



**ALTERNATIVE REPORT SUBMISSION TO THE HUMAN RIGHTS COMMITTEE IN  
RESPONSE TO SOUTH AFRICA'S INITIAL REPORT AND REPLIES TO THE LIST OF  
ISSUES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL  
RIGHTS**

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## 1. INTRODUCTION

The African Policing Civilian Oversight Forum (APCOF)<sup>1</sup> welcomes the opportunity to submit an alternative report to the Human Rights Committee (the Committee) in response to South Africa's state report and replies to the List of Issues pursuant the International Covenant of Civil and Political Rights (the Covenant).

APCOF refers to the List of Issues adopted by the Committee at its 114<sup>th</sup> session<sup>2</sup> to be considered during the Committee's evaluation of South Africa's initial state report submitted on 26 November 2014<sup>3</sup>, as well as its replies to the List of Issues submitted on 3 December 2015<sup>4</sup>.

This alternative report provides the Committee with additional material to assist in its forthcoming review of South Africa. Specifically, APCOF provides information and recommendations in relation to the following issues:

- Non-discrimination, equality between men and women and prohibition of advocacy on national, racial or religious hatred (Articles 2, 3, 20, 26)
- Prohibition of torture and cruel, inhuman or degrading treatment and treatment of persons deprived of their liberty (Articles 7, 9 and 10)
- Right to life, liberty and security of the person and treatment of persons deprived of their liberty (Articles 6, 9, 10, 14, and 23)
- Juvenile justice (Articles 9, 10, 14 and 24)

## 2. SUMMARY OF RECOMMENDATIONS

### **2.1. Non-discrimination, equality between men and women and prohibition of advocacy on national, racial or religious hatred (Articles 2, 3, 20, 26)**

THAT South Africa provide a comprehensive update to the Committee about steps it is taking to ensure the rights to life and equality for non-nationals living in South Africa are protected, including measures it has planned or has put in place to implement recommendations from the South African Human Rights Commission's report on issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals. In particular, South Africa should provide information on measures currently underway to improve policing responses to violence against non-nationals, and to build trust and confidence between migrant communities and the South African Police Service.

THAT South Africa review and revise current South African Police Service training curriculum and standing orders to ensure conformity with constitutional and legislative frameworks, and to ensure that police officers are aware of, and trained on, their legal obligations to provide equal and non-discriminatory policing services, pursuant to the Constitution of the Republic of South Africa, as well

as the Covenant.

**2.2. Prohibition of torture and cruel, inhuman or degrading treatment and treatment of persons deprived of their liberty (Articles 7, 9 and 10)**

THAT South Africa review and revise statutory provisions regarding the use of force by law enforcement officials to ensure these laws align with international human rights standards. Specifically, that the statutory provisions for the use of deadly force are limited to self-defence and defence of others, to prevent the perpetration of a serious crime involving a grave and imminent threat to life, or to arrest (or prevent the escape of) a person presenting imminent danger (life or serious injury) and resisting authority, and only when less extreme means are unavailable and/or insufficient.

THAT South Africa review and revise police training materials and curriculum, and adopt a comprehensive National Instruction on the use of force to ensure that South African Police Service officials are adequately trained, capacitated and supported to use force that is proportionate to the circumstances, and at the minimal level necessary, and that appropriate protocols are in place review use of force incidents.

THAT South Africa establish a system for the independent and regular monitoring of police cells.

THAT South Africa review the current budgetary allocations for the Independent Police Investigative Directorate to ensure that financial and human resources are sufficient to effectively perform its functions and mandate.

THAT South Africa review and revise its Police Act to align the role and the function of the South African Police Service to the standards provided for in the international human rights framework as well as its own Constitution, and in a manner which responds to the evidence-based challenges of taking a rights-based approach to policing, as identified in the Farlam Commission's report.

**2.3. Right to life, liberty and security of the person and treatment of persons deprived of their liberty (Articles 6, 9, 10, 14, and 23)**

THAT South Africa adopt a comprehensive National Action Plan to address the constraints on the right to liberty and security of the person, and treatment of persons deprived of their liberty, based on the recommendations set forth in the recent review of the framework for arrest, police custody and remand detention.

THAT South Africa provide for the collection and dissemination of disaggregated data across the criminal justice chain to facilitate an accurate statistical analysis of the number of people in contact with the criminal justice system, and the extent to which stop, search, arrest, police custody and remand detention is justified, proportionate and necessary, and for purposes of assessing the extent to which the criminal justice system is efficient and effective. Harmonised categories of measurement across the criminal justice system will offer insight into key challenge areas, allow for the development of evidence-based and targeted reform interventions, and provide for accurate

measurements of how those interventions impact the right to liberty, overcrowding and conditions of detention, over extended periods of time.

THAT South Africa review and revise the statutory framework for arrest, police custody and remand detention, and put in place alternative measures, to ensure that the deprivation of liberty is truly treated as a measure of last resort.

THAT South Africa review the current budgetary sources and allocations for the Judicial Inspectorate for Correctional Services to guarantee financial independence, and to ensure the availability of financial and human resources necessary to effectively carry out its oversight mandate.

#### **2.4. Juvenile justice (Articles 9, 10, 14 and 24)**

THAT South Africa establish a system for the independent and regular monitoring of Child and Youth Care Centres.

THAT the South African Police Service take immediate steps to ensure all its members receive adequate and ongoing training, as well as supervision, on performance of their responsibilities under the Child Justice Act.

THAT South Africa take immediate steps to reduce the number of children held in correctional centres, and provide enhanced support to alternative detention programmes.

### **3. ADDITIONAL/ALTERNATIVE INFORMATION FOR THE LIST OF ISSUES**

#### **3.1. Non-discrimination, equality between men and women and prohibition of advocacy on national, racial or religious hatred (Articles 2, 3, 20 and 26)**

**Measures taken to combat xenophobia, including when law enforcement officials have been involved in the relevant incidents (paragraph 2, List of Issues)**

APCOF is concerned about the capacity of the South African Police Service (SAPS) to effectively respond to acts of xenophobic violence, and regrets that the State has not taken the necessary measures to address the underlying causes of violence, to ensure a rights-based approach by the police, or to provide adequate policing services to non-nationals on a national level. In fact, policing responses to non-nationals have been described as ambivalent towards the protection and promotion of their rights, and as 'actively hostile or complicit' in the acts of violence committed against them.<sup>5</sup>

APCOF notes that South Africa's National Human Rights Institution, the South African Human Rights Commission (SAHRC), as well as other stakeholders, have conducted investigations on the prevalence of xenophobic violence across the country and made recommendations to the State on measures it should take to combat violence against non-nationals, including steps to enhance the

policing response.<sup>6</sup> Recommendations specific to the role of the police in addressing violence against non-nationals included:

- Establishing a national task team to document, analyse and understand policing responses to the violence with a view to improving systems and training;
- Developing early warning systems; and
- Reviewing policies and procedures in relation to the policing of non-nationals for purposes of building trust and confidence between migrant communities and the South African Police Service.

Following recent acts of public violence against non-nationals in 2015, APCOF remains concerned that South Africa has not taken all steps necessary to implement these recommendations.

**Recommendation for Concluding Observations (Articles 2, 3, 20 and 26)**

THAT South Africa provide a comprehensive update to the Committee about steps it is taking to ensure the rights to life and equality for non-nationals living in South Africa are protected, including measures it has planned or has put in place to implement recommendations from the South African Human Rights Commission's report on issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals. In particular, South Africa should provide information on measures currently underway to improve policing responses to violence against non-nationals, and to build trust and confidence between migrant communities and the South African Police Service.

**Recommendation for Concluding Observations (Articles 2, 3, 20 and 26)**

THAT South Africa review and revise current South African Police Service training curriculum and standing orders to ensure conformity with constitutional and legislative frameworks, and to ensure that police officers are aware of, and trained on, their legal obligations to provide equal and non-discriminatory policing services, pursuant to the Constitution of the Republic of South Africa, as well as the Covenant.

**3.2. Prohibition of torture and cruel, inhuman or degrading treatment and treatment of persons deprived of their liberty (Articles 7, 9 and 10)**

**Steps taken by the Department of Correctional Services and the South African Police Service to comply with Prevention of Combating and Torture of Persons Act of 2013 to prevent the recurrence of torture and ill-treatment (paragraph 10, List of Issues)**

In 2014/2015, the Independent Police Investigative Directorate (IPID) received 145 reported incidents of torture committed by police officers, reflecting an 88% increase from the previous year.<sup>7</sup> The increase in complaints to IPID can, on the one hand, be indicative of an increased public awareness about individual rights and the measures that are in place to enforce them,<sup>8</sup> especially since the enactment of the Prevention of Combating and Torture of Persons Act of 2013. However,

the impact of torture allegations committed by the police on public trust and confidence in the police cannot be underestimated,<sup>9</sup> nor should the challenges faced by IPID and other oversight mechanisms responsible for investigating incidents and complaints involving acts of torture by the police.

APCOF makes specific recommendations for strengthening oversight of police in the following section which deals with specific measures taken by the State to address police violence and excessive use of force.

**Specific measures to address allegations of police violence and excessive use of force, including in police stations and house searches (paragraph 11, List of Issues)**

APCOF regrets that South Africa's response to the List of Issues did not include requested statistics on (1) the total number of complaints of violence committed by the police lodged in the past five years; (2) the number of investigations opened, their outcome and any penalties imposed on officials that resorted to excessive use of force or violence; and (3) measures taken to improve transparency of the investigations undertaken by the Independent Police Investigative Directorate into human rights violations perpetrated by police officials.

According to the Independent Complaints Directorate's (ICD) Annual Report for 2009/2010, (the body responsible for police oversight prior to the establishment of IPID), there were 122 reported incidents of death resulting from assault by a police officer, which comprised 14% of total number of deaths caused by police action during that year. Further, during the same year, a total of 471 deaths resulting from service firearms were reported to ICD, comprising 55% of the overall deaths caused by police action during 2009/2010.<sup>10</sup>

Since the establishment of IPID in 2011, statistics relating to incidents of police violence and excessive use of force have been captured in its annual reports. According to a summary presented in IPID's 2014/2015 Annual Report of the types of cases received over the past three years, a total of 1 217 deaths have resulted from police action since 2012, with 431 in 2012/2013, 390 in 2013/2014 and 396 in 2015.<sup>11</sup> With regards to assault, a total of 11 758 incidents have been reported to IPID since 2012, with 4 131 in 2012/2013, 3 916 in 2013/2014 and 3 711 in 2015.<sup>12</sup> Additionally, IPID also captures statistics on rape by police officers and reports that, since 2012, it has received a total of 391 reported incidents of rape by a police officer, with 146 in 2012/2013, 121 in 2013/2014 and 124 in 2015.<sup>13</sup> These statistics are alarming in and of themselves, however, it is important to note that they are unlikely to provide a detailed account of the extent of police violence given that not all incidents of police assault, rape and excessive use of force are reported to IPID.

In APCOF's view, there are two specific measures that South Africa can take to address incidents of torture, violence and excessive use of force by police officials: (1) align South Africa's statutory framework for the use of force with international normative standards; and (2) strengthen the independent oversight of policing.

Use of force

The arbitrary or unlawful use of force by members of SAPS has been the subject of intense scrutiny by recently-established commissions of inquiry, oversight bodies, media outlets and agencies, and the public at large. Although the use of force is necessary in certain instances, arbitrary and excessive use of force occurs frequently, and in a variety of different contexts, including during the execution of arrests and during public order policing operations.

APCOF is concerned that amendments to Section 49 of the Criminal Procedure Act, which relate to the use of force in execution of an arrest, fall short of internationally-accepted standards, especially provisions governing the use of deadly force. In its current form, Section 49 permits the use of deadly force against a suspect of a crime involving actual *or attempted* infliction of serious bodily harm; further, there is no requirement that the suspect pose an **imminent** threat of death or serious bodily harm to the police officer or anyone in the vicinity to justify the use of deadly force. Accordingly, APCOF is of the view that, in its current form, Section 49 permitting the use of force is inconsistent with standards of international human rights law and with the Constitution.

In addition, APCOF contends that current legal provisions in South Africa allowing for the use of force in other policing contexts, including public gatherings, are inadequate and inconsistent with the international normative human rights framework for the use of force. In particular, the Regulation of Gatherings Act permits police officers to use lethal force in the protection of property.

**Proposed Recommendation for Concluding Observations (Articles 7, 9 and 10)**

THAT South Africa review and revise statutory provisions regarding the use of force by law enforcement officials to ensure these laws align with international human rights standards. Specifically, that the statutory provisions for the use of deadly force are limited to self-defence and defence of others, to prevent the perpetration of a serious crime involving a grave and imminent threat to life, or to arrest (or prevent the escape of) a person presenting imminent danger (life or serious injury) and resisting authority, and only when less extreme means are unavailable and/or insufficient.

**Proposed Recommendation for Concluding Observations (Articles 7, 9 and 10):**

THAT South Africa review and revise police training materials and curriculum, and adopt a comprehensive National Instruction on the use of force to ensure that South African Police Service officials are adequately trained, capacitated and supported to use force that is proportionate to the circumstances, and at the minimal level necessary, and that appropriate protocols are in place review use of force incidents.

Independent Oversight of Police

APCOF promotes the use of independent civilian oversight of the police as a critical tool for addressing incidents of police violence, torture and excessive use of force, and recommends the

Committee to consider a Concluding Observation which specifically calls on South Africa to strengthen its current legislative framework for the civilian oversight of police.

In South Africa, IPID has a statutory mandate to receive complaints and investigate the most serious cases of police misconduct and criminality. This includes any death in police custody, deaths as a result of police action, complaints relating to the discharge of an official firearm by any police officer, rape by police officers (on or off-duty), rape that occurs in police custody, and any allegation of torture or assault committed by a police officer.<sup>14</sup> Despite the existence of a robust mandate, APCOF has significant concerns about constraints on the financial capacity and human resources provided to IPID, which has comprised its ability to fulfill its mandate. Capacity restraints are evidenced by the fact that during the 2014/2015 reporting period, IPID completed less than half of the cases received (48%).<sup>15</sup>

APCOF is further concerned by a significant gap in the current architecture relating to police oversight in South Africa - the absence of sustained and systemic monitoring of police cells. Since responsibility for cell monitoring was transferred from IPID's predecessor, ICD, with the establishment of the Civilian Secretariat for Police (CSP), there have been a limited number of cell inspections. Accordingly, APCOF recommends that South Africa establish a system for independent and regular inspections of police cells, either as a Lay Visitor's Scheme or through a similar mechanism.

**Proposed Recommendations for Concluding Observations (Articles 7, 9 and 10)**

THAT South Africa establish a system for the independent and regular monitoring of police cells.

THAT South Africa review the current budgetary allocations for the Independent Police Investigative Directorate to ensure that financial and human resources are sufficient for effective performance of its mandate.

**Updated information on Marikana, specifically measures taken to prosecute perpetrators and prevent such events in the future (paragraph 12, List of Issues)**

The findings and recommendations contained in the Farlam Commission's report are welcomed by APCOF, which also endorses the recent establishment of a panel of international experts to consider the recommendations contained in the report.

The findings of the Farlam Commission report identified systemic challenges within policing in South Africa which need to be addressed through a broader policing transformation project. While the policy environment for policing has shifted in recent years, legislation governing SAPS has remained the same, which consequently limits the effectiveness of recommendations and policy efforts to demilitarise the police, and to promote a rights-based approach policing aligned with South Africa's human rights obligations under the Covenant as well as its own Constitution.

In this regard, South Africa's National Development Plan identifies six priorities for achieving a safer



South Africa, including professionalising and demilitarising the police service.<sup>16</sup> Since the adoption of the National Development Plan in 2012, South Africa has circulated two key policies for public comment: the draft White Paper on Policing<sup>17</sup> and the draft White Paper on Safety and Security,<sup>18</sup> which seek to create an inter-sectoral, multidisciplinary response to policing, and crime and violence prevention in South Africa. More specifically, the Draft White Paper on Police aims to establish a framework for 'an accountable, professional, competent and highly skilled police service',<sup>19</sup> which is committed to respecting and promoting human rights.

In APCOF's view, the release of the Farlam Report and the White Paper on Policing provide a critical opportunity to consider a Police Amendment Act to align the roles and functions of the police with the State's constitutional obligations, as well as its obligations under international human rights law. Further, legislative reforms would provide an opportunity to respond to challenges identified in the Farlam Commission's report, as well as other evidence-based findings and recommendations.<sup>20</sup>

#### **Proposed Recommendation for Concluding Observations (Articles 7, 9 and 10)**

THAT South Africa review and revise its Police Act to align the role and the function of the South African Police Service to the standards provided for in the international human rights framework as well as its own Constitution, and in a manner which responds to the evidence-based challenges of taking a rights-based approach to policing, as identified in the Farlam Commission's report.

### **3.3. Right to life, liberty and security of the person and treatment of persons deprived of their liberty (Articles 6, 9, 10, 14, and 23)**

#### **Updated information on measures taken to substantially decrease and eliminate cases of death of inmates in police custody (paragraph 20, List of Issues)**

APCOF commends the State for recognising the 'alarmingly high'<sup>21</sup> number of deaths in police custody and for acknowledging that 'more needs to be done to deal with the problem'<sup>22</sup> in its initial report to the Committee. APCOF is concerned, however, that (1) the information presented in its initial report is outdated insofar as it only includes statistics from the 2010/2011 ICD's Annual Report relating to deaths in police custody; and (2) that the State neglected to respond to the Committees' question regarding measures taken 'to substantially decrease and eliminate cases of death of inmates in police custody'.<sup>23</sup>

#### Statistics on deaths in police custody

Since IPID's inception in 2011, a total of 753 deaths in police custody have been reported, with 275 in 2012/2013, 234 in 2013/2014 and 244 in 2015.<sup>24</sup> These figures indicate a sharp decline from the number of deaths in police custody presented by the State in its initial report (a total of 797 deaths for the 2010/2011 reporting period)<sup>25</sup> because IPID now distinguishes between deaths in police custody<sup>26</sup> and deaths caused by police action. According to data generated by IPID in its 2014/2015 Annual Report, deaths in police custody represented 38% of the total number of reported death cases, while the remaining 62% of reported death cases were those resulting from police action.<sup>27</sup>

### Measures to reduce deaths in police custody

Preventing deaths in police custody has been identified by SAPS as a strategic risk for the medium-term in its Strategic Plan for 2014-2019.<sup>28</sup> In APCOF's view, any internal measures taken by SAPS to address the rates of death in custody must be accompanied by a strengthening of the independent civilian oversight of policing. As set out above in the Concluding Observations (Articles 7, 9 and 10) of this report, APCOF recommends South Africa to take urgent measures to implement a system of regular and independent inspection of police cells, and to review the budgetary allocations for IPID to ensure it has sufficient resources and personnel to effectively perform its mandate to investigate, inter alia, deaths in custody.

### **Measures to improve conditions of detention and to reduce overcrowding (paragraph 21, List of Issues)**

APCOF notes and welcomes information provided to the Committee about measures taken to reduce levels of overcrowding in Department of Correctional Services (DCS) facilities, including the introduction of electronic monitoring devices for remand detainees.<sup>29</sup>

Beyond taking measures to address conditions of detention and overcrowding, APCOF urges the Committee to consider other factors that have been identified as contributing to high levels of overcrowding in correctional centres. The Committee may be aware that the African Commission on Human and Peoples' Rights (Commission) recently adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), which were developed by the Commission to, inter alia, provide African states with guidance on measures for improving conditions of detention and for reducing levels of overcrowding in a pre-trial context.

As part of its efforts to implement the Luanda Guidelines at the national level, the Justice Crime Prevention and Security Cluster of the South African Government has, in collaboration with APCOF, prepared a draft report that measures the use of arrest, police custody and remand detention in South Africa and its impact on the right to liberty. The report, once published, will be made available to the Committee.

The research methodology involved measuring the risk to liberty and freedom of movement in South Africa, which provided insight into the number of people who are in contact with the criminal justice system,<sup>30</sup> and the extent to which stop, search, arrest, custody or detention of individuals is proportionate, justifiable and necessary. The objective of the study was to identify challenges and possible areas for intervention for reducing the unnecessary and arbitrary use of arrest and custody. Additionally, the study also set out to promote alternatives to detention for persons in conflict with the law, to enhance protections surrounding the right to liberty, to reduce levels of overcrowding in places of detention, and to relieve some of the burden placed on the criminal justice system.

The report makes a number of recommendations, including measures for reducing the number of arbitrary arrests and ways to improve the current bail system, and also brings to the fore ancillary factors, such as court utilisation, access to legal services, and performance of prosecutorial services,

which, when taken together, contribute to trial postponements and high levels of overcrowding.

Key findings relevant to the causes of overcrowding in South African correctional services facilities include:

- Unlawful arrest and detention by SAPS is well documented,<sup>31</sup> and there are arrest quotas linked to police performance management,<sup>32</sup> which raises concerns about the extent to which the police are trained, incentivised and supervised to exercise their arrest powers in a manner that is necessary, proportionate and procedurally fair.
- Remand detention is not used as a measure of last resort<sup>33</sup>, and the release of persons awaiting trial by judicial decision depends on a relatively narrow conceptual understanding of 'in the interests of justice'.<sup>34</sup>
- As of March 2015, 17% of remand detainees remained in custody despite having been granted bail,<sup>35</sup> because they were unable to pay the amount of the bond set by the court.<sup>36</sup> Accordingly, this trend indicates that often times, the bail amount set by the courts is not always appropriate to the circumstances of the accused, which raises concerns about the right to equality for indigent persons,<sup>37</sup> and the extent to which the courts make reasonable efforts to identify a reasonable amount of bail the accused person can afford.<sup>38</sup>
- Noting the success of measures taken by DCS to reduce the number of remand detainees held for more than two years, from 1 971 on 3 June 2013 to 1 733 on 31 March 2015<sup>39</sup>, APCOF contends that a myriad factors which contribute to the extended duration of remand must be addressed. These factors include: postponement of bail hearings,<sup>40</sup> trial postponements, absence of custody time limits, court utilisation well below the Chief Justice Norms and Standards,<sup>41</sup> court backlogs<sup>42</sup> (on account of human resource and infrastructure constraints, failure by courts to utilise court hours, poor quality of police investigations,<sup>43</sup> lack of integrated information and communications technology system for the criminal justice system,<sup>44</sup> as well as challenges arising from the transport remand detainees to the courts).

The report also notes that the lack of financial independence of the Judicial Inspectorate for Correctional Services (JICS). JICS is mandated to facilitate inspections of correctional centres and remand detention facilities, and to report on the treatment of inmates, conditions of detention, and on any corrupt or dishonest practices within DCS. However, in recent years, the effectiveness of JICS has been questioned, given that its financial and administrative support comes directly from the DCS, not National Treasury.<sup>45</sup> It is regrettable that despite the 2006 Jali Commission recommendations for reform to promote JICS' independence and to expand its mandate, and the establishment of a Prison Ombudsman, South Africa has not taken steps to promote the independence of JICS. Research into the performance of JICS indicates that the failure to implement the Jali Commission recommendations has left JICS 'unable, due to limitations of its mandate, to hold officers accountable, to place sufficient pressure on the [National Prosecuting Authority] to effect prosecutions' or compel DCS to provide reasons for refusing to accept its recommendations'.<sup>46</sup>

To address these challenges, the report makes a number of recommendations, which APCOF urges the Committee to consider as part of its review of South Africa.

#### **Proposed Recommendations for Concluding Observations (Articles 6, 9, 10, 14, 23)**

THAT South Africa adopt a comprehensive National Action Plan to address the constraints on the right to liberty and security of the person, and treatment of persons deprived of their liberty, based on the recommendations in the recent review of the framework for arrest, police custody and remand detention.

THAT South Africa provide for the collection and dissemination of disaggregated data across the criminal justice chain to facilitate an accurate statistical analysis of the number of people in contact with the criminal justice system, and the extent to which stop, search, arrest, police custody and remand detention is justified, proportionate and necessary, and for purposes of assessing the extent to which the criminal justice system is efficient and effective. Harmonised categories of measurement across the criminal justice system will provide an insight into key challenge areas, allow for the development of evidence-based and targeted reform interventions, and provide for accurate measurements of how those interventions impact the right to liberty, overcrowding and conditions of detention, over extended periods of time.

THAT South Africa review and revise the statutory framework for arrest, police custody and remand detention, and put in place alternative measures, to ensure that the deprivation of liberty is truly treated as a measure of last resort.

THAT South Africa review the current budgetary sources and allocations for the Judicial Inspectorate for Correctional Services to guarantee financial independence, and to ensure the availability of financial and human resources necessary to effectively carry out its oversight mandate.

#### **3.4. Juvenile Justice (Articles 9, 10, 14 and 24)**

APCOF acknowledges measures taken by the State to strengthen the juvenile justice system, namely the enactment of the Child Justice Act (CJA) in April 2010, which constituted a critical step towards enhancing protections for children in conflict with the law. APCOF draws the Committee's attention to two key issues that were not addressed in South Africa's response: the challenges to the implementation of the CJA, and the lack of independent oversight for Child and Youth Care Centres (CYCCs).

##### Challenges to Implementation of the Child Justice Act

Since promulgation of the CJA, issues relating to training, diversion and remand detention have arisen which pose problems for its effectiveness. For example, a steady decline in the number of SAPS officials who receive training on the CJA each year has been cause for concern, with 15 891 members being trained during its first year of implementation in 2010/2011<sup>47</sup>, compared to 4 422 members during its fifth year of implementation in 2014/2015<sup>48</sup>. When compared to the total

number of SAPS officials (157 518) in 2014/2015,<sup>49</sup> the above figure reflects that only 3% of SAPS officials were trained on provisions of the CJA during the 2014/2015 financial year. Given that SAPS is typically the first point of call when a child is suspected of committing a crime, it is critical for members to receive adequate and ongoing training about their responsibilities under the CJA, and for performance assessments to consider this area.

In addition, although the primary objective of the CJA is to divert children away from the criminal justice system and place children into diversion programmes, South Africa has witnessed a large number of alternative detention programmes being forced to close due to lack of funding. While the number of children ‘charged’<sup>50</sup> by the police has decreased from 75 435 (approximately 6 286 per month)<sup>51</sup> in 2010/2011 to 47 274 (approximately 3 939 per month) in 2013/2014<sup>52</sup>, questions regarding the impact of this decline on investment in alternative detention programmes have been raised in light of the dwindling number of children enrolled in diversion programmes. Regrettably, the effort to create an alternative channel for criminal justice may have had the adverse effect of diverting children away from the very programmes that were designed to help them.

A further cause for concern is that since enactment of the CJA, the number of children detained in correctional centres has increased, with 565 children in 2011/2012, to 733 in 2012/2013, up to 789 in 2013/2014.<sup>53</sup> Although the number of children detained in police lock-up has decreased (down from 174 in 2011/2012 to 76 in 2013/2014)<sup>54</sup>, and the number of children released on bail<sup>55</sup> and placed in the care of a parent or guardian<sup>56</sup> has also increased, the number of children placed in Child and Youth Care Centres (CYCCs) seems to be fluctuating from year to year, with 1 534 children in 2011/2012, up to 1 721 in 2012/2013, down to 1 440 in 2013/2014.<sup>57</sup> When taken together, these figures demonstrate an overall decrease in the number of children in remand; however, the growing trend of children being detained in correctional centres is deeply concerning given the high levels of overcrowding and gang violence in these settings.

#### Lack of Independent Oversight of Child and Youth Care Centres

In addition to problems with implementation, APCOF is also concerned about the lack of independent oversight of the CYCCs. Unlike correctional centres, (which fall under control of DCS and oversight of JICS), CYCCs fall within the mandate of the Department of Social Development’s (DSD), and has no mechanism for independent oversight.<sup>58</sup> Although DSD is responsible for conducting regular visits of all registered CYCCs<sup>59</sup>, not all facilities are registered, and many registered CYCCs do not receive regular visits from DSD.<sup>60</sup> Although the Child Justice Act mandates a process for ensuring quality assurance within these facilities, it only happens once every three years which is insufficient for ensuring adequate protection of children who are placed in CYCCs.<sup>61</sup> Accordingly, the lack of sufficient oversight coupled with the lack of independence in that oversight makes it difficult to accurately assess the conditions in which children are being kept, and the extent to which their rights as remand detainees are being protected.<sup>62</sup>

#### **Proposed Recommendations for Concluding Observations (Articles 9, 10, 14 and 24)**

THAT the South African Police Service immediate steps to ensure all its members receive adequate and ongoing training, as well as supervision, on performance of their responsibilities under the Child

Justice Act.

THAT South Africa take immediate steps to reduce the number of children held in correctional centres, and provide support to alternative detention programmes.

THAT South Africa establish a system for the independent and regular monitoring of Child and Youth Care Centres.

## Endnotes

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<sup>1</sup> APCOF is a network of African policing oversight practitioners from state and non-state institutions. It promotes democratic policing through strengthening civilian oversight over the police in Africa. APCOF undertakes research, provides technical support to state and non-state actors, including civil society organisations, the police and new and emerging oversight bodies in Africa. APCOF was registered in 2006 as a not-for-profit Company (section 21) under South African Company law and subsequently as a Trust in 2012. See [www.apcof.org.za](http://www.apcof.org.za) for more details.

<sup>2</sup> CCPR/C/ZAF/Q/1, adopted by the Committee at its 114<sup>th</sup> session (29 June-24 July 2015). [Herein referred to as 'Committee's List of Issues'].

<sup>3</sup> CCPR/C/ZAF/1, received on 26 November 2014, distributed by the Committee on 19 August 2015. [Herein referred to as 'State's Initial Report']

<sup>4</sup> CCPR/C/ZAF/ Q/1/Add.1, received on 3 December 2015, distributed by the Committee on 31 December 2015.

<sup>5</sup> Misago, J.P et al. (2015) *Protection from Xenophobia: Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes*, at 22, quoting Amnesty International, 2010; Landau and Haithar, 2007, The African Centre for Migration and Society, University of Witwatersrand.

<sup>6</sup> South African Human Rights Commission (2010). *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 public violence against non-nationals* at 17, Johannesburg: South African Human Rights Commission. See also: *FSaid and others v The Minister of Safety and Security and others* (EC13/08), unreported judgement handed down on 7 December 2011.

<sup>7</sup> Independent Police Investigative Directorate (2015). *Independent Police Investigative Directorate Annual Report 2014 – 2015*, at 42. Independent Police Investigative Directorate Vote 20. Available at:

[http://www.icd.gov.za/sites/default/files/documents/IPID\\_Annual\\_Report%20\\_2014-15.pdf](http://www.icd.gov.za/sites/default/files/documents/IPID_Annual_Report%20_2014-15.pdf) <Accessed on 11 February 2016>. [Herein referred to as 'IPID 2014/2015 Annual Report'].

<sup>8</sup> South African Police Service (2015). *South African Police Service Annual Report 2014/2015*, at 122. Department of Police: Vote 25, where SAPS have attributed an increase in the number of civil claims against it to an increase in community awareness of rights, and the means to enforce those rights.

<sup>9</sup> IPID 2014/2015 Annual Report, at 42. IPID reports that incidents of rape in police custody were up 79% from the previous reporting year, with smaller increases in relation to rape by a police officer (2% and deaths in police custody (4%). Concurring, complaints of the discharge of an official firearm were up 119% on the previous reporting period, to 940 incidents.

<sup>10</sup> Independent Complaints Directorate (2010). *Independent Complaints Directorate Annual Report 2009/2010*, at 75. Available at: <http://www.icd.gov.za/sites/default/files/documents/Part1.pdf> <Accessed on 11 February 2016>

<sup>11</sup> IPID 2014/2015 Annual Report, at 43.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Independent Police Investigative Directorate Act, [No. 1 of 2011], at Section 28.

<sup>15</sup> IPID 2014/2015 Annual Report, at 8.

<sup>16</sup> National Planning Commission (2012). *National Development Plan 2030: Our Future – Make it Work*, at 387-388. Office of the Presidency: Pretoria. [Herein referred to as 'National Development Plan']

<sup>17</sup> Civilian Secretariat of Police (2015). *Draft White Paper on Police*. Government Gazette Notice 179 of 2015. [Herein referred to as '2015 Draft White Paper on Police'].

<sup>18</sup> Civilian Secretariat of Police (2015). *Draft White Paper on Safety and Security*. Government Gazette Notice 178 of 2015. [Herein referred to as '2015 Draft White Paper on Safety and Security'].

<sup>19</sup> *2015 Draft White Paper on Police*, p 7.

<sup>20</sup> See, African Policing Civilian Oversight Forum, *Submission on the White Paper on Policing*, 30 March 2015, at Part 4; and Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015.

<sup>21</sup> State's Initial Report, at para 77.

<sup>22</sup> State's Initial Report, at para 77.

<sup>23</sup> Committee's List of Issues, at para 20.

<sup>24</sup> IPID 2014/2015 Annual Report, at 43.

<sup>25</sup> State's Initial Report, at para 77.

<sup>26</sup> In this regard, figures relating to deaths in police include those resulting from suicide, assault and/or injury, and natural causes.

<sup>27</sup> IPID 2014/2015 Annual Report, at 48.

<sup>28</sup> South African Police Service (2014). *South African Police Service Strategic Plan for 2015-2020*, p 8. Available at: [http://www.saps.gov.za/about/stratframework/strategic\\_plan/2015\\_2019/strategic\\_plan\\_%202015.pdf](http://www.saps.gov.za/about/stratframework/strategic_plan/2015_2019/strategic_plan_%202015.pdf) <Accessed on 9 February 2016>

<sup>29</sup> Department of Correctional Services (2015). *Department of Correctional Services Annual Report 2014/2015*, at 9. Available at: <http://www.dcs.gov.za/Publications/Annual%20Reports/DCS%20Annual%20Report%202014-2015.pdf> <Accessed on 9 February 2016>

- <sup>30</sup> Stop and search statistics available in South Africa are for police operations and not for specific individuals or groups of individuals. Thus, for example, a festive season crime combatting operation may involve stop and search of all vehicles travelling along a particular road. The vast majority of these persons will not be persons 'who are in conflict with the law'.
- <sup>31</sup> South African Police Service (2015). *South African Police Service Annual Report 2014/2015*, at 122. See also, Parliament of the Republic of South Africa, Portfolio Committee on Police, *Report of Meeting between the Portfolio Committee on Police, the Minister, Deputy Minister, Acting National Commissioner and senior management of SAPS*, 18 November 2015, available at <https://pmg.org.za/committee-meeting/21851> <Accessed on 27 November 2015>. [Herein referred to as 'SAPS 2014/2015 Annual Report']
- <sup>32</sup> Wilkinson, K. (17 May 2010) "Knysna police ordered to meet arrest quotas", *West Cape News*. Available at <http://westcapenews.com?p=1454> <Accessed on 5 October 2015>.
- <sup>33</sup> Criminal Procedure Act, [No. 51 of 1977], at section 60(4). [Herein referred to as 'CPA']
- <sup>34</sup> In considering whether it is 'in the interests of justice' to deprive the accused of his or her personal freedom, the court must consider the prejudice the accused is likely to suffer if detained in custody, by considering the following: (1) the period for which the accused has already been in custody since his or her arrest; (2) the probable period of detention until the disposal or conclusion of the trial; (3) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (4) any financial loss the accused may suffer as a result of his/her detention; (5) any impairment to the preparation of the accused's defence or any delay in accessing legal representation resulting from the detention of the accused; (6) the state of health of the accused; (7) or any other factor that should be considered by the court. Criminal Procedure Act, section 60(9). See also, section 62 of the CPA.
- <sup>35</sup> Judicial Inspectorate for Correctional Services (2015). *Judicial Inspectorate for Correctional Services Annual Report for the Period 1 April 2014 to 31 March 2015*, p. 43. [Herein referred to as 'JICS Annual Report 2014/2015'].
- <sup>36</sup> 'JICS Annual Report 2014/2015, p. 46.
- <sup>37</sup> Centre for Applied Legal Studies (January 2013). *A measure of last resort: Research report on Remand Detention in South Africa*, at 22. University of Witwatersrand: Johannesburg.
- <sup>38</sup> Ibid.
- <sup>39</sup> Ibid.
- <sup>40</sup> Ibid. See also, Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 9. See also, JICS Annual Report 2014/2015, p. 43.
- <sup>41</sup> National Director of Public Prosecutions, (2015). *National Prosecuting Authority Annual Report 2014/2015*, at 37. Available at: <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202014%20-%202015.pdf> <Accessed on 8 February 2016> [Herein referred to as 'NPA 2014/2015 Annual Report'].
- <sup>42</sup> NPA 2014/2015 Annual Report, at 8.
- <sup>43</sup> SAPS 2014/2015 Annual Report at Table 41.
- <sup>44</sup> Public Service Commission (November 2011). *Report on the Inspections of Regional Courts: Department of Justice and Constitutional Development*, at 7 – 13. See also, Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 23.
- <sup>45</sup> JICS 2014/2015 Annual Report, at 118.
- <sup>46</sup> Muntingh, L., Dereymaeker, G. (2013). *Understanding impunity in the South African law enforcement agencies*, at 40. Civil Society Prison Reform Initiative, University of the Western Cape.
- <sup>47</sup> Wakefield, L. (December 2011). 'Is the Act working for children? The first year of implementation of the Child Justice Act', at 46, citing the Inter-sectoral Committee on Child Justice's *Annual Report on the Implementation of the Child Justice Act*, at 21. South African Crime Quarterly, No. 38. Available at: <https://www.issafrica.org/uploads/CQ38Wakefield.pdf> <Accessed on 11 January 2016>
- <sup>48</sup> Police Oversight Committee, (20 May 2015). *Presentation on Implementation of the Child Justice Act to the Portfolio Committee on Police*. National Assembly, Parliament for the Republic of South Africa.
- <sup>49</sup> Courtenay, RM, Hansungule, Z. (2014). 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act' in Proudlock, P (ed) (2014) 'South Africa's progress in realising children's rights: a law review', at 156. Cape Town: Children's Institute, University of Cape Town and Save the Children South Africa. This figure is representative of the number of SAPS officials as at April 2013. See Courtenay & Hunsungule supra at 159.
- <sup>50</sup> The term 'charged' is used interchangeably by SAPS to indicate both the number of children entering the system and the total number of charges levelled against children (which may include a child having several charges laid against him or her). The numbers reflected should therefore be seen as an approximation rather than a definitive number.
- <sup>51</sup> Department of Justice and Constitutional Development (2011) at 46.
- <sup>52</sup> Wakefield, supra at 47, citing the Inter-sectoral Committee on Child Justice's *Annual Report on the Implementation of the Child Justice Act*, at 466.
- <sup>53</sup> Department of Justice and Constitutional Development. (2014). *Annual Departmental Report on Implementation of the Child Justice Act 2008 (Act 75 of 2008), 1 April 2013 to 31 March 2014*, at 34. Available at: <http://www.justice.gov.za/reportfiles/other/cja-anr-2013-2014-dojcd.pdf> <Accessed on 31 January 2016>. [Herein referred to as 'DOJCD 2014 Annual Report on Implementation of CJA']
- <sup>54</sup> Ibid.
- <sup>55</sup> Ibid.



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<sup>56</sup> Ibid. With respect to children released on bail, there was an increase from 261 children in 2011/2012 to 327 children in 2013/2014; with respect to children placed in care of parent/guardian there was an increase from 4 664 children in 2011/2012 to 5 314 children in 2013/2014.

<sup>57</sup> Ibid.

<sup>58</sup> Muntingh, L. (2012) "Children deprived of their liberty: protection from torture and ill treatment" in Van Niekerk, A., Suffla, S. and Seedat, M. (eds) Crime, Violence and Injury in South Africa: 21<sup>st</sup> Century Solutions for Child Safety, pp 166. Houghton: PsySSA.

<sup>59</sup> Children's Act, [No. 5 of 2005], at Section 197.

<sup>60</sup> Jaimeson, L. (2014). "Children's rights to appropriate alternative care when removed from the family environment: A review of South Africa's child and youth care centres", Chapter 9 in Proudloock, P. (ed) South Africa's progress in realising children's rights: a law review, p 216. University of Cape Town: Children's Institute.

<sup>61</sup> Muntingh, L. (2012) "Children deprived of their liberty: protection from torture and ill treatment" in Van Niekerk, A., Suffla, S. and Seedat, M. (eds) Crime, Violence and Injury in South Africa: 21<sup>st</sup> Century Solutions for Child Safety, pp 166. Houghton: PsySSA.

<sup>62</sup> Muntingh, L. (2012) "Children deprived of their liberty: protection from torture and ill treatment" in Van Niekerk, A., Suffla, S. and Seedat, M. (eds) Crime, Violence and Injury in South Africa: 21<sup>st</sup> Century Solutions for Child Safety, pp 166. Houghton: PsySSA.