



# Policing and non-nationals

External police oversight,  
accountability and  
xenophobic violence  
in South Africa

Laura Freeman, Lauren October and Louise Edwards



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# Introduction

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The policing of xenophobic violence and related hate crimes, and the provision of service delivery to non-nationals by the South African Police Service (SAPS), has been broadly criticised by official inquiries and investigations, as well as by researchers and commentators.<sup>1</sup> A recent publication by the African Policing Civilian Oversight Forum (APCOF) seeking to understand the fault lines in the capacity of the SAPS to prevent, detect and investigate xenophobic violence, found significant challenges. This is in spite of a constitutional and legislative framework that promotes equitable and non-discriminatory policing services to non-nationals. The report found that non-nationals in South Africa experience weak policing responses to violence against them, are particularly vulnerable to police corruption, and are not receiving equal policing services as suspects, victims of ordinary crime, or in their ability to access other services, such as document certification, from their local stations.<sup>2</sup> In trying to understand the reasons why policing in the context of non-nationals is falling short of constitutional and legislative expectations, the APCOF report identified issues relating to the responsiveness of, and follow-up by, the oversight and accountability architecture for the SAPS as a contributing factor.

The SAPS is externally accountable to multiple actors who play various roles in ensuring that its delivery of services is equitable and accessible, and that there are consequences for wrongdoing such that a culture of impunity does not flourish within the institution. This relates, firstly, to the more traditionally understood areas of oversight and accountability such as the investigation and other fact-finding mandates held by the Independent Police Investigative Directorate (IPID) and the South African Human Rights Commission (SAHRC). The SAHRC, in particular, has conducted investigations and held hearings into xenophobic violence that have resulted in targeted recommendations to address the gaps in SAPS capacity to prevent and resolve xenophobic violence and related hate crimes. However, APCOF's research has highlighted the concerning lack of evidence of implementation of the findings and recommendations, resulting (predictably) in challenges in preventing, detecting and responding to violence targeting non-nationals.<sup>3</sup>

Secondly, external oversight and accountability relate to what is known as 'before-the-fact' oversight, where the laws, policies, procedures and training to promote rights-based and accountable policing practices are established.<sup>4</sup> This work is primarily undertaken by the Civilian Secretariat for Police Service (CSPS) and the legislature, as well as by the SAHRC (particularly as it relates to training). Here, APCOF's research found that the clear articulation of policing standards related to xenophobic violence is absent, most notably in the lack of an overarching SAPS policy and accompanying regulatory instruments to operationalise policy, which are within the mandate of the CSPS,<sup>5</sup> and significant training deficits, for which the SAHRC has a mandate to contribute via a Memorandum of Understanding (MoU) with the SAPS.<sup>6</sup>

Recent policy developments at the national level provide an opportunity to examine how the performance and accountability of the SAPS in the prevention and combating of xenophobic violence and related hate crimes can be strengthened through the mandates of the key constitutional and statutory oversight bodies, as part of an overall effort to improve policing responses. This arises through the 2019 adoption of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and

Related Intolerance (the NAP). This policy is a welcome prioritisation by government to address xenophobic violence and includes, amongst its objectives, the strengthening of law enforcement and prosecution as part of its overall strategy. The contribution of oversight and accountability mechanisms will be an important element in promoting the achievement by the SAPS of the NAP objectives. This is particularly evident at three levels: the review, monitoring and support of previous recommendations by oversight bodies to strengthen the policing of xenophobia, and improving service delivery to non-nationals; the alignment of the SAPS regulatory and policy framework to the overarching objectives of the NAP; and targeted investigations into key challenging areas for the SAPS in the delivery of services to non-nationals.

With support from the European Union (EU), APCOF has developed this report in order to understand how the mandates of three key SAPS accountability stakeholders – the CSPS, IPID and the SAHRC – can be engaged to improve policing responses to xenophobic violence as well as service delivery to non-nationals. This is the third report in a series produced through an EU-supported project to develop the capacity of the SAPS to prevent and respond to xenophobic violence and related hate crimes. The first report<sup>7</sup> considered the capacity of the SAPS to prevent, detect and investigate these incidents, with the second focusing on issues of prevention and the critical role played by community policing forums (CPFs) as a key SAPS stakeholder in crime and violence prevention.<sup>8</sup>

## Terminology

This report uses the term ‘non-national’ to describe a person who resides in the Republic of South Africa and is perceived as ‘foreign’, as not belonging to South Africa, and/or originating from another country.<sup>9</sup> The term ‘non-national’ therefore includes the following:

- Migrants;
- Immigrants;
- Foreigners/foreign nationals;
- Undocumented immigrants;
- Refugees and asylum-seekers; and
- South Africans who are perceived to be foreign, including naturalised citizens and those from other ethnic groups.

In addition, the report adopts the definition of xenophobia in the NAP, which is given as:<sup>10</sup>

*...an unreasonable fear, distrust or hatred of strangers, foreigners or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes. It can manifest itself in several ways in a country. For example, it can be through victimisation on the basis of one's nationality or appearance, brutal assaults, murders, ethnic cleansing in an area, and mass expulsion from the country.*

## Methodology

This report was developed using two core research methods. First, semi-structured interviews were conducted with relevant stakeholders. This included 14 interviews with 17 individuals, as well as email correspondence and other communication. Interviews were conducted with officials from the CSPA, IPID, the SAHRC and the SAPS, as well as with researchers and civil society representing refugee- and asylum-seekers, migrant organisations, legal organisations, and policing and violence-prevention practitioners. Interviews took place between July and October 2020, either via Zoom or telephone due to restrictions imposed by the COVID-19 national lockdown in South Africa. Second, various primary and secondary resources were used to inform this report. Primary sources included legislation, annual reports and other documents published by the CSPA, IPID and the SAHRC, court decisions, and primary data from IPID that was shared with researchers. Secondary sources included previous research and writings on oversight bodies, and resources available on the Parliamentary Monitoring Group website, which provides information on the proceedings of parliamentary committees.<sup>11</sup>

In the interests of full disclosure, one of the authors of this report – Laura Freeman – was an external expert panellist at the SAHRC 2018 national hearing on xenophobia.

## Structure

This report examines the role that can be played by three of the key police oversight and accountability mechanisms in South Africa – the CSPA, IPID and the SAHRC – in the prevention and detection of, and response to, xenophobic violence and related hate crimes, and in the provision of service delivery to non-nationals living in the country. It is divided into four sections:

- The first section provides an introduction and sets the scene in terms of the importance of oversight and accountability to strengthening not only the policing of xenophobic violence, but also service delivery. The section also deals with issues of terminology and methodology.
- The second section sets out the background to oversight, accountability, and xenophobic violence in South Africa through a critical examination of the role of the key police oversight institutions to date.
- The third section identifies how the mandates of the three key South African police oversight mechanisms – IPID, the CSPA and the SAHRC – can be engaged so as to strengthen SAPS preparedness, prevention and responses in relation to xenophobic violence, and service delivery to non-nationals, in three critical areas:
  - Reviewing, monitoring and supporting the implementation of recommendations from previous oversight and accountability processes;
  - Alignment of policing policy and operational approaches to the NAP objectives; and
  - Addressing issues of systemic corruption in the policing of non-nationals.
- The fourth, and last, section provides a conclusion and recommendations aimed at strengthening the role of the SAPS through enhanced oversight and accountability in the prevention and detection of, and response to, xenophobic violence and related hate crimes, and the provision of service delivery to non-nationals.

# External police oversight, accountability, and xenophobic violence in South Africa

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## An architecture for external oversight and accountability

Since democracy, police accountability has been given constitutional, legislative and policy support in South Africa as integral to achieving democratic and rights-based policing practices.<sup>12</sup> The architecture for local police accountability was developed on the basis of two international developments at the time: the emergence of independent statutory authorities with mandates that often include dealing with complaints about, and investigations into, police conduct;<sup>13</sup> and the development of the Paris Principles, which affirmed the importance – and set the framework for the legitimacy and credibility – of national human rights institutions ‘vested with the competence to promote and protect human rights’.<sup>14</sup>

The 1996 South African Constitution made provision for the establishment of: the Civilian Secretariat for Police Service (CSPS) to provide the Minister of Police with advice on ensuring civilian oversight over policing governance, service delivery and resourcing;<sup>15</sup> and the South African Human Rights Commission (SAHRC) to promote, protect, monitor and assess human rights compliance in the country.<sup>16</sup> In 2012, the Independent Police Investigative Directorate (IPID), formerly the Independent Complaints Directorate (ICD),<sup>17</sup> was also established to promote police accountability through investigations into conduct by the South African Police Service (SAPS) and the municipal police services.<sup>18</sup> Critical supporting roles are also played by other external oversight actors, including the judiciary and the relevant committees of the national and provincial legislatures. There are also those institutions to which the SAPS is less formally accountable, such as civil society, or to which the SAPS is accountable through the state, such as the mechanisms of the United Nations (UN) and African Union (AU).

During the nearly 15 years of persistent, and often widespread, xenophobic violence against non-nationals, a fault line has been exposed in South Africa’s commitment to promoting social cohesion.<sup>19</sup> The role of the police in preventing, detecting and resolving the violence has subsequently been subject to scrutiny by a number of actors within this oversight architecture. This includes scrutiny as part (but not the sole focus) of official investigations by the SAHRC, as well as efforts by civil society and academics to frame and understand the problem. The policing of xenophobic violence has also been subject to oversight by regional and international human rights mechanisms at the level of both the UN and the AU. A common thread across this work is concern about the capacity of the SAPS to effectively prevent, detect and investigate incidents of violence, and to provide non-discriminatory policing services to non-nationals.

What follows is an analysis of the mandates of and, where relevant, recommendations made by the key external oversight and accountability actors regarding the role of the SAPS in the prevention, detection and investigation of xenophobic violence, and the provision of equitable policing services to non-nationals.



## South African Human Rights Commission

The SAHRC is South Africa's national human rights institution, established in accordance with the Paris Principles, and works to promote respect for, and protection and observance of, human rights. It has a broad mandate to: investigate and report on the observance of human rights; take steps to secure appropriate redress where human rights have been violated; carry out research and investigations; and conduct education programmes.<sup>20</sup> The SAHRC, through its Act, has extensive powers to ensure that the SAPS adheres to human rights-focused policing and, from as early as 1998, has been engaged in these issues. It has conducted multiple activities, investigations, mediations and hearings on issues relating to xenophobia, (im)migration and policing.<sup>21</sup> Those related to issues of policing are summarised below: first, in relation to immigration policing, and, second, as they pertain to xenophobic violence.

### Immigration policing

#### *1999 – Report into the Arrest and Detention of Suspected Undocumented Migrants*

In 1998, the SAHRC conducted an investigation into the treatment of people in the immigration system, including interviewing 149 detainees and 40 friends and family members of detainees at Lindela Repatriation Centre. It made multiple findings related to the arrest and treatment of persons by both the SAPS and officials from the Department of Home Affairs (DHA). These findings are worth quoting at length:

*In the majority of cases, there were no reasonable grounds for an apprehending officer to suspect that a person was a non-national. A significant number of persons interviewed had identification documents which were either destroyed or ignored or which they were prevented from fetching from home. Apprehended persons were often not told or did not understand the reason for their arrest. Extortion and bribery are practices extremely widespread among apprehending officers. Reports of assault during arrest were not uncommon. Current immigration legislation[,] combined with its interpretation[,] has created an effective pass law requirement.<sup>22</sup>*

The SAHRC recommended the introduction of regulations for the arrest of undocumented migrants to ensure clear and consistent criteria in respect of arrest.<sup>23</sup> It also recommended that police sweeps – as they were then being conducted – should stop: ‘...random pedestrian checks or area sweeps should be excluded as a modus operandi in the apprehension of suspected aliens. Such methods fail to satisfy the criteria of reasonable grounds and contribute to the high rate of unfounded arrests.’<sup>24</sup>

Despite the investigation and report being 24 years old, the findings are similar to those in more recent research and investigations.<sup>25</sup>

#### *2000 – Assessment of conditions of detention at the Lindela Repatriation Centre*

In a follow-up report, the SAHRC conducted a further investigation into the treatment of undocumented migrants held at the Lindela Repatriation Centre. It made similar findings to those in the 1999 report, particularly in relation to arbitrary arrest and corruption, and made recommendations for the establishment of specific regulations for the arrest of undocumented migrants.<sup>26</sup>

## Responses to xenophobia and xenophobic attacks

The SAHRC has held three national hearings on xenophobic attacks and xenophobia: the first in 2004 – and co-chaired with the parliamentary committee on foreign affairs – which focused on xenophobia by government and society; the second in 2009 that focused on the 2008/2009 nationwide xenophobic attacks; and the third in 2018 that acted as a follow-up on the previous hearings.

### *The 2004 hearing: Xenophobia in South Africa and Problems Related to It*

During the 2004 joint hearing, evidence was heard regarding xenophobia within the SAPS, with respondents providing information about: the arrest and detention of immigrants who were asylum-seekers; SAPS officers demanding bribes from immigrants without permits; the destruction of permits; assault; and the profiling of foreigners.<sup>27</sup> In response, the SAPS testified that it had recently conducted diversity training with 25 000 members, and that it did investigate and punish corrupt officials. As regards the destruction of documents, the SAPS stated that the issue had never been brought to its attention.<sup>28</sup> It further stated that it was frequently asked to comment on the involvement of foreigners in crime but declined to publicise such information because it might perpetuate xenophobia.<sup>29</sup>

Recommendations 6 and 23 called on the SAPS to ensure the training of personnel in refugee rights and the inclusion of the SAPS as part of a broad-scale ‘task team’ in order to create a positive narrative about foreign nationals. In addition, the SAHRC itself identified areas in which it could contribute to improving SAPS performance, including the development and roll-out of human rights training programmes for the SAPS.

### *The 2009 hearing and 2010 report*

The 2009 investigation and hearing focused on understanding the xenophobic violence of 2008. As a representative from Lawyers for Human Rights (LHR) commented: ‘[I]t is one of the most comprehensive reports on xenophobia that exists ... [giving a] clear, detailed assessment of the situation, where we failed, the shortcomings that resulted in the shocking violence of 2008, and then clear recommendations.’<sup>30</sup> The report found systemic failures by the SAPS in the prevention and detection of, and response to, the violence, including the lack of functioning early-warning systems, the failure of efforts to prevent the spread of violence, the lack of access to policing services for non-nationals, misconduct by police officials, and the lack of protection by the police during violence as well as in the follow-up and investigation of crimes.<sup>31</sup>

The 2010 report made 21 recommendations specific to the SAPS (see Appendix 1 for the full list). Recommendations included the following:<sup>32</sup>

- Establish a national task team to understand, and apply, lessons learned, and incorporate these into training and guidelines, with priority roll-out for stations in locations where there has been more than one incident of violence against non-nationals.
- Review and revise relevant standing orders and operational protocols.
- Develop best-practice guidelines together with the South African National Defence Force (SANDF) for cooperative operations.
- Increase visible policing in areas where xenophobic violence has occurred.
- Develop contingency plans for dealing with a range of social-conflict scenarios at the provincial level.

- Conduct a joint evaluation with the National Prosecuting Authority (NPA) on xenophobia-related cases to identify and address challenges in implementation.
- Develop best-practice guidelines together with the Department of Justice and Constitutional Development (DoJ&CD) on the effective use of resources.
- Oppose bail in cases where there is a threat to the course of justice, including through intimidation of witnesses and complainants.
- Ensure the continual review of information-collation mechanisms at the national police desk regarding crimes against non-nationals, and engage in targeted conflict-resolution initiatives based on patterns identified.
- Together with the DHA and Disaster Management, establish an early-warning system for xenophobic violence and patterns of crime against non-nationals.
- Together with the Monitoring and Evaluation Directorate of the CSPS, standardise the criteria for reportable incidents of xenophobia.
- Conduct immigration policing in a way that does not provoke social tension.
- Provide responsive policing services for complaints of xenophobic violence and related hate crimes.
- Together with key police civilian oversight mechanisms, develop community-based campaigns to promote the role of the justice system in advancing social cohesion.
- Investigate situations where community policing forums (CPFs) are not functioning effectively.

In terms of its coverage of oversight mechanisms, the report also made a number of key findings. First, it noted, with concern, the lack of quality record-keeping with regard to SAPS and IPID cases. This, it indicated, made some cases virtually impossible to find, as the case records did not match, thus hindering transparency, oversight mechanisms and the securing of appropriate remedies for complainants.<sup>33</sup> Second, the report made various recommendations to the SAHRC, noting: 'It is not enough ... for the SAHRC to investigate and report on the observance of human rights, as it does in this report. It also has monitoring and assessment responsibilities.' It accordingly recommended that the SAHRC:

- *Develop systematic mechanisms to ensure the ongoing monitoring of recommendations made in this report to various government structures;*
- *Make the monitoring information publicly accessible;*
- *Improve the quality and speed of complaints investigations [in] relation to prejudice-related crimes; and*
- *Intensify and systematise training [in] human rights, xenophobia and non-discrimination [for] local police, leadership structures and communities in areas previously affected by or at risk of social conflict.<sup>34</sup>*

However, the report also acknowledged that the SAHRC did not then have the capacity to carry out these oversight activities.<sup>35</sup>

### *The 2018 national investigative hearing on xenophobia, migration and social cohesion*

The 2018 hearing served as a follow-on from the 2004 and 2009/2010 hearings. However, the proceedings made limited reference to previous hearings. This was emphasised by members of civil society, who described the hearing as feeling like 'Groundhog Day' and a 'start from scratch' on the issue.<sup>36</sup> To date, the SAHRC has not publicly released a report.

### *2009/2010 report on Zwelethemba, and the subsequent Memorandum of Understanding with the SAPS*

In 2008, the SAHRC became involved in a Western Cape High Court case regarding attacks against foreign-owned shops over two days in March 2008 in Zwelethemba. The complainants argued that the police were discriminatory in their failure to prevent looting, ensure safety and security, or appropriately investigate the looting of foreign-owned shops.<sup>37</sup>

The SAHRC joined the case as a respondent and the court ordered it to 'investigate the causes, circumstances, nature and extent of the human rights violations that occurred in Zwelethemba'.<sup>38</sup> While, in the specific case, the judge was unable to find evidence to support the complainants' specific accusations, other than some dereliction of duty at one shop and some overall patterns of neglect around the taking of complaints' statements and regarding general sensitivity, the findings of the SAHRC investigation were central in the court judgment.<sup>39</sup>

The SAHRC investigation revealed various levels and types of discrimination against non-nationals in Zwelethemba being perpetuated by the SAPS, including being 'treated different[ly]'; being 'restricted in their enjoyment of freedom of movement, choice of place of residence and exercise of their socio-economic rights'; the police '[tending] not [to] believe foreigners' complaints of theft, and [failing] to act impartially in [the] mediation of conflicts'; the police not providing sufficient protection during attacks; responses to looting being 'insensitive and unprofessional'; and some victims experiencing 'double-victimisation' given the SAPS's 'apparent unwillingness ... to assist them'.<sup>40</sup> Crucially, for what would follow, the report noted that:

*...several SAPS personnel interviewed admitted that the current diversity education curriculum lacked sufficient training in the types of trauma and multiple victimization that are likely to have been experienced by foreign nationals living in South Africa and the manner in which such experiences manifest themselves in behaviour in times of crises.*<sup>41</sup>

In line with its findings, the SAHRC made certain recommendations, including the recommendation that 'personnel must be provided with education such that they are made aware: of the rights of refugees and migrants in terms of legislation; that discrimination against foreign nationals will not be tolerated; [and] of the unique sensitivities and circumstances of foreign nationals'.<sup>42</sup> The court judgment itself included several orders relating to the SAHRC, including the full implementation of its recommendations and the provision of training for the police.<sup>43</sup>

While the court judgment focused on Zwelethemba, and on the specific training and action needed there, given the 2008 context and the thrust of the judgment, and the inclusion of the SAPS national and provincial commissions in the case, there were also national implications. Thus, while the court judgment did not expressly create a basis for the SAHRC to develop an agreement with the SAPS concerning the conducting of refugee-rights training and sensitivity training (although it did identify this need) at the national level, it created a pretext for this to occur.

Related to this, both the 2004 and 2010 national hearings<sup>44</sup> recommended that the SAHRC train the police. The 2010 report read that:

*[t]he SAHRC [should] carry out a rights education programme aimed specifically at police working with displaced non-nationals, including their motivation for being in South Africa, the effect of immigration policing on access to police protection, the obstacles to justice should displaced persons leave the country, and related issues. Such training should aim to facilitate an introspective process by station-level police, capacitating them to think reflectively about measures to promote justice for non-nationals and the rule of law for communities. It should be rolled out to all stations in previously affected areas.<sup>45</sup>*

Given the 2011 Zwelethemba court ruling and the 2004 and 2010 SAHRC hearing recommendations, there was, as indicated, a pretext for an MoU between the SAPS and the SAHRC. However, it was only four years later, in 2015, that the first MoU was signed. While the MoU was 'born out of the xenophobic attacks in 2008',<sup>46</sup> it has had several iterations and focal points, as set out in Appendix 2. The latest version of the MoU, though not officially signed, is considered a 'living document', which is progressively being implemented.<sup>47</sup> Much of the focus has been on engagement between the SAHRC and the SAPS on the establishment and functioning of the National Preventive Mechanism relating to torture.<sup>48</sup> A senior police officer explains:

*We identify things that we collectively want to achieve[:] ... [O]ne of them is to look at research and training of members, but also linked with that [are] the areas around accountability whereby they [SAHRC] visit and inspect our detention facilities... . [W]e also agreed that we are going to have continuous engagement[,] including annual lectures ... and education of the communities around the rights and responsibilities [during demonstrations]... .<sup>49</sup>*

Despite the SAHRC first identifying the need for developing a training curriculum for the SAPS in 2004, such curriculum remains in a conceptual phase, with the SAHRC 'in the process of securing the necessary capacity' needed to compile the curriculum,<sup>50</sup> and with a broader focus on issues of policing and marginalisation beyond just xenophobia.

## Independent Police Investigative Directorate

IPID is a constitutionally mandated oversight body that has the mandate to, inter alia, enhance accountability and transparency of the SAPS, as well as provide for independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the municipal police services. It has two mandate areas that are relevant to the policing of xenophobic violence and related hate crimes: the investigation of individual cases, and the power to conduct investigations into systemic corruption.

### Individual cases

With regard to the mandate to conduct investigations into alleged incidents of police criminality, this extends to the following areas:<sup>51</sup>

- Deaths in police custody or as a result of police action;
- Complaints relating to the discharge of a firearm by a police officer;

- Rape of any person while in police custody;
- Rape by a police officer, whether the officer was on or off duty at the time of the incident;
- Torture or assault by a police officer;
- Corruption; and
- Any other matters referred to IPID by the Minister, a Member of the Executive Council (MEC) or the Secretary.

This mandate is an important part of South Africa's obligation to promote equality before the law and equal protection and benefit of the law under international human rights law<sup>52</sup> and under the Constitution.<sup>53</sup> Here, IPID's role is to ensure the independent and effective investigation of criminal cases that involve the police in order to ensure that there is no impunity when it comes to police officers who violate the law.<sup>54</sup> However, there is no general mandate for IPID to investigate police action in relation to xenophobic violence and related hate crimes per se, and any complaint related to xenophobia would need to relate back to the specific IPID mandate areas listed above. In response to concerns raised in 2016 by the National Assembly's Portfolio Committee on Police about the capacity of IPID to investigate police conduct in the context of xenophobic attacks, IPID noted that cases in this context are usually classified as 'assault' cases,<sup>55</sup> and attribution of xenophobia as a motivation does not appear to be captured or reported.<sup>56</sup>

IPID officers who were interviewed repeatedly stated that discriminatory or xenophobic intent is not really explored in cases where foreign nationals are victims.<sup>57</sup> Furthermore, the extent to which IPID receives and investigates complaints into police conduct regarding non-nationals is difficult to quantify because, until 2020, IPID did not include data columns relating to the race and nationality of victims. Previously, case descriptions in the IPID master register may have included the nationality of the victim, or a description that the victim was a non-national. However, this would not yield precise data, as the descriptions lack 'consistency in format and lexicon'.<sup>58</sup> Since 2020, IPID has included four 'nationality-of-victim' options: 'foreign national', 'Somalian national', 'South African national', and 'blank'. Of the 2 265 cases recorded in 2020, only 13 identified the victim as 'foreign national' or 'Somalian national', with 184 classified as 'blank'. Ten of the 13 cases were related to assault by the police, and almost all victims were spaza shop owners, with police entering on the grounds of lockdown regulations, to take money or stock, as well as assault shopkeepers.<sup>59</sup> However, from interviews with respondents from IPID headquarters and with investigators in Gauteng and KwaZulu-Natal, it is likely that the numbers recorded in the master register do not reflect the number of complaints received. Respondents reported that IPID had received 'a lot' of complaints involving non-nationals during 2020, including specific targeting regarding the sale of cigarettes during the COVID-19 lockdown.<sup>60</sup>

Apart from the challenges concerning its mandate and data collection, a barrier to effective IPID oversight in the context of xenophobic violence and related hate crimes is that non-nationals are reportedly reluctant to come forward, give statements, provide testimony, and act as witnesses in cases. IPID investigators who were interviewed report a lack of trust in the processes: 'They have been victimised in their own spaces, and they don't have faith in the criminal justice system.'<sup>61</sup> They explain that non-nationals often fail to come to interviews, and that there are constant delays and difficulties in obtaining cooperation. In addition to a lack of trust in IPID and IPID processes, non-nationals may be reluctant to act as witnesses or complainants, as they need to protect their 'business interests', because they 'feel they may be exposed' to further SAPS harassment if they are involved in an IPID case, and, indeed, because the SAPS may intimidate witnesses by inspecting their businesses during investigations.<sup>62</sup>

A useful case study in this regard comes from 2019 following the raids in downtown Johannesburg. The LHR received reports from its clients – refugees and asylum-seekers – concerning the role of the police in criminally targeting the shops of foreign nationals:

*to the extent that people were paying huge amounts of money to police to ensure that their shops were protected. And that was how the police carried out their work: if you paid the protection money, your shops wouldn't be looted, and you'd be protected by the police. But if you didn't pay then South Africans were allowed to go and loot and attack.<sup>63</sup> Unfortunately, the witnesses were afraid to come forward to give the evidence. Instead, they witnesses disappeared, 'showing the extent to which people are afraid for their lives'.*

### **Systemic investigations into corruption**

Of significance in the context of the policing of non-nationals is that IPID also has a broad mandate to investigate matters relating to systemic corruption involving the police.<sup>64</sup>

IPID has the mandate to investigate cases involving corruption under section 28(1)(g) of its Act, and also has a discretionary mandate to investigate systemic corruption within policing services under section 28(2). Neither corruption, nor what constitutes systemic corruption, is defined by the Act or its Regulations.<sup>65</sup> In practice, the overwhelming majority of cases of corruption investigated by IPID relate to its mandate under section 28(1)(g), with 95% of the 801 cases of corruption between 2012 and 2019 recorded as individual-case investigations.<sup>66</sup> However, Bruce (2020) notes that many of the cases recorded under section 28(1)(g) actually relate to 'general manifestations of systemic corruption problems', thus suggesting that they should have been categorised, and investigated, under section 28(2).<sup>67</sup>

IPID relies on individual complaints for most of its work,<sup>68</sup> which limits the extent to which it may be investigating acts of corruption against non-nationals. Like other marginalised groups, non-nationals may be less willing to report abuse or act as witnesses. However, by taking on a systemic investigation, IPID may be able to assist, given what is known about the extent of the problem.

## **The Civilian Secretariat for Police Service**

The CSPS is a state institution that serves as the technical advisor to the Minister of Police on matters of SAPS governance, service delivery and resourcing. One of the main functions of the CSPS is to provide the Minister with policy advice and research support, and to provide civilian oversight over the SAPS through monitoring and evaluating overall police performance, including compliance with policy. While it also has the capacity to receive complaints,<sup>69</sup> in practice the Secretariat rarely manages complaints itself unless directed by the Minister of Police but rather refers them to IPID or back to the SAPS.<sup>70</sup>

The CSPS has not engaged significantly with issues of xenophobic violence and related hate crimes, or with the delivery of services to non-nationals. However, there are a few areas of its work that are worth noting.

### **'We Are One Humanity' campaign together with the SAPS**

In response to outbreaks of xenophobic violence in April of 2015, the CSPS supported the Minister of Police in embarking on the 'We Are One Humanity' campaign. This aligned with Minister Nkosinathi

Nhleko's (2014–2017) activation of the CSPS Partnerships Unit.<sup>71</sup> The objectives of the campaign were set out as follows in a CSPS presentation at the time:

- Condemn, confront and combat xenophobia
- Promote acceptance of diversity, the embracing of diversity and peaceful co-existence
- Create a generation of citizens – particularly a younger generation – free of prejudice, and ... enable them to challenge xenophobic tendencies in society and [in so doing] ensure stability
- Use the successful heritage of 'protest art' and the power of creativity to capture people's imaginations and encourage the celebration of diversity rather than the fear thereof
- Develop empathy and compassion [for] our communities

The campaign was launched in Gauteng, Mpumalanga, the Free State and KwaZulu-Natal in May 2015, where provincial stakeholder engagements were conducted.<sup>72</sup> However, there is no information as to whether the remaining activities were completed, nor was there any assessment of impact. Overall, evidence at the time, and from the provinces engaged, suggests that the anti-xenophobia campaign failed to achieve its objectives.<sup>73</sup> Nonetheless, the initiative illustrates how the CSPS Partnerships Unit, and its proactive mandate to address issues related to policing policy and service delivery, can be utilised.

### White Paper on Policing and White Paper on Safety and Security

In 2016, the CSPS introduced two key policy documents on police transformation and development: the White Papers on Policing, and the White Paper on Safety and Security. The issue of xenophobia was only dealt with in the White Paper on Policing in a peripheral way, where it stated:

*Internally, the advent of democracy resulted in the increased permeability of our borders, resulting in an emergence of drug and human trafficking and xenophobic-based violence.<sup>74</sup>*

This reference in seminal policing policy is problematic, as it directly links non-nationals to acts of criminality. This is not supported by research. Furthermore, it contributes to anti-foreigner sentiment, potentially fuelling xenophobia.<sup>75</sup>

The White Paper also failed to recognise non-nationals as a vulnerable group in the context of policing, which was a deliberate policy decision made by the CSPS because 'there is a ministerial intersectoral committee and the Department of Home Affairs is still dealing with the issue of foreign nationals'.<sup>76</sup> However, the White Paper on Safety and Security – in its glossary and definitions section – did include non-nationals as a vulnerable group.<sup>77</sup> The paper noted that '[f]oreign nationals are a highly vulnerable group, and vigilante and xenophobic violence has been prevalent in South Africa for decades', and went on to cite the UN Committee on the Elimination of Discrimination against Women, which has highlighted the vulnerability of refugee and migrant women, and the UN High Commission for Refugees' (UNHCR) list of challenges and vulnerabilities facing refugees in South Africa.<sup>78</sup> However, beyond this definitional section, the White Paper on Safety and Security did not provide a policy framework for addressing the safety, security and policing needs of non-nationals.



## Khayelitsha Commission of Inquiry

The Khayelitsha Commission of Inquiry into the breakdown of community–police relations was called into action through the Western Cape Provincial Secretariat of the Civilian Secretariat. The Khayelitsha Commission questioned whether an effective policing strategy had been put in place to address crimes against foreign nationals and xenophobic crimes. It was reported that, in Khayelitsha, 96.5% of business robberies were related to foreign-owned shops, even though they only made up 50% of store owners in the area. Foreign nationals reported police inefficiencies and secondary victimisation by SAPS members when reporting crimes such as extortion, theft, and malicious damage to their property. The Commission concluded that the discriminatory behaviour towards foreign nationals ‘should not simply be dismissed as the misconduct of “bad apples”...[but is] rooted in an institutional culture within the SAPS ... and [the] SAPS needs to take urgent steps to eradicate these attitudes’.<sup>79</sup>

One recommendation of the Commission of Inquiry was that a civilian policing expert nominated jointly by the Provincial Secretariat and the Civilian Secretariat should be part of an oversight and monitoring team tasked with ensuring that SAPS members are provided with training with regard to corruption and xenophobia. The team would also ensure that SAPS members collect crime statistics relating to xenophobic violence in order to enable adequate, intelligence-led policing strategies.<sup>80</sup>

## International and regional oversight

South Africa’s xenophobic violence, and the role of the SAPS, has not escaped international attention, with human rights treaty bodies (notably the Committee on the Elimination of Racial Discrimination and the UN Human Rights Council – both in 2016), the UN Special Rapporteur on the human rights of migrants, and South Africa’s three Universal Periodic Reviews highlighting the need for a definitive state response to ensure compliance with internationally binding obligations to promote rights, including non-discrimination, equality, access to justice, and the right to life for non-nationals.

In its 2016 review of South Africa, the Committee on the Elimination of Racial Discrimination expressed concern about the treatment of non-nationals in South Africa, including in relation to accessing justice, to unlawful and prolonged detention, and to targeted discrimination, xenophobia, racism and violence. It recommended that South Africa adopt measures to address, inter alia:<sup>81</sup>

- The unlawful detention of non-nationals;
- Access to justice for non-nationals;
- The investigation and prosecution of racial discrimination and xenophobia, including the provision of data on the number of reports of incidents, prosecutions and convictions; and
- The provision of specialised training for law enforcement officials relating to racial discrimination.

South Africa also received concluding observations from the UN Human Rights Committee in 2016 regarding its compliance with the International Covenant on Civil and Political Rights, which enshrines the rights to life, freedom from discrimination, and the right to equality, among others. The Committee also expressed concern about the various ways in which xenophobia manifests itself in South Africa, such as in violence and discrimination. It called on South Africa to, inter alia:<sup>82</sup>

- Improve policing responses to violence against non-nationals;
- Ensure the effective investigation of xenophobic violence and related hate crimes; and
- Ensure that arrest and detention of non-nationals prior to deportation constitute a measure of last resort.

In each cycle of South Africa's Universal Periodic Review, issues pertaining to xenophobic violence and related hate crimes are addressed. During the third cycle in 2017, South Africa supported a number of recommendations on strengthening its protection of non-nationals against discrimination, xenophobia and related intolerance. This included specific recommendations to improve policing action in response to xenophobic violence and to ensure effective investigation and prosecution of such violence.<sup>83</sup>

At the regional level, the African Commission on Human and Peoples' Rights adopted Resolution 304 condemning xenophobic violence, and called on South Africa to comply with its human rights obligations, including the obligation that perpetrators of the violence be held accountable under the law.<sup>84</sup>

# Strengthening oversight

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In March 2019, the South African government launched the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (the NAP). Its adoption by Cabinet in February 2019 signalled a prioritisation by government to address xenophobia. The NAP includes, among its objectives, consideration of the need to strengthen law enforcement regarding, and prosecution of, xenophobia.<sup>85</sup>

The work of dedicated police oversight and accountability mechanisms will be important in promoting achievement by the South African Police Service (SAPS) of the NAP's overall objectives. This is particularly evident at three levels.

First, key oversight mechanisms – both national and international – have already considered the challenges concerned and have made recommendations to improve SAPS responses and service delivery. Efforts to review, monitor and support the implementation of these recommendations are an obvious first step in promoting NAP implementation, as they represent authoritative and evidence-based responses to one of the challenges that the NAP is seeking to resolve.

Second, as APCOF's research has highlighted, the SAPS regulatory and policy framework still has to be aligned to the overarching objectives of the NAP, with a need to develop policy on the policing of non-nationals, and to strengthen training and operational responses. This work clearly falls within the mandate of two of the key oversight mechanisms – the Civilian Secretariat for Police Service (CSPS) and the South African Human Rights Commission (SAHRC) – and speaks directly to several key NAP implementation priorities.

Finally, the shifting policy environment towards a structured approach to addressing issues of xenophobic violence through the NAP also provides an opportunity to examine, and take action in relation to, the key challenges identified by the African Policing Civilian Oversight Forum (APCOF) and others in the policing of non-nationals that have not already been addressed by recommendations from previous processes. In particular, corruption has been identified as a contributing factor in the discriminatory and unfair targeting of non-nationals by the SAPS. Corruption in the asylum and immigration system is well documented, though, from an accountability standpoint, it is largely overlooked – and this despite a clear mandate on the part of IPID to conduct investigations into systemic corruption.<sup>86</sup>

Each of these three areas for possible intervention by SAPS oversight and accountability stakeholders in the strengthening of both policing services to non-nationals and as part of broader support for NAP implementation, are discussed in detail below.

## Implementation of previous recommendations

As detailed in the second section of this report, much work has been done at both the international and national level in order to understand and address the causes and impact of xenophobic violence in South Africa, with a common thread across this work being the capacity of the SAPS to effectively prevent, detect and investigate incidents of xenophobic violence, and to render equal and non-discriminatory service to non-nationals. These various processes have resulted in credible, evidence-based and viable recommendations being made to the SAPS and its stakeholders to address the identified deficits in the prevention of, and response to, xenophobic violence. Each of the three key police oversight and accountability mechanisms has a critical role to play in monitoring and supporting the implementation of the relevant mechanisms, in line with their mandates.

At national level, this work has been primarily undertaken by the SAHRC through its investigations, inquiries, and interventions in judicial hearings. In particular, its 2009 investigation and hearing have been lauded as producing one of the most ‘comprehensive reports on xenophobia that exists ...[giving] clear, detailed assessment of the situation, where we failed, the shortcomings that resulted in the shocking violence of 2008, and then clear recommendations’.<sup>87</sup> However, the implementation by the SAPS of these previous and subsequent recommendations has remained weak. During the 2015 outbreak of xenophobic violence, for example, the SAHRC expressed concern about the lack of implementation.<sup>88</sup> Such concern was borne out by the challenges observed in the policing of subsequent outbreaks of violence (e.g. by the absence of effective early-warning systems and by deficits in police training).<sup>89</sup>

The SAHRC considers its recommendations made to the SAPS – and to any other state institution for that matter – to be binding unless set aside by a court of law, a view confirmed by the Constitutional Court’s decision that the recommendations and remedial actions set out by another Chapter 9 institution, namely the Public Protector, are binding.<sup>90</sup> However, the SAHRC itself admits that, while it is ‘good at conducting hearings, and making findings and recommendations’, the reports are ‘gathering dust’ and ‘implementation is an issue’.<sup>91</sup> As a representative of Lawyers for Human Rights (LHR) reports: ‘Mountains of reports are produced and there’s no mechanism to enforce those reports’, meaning there are ‘no consequences’.<sup>92</sup> A researcher of the African Centre for Migration and Society (ACMS) adds:

*[The SAHRC is] not performing [its] oversight function effectively. In 2009, [it] made recommendations to different [government] departments, really drawing on research evidence to instruct government departments on what should be done to address the issues raised. [It was] ignored and nothing happened.’<sup>93</sup>*

As a generalist human rights mechanism, the SAHRC also has a mandate to monitor the implementation of South Africa’s human rights obligations, including concluding observations and recommendations received as part of treaty-body reporting or other such processes. South Africa is a party to international and regional agreements that impose an obligation to promote, protect and respect the human rights of all persons in the country, regardless of their national origin. Internationally, this includes the 1951 UN Refugee Convention and its 1967 Protocol. Regionally, the African Charter on Human and Peoples’ Rights, as interpreted by the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, protects the rights of non-nationals in the context of access to justice and outlines specific protection obligations, including freedom from discrimination, equal access to services, access to language interpreters, and consular assistance and assistance by other relevant third parties.<sup>94</sup> Within this framework, the policing of xenophobic violence has received attention, as set out in the second section of this report. The recommendations have ranged from improving training and the resourcing of incidents, to enhancing monitoring of, and reporting on, cases and trends in respect of hate crimes,

enacting specific legislation, and improving police responses to violence against non-nationals through systematic and effective police investigations.<sup>95</sup> However, as with the national recommendations, there is little evidence that these recommendations have been implemented by the SAPS.<sup>96</sup>

The SAHRC's 2009 investigation and report foreshadowed the implementation challenge, recognising as critical the ongoing work of monitoring and assessing implementation of the recommendations. The report directed a number of recommendations to the SAHRC aimed at supporting implementation, including the establishment of a mechanism to monitor implementation of the recommendations, with that monitoring information being made publicly accessible.<sup>97</sup>

Significantly, an objective of the NAP is to combat xenophobia and related intolerance through, *inter alia*, the 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. This includes effective, equitable and non-discriminatory policing services.<sup>98</sup> The NAP recognises that, in its own implementation framework, it can draw on previous work in order to identify the specific interventions required to achieve its objectives. Through the SAHRC and international stakeholders, there are credible and evidence-based recommendations to the SAPS and its stakeholders designed to address the identified deficits in the prevention of, and response to, xenophobic violence, as well as in service delivery to non-nationals. Accordingly, in supporting the NAP objective of strengthening law enforcement and prosecution,<sup>99</sup> the SAHRC has a key role to play in monitoring, promoting and, where appropriate, compelling implementation.

## Policy framework for the SAPS

The NAP provides a policy framework across a range of sectors – not just limited to policing – for addressing xenophobic violence and related hate crimes. As previously outlined, the NAP does not make specific reference to the role of the SAPS, though the strengthening of law enforcement and prosecutions is a key overarching objective of the policy. The 2019–2024 NAP Implementation Plan does provide some role for the SAPS, but that is limited to its role as part of a Department of Justice-led early-warning system for xenophobic violence, and does not address the range of policy interventions identified as critical by previous national and international investigative processes with regard to improving SAPS performance.

Given the focus on the SAPS (by the processes described in the second section of this report) in order to understand and address the phenomena of xenophobic violence in South Africa,<sup>100</sup> the absence of clear policy, and an implementation framework, for the SAPS creates an obvious gap that needs to be addressed. This is necessary if the NAP is to make inroads into addressing state responses to xenophobic violence.

At an institutional level, there is no overarching SAPS policy to guide its approach to non-discriminatory and effective policing services for non-nationals. While there is a reasonably detailed constitutional and legislative framework that imposes the obligation to provide responsive, equitable and non-discriminatory policing services to non-nationals, a policy framework to support implementation of this objective is lacking. Based on the recommendations set out in the second section of this report, and the findings of previous APCOF research into the performance of the SAPS in the prevention, detection and investigation of xenophobic violence, and the role of community policing forums (CPFs), the following issues emerge that could form the basis of a policy response by the SAPS, all of which align generally with key themes of the NAP:

- Acknowledgement of xenophobia and related hate crimes as a specific phenomenon that requires a specialised policing response – including improved operational preparedness and response, early-warning systems, and improved coordination among national, provincial and more localised policing structures.
- Zero tolerance for xenophobia within the ranks of the SAPS.
- Community outreach on issues of police service delivery, xenophobia and related hate crimes.
- Building partnerships with key community structures such as CPFs so as to support integrated community safety planning and prevention activities.
- The need for training for all SAPS officers regarding: the legislative frameworks that govern immigration and asylum in South Africa; the challenges inherent within those systems; policing within a framework of non-discrimination and acceptance of ethnic and other types of diversity; and unconscious bias. Specialised training for detective services is also critical for ensuring the identification of xenophobia as a motivating factor underlying crime.
- Aligning social crime prevention strategies with requirements for non-discriminatory and equitable policing services in order to ensure that non-nationals are not unfairly targeted or profiled by police, or perceived as ‘soft targets’, and are afforded all procedural safeguards in their interactions with the police.
- Encouraging recruitment of eligible non-nationals to the ranks of the SAPS to ensure that the institution has proportional representation of non-nationals.

APCOF has also argued that the methodology for the development of the framework, if broadly consultative and inclusive of non-nationals themselves, could prove as critical as a policy document itself in beginning to restore the fractured relationship between non-nationals and the SAPS.<sup>101</sup>

One of the primary functions of the CSPA is to evaluate and develop SAPS policies, which makes it well placed to support the development of policy on the policing of non-nationals.

## Investigation of systemic corruption

Previous research identified corruption as a significant contributing factor in the targeting of non-nationals by law enforcement officials – both in terms of immigration law enforcement and ordinary criminal law and by-law enforcement.<sup>102</sup> IPID reports that most of the cases it receives that involve non-nationals are related to incidents in which the police take money from spaza shop owners.<sup>103</sup> An IPID investigator interviewed for this report confirmed that, based on information IPID had received, non-nationals are regularly targeted by SAPS officials for the purpose of corruption and bribery. Several underlying reasons for the targeting of non-nationals were offered, such as SAPS awareness of how non-nationals tend to conduct their business – with more cash and stock being available on their premises than in the case of other retailers.<sup>104</sup> IPID investigators also highlight that shebeens, spaza shops, scrapyards and other informal businesses are likely to encounter police extortion and corruption.

For undocumented migrants, there are significant consequences in failing to pay a bribe, which can involve arrest and the risk of deportation.<sup>105</sup> Those who are documented may also still prefer to pay a bribe because SAPS officers know that, even if non-nationals can prove their status in South Africa, they may still be detained by the police until Department of Home Affairs (DHA) officials confirm and clear

their papers – which is time that self-employed non-nationals cannot afford to lose.<sup>106</sup> Furthermore, it is well documented (including in previous SAHRC investigations and reports) that the SAPS may destroy papers. Thus the paper-based system in respect of visas and asylum permits makes foreign nationals vulnerable to SAPS corruption.<sup>107</sup>

IPID officers have observed that non-nationals are less likely than others to complain about their treatment at the hands of the SAPS, with one such officer noting that those without paperwork are too scared to complain for fear of being deported, and that those who are in the country legally believe that they may be targeted by the police if they do report corruption.<sup>108</sup> In the case of businesses targeted, which operate on the fringes of the law, there is a fear that reporting corruption will just make the situation worse.<sup>109</sup>

Accordingly, while IPID investigators who were interviewed acknowledged that police extortion and bribery are likely a systemic issue in the context of the policing of non-nationals, the case numbers do not reflect the potential scale of the issue.<sup>110</sup> In a recent study of corruption in the asylum system, the LHR found that only 3% of respondents attempted to report corruption to the police or other bodies.<sup>111</sup>

When IPID does receive complaints, these are usually dealt with in terms of its mandate to investigate individual cases of corruption under section 28(1)(g) of the IPID Act. However, when patterns in respect of individual complaints are found, IPID has a mandate to conduct investigations into systemic corruption under section 28(2) of its Act. There is a mounting body of evidence to support a possible IPID investigation into systemic corruption by the SAPS against non-nationals in South Africa.

## Conclusion and recommendations

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Embedded within the constitutional and legislative framework for policing in South Africa is a comprehensive external oversight and accountability architecture involving a range of different mechanisms. By design, this architecture is intended to support both proactive and reactive functions of dedicated mechanisms for police oversight (through the CSPA and IPID) in order to ensure that policing is consistent with human rights guarantees (through the SAHRC) and is accountable to multiple other actors, including the legislature and judiciary. Over the past 25 years, much has been written about the extent to which this system for police oversight and accountability is effective in holding the South African Police Service (SAPS) to account, and in contributing to its growth and improvement as a democratic police service. While it is beyond the scope of this report to analyse the performance of key police oversight institutions, what is apparent is that the track record of this system in delivering rights-based and accountable policing in the context of xenophobic violence and related hate crimes, is weak. Where investments have been made – such as through the various investigations and reports by the SAHRC – the implementation of findings has yet to happen. Despite information being available about issues related directly to mandate areas – such as investigations by IPID into systemic corruption, and the need for policy to address the deficit between the SAPS’s constitutional and legislative mandate relating to non-discriminatory policing services, and the reality of service delivery to non-nationals – there has been no significant movement towards addressing these gaps.

The National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, and its promise of measures to address xenophobic violence and related hate crimes, provides a critical opportunity to engage the mandates of the SAPS’s key oversight partners as a central means to improving policing responses. Much of the groundwork in understanding the critical failures in policing responses during outbreaks of xenophobic violence, or in terms of general service delivery to non-nationals, has been done. This includes not only the work of the SAHRC and international human rights bodies, but also the significant contributions by civil society organisations and academics, to frame and offer recommendations to respond to the challenge. Those institutions with the mandate to conduct oversight should be encouraged and capacitated to play the critical supporting role required to ensure the effective response by the SAPS to xenophobic violence and related hate crimes, and to improve service delivery to non-nationals.



## Recommendations to the SAHRC

Establish a Section 11 Committee on xenophobia and migration. While it may have a broader mandate than just policing, it is recommended that, in relation to the role of the SAPS, the Committee should:

- Review and assess the relevance of recommendations made at national and international level aimed at improving SAPS performance with regard to the prevention, detection and combating of xenophobic violence and related hate crimes, and with regard to service delivery to non-nationals;
- Develop and actively monitor an implementation framework for the recommendations identified as relevant and outstanding; and
- Through the current Memorandum of Understanding (MoU) with the SAPS, develop and deliver specialised training for SAPS officials on: the legislative frameworks that govern immigration and asylum in South Africa; the challenges inherent within those systems; policing within a framework of non-discrimination and acceptance of ethnic and other types of diversity; and unconscious bias.

## Recommendations to the CSPS

Utilising an inclusive and consultative methodology that includes non-nationals and organisations that represent their interests, develop a SAPS policy on the policing of non-nationals and on xenophobic violence and related hate crimes. The policy should:

- Align with the overarching objectives of the NAP, including its specific implementation focus on evidence-based prevention, on early warning, and on community outreach; and
- Respond directly to relevant recommendations of investigations, inquiries and other processes, including the synthesised list of issues set out in the third section of this paper.

## Recommendations to IPID

IPID should, in accordance with its mandate under section 28(2) of its Act, investigate systemic corruption by the SAPS against non-nationals, including such corruption in immigration policing and in the policing of informal businesses.

IPID should also ensure that the master register of cases includes information on the nationality of alleged victims of police abuse, and it should conduct regular analytical reviews of this data to identify the need for systemic investigations. Further, IPID investigators should be trained to identify xenophobia as a motivating or contributing factor in police misconduct and criminality against non-nationals.

# Annexure 1:

## SAHRC 2010 recommendations to the SAPS

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### **Recommendations to South African Police Service (SAPS)**

Recommendations and/or information pertaining to the SANDF are found in the following sections of the report: 2.1; 2.3; 3.1; 4.7.

- 1) Compile a documentary record of institutional learning during and after the May 2008 attacks in consultation with deployed members, which will form the basis of an engagement between SAPS and the SANDF on guidelines for future cooperation in the case of a social conflict disaster (see Recommendations to SAPS).
- 2) Together with SAPS, draw up best practice guidelines (as envisioned by the Defence Act 2002) for reference in the event of a future request for cooperative service in conditions of civic violence.

### **Recommendations to South African Police Service (SAPS)**

Recommendations and/or information pertaining to SAPS are found in the following sections of the report: 2.2; 2.3; 2.5; 2.6; 2.7; 3.1; 4.1; 4.3; 4.4; 4.6; 4.7.

- 1) Establish a national task team of police to compile a documentary record of institutional learning during and after the May 2008 attacks in consultation with affected stations and provincial offices. This should form the basis of relevant training or guidelines, which should be rolled out to all affected stations, prioritising those stations which have experienced violence against non-nationals on more than one occasion. It should also inform the recommended engagement between SAPS and the SANDF on guidelines for future cooperation in the case of a social conflict disaster (see below).
- 2) Revisit the standing orders and operational protocols currently used in the policing of social conflict in light of the findings of this report and the experience of station and provincial-level police.
- 3) Together with SANDF, draw up best practice guidelines (as envisioned by the Defence Act 2002) for reference in the event of a future request for cooperative service in conditions of civic violence. Establish an incident profile of the scale and nature of incident that will in future merit a cooperative service response. A recommended departure point would be for deployment of the SANDF to be immediately requested, and the pre-prepared guidelines activated, where the available resources are inadequate to protect both life and property or where backup to the initially affected area is depleted, for instance by the outbreak of violence in a second locality.
- 4) Boost the visibility of policing following an outbreak of social conflict by immediately and simultaneously deploying all available backup units.
- 5) Require provincial police offices to produce contingency plans for a full range of social conflict scenarios, supported by inter-provincial communication and debate.

- 6) Together with the NPA, compile an evaluation of the 2008 joint agreement on xenophobia-related cases and the challenges in its implementation, providing concrete recommendations to minimise the weaknesses and promote the strengths of the response in case of a similar situation arising in the future.
- 7) Together with DoJCD, draw up a set of best practice guidelines that in the case of a future scenario would make the best and most efficient use of resources in the judicial system.
- 8) In future, reinforce opposition to bail in court with the possibility of intimidation of witnesses and complainants and the threat this poses to the course of justice.
- 9) In relation to the national police desk on crimes against non-nationals, continually review the information collation mechanisms feeding this early warning system, so as to ensure ongoing improvements.
- 10) Partner with DHA and Disaster Management in responding to early warning information or patterns of crimes against non-nationals.
- 11) Ensure that the national police desk on crimes against non-nationals is party to the programme of targeted conflict resolution initiatives to be implemented by a department nominated by the social cluster.
- 12) Ensure that the criteria for reportable instances of xenophobia are standardised, and consider future oversight by the Monitoring and Evaluation Directorate of the Civilian Secretariat of Police.
- 13) If it is necessary to carry out immigration policing in informal settlements, do so sensitively in order not to exacerbate social tensions or alienate non-nationals from the justice system in these areas.
- 14) Ensure that sporadic prejudice-related crimes against non-national individuals, and opportunistic crimes exploiting the marginal position occupied by non-nationals, receive adequate focus and judicial response.
- 15) Partner with DoJCD, Metro Police, the Civilian Secretariat of Police and the Independent Complaints Directorate (ICD) to develop a community-based campaign to promote the justice system.
- 16) Partner with Provincial Departments of Community Safety to investigate the circumstances under which CPFs cease to function in informal settlement areas.
- 17) Support the establishment of satellite police stations in informal areas, prioritising areas where these are specifically requested, and areas at risk of public violence.
- 18) Together with Departments of Community Safety, facilitate neighbourhood watch campaigns and hotlines to local police in order to protect deserted informal homes in the wake of any displacement.
- 19) Consider ways of using media footage to assist in investigations of social conflicts that are covered by the media.
- 20) Ensure training in matters pertaining to hate crimes once such legislation is put in place.
- 21) Review SAPS record keeping and related information systems and plan improvements.

Source: SAHRC, Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals, 2010, pp. 17–18.

## Annexure 2:

### The iterations of the SAPS–SAHRC MoU

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**2015:** The first MoU is signed. It focuses on human rights in law enforcement and the reduction of violence and torture by police officials.<sup>112</sup> Similarly:

*[t]he MoU provides for a conflict-resolution mechanism between the SAHRC and the SAPS as the parties strive to promote human rights in policing. The thematic areas covered by the MoU include: curriculum review and development; visiting lectures; overcoming resistance to change in the SAPS about adopting a human rights culture; research; monitoring and evaluation; and information and media. The human rights content of the SAPS curriculum will be reviewed with regard to the protection of human rights while exercising powers of arrest, search and seizure; the policing of gatherings and demonstrations; and the use of force, including lethal force.<sup>113</sup>*

By 2017, it is found that ‘the SAHRC has not performed these functions’, with the MoU accordingly being revised.<sup>114</sup>

- **2018:** A new MoU is signed and includes the following:
  - the SAHRC will review and develop identified ... training curricula for officers of the SAPS, as well as policy pertaining to the protection of human rights; ...*
  - *both the SAHRC and the SAPS will collaborate on research to identify, amongst others, a human rights approach to policing, [including] underlying and systematic causes and consequences of violence, crime and public protests in South Africa;*
  - *the parties will undertake joint or collaborative outreach activities to, amongst others, create awareness amongst members of the community and members of the SAPS on issues pertaining to human rights, freedoms and associated responsibilities relating to the conduct and oversight of public protests[,] as well as matters of human rights and policing; ...<sup>115</sup>*

**2019:** A new draft MoU is under discussion ‘now that there is new police leadership’ ...<sup>116</sup>

**2020:** The MOU – which has not been officially signed – is now considered a ‘living document’ which is steadily being put in place.<sup>117</sup> Through the MoU, the SAHRC conducts quarterly meetings with the SAPS, and has ‘a lot of access to senior police officers’.<sup>118</sup> In recent times, much of the focus of SAPS–SAHRC interactions has been the launching of the National Preventive Mechanism (NPM) relating to torture.<sup>119</sup>

A senior police officer explains:

*We identify things that we collectively want to achieve ... [.] [O]ne of them is to look at research and training of members, but also linked with that [are] the areas around accountability whereby they [SAHRC] visit and inspect our detention facilities ... [W]e also agreed that we are going to have continuous engagement[,] including annual lectures ... and education of the communities around the rights and responsibilities [during demonstrations] ...<sup>120</sup>*

# Endnotes

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- 16 Ibid., s 184.
- 17 The Independent Police Complaints Directorate was established in 1997 in terms of the South African Police Service Act to investigate deaths in custody and as a result of police action, as well as to investigate and monitor complaints against the police (giving it both an investigative and monitoring function). It was superseded by the establishment of the Independent Police Investigative Directorate (IPID), and its purely investigative function, pursuant to the Independent Police Investigative Directorate Act of 2011.
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- 21 This includes the 1998 Campaign to Roll Back Xenophobia; the 1999 Report – Arrest and Detention of Suspected Undocumented Migrants; 2000 statements against SAPS Operation Crackdown; the 2000 Report – Lindela Detention Facility: Getting to the Crossroads of Detention and Repatriation; the 2002 establishment of an interim system for detention monitoring; the 2004 Survey of South Africans; the 2004 Hearing – Xenophobia in South Africa and Problems Related to It; the 2006 Shadow Report on South Africa's Compliance with the Provisions of the International Convention against All Forms of Racial Discrimination; the 2008 to 2011 respondents in *Said and others v Minister of Safety and Security and others*; the 2009 Report – Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence; the 2009 Policy Paper – A National Human Rights Institution's Response to a Disaster: Lessons from the South African Human Rights Commission; the 2009 to 2010 National Hearing on 2008 Public Violence against Non-nationals – Report on the SAHRC Investigations into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals; the 2014 to 2016 investigation into living conditions at Lindela; the 2014 case of *South African Human Rights Commission and 40 others v Minister of Home Affairs*; the 2016 case of *African Diaspora & 30 others v King Goodwill Zwelithini*; the 2017 complaint – Deputy Minister of Police Bongani Mkongi; the 2018 national investigative hearing on xenophobia, migration and social cohesion; and the 2018 hearings on the sale of fake and expired goods.
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## About the authors

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**Laura Freeman** is a researcher at the University of Cape Town's South–South Migration Hub and Research Associate at the Safety & Violence Initiative. Laura has focused much of her research and work on migration and xenophobic violent exclusion. She has worked as both a researcher and practitioner in communities that have experienced xenophobia, including developing programmes to foster social cohesion, inclusion and integration. Laura has taught postgraduates and professionals about xenophobia in Africa. Prior to her current post, Laura worked in the non-profit sector as Deputy Director at ALPS Resilience and Conflict & Migration Advisor at Freedom House Southern Africa. Laura has also lectured in conflict studies and political philosophy at UCT.

**Lauren October** is a violence researcher particularly interested in prevention, gender, community psychology and local governance. She has two undergraduate degrees in psychology and international studies respectively, and graduated from the University of Stellenbosch with a master's degree in political science. She is currently a researcher at the Children's Institute (UCT), working on the intersections of violence against women and violence against children. She was previously based at the Safety and Violence Initiative (SaVI), where her main focus was on xenophobia and social cohesion as well as managing content for the SaferSpaces web platform, a violence prevention partnership dedicated to implementing the White Paper on Safety and Security. .

**Louise Edwards** (B.A. (Arabic), L.L.B, L.L.M (International Law)) has spent the past 10 years working on police accountability across Africa. Her focus has included the provision of technical legal assistance to organs of the African Union, Regional Economic Communities and national stakeholders in the drafting and implementation of regional legal standards for rights-based policing. This includes leading the drafting of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (ACHPR, 2014), the Guidelines on the Policing of Assemblies in Africa (ACHPR, 2017), and the Common Standards for Policing in East Africa (EAC/EAPCCO, 2010). Prior to this, Louise was a lawyer in private practice (Allens) and in the community legal sector.



## ABOUT THIS 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.

The persistence of xenophobic violence and hate crime in South Africa raises critical questions regarding the ability of external oversight institutions – the South African Human Rights Commission (SAHRC), the Independent Police Investigative Directorate (IPID) and the Civilian Secretariat of Police Service (CSPS) – to keep the mandate holders to account.

This report reviews the role of police oversight bodies, their recommendations, and the progress made on these recommendations, before exploring how we can be more responsive.

## 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.

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