

The private security industry in South Africa: a review of applicable legislation*

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ABSTRACT

The pre- and post- apartheid governments have been engaging with the private security industry through the creation and enforcement of legislation to regulate the industry. The new government, in particular, has been actively implementing legislation to further tighten restrictions and update older legislation. Considering these developments it is perhaps necessary to review all the legislative parameters, both old and new, directed at the private security industry. The future role of private security in South Africa may depend on the success of the legislative attempts of the government and could be a preparation for a formal partnership with the public police.

Introduction

Private security or private policing is a phenomenon that has re-emerged in force in the last half of the twentieth century.¹ It is a common fact that private security is rapidly growing in many countries and is also spreading from country to country. There are many factors contributing to this rapid growth but the fact remains that regardless of the reasons for its emergence private security has firmly established itself in many countries, including South Africa.

There is no longer room for traditionally understood notions of what policing entails, since private security has entered the public policing arena by taking on more and more duties once considered sacred to the public police. The awareness, and at times, concern for this growth in private security has developed into an active international debate amongst academics, politicians and all those who are affected by this phenomenon. Many local and international debates on private security have, in fact, focused particularly on

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¹ M Shaw 'Privatising crime control? South Africa's private security industry' (1996) 3 *Imbizo* 5.

the need to address the private security industry both politically and legally. Many governments have recognised the need for a regulated system of security provision, incorporating both public and private forces. However, some countries, especially transitional countries, have faced the negative aspects of private security due to governments' inability to challenge the problems private security brings with it and / or their half-hearted attempts to channel the industry into a productive and effective policing agency. Fortunately, in South Africa there has been a realisation by government officials that allowing a private entity to perform a policing function within a democracy necessarily requires some form of clear-cut regulation. Only through public-private interface and the establishment and enforcement of effective legislation can a form of cooperation or a successful *network* of policing be created as an alternative to simply allowing private security companies to operate freely and independently, without constraints.²

The old and new South African governments have been engaging with the industry, albeit for different reasons. The old regime utilised the industry to supplement the then South African Police (SAP), which was then able to focus on more important state security issues.³ Consequently the old government provided the basis for legislative regulation through the creation of the Security Officers Act⁴ to create a professional, regulated private security industry. Some have posited that the enactment of the Security Officers Act was for the very purpose of developing a relationship between the state and private security companies to tackle the problems associated with the increasing unrest of that time and that this legislation was a tool to protect the interests of the security industry.⁵

The new government has further enacted legislation for the purposes of reining in an industry that has been perceived, by some, as having the potential to destabilise a carefully worked-for democracy.⁶ The suspicious

² L Johnston 'Transnational private policing: The impact of global commercial security' in J W E Sheptycki (ed) *Issues in Transnational Policing* (2000) 21.

³ J Irish 'Policing for profit: The future of South Africa's private security industry' (1999) 39 *ISS Monograph Series* 1.

⁴ Act 92 of 1987.

⁵ (Author unknown) 'Repositioning the security industry in a changing South Africa' (1994) 59 *Security Focus* 35.

⁶ There are those who believe that the security industry has the potential to destabilise South Africa's democracy due to the unequal distribution of security within socio-economic areas. (D Nina and S Russell 'Policing "by any means necessary": Reflections on privatisation, human rights and police issues — Considerations for Australia and South Africa' (1997) 3(2) *Australian Journal of Human Rights* 157.) There is also a perception that a more direct destabilisation is possible as a result of the belief that many right wing military leaders who fought for Apartheid — and also those who fought against it — are now involved in an industry making up such a huge portion of South Africa's security needs, Author unknown op cit (n5) 35)

nature of the new government with regard to the private security industry is perhaps reflected in the legislation it has created. An examination of the legislative framework, particularly legislation enacted after South Africa's transition, may be able to reflect what the new government expects from the private security industry, particularly in terms of its vision on private security being a legitimate supplement to the South African Police Service. In other words, the state's responses to the security industry may reveal the future path of private security in South Africa. Also, legislation is necessary to ensure that the private security sector does not dictate the terms on which security should be provided as this could lead to the overuse of private security initiatives to police society. This overuse of security very often leads to the industry being used as a conduit for criminal activities (as has been the case in many other transitional countries, such as Russia and Brazil).⁷

Thus, what follows, is a review of all the legislation that applies to the private security sector and what this entails for the industry. The most recent legislation, which has been promulgated by the new government, is an attempt to ensure that private security officials and companies adhere to the standards that a democratic society demands, especially in relation to upholding the principles of human rights. It also attempts to standardise the industry and improve its conditions, especially for private security guards or officers.

Methodology

Research was conducted by the author on the impact of private security on public policing reform as part of a broader research project on the challenges to police reform. The analysis of private security legislation formed part of this research venture. The author conducted 13, separate, in-depth interviews, over a three month period (May to July 2002), with key players within, and/or involved with, the private security industry in the Western Cape. Seven of the interviews were conducted with members of large, medium and small security companies, of which four interviews were conducted with ex-police officials now working in the private security industry. Other interviews were conducted with: a risk consultant; the manager of a security project management company; two members of the South African Police Service; a representative from a major security trade union and the manager of the Security Industry Regulatory Authority of the Western Cape.

⁷ M K Huggins 'Urban violence and police privatization in Brazil: Blended invisibility' (2000) 27 (2) *Social Justice* 113. I Shelley 'Post-socialist policing: Limitations on institutional change' in R I Mawby (ed) *Policing Across the World: Issues for the Twenty-First Century* (1999) 81.

Former legislation

Before a review is made of the legislation currently applicable to the private security industry, former legislation should be commented on, since much of the later legislation not only replaces these older, landmark statutes but is also based on them. However, it must be noted, that even though these older statutes have been replaced, certain sections may still be applicable.⁸ What follows, therefore, is a summary of the main statutes that were passed prior to the enactment of the new (and improved) legislation (to be discussed later).

Security Officers Act 92 of 1987

The Security Officers Act was passed in October 1987 and promulgated in April 1989.⁹ The main purpose of the Act was to establish some sort of regulatory mechanism to control the industry in the form of a Security Officers' Board. The Security Officers' Board comprised ten members consisting of employer and employee representatives (a total of six private security officials), consumer group representatives (such as a commissioned officer of the South African Police) and appointees of the then Minister of Law and Order.¹⁰ The Act set up the requirement that security companies, owners and guards register with the Security Officers' Board, a register being kept and certificates issued to that effect.¹¹ Restrictions were imposed in that the Security Officers' Board would decide who would qualify to be registered.¹² The submission of fingerprints, proof of age (the person in question must be 18 years or older) and the requirement that the person in question be of sound mind and not have previous convictions were stipulated by the Act.¹³ The Act also required that training should be of a certain standard, that an inspectorate be created beneath the Security Officers' Board to enforce the regulations and that a code of conduct be created to ensure ethical practice (but this code of conduct applied only to the guarding sector).¹⁴ The Act laid down the grounds for disqualification

⁸ The Private Security Industry Regulation Act 56 of 2001 repeals the Security Officers Act 92 of 1987, except for example, provisions in Act 92 of 1987 including 'the regulations, relating to the deduction and payment of annual amounts, the funding of the Security Officers' Interim Board and the imposition of criminal and other sanctions relating thereto' (s 43 of Act 56 of 2001). See also the training regulations below.

⁹ E Grant 'Private Policing' in T W Bennett, D J Devine, D B Hutchison, I Leeman, and D van Zyl Smit (eds) *Acta Juridica* (1989) 103.

¹⁰ R J Carrier *The Dissolving Boundaries Between Private and Public: Oversight of Private Security and Policing in South Africa* Unpublished policy brief (1999) 19.

¹¹ Security Officers Act 92 of 1987, s 10(1), 13 and 14. Grant op cit (n9) 103.

¹² Security Officers Act 92 of 1987, s 11(3).

¹³ Security Officers Act 92 of 1987, s 11(1)(a), s 12 (a)(i)-(iv), Carrier op cit (n10) 19.

¹⁴ Security Officers Act 92 of 1987, s 3(c), s 9, s 19, Irish op cit (n3) 12.

Carrier op cit (n10) 19. J Irish 'The business of private policing in South Africa: Sentry Security

from registration, including, for example, improper conduct specified in s 20. The Act specified that the Security Officers' Board be funded by the industry itself, through the paying of fees and fines by companies and security guards.

The Security Officers Act was not very effective.¹⁵ A number of problems were pinpointed, eventually resulting in the Security Officers Amendment Acts of 1992, 1996 and 1997 and the creation of a new Act altogether in 2001.¹⁶ The main problem with the Security Officers Act is that it excludes certain elements of the private security industry since the focus of the Act is on the guarding sector. Specifically, as highlighted by Grant, in-house security is omitted altogether.¹⁷ As stated in s 1, a security service as defined by the Act excludes 'a service rendered by an employee on behalf of his employer'.

Another problem with the Act is the required composition of the Security Officers' Board; it includes six representatives from the industry it is attempting to regulate. This was, and is, seen as problematic since the vested interests of the private security representatives could hamper the effective regulatory functioning of the Security Officers' Board.¹⁸ Similarly another problem associated with the Act as early as 1989 was the inclusion of the South African Police in the Security Officers' Board and the wide discretion allowed to the police to choose the private security representatives as the Minister of Law and Order would select Security Officers' Board members according to a list compiled by the Commissioner of Police. Grant pointed out there was a danger of bias as the Police Commissioner could elect private security representatives based on identification of similar interests to the South African Police, which at that time focused on state security within the Apartheid structure.¹⁹

Security Officers Amendment Acts 119 of 1992 and 64 of 1996

The first amendment of the Security Officers Act in 1992 was to allow for changes in the representation of the Security Officers' Board to ultimately facilitate the removal of the police representation on the Board.²⁰ The amendment also afforded the Security Officers' Board more independence

and the armed-response sector' in Vera Institute of Justice *The Public Accountability of Private Police: Lessons from New York, Johannesburg and Mexico City* (2000) 23.

¹⁵ The Security Officers Act 92 of 1987.

¹⁶ Security Officers Amendment Act 119 of 1992; Security Officers Amendment Act 64 of 1996; Security Officers Amendment Act 104 of 1997; Private Security Industry Regulation Act 56 of 2001.

¹⁷ Grant op cit (n9) 104.

¹⁸ Grant op cit (n9) 105.

¹⁹ Ibid.

²⁰ Security Officers Amendment Act 119 of 1992, s 3(1), Irish op cit (n3) 36.

and allowed more powers such as the issuing of regulations.²¹ Amendments as stipulated by the Amendment Act of 1996, relate largely to transitional changes in South Africa, reflected in the amendment of certain definitions in the Security Officers Act and the Security Officers Amendment Act of 1992.²² For instance, the Security Officers Amendment Act of 1996 uses a new definition of what a security service is by referring to the South African Police Service, not the South African Police.²³ Similarly there are also changes in the definitions of 'Minister' and 'Commissioner'.

Security Officers Amendment Act 104 of 1997

The third amendment to the original Security Officers Act was initiated as a result of a security forum that was created in 1994, which in turn created three task groups to analyse the transformation of the private security industry.²⁴ What came from these task groups was a focus on the restructuring of the Security Officers' Board, the inclusion of in-house security into the Act and other amendments. These focal points were finalised in 1996, culminating in the Security Officers Amendment Act in 1997.²⁵ The main condition of this Act (according to its preamble) is that the Security Officers' Interim Board replaces the Security Officers' Board in its role as controller, promoter and protector of the security profession 'until a new permanent Security Officers Board has been established'. This 1997 Amendment Act also stipulates that the Interim Board submits regular reports to the Minister of Safety and Security regarding the regulation of the security industry. It also allows for the Interim Board to be instrumental in the establishment of the future permanent Board and in this regard the 1997 Amendment Act also stipulates that the Minister draft a new Bill within 18 months of its enactment (that is, the enactment of the 1997 Amendment Act). This did take place in that the Private Security Industry Regulation Act 2001 Act was eventually created.²⁶ The 1997 Amendment Act also increases the Board's composition by the inclusion of 'members [who]...are representative of employees who are security officers, employers of such employees and users of security services'.²⁷ The chairperson (and vice-chairperson), according to the Amendment Act, must be independent persons, that is,

²¹ Security Officers Amendment Act 119 of 1992, s 14 and s 16, Irish op cit (n3) 37.

²² Acts 92 of 1987 and 119 of 1992 respectively.

²³ As altered by s 5 of the South African Police Service Act 68 of 1995.

²⁴ Irish op cit (n3) 37.

²⁵ Ibid.

²⁶ Act 56 of 2001.

²⁷ Security Officers Amendment Act 104 of 1997, s 5 (2). A Minnaar 'The South African private security industry and crime prevention' Paper presented to Criminological Society of South Africa (CRIMSA) International Conference *Crime Prevention in the New Millennium* (1999) 18.

not affiliated with the private security industry in any way.²⁸ In fact, two private citizens were included on the Interim Board — an accountant and an attorney.²⁹

One can see from this Amendment Act of 1997 the attempt to further narrow the gaps apparent in the original Security Officers' Act, such as the inclusion of only the guarding aspect, which in this Act is not specifically mentioned.³⁰ However, there is a general concurrence within the private security industry that this new Interim Board was created as a result of suspected mismanagement of the Security Officers' Board and its failure to live up to its role as regulator because of its lack of power to effectively enforce the legislation.³¹

Legislation currently applicable to the private security industry

What follows is an analysis of the legislation that currently affects the private security industry. The statutes are analysed, not necessarily in chronological order, but in order of their relevance to each other. For instance, the Private Security Industry Regulation Act³² is discussed first because many later statutes (regulations) stem from it.

Private Security Industry Regulation Act 56 of 2001

The Security Officers Act³³ contains many loopholes which the 2001 Act aims to eradicate thereby making the new Act a thorough piece of legislation. The Private Security Industry Regulation Act of 2001 repeals the Security Officers Act of 1987, however, as already mentioned, some provisions of the 1987 Act still apply.³⁴ In fact there is draft legislation under discussion that will be directly applied to the private security industry (at times to replace existing older legislation), such as:

- Renewal of registration;
- Firearms and weapons;
- Provision of information to consumers;
- Advertising of services;
- Legislation particularly pertinent to key cutters;

²⁸ Security Officers Amendment Act 104 of 1997, s 5.

²⁹ Interview 1: interview with a Risk Consultant and South African Security Association (SASA) representative.

³⁰ Security Officers Amendment Act 104 of 1997.

³¹ Interview 1 op cit (n29); Irish op cit (n3) 38.

³² Act 56 of 2001.

³³ Act 92 of 1987.

³⁴ Acts 56 of 2001 and 92 of 1987 respectively. See (n8) above.

- Order and safety of public places; and
- A code of conduct for the inspectors of the industry.³⁵

The new 2001 Act greatly increases the scope of the legislation by defining 'security service providers' as including both officers and businesses. Reference is made to previously excluded security service providers such as locksmiths, private investigators, security training or instruction providers, manufacturers, importers and distributors of monitoring devices, installers of security equipment, labour brokers, those who monitor electronic security equipment and those who manage or control the rendering of security services, that is, managers of companies.³⁶

The Act also stipulates the creation of a new board — the Security Industry Regulatory Authority. This Authority, according to the 2001 Act is governed and controlled by the Council. The Council's composition is different from previous legislation in that there is no representation of the security industry within this regulatory structure. The Council, according to s 6 of the Act would consist of a chairperson, vice-chairperson and three councillors all appointed by the Minister of Safety and Security and all of whom have no 'direct or indirect financial or personal interest in the private security industry' or represent in any way the interests of those within the industry.³⁷ The only voice the private security industry has is through a committee or committees that may be appointed by the Council in an advisory capacity only. In other words, the Council 'is not legally bound to accept any recommendation made by a committee'.³⁸

According to the Act the objects and functions of the Security Industry Regulatory Authority are quite extensive. The all-encompassing objective of the Security Industry Regulatory Authority is to regulate the industry and exercise effective control over it with a view to looking after the interests of the public, national interest and the private security industry itself. Other objectives include the promotion of the industry's stability and trustworthi-

³⁵ A seminar hosted by the Security Association of South Africa held in Cape Town on 27 June 2002, was attended by a large number of private security managers, representatives and interested parties. It presented the opportunity for those within the industry to point out their concerns and perceived failings of the Private Security Industry Regulation Act 56 of 2001. Key speakers were a legal adviser to the Security Industry Regulatory Authority and a South African Police Service Director (subsequent references to the seminar will be referred to as 'Seminar on Private Security Industry Regulation Act 56/2001, 2002').

³⁶ These security service providers have to be registered with the Security Industry Regulatory Authority by 1 March 2003 and have their applications in by 1 December 2002 (Correspondence with the Security Industry Regulatory Authority Head Office, August 2002).

³⁷ Private Security Industry Regulation Act 56 of 2001, s 7(b)(i).

³⁸ Private Security Industry Regulation Act 56 of 2001, s 13(5).

ness, encouraging efficiency, responsibility and a high standard of service delivery. Also included is the encouragement of the ownership and control of security companies, and the overall empowerment and advancement, of historically disadvantaged segments of society. Of interest too is the reference to the promotion of security officers' rights and other employees within the industry. As far as the functioning of the Security Industry Regulatory Authority is concerned the Act stipulates, amongst other things, the receiving, consideration and suspension or withdrawal of applications for registration and renewal of registration of the security service providers. The Security Industry Regulatory Authority is also required to gather information regarding registration and to protect security officers/employees who may be exploited within the industry. Training also plays a large part in the functioning of the Security Industry Regulatory Authority in that it should ensure that a certain standard is maintained within the industry.

In short, the main enforcement mechanisms at the Security Industry Regulatory Authority's disposal include inspections conducted by inspectors who have been given peace officer status so as to effectively enforce its regulations. Accordingly directives may be given to non-complying security service providers and if not followed the application of the security service provider would be rejected and that provider, not being registered with the Security Industry Regulatory Authority, would not be able to operate any longer.³⁹ Improper conduct, too, is dealt with by the Security Industry Regulatory Authority in terms of fines or other penalties and already-registered companies may have their registration suspended or withdrawn.⁴⁰

Criminal prosecution is also a means of effectively enforcing the Act as the managers of the private security companies now become criminally liable to comply with the Act, by being obliged to approach the Security Industry Regulatory Authority to ensure that stipulations, such as renewal of registration, change of company name and so forth, are adhered to.⁴¹

An interdict may also be granted against an offending company to ensure discontinued operation.⁴² Information regarding a defaulting company may also be published for public knowledge to further prevent continuing operations through the obligation of consumers not to make use of non-

³⁹ Peace officers status involves the gaining of limited police powers and being allowed to use these powers within a specified jurisdiction. (Private Security Industry Regulation Act 56 of 2001, s34 (3)(a)). (R C Davis and S Dadush 'Balancing public and private accountability: The MetroTech Business Improvement District' in *The Public Accountability of Private Police: Lessons from New York, Johannesburg and Mexico City* (2000) 12).

⁴⁰ Private Security Industry Regulation Act 56 of 2001, s 4(g) and s 26.

⁴¹ Private Security Industry Regulation Act 56 of 2001, ss 20 and 38.

⁴² Private Security Industry Regulation Act 56 of 2001, s 27 (1)(a).

compliant security service providers in terms of s 38(3)(g) of the Act.⁴³ In fact consumers are legally obliged to ensure that the companies they are using are registered with the Security Industry Regulatory Authority, that all the employees are also registered, that the security officers in the company are in possession of training certificates from accredited training institutions and that the security officers are also paid the minimum statutory wage according to the Sectoral Determination 6. Consumers may, in this regard, request copies of pay slips.⁴⁴ Consumers must also question whether the security officers they are using will adhere to the industry's code of conduct and have been trained for the specific job they have been allocated.⁴⁵

Therefore, considering the enforcement mechanisms that the Security Industry Regulatory Authority has available to it, the obligations of the private security companies become clear. They must register and renew their registration, train their employees — not only to qualify for initial registration but also to remain eligible as active security service providers.⁴⁶ The industry also has certain financial obligations, is expected to comply with all relevant legislation and code of conduct provisions and to allow the inspection of their premises (including inspection of all documentation). Hampering of an inspector with peace officer status constitutes obstruction of the Act; therefore the industry is required to provide information and all documents to the inspectors. Naturally the industry has its own rights and the peace officers would have to adhere to the Constitution to ensure that no human rights are violated. Security service providers also have the right of access to information and fair administrative action from the Security Industry Regulatory Authority, and they also have the right to make submissions regarding the Acts they have to adhere to.⁴⁷

A number of pertinent issues have arisen since the enactment of the Act. A particular problem with the new legislation is the requirement that security managers be trained as Grade B security officers (Grade A symbolising the highest training available to a security officer and Grade E being the lowest grade).⁴⁸ Initially allowance was made for the submission of curriculum vitae to bypass this requirement, but a moratorium was then placed on this provision. The result is that managers with experience and academic qualifications employed in the industry, who may not be involved in the guarding aspect of the industry, will have to undergo this training. This is

⁴³ 56 of 2001.

⁴⁴ Security Association of South Africa seminar op cit (n35).

⁴⁵ Security Industry Regulatory Authority Media Release, 20 March 2002.

⁴⁶ Security Association of South Africa seminar op cit (n35).

⁴⁷ Ibid.

⁴⁸ Security Association of South Africa seminar op cit (n35).

regardless of the type of involvement the manager has in the industry.⁴⁹ Also the majority of industries not complying with this requirement may not be able to comply timeously (which at the time of writing was 1 October 2002, the legislation only coming into force on 14 February 2002; but the deadline was then extended to 1 March 2003).⁵⁰

Another serious problem identified by the industry is the fact that as a result of past conditions in South Africa many black owners of private security companies do not have secondary school education. Requiring them to have a Grade B within the required time would be impractical, possibly resulting in them having to close down their businesses due to them being unable to satisfy registration criteria or re-register with the Security Industry Regulatory Authority. This provision, therefore, inadvertently undermines the objective of the legislation to encourage black empowerment.

The legislation was simply meant to promote a uniformly educated and high quality security industry and to rid the industry of illegitimate operators. However, in its attempt to do so it has merely singled out those who are under-educated and who entered the industry before the legislation was fully enacted, not necessarily those who are operating illegitimately and unscrupulously. The industry has argued that most of these owners who now do not qualify to be managers have gathered the experience necessary to legitimise their continued operation.⁵¹

The private security industry's predominant attitude to the Security Industry Regulatory Authority — the 'new' board — is somewhat sceptical. It is only natural that there would be some scepticism as to the efficiency and legitimacy of the Security Industry Regulatory Authority, especially since the old board depended on private companies to report the non-compliance of other companies, thereby in a way promoting fiercer competition. It is hoped that the Security Industry Regulatory Authority will be more professional in its regulation of the industry. Many security service providers feel disillusioned by the fact that they have been paying fees to the Security Officers' Board and have not been receiving anything in return; such as the identification cards the Security Officers' Board was supposed to issue.⁵² Once again these are complaints lodged against the old Board. The Security

⁴⁹ Interview 9; interview with the director of Peninsula Security, chairman of SANSEA (Western Cape), vice-chairman of SAIDSA (Western Cape) and national vice-chairman of SANSEA.

⁵⁰ Failure to comply by the time of the deadline will result in a fine and/or imprisonment, not exceeding five years as stipulated in s 20 of the Act. A second or subsequent conviction will result in a fine and/or imprisonment, not exceeding ten years (M McIntyre *Who Guards Our Protectors*, available at http://www.ir-net.co.za/News/article_7.asp).

⁵¹ Interview 9 op cit (n49).

⁵² Interview 4; interview with an ex-policeman, operations manager for Securicor Gray, Claremont.

Industry Regulatory Authority has only been operational since February 2002 it remains to be seen whether it will revert to the bad habits of the old board.

When interviewing the Security Industry Regulatory Authority manager in the Western Cape it was found that the Security Industry Regulatory Authority itself admits that its resources are stretched to the limit, having only five inspectors to cover the entire Western Cape, for example.⁵³ Consequently the Security Industry Regulatory Authority has recognised the need for more inspectors and has made provision for this. In particular, the new Act has included a wider spectrum of security service providers.⁵⁴ The Security Industry Regulatory Authority is confident, that with its increase of manpower and the much stricter supportive legislation, it will be able to effectively regulate the industry. Others are not so confident and view the Security Industry Regulatory Authority as another version of the old board.

Private Security Industry Levies Act 23 of 2002⁵⁵

The Levies Act makes provision for the imposition of levies by the Security Industry Regulatory Authority, and also creates a framework for the management of levies, payment thereof and the consequences of non-payment. The Levies Act also makes provision for the assessment of the Security Industry Regulatory Authority's performance with regard to decisions made.⁵⁶ The purpose of the Levies Act is to expand on the levies paid to the Security Industry Regulatory Authority.⁵⁷ Most likely the main purpose for the more stringent application of fees is to enhance the effectiveness of the Security Industry Regulatory Authority since the fees are imposed for the funding of this Authority. Also since stricter levies are imposed (and stricter criteria for registration) any person wanting to establish a security company to make a quick profit (so-called fly-by-night companies) would possibly be deterred by the strict regulations and levies or perhaps not even qualify to register at all due to the financial and regulatory implications. In other words, the new legislation mentioned above has an objective of deterring undesirable and unscrupulous security service providers who may tarnish the reputation of the entire industry. It is necessarily the case that legitimate security service providers are included in this tightening of regulations whether they need to be regulated or not.

⁵³ Interview 10, interview with Security Industry Regulatory Authority Law Enforcement Manager, Western Cape.

⁵⁴ Ibid.

⁵⁵ This Act was assented to on 24 July 2002, but has not yet come into force (at the time of writing).

⁵⁶ Private Security Industry Levies Act 23 of 2002, s 7.

⁵⁷ Security Association of South Africa seminar op cit (n35).

Private Security Industry Regulations 2002⁵⁸

The private security industry is also subject to regulations made by the Minister for Safety and Security regarding applications for registration, training requirements, clearance certificates (allowing former members of formal policing/military/security forces to become security service providers), the infrastructure required in order to provide a security service, change of name and status or any other pertinent change of security service provider information, keeping of documents and records, uniforms, insignia, badges, firearms and so forth.

Of note is s 13(5) and (6) whereby a security officer may not use his/her own firearm, while employed by the security company, since it is the company's responsibility to provide the weapon.⁵⁹ This is a change from past practices whereby security officials could use their own weapons while on duty. This new regulation may prove to be problematic since requiring that security guards be supplied with a firearm by the company would imply that the amount of weapons on the street at least double in number. The security guard would still carry his/her own weapon and then be issued with another weapon at the private security company where he/she is employed. Requiring that the security guard sign in his/her weapon is not as straight forward either since there would have to be legal provisions made for that and practical issues would also have to be considered, such as, where to store the weapon and so forth.⁶⁰

What follows is a review of the Firearms Control Act 60 of 2000, which relates to the provisions stipulated in the 2002 regulations discussed above.

The Firearms Control Act 60 of 2000

In so far as implementation, at the time of writing, s 113 and s 140 of the Firearms Act were the only sections to have come into force.⁶¹ As it pertains to the security industry, the Act stipulates that a competency certificate is required before a firearm is issued, requiring that those in the industry needing a firearm be trained at an accredited training facility.⁶² Also a limitation has been placed, allowing only persons 21 years of age and older to be issued a firearm.⁶³ This affects the industry as there are obviously security guards who are younger than 21.

There have also been limitations placed by the Firearms Control Act regarding the type of weapons that are to be prohibited in all situations, such

⁵⁸ Regulations made under the Private Security Industry Regulation Act 56 of 2001, s 35.

⁵⁹ Private Security Industry Regulations 2002.

⁶⁰ Interview 9 op cit (n49).

⁶¹ Security Association of South Africa seminar op cit (n35).

⁶² Firearms Control Act 60 of 2000, s 9 (1).

⁶³ Firearms Control Act 60 of 2000, s 9 (2)(a).

as fully automatic firearms and any military-type weapons.⁶⁴ Also a security company — which becomes the holder of the license for the guns issued to its guards — may lose its license if a weapon were to be given to an incompetent person (for example, a drunk person, unstable, mentally ill, known for inciting domestic violence and so forth).⁶⁵ Another significant provision of the Act is that the carrying of a firearm must be completely concealed in a holder or something similar. However, there is a possibility that there will be an exemption for South African Police Service officials and possibly security officers.⁶⁶ Any conviction immediately disallows the carrying of a firearm. The Act also makes provision for the prohibition of firearms in so-called firearm-free zones.⁶⁷ This is in contrast to what is known as gun-free zones, since gun-free zones determine restricted access as decided by a private business and right of admission to that business would depend on an individual not carrying a firearm. Firearm-free zones are areas that the Minister of Safety and Security has declared to be firearm-free. However, on-duty South African Police Service officials and also security officials may be exempt from this restriction.⁶⁸ It is interesting that private security would be afforded the same right as formal policing structures in this regard.

Improper Conduct Enquiries Regulations 2003⁶⁹

These regulations, which only fairly recently came into force (on 1 March 2003), stipulate the procedures to be followed in terms of conducting an enquiry into the conduct of a security service provider. The Code of Conduct for Security Service Providers 2003 defines whether conduct is considered improper or not.⁷⁰ The 'security service provider in connection with whom an enquiry is held' is referred to in the regulations as the respondent.⁷¹ The definition of a respondent, according to the regulations, makes provision for the laying of a charge against a security officer of any standing within a private security company and/or representative thereof, such as a director of a company, a trustee, a partner, a member of a close corporation and so forth.⁷² The regulations also stipulate that a charge against a security official

⁶⁴ Firearms Control Act 60 of 2000, s 4 (1).

⁶⁵ Firearms Control Act 60 of 2000, ss 20, 102, 103 and 28 (1)(c).

⁶⁶ Security Association of South Africa seminar op cit (n35).

⁶⁷ Firearms Control Act 60 of 2000, s 140.

⁶⁸ Security Association of South Africa seminar op cit (n35).

⁶⁹ Regulations made under the Private Security Industry Regulation Act 56 of 2001, s 35(1)(h).

⁷⁰ Code of Conduct for Security Service Providers 2003, Chapter 5, s 24 and s 26.

⁷¹ Improper Conduct Enquiries Regulations 2003, s 1.

⁷² Ibid.

must be submitted in the form of an affidavit to the director. In this case the director refers to 'a staff member of the Authority [that is, the Security Industry Regulatory Authority] appointed as the acting director by the Council or to whom any of the powers or duties of the director have been delegated or assigned.'⁷³ Presiding officials and prosecutors are appointed by the director with the concurrence of the Council.⁷⁴

Code of Conduct for Security Service Providers 2003⁷⁵

Security service providers are also required to adhere to a code of conduct as stipulated by the Private Security Industry Regulation Act of 2001. The code of conduct, which came into force on 1 March 2003, includes certain obligations to the Security Industry Regulatory Authority by, for example, being co-operative and accommodating in terms of the duties that the Authority has to perform. The code of conduct also requires certain obligations towards the state and state security services, towards the public and towards the private security industry itself. The code of conduct is, in essence, designed to promote the stability, status and efficiency of the industry, while endeavouring to prevent crime and promoting the public and client interest. The code of conduct also directly addresses certain categories of security service providers, such as locksmiths, private investigators, those providing training and so forth. Employers, too, are expected to adhere to certain provisions within the code of conduct and the penalties of improper conduct are stipulated to that effect.

Security Officers' Board Training Regulations 1992

The training regulations made under the Security Officers Act⁷⁶ and which are still in force, are quite extensive. The Regulations basically include the issuing of accreditation certificates by the Security Officers' Board (to sanction training facilities who adhere to certain criteria) and training certificates to be issued to security personnel who have completed training to a satisfactory standard at an accredited training institution. Procedure, with regard to the lapsing and withdrawal of accreditation certificates, is stipulated as well as the prohibitions, penalties and offences with regard to the provision of security services by non-trained or inappropriately trained personnel.

⁷³ Improper Conduct Enquiries Regulations 2003, s 1.

⁷⁴ Improper Conduct Enquiries Regulations 2003, ss 2(1) and (5).

⁷⁵ As prescribed under the Private Security Industry Regulation Act 56 of 2001, s 28(1).

⁷⁶ Act 92 of 1987, s 32(1).

Appeal Regulations 2002⁷⁷

The following three pieces of legislation (the Appeal Regulations, the Constitution and the Criminal Procedure Act) are pertinent to the private security industry even though they do not strictly limit the industry, but actually empower it through the granting of certain rights.

The Appeal Regulations standardise the procedure necessary for an appellant to lodge an appeal against the Security Industry Regulatory Authority. The appellant, according to s 30(1) of the Private Security Industry Regulation Act 56 of 2001, could lodge an appeal if the Security Industry Regulatory Authority refused the application for registration as a security service provider, suspended or withdrew registration. Also any finding of improper conduct of that security service provider could be appealed within a certain time period. The appeals would be lodged with an appeals committee, headed by an appeals secretary — with members independent from the Security Industry Regulatory Authority and the private security industry.⁷⁸

The Constitution of the Republic of South Africa, Act 108 of 1996

Sections 22 and 23 of the Constitution are particularly applicable to the private security industry (as is the whole Constitution). Section 22 states that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law'.⁷⁹ Section 23 on Labour Relations⁸⁰ would also be particularly applicable in that it highlights the rights of workers and employers regarding unionisation and fair labour practices.

The Criminal Procedure Act 51 of 1977

This Act is particularly pertinent to the private security industry in that it provides the powers that are necessary to perform duties without the particular powers of arrest and search and seizure afforded to public police officers. Thus, rather than being strictly regulatory, this Act enables the private security sector to function within the realms of the law. Section 42(3) of the Criminal Procedure Act 51 of 1977 states that 'the owner, lawful occupier or person in charge of land' may arrest a person believed to have committed any offence or who is in the process of committing an offence. Therefore in order for a private security company to arrest a person on

⁷⁷ Regulations made under the Private Security Industry Regulation Act 56 of 2001, s 30(1).

⁷⁸ Appeal Regulations 2002, Ministry for Safety and Security.

⁷⁹ The Constitution of the Republic of South Africa, Act 108 of 1996, s 22.

⁸⁰ Act 108 of 1996, s 23 (1) to (6).

somebody else's property the client simply has to allow the private company to take lawful responsibility for the property and security officers may therefore arrest persons committing offences on that particular property.⁸¹

The above summary forms the bulk of the legislation applicable to the private security industry. Other Acts that are pertinent (which apply to all businesses not just private security companies) that have not been discussed above include the Companies Act,⁸² Close Corporations Act⁸³ and the Basic Conditions of Employment Act⁸⁴ (in particular Sectoral Determination).

Conclusion

Considering the role of legislation and the resultant mechanisms being put into place to regulate the industry effectively one should critically assess whether these methods are the best means of regulation, rather than simply accept them at face value. Shearing and Kempa illustrate a number of points that should be considered when evaluating the demands of legislation.⁸⁵ They point out that legislation usually focuses on prohibiting the industry (and the Private Security Industry Regulation Act⁸⁶ is an example of this) to the exclusion of any acknowledgement of the potential that private security has in contributing to society. A simple change in tone in the legislation may encourage private security companies to take up the challenge of assisting society instead of simply adhering to minimum regulations. Shearing and Kempa also state that legal constraints may not be effective, in that private security is market-orientated and will follow market opportunities rather than be constrained by the law.⁸⁷ In other words, the client's needs come first. They indicate too, that traditional means of regulating the industry are being imposed on something that is 'informal, transitory or occur[s] on a piecemeal basis'.⁸⁸ Consider also the fact that there are over 40 security associations in South Africa each representing a different aspect of the industry. This reflects the immense diversity in the industry since most of these associations were created to cater for specific segments of the industry. It is also ironic that these informal, security associations, having no statutory powers, have

⁸¹ Carrier op cit (n10) 12.

⁸² Companies Act 61 of 1973.

⁸³ Close Corporations Act 69 of 1984.

⁸⁴ Basic Conditions of Employment Act 75 of 1997.

⁸⁵ C D Shearing and M Kempa 'The role of "private security" in transitional democracies' Paper presented at the *Crime and Policing in Transitional Societies* Conference, South African Institute of International Affairs (2000) 209. Also available at: <http://www.kas.org.za/Publications/seminarReports/crimeandpolicingintransitionalsocieties/shearing.pdf>.

⁸⁶ Act 56 of 2001.

⁸⁷ Shearing and Kempa op cit (n85) 209.

⁸⁸ Ibid.

played quite an important role in the regulation of the industry. In fact one of the main security associations, the Security Association of South Africa, was initially created in 1965 as a form of self-regulation, since at that time no regulatory structure existed. The formal regulatory mechanisms should therefore match the needs of the private security industry and reflect its nebulous and diverse nature rather than being a centralised, accountability body (such as the Security Industry Regulatory Authority). A diverse mix of accountability structures and mechanisms should be in place to address a phenomenon that is itself characterised by diversity and fluidity, as demonstrated by the existence of many security associations.

Notwithstanding the faults that formal regulation may contain, it is still essential to have a legislative framework in place if private security is to be restricted to acceptable forms of policing and business practice. The legislation is fundamentally the basis of all regulation. Since from it, mechanisms of control are created; the government implicitly adopts an attitude of control; and private security companies are informed, in no uncertain terms, of their limitations. It is also interesting that the majority have already conformed by creating their own informal mechanisms in the form of the abovementioned security associations. Private security should become an acceptable form of policing with which public structures would be willing to work. Also, private security should be moulded into the type of policing that can be made use of in all segments of society, not just in privileged areas.

It is apparent then, that on deeper reflection of what the legislation entails, the new government probably aims to make use of the private security industry in more sustainable and productive ways. For it is the tone of the legislation and its vigorous regulations that seem to symbolise and reflect the desire of the government to control the private security industry and so impel it to a standard worthy of a democratic society. The government appears to be saying that if private security is to be used effectively in the fight against crime it should adhere to strict standards of practice that best define the type of security provision that is expected in the new South Africa. Giving the private security industry a facelift and breaking from old practices linked to the old state, as it were, may be the best means by which a network of policing is created in this country.

However, these comments are preliminary, considering the fact that this seeming barrage of legislation and planned legislation still needs to be effectively implemented. The essence of regulation is that it is enforced but it is still too soon to tell whether the new legislation and drive for an improved standard of security service provision will be a success. Also it remains to be seen whether the industry can, in fact, be regulated in the manner prescribed

by the law or whether a more fluid adaptable enforcement mechanism should be created. Currently the success of the legislation depends mostly on the co-operation of the industry (and clients) considering the practical difficulty the Security Industry Regulatory Authority has in keeping the large number of companies and newly identified security service providers in check. So, will the new legislative strategy be successful in changing the face of security provision in South Africa? Or will the private security industry alter the perceptions of the government and force a rethinking of this legislative strategy and a re-analysis of the possibility of a networked police force? The private security sector brings with it a lot of problems that legislation alone may not be able to solve.