



**Submission to the Justice Portfolio Committee  
in relation to the *Criminal Procedure  
Amendment Act 2010***

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**African Policing Civilian Oversight Forum (APCOF)**  
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**About the African Policing Civilian Oversight Forum (APCOF)**

APCOF is a network of African policing practitioners drawn from state and non-state institutions. It is active in promoting police reform through civilian oversight over policing.

It believes that the broad values behind establishment of civilian oversight are to assist in restoring public confidence, develop a culture of human rights, integrity and transparency within the police and promote a good working relationship between the police and the community. APCOF achieves its goals through raising awareness and sharing information on police oversight and providing technical assistance to civil society, police and new and emerging oversight bodies in Africa.

APCOF was established in 2004 as a coalition of police oversight bodies and practitioners in Africa and was registered in 2006 as a not-for-profit company (section 21) under South African company law.

The objectives of APCOF are to:

- Create and sustain public confidence in police;
- Develop a culture of human rights, integrity, transparency and accountability within the police; and
- Promote a good working relationship between the police and the community.

APCOF works on issues such as:

- Promoting fair treatment of citizens by police agencies on the continent;
- Exchange of information and better practices among oversight bodies;
- Advocating for the establishment of police oversight bodies in countries where they do not currently exist;
- Advocating for improved resource allocation to police oversight bodies; and
- Standard setting for policing and civilian policing oversight bodies in Africa.

## Introduction

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1. APCOF welcomes this opportunity to provide a submission to the Justice Portfolio Committee about the proposed amendment to section 49 of the *Criminal Procedure Act 1977* (***the Act***) by the *Criminal Procedure Amendment Bill 2010* (***the Amendment Bill***).
2. This submission provides the Justice Portfolio Committee with recommendations that we believe will strengthen the Amendment Bill in order to provide the South African Police Service (***SAPS***) with greater clarity in decisions about the use of force, including deadly force, in effecting arrests, and to better safeguard the rights and safety of the police, suspects and by-standers.
3. APCOF would welcome the opportunity to provide an oral submission to the Justice Portfolio Committee on any aspect of this submission and its recommendations.

## Scope of APCOF's Submission

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4. This submission is limited to recommendations to changes to the proposed legal framework for the use of force, including deadly force and firearms, as proposed by section 49 of the Amendment Bill. The analysis and recommendations consider the extent to which section 49 meets international legal norms.
5. APCOF acknowledges that the legal framework is only one, albeit vital, component of the regulation of the use of force by SAPS. Therefore, SAPS and its stakeholders should give consideration to a range of complementary measures (including regulations, policies and training) to ensure that the legal framework is precise and that SAPS officers are equipped with the necessary skills and resources to make professional and rights-based decisions about when, and the extent to which, they can use force in making an arrest.
6. It is also important that the Independent Police Investigative Directorate (***IPID***) and the Civilian Secretariat of Police are strengthened to effectively monitor and, where necessary, investigate the use of force by SAPS. Their role is vital to enhancing the efficiency and effectiveness of South Africa's policy integrity and oversight system.

7. APCOF welcomes any requests from the Justice Portfolio Committee to provide further research and materials on these critical issues.

## Summary

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8. This submission considers the impact of the Amendment Bill on the use of force, including the use of deadly force and firearms, to the rights and obligations of SAPS officers during the course of making an arrest.
9. The causes and effects of the use of deadly force by police are varied and complex. However, a useful starting point for reform is a legislative framework for the use of force and firearms that is consistent with international good practice and South Africa's Constitution, and is supported by complementary regulations, policy and training on a rights-based approach to the spectrum of force available to SAPS.
10. APCOF is concerned that the Amendment Bill falls short of accepted international standards for the use of force, including the use of deadly force. The norms against which this assessment is made are found in international law, which are largely reflected in the South African Constitution and the decision of *State v Walters*.
11. In particular, APCOF draws the Committee's attention to the extent to which sections 49(2)(a) and (b) fail to meet international standards. These standards require that the use of intentional deadly force be limited to circumstances in which there is an imminent threat of serious bodily harm or death to the arrestor or others, and where the sole objective of using deadly force is to protect life in situations where less harmful measures are inadequate. In its current form, the Amendment Bill has the effect of permitting the use of deadly force against any suspect in a crime that involves actual or attempted infliction of serious bodily harm without the requirement that the suspect pose a threat of serious bodily harm to the arrestor or anyone.
12. APCOF recommends that section 49 of the Amendment Bill be changed to:
  - a. reflect international standards for the use of force, including deadly force and firearms; and
  - b. properly implement the standard for the use of deadly force against a person fleeing arrest as provided by international law, and considered in South Africa by *State v Walters*.

## International Standards for the Use of Force in Arrest

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### 'Tough' Policing in Perspective

13. The SAPS, as with other modern democratic police services, have lawful authority to apply force in the course of an arrest when circumstances require it. The adoption, implementation and enforcement of a legal framework on the use of force in arrest that is consistent with the rights to life, liberty, security, freedom from ill-treatment and the presumption of innocence is crucial to reassuring the community that the South African Government and SAPS are adhering to the rule of law.
14. According to 2010 statistics, the use of lethal force by SAPS was at its highest level since data collection began in 1997. The reasons for the increased use of deadly force by SAPS are numerous and complex, however one generally accepted factor is the adoption of 'tough' policing measures to combat high rates of criminality and violent crime.<sup>1</sup>
15. Under international and domestic human rights law, the South African Government has wide discretion in the formation and implementation of its criminal justice policies. High rates of criminality in South Africa have prompted the Government and SAPS to address the public's interest in safety and security through a 'tough on crime' approach. However, the adoption of such approaches, particularly where they include permissive or arbitrarily enforced use of force provisions, may contravene international and domestic rights norms unless they are consistent with the right to life. They have also proved ineffective in promoting safety and security often undermining community trust vital to effective policing.
16. In the context of violent criminality, SAPS will inevitably be required to use force, including deadly force, to effect an arrest in defined and limited situations. However, there are persistent reports that SAPS have used deadly force in circumstances when an arrest could have been made with less force than was used. This has been due in part to the ambiguous wording of the current section 49 and has further been complicated by compromised oversight and lack of other support and tools to assist officers in making decisions that are consistent with the highest standards of professional responsibility.<sup>2</sup>

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<sup>1</sup> David Bruce, 'An Acceptable Price to Pay? The use of lethal force by police in South Africa', *Criminal Justice Initiative Occasional Paper Series* (8), Open Society Foundation for South Africa, 2010, pg 5.

<sup>2</sup> Ibid.

17. It is therefore concerning that the Amendment Bill's rendering of section 49 is contrary to the international norms in relation to the protection of life and the use of deadly force and firearms by the police. Under international norms, firearms may only be used in the context of self-defence or the defence of others, and the only circumstances in which the use of intentional deadly force is permitted during arrest is the protection of life from an imminent threat. When considered against the current backdrop of 'tough' policing, the Amendment Bill is unlikely to address concerns about the use of deadly force by SAPS during arrest, or provide the police and community with clarification or certainty about when and how lethal force can be used during the course of an arrest.

### **International Standards – the Use of Force, including Deadly Force**

18. The norms regarding the rights and duties of police officers in relation to the use of force, including deadly force, during arrest are found in international law, and are reflected in the South African Constitution and the decision of *State v Walters*. These norms provide the building blocks for domestic laws, regulations and policies to regulate the use of force during arrest that accords with the highest standards of democratic, professional and rights-based policing.

19. South Africa is a signatory to the main conventions from which the rights discussed in this section are derived – namely the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. Accordingly, the South African Government has an obligation to ensure that its domestic legal framework for the use of force reflects the standards in international law.

20. Under international law, the right to life is one of the most fundamental of all human rights and States are not permitted to derogate from this right under any circumstances.<sup>3</sup> It protects individuals against harm by the State and imposes an obligation on States to refrain from arbitrarily depriving any person of their right to life. That obligation includes that the State take legislative measures to strictly control and limit the circumstances in which a police service may use force and deprive an individual of their life.<sup>4</sup>

21. The Code of Conduct for Law Enforcement Officials, which is the international police code of conduct, provides that police must respect and

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<sup>3</sup> Article 3, Universal Declaration of Human Rights, Article 6(1) International Covenant on Civil and Political Rights, Article 4 African Charter on Human and Peoples' Rights.

<sup>4</sup> Human Rights Council, General Comment No. 6: The Right to Life, Sixteenth Session, 1982.

protect human rights and may only use force when strictly necessary and to the extent required by their legitimate duties and objectives. Proportionality is achieved when the benefits derived from the objective outweigh the damage caused by the use of force, while necessary describes the lowest possible level of force necessary to achieve that legitimate objective.<sup>5</sup>

22. The Basic Principles on the Use of Force and Firearms further elaborate on the general provisions regarding the right to life and the corresponding limitations on the use of force, particularly in relation to the use of deadly force, including firearms. The Basic Principles make it clear that the use of force, including firearms, should only be used as a last resort, when all other non-violent means of carrying out duties have failed.

23. In relation to firearms, the Basic Principles provide that the police may only use firearms in the following circumstances:

- a. self-defence or defence of others against the imminent threat of death or serious injury;
- b. to prevent the perpetuation of a particularly serious crime involving grave threat to life;
- c. to arrest a person presenting such a danger as in paragraph (a) and (b) and resisting their authority; or
- d. to prevent the escape of a person presenting such a danger as in paragraphs (a) and (b) and resisting their authority; and
- e. only when less extreme measures are insufficient to achieve the above objectives.

24. The Basic Principles also provide that the intentionally lethal use of firearms is only permitted when 'strictly unavoidable in order to protect life'.<sup>6</sup>

25. The UN's commentary on the Code of Conduct emphasise that the use of firearms is an 'extreme measure' and that the police should make every effort to avoid using firearms, particularly in relation to juveniles. It suggests that the only circumstance in which the use of firearms may be justified, if less extreme measures fail or are impossible, is when 'a

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<sup>5</sup> Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979, commentary to Article 3.

<sup>6</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1980, principle 9.

suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender'.<sup>7</sup>

26. When lawful use of force and firearms is unavoidable, the Basic Principles provide that the police should:

- a. exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; and
- b. minimise damage and injury and respect and preserve human life.

### **APCOF's Concerns in Relation to Section 49**

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27. APCOF has a number of specific concerns in relation to the current wording of section 49(2) in the Amendment Bill, which are set out below.

28. Section 49(2) truncates and thereby waters down the obligation on arrestors to use force that is proportionate and necessary in relation to the nature of the offence. We are concerned that:

- a. proportionality and necessity are pinned to the fact of the suspect resisting or fleeing arrest, rather than what is proportionate and necessary in relation to the nature of the offence and the threat posed by the suspect to the safety of the arrestor and others;
- b. the section truncates the full obligations of arrestors under international law in relation to the general power to use of force, providing only that it be 'reasonably necessary' and 'proportionate'. The use of 'reasonably necessary' as opposed to 'strictly necessary' suggests a lower subjective standard than provided for in international norms; and
- c. there is no explicit requirement that all other practicable non-forceful means have been exhausted before resort to force.

29. APCOF is concerned that section 49(2) may therefore authorise the use of force by the police against a person attempting to flee or resisting arrest in a manner that is not proportionate to the suspected offence or the risk posed by the suspect and, and permit force to a level that is not strictly necessary to achieve the objective of arrest, in consideration of the nature of the offence and the proportionate to the risk posed by the suspect. This

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<sup>7</sup> Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979, commentary to Article 3.



is particularly concerning in relation to juveniles or individuals who pose no imminent threat of harm to the arrestor or others, against whom international norms discourage the use of force and prohibits the use of firearms.

30. Secondly, sub-sections 49(2)(a) and (b) have the effect of permitting the use of deadly force against any suspect in a crime that involves the actual or attempted infliction of serious bodily harm without a requirement that the suspect pose an imminent threat of serious bodily harm to the arrestor or anyone. International norms in respect of the use of deadly force and firearms by police centres around necessity and proportionality. Firearms should only be used to prevent serious bodily harm and death to the arrestor or others. Lethal force may only be used intentionally if the objective is to protect life, and less harmful measures are inadequate. However, in its current form, the Amendment Bill permits the use of deadly force against without the need for an imminent threat of serious bodily harm to the arrestor or others.

### **Recommendations**

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31. APCOF recommends that the Justice Portfolio Committee consider making changes to the current wording of the Amendment Bill to give full effect to international standards for the use of force, including the use of deadly force and firearms.
32. We suggest that section 29(2) be divided into two sections. The first section (a new section 29(2)) should deal with the general provisions for the use of force, and describe the limitations on the permissible use of force in the following way:
- a. that all other practicable non-forceful means have been exhausted;
  - b. that the use of force is strictly necessary and proportionate to both the nature of the offence and any imminent threat to the life of the arrestor and by-standers;
  - c. that the lowest level of possible force necessary to make the arrest is used.
33. The second section (new section 29(3)) should deal exclusively with the use of deadly force and firearms, which must be strictly regulated and limited to self-defence and/or defence of others against imminent threat of death or serious injury. Specifically, the section should refer to the

following circumstances as being the only circumstances in which it is permissible for police to use of deadly force, including firearms in the course of making an arrest:

- a. self-defence or defence or others against the imminent threat of death or serious injury;
- b. to arrest a person presenting such a danger as in paragraph (a) and resisting their authority; or
- c. to prevent the escape of a person presenting such a danger as in paragraphs (a) and (b) and resisting their authority; and
- d. only when less extreme measures are insufficient to achieve the above objectives.

### **Conclusion**

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34. Robust and rights-based regulations for the use of force by SAPS in effecting arrests is vital to promoting the safety of officers and the community. Arrests are a visible core function of policing that can have a significantly detrimental impact on public confidence if effected with unnecessary and lethal force. Public confidence in the police is vital to effective policing and any incident involving death or serious injury at the hands of police automatically tests that public confidence.
35. It is therefore regrettable that section 49 of the Amendment Bill also fails to meet international standards and will have the effect of permitting the use of force in circumstances that will contravene human rights norms and standards for democratic policing. In its current form, the Amendment Bill is unlikely to address the high rates of lethal force by SAPS, or provide the police and community with any clarification or certainty about their rights and responsibilities in relation to the use of force during arrest.
36. However, the Justice Portfolio Committee's attention on the issue of amending section 49 provides South Africa with an important opportunity to reform the way in which SAPS use force in effecting arrests to promote a model of policing that is based on democratic standards and human rights. Ensuring that the wording of section 49 accords with the highest standards is an important first step in that process.