



African Policing Civilian Oversight Forum

Submission on the proposed revised National Policing Standards for Municipal Police Services on arrest and the treatment of an arrested person until such person is handed over to a Community Service Centre Commander

9 July 2024

1. Introduction

The African Policing Civilian Oversight Forum welcomes the opportunity to make this submission on the proposed revised national policing *Standards for Municipal Police Services on arrest and the treatment of an arrested person until such person is handed over to a community service centre commander* (the proposed Standards). We are a not-for-profit trust based in Cape Town, working on issues of police accountability and governance in Africa. More information about APCOF is available at www.apcof.org.za.

Our submission is divided into two parts. The first part provides reflections about the need for coherence between the proposed Standards and other relevant regulatory guidance on arrest and detention. The second part makes recommendations to strengthen the proposed Standards.

1. Need for coherence between the proposed Standards and other regulatory guidance on arrest and detention

In preparing this submission, APCOF has reviewed other relevant standing orders and national instructions applicable to the South African Police Service (SAPS). This includes: National Instruction 11 of 2019 on arrest, treatment and transportation of an arrested person; National

African Policing Civilian Oversight Forum

Building 23B, Suite 16, Waverley Business Park, Wyecroft Road, Mowbray, Cape Town, 7925

PostNet Suite 63 Private Bag x11, Mowbray, 7705

Tel: +27 21 447 2415

www.apcof.org.za

Trust no. IT1900/2012

PBO 930041858, NPO 119 688- NPO

Trustees: A van Wyk (Chair), G Cronje (Treasurer), S Africa, T Gandidze, P Tlakula, E van der Spuy

Instruction 12 of 2019 on arrest and treatment of illegal foreigners; National Instruction 13 of 2019 on the management of persons in custody of the south African police service; National Instruction 1 of 2016 on the use of force in effecting an arrest; and National Instruction 2 of 2010 on children in conflict with the law.

We make three key points of consideration to the drafters of the standards.

First, it is not clear to us why there is need for a separate set of standards that regulate arrest and detention by members of Municipal Police Services, and why they don't simply mirror the standard set for SAPS, where appropriate. The separation inevitably risks a higher or lower standard being set. In our view, the proposed Standards should replicate the relevant SAPS National Instructions. This will prevent gaps or contradictions, and strengthen the extent to which there is a coherent regulatory framework that provide guidance on arrest and detention across all policing agencies.

Second, the proposed Standards do not provide comprehensive guidance on all aspects of the arrest procedure, as found in the National Instructions. This includes the treatment of non-nationals; the use of restraining measures; the prevention of torture and other forms of abuse; transportation; and the management of children in conflict, with the law among others. These elements should be dealt with in any revisions to the proposed Standards, in line with the guidance provided by the relevant National Instructions.

Third, we are aware that the Criminal Procedure Act (CPA) is currently under review, which may result in amendments to provisions on arrest and detention. Any significant amendments to the CPA may then require revision to existing policing standards, including the proposed Standards. We therefore recommend that finalisation of the proposed Standards be held over until the CPA amendments have been finalised.

2. Observations regarding the proposed Standards

2.1. Definition of "arrest"

Section 8 of the proposed Standards set out the elements of the arrest procedure but does not define an arrest. Defining arrest is important because it is a serious restriction on the right to liberty and movement which triggers a range of procedural safeguards to protect the life, dignity and privacy of people subject to arrest procedures. A clear definition of arrest will mitigate against

any ambiguities in the application of those safeguards, and the corresponding obligations of police officials.

We recommend that the proposed Standards should define the term “arrest” in the definition clause. We recommend that the definition offered by the African Commission on Human and Peoples’ Rights in its Luanda [Guidelines](#) on the Conditions of Arrest, Police Custody and Pre-trial Detentions in Africa be used as a reference point, as it draws from regional and international standards:

Luanda Guidelines section 1(a): “...*arrest refers to the act of apprehending a person for the alleged commission of an offence, or to the action of a competent authority to arrest and detain a person as otherwise authorised by law*”.

2.2. Use of force

Proposed Standard 8(2) does not regulate the use of force during an arrest in accordance with international standards on the use of force by law enforcement officials. Our concern is that it does not address the six core international standards on the use of force which aim to ensure that the use of force is an exceptional measure, with constraints and limitations on its use in circumstances that are legitimate. We welcome the approach taken to the use of force in the proposed National Municipal Police Standards on Crowd Management during Gatherings and Demonstrations, which provide clear guidance on the six principles in the context of public order management. We recommend that this approach be taken to the use of force during arrest through an amendment to the proposed Standards.

The six standards are set out below, and we recommend that these be reflected in the proposed Standard:

- **Legality:** There must be a basis in domestic law for the use of force in law enforcement that complies with applicable international legal standards for the use of force. The legitimate aims of law enforcement should be clearly defined, and the laws and regulations relating to the use of force should be publicly known. Compliance with the principle of legality requires that all core international standards on the use of force are contained in the laws and regulations relating to the use of force (i.e. necessity, proportionality, non-discrimination, precaution and accountability).

- **Precaution:** This relates to the duty to plan and conduct law enforcement operations in a manner consistent with minimising injury and damage, and to respect and preserve human life. Precaution also applies to both how law enforcement officials are instructed to use force, and the means available to them (e.g. do they have access to appropriate less-lethal equipment and sufficient training).
- **Non-discrimination:** Law enforcement officials are not permitted to discriminate against any person on the basis of a protected attribute under international law and the South African Constitution, and any deprivation of life resulting from a discriminatory use of force is arbitrary and therefore unlawful.
- **Necessity:** Force is only permitted in circumstances where it is strictly necessary, as an exceptional measure where all reasonable efforts have been made to achieve a legitimate law enforcement objective through non-violent means. Where force is required in the circumstances, it must be the minimum necessary, and only used in pursuit of a legitimate law enforcement purpose. When the need for force has passed, any further application of force will be arbitrary and therefore unlawful.
- **Proportionality:** Where force is unavoidable, law enforcement officials should only act in proportion to the seriousness of the offence, and the legitimate objective to be achieved. The use of deadly force, including firearms, should be restricted to situations in which there is an imminent threat to life.
- **Accountability:** Law enforcement officials should be accountable for unlawful use of force. Mechanisms for effective accountability and monitoring should be in place, and law enforcement officials should provide their full cooperation.

The African Commission on Human and Peoples' Rights has provided specific guidance on the application of these six core principles in its recent [*Study on the Use of Force by Law Enforcement Officials in Africa*](#). We recommend this Study to the drafters of the proposed Standards as it provides a clear, accessible and up-to-date summary of international standards. The study also underscores the importance of reflecting the six core standards in national law and regulation to ensure clarity for law enforcement officials on the substantive elements of the use of force (i.e. when force may be used and how) and the procedural aspects (i.e. mechanisms of accountability to ensure those standards are being observed).

2.3. Restraining measures

Proposed Standard 9(5) provides some guidance on the use of restraining measures, but is limited in scope. To ensure that the use of instruments of restraint comply with international standards, the proposed Standard should provide more comprehensive guidance to Municipal Police Services members, including limitations on their use and the manner in which they should be applied.

In particular, we are concerned the proposed Standards do not include guidance on the following aspects, which are set out in the National Instruction 13 of 2019 on Management of Persons in the custody of the SAPS:

- The circumstances in which restraining measures may be used;
- The basic principles that underpin the use of restraining measures;
- Recording incidents of the use of restraining measures;
- The ways in which a person in custody should be handcuffed;
- The restraining of persons while being transported by a motor vehicle; and
- Restraint of mentally ill persons.

APCOF also recommends that further human rights safeguards be considered for inclusion in the proposed Standards, drawing from our work to develop standards based on core human rights principles with police agencies in the East African region. This includes: ¹

- Arrested persons should only be restrained by means of handcuffs if they pose a danger to the police, others, themselves or pose a risk of escape. It is the duty of the Municipal Police Officer to assess potential harm to the suspects, if two persons are handcuffed together.
- If an arrested person does not pose a danger to the police or others, and does not pose a risk of escape, handcuffs and other restraints should not be applied.
- In assessing whether the person poses a danger or is likely to escape, factors that should be considered include:

¹ These guidance have been drawn from “Human rights training manual for police in the East African Community”, available at: <http://apcof.org/wp-content/uploads/2016/05/APCOF-Training-TRAINERS-2015-LARGE-FORMAT-WEB1.pdf>. pages 145 to 146.

- The seriousness of the offence;
 - Any violent actions or threats prior to arrest (even if the person is not arrested for an offence of violence); and
 - Factors such as age and gender, physical condition, size and apparent strength and fitness.
- If a person has an injury or condition that would be aggravated by handcuffing, and physical restraints is necessary, alternative options should be applied if possible;
 - Metal or fabric restraint should be considered over plastic restraints. However, if plastic restraints are used, they should be replaced with metal or fabric alternatives at the earliest possible opportunity;
 - Instruments of restraints, including handcuffs and leg-irons, should never be applied as a punishment;
 - People who are restrained by handcuffs or other means are at additional risk of dying from asphyxia (a lack of oxygen), if they experience difficulty breathing, and cannot change their position. Factors that increase the risk of asphyxia include:
 - If the arrested person is prone (lying down) whilst also handcuffed; and
 - Pressure placed on the neck, chest or any other part of the upper body by the person who is applying the restraints.
 - The prone position should be avoided for people who are restrained, especially during transport. If it is unavoidable, the arrested person must be constantly monitored to ensure that they can breathe;
 - Body weight should not be used on the upper body to hold down the arrested person, unless this is unavoidable. If it is unavoidable, it should only be for a short duration; and
 - Whether or not they are restrained by handcuffs or other means, arrested persons should be kept under constant observations, until they are placed in a police vehicle or custody facilities

2.4. Transporting the arrested person

Proposed Standard 9(7) makes provisions for the transportation of persons in custody. However, we are concerned that this guidance is not sufficient to ensure basic safety requirements are met, and facilitate the safe and secure transportation of arrested persons. Importantly, National

Instruction 11 of 2019 on Arrest, Treatment and Transportation of an arrested person contain important guidance in this context.

To ensure the safe, secure and humane transportation of arrested persons in accordance with international standards, the proposed Standard should set additional requirements. This should include the provisions of National Instruction 11, in addition to requiring Municipal Police Services members to ensure that:²

- Transport vehicles are searched prior to and following the transportation of an arrested person;
- Detainees who are, or have been, violent and who continue to present a risk to others, and those suffering from mental health challenges, must not be transported with other detainees;
- Women should be transported separately from men, and be accompanied by women officers;
- When placing a detainee in a vehicle, care should be taken with individuals, especially those with physical disabilities or who are restrained with handcuffs or leg restraints, as this can increase the risk of injury; and
- Arrested children should not be transported with adults

2.5. Children in conflict with the law

APCOF notes with concern the absence in the proposed Standards of a provision on children in conflict with the law. We note the standards contained in SAPS National Instruction 2 of 2010 on Children in conflict with the law, which provide operational guidance to police officers on dealing with children in conflict with the law, and call for their inclusion into the proposed Standards.

We recommend that the proposed Standards be amended to make provision for children in conflict with the law. Guidance can be drawn from existing legal and policy framework, including the South African Constitution, the Child Justice Act 75 of 2008, the Children's Act 38 of 2005, and

² These guidance have been drawn from "Human rights training manual for police in the East African Community", available at: <http://apcof.org/wp-content/uploads/2016/05/APCOF-Training-TRAINERS-2015-LARGE-FORMAT-WEB1.pdf>. Page 146

National Instruction 2 of 2010 on Children in conflict with the law. In terms of the Child Justice Act, this should include provision of the following safeguards:³

- A child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest, which may include the following 5 circumstances:
 - Where the police official has reason to believe that the child does not have a fixed residential address;
 - where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested;
 - where the police official has reason to believe that the child poses a danger to any person;
 - where the offence is in the process of being committed; or
 - where the offence is committed in circumstances as set out in national instructions referred to in section 97(5)(a)(ii).
- A warrant of arrest issued under section 43 of the Criminal Procedure Act in respect of a child must direct that the child be brought to appear at a preliminary inquiry.
- The police official arresting a child must, in the prescribed manner-
 - inform the child of the nature of the allegation against him or her;
 - inform the child of his or her rights;
 - explain to the child the immediate procedures to be followed in terms of this Act; and
 - notify the child's parent, an appropriate adult or guardian of the arrest:Provided that if a police official is unable to notify the child's parent, an appropriate adult or guardian of the arrest. the police official must submit a written report to the presiding officer at the preliminary inquiry.
- A police official, where possible the police official who arrested the child, must immediately, but not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested of the arrest in the prescribed manner.
- If a police official is unable to inform a probation officer of the arrest, the police official must submit a written report to the inquiry magistrate at the preliminary inquiry, furnishing reasons for non-compliance, as prescribed.
- Any child who has been arrested and who remains in custody must, whether or not an assessment of the child has been done, be taken by a police official to the magistrate's court having jurisdiction, in order to deal with the matter in terms of section 5(2) to (4), as

³ Section 20 of the Child Justice Act 75 of 2008. These guidance have been drawn from the section, verbatim.

soon as possible but not later than 48 hours after arrest, in which case the provisions of section 50(1)(d) of the Criminal Procedure Act dealing with-

- Ordinary court hours;
- physical illness or other physical condition; and
- arrest outside of the area of jurisdiction of the court

apply in respect of the expiry of the period of 48 hours.

2.6. Planning for arrests

Planning and preparation for an arrest are key to the capacity of police officers to exercise their powers of arrest and detention in a safe and rights-compliant manner. Effective planning allows police officers to undertake risk assessment and mitigation in relation to an arrest, which can make such operations safer for police officers, those subject to arrest, and bystanders. Where conditions allow (e.g. if an arrest is made on the basis of a warrant), police officers should be mandated to plan for the arrest prior to effecting it.

APCOF recommends that the following be added to the proposed Standards:

- Arrests should be planned in advance, wherever possible, in consultation with an officer in charge or more experienced officer.
- Whenever possible, arrests shall be made at a time and place and in a manner that will maximise successful arrest probability and minimise danger to police and bystanders and ensure the rights of dignity and privacy.

3. Conclusion

APCOF, again, welcomes the opportunity to comment on the proposed Standard. We hope that the recommendations contained in this submission will be incorporated into any revised draft to ensure that guidance on arrest and detention for Municipal Police Service members complies with international standards. APCOF is available to provide further information related to any aspect of this submission on request.