



Launch of report on policing and non-nationals

External police oversight,
accountability and xenophobic
violence in South Africa

15 March 2022



SIGRID RAUSING TRUST



Launch of report on policing and non-nationals

External police oversight,
accountability and xenophobic
violence in South Africa

15 March 2022



SIGRID RAUSING TRUST





© African Policing Civilian Oversight Forum, 2022

African Policing Civilian Oversight Forum (APCOF)

Building 23B, Suite 16
The Waverley Business Park
Wycroft Road
Mowbray, 7925
Cape Town, ZA

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

This publication was produced with the financial support of the European Union and the Sigrid Rausing Trust. Its contents are the sole responsibility of African Policing Civilian Oversight Forum and do not necessarily reflect the views of the Sigrid Rausing Trust or the European Union.



This publication was made possible through the support of the European Union

SIGRID RAUSING TRUST



Contents

1. Executive summary	1
2. Towards strengthening external police oversight mechanisms to combat and prevent xenophobic violence and hate crimes	2
3. South Africa's international obligations to combat discrimination	4
4. South Africa's National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance	6
5. The role of communities in combating xenophobic violence and hate crimes	10
6. Final thoughts	11



1. Executive summary

The African Policing Civilian Oversight Forum (APCOF) has received support from the European Union (EU) for a three-year project that is intended to improve the capacity of the South African Police Service (SAPS) to prevent, detect and investigate xenophobic violence and related hate crimes. The project's methodology includes the publication of three research reports on various elements of the role of policing and associated structures in preventing and combating xenophobic violence. The subject of the present hybrid event was the launch, on 15 March 2022, of the third and final project research report on the role of police oversight.

The police oversight study follows two previous publications and launches related to the project. The first, 'Policing and non-nationals: Analysis of police prevention, detection and investigation of xenophobic violence in South Africa', was launched in June 2021 and explored why the SAPS is failing to effectively prevent, detect and investigate xenophobic violence and related hate crimes. The second research report, 'Policing and non-nationals: Community Police Forums and xenophobic violence in South Africa', was launched in September 2021. It critically examined the role that Community Police Forums (CPFs) can play in the prevention of xenophobic violence as part of the formal architecture of policing, violence prevention and safety in South Africa.

The third research report, 'Policing and non-nationals: External police oversight, accountability and xenophobic violence in South Africa', explores the challenges inherent in the spheres of legislation, policy and practice regarding the role of external oversight in monitoring the implementation of the report's recommendations to the SAPS. The research engages with the critical question pertaining to the capacity of external police oversight bodies, namely the South African Human Rights Commission (SAHRC), the Independent Police Investigative Directorate (IPID) and the Civilian Secretariat for Police Service (CSPS), to hold the SAPS as mandate holder to account. Critically, the seminar provided a forum for key stakeholders from government, the police, the oversight community, and civil society to unpack these issues and examine how police performance and accountability can be strengthened through the mandates of the key constitutional and statutory oversight bodies.

The launch event was moderated by APCOF's **Themba Masuku**. Opening remarks were made by delegates from the EU and the SAHRC. In his opening remarks, **Dr Bernard Rey**, the EU Head of Cooperation, affirmed the EU's support to end all forms of racism, racial discrimination, xenophobia and hate crimes, and called on all external police oversight bodies to play their role in addressing this challenge. He was followed by **Commissioner Chris Nissen** of the SAHRC who reflected on various inquiries that the SAHRC had conducted into xenophobic violence, and who also noted with concern the lack of follow-up regarding the implementation of the findings and recommendations concerned. He stated that he welcomed the APCOF research report, and gave an undertaking that the SAHRC would reflect on the recommendations made in order to strengthen its internal capacity to monitor the implementation of its own findings and recommendations.



2. Towards strengthening external police oversight mechanisms to combat and prevent xenophobic violence and hate crimes

Louise Edwards of APCOF presented the report's findings on behalf of the research team. The presentation followed the structure of the report, and examined three key issues.

External police oversight, accountability and xenophobic violence

First, the report examines the importance of oversight and accountability in strengthening not only the policing of xenophobic violence, but also policing service delivery to non-nationals. This stems from APCOF's previous research on the role of the SAPS in preventing, detecting and investigating xenophobic violence, which research identified issues relating to the responsiveness of accountability institutions with mandates in respect of policing as a significant contributing factor. The SAPS is externally accountable to various mechanisms that play different roles in ensuring equitable, non-discriminatory and responsive policing, as well as seeing to it that there are consequences for officers responsible for wrongdoing. When there are weaknesses or failures in external accountability, there is impunity regarding wrongdoing, and limited investment in reforming problematic policing systems and procedures.

The report then provides a critical examination of the role of the key police oversight institutions in dealing with xenophobic violence to date. It thus reflects on the constitutional and statutory establishment of the three key mandate holders – IPID, the CSPA and the SAHRC.

Arguably, the SAHRC has been the most active accountability stakeholder in the area of policing and non-nationals, having conducted several investigations and inquiries related both to immigration policing and xenophobic violence. IPID has a mandate to investigate individual cases of alleged wrongdoing by the police, as well as conduct systemic investigations into corruption. However, the research indicates that this does not include consideration of xenophobia as a motivating factor, and, until 2020, information regarding the nationality or race of victims was not systematically collected. Finally, the CSPA has not engaged significantly with issues of xenophobic violence and related hate crimes, or with the delivery of services to non-nationals. This is despite the Khayelitsha Commission of Inquiry recommendations regarding the need for policy frameworks and tools that fall within the CSPA mandate.

The report also considers the part played by regional and international oversight bodies in addressing the role of the SAPS in combating xenophobia and xenophobic violence in South Africa. Mechanisms such as the United (UN) Committee on the Elimination of Racial Discrimination, the UN Human Rights Council, the UN Special Rapporteur on the human rights of migrants, the Universal Periodic Reviews, and the African Commission on

Human and Peoples' Rights play an important oversight role and have highlighted the need for improved policing responses to xenophobic violence and for access to justice by non-nationals. Some of the recommendations made to South Africa by these bodies include the need to investigate and prosecute incidents of racial discrimination and xenophobia, and to ensure that there is specialised training for law enforcement officials in order to improve the investigation and prosecution of perpetrators of xenophobic violence.

Strengthening oversight

Based on the critical analysis of the police oversight architecture's engagement with issues of xenophobic violence and related hate crimes, the report then identifies three areas where this role could be strengthened and aligned with the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).

First, responding to the NAP objective of ensuring implementation of recommendations made by previous inquiries, and through the establishment of mechanisms to ensure that non-nationals receive the services to which they are constitutionally entitled, the report identifies the range of recommendations made by national, regional and international oversight processes to improve policing service delivery to non-nationals. Further, it identifies the SAHRC as a key stakeholder in monitoring and evaluating the extent to which these recommendations are given effect by the SAPS.

Second, the NAP provides overarching policy guidance for all sectors to address issues of xenophobia, but there is no SAPS-specific policy to guide the SAPS's approach to non-discriminatory and effective policing services for non-nationals. One of the primary functions of the CSPS is to evaluate and develop SAPS policy, and the research identifies this oversight mechanism as well placed to support the development by the SAPS of such a policy.

Finally, the report highlights the link between corruption and the targeting of non-nationals by law enforcement officials, both in terms of immigration law enforcement and ordinary criminal law and by-law enforcement. It concludes that there is a mounting body of evidence to support a possible IPID investigation, in terms of section 28(2) of its enabling Act, into systemic corruption by the SAPS against non-nationals in South Africa.

Conclusions and recommendations

The report concludes with findings and recommendations for implementing the actions identified by the research as having the potential to strengthen oversight of police service delivery to non-nationals. With regard to the SAHRC, this includes the establishment of a Section 11 Committee by the Commission to monitor implementation of recommendations of national and international inquiries/processes, and to develop specific capacity-building tools on bias and xenophobia for the SAPS. As regards the CSPS, the report recommends that it develop a SAPS policy on the policing of non-nationals, and on xenophobic violence and related hate crimes, that is aligned with the NAP and responds to the various recommendations made by national and international inquiries/processes. Finally, as regards IPID, the report recommends that it undertake a systemic investigation into corruption against non-nationals by the SAPS, and ensure that the master register of cases includes information on the nationality of victims of police abuse.



3. South Africa's international obligations to combat discrimination

Advocate Pansy Tlakula, APCOF board member and a member of the UN Committee on the Elimination of Racial Discrimination (CERD), followed with a presentation on South Africa's international obligation to combat discrimination, including discrimination on the basis of nationality.

South Africa has a clear and binding obligation under international human rights law, and under the Constitution, to deliver equitable and non-discriminatory services to all people living in South Africa. This obligation includes those obligations which derive from South Africa's ratification of the Convention on the Elimination of Racial Discrimination. Such Convention provides broad protection against racial discrimination in all its forms, including xenophobia. State-party compliance with the Convention is monitored by CERD, primarily through its periodic reporting mechanisms. In its reviews of South Africa, the Committee has raised a number of issues for discussion related to xenophobia. These include progress towards adopting and implementing the NAP, measures to combat discrimination and xenophobic violence against non-citizens, and addressing the root causes of xenophobia. South Africa last submitted to a review by CERD in 2016. Based on the findings of the present research, it appears that many of the recommendations made by the Committee have not been implemented.

Advocate Tlakula raised concerns about the lack of statistical data – including social and economic indicators – on non-citizens. This was the subject of an earlier recommendation by CERD, which called on South Africa to record and make information available. The present report under discussion, and the previous reports published by APCOF on the policing of xenophobic violence, and the role of CPFs in combating xenophobic violence, also underscore the need to improve statistical data related to non-citizens in South Africa. In the policing sphere, disaggregation of data in order to identify when violence may be perpetrated on the basis of a person's citizenship or national origin, is critical to ensuring that xenophobic violence, and inequitable delivery of policing services, is recognised from a law enforcement perspective as a challenge to be addressed, and to ensuring the planning and deployment of effective policing responses.

She also noted that the absence of legislation pertaining to hate crimes and hate speech in South Africa had been previously raised by CERD. While acknowledging that a draft Bill is before Parliament for consideration, she indicated that the absence of a legislative framework to protect against increasing hate speech and hate crimes in South Africa, including the targeting of persons on the basis of their citizenship or national origin, remains a concern. From a law enforcement perspective, the passage of this legislation is critical to ensuring that crimes motivated by xenophobia can be investigated and prosecuted through such lens, with this aggravating factor being reflected in the way services are delivered to victims, in sentencing, and in other measures.

In her concluding remarks, Advocate Tlakula observed that South Africa has repeatedly demonstrated its commitment at the international level to its treaty obligations, and has engaged proactively and constructively with the relevant mechanisms, like CERD, to monitor compliance. However, a critical challenge with respect to South Africa's recent human rights record is xenophobic violence, and the lack of pace in addressing not only historic incidents, but also in dealing with the underlying causes. There is information and support available to South Africa – from civil society, the SAHRC, as well as bodies like CERD – to address this. It is therefore encouraging to see the necessary commitment by way of the implementation of the NAP, and the engagement of relevant departments in initiatives such as this one by APCOF. Critical, and relevant to the present report that is now being launched is the role that the oversight community can play in ensuring effective implementation of measures aimed at addressing xenophobic violence and justice service delivery for non-nationals. Civil society stakeholders are encouraged to continue their work in conducting research and providing technical support, and the SAHRC is encouraged to fulfil its mandate of monitoring implementation of its recommendations. CERD will also continue to play an active role with its rigorous review of South Africa's efforts since its last reporting period in 2016, and with its concluding observations and recommendations aimed at addressing the challenges.



4. South Africa's National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance

Danaline Franzman, Chief Director: Social Justice and Participatory Democracy in the Department of Justice and Constitutional Development (DoJ&CD), gave a presentation on the NAP, which is a government plan for tackling the problem of xenophobia and hate crimes. Ms Franzman welcomed the research report as an important contribution to the work of protecting the rights of all people living within the borders of South Africa. Given ongoing concerns regarding high levels of anti-foreigner sentiment and xenophobic violence, the report highlights both critical gaps and opportunities for various stakeholders to make a critical contribution to addressing this problem. As envisaged by the NAP, the report calls for all role players to play a part in preventing and combating xenophobic violence.

The presentation by Ms Franzman outlined the background to the NAP, some of the critical milestones already achieved by it, and various initiatives and programmes that are underway in the DoJ&CS in terms of the NAP. The DoJ&CD as the focal agency is mainly responsible for the development, finalisation and overall coordination of the implementation of the NAP by all government departments and other key role players, but the NAP belongs to all in the country. The plan calls on all South Africans, civil society and government departments to play their part in combating all forms of discrimination against other people based on nationality, race, religion, sexual orientation, and other related intolerances. In approving the NAP, Cabinet made a bold statement of intent and commitment to root out all forms of discrimination, including guaranteeing the safety of non-nationals. The presentation highlighted that a lot more work is expected up until February 2024, when the NAP will be reviewed by Cabinet.

Background to the NAP

The NAP was developed following the third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), which took place in 2001 in Durban. Following the WCAR, the Durban Declaration was agreed to, which committed countries to develop programmes of action for addressing all forms of discrimination. The DoJ&CD was mandated to coordinate the development of the NAP, which took several years to conclude. The NAP was finally approved by Cabinet in 2019, almost 18 years since the Durban Declaration in 2001. The development of the NAP was a collaborative effort by a multisector Steering Committee which comprised representatives of government departments and civil society formations. The Committee undertook several stakeholder engagements and consultations in order to gather inputs from across the country, which culminated in a final document being presented to Cabinet in 2019. In this regard, the NAP should be seen as an all-embracing plan that should be owned and championed by every government department and civil society formation if it is to succeed in addressing and combating all forms of discrimination.

Implementation of the NAP

The implementation of the NAP is coordinated by the Interim NAP Governance Structure (GS), which replaced the NAP multisector Steering Committee under the auspices of the DoJ&CD. A number of programmes have been implemented which are considered critical to a comprehensive approach to addressing discrimination and related intolerances. Some of the key achievements include the following:

- A national baseline study to determine the levels of racism, racial discrimination, xenophobia and related intolerances. The study, commissioned to be carried out by the Human Science Research Council (HSRC), provides critical data, information and analysis on the attitudes of ordinary people to racism, other forms of discrimination, and anti-foreigner sentiments. Some of the key themes explored in this research include an understanding of how refugees, asylum-seekers and cross-border migrants are viewed in the country. Based on the research findings, a policy brief was developed addressing the challenges in the context of implementing the NAP.
- The launch of a national survey and a NAP virtual repository, which is a single online portal hosted on the DoJ&CD website. This online portal provides open and free access to NAP documents, files, promotional material, and other related information. It serves as an online resource for all NAP-related information which is available and accessible to the broader public, organisations, government, academics, and private-sector institutions interested in addressing and combating discrimination in South Africa.
- The development of a service directory and database of service providers for victims of discrimination, both of which are available on the online portal. The service directory provides a comprehensive list of service providers in South Africa that are to be found in government, civil society, Chapter 9 institutions, and community-based organisations.
- The development of an Integrated Government Strategy on Public Education pertaining to anti-discrimination in support of NAP implementation. This integrated strategy will contribute to an improved and coordinated government-wide approach to public education on anti-discrimination issues. It will also assist role players to consciously and deliberately develop interventions that are aligned to the NAP.
- The introduction of a programme of social-mobilisation dialogues to address xenophobia and related intolerances. The dialogues are being rolled out in partnership with other relevant role players in different provinces. They are focused on creating a broader understanding of several key issues and include themes such as migration policy, narratives, myths, misconceptions, and facts about migration and the human rights of asylum-seekers, refugees, and migrants in local communities.
- A draft document on the funding model for the implementation of the NAP was completed in the 2020/2021 financial year. This is an important document for supporting the roll-out and implementation of NAP programmes throughout the country. Several campaigns have been conducted collaboratively with other key role players and included online webinars, physical workshops, dialogues, and the celebration of special commemorative days such as Africa Day, World Refugee Day and Youth Day. Campaigns have been rolled out by using community and commercial radio stations, social media platforms, and direct community interventions.

UN Protection Working Group for promoting and protecting the rights of non-nationals

The DoJ&CD has co-chaired the UN Protection Working Group (UNPWG) since 2013, which group seeks to promote and protect the rights of non-nationals. The UNPWG also provides an important platform for the exchange of information on issues pertaining to the protection of non-nationals, including refugees and asylum-seekers, and agrees on actions that may be required to address the problems faced by foreign nationals. Moreover, the UNPWG plays a proactive role by issuing early warnings related to xenophobic incidents, and identifies hotspots for member states so that they can prepare their responses and prevent the displacement of, and violence against non-nationals.

The participation of the DoJ&CD in global structures provides an opportunity to collaborate with different role players in the implementation of the goals of the NAP. Some of the critical partners that the DoJ&CD interacts with include the Department of Social Development, the SAPS, the National Prosecuting Authority (NPA), the National Joint Operational and Intelligence Structure (NATJOINTS), and the International Organization for Migration (IOM). These role players are critical to the development and establishment of a Rapid Response Mechanism for all forms of discrimination and for supporting NAP objectives.

Key challenges for the DoJ&CD in the implementation of the NAP

There are several challenges that the DoJ&CD is facing in coordinating the implementation of the NAP. First, not all government departments have developed plans in line with the NAP in order to address discrimination. This is a challenge because all government departments have a role to play in preventing discrimination, xenophobia and related intolerances. In this regard, uptake by and the support of government departments have been slow, which is a great concern. The slow uptake by key government departments manifests in low levels of response to communication, in low turnouts at consultative workshops, and non-responsiveness to invitations – all of which impact on the ability of the DoJ&CD to finalise agreements.

Further challenges relating to coordination are that government coordination and the governance structure for the NAP have not yet been established. Similarly, the monitoring and evaluation mechanisms currently available are falling short because of a lack of a governance structure to coordinate the implementation of NAP activities across government departments.

Way forward with regard to strengthening the NAP

Ms Franzman concluded the presentation by making several key proposals critical to strengthening the implementation of the NAP.

It is important that all government departments, especially the Justice, Crime Prevention and Security (JCPS) Cluster, become involved and commit to the implementation of the objectives of the NAP so as to prevent xenophobic violence and hate crimes. Further, the establishment of the NAP GS is key to ensuring strategic oversight, effective coordination, and reporting on the impact of the NAP in addressing discrimination and related intolerances. Given the importance of this structure, there is a need to further engage all stakeholders to ensure that all relevant departments participate fully in the GS.

The DoJ&CD will be coordinating the celebration of the 25th anniversary of the South African Constitution and the hosting of the 20th Anniversary of the WCAR. These events provide an opportunity to strengthen collaboration in relation to existing and new community engagements and outreach programmes, to anti-racism and gender-sensitive human rights training, and to awareness-raising campaigns on the harmful effects of discrimination, hate crime and related intolerances.



5. The role of communities in combating xenophobic violence and hate crimes

Roshila Nair, Co-Convenor of the Basic Needs Working Group and the COVID-19 People's Coalition, together with Global South Against Xenophobia (GSAX), presented on the role of communities in combating xenophobic violence and hate crimes. This has been identified as critical in bringing about changes and in mobilising communities against such crimes. Similar strategies adopted during the struggle against apartheid are relevant, because community activities were instrumental in mobilising people and confronting the discriminatory system. Xenophobia and hate crimes require communities to be organised and conscientised about social cohesion, Ubuntu, and what it means to be a South African in Africa. African migrants in South Africa are protected by the constitutional guarantee that states that South Africa belongs to all who live in it. In addition, xenophobia and hate crimes are contrary to the vision of integrating South Africa in the continent. South Africa cannot succeed on its own and requires society as a whole to reject the ill-treatment of African migrants in South Africa.

As part of integrating African migrants, Ms Nair suggested that particular attention should be given to the following:

- Access by children of migrants to schooling;
- Access by migrants to social security and welfare services;
- Access by migrants to health services, and by pregnant women to maternity facilities; and
- Access by migrants to housing and equal protection, and an end to unlawful detention of asylum-seekers and refugees.

Ms Nair also pointed to the lack of prosecution of perpetrators of xenophobic violence as a major concern. Prosecuting perpetrators of the crimes concerned is important in sending a strong signal that xenophobic violence will not be tolerated. Several organisations supporting an anti-migrant agenda should also be dealt with when they instigate xenophobic violence and hate crimes. Part of the strategy should include establishing dialogue within communities in conflict in order to address the root causes of discrimination and violence, and also conducting public-education campaigns to end racism and xenophobia.



6. Final thoughts

In reflecting on the discussions of the day, **Commissioner Chris Nissen** of the SAHRC emphasised that external police oversight bodies such as the SAHRC should engage in serious introspection regarding their effectiveness in holding the police to account. He acknowledged that the research report – which he welcomed as being important – had exposed serious weaknesses in the effectiveness of the relevant oversight bodies. He concluded by emphasising that oversight bodies must acknowledge and accept that they could do more to combat xenophobic violence, and that the recommendations contained in the report are a vital first step towards achieving this.

ABOUT THIS LAUNCH REPORT

The African Policing Civilian Oversight Forum (APCOF) is funded by the European Union (EU) in order to support the development of the South African Police Service's (SAPS) capacity to detect and prevent, and respond to, xenophobic violence and related hate crimes. The present project is set against the backdrop of numerous incidents of xenophobic violence and hate crimes directed, since 2008, at non-nationals and other persons marginalised on the basis of their national origin who reside in the Republic of South Africa. Outbreaks of xenophobic violence have, however, persisted, and the SAPS' capacity to effectively detect, prevent and respond has been questioned, despite successive research studies, inquiries and recommendations by national, regional and international human rights bodies over the past 11 years designed to strengthen the SAPS' capacity.

The present research was conducted in order to better understand the role under regulation and policy that Community Police Forums can play in the prevention of xenophobic violence and related hate crimes in South Africa. It explores the challenges inherent in the legislative and policy framework and its implementation that have resulted in critical failures. The report examines whether a broader understanding of 'prevention' in the context of the role of Community Police Forums is required, before identifying opportunities to bolster their role in actively preventing and responding to violence against non-nationals.

ABOUT APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.



www.apcof.org

This publication was made possible through the support of the European Union and the Sigrid Rausing Trust.



SIGRID RAUSING TRUST