'Regan', p.63.

100 Interview with author, April 2016.

on the core Commission with particular expertise in policing to review police dockets and a private investigator to review individual cases.<sup>101</sup>

### **3.5.4 Archive**

The archival footprint of the Commission has been enormous. According to a Commission staff member, some believe it to be ‘the proudest legacy of the Commission’.<sup>102</sup> One academic agreed, stating that thousands of pages of information on a wide range of administrative, operational and policy matters of relevance to police and policing had been produced. The online storage of expert testimonies, witness statements and transcriptions of cross-examinations has further enhanced access to both primary and secondary material.<sup>103</sup>

Members of the Commission staff also told us how important it was to have a web-based model in the Khayelitsha Commission and how important it is for future commissions wisely to use the internet and technology.<sup>104</sup> In this case, the circumstances of the members of the Secretariat necessitated a web-based model as they were based in different locations, and therefore had to use Dropbox and Skype to share information.<sup>105</sup> Electronic communication and publication of the Commission’s materials also proved to be the most cost-effective means of sharing information internally and externally.<sup>106</sup> All notices to parties were published on the Commission’s website, as well as the full record of the proceedings.<sup>107</sup> This process was similar to the way in which South Africa’s Constitutional Court issues notices to parties.

The Commission’s website will remain active until 2022, after which the documents produced during the Commission will be stored in the provincial archive.<sup>108</sup> According to Commissioner O’Regan, creating an online system has facilitated a cooperative network between policy makers, the academy and the government.<sup>109</sup>

101 Interviews with author, March-April 2016.

102 Interview with author, March 2016.

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*; interview with Judge Kate O’Regan, March 2016.

106 Interview with Commission staff, March 2016.

107 *Ibid.*

108 Interview with provincial government official, March 2016.

109 Interview with author, March 2016.

### 3.5.5 *Final report*

On 25 August 2014, after two years of meticulous investigation, 40 days of public hearings, 50 000 pages of police documents, 400 dockets, dozens of expert reports and approximately 200 affidavits,<sup>110</sup> the Khayelitsha Commission published its 540-page report, entitled *Towards a Safer Khayelitsha*. One particularly striking feature of the report is that a large section is dedicated to summarising the 200 or so witness statements. Commissioner O'Regan explained this, saying that the bravery of the witnesses on the side of SAPS and community required a 'respectful' means of recording their testimonies and including them in the report.<sup>111</sup> The Commission handed a copy of the report to the Western Cape government, City of Cape Town and the Social Justice Coalition.

The final report, divided into four parts, systematically worked through its terms of reference, working methods, local context, institutional framework, individual complaints, testimony and documents received in phases 1 and 2, made findings as to policing inefficiencies and breakdown in trust between police and the community, and concluded with 20 recommendations. The final report revealed significant inefficiencies both within police stations, as well as a detailed investigation and exposition of the external relations of the SAPS in Khayelitsha.

Perhaps the Commission's most striking finding is that SAPS's system of human resource allocation is 'unconscionable' and has led to significant understaffing of police personnel in the poorest areas of Cape Town with the highest levels of serious contact crime. The reasons for this were varied, but among them the Commission found that the system was highly complex, not publicly available or debated, even within SAPS or by the key oversight bodies, such as the national Parliament and the Western Cape legislature, and that the data used to calculate the allocation was 'not necessarily accurate', not even requiring a check against per capita police personnel to residents ratios.<sup>112</sup>

Although it is incontestable that the Commission uncovered a wealth of information, its deliberately narrow remit meant that its report focused on police inefficiency rather than the broader socio-economic context of crime, a focus one criminology academic criticised.<sup>113</sup> However, this narrow remit did not constrain the Commission from enumerating the

110 Ukwazi, *Safety, Justice and People's Power*, p.ix.

111 'On the Record with Judge Kate O'Regan', p.62.

112 Final Report, ch.15, paras.31–33.

113 Interview with author, March 2016.

inefficiencies it assessed, including the poor performance of the police stations in question, institutional problems at cluster and national levels – including the centralised nature of resource allocation; the ‘cowboys don’t cry’ institutional policing culture; poor behaviour of highly-ranked law enforcement officials; corruption; a lack of strong, respectable leadership within SAPS; and a lack of provision within the department for establishing external relations.<sup>114</sup>

Two sections of the report are particularly noteworthy because of the complexity of the issues they address. First, there is a section that discussed one of the most intractable policing issues before the Commission, namely, vigilantism. As described by Dr Gail Super, a criminologist who testified before the Commission, the root causes of vigilantism, or vigilante practices, pre-date the modern policing era and, therefore, in some respects are far more complex to resolve.<sup>115</sup> She emphasised the fact that the roots of these practices are historical and cultural, and that it was a misnomer to think of them merely as symptoms of a weak or ineffective criminal justice system.<sup>116</sup> Dr Kelly Gillespie, a social anthropologist, signalled the change in perception of vigilantism: whereas in the 1940s and 1950s it was seen as ‘informal policing’ aligned to the underground political movement against apartheid and highly effective at maintaining order in the townships, it had morphed into violent, organised, and conservative groupings by the 1980s designed to neutralise groups opposed to the apartheid state.<sup>117</sup> The witness stated that the perception of increased crime in Khayelitsha was explained by community residents as linked to the decline in community structures maintaining order.<sup>118</sup>

In the end the Commission tried its best to direct one recommendation specifically to this issue – advising SAPS to develop an ‘intelligence-led approach’ to vigilantism and vengeance attacks; to develop ‘a policing strategy’ as a matter of urgency; to document and report incidents regularly; and to institute a public education programme.<sup>119</sup> If implemented, these responses would be critical to combating the scourge of vigilantism but, according to the testimony of Dr Pumla Gobodo-Madikizela, an expert on trauma, memory and forgiveness, they may still not address the

114 L. Freeman & C. McDonald ‘Mapping Khayelitsha: The Complexities of Everyday Policing in a High-Crime Area’ *South African Crime Quarterly* 53 (September 2015) p.35.

115 Final Report, ch.12, paras.29–31.

116 *Ibid.*

117 *Ibid.*, ch.8, paras.28–33.

118 *Ibid.*, ch.8, para.30.

119 *Ibid.*, ch.15, paras.31–36.

underlying socio-cultural roots of the issue and the inter-generational apartheid legacy of violence that, some claim, feed it.<sup>120</sup>

The report noted that SAPS lacks provision for the establishment of external relations, except insofar as there are detective court case officers. Indeed, there are no station-level positions that focus on creating an effective external inter-workings.<sup>121</sup> The community policing structures are numerous – ranging from community policing forums, to neighbourhood watches, to the Khayelitsha Development Forum, taxi associations, the South African National Civic Union, and the Congress of South African Trade Unions –but in operation regularly work outside formal SAPS structures.<sup>122</sup> The Commission identified community-policing forums as a civilian oversight mechanism over police, and created a basis in law for neighbourhood watches. A provincial government office emphasised to us that both were discussed as important existing community mechanisms for ensuring civilian-led safety, and not a resort to vigilante justice.<sup>123</sup>

Another section of the report addressed policing culture. Given the difficulties in penetrating the opaque internal nature of SAPS, the Commission felt it important to speak about that breakthrough that occurred during the hearings in respect of SAPS's engagement with the inquiry.<sup>124</sup> Due to the informal 'code of silence' between police officers to leave wrongdoing unreported, corruption and ineptitude continue to flourish in policing institutions across the globe, and police accountability remains elusive.<sup>125</sup> By explicitly acknowledging this culture, the Commission upheld its mandate not to point fingers but to identify breakdowns in systems that contributed to soaring crime levels in Khayelitsha. The report highlighted that there is no simple solution to the systemic challenges in policing, and that because it is difficult to see what goes wrong from the inside, the situation demands that 'one steps back to gain a clearer understanding'.<sup>126</sup> By obtaining a fair level of detail about what was wrong, including through external inputs, the Commission undertook a 'root solution oriented approach'<sup>127</sup> to policing that revealed 'a sense that there can actually be solutions to the challenges faced'.<sup>128</sup>

120 *Ibid.*, ch.12, paras.211–228.

121 Freeman & McDonald, 'Mapping Khayelitsha' pp.33–35.

122 *Ibid.*

123 Interview with author, March 2016.

124 Interview with Judge Kate O'Regan, March 2016; Final Report, ch.14, paras.62–83.

125 Final Report, ch.12, paras.23–26.

126 Interview with Judge Kate O'Regan, March 2016.

127 *Ibid.*

128 *Ibid.*

After three months of deliberations, the Commission settled upon 20 recommendations to begin to alleviate the problems that had been presented to it in respect of community policing in Khayelitsha. Key recommendations included the following:

1. Each police station in Khayelitsha should adopt a Community Policing Commitment in consultation with local residents.
2. The police in Khayelitsha should adopt a procedural justice model of policing.
- ...
6. The Provincial Commissioner should issue guidelines for visible policing in informal neighbourhoods.
7. The SAPS system for determining the human resource ratio should be revised and the human resources at each of Khayelitsha's three police stations should urgently be re-allocated.
- ...
11. Vigilantism should be dealt with by SAPS in a more systematic manner.
12. A multi-sectoral task team on youth gangs should be established by DOCS.
- ...
16. The system by which complaints are lodged against SAPS should be revised to allow for greater fairness and objectivity.
17. DOCS and the Civilian Secretariat for Police should assume more active roles in monitoring the three Khayelitsha stations and the FCS Unit.

Although the Commission crafted these recommendations, a policing expert with whom we spoke suggested that the strength of the recommendations was that they really had emerged from SAPS's own testimony.<sup>129</sup> Missing, however, from the recommendations was any specification of the mechanisms necessary to effectuate the recommendations, or the roles that would need to be assigned in order to realise them. One civil society organisation felt that the Commission should have directed the Premier in the report to adopt an 'intersectoral structure' and make cabinet-level appointments across departments to ensure that 'the baby is looked after'.<sup>130</sup>

129 Interview with author, April 2016.

130 Interview with author, March 2016.

### 3.5.6 Political reception of the report

Commissioner O'Regan attempted to insulate the final report from party politics in her handover statement to Premier Zille, in which she noted:

The most important consideration in assessing this report is the need to improve the safety of people who live and work in Khayelitsha. This is a strategic goal of both national and provincial government. It is unlikely that those strategic goals will be advanced if those who read and comment on this report, forget that its recommendations are aimed solely at improving the quality of life of the people of Khayelitsha, and instead comment on the report in a manner that engages in a transient dialogue focused on political point-scoring.<sup>131</sup>

The Commission's framing of the final report as fair and independent had limited political effect. Characteristic of this Commission from its inception, the political squabbling continued after the Commission released its final report. Premier Zille attempted to contact the National Commissioner of Police and Police Minister in light of the findings, but for nine months no response was forthcoming. Next, in June 2015 Commissioner Phiyega sent Premier Zille an interim response to the Commission's report marked confidential, in which she responded to each of the 20 recommendations, finally dismissing both the Commission and its findings as an 'expensive and resource-hungry paper exercise'.<sup>132</sup> Zille responded in turn in July 2015, and the ANC characterised Zille's response as 'blame shifting'.<sup>133</sup>

Finally, in late August 2015 Police Minister Nathi Nhleko and Premier Zille issued a joint statement stating that national and provincial governments were establishing a joint task team to engage and implement the Commission's recommendations. Five representatives from each sphere of government were invited to sit on the task team, and were instructed to report directly to both the Premier and the Police Minister. SAPS and DOCS were to enter into a memorandum of understanding (MOU), clarifying roles and relationships between the provincial and national governments,<sup>134</sup> with the coordinating committee for that task

131 Handover Statement by Commissioners para.27, available at: [http://www.khayelitsha.commission.org.za/images/towards\\_khaye\\_docs/Commissioners\\_Handover\\_statement\\_25\\_August\\_2014.docx](http://www.khayelitsha.commission.org.za/images/towards_khaye_docs/Commissioners_Handover_statement_25_August_2014.docx).

132 J Cronje 'Phiyega Slams Khayelitsha Commission' *IOL News* (8 August 2015).

133 F Jacobs 'Khayelitsha: Zille Must Stop Blame Game' *ANC W Cape* (10 August 2015).

134 'Task Team to Tackle Khayelitsha Commission Recommendations on Policing' *News24* (24 August 2015) available at: <http://www.news24.com/SouthAfrica/News/Task-team-to-tackle-Khayelitsha-Commission-recommendations-on-policing-20150824>.

team chaired by the Provincial Commissioner of Police and the Provincial Minister of Community Safety. As of the end of 2017, that MOU had not been signed.

Although there has arguably been some progress on the part of the provincial government, national government still has made no progress on the implementation of the recommendations.<sup>135</sup> Instead, acrimony between the parties continues to this day and has seriously impeded the effectiveness of any initiative to implement the Commission's recommendations. The example of the Khayelitsha Commission painfully demonstrates one paradox of commissions of inquiry: the independence that is necessary for commissions to effectively investigate complicit political actors often also acts to insulate commissions in a political vacuum that offers little hope for their recommendations to be implemented.

### **3.5.7 Public reaction to the report**

The Commission came about in a political climate in which there was widespread denial about the challenges faced in policing and resistance to public processes of inquiry and accountability. The police killings of a service delivery protestor, Andries Tatane, in 2011 and mineworkers at Marikana in 2012 remained fresh on people's minds and hindered candid dialogue with the police. From the perspective of one civil society organisation, many members of the public were very surprised at how much information had been allowed to come out through the process.<sup>136</sup> A provincial government official believed that through the litigation, the Commission served to clarify to the government and to the public the provincial competency of policing oversight, which previously had not been clear.<sup>137</sup> Indeed, its very existence has offered other social justice movements hope about the possibility of establishing commissions of inquiry using other provincial oversight powers.<sup>138</sup> For many academics and civil society organisations we spoke to, the final report reinforced the necessity of the Commission because no other platform would have allowed for this spotlight on policing.<sup>139</sup> A member of the Commission's staff,

135 A Furlong 'Three Years After the Khayelitsha Commission, Is There Any Progress?' *Times Live* (25 August 2017).

136 Interview with author, April 2016.

137 Interview with author, March 2016.

138 See, for example, N. Davids 'Special Units to Probe Child Murders in the Western Cape' *Sunday Times* (21 September 2017) available at: <https://www.timeslive.co.za/news/south-africa/2017-09-21-special-units-to-probe-child-murders-in-the-western-cape/>.

139 Interviews with author, March 2016.

however, felt that without the power to make binding recommendations, the Commission could not achieve much direct success.<sup>140</sup> Many respondents shared the sentiment that the starkest recommendation in the report was that about inequitable resourcing in policing.<sup>141</sup>

### 3.5.8 *Good practices from the Commission*

The Khayelitsha Commission was notable in many respects. Historically, commissions of inquiry have often been perceived throughout the world as a vehicle for political whitewashing, without much consideration given to the mechanics of how they will operate or without much reflection of the symbolic role they may play in the community. The Khayelitsha Commission was different in the way it was managed as well as the content of investigation. As one academic stated, the Commission's use of the web, as well as the way in which the Commission was organised and focused on appropriate management of time, resources, and the process facilitated the collection and creation of a substantial amount of information in a very short period of time.<sup>142</sup> As a policing expert shared with us, '[n]o other commission was able to get the statistics that [this Commission] did', information that is generally beyond the public purview.<sup>143</sup> The Commission issued recommendations that are very practical, and which focused on addressing matters at a local level. Its recommendations were capable of being implemented without further inquiries.

Among some civil society organisations there was also a particular sense of collective ownership around community policing that emerged during the Commission, not only the sole responsibility of the police.<sup>144</sup> In this way the Commission attempted also to promote the building of trust and relationships so that there are new ways of engaging between the community and the police.<sup>145</sup> A member of staff explained this phenomenon as the work of the Commission facilitating a process whereby 'people started to critically examine the mechanics of their social contract with authorities'.<sup>146</sup> Whereas many commissions can serve to de-humanise, this Commission served, according to one academic, to 'humanise' the policing process, without identifying scapegoats or

140 Interview with author, April 2016.

141 Interviews with civil society organisation and Commission staff, March-April 2016.

142 Interview with author, March 2016.

143 Interview with author, April 2016.

144 Interview with author, March-April 2016.

145 *Ibid.*

146 Interview with author, April 2016.

vilifying puppets or masters.<sup>147</sup> The Commission thus proceeded as a well-managed theatrical spectacle, bridging divides along the way and ‘opening up internal administrative logic’.<sup>148</sup>

## **4 The impact and legacy of the Commission**

The Khayelitsha Commission examined the challenges of policing in a single township, which was exemplary of a larger deeper-seated problem. As Commissioner O’Regan shared with us, ‘[f]ixing the problems of one station is the short-term solution. Accepting the deeper problem is important.’<sup>149</sup>

There are many ways in which to understand what the impact or legacy of the Commission has been in Khayelitsha, in South Africa, and beyond. The success of a commission of inquiry often is measured by the degree of implementation of its recommendations. This part will consider this, and also propose a number of other impacts.

### **4.1 Implementation of report’s recommendations**

The recommendations here were levelled at different spheres of government and envisioned a very active continuing role for civil society and community structures to play in implementation. Many of the recommendations fall within the mandate of SAPS. The Western Cape’s DOCS committed itself to ensuring that the evidence gathered, as well as the work of the Commission, would be incorporated into the Western Cape government’s crime prevention strategies and that it would assist in the establishment and running of an oversight team to monitor the implementation of the Commission’s findings and recommendations. It has been collaborating with the provincial structures of SAPS to implement recommendations jointly where possible.<sup>150</sup>

To date, though, national SAPS has not shown any political will to implement the report’s 13 recommendations that fall directly within the mandate of SAPS. It took a full year for the National Commissioner to respond to the Commission’s report, and then only by refuting the need for the Khayelitsha Commission in the first place and alleging that its findings

147 Interview with author, March 2016.

148 *Ibid.*

149 Interview with Judge Kate O’Regan, March 2016.

150 Western Cape Premier’s Office ‘Media Statement: Khayelitsha Commission of Inquiry Progress Update’ (29 August 2016).

were 'biased' and 'misdirected'.<sup>151</sup> This national silence is significant because in South Africa policing remains a centralised function with the most important decisions being taken at national level. One civil society organisation explained this dynamic that local commanders cannot determine what they can do without input from the national government.<sup>152</sup>

Since the Commission submitted its report, the police in Khayelitsha (in the absence of directives from the National Commissioner or Minister of Police) have been engaging with the Commission's recommendations, seeking to 'bridge' certain policing gaps. As a result of the memorandum of understanding between provincial and national governments, a 'Joints' process has been established, composed of SAPS station and cluster representatives, civil society organisations, local community and political leaders, and other police and government stakeholders. Within this process are sub-forums focusing specifically on alcohol abuse, vigilantism, gender-based violence and transport safety. Several respondents involved in the Joints process criticised its progress, however, particularly the police leadership of the process, the failure to integrate existing community structures and also highlighted the uneven progress among the sub-forums.<sup>153</sup> For example, one civil society organisation stated that the alcohol sub-forum has been working well, with a shift from a top-down approach of law enforcement to a more collaborative approach to policing with the province and SAPS.<sup>154</sup> Nonetheless, these processes are ongoing and it may be too early to analyse any potential outcomes.<sup>155</sup>

Yet, with regard to two recommendations in particular, national SAPS's failure to act has been immediately detrimental because they are areas needing national commitment and direction. First, SAPS has not developed any prescripts about how to provide visible policing in densely-populated, informal neighbourhoods.<sup>156</sup> This is a widespread

151 Cronje, 'Phiyega Slams Khayelitsha Commission'. It should also be noted that Phiyega more recently was suspended subsequent to the Marikana Commission of Inquiry, which found that she lacked the integrity and leadership required for the post of SAPS National Commissioner.

152 Interview with author, April 2016.

153 Interviews with civil society organisations and academics, March 2016.

154 Interview with author, March 2016.

155 Freeman & McDonald, 'Mapping Khayelitsha' p.28.

156 The SAPS Research Unit commissioned a discussion paper on 'Influence of Environmental Design and Effective Policing in the South African Context' in 2016/7, which asked some related questions, but there is no evidence of it yet having been translated into reformed policy. A presentation of the discussion paper is available at: [https://www.saps.gov.za/resource\\_centre/publications/research\\_colloquium\\_maj\\_gen\\_mfazi\\_amended3.pdf](https://www.saps.gov.za/resource_centre/publications/research_colloquium_maj_gen_mfazi_amended3.pdf).

problem that is not even beginning to be resolved. Second, SAPS has not taken any visible steps to overhaul ‘as a matter of urgency’ the system by which it allocates policing resources and personnel, even in light of the Commission’s suggested approach of calculating allocation primarily on the basis of adjusted total population.<sup>157</sup> For example, as of August 2016 the national average police to population ration is 1:358. In the case of Khayelitsha’s three police stations this ratio is much worse:

- Harare – 1:826
- Khayelitsha Site B – 1:569
- Lingeletu West – 1:440<sup>158</sup>

These ratios have generally worsened since the time of the Commission, when they were Harare – 1:635; Khayelitsha Site B – 1:688; and Lingeletu West – 1:275.<sup>159</sup> During the Commission Police Brigadier Rabie testified that it was not possible to draw conclusions by looking at the police to population ratio, but acknowledged that ‘maybe there is a need for us to revisit the model’.<sup>160</sup>

So how then does one measure the impact of the Khayelitsha Commission? One obvious response would be that the impact of the Commission has been limited beyond the terms of its mandate, that is, producing a well-researched, detailed, comprehensive report, because of the failure by the government to implement the Commission’s most urgent recommendations. Yet policing experts agree that a single commission of inquiry at best can ‘tinker’ with the reforms necessary to truly change organisational life within the police. No sustainable police reform can occur without effective and constant leadership<sup>161</sup> and effective internal structures. For the situation to change fundamentally, according to one policing expert, there needs to be a new policing process instigated from within the police, not externally.<sup>162</sup> Beyond this, there must be integration

157 Final Report, ch.15, para.34.

158 Western Cape Premier’s Office, ‘Media Statement: Khayelitsha Commission of Inquiry Progress Update’ (29 August 2016).

159 Final Report, ch.11, para.109.

160 *Ibid.*

161 This ‘serial crisis of top management’ has taken its toll on the ability of police to do their work, with five different national police commissioners in the last eight years. Submission by Institute for Security Studies and Corruption Watch to Parliamentary Committee on Police. J. Bornman ‘It’s Easier to Become SA’s Police Commissioner Than a Constable’ *Times Live* (21 September 2017).

162 Interview with author, April 2016. Apparently, SAPS has drafted reports on 35% of policing commissions, but those reports are not actioned. A journalist who reported extensively on the Commission also suggested that the problem with implementation

and interdependence between various government departments on the criminal justice value chain, according to a provincial government official.<sup>163</sup>

There are shifts occurring within police culture and relationships with police. In particular, there have been some changes to relationships between the communities and local-level SAPS officials as a result of this Commission. SAPS in Khayelitsha views complaints from the public differently and has improved the manner in which it provides answers to public queries.<sup>164</sup> Most notably, the recommendation of an 'urgent change management process' for SAPS leadership in Khayelitsha led to the appointment of a new cluster commander, General Brand, who has initiated a Joint Forum to unite civil society, government and policing. While this Forum still is in the early stages of development, it is symbolic of a commitment to greater collaboration and effectiveness by SAPS. One academic with policing expertise also suggested that a positive development has been to observe the approach local police have taken to implementation: they have embraced a lens of a 'whole of society paradigm', in terms of which police operate within a broader prism of actors and approaches to policing rather than as the only actor. The challenge, she suggested, is how to operationalise this approach.<sup>165</sup>

In August 2017 the Western Cape government proclaimed that it was making 'steady progress' towards the implementation of the Commission's recommendations, while civil society claimed that at best this progress is incremental.<sup>166</sup> The Premier's office claimed that it had met or is in the process of meeting its commitments on seven of the Commission's recommendations, and is in discussion with the new Police Minister about his cooperation on implementation of recommendations, but civil society, while praising the provincial efforts as positive, maintains that much work is to be done. The provincial government asserted that additional detectives have been appointed, a monitoring and oversight team has been established, there has been a reduction in vigilante killings and certain leadership and management posts have been filled. According to civil society, the most visible progress has been made at the Khayelitsha Cluster level, where General Brand has displayed themes of community

rested in the fact that civilians were telling the police how to do their work. Interview with journalist, March 2016.

163 Interview with author, March 2016.

164 Interview with Judge Kate O'Regan, March 2016.

165 Interview with author, March 2016.

166 Furlong, 'Three Years After the Khayelitsha Commission'; O. Hlati 'Crime Decrease Claims Disputed' *Cape Argus* (24 August 2017).

ownership, community participation, and community involvement.<sup>167</sup> One policing expert also felt that the Premier could have done more of a post-Commission assessment to convince other government departments to take the implementation of the recommendations more seriously.<sup>168</sup> However, the two areas where there has been conspicuous silence are the recommendations directed at developing a visible policing policy in informal settlements and the discriminatory resource allocation guides at national level. Despite SAPS's lack of cooperation on these specific recommendations, however, it is notable that the Social Justice Coalition has been able in the last two years to finally obtain data from SAPS on police resources at all 1 140 police stations across the country, data SAPS previously referred to as privileged.<sup>169</sup>

Indeed, this archived information has now been used by civil society to press for accountability. A court application was launched in April 2016 by the Social Justice Coalition, Equal Education<sup>170</sup> and Nyanga Community Policing Forum, against the Minister of Police, Nathi Nhleko, for failing to implement the Commission's recommendations, particularly in respect of the discriminatory allocation of policing resources in black communities in violation of the South African Equality Act. The Social Justice Coalition strategically included discriminatory police allocation statistics from another South African province, KwaZulu-Natal, in order to insulate the case from the party politics that have haunted relations between the Western Cape and national government.<sup>171</sup> As per the recommendation, civil society is calling on SAPS to revise its allocation of resources according to population, crime statistics, and socio-economic resources, all of which must be taken into account. After a long period without response from SAPS, the trial got underway in late November 2017, and continued in February 2018. The applicants maintain that the current police allocation in the Western Cape unfairly and unintentionally discriminates on grounds of race and poverty,<sup>172</sup> while SAPS has responded

167 Interview with author, March 2016.

168 Interview with author, April 2016.

169 T. Ntongana 'Activists Present Stats on Unequal Policing' *GroundUp* (20 July 2017) available at: <https://www.groundup.org.za/article/activists-present-stats-unequal-policing/>.

170 Founding Affidavit of Phumeza Mlungwana, *Social Justice Coalition v Minister of Police & Others* Equality Court Case 3/2016, available at: [https://d3n8a8pro7vhmx.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1485186193/SJC\\_Founding\\_Affidavit.compressed\\_final.pdf?1485186193](https://d3n8a8pro7vhmx.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1485186193/SJC_Founding_Affidavit.compressed_final.pdf?1485186193).

171 There was also a 2012 policing commission of inquiry on the same issue in KwaZulu-Natal that was also plagued by politics.

172 M. Gontsana 'Police System Unintentionally Discriminates, Argues Civil Society Lawyer' *GroundUp* (16 February 2018).

that crime cannot be predicted only by population size and crime rate.<sup>173</sup> As one policing expert shared with us, this case has the potential to have ‘a catalysing effect’ by strengthening national structures of SAPS as to how it allocates human resources.<sup>174</sup>

#### 4.2 Resolution of some individual cases

Probably the most direct measure of success of the Commission, according to one Commission staff member, is that all of the individual cases presented to the Commission were investigated and in some, suspects were tried and sentenced.<sup>175</sup> The Commission reviewed the investigations conducted by the Tshabalala Task Team set up to look into the original complaint. The cases included three brutal murders of young women, two of the three cases also involving rape; two cases of community members who were shot by members of SAPS in Khayelitsha while going about their daily business; and one case involving the alleged rape of a young child.<sup>176</sup> Of these cases, four, including the three murder cases, resulted in convictions, but only after significant delays. In several of the cases court proceedings commenced only after the complainant organisations had started protest campaigns. Despite the limited progress made in some of these individual cases, the Commission found that the cases were otherwise marked by poor investigation, failures of communication, and allegations of witness intimidation.

#### 4.3 Entrenching provincial competency in policing oversight

Another legacy of the Commission, according to a civil society organisation working to monitor policing issues, has been to entrench provincial oversight of policing as a constitutional right, which previously has been untested and also an unfunded mandate.<sup>177</sup> A policing expert found that the Commission represented a provincial expression of its powers in ‘a creative and new way’.<sup>178</sup> For the first time in a public forum it attempted to get to grips with the challenges facing policing at a local level, particularly in areas difficult to police.<sup>179</sup>

173 M. Gontsana ‘Police Resources: There’s Nothing Wrong with the Allocation System, SAPS Tells Court’ *GroundUp* (15 February 2018).

174 Interview with author, April 2016.

175 Interview with author, April 2016.

176 Final Report, ch.6, para.43.

177 Interview with author, March 2016.

178 Interview with author, April 2016.

179 *Ibid.*

After the Commission had completed its work, the Western Cape, as one of the few provinces dealing with community policing, adopted the Community Safety Act. The judicial affirmation of its power to create this Commission emboldened the province to continue exercising its oversight power in innovative, creative ways, now in the form of an Office of the Ombudsman, for which it placed one of the Khayelitsha commissioners – Advocate Vusi Pikoli – at the helm. His office handles complaints about police service and also examines ways in which it can further the work of the Commission. Since his appointment in 2014, Advocate Pikoli's office has received 825 complaints, of which 481 have been finalised and 344 are under investigation.<sup>180</sup> Advocate Pikoli firmly believes that through mediation, better relations are possible between the police and communities.<sup>181</sup> He has already hosted visits from four other provinces interested in creating similar mechanisms, and indeed from other countries around the world.<sup>182</sup>

One provincial government official emphasised the paradox of this new office: while many have easily dismissed this office because they do not understand its mandate, it actually offers the most room for oversight and accountability because of its accessibility.<sup>183</sup> A member of civil society agreed.<sup>184</sup> Indeed, it was the systemic issues identified by the Commission that catalysed the creation of this office, transforming the DOCS at provincial level from being an 'expensive post office' to facilitating a mechanism for policing oversight and accountability, particularly where IPID has shown itself to be insufficient.<sup>185</sup> Another policing expert lauded this office as an 'outgrowth' of the Commission, which fills an oversight gap nationally with dedicated capacity to investigate police wrongdoing.<sup>186</sup>

#### **4.4 Shifting attitudes, modelling a democratic dialogue between police and communities and creating transparency of information**

Some academics and members of the Commission staff highlighted this as a 'people-centred Commission', in which ordinary residents were invited to speak and be heard about their experiences of policing. Some respondents emphasised the importance of also providing this space to

180 M. Duval 'Ombudsman: Policing Inefficient' *News24* (3 February 2017).

181 Interview with Advocate Pikoli, March 2016.

182 *Ibid.*

183 Interview with author, March 2016.

184 *Ibid.*

185 Interview with provincial government official, March 2016.

186 Interview with author, April 2016.

police officials to ‘vent’ about the challenges of doing their work and for showing SAPS as ‘active participants in the larger criminal justice value chain’.<sup>187</sup> The real value of commissions of inquiry may lie in the extent to which they contribute to democracy. Its processes, such as public hearings and the release of a report, that may allow a space for public dialogue and debate, help to achieve this goal even if the recommendations that follow are seldom or never implemented.<sup>188</sup> To one civil society organisation, a commission of inquiry facilitates public interrogation of a phenomenon or practice that is not clearly understood.<sup>189</sup>

An academic with policing expertise suggested to us that one of the most outstanding legacies of the Commission is a shift in attitude towards the police. The police, she maintains, are now ‘the voice of the people. They are the fulcrums around which trust and community engagement [are] centred.’ Attitude is difficult to change and to gauge but it is important that people are now more open to engagement and dialogue.<sup>190</sup>

Moreover, with its forward-looking mandate, this Commission was able to contribute towards accountability by acknowledging the importance of a holistic approach to policing and for making an extensive amount of data available for further action. Stakeholders can later be held accountable for not changing practices even after a public process was undertaken and information was archived and placed into the public domain. For the research community, it was important that evidence-based analysis had a home in the archive, and that it included SAPS’s documents which revealed the operational and bureaucratic secrets of internal processes and made public the administrative logic behind policing decisions.<sup>191</sup>

## 5 Local value systems and commissions of inquiry

When asked about values animating the Commission’s operation, many participants responded by referring to constitutional values and human rights. Perhaps this was influenced by having Kate O’Regan as one of the commissioners, who infused the proceedings with human rights language and procedures. The report speaks about *ubuntu*, particularly in the context

187 Interviews with author, March–April 2016.

188 Michael Bishop ‘An Accidental Good: The Role of Commissions of Inquiry in South African Democracy’ (2015) available at: <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf> p.40.

189 Interview with author, March 2016.

190 *Ibid.*

191 *Ibid.*

of its first and second recommendations for a community policing model and a policing model based on procedural justice, respectively, where the Commission exhorts SAPS to protect and deal with the residents of Khayelitsha in a manner that is consistent with *ubuntu*.<sup>192</sup>

There was a real sense of dignity, of the right to life, and of other constitutional values as being central to the ethos of the Commission, and also reflected in the recommendations. This was evident in its operation – for example, the asking of questions in an even-handed manner, the documentation and inclusion into the record of all individual complaints laid at the Commission against SAPS, and the provision of social services to support witnesses experiencing re-traumatisation. As one criminologist who has assessed policing commissions globally stated, '[w]hile many commissions can serve and have served to dehumanise, this Commission served to humanise'.<sup>193</sup> The Commission spent a year making connections in the local community and advertising the Commission to disseminate information as broadly as possible. As stated above, the ability of the Commission to ultimately draw the initially hostile SAPS into its processes evidenced its thoughtful methods of operation. Indeed, the Provincial Commissioner of Police's apology constituted such a public display of accountability and humility that it left a deep impression in the minds of many Khayelitsha residents, for whom the police had always been seen as 'the other'.<sup>194</sup>

## **5.1 Vigilante practices and ubuntu**

In considering how local value systems may have infused the process of the Khayelitsha Commission in a more robust manner, one area where it may have further assisted is in addressing the systemic issue of vigilantism, which itself is a right to life violation. Several respondents who are residents of Khayelitsha or who have close ties felt that although a precondition for the success of the Commission, full community buy-in was not present because mutual trust had not been established and the nature and structure of local politics not fully understood.<sup>195</sup> The Commission needed to understand the mindset of many members in Khayelitsha in order to effect an attitudinal shift to the culture of vigilantism. Community residents drew links between modern-day

192 Final Report, ch.15, paras.1–15.

193 Interview with author, March 2016.

194 Social Justice Coalition, *People Power: The Khayelitsha Commission of Inquiry* (film), available at: <https://www.youtube.com/watch?v=he35ffrgRJE>.

195 Interviews with civil society organisations, academic and local government official, March 2016.

vigilante practices and the apartheid past, where people rallied together in times of trouble.<sup>196</sup> Thus, ironically, some vigilante practices as a form of autonomous, community-led justice practices actually evince *ubuntu* in the motivation for collective unity against external threats to the public order.<sup>197</sup> The Commission did hear from three experts approaching vigilantism from perspectives of sociology, psychology and criminology, and made nuanced findings that spoke to the need to understand the broader social, political and historical context of vigilantism.<sup>198</sup> But there was a feeling, voiced by one local government official, that the legal nature of the Commission prevented it from going as far as it could in this terrain, and that perhaps a spin-off from the Commission would have been to initiate *imbizo* (Zulu for ‘meeting’ or ‘gathering’)-style dialogues, or traditional communal gatherings, that trained community leaders in restorative justice techniques as an alternative to addressing conflict.<sup>199</sup>

Of course, as the Commission discovered, this was difficult territory because of how politically captured these community policing structures are, and we were told by multiple respondents that representatives from these structures refused to engage the processes of the Commission despite its targeted outreach to them.<sup>200</sup> One nevertheless wonders whether a deeper opportunity for dialogue, or a different kind of dialogue beyond Commission hearings, could have opened up the space for those structures, as ‘gatekeepers of informal justice’, to participate more actively in this investigatory process.<sup>201</sup> Several respondents critiqued this aspect of the Commission, and even one of the staff members of the Commission Secretariat opined that perhaps the Commission was a little premature as the parties before it ‘needed to find one another before resorting to litigation’ (referring to the constitutional challenge to this Commission). This statement evinces the importance of reconciliation within communities and a buy-in to accountability processes. It is not clear, however, that an alternative would have worked in the context of Khayelitsha and, to be fair, all accounts from Commission staff members were that they worked tirelessly – even if ultimately unsuccessfully – to bring all community stakeholders into the process.<sup>202</sup>

196 Focus group with community residents, April 2016.

197 *Ibid.*

198 Final Report, paras.342–46.

199 Interview with author, March 2016.

200 Interviews with civil society organisations and local government official, March–April 2016.

201 *Ibid.*

202 Interviews with author, March–April 2016.

Still, according to Pumla Gobodo-Madikizela, an expert in trauma, memory and forgiveness, perhaps the Commission, in seeking to address the root causes for a persistent ‘culture of violence’ that has been transmitted inter-generationally and that continues to play out ‘both as cultural memory and collectively shared traumatic memory’,<sup>203</sup> could have constituted a parallel dialogue with community stakeholders outside the formal hearing space. Community policing forums have a constitutional mandate, and now neighbourhood watches have a basis in provincial law, but perhaps there should have been a broader dialogue, beyond their legally-mandated oversight functions, to understand how best to harness existing structures and attitudes to contribute to ‘a whole of society’ paradigm of criminal justice. There is an inherent tension between providing state sanction for these structures and allowing them to flourish as semi-autonomous and organic structures formally outside the state. There is a tendency for powerful interest structures at the local level to ‘colonise’ these structures instead of trusting in their capacity to self-govern. As Gobodo-Madikizela noted, community dialogue programmes could have been facilitated to begin a process of ‘empathetic repair’ with an aim of fostering a sense of community pride in Khayelitsha and to ‘rehumanise’ those who feel stuck in apartheid, as excluded and discarded members from society.<sup>204</sup> Elsewhere, Gobodo-Madikizela has spoken of the need to nurture transformational dialogue between victims and offenders through participatory processes and within a framework of relational responsibility which allows participants to take responsibility for a collective sense of well-being.<sup>205</sup>

## 6 Conclusion

The crisis of police identity and approaches to policing are global issues that found expression locally in one township in South Africa. Commissions of inquiry provide a unique platform for public contestation on the meaning and value of various (constitutional) norms and governance issues. The Khayelitsha Commission represents an innovation on traditional commissions of inquiry in embracing a broader, more modern concept of accountability. This is consistent with trends in international human rights law to define accountability in a more holistic manner to include effective remedies and reparations and to provide a central role to victims in the accountability process.

203 Final Report, ch.12, paras.211–226.

204 *Ibid.*, paras.227–28.

205 P. Gobodo-Madikizela ‘Forgiveness and the Maternal Body: An African Ethics of Interconnectedness’ *Essays on Exploring a Global Dream* Essay 5 (Spring 2011) pp.11–12.

The Commission was effective on its own terms, despite being born from a context of political contestation. It was able to carry out its mandate and delivered a hard-hitting report that was mostly clear in its identification of the roles and responsibilities of different actors. The Commission was able to expose the root causes of the policing situation in Khayelitsha and contribute to accountability through the creation of a record.

The Commission also highlighted that accountability for state (in) action can take many forms beyond criminal culpability. Those affected by the erosion of police accountability in Khayelitsha mostly wanted an opportunity to engage SAPS in some sort of dialogue. The cathartic effect of commissions of inquiry through narration was highlighted in the expectation from various interlocutors that there would be some sort of reconciliation after the commission process had been completed. Yet, it was also highlighted that this was not the primary function of these commissions. They were constituted as legal instruments to investigate a particular violation or pattern of them and to offer recommendations to government on how best to address these issues such that they do not occur in the future.

It is within this gap that alternative modes of dispute resolution find most application. Some respondents offered that the Commission processes would have been better bolstered through follow-up dispute resolution mechanisms rooted in various communities. The nature of the violations demanded that alongside the vertical breakdown between the state and its people, the horizontal breakdown in community relations also needed to be addressed. These processes must be rooted in the traditions of the various peoples if they are to be effective.