

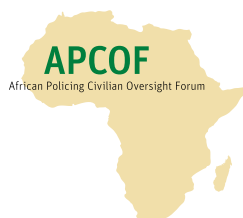


REPORT ON A DIALOGUE ON HUMAN RIGHTS AND POLICING

2–3 May 2018
Johannesburg, South Africa

Hosted by
African Policing Civilian Oversight Forum

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Building 2B, Suite 16
Waverley Business Park
Wycroft Road
Mowbray 7925
South Africa

Tel: +27 21 447 2415
Fax: +27 21 447 1691
Email: info@apcof.org.za
Web: www.apcof.org.za

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Acronyms and abbreviations

ACHPR	African Commission on Human and Peoples' Rights / African Charter on Human and Peoples' Rights
APCOF	African Policing Civilian Oversight Forum
CJS	Criminal justice system
CoGTA	Department of Cooperative Governance and Traditional Affairs
CPA	Criminal Procedure Act
CPF	Community policing forum
CSC	Community service centre
CSIR	Council for Scientific and Industrial Research
CSO	Civil society organisation
CSP	Civilian Secretariat for Police / Civilian Secretariat for Police Service
CSVR	Centre for the Study of Violence and Reconciliation
DPCI	Directorate for Priority Crime Investigation (Hawks)
DCS	Department of Correctional Services
DOCS	Western Cape Department of Community Safety
FOSAD	Forum of South African Directors-General
GIS	Geographic information system
IDP	Integrated development plan
IPID	Independent Police Investigative Directorate
JCPS	Justice, Crime Prevention and Security Cluster
JDI	Just Detention International
JMPD	Johannesburg Metropolitan Police Department
Khayelitsha Commission	Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and the Police in Khayelitsha
MOT	Monitoring Oversight Team (on the recommendations of the Khayelitsha Commission)
NATJOINTS	National Joint Operational and Intelligence Structure
NI	SAPS national instruction
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NMT	National Monitoring Tool
OSF-SA	Open Society Foundation for South Africa
POP	SAPS Public Order Policing unit
PROVJOINTS	Provincial joint operational and intelligence structures
SAHRC	South African Human Rights Commission
SAITF	South African Informal Traders' Forum
SALGA	South African Local Government Association
SANTRA	South African National Traders' Retail Alliance
SAPS	South African Police Service
SARS	South African Revenue Service
SERI	Socio-Economic Rights Institute of South Africa
SJC	Social Justice Coalition
SO	SAPS standing order
SOP	SAPS standard operating procedure
Wits	University of the Witwatersrand, Johannesburg

1 Background

The Dialogue on Human Rights and Policing, hosted by the African Policing Civilian Oversight Forum (APCOF) in partnership with the South African Human Rights Commission (SAHRC) and with the support of the Open Society Foundation for South Africa (OSF-SA), took place in Johannesburg from 2 to 3 May 2018. This annual event brings together a variety of role-players in policing, including government, police oversight bodies, the academy and civil society organisations (CSOs), to discuss key issues pertaining to policing and human rights in South Africa. The dialogue aims to build a South African consensus on promoting human rights in policing by:

- creating a space for constructive discussion between various stakeholders to engage on human rights-related policing issues;
- supporting and encouraging South African contributions and inputs into police policy developments; and
- encouraging stakeholders to share experiences and comparative analysis of human rights in the policing context.

This year there were a number of focal areas, each of which was introduced by a panel of experts before engaging in conversation with the audience. In this report, the focal areas of the discussion form the sections below, in which the panellists are listed, followed by a brief overview of the presentations and conversations.



Adv. Majola, Chair, SAHRC

Gen. Masemola, Divisional Commissioner Policing, SAPS

Adv. Thipanyane, CEO, SAHRC

2 Policing and the safeguarding of human rights

Panellists:

Adv. Bongani Majola, Chair, SAHRC

Lt-Gen. SF Masemola, Deputy National Commissioner: Policing

Adv. Majola, while acknowledging the progress since 1994 that saw a new South Africa formed as a democratic state with new legislation and new structures, highlighted how this also brought with it new challenges for the way in which policing is undertaken. Such changes have produced both positive and concerning results, the negative of which have undermined the protection of human rights while also costing SAPS over R 5 billion in civil claims. Many of these are a result of SAPS personnel undertaking actions which infringed on the rights of those placed under arrest or in detention facilities operated by the police. Adv. Majola further highlighted that, in mitigating these challenges, a draft memorandum of understanding (MOU) between the SAHRC and the SAPS (discussed at last year's Dialogue) remains under discussion now that there is a new police leadership, and it was urgent that this was concluded. Among other things, the MOU is intended to provide a high-level channel of communication for complaints to be dealt with promptly by police leadership.

Lt-Gen. SF Masemola reiterated that the SAPS operates under the human rights framework created by the Constitution, ultimately to give service to the community at large. While the SAPS is committed to protecting human rights, communities and the SAHRC should assist and partner with the police to improve the service. The rules and policies that govern the police are the product of the democratic dispensation. Institutions such as the SAHRC, the Independent Police Investigative Directorate (IPID) and the Civilian Secretariat for Police (CSP) are essential in holding the police to account and advising them on how to improve. In this regard, the SAPS would welcome training by the SAHRC and others to improve its policing practice. The SAPS Act spells out what the police are required to do, and there are a number of standard operating procedures (SOPs) and policies that SAPS members must adhere to in the execution of their duties.

In striving to make the SAPS more effective, efficient and rights compliant, such support is vitally important in a climate of constrained resources. Even though the population is steadily increasing, National Treasury cost containment measures have led to a decline in personnel and resources. There are also increasing demands for other government services such as health and social development.



Comment from the floor: Every cent spent on policing is money which could have been spent on social development or health. The police are not underfunded, there is a problem with *how* the resources are used.

@SAHRCommission @APCOF #PolicingDialogue

People have a democratic right to protest, and the SAPS is tasked with managing protest. Police members at station level are the first level of response, but they are not trained to respond to public order policing needs, which demands specialised units that require further resources. Over the last five years, the basic police training curriculum has included some material on policing crowds, but further training is required at cluster level. Lt-Gen. Masemola further noted that controlling a volatile crowd requires a large number of specially trained Public Order Policing (POP) members.

After the advent of democracy, it was expected that there would be fewer protests, and the number of POP members was reduced from 11 000 to 4 000. In 2007, POP units were decentralised to the provinces, with more populous provinces being allocated two units and the others one. The current situation is that there are not enough POP members available at cluster level to deal with the current context of increasing numbers of violent protests, and there are too few POP members overall. POP units are being re-equipped in the current three-year budgeting cycle, and a submission has been made to National Treasury to employ more POP members. The SAPS hopes to receive approval to increase the number of POP members from 4 000 to 9 000–11 000. However, more effective responses require an integrated system of intelligence sharing, as well as more substantive working relationships with partners such as the metro police services. In this vein, the National Commissioner

has issued a directive to the SAPS to consider whether there should be a single police agency, or whether different police agencies should continue but with better coordination, command and control across the various departments. This matter was previously under consideration by the CSP and is currently in the hands of a SAPS task team. Provincial joint operational and intelligence structures (PROVJOINTS) already exist to bring together all police, including metro police agencies, as well as every other department with an interest in a security-related issue at the provincial level. If the matter is not resolved at that level, the issue will be referred to the National Joint Operational and Intelligence Structure (NATJOINTS) and the Directors-General cluster, from where it may be referred to the Justice, Crime Prevention and Security (JCPS) Cluster.

Discussion points

Individuals noted that protests are typically about local government and broader service delivery issues. Structures such as the Forum of South African Directors-General (FOSAD) should be used, therefore, to formulate coordinated responses to issues as they arise. Another noted that university students have been complaining about the militarisation of campus security operations as a result of previous protest action. Lt-Gen. Masemola said the SAPS has no intention of militarising campuses. Meetings are held with university and student representatives. POP operations only take place on campuses when the police have been summoned by management, namely when property is being damaged. A member of the SAPS is appointed as a liaison officer on every campus to understand crime patterns on campuses and to act as a bridge between university management, students and the police. Queries related to how the SAPS is approaching the policing of communities living in informal settlements, where access is difficult and there is poor infrastructure, few fixed addresses and so on. Lt-Gen. Masemola acknowledged that service to informal settlements requires further attention. In the Western Cape, certain SAPS members had been reported to IPID for their conduct in respect of policing spaza shops, and there is a lack of coordination between metro police and the SAPS regarding the policing of such shops. Lt-Gen. Masemola said the SAPS had been coordinating its activities with the Department of Small Business Development and other departments and agencies to ensure that spaza shops are registered, that they are operating in accordance with environmental and health standards, and that they pay tax. Joint operations are undertaken at times with immigration officials, metro police and the South African Revenue Service (SARS).



@APCOF @SAHRCommission

Takalani Ramaru of the Civilian Secretariat of Police: Democratic police are accountable, transparent, subject to the rule of law, and most importantly respect human rights and dignity. Democratic policing does not mean a 'free for all'.



Adv. Majola, Chair, SAHRC

Lt-Gen. SF Masemola, Deputy National Commissioner: Policing

3 Decriminalisation of petty crime and the governance of poverty

Panellists:

Melody Kozah, APCOF

Michael Clark, Socio-Economic Rights Institute of South Africa (SERI)

Sasha Gear, Just Detention International

Melody Kozah began by noting that petty offences are minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment – often for failure to pay the fine. Examples include offences such as ‘being a rogue and vagabond’, being ‘an idle or disorderly person’, loitering, begging, ‘being a vagrant’, failure to pay debts, being ‘a common nuisance’, and ‘disobedience to parents’. The rationale for petty offence laws is to maintain public order, promote public safety, and prevent crime. However, these laws have the effect of punishing, segregating, controlling and undermining the dignity of persons on the basis of their socio-economic status. They restrict the ability of people to engage in life-sustaining activities, particularly those living in poverty. They perpetuate the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. The enforcement of petty offences contributes to the overcrowding of places of detention. These laws have the effect of punishing people living in poverty and people performing life-sustaining activities in public. Loitering laws have a disproportionate impact on key populations, in particular sex workers and migrants. Petty laws are defended on the grounds that they are needed to beautify cities, but a criminal justice response cannot be the solution to a socio-economic problem. In 2003, the African Commission on Human and People’s Rights (ACHPR) encouraged state parties to adopt strategies to address prison overcrowding, including reducing the number of people entering the prison system by decriminalising petty or minor offences.¹ In November 2017, the ACHPR Principles on the Decriminalisation of Petty Offences established standards against which petty offences should be assessed, and promoted measures that can be taken by State parties to ensure that such laws do not target persons based on their social origin, social status or fortune by criminalising life-sustaining activities.² The Principles seek to guide States on measures that can be taken to enhance human rights protections at the critical intersection of poverty and criminal justice.

In order to be legitimate, necessary and proportionate, criminal laws must pursue a legitimate objective. They must be a necessary and proportionate measure to achieve that legitimate objective within a democratic society, including through the prevention and detection of crime in a way that does not impose excessive or arbitrary infringements upon individual rights and freedoms. There must be a rational connection between the law, its enforcement and the intended objective. Laws which allow for arrest and imprisonment for petty offences can be a disproportionate measure which is contrary to the principle of arrest as a measure of last resort.

Key recommendations to State parties under the Principles are:

- decriminalise those petty offences which criminalise conduct in broad, vague and ambiguous terms;
- ensure that laws which criminalise the status of a person or their appearance are decriminalised, in particular, laws that criminalise life-sustaining activities in public places; and
- provide alternatives to arrest and detention for minor offences that are not decriminalised under the Principles. These alternatives could include diversion of cases involving petty offences away from the criminal justice system (CJS), and making use of community service, community-based treatment programmes and alternative dispute resolution mechanisms.

Moving forward, **Michael Clark** noted that under ‘Operation Clean Sweep’, between 30 September and 31 October 2013, the Johannesburg Metropolitan Police Department (JMPD) and the City of Johannesburg forcibly removed 2 160 informal traders, confiscated their goods, and demolished

some structures set up for informal trading. All of the traders had valid trading licences and leases, and many had been trading for long periods, some as long as 20 years. The JMPD said it was acting on the instructions of the mayor, and that the objective was to get rid of unsightly and disorderly informal trading, which allowed crime and destroyed the ability of people in the inner city to enjoy facilities near informal trading areas.

The South African Informal Traders' Forum (SAITF) and other informal street traders launched an urgent application (Part A) in the South Gauteng High Court for an order stating that they are permitted to trade in a manner consistent with sections 9 and 10 of the City's Informal Trading By-Laws, at the locations they occupied immediately before their removal. The Court consolidated the SAITF case and a similar case launched by the South African National Traders' Retail Alliance (SANTRA), and struck these urgent applications off the roll on the grounds that they were not urgent. The Court has never provided reasons for this judgment. An agreement was, however, reached with the City of Johannesburg to have a verification process in which every informal trader would have to reapply for a trading licence, after which traders would be allowed to return and continue trading. After everyone was re-registered, there were very few unlawful traders among them, but the City reneged on this agreement, and again forcibly removed the traders. It became clear that the real intention was not to make informal trading more orderly, but to move them elsewhere. Informal trading is regulated by law, but the operation was conducted unlawfully. SAITRA and SANTRA approached the Constitutional Court for urgent relief. It is very rare for the Constitutional Court to intervene or to order interim relief, but the Court found that the City and JMPD had acted unlawfully.

The criminalisation of poverty evident in this case is linked to pervasive narratives associated with poverty, aesthetics and crime – notions like 'criminality hides among hawkers', that 'crime and grime go together', and that certain people are entitled to be in the city and others are not. These notions persisted even after verification and re-registration, and even though many of the traders had legal, valid trading permits. The JMPD's stated intention was to reduce crime through this intervention. Anecdotal evidence from the Centre for the Study of Violence and Reconciliation (CSV) shows that, by itself, law enforcement does not reduce crime.

Informal trading permits are conceived of as a form of social assistance rather than legitimate trading, so authorities often target the indigent, or restrict the number of permits to one person in a household. This is seen as a kind of handout, and it plays into the idea that informal traders are



Participants at the Dialogue

a nuisance rather than legitimate role-players in the economy. There is a severe lack of oversight and accountability to hold law enforcement officials responsible for goods lost and destroyed during confiscation, which permits a culture of impunity. Without a firm hand on law enforcement officials, conflict will increase as respect for the law decreases. Training is needed to increase sensitivity, and more broadly to unpack subtle prejudices and to reassess the assumptions about the powers that police have. City and law enforcement officials should be aware of their prejudices against poor people, foreigners and others.

Sasha Gear documented how the treatment of persons accused of a petty crime and less serious crime is a key contributor to extremely harsh prison conditions characterised by overcrowding, understaffing and associated deprivations. Conditions are particularly horrific in remand facilities (also known as awaiting-trial prisons). Too many people are held in such facilities for far too long, for crimes that are not serious, because they cannot pay a small fine or bail amount, or because they cannot get bail as a result of not having a fixed address. It is precisely those who are incarcerated for less serious crimes, as well as people in prison for the first time, who are among the most vulnerable to sexual and other forms of life-changing violence behind bars. This is because of the ways that prison culture magnifies destructive notions of masculinity, which prize violence as essential to 'manhood'. Those who do not exhibit an aptitude for violence or who are caught for 'silly, sissy' crimes are not seen as real men, and are likely to be raped, repeatedly. This context places pressure on people who would not normally commit violent acts to do so in order to gain respect and protect themselves. New detainees are particularly exposed to brutalisation because it is in court cells that they meet current prisoners – people serving a sentence but in court as part of a trial. Sentenced prisoners are under immense pressure to secure and smuggle goods back into prison. Court cells present a rare moment of exposure to the goods that they need to negotiate their way inside prison. Newcomers find themselves in cells with hardened prisoners, robbed of anything valuable, and forced to smuggle things like money and dagga into prison in their anuses. This prefigures other forms of sexual violence.

There are good arguments for revising laws on petty offences but, even where non-custodial options already exist, police do not always use them. Effective measures should be put in place to hold police properly accountable for arresting people for petty offences, explaining who is arrested and why, and what precautions have been taken to ensure the safety of people in detention.

Discussion points

Members of the audience challenged the speakers to engage more actively with the complexities of policing petty crimes and by-law enforcement. It was noted that so many of these issues seem so simple to address, but they are also very complex. SAPS and Department of Correctional Services (DCS) officials are expected to deal with the huge socio-economic problems of society. There is a need for a broader public awareness and discussions about where crime comes from, and the levels of traumatisation of the officials themselves, which sheds light on the behaviour of some officials. The SAPS responded by noting that officers are expected to do many things, including enforcing by-laws. Municipal police seldom inform the SAPS when they carry out by-law enforcement raids, and informal traders may strike back by damaging property. Socio-economic problems should not become police problems, but they often do. It was also noted that municipal police are primarily responsible for by-law enforcement, and there is a need for specific units for by-law enforcement. There is space for more burden-sharing. By-law enforcement in and of itself does not lead to crime reduction. As such, the real work is dialogue and engaging with people at every level in order to challenge our own prejudices so that the focus can fall on the dignity of the person, of every person. Efforts were being made, however. The CSP published the White Paper on Safety and Security in 2016. It envisages a whole-of-society, whole-of-government approach that focuses on safety and security and moves the burden of ensuring safety from the police to local safety plans. The CSP has been working with COGTA on safety and security implementation plans for municipalities that are an integral part of their integrated development plans (IDPs). The Director-General of COGTA supports this initiative. FOSAD is one of the structures the CSP hopes to work with, as well as the South African Local Government Association (SALGA). The Cabinet now agrees that responsibility for the White Paper should be located in the Presidency rather than the SAPS. Cooperation with the SAPS on the implementation of the White Paper has improved, using the implementation model that was applied to the 2010 World Cup.

4 Safety and development in informal neighbourhoods

Panellists:

Mandisa Dyantyi, Social Justice Coalition (SJC)

Chumile Sali, APCOF

Dr Andrew Faull, Independent consultant

Mandisa Dyantyi began the discussion by noting that the lack of respect for human rights in policing informal settlements is not just a policy issue, it is a structural one. The discourse of human rights pretends that everyone has the same access to opportunities, but this is not true. The reason why informal settlements exist in the first place is that South Africa is coming out of a system that deliberately excluded and disadvantaged a vast proportion of the population by removing Blacks (African and coloured people) from the inner city and what the city has to offer. The provision of policing and any other kind of service in the South African context requires human rights to be built into its approach. The provision of sanitation, for example, preserves and promotes human rights by providing dignity for people who have been stripped of their dignity. What is missing is centring service delivery on human rights for everyone, providing access to sanitation, and providing access to economic opportunities. It is the lack of opportunity which leads to crime, she added.

Chumile Sali highlighted that the Khayelitsha Commission recommended that the Western Cape Provincial Commissioner should issue guidelines for visible policing in informal neighbourhoods. Training at SAPS colleges is designed for policing formal settlements, not informal ones. Police colleges use a model of a house for training purposes, not a shack. Even though around 12 million South Africans reside in informal settlements, police and ambulances do not provide services in informal settlements on the grounds that it is too dangerous for them. It is clear that routine visible policing patrols are done in vehicles on paved roads. Most informal neighbourhoods are not accessible by vehicle, so they do not get the benefit of this service. Street lighting would, for instance, make a difference to safety in informal settlements, but it is not always adequate. There is a network of closed-circuit television cameras in Khayelitsha, but many have no lights nearby, rendering evidence collected by those cameras inadmissible in court proceedings.

Lastly, **Andrew Faull** outlined how informal settlements are hotbeds of contact crimes³ in South African metropolitan municipalities. Murder statistics ranked by station show that seven of South Africa's worst ten stations for murder are in Cape Town (Nyanga, Delft, Khayelitsha, Philippi East, Kraaifontein and Gugulethu),⁴ and three other Cape Town stations are in the top 20 (Mfuleni, Mitchells Plain and Bishop Lavis).⁵ Ten of the 150 police stations in the Western Cape account for 47% of the murders recorded in the province.⁶ While correlation does not mean causation, all these precincts include elements of informal settlement. According to the Western Cape SAPS, murder is the product of 'social imbalances ... common to basically all informal settlements'; attempted murder is 'assaults gone wrong ... was never intended'; 44% of business robberies targeted informal businesses; and 43% of stolen vehicles that are recovered are found in informal areas. Informal neighbourhoods and residents are particularly affected by violence, as victims or as perpetrators.

Each precinct has a number of sectors with sector commanders who must be energetic if they are to be successful. Sector policing requires targeted interventions in sectors. Sector commanders are expected to: identify and address key problems based on their knowledge of the sector and their relationships with sector stakeholders, to identify hotspots and vulnerable communities; address community needs; use all available resources effectively; target visible patrols; move resources where necessary; and focus on selected problems. Police need to focus on crime, and municipalities need to address the underlying issues. Informal settlements are focused areas of crime, and policing can disrupt crime in those places, and can 'put a lid on the pot' while the causes of crime are addressed. However, municipalities resist becoming involved, because policing is the first step in legitimising informal settlements, and municipalities do not want to legitimise informal settlements. As long as this stalemate prevails, the causes of crime will not be addressed. The solution to high levels of crime is not to hire more police officers. Many studies show there is no clear correlation between the number of police and the levels of crime. The idea of visible policing is misleading, because having a police officer on every corner does not make a society safe. The standard model of policing

characterised by random (visible) patrols, rapid (visible) responses, and follow-up investigations has limited impact on general crime.

A number of evidence-based crime and violence reduction resources, as well as police-specific resources, are already available on public platforms (e.g. the Center for Problem-Oriented Policing at the University of New York,⁷ the UK College of Policing,⁸ and the World Health Organization Violence Prevention Toolkit⁹). These have mostly been developed in affluent country contexts, but the South African context is different. The evidence from studies of procedural justice shows that, if police treat everyone in the same way, there can be big improvements in public safety. The SAPS is in a good position to become a leading, learning, evidence-based police organisation that uses targeted interventions in its specific high-crime, high-inequality context, monitors the efficacy of these interventions, and documents the lessons learned. As the evidence base grows, policing in South Africa should become more efficient and effective.

Discussion points

Participants noted that the premier of a province may exercise oversight of the police and may investigate or appoint a commission of inquiry into complaints of police inefficiency or a breakdown in relations between the police and any community.¹⁰ The Constitutional Court judgment regarding the Khayelitsha Commission ruled that the inquiry should go ahead, and that it should have the power to issue subpoenas. This meant that the SAPS had to appear before the Commission and give account. However, there is nothing legally binding about the 20 recommendations in the Khayelitsha Commission report. All the Commission could do was to submit its report to the Minister of Police and the SAPS National Commissioner. A task team has been established, comprising representatives of the Western Cape Department of Community Safety, the SAPS, and certain other bodies like community policing forums (CPFs) (which have not been very active).



@APCOF @SAHRCommission

So often being poor is criminalised. We need to address the structural problems as well as the daily manifestation of targeting poor people because they are poor.

It was also noted that the Monitoring Oversight Team (MOT) was established to look at some of the recommendations of the Khayelitsha Commission. One was compliance with SAPS National Instruction (NI) 3 of 2013 on sector policing. Minimum sector policing standards have not been fully adhered to in the Khayelitsha, Lingeletu West and Harare police stations, in particular, in the appointment of sector commanders for the three stations. There are six sectors in Khayelitsha, but only two sector commanders have been appointed. In Harare, there are four sectors, but only one sector commander has been appointed. In Lingeletu West, there are four sectors, but again only one sector commander has been appointed. Sector commanders were redeployed to the stabilisation unit which focuses on policing the cluster as per the instruction of the provincial commissioner. Some of the commanders were redeployed to other units within the three stations. There are no sector sub-forums in Khayelitsha, but there is one in Harare, and there is also one in Lingeletu West. Despite this, one participant noted that there are no operational strategic plans for policing informal settlements in Khayelitsha (the areas of jurisdiction of the Khayelitsha, Harare and Lingeletu West police stations). There are also no social crime prevention interventions in informal settlements in Khayelitsha, which is one of the minimum standards in NI 3 of 2013 on sector policing. With this in mind, more attention should be given to developing the management skills of station commanders and cluster commanders. Many detectives who lack promotion prospects apply to become station commanders and are appointed, even though they lack the requisite management skills. Cluster commanders should have the management skills to make resources available wherever they are needed in the cluster. Providing management training would also address human rights issues in a semi-military institution. It is the example the leader sets and the instruction the leader gives that count in the end.

Such concerns are magnified by the availability of weapons. In 2016, former Police Colonel Chris Prinsloo was sentenced to 18 years' imprisonment for stealing 2 400 firearms and thousands of rounds of ammunition and selling them to gangsters on the Cape Flats. In August 2017, 15 firearms

were reported missing from the Mitchells Plain police station, and five days' later another 18 firearms could not be accounted for at the Bellville South police station. In contrast, a study that shows that clampdowns to seize unlicensed firearms reduce levels of crime, but the mechanism used – sealing off a neighbourhood and not letting anyone in or out – does not generally build good relationships with community members.

Police are, however, vulnerable themselves. Trauma in the police is severe and suicide figures are very high. There are too few police psychologists. Whenever a police officer has been involved in a fatal shooting, that member should not be allowed to carry a firearm until such time as a psychiatrist gives permission. There should be debriefing after any POP operation because police members are often aggressive at that point. During the Lwandle Commission of Inquiry into the evictions of hundreds of people, it emerged that police who were engaged in the evictions were not debriefed after the first day of events, and the lack of debriefing could have contributed to police violence against those people on the second day.



Participants at the Dialogue

5 Police oversight within a human rights framework

Panellists:

Robert McBride, Executive Director, IPID

Dr Mary Rayner, human rights consultant, SERI

Takalani Ramaru, CSP

Dr Simon Howell, APCOF

Capt. Jeremiah Motlokwane, SAPS National Coordinator: Custody Management

Beginning at a broad level, **Robert McBride** noted that the price of democracy is eternal vigilance. The assumption is that everyone wants to obey the law and comply with constitutional values, including government officials and elected officials. However, the last few years have shown that, while there are people committed to constitutionalism, there are others with nefarious and criminal intent who are committed to subverting constitutionalism. Moving from the Independent Complaints Directorate to IPID was a big transition.



#humanrightspolicingdialogue @SAHRCommission @APCOF

Laws need to be clear, precise, proportional and necessary.

Detention needs to be the last resort and more diversion programmes in place.

The drafters of the IPID Act did a really good job, and the result is that IPID has a much higher level of independence than some of its counterparts. However, there was no best practice to follow, and the drafters could not envisage every eventuality, so there are some gaps. The UK Independent Police Complaints Commission is ahead of IPID in that it has its own intelligence unit to support investigations. The Constitutional Court judgment on the independence of IPID found that those areas that do not comply with the Constitution must be amended. The Portfolio Committee on Police has interpreted the judgment to mean that two or three sections of the IPID Act need to be amended, but IPID believes that all aspects of the Act that do not comply with the Constitution should be amended.

Mary Rayner then moved the discussion to an overview of the key points from a qualitative set of case studies on the experiences of people directly affected by the use of force by SAPS POP units during the #Fees Must Fall protests at the University of the Witwatersrand (Wits) in 2016.¹¹ In contrast to the other speakers, Dr Rayner sought to illustrate a case study on the vital role civil society can and must play in police oversight. The data for the study was drawn from events between September and November 2016 when the university formally called the SAPS on to its campuses to manage a new wave of protest. The research team found the following violations of applicable human rights law:

- unjustified use of force and the misuse of permissible weapons in response to peaceful assembly or against individuals who posed no threat to the police or others;
- use of excessive force to disperse peaceful protests, despite appeals to negotiate;
- targeted or indiscriminate use of force against humanitarian workers and in a place of safety; and
- indiscriminate and unjustified use of force in the enforcement of the university-imposed curfew.

The report includes a range of recommendations, including accountability measures to ensure that the pattern of the various abuses documented are not repeated; controls on the use of less lethal weapons; obligations to negotiate, de-escalate, and avoid the use of force; not permitting arbitrary detention; controls on targeted use of force against humanitarian workers; not permitting indiscriminate and unjustified use of force to enforce university curfew measures; and obligations to ensure access to medical care in situations of conflict.

An initial report of the findings was sent in November 2017 to the SAPS Acting National Commissioner and the Deputy National Commissioner: Management Interventions, noting certain findings and recommendations for their consideration and response. The report was also sent to IPID for information and possible action. SERI also made a submission to the Panel of Experts on the recommendations of the Marikana Commission of Inquiry.

In discussing accountability, **Takalani Ramaru** highlighted that civilian oversight is a mechanism to enhance democratic policing through the participation of stakeholders outside the police in the ongoing monitoring, investigation and review of police in terms of their performance, policies and conduct. It refers to the entire system of ensuring that police service delivery is constitutionally compliant and consistent with the public good. Policing for democracy is required to maintain peace and order, which is necessary for free and open political exchange. Bodies which have oversight of the police include the CSP, Parliament (through the National Assembly Portfolio Committee on Police), IPID, the Directorate for Priority Crime Investigation (DCPI)¹² Judge, the SAHRC, the Public Protector, and CSOs.

The CSP exercises civilian oversight over the SAPS through the following:

- monitoring and evaluating overall police performance against planned programmes;
- giving strategic advice to the Minister of Police in respect of developing and implementing policies;
- implementing a partnership strategy to mobilise role-players and stakeholders to strengthen service delivery by the SAPS to ensure the safety and security of communities;
- monitoring the performance of the police and regularly assessing the extent to which the SAPS has adequate policies and effective systems, and recommending corrective measures where necessary;
- monitoring the utilisation of the SAPS budget to ensure compliance with policy directives and instructions of the Minister;
- monitoring and evaluating compliance with the Domestic Violence Act, 1998;
- assessing and monitoring the ability of the SAPS to receive and deal with complaints against its members; and
- conducting or commissioning relevant research.



Robert McBride, Executive Director, IPID speaks to **Kwanele Pakati** and **Commissioner Adv. Sibanyoni**, SAHRC

Members of the public can approach the CSP with complaints about the police. Imminent amendments to the IPID Act will make IPID more independent, and amendments are also envisaged for the Civilian Secretariat for Police Service Act. The CSP has insufficient resources to meet its mandate. There are fewer than 20 CSP staff who carry out the monitoring of the SAPS, an organisation with 187 000 members, and the CSP has a budget of only R 123 million to monitor the SAPS, which has a budget of R 9 billion.

The national CSP has no investigation powers, but provincial secretariats do have such powers. The best the CSP is currently able to do is to work with the SAPS Management Intervention Unit. That said, dealing with complaints against senior SAPS personnel is very difficult. There is not as much cooperation between oversight bodies as there could be, and partnerships are necessary. The law compels IPID and the CSP to work together, and quarterly consultative forum meetings and monthly technical meetings take place to facilitate this. A lack of access to SAPS information hinders effective oversight, and the SAPS does not always cooperate when the CSP makes recommendations. Even when policies are developed in cooperation with the SAPS, they are not always implemented. Finally, there is a lack of public understanding of the CSP's work, and the organisation should undertake public education initiatives to rectify this situation. Police operate in a difficult environment, and this makes oversight hard. Sometimes the CSP receives complaints about the police that are not really about the police. Members of the public expect police to deal with every issue, and they even call the police when there is a fire rather than the fire department.

Simon Howell said that the monitoring police performance was made more difficult because current SAPS data is not effectively translated into information; some important data is missed or overlooked; there is poor communication between organisations in the CJS; and the value and utility of data is frequently under-appreciated. The SAPS should facilitate effective data/information management across divisions and services: operational data (crime intelligence, surveillance etc.); strategic data (resource management and deployment); and managerial data (performance management). One of the obstacles is a culture among intelligence operatives (including police intelligence) of not sharing data with others. SAPS data is more useful than data collected by other parts of the CJS (e.g., DCS data), but it should be shared more effectively to help optimise the functioning of the system. Moreover, effective policing is frequently defined numerically and cumulatively in terms of crime statistics. There is a public perception that greater numbers reflect better policing, but this is not necessarily the case. Current SAPS performance metrics such as arrest targets do not measure effective policing.

Focusing on sector policing and hotspot analysis can bring about a type of policing that is not necessarily what is needed in a particular place. Arresting and convicting people is not always the best response. The conviction rate of drug users is less than 1%, which show that another approach to drug use is needed. When it comes to drug user offences, petty crimes, and first-time offenders, diversion is better than putting offenders behind bars. It is better to teach people not to do bad things than put them in prison. There are many opportunities for creative sentencing that can make a broader societal contribution. One SAPS cluster commander in the Western Cape used a gangster to build a park as part of his parole. In the process, the gangster engaged with the community, and people did not damage the park equipment because they knew it had been installed by a gangster. Creating a safer and more secure society is not just a function of the CJS, and it is not just about security. It is also about education and development and enabling people to live good lives.

Finally, **Capt. Jeremiah Motlokwane** described the measures that control and manage persons in custody. The two SOPs that govern the treatment of foreign nationals detained under the Immigration Act emphasise the importance of treating such persons with respect and dignity.¹³

The standing orders (SOs) and NIs on arrest and detention provide a comprehensive package of human rights protections: the arrest and treatment of an arrested person; handling from the time of arrival at a police station; transportation; use of restraining measures; court and court orderly duties; prevention and combating of torture; medical treatment and hospitalisation; and treatment of children in conflict with the law.¹⁴



Robert McBride: Our protesters flirt with the symbolism of #violence. That's why protesters burn tyres and trucks, throw stones, carry weapons. We need to say it is not OK to flirt with symbols of violence.
@SAHRCommission @APCOF #HumanRightsPolicing

Section 35 of the Constitution provides that an arrested person has the right to be released if the interests of justice permit it, subject to reasonable conditions, and is governed by NI 3 of 2016 on Bail and the Release of Persons. The purpose of arrest or detention may never be to punish a person for what a police official, complainant or community believes the person has done. However, despite this, there is ongoing training on human rights in policing in the SAPS. An effective discipline and integrity management capability is being put in place. All approved and signed NIs, SOPs, guidelines and circulars are published on the SAPS intranet and sent to all SAPS email users for immediate implementation. NI 6 of 2017 provides for service complaints to be lodged against the SAPS. Monitoring and quality assurance frameworks are in place, backed up by NIs on first-level and second-level inspections. In the event of a lack of compliance, NIs enable on-site managers to apply corrective or disciplinary procedures. The SAPS Management Intervention component identifies stations experiencing specific kinds of problems, and runs specific interventions at cluster, provincial and national level. The Office of the SAP National Commissioner is open to suggestions, and suggestion boxes in stations are intended to encourage communities to submit suggestions for station-level improvement. There was also an acknowledgement that there is always room for improvement in the SAPS, and said that most complex issues require engagement with partners. As had been said at the beginning of the current Dialogue, a draft MOU between the SAHRC and the SAPS is in the process of being approved. Crime prevention and safety and security cannot be addressed by the police alone – other departments and CSOs have a vital role to play.

Discussion points

It was noted that so long as violence is seen as currency, and is enjoyable for the news, it is seen as acceptable. But it is never acceptable for any politician to legitimise the use of violence for anything. A certain percentage of people engage in crime, and if there are more people, there will be more crime. Ultimately, if anything goes wrong, the blame will come to government. Developers should be required to plan and share the cost of the additional emergency and police services that a new development will require. The SAPS noted that work is being done to determine the number of people being released by the SAPS in the interests of justice under section 64 of the CPA. J534 releases (and all other 'J' documents) are Department of Justice and Constitutional Development documents, so the SAPS does not keep statistics on those. Information about releases on warning (using the SAPS 496 document), and releases because there were no charges within 48 hours of arrest (using SAPS 328 document) are held by the police station where those people were released. Despite this, a SAPS 14A Notice of Constitutional Rights must be given to a person admitted to custody, but many people are not informed of their rights. However, police station records are frequently incomplete. The records indicate that a person was arrested and released, but it is not clear whether the person was charged or not. The release people held for petty crimes after paying a fine must be managed properly, or it can create the perception of bribery. There have been allegations that money paid by persons as fines to secure their own release was misused. A system must be put in place to manage the payment of fines to police, and IPID should investigate the systemic abuse of fine money wherever this occurs.

Moreover, the CSP and other police oversight bodies should not be silent in times of moral crisis. The effectiveness of an oversight body has a lot to do with the quality of its leadership. The SAPS did not pay much heed to IPID until Robert McBride was appointed as its head. The CSP should not be afraid to use its legislative power to compel the SAPS to heed its recommendations. While the national secretariat does not have investigative powers, it should ensure that provincial secretariats use their powers to investigate. Resultantly, it is vitally important for people to have the courage to interrogate the biases and ideologies they bring and present as knowledge about what kind of policing can reasonably be advocated in South Africa. The picture is multi-faceted and contradictory. During the student protests at the University of Cape Town campus, racism prevailed, buildings were burned, and the police refused to intervene.

6 Closing

Panellists:

Chantal Kisoon, SAHRC

SAHRC Chief Operating Officer **Chantal Kisoon** said the Dialogue on Human Rights and Policing has become an annual feature event, marking the commitment by the SAHRC, APCOF and the SAPS to continue to build on engagements that have been taking place. After summing up key aspects of the conversation over the course of the Dialogue, she said she looked forward to formal cooperation with the SAPS once the draft SAHRC–SAPS memorandum of understanding had been finalised and signed. Ms Kisoon thanked the SAPS, especially Lt-Gen. Masemola, Robert McBride of IPID, representatives of civil society organisations, representatives of Chapter 9 organisations and APCOF and the support of the Open Society Foundation for South Africa, without whom the event would not have been possible.



Adv. Majola, Chair, SAHRC

Lt-Gen. SF Masemola, Deputy National Commissioner: Policing

Adv. Thipanyane, CEO, SAHRC

Sean Tait, APCOF

7 Afterword

Panellists:

Kwanele Pakati, SAHRC

The Dialogue produced rich discussion on the challenges and opportunities to promote greater human rights compliance in policing. These opportunities and challenges will feed into the strategic planning agenda for the Commission as they will into the developing agenda that will underpin the memorandum of understanding being drafted between the SAHRC and the SAPS. In the spirit of collaboration produced by the Dialogue, they will also continue to be addressed by partners in state and civil society alike.

Policing in informal settlements sparked wide debate. The issues of infrastructural design and planning have been noted as an inhibiting factor. In order to improve safety in such densely populated areas, infrastructure must be improved within acceptable standards, social crime prevention interventions in informal settlements must be increased, and more attention should be given to developing the management skills of station commanders and cluster commanders. New housing developments have an implication for police resource planning and allocation, and developers need to plan for and share the cost of providing the additional emergency and police services. The Khayelitsha Commission of Inquiry issued valuable recommendations. Where these recommendations have a national footprint, they may be extrapolated with necessary adaptations.

SAPS and local government law enforcement should engage more proactively with the complexities of addressing petty crimes and the enforcement of by-laws. Consideration should be given to the potential impact of outdated municipal by-laws and how these have the consequence of criminalising poverty. Taking a rights-based approach to these issues will fundamentally create public awareness and discussions on how the socio-economic situation in South Africa has a direct bearing on the types of crimes and the frequency of crime in the country.

We need to be mindful of the needs of responding officers. There are too few police psychologists to assist police with debriefing and therapy after an incident of a violent nature. These traumas run the risk of being carried onto the street and into the home. We need to understand how crime as a social phenomenon has an impact on the well-being of law enforcement agents as first responders.

The Forum of South African Directors-General (FOSAD) and similar structures should be used to formulate coordinated responses to issues of service delivery before they ignite into protest. Similarly, the Department of Planning, Monitoring and Evaluation together with the Department of Cooperative Governance and Traditional Affairs and the South African Police Service should establish a rapid response structure to respond to service delivery-related protests. The Ministry of Police needs to release the report of the Team of Experts reviewing public order policing in South Africa in the wake of the Marikana tragedy.

ENDNOTES

- 1 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa.
- 2 The Principles hold that petty offences are inconsistent with the provisions of the African Charter on Human and People's Rights, that provide rights to equality and non-discrimination, as well as the rights enshrined in national constitutions (e.g. the Constitution of the Republic of South Africa). The enforcement of petty offences is inconsistent with Article 5 of the African Charter, namely the right to dignity and freedom from torture, cruel, inhuman or degrading punishment, because this enforcement contributes to overcrowding in places of detention or imprisonment. It may also be inconsistent with the right to dignity and freedom from ill-treatment if the enforcement of petty offences involves mass arrest operations. The enforcement of petty offences is inconsistent with Article 6 of the African Charter which guarantees all persons the right to liberty and security of the person, and which prohibits arbitrary arrest and detention.
- 3 Quoting Africa Check: 'Crimes against a person – generally referred to as "contact crime" where a person or people are injured/harmed or threatened with injury/harm during the commission of a crime. A further sub-category of "contact-related crime" is used for violent crimes committed against property with the intention of causing damage to a person, for example arson or malicious damage to property.' Available at <https://africacheck.org/factsheets/a-guide-to-crime-statistics-in-south-africa-what-you-need-to-know/> [accessed 21 May 2018]
- 4 Nyanga – 281 murders (1st – the station with the most murders); Delft – 183 (4th); Khayelitsha – 179 (5th); Harare – 174 (6th); Philippi East – 150 (7th); Kraaifontein – 142 (8th); and Gugulethu – 136 (9th)
- 5 Mfuleni – 125 (13th); Mitchells Plain – 103 (18th); and Bishop Lavis – 97 (20th)
- 6 1 570 of 3 311.
- 7 <http://www.popcenter.org/> [accessed 21 May 2018]
- 8 <http://whatworks.college.police.uk> [accessed 21 May 2018]
- 9 <http://www.who.int/violenceprevention/publications/en/> [accessed 21 May 2018]
- 10 Section 206(5)
- 11 Rayner M, Baldwin-Ragaven L & Naidoo S. 2017. *A Double Harm: Police Misuse of Force and Barriers to Necessary Health Care Services: Responses to Student Protests at the University of the Witwatersrand, September to November 2016*. Johannesburg: Socio-Economic Rights Institute of South Africa. Available at https://seri-sa.org/images/A_Double_Harm_Wits_Report_FINAL.pdf [accessed 21 May 2018]
- 12 Commonly known as the Hawks.
- 13 SOP on Foreign Nationals 1 of 2016; SOP dated 2018-03-02: Arrest and Detention of Illegal Foreigners
- 14 SO (General) 361: Handling of Persons in the Custody of the Service from their Arrival at the Police Station; SO (General) 341: Arrest and Treatment of Arrested Person; SO (General) 345: Transportation of Persons in Custody; SO (General) 350: Use of Restraining Measures; SO (General) 271: Court and Court Orderly Duties; NI 6 of 2014: The Prevention and Combating of Torture of Persons; NI 8 of 2016: Medical Treatment and Hospitalization of a Person in Police Custody; NI 2 of 2010: Children in Conflict with the Law

PARTICIPANTS

Mrs Lungile Kubheka	ACOASA
Ms Louise Edwards	African Policing Civilian Oversight Forum (APCOF)
Dr Simon Howell	African Policing Civilian Oversight Forum (APCOF)
Ms Melody Kozah	African Policing Civilian Oversight Forum (APCOF)
Mr Chumile Sali	African Policing Civilian Oversight Forum (APCOF)
Mr Sean Tait	African Policing Civilian Oversight Forum (APCOF)
Lloyd Kuveya	Amnesty International Southern Africa Regional Office
Ms Shemilla Mohamed	Amnesty International Southern Africa Regional Office
Ms Veronica Sabin	Amnesty International Southern Africa Regional Office
Ms Jennifer Wekks	Amnesty International Southern Africa Regional Office
Ms Bilkis Omar	Civilian Secretariat of Police (CSP)
Mr Takalani Ramaru	Civilian Secretariat of Police (CSP)
Mr Munya Katumba	COC Netherlands
Ms Gwen Dereymaeker	Department of Community Safety - Western Cape
Deputy Commissioner Lucky Mthethwa	Department of Correctional Services (DCS)
Ms Felicity Harrison	Goedgedacht Forum
Dr Andrew Faull	Independent Consultant
Ms Annelize van Wyk	Independent Consultant
Mr Robert McBride	Independent Police Investigative Director (IPID)
Mr Mamodishe Molope	Independent Police Investigative Director (IPID)
Mr Murasiet Mentoor	Judicial Inspectorate for Correctional Services
Ms Doreen Gaura	Just Detention International – South Africa
Ms Sasha Gear	Just Detention International – South Africa
Mr Chris Moag	Media 24
Ms Venessa Padayachee	NICRO
Nalaedzo Nethonzhe	Power FM
Mr Mxoliso Lugulwana	Provincial Secretariat for Police – Western Cape
Michael Clarke	SERI-SA
Princess Molopi	SERI-SA
Ms Mandisa Dyanti	Social Justice Coalition (SJC)
Mr Dalli Koch Weyers	Social Justice Coalition (SJC)
Dr Mary Rayner	Socio-Economic Rights Institute (SERI)
Ms Donna Evans	Sonke Gender Justice
Alexandra Fitzgerald	South African Human Rights Commission (SAHRC)
Ms Chantal Kisoou	South African Human Rights Commission (SAHRC)
Caitlin Lang	South African Human Rights Commission (SAHRC)
Adv. Majola	South African Human Rights Commission (SAHRC)

Kwanele Pakati	South African Human Rights Commission (SAHRC)
Commissioner Adv. Jonas Sibanyoni	South African Human Rights Commission (SAHRC)
Zeenat Sujee	South African Human Rights Commission (SAHRC)
Sibongiseni Tula	South African Human Rights Commission (SAHRC)
Adv. Thipanyane	South African Human Rights Commission (SAHRC)
Shanelle van der Berg	South African Human Rights Commission (SAHRC)
Lt. General LJ Mothiba	South African Police Service (SAPS)
Brigadier George Anthony Prins	South African Police Service (SAPS)
Malose J Mavakalla	South African Police Service (SAPS)
Captain Motlokwane	South African Police Service (SAPS)
Ms Jenny Pillay	South African Police Service (SAPS)
Dr Elrena van der Spuy	University of Cape Town – Centre of Criminology
Dr Heidi Brooks	University of Johannesburg – Centre for Social Change
Ms Zita Hansungule	University of Pretoria – Centre for Child Law
Mr Stanley Malematja	University of Pretoria – Centre for Child Law
Thabo Lesoro	#RSA

The African Policing Civilian Oversight Forum

The African Policing Civilian Oversight Forum (APCOF) is a not-for-profit trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve, namely: to assist in restoring public confidence; developing a culture of human rights, promoting integrity and transparency within the police; and good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

www.apcof.org.za

The South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is a national human rights institution established in terms of section 181 of the South African Constitution. Along with other institutions created under Chapter 9, it is described as a 'state institution supporting constitutional democracy'. In terms of section 184 (1) of the Constitution, the SAHRC is mandated to: promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; and monitor and assess the observance of human rights in South Africa.

www.sahrc.org.za

