



REPORT ON THE NATIONAL DIALOGUE ON POLICE AND HUMAN RIGHTS

Arbitrary arrest in South Africa

22 MARCH 2022
PRETORIA, SOUTH AFRICA

Hosted by
African Policing Civilian Oversight Forum

In partnership with
South African Human Rights Commission and
South African Police Service

Funded by
The Sigrid Rausing Trust



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This was a hybrid event, with in-person attendance taking place at the Premier Hotel in Pretoria, while online participants were able to join via Zoom. It was organised by the African Policing Civilian Oversight (APCOF) and the South African Human Rights Commission (SAHRC).

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ACRONYMS AND ABBREVIATIONS

ACJR	African Criminal Justice Reform
African Commission	African Commission on Human and Peoples' Rights
APCOF	African Policing Civilian Oversight Forum
CTMPD	Cape Town Metro Police Department
IPID	Independent Policing Investigative Directorate
ISS	Institute for Security Studies
LEAD	Law Enforcement Assisted Diversion
LHR	Lawyers for Human Rights
Luanda Guidelines	Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
MoU	Memorandum of Understanding
NICRO	National Institute for Crime Prevention and the Rehabilitation of Offenders
NPA	National Prosecuting Authority
OST	Opioid Substitution Therapy
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
WCPO	Western Cape Police Ombudsman

1 | Executive summary

On 22 March 2022, the South African Human Rights Commission (SAHRC) and the South African Police Service (SAPS), with support from the African Policing Civilian Oversight Forum (APCOF), participated in the fifth National Dialogue on Police and Human Rights. It was attended, and contributions were made, by a range of stakeholders from government, academia and civil society. The focus of the 2022 dialogue was on understanding the extent, the underlying causes (and the impact) of arbitrary arrest, and developing responsive human-rights solutions to this criminal justice issue.

The dialogue underscored the existing international, constitutional, legislative and operational framework pertaining to lawful arrests in South Africa. While this progressive legal regime should inform the everyday actions of police officers, the discussion revealed that there is a normative gap between this framework and practical policing knowledge and behaviour. This gap is driven by several complex and intersecting factors which were discussed in detail. Examples of these factors include elements that are internal to the SAPS, such as a problematic policing culture and a lack of discipline and accountability. These internal shortcomings have been further compounded by external factors, such as the coronavirus (COVID-19) pandemic, and the resulting government response which effectively exacerbated socio-economic suffering and ineffective police performance.

While lawful arrest fulfils an important criminal justice function, an arbitrary arrest has significant detrimental consequences. For example, research has confirmed that arbitrary arrest places an unnecessary burden on scarce state resources, while exposing the police to civil claims and undermining public trust and confidence in the police. Research has also revealed the negative social impact of arrests, with a disproportionate burden on particular segments of society. These arrests represent a tendency to replicate underlying power dynamics within society, with ethnic and racial minorities at a higher risk of being arrested. This is manifested as increased suspicion against 'young men, black people and people who had been previously arrested'.¹ Arbitrary arrest can also serve to entrench socio-economic vulnerability, while often causing undue harm to drug users. Given the significant impact on the rights of arrested persons, the rule of law, and the effective functioning of the criminal justice system, arbitrary arrest requires effective solutions.

While arbitrary arrest is a complex criminal-justice issue, part of the challenge is that the power to arrest is ultimately a discretionary policing power. Accordingly, police officers require sufficient instruction, guidance, training and supervision to ensure that they are exercising this power within the confines of the law and in accordance with human rights. There is, therefore, a need to reflect on how the existing legal framework can be strengthened, while being translated into workable solutions that ensure human rights-based implementation. The dialogue explored the transformative potential of evidence-based training, the development of more responsive policing indicators, and the need to raise awareness on alternatives to arrest, such as harm reduction measures and diversion. If we are truly committed to establishing a democratic society based on human rights, then these alternatives require serious consideration, support and commitment.



2 | Overview of this report

This report sets out the themes and sub-themes discussed during the dialogue, the challenges and good practice shared, and the recommendations that emerged from both the panel presentations and the interactive discussions that followed. In addressing the major theme of arbitrary arrest, this report covers the sub-themes of:

- the legal framework for a lawful arrest under South African law, and international human-rights standards;
- the extent of arbitrary arrest in South Africa, and understanding its drivers;
- the impact of arbitrary arrest on human rights, criminal-justice capacity and trust in policing; and
- developing responsive human-rights solutions to the drivers of arbitrary arrest.

3 | Background context to the dialogue

Given the negative impact of arbitrary arrest, as briefly outlined above, both the SAPS and the SAHRC have recognised the need to further understand the extent and drivers of the problem in South Africa. Accordingly, the dialogue was held under the auspices of the SAHRC Memorandum of Understanding (MoU) with the SAPS, and was informed by the overarching goal of promoting human rights-compliant policing in South Africa. The dialogue also sought to develop collaborative and cooperative interventions to ensure a more rights-based and rational approach to arrest.

Given that the human rights implications of arbitrary arrest fall within the constitutional mandate of the SAHRC, and that arbitrary arrest carries significant costs for the SAPS and society at large, this dialogue was both necessary and timely. The dialogue also formed part of the commemoration of South African Human Rights Day held on 21 March 2022, as well as Africa Pre-trial Detention Day, which is observed annually on 25 April to raise awareness of human-rights violations related to pre-trial detention.

4 | Theme 1: The legal framework pertaining to lawful arrest

The rights to privacy, liberty, freedom and security of the person and the rights of accused and detained persons are protected at both the international and the national levels. Article 9 of the Universal Declaration of Human Rights provides that no one shall be subjected to arbitrary arrest or detention. Article 6 of the African Charter on Human and Peoples' Rights provides that:

every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.²

The African Commission on Human and Peoples' Rights (the African Commission) has adopted the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) to articulate the grounds for lawful arrest based on the principles of equality and the rule of law. States are required to implement these guidelines in a manner that is clear, accessible, consistent with international standards, and in a manner that respects the rights of the individual. Arrests may not be carried out in a discriminatory manner, with explicit prohibition against discrimination on the basis of race, ethnicity, colour, language, religion, political affiliation, nationality, social origin, or any other status. All persons detained in police custody should have a presumptive right to police bail.³ This is necessary, as the absence or denial of bail can exacerbate the impact of

an inappropriate arrest by adding to the length of detention. The African Commission also articulated the requirements for a lawful arrest in the case of *Amnesty International and Others v Sudan*,⁴ finding that the act of arrest must be compliant with acceptable international standards and based on concrete and substantiated acts. The African Commission emphasised that the arresting officer must think twice and only act on substantive reasons before effecting an arrest.⁵

These provisions are reflected in South African human-rights law. For example, under the Constitution of the Republic of South Africa, section 9 protects the right to equality and freedom from unfair discrimination. Equally, section 12 guarantees the right not to be deprived of freedom arbitrarily or without just cause. Section 14 protects the right to privacy, which includes the right not to have one's person or home searched, property or possessions seized, or privacy of communications infringed. Section 35 goes on to spell out the rights of arrested, detained and accused persons. Section 40 of the Criminal Procedure Act 51 of 1977 also contains protections against arbitrary arrest and detention, with these protections supported by ample case law.

In addition to this constitutional and legislative framework, the SAPS has developed Standing Orders and national instructions. For example, Standing Order 341 provided guidance to officers on the procedure related to an arrest, and explicitly prohibited arbitrary arrest for the purposes of punishing, scaring and harassing people. Before making an arrest, the Standing Order required that officers must form the objective belief that the person arrested has committed, or is about to commit, an offence.

The Standing Order 341 on the arrest and treatment of an arrested person has been replaced by a number of national instructions (NIs):

- NI 11/2019 – on the arrest, transportation and treatment of persons in custody.
- NI 12/2019 – on the arrest and treatment of persons illegally in South Africa, detailing how the SAPS may detain them, and how to deal with the requirements of the Immigration Act and the Department of Home Affairs.
- NI 13/2019 – on the management of persons in custody of the SAPS.
- NI 3/2016 – on bail and release.
- NI 2/2010 – on the treatment of children in conflict with the law.

When the SAPS' legal and policy services staff find out about specific operational challenges, they provide detailed advice in circulars. One of the most important circulars dealing with the arrest and detention of suspects, which was issued in 2019, explains the discretionary powers that police have in relation to arrest.⁶

In spite of this progressive framework, the South African Police Service Act 68 of 1995 (the SAPS Act) has been misused at times to bypass these human-rights protections. For example, section 13(7) of the SAPS Act gives the national and provincial police commissioners the power to cordon off areas and perform crime prevention exercises to restore public order or to ensure safety in a particular area. Most of the individuals who are subsequently arrested in such circumstances, without a warrant and, for the most part, without reasonable suspicion, are from low-income, high-density areas.⁷ The Constitutional Court declared section 13(7)(c) of the SAPS Act to be unconstitutional and invalid.⁸ It held that the use of this section to conduct sweeps and raids against 2 800 residents of 15 Johannesburg high-rise blocks during 2017 and 2018 was 'cruel, degrading and invasive'.

In the light of the constitutional, legislative and regulatory framework, a person can only be lawfully arrested in three circumstances:

1. on the strength of a warrant of arrest issued by a court of law;
2. where a police officer witnesses someone committing an offence; or
3. where there is probable and reasonable cause to believe that a person has been involved in the commission of a crime.⁹

With regard to the probable and reasonable cause for believing that a person has been involved in a crime, Clive Plasket¹⁰ sets out that:

- the person executing the arrest must have an open mind regarding the factors pointing to both the suspect's innocence and their guilt;
- suspects should have the opportunity to offer an explanation as to why they found themselves in a particular situation before being arrested; and
- for police suspicion to be reasonable, it must extend to all elements of the offence.¹¹

In addition, when affecting an arrest, there must be a real and substantial consideration of the suspect's human dignity and their right to freedom. When arresting an individual without a warrant, arresting officers must properly consider the rights to human dignity and freedom. In the *Brand* case,¹² the court held that the arresting officer must think twice before arresting someone without a warrant. In spite of the existing progressive legal framework and the requirements for lawful arrest, the level of arbitrary arrest remains high. It is therefore necessary to review and understand its underlying causes.¹³

5 | Theme 2: Understanding the extent of arbitrary arrest and its drivers

This section draws from the first panel discussion, which was facilitated by Gushwell Brooks of the SAHRC and included presentations from Prof. Lukas Muntingh from African Criminal Justice Reform (ACJR); Wayne Ncube from Lawyers for Human Rights (LHR); and Dr Trevor Ngwane from the University of Johannesburg. This section represents a synthesis of the information that was shared by the presenters and the discussion that followed.

The first panel confirmed that there are several complex and intersecting factors that give rise to the problem of arbitrary arrest. These factors include elements that are internal to policing institutions, such as policing culture and problematic performance incentives, as well as external socio-economic factors. These drivers are discussed in further detail below.

Policing culture, organisational pressure and competence

Policing culture inevitably influences how the existing legal framework is implemented. Viewing arbitrary arrest from a police perspective, the inclination of police officers to arrest people for minor offences is partly motivated by their identity as law enforcement officers. Police officers are not, however, always aware of legal changes that have occurred in response to social developments. For example, in spite of the possession of small quantities of cannabis being decriminalised, many police officers continue to arrest people for possession.¹⁴

The internal culture within policing organisations has also been shaped by historical ideas concerning performance monitoring. Traditionally, arrests were used as an indicator of positive performance. While the performance management system itself no longer incentivises arrests, many police officers on the ground still perceive arrests as proof of positive performance. Furthermore, driving narrative in day-to-day policing has been established after many years of incentivised arrest targets. Even station commanders may not have been provided with training on how to adjust to new cultural ideas of what constitutes positive police performance. Commanding officers also act to protect their jobs, and the jobs of their subordinates, resulting in them encouraging enforcement of the law in the way that it is traditionally understood. The internal organisational culture therefore places significant pressure on police officers to be seen as taking action through, for example, stop and search activities and arresting individuals. These actions are favoured as: a) they are publicly visible; b) officers can report on these activities to their superiors; and c) these actions can be counted. Transforming this perspective will necessarily require replacing arrest as a measurable performance indicator with a different and credible activity that is incentivised.

Being kind, listening, and visiting a victim after the commission or reporting of an offence constitutes positive police behaviours which are very difficult to report on. The well-meaning officials in the SAPS who developed the performance management system are aware of the tension between quantifiable indicators and activities that are difficult to report on. The primary question therefore remains how performance management indicators are interpreted by frontline police officials.¹⁵

While arrests are no longer incentivised, the SAPS has detection rate targets. A detection means a suspect has been identified, whether or not he or she has been arrested. Ideally, the case would then be sent to court and the National Prosecuting Authority (NPA) would decide to prosecute, or if a decision was taken not to prosecute, the SAPS would close the case. These detection rate targets indirectly incentivise arrest, even in instances where there is no evidential link between the arrested person and the crime. While police may perceive that making an arrest creates the impression that they are performing effectively, trust in the police and conviction rates remain low, and South Africa is not necessarily seeing justice being done.¹⁶

The emphasis on reported crime further translates into police officials feeling the pressure to downplay the rise in crime. This pressure results in poor service at the station level, with officers often discouraging victims of crime from reporting incidents of crime. This approach offers an inaccurate picture of crime levels and does nothing to improve public safety.

In spite of existing performance indicators, police performance is worsening. In an Institute for Security Studies (ISS) factsheet summarising eight years of SAPS performance data, Gareth Newham pointed out that, between 2012 and 2020, there was a 40% reduction in roadblocks, an 89% reduction in cordon off and search operations, 82% fewer air support operations, 20% fewer vehicle searches and 92% fewer people searches.¹⁷ Some may perceive this as negative, but many would argue that it represents a positive shift in policing. It could potentially suggest a breakdown in policing, or it could suggest a positive shift away from the idea that simply searching and coercing people constitutes effective police work. Simultaneously, between 2012 and 2020, there was an increase in other activities such as premises being searched, schools being attended, and shopping centres being visited. It is important to keep an open mind when interpreting these shifts in activities and determining whether they represent a conscious shift in posture. Ultimately, however, current activities are not improving safety.

Murder has continued to increase, serious violent crime has continued to increase, and trust in the police has now declined to its lowest level ever. SAPS metrics further indicate that there has also been a decline in performance over the same period: there has been a 52% decline in firearms recovered and confiscated; the detection rate for murder has dropped from 38% to 19%; the detection rate for robbery has declined from 24% to 17%; and the detection rate for contact crimes has declined from 62% to 49%.¹⁸ In spite of the high level of arbitrary arrest, the quality of police work has therefore declined in recent years, further emphasising the need to reconsider policing performance indicators.



While crime has increased, there was a significant decline in the total number of SAPS arrests between 2013/2014 and 2019/2020, which appears positive. There has been a slight decline in the number of arrests for all contact crimes; however, the detection rate for all contact crime has plummeted to 49%. The number of murders was fairly consistent between 2013/2014 and 2019/2020, but the murder detection rate has plummeted to 19%.¹⁹ The conviction rate is even lower.

What can be drawn from these statistics is that the internal organisational culture within the SAPS, and the focus on current statistical performance indicators, are not serving to improve public safety or police performance. Arbitrary arrest persists because of the manner in which frontline police officers interpret existing performance indicators and because they do not understand the purpose of arrest. Officers use arrest to either create the impression that they are doing police work, as a form of punishment, or to extort a bribe.²⁰

Police also resort to arrest because they perceive the criminal justice system as being ineffective. Approximately 34% of people in correctional facilities have been remanded in custody without being found guilty of a crime.²¹ Courts, particularly in South Africa's cities, are not adequately resourced to deal with the high number of people that move through them. Many people who lack access to *pro bono* legal representation or legal aid are not able to obtain bail, resulting in them staying in remand for extended periods of time. This leads to accused persons taking plea deals out of desperation, as they have been in custody for up to six months without appearing in court, without being able to see the docket, and without being able to challenge the lawfulness of their arrest or search. If every person facing charges were to have their day in court, the criminal justice system would collapse for lack of courts, magistrates and lawyers willing to represent clients.²² The police perspective on the inadequacy of the criminal justice system is also compounded by arrested persons being released on bail, as well as repeat offending, low conviction rates, punishments being inadequate, and a lack of rehabilitation of offenders.

Circumstantial factors that contribute to the incidence of arbitrary arrest include the attitude of the person towards the officer, resistance to being arrested, and people getting into an argument with an officer.²³

Ultimately, however, arbitrary arrest is a misuse and abuse of police power that occurs due to a disconnection between existing laws and everyday policing practice and culture. This is related to the high levels of corruption and the lack of accountability and discipline within the SAPS.

Lack of accountability within the SAPS

There have been a number of media reports indicating the disciplinary challenges within the SAPS. These reports have revealed that there is a lack of accountability for police misconduct, including violence and corruption. Concern has been expressed over whether the Independent Policing Investigative Directorate (IPID) is adequately resourced and whether it is an effective vehicle to ensure police accountability. Given the low number of prosecutions, criticism has also been levelled against the NPA, citing that police misconduct is not taken seriously.

The accountability challenge is also inherent in the lack of mandate or capacity of oversight mechanisms to monitor the implementation of findings regarding arbitrary and unlawful arrest. For example, the Office of the Western Cape Police Ombudsman (WCPO) conducts impartial and independent investigations of complaints in relation to police inefficiency and/or a breakdown of relations between the police and communities, including complaints of unlawful arrest. Where a complaint is found to be substantiated for service delivery inefficiency, the WCPO makes recommendations to the SAPS or to the Cape Town Metro Police Department (CTMPD). However, no recommendations can be made regarding the legality of arrests, and the WCPO has no mandate to monitor what happens to complaints after concluding its work. It sends quarterly reports to the Western Cape Provincial Parliament Portfolio Committee on Safety, which has a mandate to hold the SAPS and the CTMPD accountable.²⁴

Accountability challenges are exacerbated by internal policing culture and discipline. The idea of 'what happens on a shift stays on the shift' remains a common cultural trope among police officials. Some managers may also be reluctant to act against corruption or abuse of power due to a fear of retaliation or reprisals. Effective, fair and prompt internal discipline is vital to the functioning of any organisation. It indicates that there are rules, and that anyone breaking the rules is dealt with effectively and fairly. This is even more so for a police service: if minor transgressions are not addressed, it only raises the bar of (a culture of) impunity. There should be a high reliance on self-regulation, but this does not appear to be the case. If, for example, unlawful arrests are not dealt with effectively, assaulting a suspect may be seen as acceptable behaviour.²⁵

Disciplinary action against SAPS members is a seemingly rare event, and one that has declined substantially in recent years. For example, 44.3% of disciplinary action brought against officials have findings of 'not guilty' or 'withdrawn', meaning that, even if a case were to proceed to a disciplinary hearing, there is a high likelihood that errant police officers would face no consequences.²⁶

There are also very few prosecutions of police officers. Of the 9 899 cases referred by IPID to the NPA between 2015/2016 and 2020/2021, there was a decision to prosecute in fewer than 3% of cases. In 20% of cases, the decision was not to prosecute. In 75% of the cases, the NPA had not responded with a reply at the time of reporting. The message to ordinary SAPS members is therefore that, even in the event of serious rights violations such as murder, torture or rape, there is a 97% likelihood that there will be no consequences.²⁷

The disciplinary culture within the SAPS must therefore be strengthened. Strengthening accountability requires strict adherence to internal disciplinary procedures, accompanied by criminal prosecutions where appropriate. If there are civil claims, the losses incurred by the state must be recouped from offending officials in terms of the applicable National Treasury regulations. Police management, from the executive level to the national and provincial commissioners, should furthermore be made to understand that this lack of police accountability serves as a significant driver of crime, and that it carries a substantial financial and social cost.²⁸

External pressure

Dominant social views on what is 'moral', on what constitutes 'order', and the need for punitive approaches that favour a posture that is 'tough on crime' place additional pressure on police to effect arrests for minor offences. When police come across something that is illegal – for example, the use of drugs – officers feel compelled to act because they are afraid of being accused of dereliction of duty by their commanding officers and by society. While police officers may be aware that something is amiss, unless their commanding officers have provided a specific instruction, they fear using their discretion.²⁹

A major concern for the police is the public perception that the only way to ensure an accused's presence in court is to arrest them. Members of the public do not realise that there are other ways of securing the attendance of a person in court, and that cases should be investigated before a person is arrested. There is therefore the need to raise awareness that arrest is not the only means to secure an appearance in court. It is also important to highlight that bail is necessary to secure fair criminal trials and to avoid unfair plea deals.

COVID-19

The COVID-19 pandemic has had a devastating impact, both globally and nationally. Globally, the capitalist system is in crisis, with rising unemployment. Nationally, the World Bank has declared South Africa to be one of the most unequal societies in the world,³⁰ with the pandemic exacerbating South Africa's dual crises of poverty and inequality. When people are unemployed, hungry and uncertain about their future, they take action and are often met with police repression and an unresponsive state. This contributes to people blaming foreign nationals, with Xenophobic attacks on the rise. In July 2021, these social crises manifested in people attacking shopping malls and other infrastructure.³¹

Despite COVID-19 being a public health crisis, the authorities relied heavily on the police to enforce the National State of Disaster regulations. As a result, there were high numbers of arrests during the pandemic. Adopting a criminal-justice response to socio-economic problems that could instead be dealt with in a more humane manner only serves to create additional problems. This kind of approach reinforces colonial and apartheid-era modes of policing that are based on ideas of 'who belongs where', increasing the risk of arrest for people who are 'out of place', such as homeless people. When there are serious crimes, there is a legitimate public expectation that arrests should be made. However, public expectations of the police should be tempered when it comes to less serious crimes or crimes that require a socio-economic response from the state.

When the COVID-19 regulations came into effect and the number of arrests increased, LHR's rights violation hotline received close to 800 calls, with approximately 500 relating to police brutality, misconduct or unlawful arrests.³² This took place at a time when the courts were scaling back their operations and postponing matters, significantly reducing suspects' access to justice and their ability to apply for bail. At the time, the SAHRC wrote to the Minister of Justice and Correctional Services requesting the adoption of regulations which allowed for people arrested for minor crimes not to have to appear in court, and not to be remanded in custody.

Under the National State of Disaster, police were simply instructed to arrest people who transgressed the regulations, regardless of their socio-economic context. This led to police targeting homeless persons. Police officers have pointed out that they do not make the law, they enforce it, and that they are under political pressure to enforce laws that have the most significant impact on the most vulnerable people. This underlines the need to understand and address the negative impacts of arbitrary arrest, for both the SAPS and society at large.³³

6 | Theme 3: The negative impact of arbitrary arrest

Given that Panel 1 also discussed the impact of arbitrary arrest, this section draws from certain aspects of the presentations by Prof. Lukas Muntingh from ACJR, Wayne Ncube from LHR, and Dr Trevor Ngwane from the University of Johannesburg. The following section incorporates the information provided during these presentations as well as the insights gleaned from the subsequent debate.

Arbitrary arrest carries a significant social, human rights and financial cost. While arbitrary arrest already infringes upon the human right to freedom and security of the person, it also exposes detained persons to the risk of further human-rights violations, such as rape or assault by other detainees, enforced disappearances and torture. Below is a review of the various negative outcomes of arbitrary arrest.

Financial and reputational costs for the SAPS

The use of the police to attack the struggle for national liberation during the apartheid era led to the SAPS losing its credibility and legitimacy. Arbitrary arrest has only worsened the SAPS' already negative reputation, and carries significant financial costs for the SAPS. According to the 2020

submissions to the Portfolio Committee on Police, in 2018/2019 alone, the SAPS paid out R535.25 million for civil claims in total, a significant portion of which is attributable to wrongful and arbitrary arrests.³⁴

Stop-and-search activities also waste public resources while alienating and antagonising the population. This brings about a decline in public trust of the police in certain areas, because it amounts to harassment and therefore reduces the legitimacy of the police. This style of policing, coupled with poor training, increases the risk of unlawful and arbitrary arrests.³⁵

The community should be able to trust that, when they call the police, the SAPS will improve the situation. However, for many people, the SAPS represents the enemy. In order to function effectively, the police must be respected and they must have sufficient authority. In the absence of this, the only means that they have to calm a situation is through the use of brute force. However, violence begets violence. People fight back against police violence, which creates more insecurity, instability, and uncertainty. While arbitrary arrest carries a cost for the SAPS, it also causes significant social damage.³⁶

Entrenching discrimination

As mentioned above, police officers tend to target the most vulnerable members of society, who do not traditionally have the power to challenge the police. This effectively results in discrimination based on race, nationality and class.

Racial discrimination

One of the social costs of arbitrary arrest is that it effectively entrenches discrimination and disadvantage. For example, research has demonstrated that the SAPS specifically targets African and coloured men, and that it is predominantly poor young men (African and coloured) who carry the brunt of the arrest burden. High volumes of stop-and-searches and arrests do not yield positive results in respect of successful prosecutions. It takes approximately 13 stop-and-searches to produce one conviction, and many of those may be for minor drug offences. These rights violations on a mass scale do not, therefore, make South Africa's streets safer.³⁷ Academic research from around the world indicates that people who have less power, such as homeless persons or people suspected to be foreign nationals, are particularly vulnerable to arrest without a warrant. People living in such circumstances do not have the necessary political or economic power to push back against these unlawful actions by police.

Discrimination against foreign nationals

A week before the current dialogue, the SAPS reported the arrest of approximately 400 people over one weekend, of whom 390 were suspected of not having valid documentation from the Department of Home Affairs. Given that arrests must be based on reasonable suspicion, this raises the question of whether South Africa's privacy laws were properly applied in these cases. The discriminatory targeting of foreign nationals for law enforcement has resulted in civil claims being awarded against the SAPS. For example, in March 2022, a court ordered the SAPS to pay R200 000 to a refugee who was searched outside his home and not permitted by the police to return inside to get his refugee papers. He was arrested because he would not pay a bribe. The stop was ruled unlawful because there were no grounds to stop him, the search was unlawful, and the failure of the police to exercise discretion by allowing him to fetch his documentation was unlawful.

Discrimination against drug users

In spite of the *Prince* judgment³⁸ and the global move away from problematic racist and classist drug enforcement policies, arrests for drug offences increased in the last financial year from 150 000 to over 300 000.³⁹ Research has shown that arresting a street-level drug user worsens that person's drug use disorder. Once people enter the prison system, they are further traumatised, and the biggest driver of drug use according to Gabor Maté is disconnection and trauma.⁴⁰

Being in prison separates people from social institutions – from families, from schools and from the workplace. Most dealers and runners claim that they entered into this kind of work because they were users who were imprisoned and, once they had a criminal record, they could not find work.

After being arrested, people fear public authorities, lessening their propensity to engage in help-seeking behaviour, including from hospitals which do not deal well with vulnerable groups. Arresting people for possession also drives drug dealers underground. The more underground drug use is, the more difficult it is to police dealers, suppliers and the demand for drugs.

Often, after an arrest, users' tolerance levels drop. When they start to use again, they may overdose, leaving police to deal with an overdose death that could have been avoided. This is traumatic for police. The SAPS do not have access to drugs such as naloxone, which could help to prevent an overdose. Once drug users have been arrested, they become much more conscious of policing and the possibility of being arrested, driving them to places that the police are reluctant to visit. This makes it harder to reach drug users.⁴¹

Socio-economic discrimination

Arbitrary arrest can also lead to entrenching socio-economic disadvantage through the criminalisation of protest action. For example, working class communities dealing with overcrowding in informal settlements and a lack of access to adequate water, electricity and roads often face the frustrating reality of unresponsive politicians and officials. This may lead to them utilising their constitutional right to take protest action, which may be either spontaneous or planned (with notice being provided to the police).

A protest march that begins peacefully may spiral out of control and become disruptive, especially when the authorities fail to respond. When authorities ask the police to intervene instead of sending the government officials who are able to attend to these grievances, this places police officers and the community at a disadvantage, particularly as police officers do not have the capacity to address and improve access to socio-economic resources such as housing and water. When protests are spontaneous, local police may also not have sufficient time to summon the public order policing units which are trained in the management of assemblies. Local SAPS members might go to the scene to restore law and order, and ultimately resort to arresting people, including innocent bystanders. They might also resort to using rubber bullets. People should not however, be treated like criminals when they demand access to services to which they are constitutionally entitled and when they utilise the only political voice available to them. People who are arrested for taking protest action feel that they have been arbitrarily and unlawfully arrested, and they lose their freedom and their dignity in the process. When people are arrested simply for taking collective action to improve their living conditions, they lose respect for the police. This has a negative impact on social cohesion.⁴²

The personal cost of arbitrary arrest

People who have been arrested are traumatised by the experience of being in detention. Being arrested may damage the reputations of individuals or organisations, as many of us assume that people who have been arrested have committed a crime. Community organisations whose members have been arrested might lose the support of the community simply because their members have been arrested. Being arrested also disrupts the inner life of people and affects people in material ways – they cannot attend work, or conduct business, or look after their children. People who have been wrongfully arrested are understandably resentful towards the police, other law enforcement agencies and the state, and their families and loved ones may also feel resentful.

7 | Theme 4: Developing responsive human-rights solutions

This section drew from the second and third panel discussions. The second panel discussion focused on responding to the challenge of arbitrary arrest. This panel was facilitated by Nokwanda Nzimande of the SAHRC, with presentations from Maj-Gen. Oswald Reddy, the Western Cape Police Ombudsman (WCPO); Maj-Gen. Susan Pienaar, Head of the Proactive Policing Services, Visible Policing and Operations at the SAPS; and Dr Andrew Faull of the ISS. Panel 3 examined alternatives to arbitrary arrest and included presentations by Prof. Monique Marks of the Durban University of Technology and the Bellhaven Harm Reduction Centre; Themba Masuku of APCOF; and Dr Magda Reynolds from the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO). The third panel discussion was facilitated by Sean Tait of APCOF. The following section incorporates the content of the presentations together with the inputs received during the dialogue.

In the light of the negative impact of arbitrary arrest, the two panel discussions highlighted a number of mechanisms which can be utilised to address this problem. Examples of these mechanisms included utilising existing alternatives to arrest, implementing evidence-based training, and developing more responsive policing indicators. In order for these mechanisms to work, there is a strong need for effective collaboration and strong cooperative governance.

Harm reduction as an alternative to arrest

The National State of Disaster regulations, which were issued in 2020, resulted in a positive shift in the manner in which drugs were policed in Durban. While COVID-19 is generally recognised as a disaster, in Durban it led to what has become known as the 'Durban Moment'. Under the COVID-19 regulations, over 200 homeless people were placed in 11 homeless safe spaces. A team was assigned to work in these spaces to create an evidence-based withdrawal management programme under the guidance of the Deputy Mayor (this was necessary as an estimated 40% to 60% of homeless people have a drug use disorder).⁴³ Given that the placement of homeless people in these safe spaces would push drug users into forced withdrawal, the programme sought to provide responsive services. As withdrawal is an extremely traumatic experience, the programme encouraged homeless people to stay in these safe spaces by providing them with a substitute for heroin⁴⁴ in the form of methadone, an opioid substitute in what is known as opioid substitution therapy (OST).

The SAPS and the Durban Metro Police were instructed to protect the withdrawal management programme. This created a situation where police were forced to engage with the medical treatment



team and with homeless people. This created an understanding among police of the humanity of drug users and homeless people, and vice versa, and also enabled police to understand the importance of having evidence-based interventions available to people with a drug-use disorder, rather than resorting to arrest.

Arrest was not an option for the police in Durban at this time, as the people involved in the programme were already in homeless COVID-19 shelters that they were not permitted to leave. Finding an alternative to arrest requires making sense of the trauma and disconnection that underlies problematic drug use. This provided the opportunity for the police to bring in psycho-social services to assist. Two thousand people were effectively diverted as they were all active drug users. After Alert Level 4, the municipality, which has always been prohibitionist and abstinence-based, recognised the value of harm reduction, and provided the project with a building which is now called the Bellhaven Harm Reduction Centre.

The various forms of harm-reduction interventions for drug users include OST, drug consumption rooms, and needle and syringe programmes. These harm-reduction interventions assist vulnerable groups while providing a safer environment for the police to operate in. For example, police fear needlestick injuries from carelessly discarded needles and syringes. Needle syringe programmes are therefore important for harm reduction as people hand in their used needles and syringes, which are disposed of as medical waste, in exchange for new ones.

The need for change is evidenced by the fact that the police themselves were the strongest advocates of the Bellhaven model during Alert Levels 4 and 5 of the National State of Disaster. As there were only three nurses available, the police occasionally administered medication themselves to avoid people going into withdrawal. In this way, police became active harm-reduction practitioners. Most importantly, they understood that human rights are at the centre of what the police were doing. In this manner, the police were able to foster legitimacy and authority among the homeless population.

Evidence-based interventions such as OST also reduce criminality. When people are on this type of therapy, they do not go into withdrawal, they do not need a fix every four hours, and their propensity to engage in criminal activities is dramatically reduced.

Diversion as an alternative to arrest

Communities should be made aware that, although arrest can be necessary to protect lives, there are alternatives to arrest for less serious crimes. Examples of alternatives include recording people's names, issuing warnings, using third-party referrals to agencies that can assist, and diversion from the criminal justice system for minor infringements. Recording people's names and issuing warnings for minor offences can also serve as a deterrent in certain instances.

Diversion is often misunderstood as a soft option or a slap on the wrist. Rather, diversion is based on an assessment of the person (the offender), with the response then tailored to their specific needs in a manner that reduces the likelihood of reoffending. After completing the assessment, the offender is required to complete the diversion programme before their case can be finalised. Diversion can be very successful. In NICRO's Shifting Gears programme for reckless and negligent driving, 97% of participants did not reoffend for five years.⁴⁵ The lack of understanding of the value of diversion misses a key opportunity to reduce the risk of offending among young people under the age of 25, whose brains (particularly the prefrontal cortex) are still developing.⁴⁶ This part of the brain is responsible for reasoning, planning, judgement and impulse control.

NICRO, which has offices in seven of South Africa's nine provinces, experienced a dramatic drop in the referral rate for diversion during COVID-19, despite high numbers of arrests. In spite of its positive potential, diversion is underutilised by prosecutors and the courts because of the length of time it takes to divert a person, which appears as a hindrance. While it may seem easier to strike a matter off the court roll, the accused often ends up reoffending and appearing in court again, as the circumstances that led to the original offence were never addressed.⁴⁷

Evidence-based training

Police necessarily have the discretion to use their powers of arrest, but it is vital to ensure that they only use these powers appropriately and in accordance with the law. This requires additional training on the human-rights implications of arbitrary arrest.

Given the positive outcomes of the Bellhaven programme, there is a need for capacity development on harm-reduction alternatives and diversion with potential partnerships with organisations such as Law Enforcement Assisted Diversion (LEAD). LEAD is a US-based organisation made up of high-ranking police officers who have refused to arrest people for possession of drugs.

Training for police on how to deal with vulnerable population groupings and harm reduction is also already being developed, and the SAPS has agreed to incorporate this into its training. However, for harm reduction and diversion to work effectively, police officers, prosecutors, magistrates and students should be trained on these alternatives, particularly adult diversion. This is necessary given the value in obtaining a holistic understanding of offenders and their specific needs.

Improved and responsive policing indicators

The SAPS must utilise evidence and research to determine what works and what makes society safer in determining police performance indicators. Setting the right performance targets is important to obtain the desired results. It is thus necessary to find accurate and reliable ways of measuring police performance so that the performance indicators demonstrate whether the SAPS has improved its service delivery and effectiveness. Until this is done, the SAPS may be meeting its performance targets while failing to show genuine improvement. It is, however, difficult to find indicators that accurately measure the outcome of police work. It is very easy to measure police activity – for example, the number of people and houses searched, the number of people arrested – but it is very difficult to measure whether those activities resulted in increased feelings of safety, greater trust in the police, and more positive identification.⁴⁸

SAPS operations are not currently based on evidence-based practice. Instead, there are underlying beliefs and internal biases that drive the SAPS' approach to drug users and homeless people. In contrast to adopting vague and biased approaches, the performance management system requires more geographically specific and problem-specific indicators. Evidence cannot be generated in isolation or by a single source, so police should develop indicators with the support and oversight of the research community.⁴⁹

As the SAPS sector policing manual suggests, priority problems should be identified at the local level with partners. However, for this to work, it is necessary to incentivise:

- establishing partnerships to identify priority local-level problems;
- developing a specific theory of change to address local-level problems;
- identifying indicators to measure progress against baseline measurements;
- implementing problem-solving activities guided by the best advice; and
- monitoring and revising these activities, and documenting the lessons learned.

The police must be fair throughout, the procedures need to be just, and it is necessary to have accountability, while ultimately working towards effectiveness and legitimacy. If the SAPS responds quickly, and treats everyone respectfully and fairly, this will help to build trust in the SAPS, feelings of safety, and contribute towards building a national identity that shows that the SAPS cares for the public and will do more than simply arresting people. Police are culture workers. They create identity in the way in which they engage with members of the public.⁵⁰

Therefore, while reported crime, detection, and conviction rates should be tracked and monitored, this should not be what the police are judged on. Other incentives should be put in place to shape more positive stories for police officials. When developing these performance indicators, SAPS leadership should also question how these indicators will be interpreted by frontline police officials, how it is changing the station-based story, and how the police in each station work.

Examples of proposed interim targets (until a new system is developed) include the following:

- An increase in the proportion of people feeling safe when walking alone during the day and night, measured at station level.
- An increase in the proportion of people who trust the police, measured at the station level.
- An increase in the number of victims and suspects satisfied with their interaction with the police, measured at the station level, with suitable incentives.
- The ratio of police resources at all functional levels per 100 000 population.
- Murder per 100 000 population at national, provincial, district and station levels.
- The crime harm index at national, provincial, district and station levels.
- An increase in the number of professionalism and integrity ('sting') tests carried out each day, with a target of 75 a day by 2024.
- A reduction in the number of people seeking treatment for violence-related injuries at health facilities, based on data collected at health facilities.
- The percentage of stations implementing theory-of-change and evidence-based problem-oriented interventions (including select indicators specific to each problem, with suitable incentives).⁵¹

8 | Concluding observations

The dialogue was convened by the SAHRC and APCOF, with a clear understanding of the need for collaborative and cooperative stakeholder action through identifying the issues, the gaps, and potential solutions to the problem of arbitrary arrest.

While an arrest can be made without a warrant, it must be based on reasonable grounds. It must only be exercised as a measure of last resort in accordance with the Constitution and with regional and international instruments.

While international and national law makes it clear that the deprivation of liberty is forbidden unless it is justifiable under strict circumstances, there is a persistent disconnection between this legal framework and effective implementation. The discussion revealed that this disconnection is driven by a mixture of complex and intersecting factors. These include internal challenges within the SAPS, such as a lack of discipline and accountability and a problematic culture informed by outdated policing performance indicators. These internal factors are further exacerbated by external elements such as the COVID-19 pandemic, public pressure, and the underlying racial and class bias that persists within our society.

While the discretionary power of arrest must often be exercised within a split second under significant pressure, the severe impact of arbitrary arrest requires further training to ensure that this discretion is exercised appropriately. An arbitrary arrest has a detrimental impact on public resources, the reputation of the SAPS and the human rights to dignity, liberty and the right to be presumed innocent. These fundamental rights form the bedrock of any democracy, and when they are violated repeatedly over a protracted period the objectives of law enforcement become impossible to achieve.

Given that arbitrary arrest compounds disadvantages based on race, class and nationality, the failures of the criminal justice system and the problem of arbitrary arrest undermine South Africa's democratic aspirations, with deep implications for social cohesion and basic respect for human rights. As underscored by the panellists, there is, therefore, a need for enhanced training to consider alternatives to arrest, such as diversion and harm reduction measures and to develop more responsive policing indicators. Diversion is particularly appropriate when dealing with petty offences. For these mechanisms to succeed, however, a range of social services needs to be available.

While many police officers do go above and beyond the call of duty, much work still needs to be done for the promises of the Constitution to become real for everyone. The SAPS has communicated its commitment to working with the SAHRC in complying with the practical recommendations that arise from this dialogue. As articulated by the panellists, it is necessary to raise awareness and to re-envision basic respect for human dignity, liberty and justice within the context of arbitrary arrest. In the language of the SAPS, this is going back to basics.

ENDNOTES

- 1 Muntingh, L. 2015. Arrested in Africa. Exploration of Issues. Dullar Omar Institute. University of Western Cape, p20.
- 2 This information on the international legal framework was drawn from the presentation by Themba Masuku of APCOF.
- 3 Ibid.
- 4 *Amnesty International and Others v Sudan, African Commission on Human and Peoples' Rights*, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).
- 5 This discussion of *Amnesty International v Sudan* was drawn from the closing remarks made by Dr Kwanele Pakati of the SAHRC.
- 6 This overview of the SAPS' National Instructions was drawn from the presentation made by Maj-Gen. Susan Pienaar of the SAPS.
- 7 This was drawn from information presented by Wayne Ncube of Lawyers for Human Rights.
- 8 *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021]ZACC 37.
- 9 This was drawn from the presentation by Themba Masuku of APCOF.
- 10 Plasket, C. 1998. Controlling the discretion to arrest without warrant through the Constitution. *South African Journal of Criminal Justice*, Vol. 11, 173.
- 11 This was drawn from the presentation by Prof. Lukas Muntingh of African Criminal Justice Reform.
- 12 *Brand v Minister of Justice* 1959 (4) SA 712 (A).
- 13 This was drawn from the presentation by Prof. Lukas Muntingh of African Criminal Justice Reform.
- 14 This information was provided by Prof. Monique Marks of the Durban University of Technology and the Bellhaven Harm Reduction Centre.
- 15 This information was drawn from the presentation by Dr Andrew Faull of the Institute for Security Studies.
- 16 Ibid.
- 17 Ibid.
- 18 Ibid.
- 19 Ibid.
- 20 This information was presented by Maj-Gen. Oswald Reddy, the Western Cape Police Ombudsman.
- 21 This information was presented by Wayne Ncube of Lawyers for Human Rights. The percentage of 34% was provided by the World Prison Brief 'World Prison Brief Data-South Africa- 2021' <<https://www.prisonstudies.org/country/south-africa>> (accessed 02/06/2022). This correlates with the 2020/2021 Annual Report by the Department of Correctional Services, which states on page 54 that: 'The unsentenced inmate population constituted 33.97% [for the period of 2020/2021]' <<http://www.dcs.gov.za/wp-content/uploads/2021/11/DCS-AR-202021-FINAL-SIGNED.pdf>> (accessed 02/06/2022).
- 22 This information was presented by Wayne Ncube of Lawyers for Human Rights
- 23 This information was presented by Maj-Gen. Oswald Reddy, the Western Cape Police Ombudsman.
- 24 Ibid.
- 25 This was drawn from information presented by Prof. Lukas Muntingh, of African Criminal Justice Reform
- 26 These statistics were drawn from the presentation by Prof. Lukas Muntingh of the African Criminal Justice Reform.
- 27 Ibid.
- 28 Ibid.
- 29 Information presented by Prof. Monique Marks of Durban University of Technology and Bellhaven Harm Reduction Centre.
- 30 E Stoddard. 2022. 'South Africa the world's most unequal country – World Bank report' < <https://www.dailymaverick.co.za/article/2022-03-13-south-africa-the-worlds-most-unequal-country-world-bank-report/>> (accessed 02/06/2022).
- 31 This was drawn from the presentation by Dr Trevor Ngwane of the University of Johannesburg.
- 32 Information presented by Wayne Ncube of Lawyers for Human Rights.
- 33 This was drawn from the presentation by Themba Masuku of APCOF.
- 34 SAPS Annual Report 2018/2019, p. 426.
- 35 This information was drawn from the presentation by Prof. Lukas Muntingh of African Criminal Justice Reform.
- 36 Information presented by Dr Trevor Ngwane of the University of Johannesburg.
- 37 This information was part of the presentation by Prof. Lukas Muntingh of African Criminal Justice Reform.
- 38 *Minister of Justice and Constitutional Development and Others v Prince* CCT108/17 [2018] ZACC 30.
- 39 This information was provided by Prof. Lukas Muntingh of African Criminal Justice Reform during the discussion session.
- 40 Gabor Maté is an addiction specialist and author of several best-selling books including *In the realm of hungry ghosts: Close encounters with addiction*.
- 41 This information was drawn from the presentation by Prof. Lukas Muntingh of African Criminal Justice Reform.
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- 44 Known as *whoonga* or sugars in Durban, and as *nyaope* in Gauteng.
- 45 This information was drawn from the presentation by Dr Magda Reynolds of NICRO.
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- 47 This information was drawn from the presentation by Dr Magda Reynolds of NICRO.
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- 49 Ibid.
- 50 Ibid.
- 51 Ibid.

The African Policing Civilian Oversight Forum

The African Policing Civilian Oversight Forum (APCOF) is a not-for-profit trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve, namely: to assist in restoring public confidence; developing a culture of human rights, promoting integrity and transparency within the police; and good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

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South African Human Rights Commission

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