



African Policing Civilian Oversight Forum

Submission

South African Law Reform Commission's Discussion Paper 166: Reform of the Arrest Dispensation

27 March 2025

INTRODUCTION

1. APCOF welcomes the opportunity to provide input on Discussion Paper 166: Reform of the Arrest Dispensation. We are encouraged by the Commission's work to propose reform to the use and conditions of arrest in South Africa, given the concerns raised by us, and others, about rates of arbitrary arrest. For further discussion on this issue, please refer to [our assessment](#) of South Africa against the provisions of the African Commission on Human and Peoples' Rights Luanda Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa, and the outcomes of the South African Human Rights Commission and APCOF [national dialogue on police and human rights of 2022](#), which focused on arbitrary arrest.
2. While Discussion Paper 166 makes a number of important proposals, we submit that further consideration should be given to the following issues:
 - a. Ensuring oversight of arrests by private individuals
 - b. Strengthening oversight and accountability of private security personnel
 - c. Further emphasis on alternatives to arrest and arrest as a measure of last resort
 - d. Due regard to principle of legality and necessity in arrest procedures
 - e. Addressing the risk of discriminatory arrest practices
 - f. Regulating the use of force during arrest

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ENSURING OVERSIGHT OF ARRESTS BY PRIVATE INDIVIDUALS

3. In response to the constitutionality of private persons exercising police powers in Chapter 2 of the Discussion Paper, we note the pragmatic approach taken to this issue by the Commission, which seeks to balance public safety and security challenges with the resource challenges experienced by the South African Police Service (SAPS). However, we are concerned that this approach presents significant risks from an oversight perspective, particularly in a situation where the responsiveness and effectiveness of the SAPS is an issue that must urgently be addressed. These risks include the potential for abuse, wrongful arrest, excessive force, and violation of constitutional rights. The Discussion Paper does not propose sufficient oversight to regulate these arrests, potentially creating a gap in accountability, transparency, and human rights protections.
4. To mitigate these risks, a legal framework must be established that outlines the legal responsibilities, limitations, and accountability mechanisms for private individuals (in their capacity as peace officers as discussed throughout the Discussion Paper) performing arrests, and a clear use of force restriction must be established to prevent excessive or unnecessary violence during such arrests.
5. The Civilian Secretariat for Police Services (CSPS) could play an important role in developing national policy guidelines on private arrests, ensuring that the legal framework aligns with constitutional rights and international human rights standards. These guidelines should specify who may lawfully conduct a private arrest, under what circumstances, and the procedural safeguards that must be followed. The CSPS could also facilitate public education programmes to ensure that the community understand their rights and limitations when effecting an arrest.
6. Additionally, the Independent Police Investigative Directorate (IPID) should be mandated to investigate complaints of abuse or misconduct arising from private arrests. Given the potential for discrimination, including racial profiling, and excessive use of force in the private arrest context, IPID should be empowered to receive, investigate, and take action on reports of wrongful or abusive private arrests, including those involving private security personnel. To ensure this, a formal complaints mechanism should be introduced, allowing individuals who have been subject to an unlawful private arrest to make a complaint directly with IPID.

STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF PRIVATE SECURITY PERSONNEL

7. The Discussion Paper details the current regulation of private security personnel in South Africa, which is principally conducted under the Private Security Industry Regulation Authority (PRISA) through its responsibility for setting standards and ensuring compliance with legal guidelines. However, while PSIRA provides an important regulatory function, significant gaps in enforcement and compliance mechanisms remain. The rapid growth of the private security industry, which now employs more personnel than the SAPS, has led to concerns over accountability, excessive use of force, and human rights violations, particularly when

exercising what are essentially public policing functions. APCOF has previously conducted research on this issue in our [policy paper on regulating private security in South Africa](#).

8. One significant concern is that PSIRA lacks the necessary enforcement powers and resources to effectively regulate the number of private security providers currently operating in South Africa. While PSIRA is mandated to register companies, conduct inspections, and enforce compliance, many private security firms operate outside of its effective oversight, leading to incidents of abuse, corruption, and impunity.
9. To address these issues, PSIRA's authority and enforcement capacity should be strengthened. This includes expanding its investigative powers, increasing penalties for non-compliance, and ensuring that all private security personnel are held accountable for rights violations. Furthermore, there is a need for greater cooperation between PSIRA, IPID, and the CSPS to ensure that private security personnel engaged in what are essentially public policing are subject to the same level of scrutiny as public law enforcement officials from SAPS or municipal policing services.
10. We also recommend the inclusion of human rights training for all private security personnel. Many security officials lack formal training in the legal limits of their authority, leading to excessive force, arbitrary arrest, and discriminatory profiling practices, particularly in relation to marginalised communities, informal traders, and people exercising their right to freedom of assembly. Human rights training should include guidance on lawful arrest procedures, proportionality in the use of force, non-discrimination, and accountability mechanisms for rights violations. This training should be mandatory for licencing and renewal of registration, and incorporated into PSIRA's existing certification practice.

ALTERNATIVES TO ARREST AND ARREST AS A MEASURE OF LAST RESORT

11. A key concern for APCOF, as noted in the Discussion Paper, and drawn from its work in ensuring that policing practices comply with international and regional human rights standards, is the principle that arrests should be a measure of last resort, and that non-custodial alternatives should be prioritised whenever possible.
12. Our work with the African Commission on Human and Peoples' Rights in the development and implementation of the [Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa](#) and our subsequent [review of South Africa's compliance with the Guidelines](#) emphasises the urgent need in South Africa to ensure that arrests are only carried out when strictly necessary and that law enforcement authorities with the power to arrest ensure that they explore all possible alternatives before making an arrest. This approach, articulated under the Guidelines, and supported by the United Nations Standard Minimum Rules for Non-custodial Measures (the [Tokyo Rules, 1990](#)), stress the importance of non-custodial measures to ensure the least restrictive means are used in criminal justice enforcement.

13. While the Discussion Paper refers to the alternatives to arrest available under the Criminal Procedure Act 51 of 1977 (including summons and written notice to appear), in our view it does not go far enough in ensuring that they are prioritised over arrest. What is lacking is the proposal of a robust framework to guide police discretion in applying alternatives to arrest. This is an issue because international and regional human rights law requires clear legal safeguards to prevent arbitrary arrest, particularly for minor, non-violent offences. International good practice – including that outlined in the Luanda Guidelines – requires that:
- a. Arrest should only be carried out when necessary to prevent an imminent crime or to ensure court attendance when no other alternatives are available (Luanda Guidelines, Principle 4).
 - b. Police must be required to document in registers relating to arrest and charge the specific reasons why alternatives to arrest were not used in a given case.
 - c. Arrests should never be used as a form of punishment, coercion, or to harass.
14. However, the Discussion Paper does not mandate that law enforcement justify their decision to arrest instead of using a summons or written notice. Without such safeguards, there is a risk of arbitrary or unnecessary arrests.
15. The Discussion Paper also does not emphasise the need for specialised training for law enforcement personnel regarding the availability and application of alternatives to arrest. International and regional good practice would require training in relation to the following:
- a. The principle of proportionality in arrests, ensuring that minor offences do not result in unnecessary arrest and custody.
 - b. Alternative dispute resolution mechanisms, and how law enforcement officials should be equipped to resolve minor disputes without resorting to arrest.
 - c. Human-rights compliant arrest procedures, which consider whether a less restrictive alternative is available before making an arrest.
16. Without a distinct focus on police training on alternatives to arrest, arrest as the default approach of law enforcement officials will continue to be the primary response, despite existing non-custodial options. This overuse of arrest contributes to overcrowding in remand detention facilities, which in itself is a violation of the rights of detainees to be held in humane conditions under international and regional human rights law.
17. To promote alignment of South Africa’s framework for arrest with international and regional standards relating to alternatives to arrest, interventions are required in terms of the current legal and policy framework, in addition to strengthening both the capacity of police to implement alternatives, and oversight and accountability for their decisions. Therefore, we recommend that consideration be given by the Commission in relation to the following issues:

a. Strengthening legal frameworks for alternatives to arrest

This can be achieved through an amendment to the Criminal Procedure Act that explicitly provides that arrest should only be used as a last resort, requiring police officers to provide a written justification for not using a summons or written notice in the documentation they complete in processing an arrest. Furthermore, the Act can also include a statutory presumption in favour of non-custodial alternatives for minor, non-violent offences.

b. Enhancing police training and capacity building

Officials with the power to arrest in South Africa should be subject to mandatory human rights training on the appropriate use of alternatives to arrest, coupled with training on conflict resolution and mediation to prevent unnecessary criminalisation of disputes.

c. Strengthening oversight and monitoring of arrest practices

Internal disciplinary procedures within SAPS must be strengthened to address these, and other challenges. In the [2022 dialogue on policing and human rights](#), it was highlighted that ‘even if a case were to proceed to a disciplinary hearing, there is a high likelihood that errant police officers would face no consequences’ (p. 7). This requires strict adherence to internal disciplinary procedures, accompanied by criminal prosecutions where appropriate. Furthermore, the CSPA could be encouraged to establish a monitoring system that tracks the use of arrest versus alternatives, with annual reporting to the Parliament of the findings. IPID could also be statutorily empowered to investigate cases where police officers fail to apply alternatives to arrest in situations where they were appropriate.

PRINCIPLES OF LEGALITY AND NECESSITY IN ARREST PROCEDURES

18. Both the International Covenant on Civil and Political Rights (ICCPR, article 9), and the Luanda Guidelines emphasise that arrest should only be conducted in strict compliance with the law, with clear procedural safeguards to prevent arbitrary arrest. The principle of legality requires that laws governing arrest must be precise, accessible, and predictable, while the principle of necessity mandates that arrest should only occur when absolutely required to achieve a legitimate law enforcement objective.

19. These are fundamental principles of human rights law, and while the Discussion Paper discusses legal provisions for arrest, we recommend that further consideration be given to recommendations that require the development of a clear legal framework to ensure police compliance with these principles. The framework should ensure that arresting officers are held accountable for failing to meet the legality and necessity thresholds.

20. Consideration be given to recommending that section 39 of the Criminal Procedure Act be amended to explicitly provide that an arrest is unlawful if it fails to meet the principles of legality, necessity and proportionality. To support the implementation of this statutory provision, a mandatory recording requirement for all arrests should be introduced which require officers to document the specific legal basis and necessity of the arrest. As per above, we also request that the Commission give consideration to recommending an expansion of IPID's mandate to investigate police actions as they relate to arbitrary or unlawful arrest.

ADDRESSING THE RISK OF DISCRIMINATORY ARREST PRACTICES

21. The Discussion Paper does not propose safeguards to prevent racial profiling, unlawful stop-and-search practices, or discriminatory arrests. Profiling, based on race, nationality, socio-economic status, or political activity in the context of an arrest constitutes a human rights violation in accordance with the African Charter on Human and Peoples' Rights (ACHPR, Article 2), including as interpreted by Principle 6 of the Luanda Guidelines, and Article 26 of the ICCPR. Issues regarding profiling and discriminatory practices in law enforcement in South Africa have been studied and raised consistently, including by [Africa Criminal Justice Reform](#), where concerns were raised regarding discrimination on the basis of race, gender, and socio-economic status in law enforcement in South Africa. However, there is limited information in the Discussion Paper on the disproportionate impact of arrests on marginalised groups, including in relation to [homeless persons](#) who are subject to arbitrary arrests under municipal by-laws and [migrant and undocumented individuals](#) who are detained without proper procedural safeguards, amongst others.

22. The Commission is encouraged to consider additional recommendations for the introduction of anti-discrimination safeguards in arrest procedures, including prohibitions in law, and policing procedure, against profiling and arbitrary detention. Police should also be required to compile disaggregated data on arrest demographics to monitor discriminatory practices, coupled with training on profiling on grounds understood to be an issue in South Africa, including race, gender, socio-economic status, and migration status.

REGULATING THE USE OF FORCE DURING ARREST

23. The Discussion Paper does not adequately deal with issues relating to excessive use of force during arrest, despite documented concerns against police brutality, including APCOF's 2021 [quantitative study on the use of lethal force by the police in South Africa](#). Reports from IPID, the South African Human Rights Commission and civil society organisations have consistently highlighted cases where force was used disproportionately or unlawfully during arrest, leading to serious injuries, deaths and violations of human dignity. Without explicit legal provisions regulating the use of force during arrest, there remains a significant gap in accountability, police training, and oversight, which enables a culture of impunity and excessive force within South African policing.

24. The [United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#) (1990), and the African Commission's [Guidelines on the Policing of Assemblies by Law](#)

[Enforcement Officials in Africa](#) and [General Comment No. 3 on the Right to Life](#), establish clear international standards regarding the use of force during arrests. These standards emphasise that force must be used only when strictly necessary, must be proportionate to the threat posed, and should always aimed at de-escalation rather than punishment or intimidation. Law enforcement officials are required to prioritise non-violent means, such as negotiation, persuasion, or warnings, before resorting to force. These principles are particularly important in ensuring that arrest procedures uphold human rights, prevent abuses, and do not contribute to unnecessary violence in law enforcement operations.

25. The Commission should give consideration to recommending either:

- a. Ideally, the enactment of statutory instrument which provides police officers with a comprehensive and non-contradictory legal framework for the use of force. The Panel of Experts on Policing and Crowd Management Established by the Minister of Police in terms of the Recommendations of the Marikana Commission of Inquiry has already recommended that the South African Parliament consider future legislation, given the fractured and inconsistent articulation of use of force law across a number of statutes in South Africa.
- b. Less ideally, but as an interim measure ahead of new legislation, an amendment to the Criminal Procedure Act to explicitly provide that force may only be used when absolutely necessary and proportionate to the level of resistance or threat posed.

26. Based on the findings of a trial in the Western Cape, the Commission may also consider recommending the introduction of [mandatory body-worn cameras for police officials](#) conducting arrests. Such an intervention could be a valuable part of strengthening the broader accountability framework, enabling the documentation of interactions, deter misconduct, and provide evidence in cases of allegations of excessive force.

27. Finally, we recommend that the Commission review the recommendations made in APCOF's 2021 [quantitative study on the use of lethal force by the police in South Africa](#), which address both preventive and accountability elements in reducing incidents of lethal use of force by the police, including in situations of arrest.

CONCLUSION

28. APCOF commends the Law Reform Commission's consideration of reform to the use and conditions of arrest in South Africa, but urges that additional measures be considered to ensure that arrest aligns with South Africa's constitutional and international human rights obligations. We strongly recommend that the Commission strengthen its report and findings in relation to:

- a. Ensuring oversight of arrests by private individuals
- b. Strengthening oversight and accountability of private security personnel
- c. Further emphasis on alternatives to arrest and arrest as a measure of last resort

- d. Due regard to principle of legality and necessity in arrest procedures
- e. Addressing the risk of discriminatory arrest practices
- f. Regulating the use of force during arrest

29. We appreciate the opportunity to contribute to this important reform process, and welcome further engagement on these issues.

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