



# African Policing Civilian Oversight Forum

## Submission to Portfolio Committee on Police

20 April 2020

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to present this submission to the Portfolio Committee on Police regarding policing practices in the enforcement of the lockdown regulations, made in terms of section 27(2) of the Disaster Management Act of 2002 (the Regulations) to combat the novel coronavirus (Covid-19). While APCOF commends the timely and decisive response from the government to challenges posed by Covid-19, we emphasise the significance of striking a balance between the promotion of public health and safety on the one hand, and the protection of non-derogable constitutional rights on the other. We believe that, even in these compelling circumstances, the provision of policing services must remain guided by principles of, *inter alia*, equality, non-discrimination, necessity and proportionality in the use of force, and be subjected to effective internal controls and external oversight to ensure accountability and transparency. The constitutional role of the South African Police Services (SAPS) has not changed and remains to:

- ensure the safety of and security of all persons in South Africa;
- uphold and guard the fundamental rights of every person as guaranteed by the constitution;
- ensure cooperation between the Service and the communities it serves in combatting crime;
- reflect respect for victims of crime and their needs; and
- ensure effective civilian supervision over the Service.

APCOF makes the following observations and recommendations to promote the required balance, and to ensure that SAPS fulfils its role within the rights-framework envisaged by the Constitution.

### 1. Oversight of SAPS

The central role played by SAPS in the enforcement of the lockdown regulations must be subject to scrutiny by its oversight bodies to ensure that police actions do not further limit rights beyond those reasonably necessary to implement a lockdown. In this regard the role of the Independent Police Investigative Directorate, the Civilian Secretariat of Police, the Police Ombud in the Western Cape and the National Preventive Mechanism under the coordination of the South African Human Rights Commission are critical.

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APCOF urges the Portfolio Committee to play a strong and proactive role by:

- conducting its own scrutiny of SAPS actions in the enforcement of the lockdown regulations. To this end, we call on the Committee to convene regular bi-monthly meetings, which are open to the public, to review police action with regards to the regulations, and to address issues as they arise.
- ensuring the oversight mechanisms listed above strengthen their outreach and access to ensure they are contactable and responsive to members of the public whose movement is restricted by the lockdown regulations, and to conduct their own monitoring and oversight.

Further APCOF commends the South African Human Rights Commission on the establishment of a civilian monitoring capacity under Section 11 of its mandate. The South African Human Rights Commission is deemed an essential service and, by extension, the monitors appointed by the Commission. APCOF urges that SAPS, through the Committee, note this and ensure that the monitors are not hindered in their activity.

## **2. Police bail and alternatives to custody**

The Committee will be aware that the Minister of Justice issued new regulations that require SAPS officers to grant bail in terms of sections 59(1) and 59A(1) of the Criminal Procedure Act and, where it is appropriate and necessary to do so, release an accused person on warning in accordance of section 56(1) of the Act. Furthermore, the regulation requires that a person arrested for a minor/petty offence not be subject to police custody, but rather released with a court date.

APCOF welcomes these measures, however, it implores the Committee to maintain oversight of the implementation by SAPS of these measures, as APCOF has received information regarding the arrest and detention of persons, who would otherwise qualify for bail under sections 59(1) and 59A(1) and/or who are accused of committing a petty offence.

## **3. Incidents of xenophobia**

APCOF is concerned about reports of xenophobic actions – including robbery of foreign-owned shops - against non-nationals on the basis of their national origin. SAPS has a critical role to play in the prevention, detection and investigation of these incidents, but in both the current and historic incidents of xenophobic violence and related hate crimes, APCOF is concerned about SAPS failure to adequately perform this role.

The Portfolio Committee should therefore call on SAPS to demonstrate whether it has adopted any specific strategy and procedures to combat and respond to xenophobic actions and other hate crimes, given the heightened risk of such conducts during this period and specifically:

- the manner in which cases relating to xenophobia and hate crimes are investigated;
- procedures for the identification of matters as xenophobia or hate crimes;
- special investigative procedures that apply to matters identified as xenophobic or hate crimes; and
- the treatment of complainants and victims, including detail on the process for obtaining victim impact statements, risk assessments and referrals for victims and complainants.

#### 4. Use of force

APCOF is concerned about reports of excessive use of force by SAPS officers in the enforcement of lockdown measures. Excessive use of force by law enforcement officials is always unlawful under international law – including in exceptional environments such as states of disaster and emergency. When security forces resort to force under a national state of disaster, they are obliged to continue to abide by the fundamental principles of international human rights law that bind all states; namely, necessity, proportionality, precaution and non-discrimination. Most importantly, the right to life is non-derogable at all times.<sup>1</sup> Section 13(3)(b) of the South African Police Service Act 68 of 1995 states “Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.”

APCOF is concerned about reports of excessive use of force, including the use of firearms and inappropriate equipment such as *sjamboks* by security forces under the national state of disaster. We are further concerned by the fact that vulnerable communities, for whom the implementation of stay-at-home rules and social distancing guidelines may be difficult or impossible, have been disproportionately affected by police violence.

Given the urgency with which the security forces were deployed, and considering that police training focuses overwhelmingly on the use of firearms and potentially lethal force,<sup>2</sup> APCOF recommends that the Portfolio Committee urge for a revision of the Covid19 Regulations to make explicit reference to the principle of the minimum use of force and the principles of necessity and proportionality, and security forces should be reminded of the importance of continued adherence to this principle during the national state of disaster including with regard to the use of less lethal equipment.

Importantly minimum force options include discussion, instruction, consultation and community engagement.<sup>3</sup> These methods should be adopted as the core operating principles of the security forces entrusted with assisting members of the public to comply with the Regulations in the face of the public health and humanitarian crisis triggered by the Covid19 pandemic.

#### 5. Private Security Industry

APCOF recognises that the private security has been declared an essential service. As the private security industry has grown over the decades, so to it has been, and is increasingly, engaging in duties that had previously been the exclusive mandate of the state. A glaring omission in current legislation is the fact that there are few effective means by which private security companies are overseen through civilian oversight comparable to the oversight mechanisms put in place for the SAPS and other law enforcement agencies. There are few centralised channels by which members of the public, for instance, can complain; and no consistent and thorough information on the nature of private security company abuses – except through a review of incidences that make it to the courts. There have been reported incidents of private security being used in evictions under the current state of disaster, which is in contravention of the Regulations. APCOF argued for stronger oversight in its submissions on the Private Security Industry Regulation

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<sup>1</sup> See Covid19 Human Rights Dispatch No. 1: Police and military use of force in a state of emergency, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, OHCHR, 2 April 2020, available at: <https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf>.

<sup>2</sup> David Bruce, Covid-19: Police abuses reveal systemic flaws, David Bruce, 16 April 2020. <https://mg.co.za/article/2020-04-16-covid-19-police-abuses-reveal-systemic-flaws/>

<sup>3</sup> See note 1.

Amendment Bill (27 of 2012), and the final Bill approved by Parliament and submitted to Cabinet at least introduced a requirement for private security companies to report on injuries and deaths as a result of firearms to the Minister.

APCOF recommends that the Portfolio Committee motivate for this provision on the reporting of injuries and deaths by private security be included in the revised the Regulations.

## **6. Public access to police stations**

Police stations serve a critical function as a key access point for policing service delivery to the general public. APCOF recognises the need for police stations to take measures to protect members and the public from potential exposure to Covid-19, and would welcome evidence-based measures to be implemented by SAPS, while also ensuring that police stations remain accessible as an essential service. We commend innovative measures taken, such as the temporary relocation of the community service centre in Hermaus following the temporary closure of the station. However, APCOF is concerned about reports of individual stations implementing measures that prevent the public from free access to community service centres. For example, Claremont SAPS in the Western Cape was reported to have, for a time, locked the front gates which effectively prevented the public from accessing the community service centre and reporting crime.

APCOF urges the Portfolio Committee to maintain oversight of service delivery by SAPS through measures which may result in the effective closure of police stations to the public. Measures taken by stations to prevent the spread of Covid-19 must remain evidence based, and not prevent or discourage members of the public from accessing stations to report crime or seek other forms of assistance.

## **7. Military subordinate to civilian police command**

The deployment of the South African National Defence Force (SANDF) to support enforcement of the lockdown was an extraordinary measure in response to an extraordinary set of circumstances. International best practice, and guidelines issued at the African Union level,<sup>4</sup> the deployment of military to operations should only be in exceptional circumstances, and only if absolutely necessary, with personnel subordinate to, and under the command of, police authorities. The extent to which this is the case in South Africa under the current regulations, is questionable and there have been many incidents of the military operating without any police being present.

APCOF calls on the Portfolio Committee to maintain a vigilance over ensuring the primacy of the police role during this time of military deployment.

APCOF can provide further information about any issue raised in this submission. Please contact:

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<sup>4</sup> See Article 3.2, African Commission on Human and Peoples' Rights, Guidelines on the Police of Assemblies by Law Enforcement Officials in Africa, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 18 April 2020).