



# DIALOGUE ON HUMAN RIGHTS AND POLICING

20–21 April 2017  
Johannesburg, South Africa



Hosted by the  
African Policing Civilian Oversight Forum

In partnership with the  
South African Human Rights Commission



The Dialogue received financial support  
from the Open Society Foundation for South Africa



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## ERRATA

*After receiving feedback from the SAPS, we would like to add the following errata to this report.*

The information in the **fifth paragraph on page 5** is better expressed by the following: *During her address, Maj-Gen Maropeng Mamotheti emphasised that all SAPS policy directives (National Instructions and Standing Orders) contain provisions for disciplinary processes/corrective actions to be initiated by the management in the event of non-compliance by members implementing the directive. She also emphasised the continuous training of members as well as management interventions to ensure that members are capacitated, guided and take the necessary disciplinary steps where there is deliberate dereliction of duties and non-compliance.*

The **first paragraph on page 20** refers to the SAPS torture policy and mentally ill persons. In fact, the required SAPS response to mentally ill persons is described in section 40 of the Mental Health Care Act, 2002.

Regarding the **fifth paragraph on page 21**, it is worth noting that the SAPS participated in the Department of Social Development-led Gender-Based Violence Command Centre and it is now possible for people with speech and hearing impairments to report gender-based violence. A facility for people with speech and hearing impairments to report other kinds of crime is still under development.

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## ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
APCOF	African Policing Civilian Oversight Forum
AU	African Union
CPA	Criminal Procedure Act, 1977
CPF	community policing forum
CSO	civil society organisation
CSP	Civilian Secretariat for Police
DHA	Department of Home Affairs
DOJ&CD	Department of Justice and Constitutional Development
DPCI	SAPS Directorate for Priority Crime Investigation (the Hawks)
DSD	Department of Social Development
FCS	SAPS Family Violence, Child Protection and Sexual Offences (units)
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate (replaced by IPID)
IPID	Independent Police Investigative Directorate
JDI	Just Detention International
LGBTI	lesbian, gay, bisexual, transgender and intersex
Luanda Guidelines	ACHPR Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
M&E	monitoring and evaluation
MEC	member of the [provincial] executive committee
MOU	memorandum of understanding
NDP	National Development Plan
NGO	non-governmental organisation
NI	SAPS National Instruction
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SAPS	South African Police Service
SARPPCO	Southern African Regional Police Chiefs Co-operation Organisation
SO	SAPS Standing Order
SWEAT	Sex Workers' Education and Advocacy Task-force
SWs	sex workers

*A trusted police service enables people to engage without hesitation, to support the police, to partner with the police. The result is the enhancement of law and order, which is the main mandate of the police.*

## I BACKGROUND

The Dialogue on Human Rights and Policing was held in Johannesburg from 20 to 21 April 2017 as a joint initiative of the African Policing Civilian Oversight Forum (APCOF) and the South African Human Rights Commission (SAHRC). The Dialogue brought together a wide variety of role-players in policing, including the South African Police Service (SAPS), statutory oversight bodies, Chapter 9 institutions,<sup>1</sup> academia, and civil society organisations (CSOs). It sought to build on the work that had been done at a similar event in April 2016 to help build consensus on promoting human rights in policing in South Africa by: creating a space for constructive discussion on police and human rights; supporting and encouraging South African contributions to contemporary police policy; and encouraging participants to share experience and comparative analysis in the policing context.

The event received financial support from the Open Society Foundation for South Africa.

## II EVENT OPENING

SAHRC Chairperson **Adv. Bongani Majola** opened the event.

Adv. Majola said the SAPS plays a critical role in all areas of South African life and the SAHRC relies strongly on the support of the police to meet its mandate. There can be no law and order without the police. If the SAPS were to earn the trust of the people it serves, people would want to support and partner with them. This will help to enhance law and order, reduce crime, and improve safety and security. The support of the police makes it possible to enjoy a wide range of human rights, including freedom and security of the person, and the right to demonstrate and picket. Adv. Majola declared that South African police officers often operate in a violent society, and the SAHRC condemns the killing of police officers. The police will play an important role in the right to vote as the 2019 provincial and national elections approach. They protect foreigners as well as citizens. The SAHRC will continue to educate people about their rights and responsibilities under the Constitution.

**Sean Tait** expressed his gratitude for again being able to co-host a dialogue on policing and human rights, a year after the first one. Building and deepening democracy and democratic policing will always be a work in progress, he said. There are a great many voices in the arena of policing, including, but not limited to, the police, community organisations, oversight organisations, human rights organisations and academia. Dialogue between the many stakeholders – on the improvements made in policing and human rights as well as the challenges to be overcome – enables forward movement. Mr Tait informed the participants that the programme had been developed collaboratively with the SAHRC and the SAPS.



*Adv. Bongani Majola, Chair of the SAHRC*

### III THEME: DEVELOPMENTS IN HUMAN RIGHTS AND POLICING SINCE APRIL 2016

#### Panel discussion

**Chairperson:** Commissioner Chris Nissen, SAHRC

**Panellists:** Melanie Dugmore (independent consultant); Francois Beukman (Chairperson: National Assembly Portfolio Committee on Police); Major-General Maropeng Mamotheti (SAPS)



*Melanie Dugmore, Francois Beukman, Chris Nissen and Major-General Mamotheti*

#### *Key elements of effective democratic policing*

In her address, **Melanie Dugmore** said that two essential areas of policing in a democracy are responsiveness and accountability.<sup>2</sup> The SAPS should: 1) make responding to the needs of individuals and groups (including the marginalised and vulnerable) its top operational priority; 2) be accountable to the law rather than the government of the day (giving effect to international and domestic criminal and administrative law); 3) protect human rights (particularly those rights necessary for the protection of unfettered political activity and the protection of democratic freedoms such as the right to protest); 4) be transparent in operations, budgets and policy matters; 5) adhere to high standards of conduct and professional service; 6) be subject to regular scrutiny through both internal and external systems (from within the SAPS, from government, civil society, parliamentary institutions and independent external oversight mechanisms); and 7) be representative of the community it serves. The rights of police officers should also be respected, including fair conditions of employment and pay; just, procedurally fair, transparent disciplinary systems; skills training for professional development; and a working environment for officers that addresses the intrinsic risks associated with law enforcement.

#### *Challenges*

Key challenges identified by recent commissions of inquiry and the Constitutional Court in respect of the SAPS include: inadequacies in the protection of human rights, demilitarisation and public order policing;<sup>3</sup> a lack of independence in the work of SAPS oversight bodies; a lack of operational autonomy; vulnerability to political interference;<sup>4</sup> poor responsiveness and a lack of efficiency and professionalism.<sup>5</sup> Policy responses to known shortcomings include the National Development Plan (NDP), the 2016 White Paper on Policing and the 2016 White Paper on Safety and Security.

When the United Nations considered South Africa's March 2016 International Covenant on Civil and Political Rights (ICCPR) report, it urged South Africa to: improve conditions of detention; reconsider



arrest quotas as an indicator of police performance; improve pre-trial detention; strengthen oversight bodies; implement the Optional Protocol to the Convention against Torture (OPCAT); and ensure regular and independent monitoring of all places of detention.

The African Commission on Human and Peoples' Rights (ACHPR) has urged South Africa to make use of its Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa ('the Luanda Guidelines').

The SAPS itself is keenly aware of its own shortcomings. In 2007/08, the SAPS Policy Advisory Council referred to challenges with regards to the command and control in the police, poor discipline, high levels of corruption and poor service delivery. In 2012, the SAPS Detective Dialogues organised by the Portfolio Committee on Police highlighted corruption, high caseloads, inadequate resources, poor quality investigations, indiscipline and a lack of training as problems in need of attention. In 2015, the Police Inspectorate highlighted many concerns about the effectiveness, efficiency and quality of SAPS service delivery. The responses of the SAPS include work to enhance the quality and functioning of the SAPS detective service (the 2015 Detective Turnaround Strategy), the Back to Basics Approach, and recovery plans in respect of visible policing, the detective services and the SAPS organisational structure.

In October 2015, the National Assembly's Portfolio Committee on Police recommended: continuing to demilitarise and professionalise the SAPS; exercising effective management and control over stations; strengthening the Police Inspectorate; taking steps to reduce civil claims against the SAPS for unlawful actions by members; reviewing the SAPS resource-allocation plan;<sup>6</sup> producing a turnaround strategy for crimes against women and children; producing a strategy to retain detectives; and producing a needs analysis in respect of detectives.

Supporting the implementation of a human rights agenda for policing requires an enabling framework (policies, laws and regulations), as well as frameworks for effective monitoring and oversight. Police managers should be held accountable for effective enforcement of national instructions, standing orders and disciplinary sanctions. Policing strategies and programmes should be backed up by action plans with clear time frames, deliverables, roles and responsibilities, and monitoring and evaluation (M&E) frameworks to assess impact.

*'Supporting the implementation of a human rights agenda for policing requires an enabling framework (policies, laws and regulations), as well as frameworks for effective monitoring and oversight. Police managers should be held accountable for effective enforcement of national instructions, standing orders and disciplinary sanctions. Policing strategies and programmes should be backed up by action plans with clear time frames, deliverables, roles and responsibilities, and monitoring and evaluation frameworks to assess impact.'*

### *Effective oversight*

Stronger oversight is necessary from: the Civilian Secretariat for Police (CSP); Independent Police Investigative Directorate (IPID); the Directorate for Priority Crime Investigation (DPCI) Judge;<sup>7</sup> the Department of Planning, Monitoring and Evaluation; communities; Parliament and provincial legislatures; and internal SAPS accountability structures such as the Police Inspectorate, the performance management component and disciplinary system. Public and community mechanisms for engagement and participation should be strengthened.

### *Professionalising the SAPS*

The SAPS should be professionalised through the SAPS Code of Conduct; the establishment of a National Policing Board; selecting SAPS members for excellence and professionalism; training; civilianising/demilitarising the culture of the SAPS; and implementing the White Paper on Policing and the recommendations of the Transformation Task Team.

Three areas need attention: 1) accountability (addressing the lack of consequence management and monitoring of the Back to Basics and the Detective Turnaround Strategy); 2) implementing the Luanda Guidelines; and 3) reviewing the legal framework for the use of force by SAPS members to align it with human rights standards.

APCOF has produced a report on the interpretation of the Luanda Guidelines into practical systems and tools at police-station level. There is a need to modify standing orders and put registers and systems in place to manage ordinary arrests and people in custody. Independent monitoring is not yet in place to measure South Africa's adherence to OPCAT and its continental obligations. The CSP should update and review its policy framework to ensure that the standard for lethal force set in section 49 of the Criminal Procedure Act, 1977 (CPA), is consistently articulated in training and guidelines. Statistics on the police use of force should be reported.

### *Improving conditions on the ground*

**Hon. Francois Beukman** reported that new SAPS recruits undergo three weeks of training, including on public order policing and the use of force. However, ordinary police officers are faced with difficult situations every day and they need ongoing training to be able to respond well. There should be ongoing training and revision. The SAPS leadership should be addressing police members all the time to develop an organisational culture that respects human rights, for example during morning parades at police stations. The performance agreements of station commanders should be aligned with human rights and values, and with those of cluster commanders. There are over 1 100 police stations in South Africa. While there are many complaints, some police stations have shown an excellent record in responding. The first port of call for complaints is the station commander. If there is no satisfactory response, then the cluster commander should be approached and, if that is unsuccessful, then the provincial commissioner. The old Independent Complaints Directorate (ICD) Act made the ICD responsible for addressing service delivery problems, but its successor, IPID, is no longer responsible for that. It is possible that IPID's mandate should be revised to include dealing with service delivery complaints. IPID can only function properly if it can use ballistics and forensics services that are independent of those provided by the institution it is investigating (the SAPS), but no funding has been made available for this purpose. IPID asked for an extra R5 million to complete its work on the Marikana case, but National Treasury did not grant this request.

### *Recommendations to SAPS management*

**Hon. Beukman** made seven recommendations for promoting adherence to human rights standards in the SAPS. The first is to recognise that the tone of an organisation is set at the top. The most senior leaders of the SAPS and the Minister and Deputy Minister of Police should emphasise the importance of human rights in policing rather than the use of force so that members can understand what is required of them. The Portfolio Committee has recommended that the senior SAPS national and provincial management should attend a workshop on the Constitution, civilian oversight, the rule of law and the separation of powers by the end of the current financial year. To this end, the SAPS and the National School of Government established a task team which developed a working document for the content of the workshops, with topics such as: the Constitution and the citizen-centred approach; mandates, legislation, policies and the Code of Conduct; ethical leadership and decision-making; the political/administrative interface; and human rights.

*'The tone of an organisation is set at the top. The most senior leaders of the SAPS and the Minister and Deputy Minister of Police should emphasise the importance of human rights in policing rather than the use of force so that members can understand what is required of them.'*

The second is to establish the National Policing Board, now long overdue. According to the NDP: 'A national policing board should be established, with multi-sectoral and multidisciplinary expertise. It will set standards for recruiting, selecting, appointing and promoting police officials and police officers. The Board will also develop a professional code of ethics and analyse the professional standing of policing, based on international norms and standards.' In jurisdictions such as the UK and Northern Ireland, policing boards play a very important role in setting standards and promoting a human rights culture.

The third recommendation is that the SAPS should adopt the use of technology ('digital policing'). In jurisdictions such as the US and the UK, state-of-the-art technology such as bodycams are being used to enhance security and promote good conduct by the police and members of the public.

Fourth, station commanders and unit commanders should set an example of adherence to human rights because that is the cue that members will follow. For example, if a station commander or unit commander does, or does not, regularly check the Domestic Violence Act register, or encourage reporting to IPID on certain violations, members will follow the commander's example.

Fifth, community policing forums (CPFs) should play a major monitoring role in order to ensure that police adhere to human rights standards, especially in respect of arrests and detentions where most rights infringements take place. CPFs currently work directly with the SAPS but the White Paper on Policing envisages that these structures will move to the CSP. CPFs should operate at arms' length from the police so that they can provide independent oversight at local level.

The sixth recommendation is that the SAPS should consider reporting regularly on its use of force, for example, the use of crowd control measures such as rubber bullets, batons and water cannons.<sup>8</sup>

Finally, human rights compliance should be integrated into everything the police do. The SAPS should consider including measures of progress towards the use of rights-compliant methodologies across the organisation and include these in its Annual Performance Plan. At the moment, the focus of human rights compliance seems to be restricted to Family Violence, Child Protection and Sexual Offences (FCS) units.

### *Instruments to promote human-rights compliant policing by the SAPS (1)*

In his address, **Maj-Gen Maropeng Mamotheti** stated that the SAPS has been committed to rights-compliant policing since 1995. All new recruits get human rights training and there is ongoing rights training in every province. The SAPS Legal and Policy Services keeps updating its policies, standing orders (SOs) and national instructions (NIs) to keep them compliant with human rights standards. Disciplinary proceedings are instituted whenever members do not comply with SOs or NIs.

She gave a number of examples of SOs and NIs that protect human rights. SO (General) 341 deals with arrests and the treatment of arrested persons until persons are handed over to a community service centre (police station), and SO 361 describes how arrested persons should be dealt with from the time they arrive at a police station. SO 331 governs the safekeeping of arrested persons' property. There is a national instruction on search and seizure. There are also NIs dealing with children in conflict with the law (NI 2 of 2010) to give effect to South Africa's obligations under international and regional agreements. NI 3 of 2010 deals with the care and protection of children in terms of the Children's Act, 2005. NI 8 of 2011 deals with the operation of roadblocks and checkpoints. NI 2 of 2012 deals with victim empowerment in accordance with international and regional legal instruments.



There are NIs that deal with: vulnerable persons and persons with special needs; giving effect to the Prevention and Combatting of Torture of Persons Act, 2013; the trafficking of persons, in accordance with international and regional instruments; the use of lethal force when effecting arrests of suspects under section 49 of the CPA; bail and release of persons to give effect to the right to be released from detention if the interests of justice permit; and with medical treatment and hospitalisation of persons in custody, including the right to care, food and water. The SAPS is currently working on a document dealing with undocumented persons in consultation with the Department of Home Affairs (DHA).

The SAPS also protects the human rights of its members. For example, it has an employment equity policy and prohibits unfair discrimination including discrimination against persons with HIV. There is a disability policy and a policy on the use of official languages in the SAPS. She said the SAPS is committed to continually upholding its constitutional mandate to the best of its ability.

*'As the SAPS, we are committed to continually upholding our constitutional mandate to the best of our ability.'*

Responding to a statement that there is an inherent apartheid-era indignity about being put in the back of a police van rather than another kind of police vehicle, Maj-Gen Mamotheti said there had been incidents of members being attacked and killed by people sitting in the back seat of certain police vehicles. Responding to a comment that conditions in police barracks should be improved to improve staff morale, she said the Department of Public Works is responsible for building maintenance and the SAPS does day-to-day maintenance of living quarters. She said education in communities is necessary to protect police from being attacked and killed. A culture of respect for human rights is being built in the SAPS, and communities should support and protect the police.

### *The role of the SAHRC*

**Commissioner Chris Nissen** informed participants that there is a memorandum of understanding (MOU) in place between the SAPS and the SAHRC. Police need to be sensitised as to what constitutes a human rights violation. There is a low level of trust between communities and the police. When a pig's head was placed in a mosque in Simonstown, police did not see it as a violation of a religious right, so they did not treat the scene as a crime scene. There was a case in Merrydale in the Northern Cape where a farmer asked police to remove 40 workers from his farm, but it later emerged that he had not paid them. During a march in Greyton, police shouted at protestors and said they could now shoot at people. This is a misunderstanding based on the tone set at the top. Ten people were arrested in Caledon and restrictive bail conditions were imposed because local people did not want to see them in the town. About 40 women in Hanover Park told the SAHRC recently that each of them had lost a child in gang violence but they were afraid to go to the police because they said the police would inform the gangsters. Near Kimberley, there is a Khwe community where no police officer or court provides services in the Khwe language. He said the SAHRC would work to improve the relationship between communities and police in order to protect people's human rights.



*Commissioner Chris Nissen of the SAHRC*

## Questions, comments and discussion points

### *Police refuse to take cases where they believe no prosecution is likely*

It was observed that there are cases of women being raped in taxis and, when they report the matter, the police refuse to take the case because they believe it will not be prosecuted.

### *IPID is under-resourced*

It was noted that in 2015/16, IPID reported 366 deaths from police action, 216 deaths in police custody, 145 cases of torture, 51 cases of rape and 3 509 cases of assault by officers on duty. The fight against crime should never be at the expense of promoting and protecting human rights. IPID should be better resourced to meet its mandate of investigating grave and serious violations of human rights.

### *Police do not always protect the rights of farmworkers*

It was stated that police behave inconsistently when it comes to protecting vulnerable farmworkers. When former farmworkers wanted to visit ancestral graves in one location, the police said this was a dispute between the parties and that they did not want to intervene. However, when farmers evict farmworkers, then the police are present. Farmworkers living near Genadendal contacted the SAHRC to say they had reported the farmer's threat to evict them without a court order. They showed the SAHRC a letter from the Office of the State Attorney to prove they had been living on the land for five years. When people attacked them, the police watched and did nothing. In Bronkhorstpruit, a farmer impounded cattle that had been grazing on his pumpkins and wanted to take the cattle to Brits, but the police did the right thing by intervening to tell the farmer that impounding animals now requires a court order. This kind of positive action to defend people's rights will help reduce conflict and build trust in the police, reducing the risk that people will take the law into their own hands.<sup>9</sup>

### *Managing liability for civil claims*

According to one participant, the SAPS National Management Intervention Unit identifies provinces, divisions, clusters and stations where there are many civil claims to manage specific problems at provincial, divisional, cluster or station level. This seems to be well managed by the SAPS, and it seems there may be a role for accountability agencies to work with the police on this.

### *Statistics are not a reliable measure of the level of crime or police performance*

Some policing challenges are the result of the monitoring and accountability mechanisms that are currently being used, it was claimed. The SAPS says the number of rapes and sexual assaults has gone down but, in fact, the Victims of Crime Survey shows that fewer incidents have been reported (over 20% fewer over the last three or four years) because victims have less trust that the police will do something about a complaint. There is a danger in managing the police by assuming they are doing a good job if crime statistics are going down. The numbers of only a few crime categories – organised robberies, hijackings and house robberies – can be used as a measure of police performance. When it comes to murder, rape, assault and other violent crimes, the numbers are not a good indicator of police performance.

### *The police cannot be seen as separate from the rest of the criminal justice system*

It was noted that CPFs want to support the police to apprehend suspects, and then they sometimes want the police to mete out justice because they don't believe the criminal justice system will work. However, the police cannot be seen as separate from the rest of the criminal justice system. Although the number of arrests has gone up massively in the last few years, conviction rates and the number of cases finalised are low.

### *Police bear the brunt of dissatisfaction about government services*

The police, it was claimed, are often the first government officials to feel the brunt of other departments' service delivery failures in, for example, housing, roads or social development.

### *Human rights training is necessary*

The importance of human rights training was mentioned by a number of participants. SAHRC education programmes on human rights and responsibilities has been very effective in the past, and the Commission should continue to do this in schools to influence people when they are young. Training of police and communities is important, but being trained does not necessarily affect people's attitude or behaviour. It is necessary to look beyond training, beyond creating awareness. Human rights education cannot be taught as a separate component; it could be done through role-play. Changing hearts and minds does not happen by giving lectures; the occurrence of a human rights education needs to be context-specific. SAPS officers can become human rights education officers to anyone in their care or custody. The schools moot-court competition of the Department of Basic Education, Department of Justice and Constitutional Development (DOJ&CD) and universities is a way to boost human rights education by getting new issues onto the agenda and debating them.

### *SAPS resource allocation*

A participant said that provincial commissioners have some say over the allocation of resources. There was talk of building a new police station in Makhaza, Khayelitsha, but then it was announced that R100 million would be spent on upgrading Muizenberg police station. It takes approximately seven years for a Department of Public Works project to be implemented from the time planning begins. The Khayelitsha Commission report showed that SAPS resource allocation in Cape Town is irrational and must be adjusted. There are more police in Nyanga and Khayelitsha than in Camps Bay and Rondebosch, but fewer per capita. The ratio of police to population in Camps Bay is 1:115, in Harare it is 1:887 residents. There were seven murders in Sea Point last year, but 369 in Khayelitsha. The argument is not about increasing the SAPS budget but about reallocating it.<sup>10</sup>

### *The right to remain silent*

It is the right of an accused person to remain silent, but police officers who are accused persons have to make a statement, claimed one participant. This infringes on their human rights. Another participant pointed out that police must say what happened, and an adverse inference can be drawn if they remain silent.

### *Police commanders should ensure logs of the use of force are kept*

It was suggested that station commanders keep logs of what police do, the use of force, discharge of weapons and so on, and that the logs should be kept in the prescribed way, and that if this is not done, there should be consequences.

### *Rethink what a police station is*

It was pointed out that the idea of a police station is antiquated. It is important to consider what it does and who it serves. The SAPS could perhaps work from simple contact points or use internet channels rather than large buildings with high walls.



**SAHRCommission @SAHRCommission Apr 20**  
**SAHRC Chair Prof Bongani Majola says the SAHRC needs to work closely with SAPS in combating Human Rights violations**



**Niñha\* @Naewizzle Apr 20**  
**Dugmore says SA must align its police reform agenda within the framework of democratic policing**



**Goedgedacht Forum @GGD\_Forum Apr 20**  
**Worrying increase in number of complaints against police.**

## IV THEME: PROMOTING SOUTH AFRICA'S NDP VISION OF DEMOCRATIC POLICING

### Panel discussion

**Chairperson:** Sean Tait (APCOF).

**Panellists:** Dr Andrew Faull (Centre of Criminology, University of Cape Town); Prof. Christof Heyns (UN Human Rights Committee, University of Pretoria Institute for International and Comparative Law in Africa); Adv. Vusi Pikoli (Western Cape Provincial Police Ombudsman).

#### *The SAPS Code of Conduct*

In **Dr Andrew Faull's** view<sup>11</sup> police codes of conduct help to translate the details of laws, rights and treaties into plain language. When linked to clear standards of behaviour, and to M&E systems, codes have the potential to shape the attitudes and organisational culture of a police organisation.

The SAPS Code of Conduct was introduced in 1997, just two years after the SAPS was established. The Code was hastily drafted by an SAPS management committee because the SAPS wanted to distance itself from its predecessor, the apartheid-era South African Police. It was linked to talk of 'professionalism', and its dissemination was ad-hoc and unplanned. In 1998, a committee was established to address professional conduct, and specific measures were undertaken to institutionalise the Code and put disciplinary processes and procedures in place. However, between 2000 and 2008, there is no mention of the Code in official SAPS documents.

The NDP (published in 2012) says: 1) non-adherence to the Code should have consequences for individual members; 2) the Code should be included in disciplinary regulations and performance appraisals; 3) periodic checks should be conducted to ensure that the Code is understood and practised by all members; 4) disciplinary cases involving a breach of the Code should be dealt with as a priority; 5) members charged with misconduct should be required to leave their stations immediately until allegations are tested and cases finalised; and 6) professionalism should be attained through enforcing the Code of Conduct and ethical policing. In other words, the SAPS must develop indicators through which behaviour can be evaluated, with clear disciplinary and career consequences for those whose conduct is judged to be unprofessional.

Between 2012 and 2016, the Code of Conduct is mentioned in official documents again. The 2016/17 Annual Performance Plan says the SAPS has not adequately internalised its Code of Conduct, which should permeate all policing activities, providing a practical and moral compass for members. But the 2016/17 performance indicators make no mention of the Code.

Codes of conduct are not legally enforceable, so they rely on disciplinary and management regulations. SAPS disciplinary regulations are meant to ensure continuity in disciplinary application, but they also provide officers with huge discretion in how they interpret the seriousness of an offence. This is likely to have been a rational choice, but it contrasts with the NDP's desire for a swift and consistent response to misconduct. On 1 November 2016, new SAPS disciplinary regulations came into effect, but these do not seem to have been amended with the NDP in mind. This may not mean that the SAPS has ignored the NDP, but rather that it believes its existing regulations are adequate.

The SAPS is a member of the Southern African Regional Police Chiefs Co-operation Organisation (SARPPCO) whose Code of Conduct is clear, succinct and measurable. It could consider including elements of the SARPPCO Code of Conduct such as: a clear statement on the use of force; a clear statement on torture or related abuse; a clear statement on the treatment of detainees; a clear statement on the treatment of victims; a clear statement on respect for the rule of law; a clear statement on trust; a clear statement on confidentiality; and a clear statement on property rights.

Responding to a question about whether internal SAPS disciplinary procedures take the place of criminal sanctions, Dr Faull said disciplinary measures are separate from criminal procedures but

they may run at the same time. The burden of proof in internal cases is lower – on the balance of probabilities beyond a reasonable doubt – than in criminal cases. The SAPS is required to report criminal cases within a specified period to IPID for investigation.

*'The SAPS Code of Conduct could include elements of the SARPCCO Code of Conduct such as: a clear statement on the use of force; a clear statement on torture or related abuse; a clear statement on the treatment of detainees; a clear statement on the treatment of victims; a clear statement on respect for the rule of law; a clear statement on trust; a clear statement on confidentiality; and a clear statement on property rights.'*

### *The role of the Western Cape Provincial Police Ombudsman*

**Adv. Vusi Pikoli** responded that policing conferences have been discussing the same issues since before the 1996 Constitution was passed. The SAPS Act, 1995, was passed when the 1993 Interim Constitution was in effect. Interim regulations that govern CPFs go back to 2001 and they have never been finalised.<sup>12</sup> The 1996 Constitution establishes civilian secretariats for the defence force and for the police to ensure that South Africa does not go back to an era where power is abused. The SAPS Act needs a serious overhaul to make sure it is consistent with the 1996 Constitution in respect of democratic policing, specifically with regard to its accountability and oversight provisions.

The NDP says '[s]afety is a core human right. It is a necessary condition for human development, improving quality of life and enhancing productivity. When communities do not feel safe and live in fear, the country's economic development and the people's wellbeing is affected, hindering their ability to achieve their potential'.

Section 198 of the Constitution says 'national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'. There is no national police station, nor are there provincial police stations, South Africa only has local police stations. There is a direct correlation between an efficient police service and public trust in the police. How good a station is usually reflects how good the commander is.

*'Safety is a core human right. It is a necessary condition for human development, improving quality of life and enhancing productivity. When communities do not feel safe and live in fear, the country's economic development and the people's wellbeing is affected, hindering their ability to achieve their potential.'*

Section 206(3) provides that each province is entitled to: monitor police conduct; oversee the effectiveness and efficiency of the police service; promote good relations between the police and the community; assess the effectiveness of visible policing; and liaise with the Cabinet member responsible for policing with respect to crime and policing in the province. The office of the Western Cape Provincial Police Ombudsman is established by the Western Cape Community Safety Act, 2013. Policing is a national competency, but the Constitution provides that provinces have an important role to play in policy without necessarily taking management and control out of the hands of the National Commissioner. Section 206 entitles provinces to investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community. While any province may establish a statutory structure to monitor police conduct, the Western Cape is currently the only province to have done so.

The provincial Act provides that if the provincial Ombudsman is of the opinion that another organisation may do a better job or a matter belongs there, it may be referred there. The Ombudsman's office deals with service delivery – poor investigations, unacceptable behaviour, lost dockets and a breakdown in relations between police and community. IPID's mandate derives from section 18 of the IPID Act – to investigate action bordering on criminality. The Ombudsman refers certain matters to IPID and IPID refers certain matters to the Ombudsman's office. When complaints about the police have been given to the police, the Ombudsman allows the SAPS to complete the investigation and then determines whether a proper investigation has been done.



The critical components of the three-way partnership to hold the police accountable – police, civilians, and the MECs responsible for community safety – do not have the same understanding and expectations of one another.

The SAPS has its own understanding of what democratic policing is. National and provincial police officials say that they are tired of having to answer to so many oversight bodies, even though oversight is a constitutional imperative. Generally speaking, the security services don't want to be called to account, and when they do account for themselves, they do so reluctantly.

### *The role of CPFs*

CPFs have their own understandings of their role. And the provincial executive authorities have their own understanding of how to measure the functionality of CPFs. CPFs complain about being undermined by the police; the police say that CPFs want to do things they may not do. Police say that CPFs don't want to have a say. There are 16 SAPS clusters and about 150 police stations in the Western Cape. The Provincial Commissioner is responsible for establishing CPFs at station and cluster level, and station commanders and cluster commanders are supposed to be members of their respective CPFs. Station commanders have discretion over whether to make resources and assistance available to CPFs. Relationships between station commanders and CPFs are good in some cases, but not in others.

The Western Cape Department of Community Safety has a budget of about R5 million that CPFs can apply for to conduct their programmes. With regard to CPF participation in the formulation of annual safety plans, CPFs normally do not play any role; station commanders usually draft those plans and CPFs just agree with what they say. Things are not as they should be. The challenge is to make civilian oversight bodies work. An MOU between the three parties is necessary, otherwise the partnership will fail.

### *Accountability at station level*

Adv. Pikoli noted that he has observed a gap between what SAPS managers at national and provincial level say, and what police officers on the ground *do*. For example, in one case, his office investigated the death of a two-year old boy at the hands of his mother's boyfriend. When she went to the police station to report a case of domestic violence, police officers refused to take a statement. They accused her of being drunk. Drunk or not drunk, anyone has the right to lay a charge. The NGO Mosaic assisted her in getting a protection order the following day, which was ignored and the boy was beaten to death. Without effective police station leadership, he said, it will be impossible to provide safety and security.

### *The use of force*

**Prof. Christof Heyns**<sup>13</sup> reported that while the use of force by police affects many rights – such as the right to bodily security, and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment – the ultimate concern about the use of force is the use of *lethal* force. This is directly related to the right to life. The right to life has two basic components: 1) the right to be protected against the arbitrary deprivation of life unlawful in terms of international law; and 2) if there is a reasonable suspicion that a death was unlawful, there must be a proper investigation and accountability. Failure to investigate is in itself a violation of the right to life.

The right to life was internationally recognised in the ICCPR and came into effect in 1976.<sup>14</sup> The UN Code of Conduct for Law Enforcement Officials<sup>15</sup> of 1979 was the beginning of the international legal framework regulating the use of force, in particular the use of lethal force. After the lack of any official investigation into the assassination of Benigno Aquino in Manila in 1983, a group of legal and forensic science experts drew up the Minnesota Protocol on the Investigation of Potentially Unlawful Death, including protocols on how autopsies should be conducted. The principles and guidelines of this protocol were adopted by the UN in 1989<sup>16</sup> and 1991<sup>17</sup> respectively. In 1990, a set of international standards on the use of force and firearms by law enforcement officials came into being.<sup>18</sup>

New documents in the field include a joint report of two UN Special Rapporteurs on the management of assemblies presented to the UN Human Rights Council in 2016 which includes a section on the



*Prof. Christof Heyns, Institute for International and Comparative Law in Africa*

use of force and ways to avoid situations where force may have to be used.<sup>19</sup> The Minnesota Protocol was revised and made much broader to bring it up to date with advances in forensic science, DNA analysis and clear international law principles about the legal duty to investigate. This document is a restatement of the entire field of law and accountability and it was adopted by the UN in 2016.<sup>20</sup> It covers the process from the crime scene to the investigation, to the autopsy, to the inquiry (which must be prompt, impartial and independent).

The UN Human Rights Committee is in the process of drafting a new general comment on the right to life which includes a section on when force may be used, including the principles of legality, precaution, necessity, proportionality and accountability. The UN Office on Drugs and Crime has been working on a new handbook on the use of force by police for some years, and this will be an important point of reference in future.

The ACHPR general comment on the right to life in the African Charter on Human and Peoples' Rights is a progressive document that describes when police may use force, the consequences of using force, and related matters.<sup>21</sup> The ACHPR's Luanda Guidelines deal with arrest, police custody and pre-trial detention on the continent.<sup>22</sup> The ACHPR document on managing assemblies emphasises the need to apply non-violent methods before using force and firearms, and subject to legality, necessity and proportionality.<sup>23</sup> These documents are good because they see the use of force in a holistic context and state the need to avoid using force in the first place through proper management.

The Office of the UN High Commissioner on Human Rights has been engaged with the issue of less lethal weapons. Technology has made new, less lethal weapons possible, for example Tasers. Studies are being done on the use of Tasers, body-worn cameras and their impact on privacy, and the remote-controlled use of force (armed drones). There is no guideline for the use of drones in the UN system. It may not be unlawful to use drones, and it is already legal in places like North Dakota, but their use is potentially very dangerous.

The basic rules on the use of force are fairly entrenched, and they have become more nuanced. The requirements of necessity and proportionality are well established, and there is an increasing

emphasis on a third substantive requirement – the duty of precaution. Necessity is emerging as a factual test of the use of force. It has a qualitative component – is the use of force necessary? It has a quantitative component – is the least force being used? It has a temporal component – is the use of force urgent? Proportionality is a value judgement of the benefits of the use of force versus the harm it causes. Force may be used to, for example, prevent a theft or stop an assault or save a life, but it must be proportionate to the harm it is being used to prevent. It may be necessary to use a firearm to stop a thief, but doing so may not be proportional to the aim of preventing a theft. The third component – precaution – is a duty. Feasible precautionary steps must be taken to avoid the use of force becoming necessary. Police must have proper protective gear, less lethal weapons and proper training to avoid having to use force to protect themselves. The duty is going increasingly upstream. For example, were police ready for a demonstration because they knew it was coming? If they were not prepared, they may end up using force that would not have been necessary had they been properly prepared.

Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that law enforcement officials may only use firearms to kill when there is a threat to life and the threat is imminent. If there is a threat but it is not imminent (i.e. it is not measurable in seconds), officials may only shoot to stop, and in the case of serious threats of injury that are imminent, they may only shoot to stop.

*'There are at least three other South African laws that deal with the use of deadly force or firearms, none of which meets generally accepted international standards, and all of which set different standards.'*

The SAPS Act mentions the use of force briefly, but just to say that a police member may only use the minimum force that is reasonable in the circumstances. There are at least three other South African laws that deal with the use of deadly force or firearms, none of which meets generally accepted international standards, and all of which set different standards. The Correctional Services Act, 1998, says that firearms may be used to stop an escape, but it does not qualify this by saying there must be an immediate threat of death or bodily harm. This may not meet the standard of temporality or necessity. The Regulation of Gatherings Act, 1993, says that firearms may be used to protect movable or immovable property. The use of force is internationally permissible to prevent imminent death or serious bodily injury, but not to protect property. Section 49 of the CPA allows for the use of lethal force or a firearm where, for example, a suspect is fleeing and is suspected of a crime involving serious bodily harm. Although this amended provision is an improvement on the previous version of section 49, it may not sufficiently meet the temporality requirement because it permits the use of force even if the threat is not necessarily immediate or an emergency.

It may make sense to write a single act that deals with the use of deadly force or firearms into one set of standards that brings in the element of precaution, requires least force, and requires that lethal force may only be used when there is a serious threat to bodily security that is also immediate.

Responding to a question about whether adherence to human rights guidelines is seen as an optional 'soft law' rather than a requirement to adhere to internationally accepted standards, Prof. Heyns said that many guidelines begin as soft law, but, if they become incorporated into laws, they can be considered to be hard law. For example, the Universal Declaration of Human Rights is not binding, but it has been incorporated into so many laws that it can now be considered 'hard' law. The right to life is mentioned in the Constitution of almost every country in the world. The basic principles of use of force and use of firearms by law enforcement officials started out as soft law, but they have become widely accepted as internationally accepted principles for decision-making. The standards are stronger and more established than they were ten years ago. So, for example, section 49 of the CPA now falls short of international standards regarding precaution and necessity. Danger must be imminent, measured in seconds, or grave, before lethal force may be used.

*'It may make sense to write a single act that deals with the use of deadly force or firearms into one set of standards that brings in the element of precaution, requires least force, and requires that lethal force may only be used when there is a serious threat to bodily security that is also immediate.'*

## Questions, comments and discussion points

### *Torture*

Pointing out that torture is a violation of human rights, a participant asked what happens to the reports, for example, the IPID report of 2011 that highlighted incidents of torture. He asked whether the SAPS did something with the report, whether the Portfolio Committee on Police did something with it, or whether the Portfolio Committee on Justice took this report seriously. Nobody answered this question.



*Chumile Sali of the Social Justice Coalition and Lawson Naidoo of the Council for the Advancement of the South African Constitution*



Goedgedacht Forum @GGD\_Forum Apr 20

Where is the commitment and will to implement the legislation and the vision of the NDP?



Niñha\* @Naewizzle Apr 20

Maj Gen responds saying numbers shouldn't be this high, but the levels of torture are receiving the highest attention #HumanRightsPolicingSA



Goedgedacht Forum @GGD\_Forum Apr 20

We need to have a common understanding of terms like democ. policing, community involvement & the role of the CPFs #HumanRightsPolicingSA



Niñha\* @Naewizzle Apr 20

We are aware of violence and killing of policing. As SAHRC we are greatly pained every time a policeman is killed. #HumanRightsPolicingSA

## V THEME: POLICING, HUMAN RIGHTS AND INSTITUTIONAL CHALLENGES

### Panel discussion

**Chairperson:** Fola Adeleke (SAHRC).

**Panellists:** Alexandra Hiropolous (African Centre for Migration and Society, University of the Witwatersrand); Louise Edwards (APCOF); Donna Evans (Sonke Gender Justice); Munya Katemba (Cultuur en Ontspanningscentrum [COC] Netherlands); Sasha Gear (Just Detention International [JDJ] South Africa); Brigadier Mbali Mncadi (SAPS).



*The SAHRC's Fola Adeleke chairs the panel on policing human rights and institutional challenges*

### *Policing and migrants in South Africa*

**Alexandra Hiropolous**<sup>24</sup> observed that the Department of Home Affairs (DHA) administers the Immigration Act, 2002, which regulates arrest and deportation, and the Refugees Act, 1998. The DHA is in the process of drafting a new White Paper on International Migration.<sup>25</sup> Current South African immigration law has a strong security and sovereignty-centred agenda, influenced by the dominant themes of security, border control and the use of law enforcement to manage migration and deport illegal migrants. Although the Constitution affords documented and undocumented non-nationals the right to life, dignity, equality before the law, administrative justice, basic education and health care, labour rights and rights if they are arrested or detained,<sup>26</sup> few foreigners see their rights realised in practice.

It is widely believed that migration into the country is both rampant and illegal, but realistic estimates based on triangulation from a variety of data sources indicate that two to three million non-nationals (documented and undocumented migrants, refugees and asylum seekers) currently live in South Africa, representing an increase of 238% over the 15-year period since the 1996 census. Most of them are Zimbabweans (about 1.5 million people), and there are significant numbers of refugees and asylum seekers from Mozambique, the Democratic Republic of Congo, Angola, Somalia, Congo and Rwanda.<sup>27</sup>

Under the Refugees Act, the first domestic refugee legislation incorporating both the UN's 1951 Refugee Convention<sup>28</sup> and the African Union (AU) Refugee Protocol,<sup>29</sup> South Africa has a policy of self-settlement and self-sufficiency for asylum seekers and refugees, including the right to work and

the right to access public health care and education services. In practice, asylum seekers experience extreme difficulties lodging their claims at the DHA and accessing government services. In spite of a good legal framework, many of South Africa's policies and actions to control immigration have been inhumane and unconstitutional, leading legal organisations to regularly turn to the courts to ensure that migrants' rights are realised.<sup>30</sup>

Immigration and police officers often use random pedestrian spot checks or area sweeps to apprehend persons with the intention of removing them from the country. Deportations of undocumented migrants have risen steadily since 2000, with Zimbabwean deportations reaching 150 000 in 2005. Since then, Zimbabweans have by far been the largest national group, mainly due to the heightened activity of the police in immigration enforcement. By the end of 2015, over 15 000 migrants had been 'repatriated' by the South African government. The processes leading to deportation often occur outside of the law<sup>31</sup> and violate the procedural guarantees put in place by both domestic and international law.

Migrants can be detained for criminal conduct at correctional facilities in terms of common law for processing and deportation or expulsion in terms of the Immigration Act, but there is very little information about the detention of non-nationals at police stations. They must be held separately from criminal suspects. Lawyers for Human Rights site visits showed a 'complete denial of any constitutional or civil rights at police station detention centres'. Persistent arrest and detention of unaccompanied minors is taking place at police stations (whether classified as places of detention for immigrants or not) and at Lindela.<sup>32</sup>

Since the first outbreak of xenophobic violence in 2008, there has been some progress in the response of both the SAPS and the DOJ&CD to foreigner victimisation, including improved coordination between national police, civil society and UN agencies. This has led to improved communication and to a number of instances where police have been able to respond quickly to outbreaks of violence. However, such instances appear to be the exception rather than the rule and much remains to be done to ensure the protection of migrants' rights.<sup>33</sup>

Increasingly, the response of police to their evident inability to combat high levels of crime has been to blame foreign nationals and to target them for arrest and deportation. In 2015, both the Minister of Police and the National Commissioner, in Parliament, blamed South Africa's rising crime on foreign nationals without substantiating these claims in any way. After the xenophobic attacks of June 2015, Operation Fiela was put in place, supposedly to protect foreign nationals, but it soon turned into a general 'crime-fighting initiative' that involved sweeping arrests of over 40 000 individuals between April and December 2015. The SAPS conducted night raids that targeted foreign nationals with the South African National Defence Force and the DHA that frequently involved heavy-handed policing and the lining up of foreigners on public streets. There have been many outbreaks of xenophobic violence in several urban centres, accompanied by looting and the murder of foreign nationals, and police have been accused in many cases of not intervening to protect foreigners or their property.

*'Increasingly, the response of police to their evident inability to combat high levels of crime has been to blame foreign nationals and to target them for arrest and deportation.'*

In response to xenophobic attacks in Johannesburg in February 2017, Mayor Herman Mashaba said the Johannesburg Municipal Police Department would conduct regular raids on alleged drug dens. He is also establishing municipal courts to deal with by-law issues with their own magistrates and prosecutors who will not fall under the National Prosecuting Authority. The constitutionality of this initiative is questionable.

The Minister and Deputy Minister of Police should make the respect for migrants and their rights a priority. SAPS members should receive training in migrants' rights and the legal framework surrounding detention for criminal offences and violations of the Immigration Act. Support should be provided for detainees' procedural rights, such as the right to make submissions, and they should receive access to free legal counsel and access to information in a language they understand. Measures should be taken to avoid the arrest and detention of unaccompanied minors. There should be monitoring to ensure that police stations that are also immigration detention centres

comply with the minimum standards of detention in accordance with the Immigration Act and the 2014 *SAHRC v Minister of Home Affairs High Court* ruling. Consideration should be given to amending the SAPS Code of Conduct to include clear statements about torture, the treatment of detainees or victims, property rights and confidentiality, among other things.<sup>34</sup> Legislative, judicial, civil society and community oversight is necessary to hold the SAPS accountable, backed up by action plans, time frames and clear responsibilities. A permanent inspectorate should be established to visit persons held in terms of the Aliens Control Act in any police, prison or other detention facility in order to monitor compliance with arresting guidelines, the Act, and with the constitutional provisions relevant to arrest and detention.

### *Policing and sex workers in South Africa*

**Donna Evans**<sup>35</sup> claimed that marginalised and stigmatised groups in society – such as migrants, sex workers (SWs), homeless people, drug-users and others – are particularly at risk of human rights violations and abuses of power by the police and members of public and private security forces.

The Sexual Offences Act, 1957, criminalises all aspects of sex work, including SWs, their clients and any persons living off the proceeds of sex work. Police have wide powers over SWs, including the use of public by-laws and regulations. SWs are often arrested without police following necessary procedures. For example, SWs report being arrested while doing their shopping, visiting friends, walking along public streets, etc. This creates a hostile and violent environment. SWs regularly lodge complaints about police abusing their rights with advocacy organisations such as SWEAT,<sup>36</sup> Sonke Gender Justice, the Women's Legal Centre, the Wits Reproductive Health and HIV Institute, and the Treatment Action Campaign. Very few successful outcomes have been reported through the use of existing police complaints mechanisms.

Sonke conducted research from February 2016 into the policing of SWs in Gauteng and Mpumalanga (focused specifically on the policing environment and civilian oversight of the police) in order to produce a body of research recording the contemporary policing experiences of SWs at grassroots level. Participants had to be adult SWs who had had experience with the police, and who were willing to consent to being interviewed about these experiences. They were contacted through existing service organisations, outreach and sex-worker contacts.

A total of 120 male, female and transgender SWs participated in the work described in the draft case study report: 63 provided qualitative interviews, including street, informal brothel, and tavern-based SWs; and 57 participated in a survey on policing experiences, which was conducted at one semi-rural location in Gauteng. This work was supplemented by ongoing intensive interviews with service providers who provide support services to SWs across health and advocacy domains. Research participants reported: torture, rape, sexual assault, systematic corruption through bribes or demands for free sex, assault, assault with intent to cause grievous bodily harm, unlawful arrest and detention, refusal to take reports of criminal conduct, refusal to investigate complaints, harassment, intimidation, threats and kidnapping.

She said that this research project is intended to: 1) be an invitation for interested people, organisations, government actors (including the SAPS), civil society organisations and others to participate in cooperative problem-solving around the policing of sex work; 2) establish new ways of working through gender-based violence frontline policing challenges; 3) strengthen the pathways for dialogue and positive partnerships; and 4) reduce the volume of human rights abuses being experienced by SWs by supporting rights-based policing approaches. The report is due to be completed in May 2017.

### *AU Guidelines for the Policing of Assemblies*

**Louise Edwards** reported that the ACPHR Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa<sup>37</sup> will be launched in Niamey, Niger, on 8 May 2017. This is a set of progressive normative 'soft law' standards that bridges the gap between abstract ideal human rights standards for the policing of assemblies and real operational policing standards. Because assemblies are so visible, professional policing of such events has the potential to improve relationships and trust between communities and police.

This document was produced after extensive consultation with police services, ministries of justice and national human rights institutions across Africa to make sure that it reflects the collective aspiration of the stakeholders. The meaning for South Africa is that there is now a model for transforming abstract ideas into operational standards derived from the Constitution, the SAPS Act, NIs, SOs and standard operating procedures.

The starting point for the Guidelines was the African Charter on Human and Peoples' Rights, other relevant international human rights instruments and national constitutions to give effect to the right that everyone has to assemble freely with others, and the right to freedom of expression. The Guidelines state that limitations imposed by a state party on the right to assemble freely with others must be in accordance with limitations on the right to assemble in terms of regional and international human rights standards, including: the right to life; freedom from discrimination; equality of, and equal protection before, the law; the right to dignity and freedom from torture and other ill-treatment; the right to liberty and security of the person; the right to have a cause heard; freedom of movement; freedom of conscience; the right to privacy; the right to receive and disseminate information and to express opinions; the right to free association; and the right to participate freely in public affairs and to have equal access to public services.

The document restates and reimagines the role of police in an assembly operation. It marks a shift from police being arbiters of what is permissible in terms of mode and content to facilitating the right to freedom of assembly and of expression. The Guidelines explain in concrete terms how to put that into practice. The starting point for the police is to facilitate the enjoyment of the right to assemble, so responses and limitations imposed by police on assembly organisers and participants are clearly articulated in a range of tests: legality, proportionality, necessity and precaution. It puts the emphasis of the police response first on facilitation and steps that should be taken before reaching the assembly point to minimise the need for the use of force once the police get there. It moves from de-escalation to a graduated escalation in the use of force. It provides both an operational policing framework and a framework for the community and police to set expectations for the policing of assemblies.

*'The starting point for the police is to facilitate the enjoyment of the right to assemble, so responses and limitations imposed by police on assembly organisers and participants are clearly articulated in a range of tests: legality, proportionality, necessity, and precaution.'*

The document recognises that the police maintain a monopoly on the use of force. The police have powers of arrest and detention and powers to disperse an assembly, but the Guidelines show how to avoid having to use force. If the presumption of the right to assemble is the starting point, the principle of precaution requires legislative and operational steps to be taken even before police are deployed into an assembly operation. It does this through the legal framework, officer training and specialist training in such areas as communication and understanding crowd behaviour. The document has a strong emphasis on communication and transparency, risk assessment and contingency planning in order to inform dynamic responses, use of force (based on legality, proportionality, necessity and precaution), command and control, tactics, deployment, visibility of police, visibility of armaments, debriefing and review, and accountability. The Guidelines provide a strong role for national human rights institutions and civil society in monitoring and engagement, conduct and review.

South Africa has an obligation to implement the Guidelines because it is a member of the AU, and the question is how it will do this. Although this is a soft law instrument, it is an authoritative interpretation of binding African Charter rights, and it is the standard against which South Africa will be reviewed at continental level. APCOF will be embarking on a process to support the implementation of the Guidelines across the African continent.

### *Policing and the needs of key populations*

According to **Munya Katumba**, working with key populations – groups that are most likely to be exposed to HIV or to transmit it – is critical for slowing down the spread of HIV. Key populations include men who have sex with men, LGBTI<sup>38</sup> people, migrants and mobile populations, SWs, clients



of SWs, drug users and prisoners. Key populations are vulnerable because they experience stigma, discrimination, moral judgement, prejudice and violence in their communities, in health facilities and when engaging with law enforcement officers. When key populations engage in illegal behaviour (and partly because of community pressure, discrimination and arrest quotas), police tend to act more harshly towards them, criminalising them unnecessarily, exposing them to health risks, a criminal record and organised criminals. This decreases the likelihood that they will 'recover' from a brush with the law. Understanding the impact of criminalisation, stigmatisation and discrimination on key populations can empower police and other law enforcement agencies to fulfil their mandates while also upholding the constitutional principles that should guide the police's daily interactions with everyone.

*'Understanding the impact of criminalisation, stigmatisation and discrimination on key populations can empower police and other law enforcement agencies to fulfil their mandates while also upholding the constitutional principles that should guide the police's daily interactions with everyone.'*

There is a general lack of empathy among police officers towards LGBTI people because they don't understand much about sexual orientation or gender identity. There are an estimated 153 000 SWs in South Africa. HIV prevalence in female SWs in Johannesburg is 71.2%.<sup>39</sup> A 2013 SWEAT survey of 1 129 SWs showed that 55% (and 66% of SWs who operate on the street) had experienced police violence in the previous 12 months. During a COC (Cultuur en Ontspanningscentrum, from the Netherlands) needs assessment, most SAPS officers said they understood that sex work is done primarily for financial reasons, but most associated sex work with crime, particularly theft. There was little recognition of the rights of SWs. Many arrests of SWs were made to reach arrest targets, to reduce the sex worker population and to put pressure on crime syndicates.

Police recognised that drug use is a priority concern and that it is increasing among young people. However, moral views and personal opinions influenced police attitudes towards people who use drugs. Although the SAPS provides its own members with access to substance-use disorder treatment services, these services are not provided to other people who use drugs. Police arrest them and they are processed in the criminal justice system.

There is a need for training to address gaps in police knowledge about sexual orientation, gender diversity, SWs' rights and substance users. There should be interventions to shift the attitudes of police so that they better understand key populations and be more empathetic towards them. The SAPS should review the use of output measures (arrest and crime statistics) as a measure of impact (how effective the police are at improving safety and security for all).

The SAPS has developed LGBTI guidelines and needs help to implement protocols around handling transgender people in order to improve relationships with LGBTI people, both inside and outside the SAPS. The expected benefits of police sensitisation training include: better protection of human rights and vulnerable people as per the NDP and best practice policing; improved employee wellness in respect of acceptance of different sexual orientations in the SAPS, management of drug use among members, and management of gender-based violence involving members; reduced HIV infections among police members; fewer civil complaints and lawsuits; fewer deaths in custody; better law enforcement services in respect of sex work, drug use and LGBTI issues; improved relationships with communities; and better adaptation to the changing legal environment in respect of pending hate crimes legislation and the possibility that sex work may be decriminalised.

### *Conditions of detention in SAPS cells*

**Sasha Gear** stated that conservative estimates suggest the SAPS detains about two million people every year. When law enforcement officials detain anyone, they take absolute responsibility for protecting the detained person from harm in terms of international law, the Constitution and SAPS policy. A detained person becomes immediately vulnerable because he or she is absolutely dependent on officials for just about everything. IPID's annual reports on deaths in custody and deaths that resulted from injuries in detention show that there is a high risk of violence in custody. There is a general upward trend of deaths in detention – in 2015/16, there were 94 such deaths. Other causes of deaths in detention (illness, suicides and injuries prior to detention) highlight shortcomings in the care of detainees.

In 2003, the SAPS adopted its Policy on the Prevention of Torture and the Treatment of Persons in Custody in terms of the UN Convention Against Torture and put standing orders in place. This policy uses the UN definition of torture and lays out requirements for the care of detainees. For example, it recognises that children and people under the influence are vulnerable, and requires that mentally ill people, people with disabilities and those accused of violent crimes should be detained separately.

There was an emphasis in the SAPS 2002–2005 Strategic Plan on the safety of suspects and prisoners, but this was lost in subsequent years. The 2010/11 plan mentioned detainee wellbeing, but only in relation to health. The priority concern in respect of custody was on preventing escapes. The 2015 plan does not mention safety in custody as a strategic objective, but it does mention deaths in custody as a strategic risk. The standing orders have been updated a couple of times, but improving conditions of custody do not appear to have been a high priority.

Some of the offences that people are arrested for – for example drunkenness and ‘failure to comply’ – are petty, and there are far more appropriate sanctions available to the SAPS. Just Detention International has been told in a number of forums that numbers of arrests are part of the performance measures for SAPS officers at station level. This fuels detention for petty offences. One night in detention can destroy someone’s life.

*‘Numbers of arrests are part of the performance measures for SAPS officers at station level. This fuels detention for petty offences. One night in detention can destroy someone’s life.’*

In one case, a man (‘Jack’) was arrested for talking back to police officers after his partner was arrested for driving under the influence. He was angry about police referring to them as faggots. They arrested him, apparently to teach him a lesson. ‘Your mouth is big, hey’, said an officer. ‘Let’s see how big it stays. You’ll see what happens to someone like you. We’ll talk in the morning.’ He was raped in the cell and released the next day without any charges. He should not have been arrested in the first place. In this case, the police officer was aware of Jack’s vulnerability and apparently put him in a place where he would be punished. Police have to endure huge pressures. They should be trained in how to manage stress, and how to remain composed and professional. No officer can be allowed to put people in custody for being impertinent.

Police need to have a more nuanced analysis of vulnerability when allocating detainees to cells, for example, when dealing with LGBTI inmates or first-time inmates. Men who reported having been



*Brigadier Mbalu Mncadi of the SAPS*

raped, both gay and first-time detainees, were put in cells with obviously seasoned prisoners. Police are required to keep registers of people in custody, but there is no record of who was kept in which cells. It is important to keep such records to be able to identify inmates who harm other inmates.

There should be surveillance and monitoring of the safety of people in custody. In many police stations, cells are far away from the rest of the station and cries for help may not be heard. The SAPS torture policy requires that police check on inmates every hour. This seems to take place at predictable hourly intervals, so attacks can be timed to take place when no police are likely to be nearby.

### *Instruments to promote human-rights compliant policing in the SAPS*

**Brig. Mbali Mncadi**<sup>40</sup> noted that the constitutional mandate of the SAPS is to prevent, combat and investigate crime; to maintain public order; and to protect and secure the inhabitants of the Republic – a mandate that includes all elements of the Bill of Rights. The new SAPS Division for Management Interventions will be doing quality assurance and intervening where necessary. The SAPS has put a number of national instructions, standing orders, and standing operating procedures in place to protect human rights.

For example, NI 2 of 2012 provides minimum standards for the treatment of victims of crime, including the rights to respect and dignity, information and practical assistance, including practical assistance to people with special needs, for example people with communication disabilities. Braille communication materials have been developed and are being distributed in a targeted way. A process is under way to consider providing sign language interpreting. Emergency reporting is being made available to people with speech and hearing impairments. Universal access arrangements (ramps, ablution facilities and lowered counters) have been implemented in certain locations.

NI 2 of 2010 deals with the treatment of children in conflict with the law.<sup>41</sup> NI 3 of 2010 provides instructions on the care and protection of children requiring emergency protection. NI 3 of 2008 provides instructions on how to deal with consensual sexual acts between children.<sup>42</sup> NI 7 of 1999 gives instructions for dealing with domestic violence.<sup>43</sup> NI 1 of 2014 gives instructions on how to deal with older persons.<sup>44</sup> NI 4 of 2015 deals with trafficking in persons.<sup>45</sup>

Standard Operating Procedure 1 of 2016 describes how the SAPS must deal with foreign nationals, emphasising the importance of treating them with respect and dignity. SO 361 governs the treatment of awaiting-trial detainees, including access to amenities and visitors. SO 341 prescribes arrest procedures, and SO 349 deals with access to medical treatment.

A number of policy directives to protect human rights are in the process of being drafted. For example, the Draft Guidelines on Provision of Services to Persons with Disabilities focuses on reasonable accommodation and addressing barriers to accessing services (e.g. disabilities that affect the ability to communicate) and the identification of persons with disabilities. This document has been drafted in consultation with organisations representing persons with disabilities, Chapter 9 institutions and the Department of Social Development (DSD). This document is awaiting sign-off.

Draft Standard Operating Procedures for Lesbian, Gay, Bisexual, Trans-Sexual and Intersex (LGBTI) Persons have been produced in consultation with the LGBTI Task Team (convened by the DOJ&CD) and CSOs in the field. This document is currently being revised. A Draft Standard Operating Procedure on the Handling of Sex Workers has been produced in consultation with the Sexual Offences Task Team and CSOs in the field. This document is currently under revision. A Draft Standard Strategy on Community Policing Forums is being produced to improve the functionality of CPFs.

Turning to the implementation framework, she said the National Crime Combatting Strategy provides a practical framework for addressing crime at local level in preventative, reduction, stabilising and normalising modes. It is based on information-driven policing (crime-threat analysis and crime-pattern analysis) that informs interventions to address crime in a specific locality.

The National Crime Prevention Strategy of 1996 deals with the causes, predisposing factors and opportunities for crime by mobilising partnerships in government and communities. Inter-sectoral initiatives to deal with locality-specific conditions are monitored through participation in various interdepartmental and multi-sectoral programme and task teams.

Ongoing training and capacity-building learning programmes are in place to improve the SAPS response in respect of victim empowerment, domestic violence, first responders to sexual offences, and to enhance the work of FCS units. A learning programme on dealing with vulnerable persons is currently under development.

*'Ongoing training and capacity building learning programmes are in place to improve the SAPS response in respect of victim empowerment, domestic violence, first responders to sexual offences, and to enhance the work of the SAPS Family Violence, Child Protection and Sexual Offences (FCS) units. A learning programme on dealing with vulnerable persons is currently under development.'*

The SAPS frameworks on how police should deal with victims and offenders makes it clear they must respect them and preserve their dignity. Any problems should be reported to station management, the shift commander or the station commander on duty to be dealt with immediately. Any person who is not satisfied with the response that he or she receives from the manager on duty should immediately report the matter to cluster management, to provincial management and to oversight bodies.

The SAPS is engaged in ongoing monitoring, inspection and quality assurance. Different divisions conduct their own inspections. National instructions enable on-site managers to apply corrective or disciplinary procedures when necessary. There are also NIs which guide first- and second-level inspections of the 1 143 police stations in South Africa. When specific station-level problems have been identified through inspections, or as a result of complaints from the public, or in response to crime trends, an investigation will be done and recommendations will be made with action plans for station managers to implement.

Where an issue requires an interdisciplinary intervention, for example dealing with unaccompanied minors, the SAPS works in a cross-cutting way. An interdepartmental protocol is being developed with the DHA and the DSD to govern the treatment of unaccompanied minors. First responders (police stations, patrollers, emergency services, sector commanders, border police/port of entry police) take the first statements and provide immediate victim support and assistance. There may be community and stakeholder interaction for preventative interventions and programmes. FCS units provide specialised child-focused investigations, victim assistance and preventative interventions based on offender and victim profiles. The DPCI conducts investigations into organised crime links, for example child trafficking syndicates. Tertiary support may be provided by SAPS forensic science capacity, for example ballistics and DNA analysis.

## **Questions, comments and discussion points**

### *Early warning systems for xenophobic violence*

A participant said it is not possible to separate policing from its social context. Local government can create an enabling or a disabling environment for rights-compliant policing. The South African Local Government Association (SALGA), the Department of Cooperative Governance and Traditional Affairs and municipal integrated development planning should all be playing a part in building early warning systems for xenophobic violence and other potential threats that bring in all necessary government institutions. The DOJ&CD has drafted a national action plan to address xenophobia for public comment.<sup>46</sup>

### *Expressions of morality undermine the rights of sex workers*

A participant said that the elephant in the room about the abuse of SWs' human rights is that arguments about the right to work and human rights for all are undermined by expressions of morality, including police and other government officials, that is, the idea that sex work is 'immoral'.

### *Community oversight bodies put pressure on the SAPS*

A participant said that communities often express policing needs as a need to police SWs and migrants rather than a need to protect vulnerable people.

### *The role of CPFs*

A number of participants spoke about CPFs and their role. They should monitor police performance rather than identify policing priorities. They are supposed to play an oversight role, yet they are dependent on station commanders for transport and facilities for holding meetings. MOUs would clarify the relationship between the SAPS and CPFs. The draft strategy on CPFs has not yet been circulated to the provinces and this is important because it affects the role of MECs and the CSP.

### *Do not establish a separate SAPS Directorate for Human Rights*

A participant responded to a suggestion that the SAPS should establish a separate Human Rights Directorate by saying this is contrary to everything that is good practice. He said respect for human rights should be part of the key performance indicators for every component of the SAPS.

### *Bring in the voices of other players in the criminal justice system*

A participant said that discussions about policing and human rights should include representatives of other players in the criminal justice value chain – the National Prosecuting Authority, Department of Correctional Services, DSD, DHA and the DOJ&CD.



**POWER987News @POWER987News Apr 21**

**Hiropoulos says SAPS is unfairly targeting foreigners and accuse them of being responsible for rising crime levels**



**Goedgedacht Forum @GGD\_Forum Apr 21**

**The treatment of migrants and refugees need to be brought into line with constitutional and human rights imperatives**



**Goedgedacht Forum @GGD\_Forum Apr 21**

**Policing responses to assemblies needs 2 b looked at. Protests are not criminal activities but a constitutional right**



**Goedgedacht Forum @GGD\_Forum Apr 21**

**Gr8 concern @ treatment by the police, soliciting of bribes & low conviction rates in cases reported by sex workers**



**Andrew Faull @AGFaull Apr 21**

**SAPS helps its officials access #drug treatment but asks them to arrest and prosecute public users.**



**Goedgedacht Forum @GGD\_Forum Apr 21**

**Oversight is needed of people in detention. Incarcerated people are vulnerable and at risk. More needs to be done**

## VI CLOSING

SAHRC CEO **Chantal Kissoon** thanked all the participants for sharing their perspectives on how to advance human rights in policing. Some of the key points which emerged during the conference were: the need for effective oversight, participation, communication, transparency, cooperation, consequence management, and M&E. There are obvious shortcomings in the current legal framework for the use of lethal force. It is clear that the SAPS is open to constructive suggestions about rights-compliant policing and how to improve service delivery. The SAHRC acts as an enabler, a facilitator, and an influencer (e.g. when making submissions on draft legislation). It would like to have more focused discussions with stakeholders on specific issues and to influence the content of SAPS training material.

**Sean Tait** reported that clear direction had emerged for amending the SAPS Code of Conduct so that it becomes a value statement, aligned with the NDP, bringing together policing and human rights, coupled with an appropriate M&E framework. The SAHRC has a clear role to play here. Amendments are due to be made to the IPID Act to make it more independent. IPID should have stronger links with oversight bodies. Amending the SAPS Act to bring it in line with the 1996 Constitution should not be delayed any more. An election is due in 2019, and there will be a new administration. It is important to have a good legislative framework in place for the kind of police service people want in South Africa.



*The SAHRC's Chantal Kissoon closes the Dialogue*

## ENDNOTES

- 1 State institutions supporting constitutional democracy listed in Chapter 9 of the Constitution of the Republic of South Africa, 1996.
- 2 More detail is available in Dugmore, M. 2017. *Substantive areas of police reform: Developing a new policing reform agenda*. Cape Town: African Policing Civilian Oversight Forum (APCOF Policy Paper no. 15). Ms Dugmore's PowerPoint presentation is available from APCOF ('Melanie Dugmore Policing and human rights in SA 20 Apr 2017').
- 3 The Goldstone Commission of Inquiry (reports from 1991–1994) and the Marikana Commission of Inquiry (2012).
- 4 The Khampepe Commission (2005) and several Constitutional Court decisions: *Helen Suzman Foundation v President of the RSA and Others*; the *Glenister* cases; and *Mc Bride v Minister of Police and Another*. Dr Peter Waddington's review of the Boipatong massacre described the police response to, and investigation of the attack 'woefully inadequate' and 'incompetent'. He found serious shortcomings in command and control and in contingency planning.
- 5 The Khayelitsha Commission of Inquiry and the Marikana Commission of Inquiry.
- 6 Which matches stations and staff with policing needs in specific locations.
- 7 An independent complaints unit that oversees the DPCI.
- 8 The SAPS faced civil claims totalling R14bn in 2015/16.
- 9 Maj-Gen Mamotheti responded by saying the SAPS is responding at the highest level to the recommendations of the Marikana Commission in respect of the use of force. Ongoing training of members and the adoption of appropriate policies will help SAPS members to know how to deal with evictions and other land matters.
- 10 Maj-Gen Mamotheti responded by saying the SAPS building plan for five years goes to the Department of Public Works. Resource allocation is a challenge at a time when budgets are being cut, the population is growing, and there is a high influx of people into certain areas. The provincial commissioner has the power to reallocate resources. He or she may decide to move members from Cape Town to Nyanga or Khayelitsha.
- 11 Dr Faull's PowerPoint presentation ('Andrew Faull The NDP and the SAPS Code of Conduct 20 Apr 2017') is available from APCOF.
- 12 Although it was pointed out during the conference that some work has been done on CPFs, particularly their relationship with the CSP.
- 13 Prof. Heyns was the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions between 2010 and 2016 where he dealt extensively with the right to life, the death penalty, deaths in custody and the use of force. He is currently a member of the UN Human Rights Committee, a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by state parties.
- 14 It came into effect in South Africa on 10 March 1999.
- 15 Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.
- 16 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council Resolution 1989/65 of 24 May 1989. <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.
- 17 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/.12 (1991). <http://hrlibrary.umn.edu/instreet/executioninvestigation-91.html>.
- 18 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 1990. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.
- 19 UN Human Rights Council. Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, 4 February 2016. [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A.HRC.31.66\\_E.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A.HRC.31.66_E.docx)
- 20 The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. <http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf>.
- 21 General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4). <http://www.achpr.org/instruments/general-comments-right-to-life/>.

- 22 ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. [http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines\\_arrest\\_police\\_custody\\_detention.pdf](http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf).
- 23 ACHPR Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. [http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr\\_guidelines\\_on\\_policing\\_assemblies\\_eng\\_fre\\_por\\_ara.pdf](http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf).
- 24 Ms Hiropolous's PowerPoint presentation ('Alex Hiropolous Policing migration in South Africa 21 Apr 2017') is available from APCOF.
- 25 Department of Home Affairs. Towards a White Paper on International Migration: Guidelines for Public Consultation, 15 June 2016. [http://www.home-affairs.gov.za/files/GUIDELINES\\_FOR\\_CONSULTATION\\_29062016.pdf](http://www.home-affairs.gov.za/files/GUIDELINES_FOR_CONSULTATION_29062016.pdf).
- 26 Section 35 of the Constitution provides, inter alia, that detainees must be informed about the reason for their arrest and detention, be given a hearing in court within 48 hours after the time of arrest, and be detained in facilities which conform to standards of human dignity. According to the Immigration Act, the SAPS has a duty to provide support to the Department of Home Affairs (DHA) regarding the implementation of immigration laws, especially in the arrest of those violating the provisions of the Act, such as entering the country without legal documents. Section 41 of the Act empowers police officers to detain, without warrant, a person suspected of being an illegal foreigner in order to verify their status. The person may be detained for up to 48 hours while their status is verified, provided there are reasonable grounds for such detention. According to immigration regulations, where it cannot be immediately verified, an immigration officer should be called in person to determine the status of the individual.
- 27 Most migrants in South Africa now come from Africa and Asia, including significant numbers of refugees and asylum seekers – predominantly from Zimbabwe, Mozambique, the Democratic Republic of Congo, Angola, Somalia, Congo and Rwanda – primarily in search of economic opportunities, protection from political or domestic persecution, violence or natural disasters and less frequently, in search of passage to a final destination elsewhere, typically Europe, North America and Australia. International migrants are generally younger and more ethnically diverse than before 1994, and there is a much larger proportion of females. South Africa's post-apartheid migration policy encourages a mix of circular, permanent and transit migration.
- 28 Convention Relating to the Status of Refugees adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>.
- 29 AU Convention Governing Specific Aspects of Refugee Problems in Africa. <http://www.achpr.org/instruments/refugee-convention/>.
- 30 For example, in *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014], the SAHRC instituted proceedings relating to the systemic and persistent practices of unlawful detention of undocumented migrants at the Lindela Repatriation Centre. The court ordered that no person may be detained for a period exceeding 30 calendar days from the date on which that person was first arrested and detained, pending his or her removal from the country, in the absence of a valid and lawful warrant issued by a magistrate's court on good and reasonable grounds for a period not exceeding 90 calendar days in terms of the Act. No person may be detained for more than 120 days. In *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (CCT 18/03) [2004], the court ordered that a detained person must appear before a magistrate's court judge 48 hours after arrest, must appear in person at a magistrate's court within 30 days of detention, and that the DHA and the Minister of Police must ensure their offices are compliant. The LHR case shows over a decade of disregard by the DHA of existing legislation and legal rulings.
- 31 Initial approaches must, in law, be based on reasonable suspicion that an individual is a non-national. All suspects should be advised that reasonable grounds exist that they are an alien and should be advised of their right to satisfy the arresting officer that they are entitled to be in the country. Arresting officers should assist such suspects, within reasonable means, to obtain or retrieve documentation from their place of residence, employment or otherwise that would evidence their right to be present in the country.
- 32 South African Human Rights Commission Report into the Arrest and Detention of Suspected Undocumented Migrants Launched in Parktown, Johannesburg, 19 March 1999. <https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>.
- 33 Breen, D & Nel, JA. 2011. South Africa: A home for all? The need for hate crime legislation. *SA Crime Quarterly*, 38: 34–41.
- 34 Although the NDP does ask for the SAPS Code of Conduct to be measurable.



- 35 Ms Evans's PowerPoint presentation ('Donna Evans Policing and sex workers 21 Apr 2017') is available from APCOF.
- 36 Sex Workers' Education and Advocacy Task-force.
- 37 ACHPR Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. [http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr\\_guidelines\\_on\\_policing\\_assemblies\\_eng\\_fre\\_por\\_ara.pdf](http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf).
- 38 Lesbian, gay, bisexual, transgender, intersex.
- 39 From a 2015 study of sex workers in Cape Town, Durban and Johannesburg by the University of California, San Francisco (UCSF) and others.
- 40 Brig. Mbali's PowerPoint presentation ('Mbali Mncwadi SAPS Back to Basics 21 Apr 2017') is available from APCOF.
- 41 Giving effect to the Child Justice Act, 2010.
- 42 Offences under the Sexual Offences (Criminal Law and Related Matters) Amendment Act, 2007.
- 43 Offences under the Domestic Violence Act, 1998.
- 44 Giving effect to the Older Person's Act, 2006.
- 45 Offences under the Trafficking in Persons Act, 2013.
- 46 National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 – 2021) – Draft for public consultation. <http://www.justice.gov.za/docs/other-docs/nap.html>. Alex Hiropolous responded by saying wherever there is a lack of leadership at local government level, informal groups start to act as enforcers. During the upsurge of xenophobic violence in Mamelodi, residents' groups started to demand that members of the community had to have stamps. SALGA agreed on a mechanism that would report to the MEC for safety and security, but there was resistance from local councillors who remain convinced that there are eight or nine million migrants in South Africa. There has been very little action on the DOJ&CD action plan. It should not be the job of the SAPS to police migration. Most migrants are arrested for lack of documentation, not for criminal offences. Policing resources should not be deployed to target SWs and foreign nationals, they should be targeted at real policing priorities. The SAPS standard operating procedure on the treatment of migrants does not appear to have been implemented at station level yet.

## PARTICIPANTS

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## The South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is South Africa's national human rights institution. It is mandated by Section 184 of the Constitution of the Republic of South Africa, Act 108 of 1996 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 the Republic.

The SAHRC is bestowed with the power to:

- investigate and to report on the observance of human rights;
- take steps to secure appropriate redress where human rights have been violated;
- carry out research; and
- to educate.

## 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.



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