

# UNFIT TO OWN A FIREARM?

## The role of the police in firearm control

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This article draws on a study that examined aspects of the implementation by the South African Police Service (SAPS) of section 11 of the old Arms and Ammunition Act. This section refers to the declaration by the police of a person to be unfit to possess a licensed firearm.<sup>1</sup> Although the police are more vigilant than ever about declaring people unfit, their lack of knowledge about the process needs to be addressed, as does the tendency of police and prosecutors to blame each other for problems that arise. Unless these deficiencies are ironed out soon, they will obstruct the execution of the new Firearms Control Act.

Even though the new Firearms Control Act (60 of 2000) was passed in October 2000, at the time of this study (July-October 2002) it had still not been promulgated in its entirety.<sup>2</sup> Until the regulations for the new Act are finalised and promulgated, SAPS members have to apply the old Arms and Ammunition Act (75 of 1969). This has been the case even though since early 2002 the police have been preparing for the implementation of the new Act by setting up the requisite infrastructure such as establishing Firearm Registration Centres and appointing Designated Firearms Officers (DFOs).

### SAPS unfitness hearings in terms of s11

Broadly, Section 11 of the Arms and Ammunition Act (s11) enables the police to declare an existing firearm licence holder 'unfit to possess a firearm' without taking the matter to a criminal court. Furthermore, the SAPS may declare a person unfit to possess a firearm without that person being convicted of any criminal offence.

To declare any person unfit the police are required to hold a hearing to look into such a matter. Under certain circumstances they are required to hold a hearing if they have reason to believe, on the grounds of a statement made by a witness under oath, that:

- a person has threatened or expressed the intention to kill or injure him- or herself or any other person;
- a person's possession of a firearm is not in his or her interests or the interests of any other person as a result of his or her mental condition, inclination to violence (whether a firearm was used in violence or not), or dependence on alcohol or drugs; and/or
- a person has failed to take reasonable steps to ensure the safekeeping of the firearm.

### S11 hearing procedures

The police need to follow a specific procedure for an s11 hearing prior to a declaration of unfitness being enforced. However, even before an s11

hearing is held, if any of the above conditions are evident, and that person is suspected of having any firearm/s in his or her possession, a warrant for the search and seizure of such firearms must be issued and executed with immediate effect (s11 (2)(a)).

The general procedure is that when a case is reported to the Designated Firearm Officer (DFO), a file is opened. (A similar procedure to that of a case docket is being followed at some police stations.) The file is then 'booked out' to a police member for further investigation. It becomes an official investigation, similar to a criminal docket.

When all the evidence has been collected to the satisfaction of either the Designated Firearm Officer (DFO) or the station commissioner, a presiding officer is appointed to hold the hearing. The DFO then sees to it that all the necessary notices to the accused are filled in and properly served on them (it is a prerequisite that such a person must receive a written notice of the hearing requesting their attendance).

The main purpose of the hearing is to give the person an opportunity to advance reasons why he or she should not be declared unfit to possess a firearm. An attorney may represent him or her at that hearing, and he or she may call witnesses and cross-examine the person who made the sworn statement (s11 (3-4)). However, the hearing can proceed whether or not the person attends the hearing (s 11 (6)).

The presiding officer must be a SAPS officer of the rank of superintendent or higher. (Currently there are moves afoot to lower this rank requirement to the level of captain.) At the hearing all that is required to declare the person unfit, is for the police officer conducting the hearing to satisfy him- or herself that the evidence given during the hearing supports the reasonable belief that the person is unfit to possess a firearm (s11 (4)(a-b)). Notification of the result of an s11 hearing,<sup>3</sup> is done on a SAP 21 form. The person must also be furnished in writing with the reasons why the declaration was made. This informs the person declared unfit of their right to appeal in writing to the Firearm Appeal Board within 60 days<sup>4</sup> from the

date notified of the declaration. The Appeal Board may confirm, vary or set aside the declaration concerned (s14 (1)). During this period of appeal the declaration will remain in force.

The details of a person so declared unfit, together with the information regarding the declaration (date, place, declared by whom, period of unfitness, and full reasons) are also filled in on the SAP 304 form which is sent off to the Central Firearms Register (CFR) for recording.

Any declaration resulting from such a hearing must be for a period of no less than two years although it can also be suspended for two years (s 11 (6)). Irrespective of the declared period of unfitness, the person may appeal in writing to the Appeal Board to have the declaration lifted or discharged after the expiration of a period of two years. At the end of the period the person is entitled to gain possession of a firearm and to carry it legally.

#### **Statistics on applications for firearms and s11**

According to the Central Firearms Registry, as of October 2002 the total number of firearms registered to individuals in South Africa was 3,654,434. A further 81,242 firearms were registered in the names of institutions. This means that there was one legal firearm for every 11 people in the country. However, many licensed firearm owners have more than one firearm, indicating that the total number of people in possession of a legal firearm is significantly lower.<sup>5</sup>

From January to October 2002, the Central Firearms Register (CFR) received 117,864 applications for firearm licences. In the same period the vast majority of applications, that is, 103,056, were approved (some of which may have been received before 2002) while only 5,453 applications were refused.

Countrywide for the period January to October 2002, s11 applications resulted in only 541 persons being declared unfit through s11 hearings. This national data masks some stark differences amongst the provinces.

Map 1 shows the number of s11 unfitness declarations in each province, January to October 2002. The Western Cape has by far the most s11

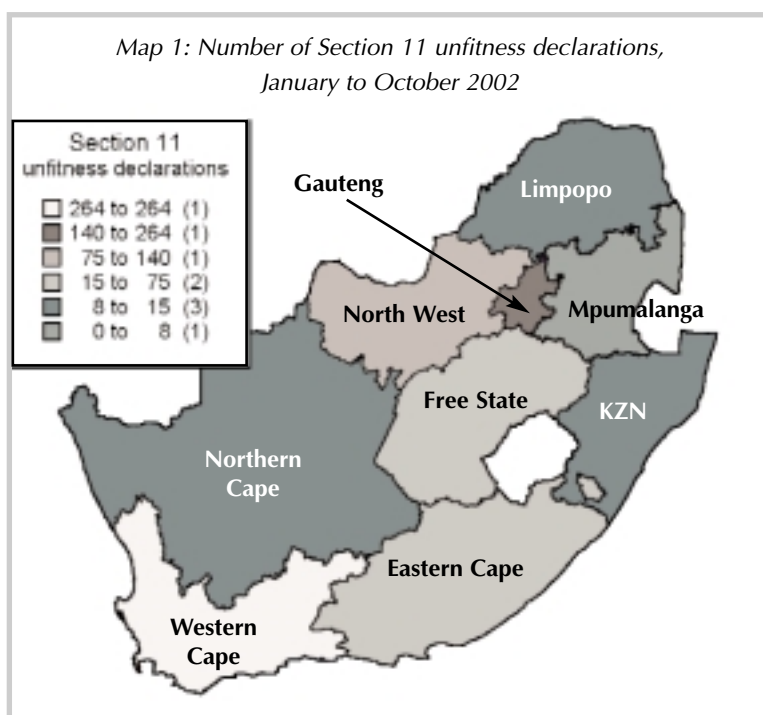
unfitness declarations, accounting for almost half, (49% or 264) of the 541 declarations in South Africa. Next is Gauteng with 26% (140) and North West with 14% (75). Less than 2% (10) occurred in KwaZulu-Natal, Limpopo and the Northern Cape respectively. There were no declarations at all in Mpumalanga. On average there are 4.31 applications per 1,000 adults in any one year, with provincial figures ranging from 2.2 in Limpopo to 8.1 in Gauteng.

However, within the context of the large number of firearm licences already issued, and the continued growth of the number of annual applications, the low number of s11 hearings is of concern. This is particularly the case given the current high levels of violent crime. The question then is, in practical terms, what the situation on the ground is regarding s11 hearings.

#### Results of interviews with police

The s11 process is initiated when the DFO becomes aware of a transgression (as defined above) and institutes the hearing that will determine if the person should be declared unfit to possess a firearm. It is the duty of the police to obtain an affidavit from the complainant that can be used as a basis for an s11 hearing. The internal procedures also require the police to peruse the Occurrence Book and the dockets returned from court to establish whether or not an s11 hearing is necessary.

Interviews carried out with members of the police during the study provided insight into the practical implementation of s11 hearings. This would include when s11 hearings were held (other than the circumstances prescribed by the provisions of the Arms and Ammunition Act), whether or not police consulted the Occurrence Book for potential s11 hearings, and the problems encountered with respect to s11. (The information for this section of the article emanates from interviews conducted with DFOs in the four



provinces selected: Eastern Cape, Gauteng, KwaZulu-Natal and Western Cape).

Police interviewed indicated that they were obliged to hold an s11 hearing regardless of whether or not a case had proceeded to court. Moreover, a hearing could be instituted in any case involving violence, and not necessarily only involving a firearm. The obligation was independent of the outcome of the court hearing. This was irrespective of whether the outcome of the court proceedings was an admission of guilt by the accused, an acquittal, whether the prosecutor declined to prosecute, the matter was withdrawn, or a conviction had been secured.

In addition, an s11 hearing would also be held if the prosecutor specified on the docket that it was required. Moreover, where a person has attempted to commit suicide and is a licensed firearm holder, the police will institute an s11 hearing to determine his or her fitness to own a firearm. The police also stated that in respect of domestic violence charges laid at the police station, some partners – despite withdrawing such charges at a later stage – are willing to make a statement that enables the SAPS to hold an s11 hearing. This is done in order to remove the firearm from the abuser's possession.

The interviews tried to establish to what extent the police were proactive with regard to initiating s11 hearings by consulting the Occurrence Book on a daily basis at their stations. In most areas someone, for example a branch commander, station commander, detective or DFO, was responsible for inspecting the crimes recorded in the Occurrence Book and determining whether or not a hearing should be instituted.

Moreover, some heads of detectives scrutinised dockets that were returned from court in order to ascertain if s11 hearings were necessary. In some places police admitted that this was not being done despite being aware of internal instructions pertaining to s11 hearings (the SAPS have internal guidelines that prescribe when s11 hearings should be instituted). This was attributed to the lack of liaison and information-sharing between the Crime Information Analysis Centre (CIAC) and the DFOs in those areas.

These problems provide some insight into why so few s11 hearings have been held thus far. There appears to be a gap in the performance of the police in this regard.

#### **Problems related to s11 hearings**

Several problems were highlighted with respect to s11 hearings. These ranged from the huge backlog in hearings to the fact that there was an over-reliance on the police to declare people unfit to possess a firearm.

All the police members interviewed acknowledged that previously s11 hearings were not given the attention they deserved – hence the backlog. Some admitted that it was “too difficult to go back in time and check for s11”. When the research was conducted, figures for the number of s11 hearings held thus far and the number outstanding were not available. Nevertheless, figures were provided in some areas.

For example, on the West Rand, 152 s11 hearings were outstanding by April 2002. In the Western Cape a DFO averred that a colleague had ‘inherited’ 53 s11 hearings but could not trace any of the people concerned. In the Eastern Cape a DFO stated that only four s11 hearings had been

held each month since July 2002. All these figures indicated to the researchers that while backlogs continued to exist, not enough s11 hearings were being instituted.

Some complained that s11 hearings were time-consuming because a docket had to be prepared. A DFO in Gauteng criticised the absence of registers concerning s11 hearings at some police stations in his area. Others condemned the lack of knowledge of s11 amongst some police members, saying that it was not being used effectively enough to “get rid of weapons”. Moreover, they averred that detectives were to blame for the increase in s11 hearings because they often did not alert prosecutors to the prospect of s12.<sup>6</sup> In addition, it appears as if detectives are not familiar with the provisions of s12 (1) and (2) of the Arms and Ammunition Act.

The police complained that there was an over-reliance on them to conduct s11 hearings. According to them this stemmed from the practice by the courts that neglected to declare people unfit in terms of s12 of the Arms and Ammunition Act. Further to this they professed that “the courts only concentrate on the elements of the crime and leave the police to do s11 ... they do not consider s12, thereby increasing the police workload”. They added that when prosecutors declined to prosecute due to a lack of evidence in a matter, the onus rested on the police to hold an s11 hearing. Furthermore, they contended that the “courts leave it to the SAPS to do s11 – they do s12 more seldom”.

Conversely, the prosecutors interviewed placed the blame on the police for not initiating declarations of unfitness. In addition, prosecutors revealed that they would not alert a magistrate to the possibility of an s12 declaration because it was the magistrate’s duty to consider it. Moreover, prosecutors admitted that they would not raise this issue unless the police investigating officer specifically asked them to do so.

Another problem mentioned was with respect to the 60-day appeal period. Some police were concerned that during the period of appeal a large number of weapons are stored at police stations. According to

the police the weapon is "often not sold and no appeal is held". At times the applicant does not want to appeal and waits for the weapon to be sold, but in the interim it is kept at the police station. The police auction the weapon, which incurs costs, and is an "administrative hassle". A designated police officer (DPO)<sup>7</sup> interviewed in the Western Cape estimated that at "any one time there are 170 weapons just sitting at the police station, including those handed in to be destroyed". This, he added, was "a significant danger and target for theft".

It is evident from the above that the police have a significant role to play in declaring people unfit to possess a firearm. In order to alleviate the burden placed on them of holding s11 hearings, the police have in some provinces (Eastern Cape, Gauteng and Western Cape) developed an endorsement form that is affixed to the outside cover of a docket sent to the local prosecutor's office. This document serves to alert prosecutors to the prospect of the court declaring an accused unfit to possess a firearm.

The form provides the prosecutor with information such as the accused's name, address, identity number, offence charged with, and the CAS number. In addition, it stipulates that if the accused is convicted of any offence referred to in s12(1) or (2) of the Arms and Ammunition Act the prosecutor should bring the matter to the attention of the magistrate presiding over the case. The magistrate would then determine whether or not the accused is fit to continue to own a weapon. This initiative is a step in the right direction because it may help to lighten the workload of the police and ensure that the courts play their part in this regard.

### Conclusion

Despite the law affecting firearms being in a state of transition, the responsibilities of the police and the courts in excluding unfit persons from firearm ownership, remain. Mindful of this responsibility, the police are seemingly now more vigilant than ever about instituting s11 hearings and thereby declaring people unfit. Nevertheless, the lack of knowledge about these hearings and their impact needs to be addressed by developing standardised procedures and manuals for use by the SAPS countrywide.

The tendency of police and prosecutors to blame each other with respect to the implementation of s11 and 12 of the Arms and Ammunition Act, hampers its effectiveness. Moreover, joint training sessions comprised of police and prosecutors should take place in order that each understands their obligations in respect of s11 and s12 of the Arms and Ammunition Act and performs accordingly. Unless these problems are ironed out soon they will prove to be an obstacle to the smooth execution of the new Firearms Control Act.

### Acknowledgement

The information for this article was extracted from a more comprehensive study: D Mistry, A Minnaar, J Redpath & J Dhlamini, *The role of the criminal justice system in excluding unfit persons from firearm ownership*, GFSA/IHRCJS Research Report, December 2002.

### Endnotes

- 1 In the new Firearms Control Act provision for such declarations is made in Chapter 12, section 102. This section broadly follows s11 but with two additional requirements, namely that a declaration of unfitness can be made if a final protection order under the Domestic Violence Act, 1998 (116 of 1998) has been issued against such a person, and if such a person has provided false or misleading information for certain information requirements of the Act.)
- 2 The full implementation of the new Act is still some way off since new draft regulations requiring public comment to reach the Central Firearms Register (CFR) by 29 April 2003 were only gazetted on 27 March 2003. These were the third set of draft regulations in the long process of implementation of the Act. The head of the CFR estimated that it would be at least another six months after April before the regulations were finalised so that they could be implemented. Only at that time would all the provisions of the Act be officially promulgated in their entirety.
- 3 Including the period for which the order will be valid (by law not less than two years) and the notice that all licences, certificates of competence, authorisations/permits to possess a firearm/s and ammunition issued to the person declared unfit, and all firearms and ammunition in such a person's possession, must be surrendered to the police station in question within seven days (s 16). Importantly, the new Firearms Control Act has tightened up on certain of these limitations, namely that the minimum period for which a declaration of unfitness order will be valid is five years (s 104 (2)); while a person declared unfit will have to surrender and hand over all firearms, ammunition and licences in his/her possession to the nearest police station within 24 hours (s 104 (6)).

- 4 The declaration remains in effect until the finalisation of the appeal (either confirmation or lifting).
- 5 These figures do not include those held by dealers, gunsmiths, manufacturers and government departments.
- 6 S12 (1) provides for automatic declarations of unfitness whilst s12 (2) makes provision for discretionary declarations of unfitness by the courts.
- 7 In the Western Cape police appointed to deal with firearms are called DPOs because they are not only responsible for firearms but also for liquor-related matters.