



# African Policing Civilian Oversight Forum

## **Submission by the African Policing Civilian Oversight Forum: South African Police Service Amendment Bill, 2020**

### **1. Introduction**

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to provide this written submission in response to the call for public comment on the South African Police Service Amendment Bill, 2020 (SAPS Amendment Bill). APCOF commends the Civilian Secretariat for Police Service for inviting public comment in respect of this draft Bill. We are encouraged by the stated aim of aligning the Bill with the Constitution, jurisprudence, and the policy framework that has been progressively developed to guide policing since the current policing legislation was passed by the National Assembly in 1995.

The enabling legislative framework for policing in South Africa has come under scrutiny over the past 25 years, as the expectations of community, practitioners, Parliament, and the courts evolved with respect to what constitutes rights-based, responsive and effective policing in a democratic society. The challenges confronting South African policing are well studied and understood, and are reflected in the justifications for the overarching policy frameworks provided by the National Development Plan and White Paper for Policing. The effect of the challenges, which includes the erosion of trust between police and the community, will not be wholly addressed by legislative reform. However, addressing the weaknesses in the current legislative framework for policing is an important first step.

In addition to the progressive development of a policy framework for policing in South Africa since 1995, international and regional law has developed to provide additional guidance to South Africa as it embarks on the first wholesale reform of policing legislation since democracy. APCOF has assessed the proposed SAPS Amendment Bill against these international and regional instruments, such as the Pan African

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Parliament's [Model Law for Police in Africa](#), and the African Commission on Human and Peoples' Rights' various instruments, including:

- [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#);
- [Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa](#);
- [Principles on the Decriminalisation of Petty Offences in Africa](#);
- [General Comment on the Right to Life](#)

APCOF has also taken note of recent legislative reform for policing in [Nigeria](#) and [Kenya](#), which provide some insights, particularly in terms of issues of ensuring independent processes for vetting, discipline and training of members.

## **2. Summary of recommendations**

2.1. Repeal the South African Police Service Act, 1995 (Act No. 68 of 1995) and replace it with a new legislative instrument (submission section 3).

2.2. Use gender-neutral pronouns throughout the text (submission section 4).

2.3. Initial establishment in the Police Act of a National Police Board to provide a framework of standards for the SAPS to ensure it is professional and staffed, trained and managed appropriately (submission section 5).

2.4. Establish an internal SAPS promotion board or committee, tasked with the implementation of an open, competitive and transparent system for promotions within the Service (submission section 6).

2.5. The recommendations of the Portfolio Committee on Police following the Detective Dialogue to be reviewed and included by the Secretariat in a revised SAPS Amendment Bill, with a particular focus on career-pathing for detectives (submission section 7).

2.6. Ensure alignment between 'districts' as defined in section (1)(c) with local government boundaries, magisterial districts, correctional service areas, and education and social development service boundaries to promote effective implementation of the White Paper on Safety and Security (submission section 8.1).

2.7. Define key terms used in the context of the use of force, including necessary, proportionate, precautionary, and legitimate law enforcement objectives (submission section 8.2).

- 2.8. Expand the Purposes of the Act in section 1A to include the vision, role and general functions of the Service, drawing on the broader vision for the SAPS articulated in the White Paper on Policing and the National Development Plan (submission section 9).
- 2.9. Include in the proposed new section 4A specific reference to the National Development Plan, the White Paper on Policing and the White Paper on Safety and Security as the national policing policy framework, and require that it be reviewed and revised every 5 years with clear reference to the requirement for public consultations (submission section 10).
- 2.10. Amend section 6 to provide further elaboration on the process for the transparent and competitive recruitment of a National Commissioner (submission section 11).
- 2.11. Expand the principles underpinning the use of force in section 13 to include the principles of precaution and de-escalation, and the requirement that the principles apply in relation to a legitimate law enforcement objective (submission section 12.1).
- 2.12. Include the steps under international and regional law that must precede, occur during, then follow the use of potentially lethal force in section 13 (submission section 12.2).
- 2.13. Prohibit in section 13 on the use of all assault weapons whose automatic component may be disabled (submission section 12.3)
- 2.14. Revise section 13(iii) to read ‘only use deadly force in circumstances in which there is an imminent risk of death or serious injury to a person, and only when less extreme measures are insufficient to achieve these objectives’ (submission section 12.4).
- 2.15. Ensure that vetting under section 15 is extended to include all SAPS members as routine, and the publication of criteria against which vetting will be made (submission section 13).
- 2.16. Clarify what is meant by public order ‘capacity’ in section 17 (submission section 14.1)
- 2.17. Amend section 17 in terms of chain of command in a public order management context to remove confusion and contradiction in terms of the deployment of national public order policing capacity, and to remove the Minister from any operational decision-making function (submission section 14.2).
- 2.18. Revise section 17(f)(c)(5) to provide for the circumstances in which the national public order policing capacity can be deployed, and to make it clear that the decision is reserved for SAPS command, and not within the power of the Minister of Police (submission section 14.3).

- 2.19. Clarify in section 17 the circumstances in which the National Commissioner has the power to withdraw national public order policing capacity from a province (submission section 14.4).
- 2.20. Include in section 17(g)(8) the requirement of quarterly reporting on both national and provincial deployments of public order policing capacities (submission section 14.5).
- 2.21. Provide clear requirement for training for municipal police officers who are deployed to public order incidents under the proposed section 64E(d) (submission section 14.6).
- 2.22. Revise section 17CA to provide for an independent and transparent process for the recruitment of the National Head and Deputies of the Hawks (submission section 15).
- 2.23. Address issues with the Police Intelligence Division in Chapter 6C, including to clarify the lines of reporting and the circumstances in which the National Commissioner does not receive a report from the Divisional Commissioner of National Intelligence, the requirement for all members to obtain security clearances, and to shield against political interference in the work of police intelligence by giving recourse to the courts, rather than the Minister, for appeals (submission section 16).
- 2.24. Remove the requirement that the Secretariat chair the National Community Policing Board, and make provision for the allocation of resources to CPFs by the Secretariat, in section 18 (submission section 17).
- 2.25. Publish the criteria against which lifestyle audits and integrity testing will be made in section 28A (submission section 18).
- 2.26. Prescribe minimum standards for training under section 32 (submission section 19).
- 2.27. Amend section 43 of the SAPS Act to require the automatic dismissal from the Service of any member who is convicted of a criminal offence (submission section 20).
- 2.28. Revise section 71A to ensure that the crime of disinformation is consistent with emerging human rights standards on this issue (submission section 21).
- 2.29. In terms of the proposed amendments to the Regulation of Gatherings Act, amend section 2(2) to remove the reference to a 'prohibition' of a gathering; revise the proposed amendments to use of force in section 9 to ensure they are consistent with international and regional norms including the requirement of imminence in terms of deadly force, the use of deadly force in

relation to property, and prohibition on the use of firearms except in limited circumstances (submission section 22).

### **3. Repeal of the South African Police Service Act, 1995 (Act No. 68 of 1995)**

At the outset, APCOF notes with disappointment that the SAPS Amendment Bill seeks to make changes to the existing Police Act, rather than propose the repeal of the South African Police Service Act, 1995 (SAPS Act) and replace it with an entirely new legislative framework for policing in South Africa.

This was the favoured approach in Nigeria and Kenya, where comprehensive law reform was achieved through the passage of an entirely new enabling statutory instrument for the police. This type of wholesale reform will allow the drafters of the Bill to operationalise the underlying policy objectives set out in the White Papers on Policing and on Safety and Security, and the National Development Plan (which are discussed in more detail below) unencumbered by a 25 year old legislative framework, and to ensure both consistency and cohesiveness in the approach to a new legislative framework for police.

We are particularly concerned that the piecemeal approach to reform means that critical and historical issues with the legislative framework for policing in South Africa have, frankly, been missed by this draft Bill. It does not, for example, take into account a number of resolutions and recommendations adopted by Parliament on the advice of the Portfolio Committee on Police over the years – including, for example, the recommendations emerging from the [Detective Dialogues](#), the issue of ongoing employment for SAPS members who acquire criminal records during their service, and the need to strengthen the transparency and veracity of systems for promotion.

Accordingly, we urge the Secretariat to reconsider taking the current SAPS Amendment Bill forward, and to rather adopt a process by which the 1995 SAPS Act is repealed, and a new legislative framework proposed, for public comment. This approach will promote a more robust reform of policing in South Africa to align with the significant work already undertaken by various institutions and bodies, including commissions of inquiry, the National Assembly's Portfolio Committee on Police, and courts, since the adoption of the 1996 Constitution.

### **4. Use of pronouns**

APCOF notes that throughout the text, the draft Amendment Bill uses the pronouns 'he or she' or 'him or her'. From both a grammatical perspective, and to promote inclusive language, we recommend the use of

gender-neutral pronouns they/them in the text, which has legal and common usage as both a singular and plural pronoun.

## 5. Absence of provision for a National Police Board

APCOF is disappointed by the absence of provisions in the Police Amendment Bill for the establishment of a National Police Board within the Act. The proposed establishment of a National Police Board has been over 10 years in the making, and with the benefit of an agreed NDP and White Paper on Police, which created the policy framework for its establishment, it is a critical and opportune moment to provide for this facility in the amended SAPS Act. Given the emphasis in the SAPS Amendment Bill on reform to recruitment, vetting, training and discipline, it is critical that further drafts of this Bill revisit the establishment of the Board, which was recommended by the NDP and White Paper to deal precisely with these issues in a way that promotes the independence, professionalism and integrity of the SAPS.

Chapter 12 of the NDP envisions a police organisation that is well-resourced, professional and highly-skilled, with members who value their work, serve the community, and who carry out their duties without discrimination and with due regard to equality and justice. To fulfil this vision, both the NDP and the 2016 White Paper on Police identify the establishment of a National Police Board as both necessary and urgent. The NDP identifies the National Police Board as a means to harness the vast talent available to South Africa through the multi-disciplinary and multi-sectoral expertise of South Africans to work with the SAPS to help set standards for recruiting, selecting, appointing and promoting SAPS members and other officials. The Board is seen as being instrumental in developing a code of ethics, and to ensuring that training for police is consistent with international norms and standards.<sup>1</sup> This is echoed in the 2016 White Paper on Policing, which describes the function of the National Police Board as essential to ensuring that the SAPS achieves the vision of the NPD for professional and accountable policing.<sup>2</sup>

Following the release of the NDP, APCOF [published a research paper on the proposed National Police Board](#), which provided evidence-based recommendations on the scope and function of the Board, with a view to informing the translation of the NDP's broad policy statement into enabling legislative provisions. In that research paper, APCOF motivates for the establishment of a Board that is tasked with a function similar to that of a Public Service Commission, to provide a framework of standards for the SAPS to ensure it is professional and staffed, trained and managed appropriately. APCOF takes this broad policy framework

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<sup>1</sup> Presidency of the Republic of South Africa, National Planning Commission, 'National Development Plan 2030: Our Future – Make it Work', 2013, at 390, available at <https://www.gov.za/issues/national-development-plan-2030> (accessed on 2 November 2020).

<sup>2</sup> Civilian Secretariat for Police, 'White Paper on Policing', 2016, at 21, available at [http://www.policesecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policesecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf) (accessed on 2 November 2020).

provided by the NDP and takes it further to recommend that the Board be comprised of a multi-sectoral and multi-disciplinary team including, at a minimum:<sup>3</sup>

- A retired judge (to serve as Chair of the Board);
- A human rights expert in the field of policing;
- A labour and human resource practitioner with strong expertise in staff development, discipline and promotion processes;
- A legal practitioner with experience in criminal law;
- A finance and resource expert;
- An expert in crime prevention to assist in creating an integrated approach to social crime prevention and intervention in policing;
- Representatives of civil society organisations; and
- A representative from the SAPS and Municipal Police Service.

APCOF further motivates that in keeping with the recommendations that the recruitment process for the SAPS leadership be open, competitive and transparent (see section 11, below), that the process for appointing members of the Police Board should be the same. We also recommend that the establishment of the Police Board be legislative, and ensure its functional and financial independence from the SAPS and the Minister of Police. Drawing on the challenges experienced by the Judge for the Directorate for Priority Crime Investigation and the Civilian Secretariat for Police, APCOF recommends that the Board receives a budgetary allocation directly from National Treasury, has control over how the funds are allocated and spent, and reports on its budget and activities directly to the National Assembly. We also recommend that the Board be established as a permanent administrative structure with its own enabling legislation, and that its recommendations are binding.

APCOF submits that the Board should have the following functions:<sup>4</sup>

- Determine the minimum standards for recruitment, selection, appointment and promotion of members of the SAPS and MPS and monitor implementation thereof;
- Conduct appropriate vetting and competency testing of all SAPS and MPS personnel;
- Develop a disciplinary regime for the SAPS and MPS, with clear timeframes, that deals with matters fairly and efficiently, imposes clear sanctions when infractions have occurred, and puts in place monitoring mechanisms to ensure that sanctions are implemented accordingly;

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<sup>3</sup> Annelize van Wyk and Sean Tait, 'The National Police Board', *APCOF Policy Paper*, No. 12, July 2015, at 1, available at <http://apcof.org/wp-content/uploads/2016/05/No-12-The-National-Police-Board-Annelize-van-Wyk-and-Sean-Tait.pdf> (accessed on 3 November 2020).

<sup>4</sup> *Ibid*, at 2.

- Evaluate and benchmark all existing training programmes for the SAPS and MPS against international standards, assess their relevance to the South African context, and determine whether the content of such programmes adhere to the Constitution; and
- Set minimum standards, criteria and competency requirements for all training programmes with the SAPS and MPS for all trainers. This process should cover basic training, the training of detectives, specialised training and ongoing training, and must include the required competency level for a pass.

Additionally, the Board should have the power to provide input on matters within the scope of its mandate, including:<sup>5</sup>

- Criteria for human and physical resource distribution, and monitoring thereof;
- Advice to the Minister of Police on budget matters related to its mandate;
- Recommendations on the implementation of the findings or reports from Commissions of Inquiry or recommendations from the Parliamentary Portfolio Committee on Police;
- Recommendations on the restructuring of the SAPS; and
- Review concerns relevant to its mandate in all police units and units where specific concerns are raised.

There is international precedent for the establishment of a mechanism with similar powers to those recommended by the NDP for the National Police Board. In both Kenya and Nigeria, police service commissions operate to set standards and oversee police recruitment, vetting, training and discipline. In Nigeria, the Police Service Commission has, for example, the powers to formulate policies and guidelines for appointment, promotion, discipline and dismissal; identify factors inhibiting and undermining discipline; and draft and implement policies for improving the efficiency and discipline of the police.<sup>6</sup> The Kenyan Police Service Commission has similar powers to those of the Nigerian Commission, and in addition, can determine the appropriate remuneration and benefits of police officers, as well as investigate, monitor and evaluate the organisation, administration and personnel practices of the Kenya National Police Force.<sup>7</sup> APCOF submits that the enabling legislation for both police service commissions will be instructive for South Africa should the NDP's recommendation of a Police Board be taken forward in a revised version of the Police Bill.

The NDP and White Paper are unequivocal in their support for the establishment of a National Police Board, which has the potential to play a valuable and complementary role to existing oversight bodies for the SAPS, with a critical and much needed focus on the human resource environment. Accordingly, APCOF

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<sup>5</sup> Ibid.

<sup>6</sup> Nigerian Police Service Commission (Establishment) Act, No. 1 of 2001, section 6(1), available at [http://www.commonlii.org/ng/legis/num\\_act/psca402/](http://www.commonlii.org/ng/legis/num_act/psca402/) (accessed on 4 November 2020).

<sup>7</sup> Ibid, section 3.



recommends that the SAPS Amendment Bill include the establishment of the National Police Board, subject then to its own enabling legislation, similar to those cited in our submission with respect to Nigeria and Kenya.

## **6. Absence of internal promotion boards/committees**

APCOF recommends that the draft SAPS Amendment Bill be revised to include the establishment of an internal SAPS promotion board or committee, tasked with the implementation of an open, competitive and transparent system for promotions within the Service. Ideally, the system for promotions would be established by the National Police Board, which we outline above in section 5 of this submission, and implemented by the internal board or committee. However, in the absence of the National Police Board, the internal SAPS promotion board/committee could be similarly tasked to determine the minimum standards for promotion of members of the SAPS and MPS and monitor implementation thereof. It would then be responsible for:

- Establishing the criteria against which interviews, assessments and promotions are made;
- Conducting interviews and making public the results of the assessment of individual candidates against the objective criteria known to applicants; and
- Making promotions.

Ensuring an open, competitive and transparent system for promotions is critical to promoting a professional police service, and to ensuring that rank and file members have confidence in the system and are incentivised to carry out their duties to the highest standards.

## **7. Absence of career-pathing for detective services**

In 2012, the Portfolio Committee on Police held the [Detective Dialogue](#) to address numerous challenges identified with respect to detectives at station level. Amongst the recommendations of the Committee was the inclusion of career-pathing in any future revision of the SAPS Act, to address issues including a defined career path, promotion and retention strategy within Detective Services. The Committee recommended that promotion be linked to training, qualifications and experience, and be transparent to all members of the SAPS – and that the focus be on retaining detective capacity within Detective Services, rather than losing detectives to promotions which take them away from detective work and into more administrative functions. Accordingly, APCOF recommends that the recommendations of the Portfolio Committee on Police following the Detective Dialogue be reviewed and included by the Secretariat in a revised SAPS Amendment Bill, with a particular focus on career-pathing for detectives.

## **8. Amendment of section 1 – Definitions in the Police Act**

### **8.1. Section 1(c) – district**

The SAPS Amendment Bill includes ‘districts’ in section 1(c), which are defined as ‘those areas of responsibility for a number of police stations grouped together for purposes of coordination’, as determined by the Provincial Members of the Executive Committee (MEC) responsible for policing from ‘time to time’. However, it is unclear whether districts are replacing sectors or clusters, and how the districts will align with local government boundaries, magisterial districts, correctional service areas, and education and social development service boundaries, which is a prerequisite to the effective implementation of the White Paper on Safety and Security. The SAPS Amendment Bill should be amended to include, as part of the determination by the Provincial MECs, the need for alignment between the districts and other relevant boundaries as per the White Paper.

### **8.2. Necessary, proportionate, precautionary, and legitimate law enforcement objective**

APCOF recommends that key terms used in the context of use of force provisions of the Act are included in section 1 of the SAPS Act. These definitions, and the rationale for their inclusion, are set out in section 12.1.1 of this submission, below. Providing definitions for key terms related to the use of force are important not only for statutory interpretation of the Act by the legislature, departments, courts and the SAPS itself, but to promote effective training of SAPS members in terms of their obligations, and limitations, with respect to force.

## **9. Insertion of Section 1A – Purpose of the Act**

APCOF is disappointed that the proposed new ‘Purpose of the Act’ limits its vision for policing in South Africa to what are essentially its functions, rather than giving effect to the broader vision set out in the White Paper and NDP.

The proposed new section 1A highlights accountability, integrity, professionalism, legitimacy and the rule of law, which we acknowledge and support as important tenets of modern democratic policing. However, a vision for policing in South Africa that upholds and protects human rights, is demilitarised, takes an integrated approach to safety and security, and which provides services equally to all, without

discrimination, and with regard to the vulnerability of certain groups to less favourable treatment,<sup>8</sup> are elaborated in overarching policy and thus notably absent from the draft section 1A. Policy is not binding on SAPS members, however the inclusion of these key policy objectives in the operative clauses of the enabling legislation for the police service (rather than in the current Preamble) will make members bound to act within that framework, and can create a pathway to ensuring that violations of a person's right to dignity and equality, for example, are part of the disciplinary code for SAPS members.

APCOF recommends that consideration be given to the way in which the vision, role and general functions of the police service are articulated by the Pan African Parliament in the [Model Police Act for Africa](#). It divides the vision, role and general functions into three distinct but sequential sections in Sections 3, 4 and 5, which we submit reflects the broader policy aims of the White Paper and NDP, and could be appropriately adapted for South Africa in the following way:

### ***New section 1A Vision of the South African Police Service***

*The South African Police Service is an independent, accountable, responsible and professional civilian law enforcement agency that respects, protects and promotes human rights, provides equitable and community-centred services to all in society, and takes an integrated approach to safety and security.*

### ***Section 1B Role of the South African Police Service***

*The role of the South African Police Service is to:*

- a. Protect the rights of all persons in South Africa;*
- b. Prevent the commission of offences;*
- c. Maintain peace and order;*
- d. Detect, investigate and bring before a court of law any person reasonably suspected of committing an offence; and*
- e. Promote safety, security and social crime prevention.*

### ***Section 1C General functions of the South African Police Service***

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<sup>8</sup> National Assembly, Portfolio Committee for Police, 'National Development Plan recommendations for Policing: SAPS, Civilian Secretariat for Police & Civil Society briefing', 12 September 2017, at 385, available at <https://pmg.org.za/committee-meeting/24985/> (accessed on 2 November 2020). Civilian Secretariat for Police, 'White Paper on Policing', 2016, at 21, Chapter 2, available at [http://www.policesecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policesecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf) (accessed on 2 November 2020).

- a. *The functions of the South African Police Service include the following;*
- i. *Prevent, detect and investigate crime;*
  - ii. *Protect, respect and uphold the human rights of all persons;*
  - iii. *Enforce and uphold the law;*
  - iv. *Maintain public safety and social peace;*
  - v. *Provide assistance to those who require it within the duties assigned to it by law; and*
  - vi. *Cooperate with and provide assistance to other authorities within the duties assigned to it by law.*
- b. *To achieve the full performance of these general functions, the South African Police Service will:*
- i. *Establish and maintain a partnership between the community and the Service and be responsive to the needs of the community;*
  - ii. *Promote communication between the Service and the community;*
  - iii. *Be transparent and accountable to the community and to statutory oversight authorities;*
  - iv. *Strive to achieve gender equality.*

## **10. Chapter 2 – Police Policy**

The proposed new section 4A provides for the establishment of a national policing policy that reflects the policing needs and priorities of the provinces. However, it is not clear what a national policing policy is and how it will relate to the already operational White Paper on Policing (2016) and the White Paper on Safety and Security (2016), neither of which are specific about provincial variances.

Developed by the Civilian Secretariat for Police Service, the White Paper on Policing, in particular, is the overarching national policy statement on policing for South Africa. It aims to provide a framework that is consistent with the obligation of the police in terms of the Constitution, and recommendations contained in the National Development Plan (NDP), which a national policing policy under the proposed new section 4A of the SAPS Amendment Bill would also presumably seek to achieve. Similarly, the White Paper on Safety and Security (2016) provides an overarching policy framework for implementation of the Constitution and NPD in addressing safety, crime and violence provision, with specific direction to relevant departments, the SAPS and the broader criminal justice system.

Without further information on the proposed 'national policing policy', APCOF is concerned that if implemented, any efforts will duplicate those already made by the Civilian Secretariat, and countless justice sector stakeholders, in developing the White Papers on Policing, and Safety and Security. There are ways in which to strengthen the current White Papers, and [APCOF is one of a number of organisations to have previously made submissions on where the policies can be better aligned to the Constitution and NPD](#). We submit that resources may be more efficiently spent in updating and strengthening these documents based on comments received and developments in policing and safety discourse since 2016, rather than creating a new national policy framework.

Further, the proposed section 4A limits the consultation requirements on the Minister in the development of the new national policing policy to provincial governments. This should extend to include the broader justice and safety sectors, as well as public comment, to ensure that the policing needs and priorities of the community are reflected, in addition to those of provincial governments.

Accordingly, APCOF recommends that the proposed new section 4A refer specifically to the NDP, the White Paper on Policing and the White Paper on Safety and Security as the national policing policy framework, and require that it be reviewed and revised every 5 years with clear reference to the requirement for consultation with the public, as well as provincial governments.

#### **11. Section 6 – appointment of the National Commissioner of the Service**

APCOF is concerned that the proposed amendment of section 6 of the 1995 SAPS Act does not address the secretive and vague process of appointment of police leadership. Emerging from an era of state capture, where the criminal justice system was manipulated to undermine accountability for widespread looting by a political elite, the failure to address the appointment process for the National Commissioner of the Service will not build trust in the credibility of police leadership. The criteria for appointment of the National Police Commissioner is less than that set for a constable, with a process that is far less robust. This, despite the NDP recommending that the National Commissioner (and Deputies – though we note that the process for the appointment of management positions below that of a National Commissioner are already provided for in the Act) be appointed in a competitive and transparent process, on the recommendation of a selection panel that interviews candidates and makes their decision based on objective criteria.

The recently adopted Pan African Parliament's Model Police Law for Africa echoes the NDP, and calls on the appointment of the head of police 'subject to a transparent and competitive process, and made on recommendation of parliament following a written report from a constituted independent body'. The

Portfolio Committee for Police has, in the past, received [recommendations](#) in terms of implementation of the NDP's recommendations for the appointment of the National Commissioner, and APCOF endorses the broad steps suggested by the ISS and Corruption Watch, which entail the formation of an independent panel to develop key criteria, interview and make recommendations to the President and Minister, public advertisement for the position, with shortlisted candidates' CVs published, and an oversight role for the National Assembly in the recruitment process.<sup>9</sup> This is a role that could be undertaken by the National Police Board, which we suggest be included in a revision of the SAPS Act, as set out in section 5 of this submission.

Accordingly, APCOF recommends amendment to section 6 of the Police Act provide further elaboration on a process for the transparent and competitive recruitment of a National Commissioner, with specific reference to:

- The establishment of an independent panel, which we submit should be delegated to the National Police Board (which is considered in section 5 above).
  
- The terms of reference for the panel will be:
  - To develop clear, merit-based criteria for the post of the National Commissioner of the Service.
  - To undertake a transparent and merit-based recruitment process that results in a shortlist of the individuals most qualified to effectively lead the Service.
  
- The process of appointment is clearly set out in law, and includes:
  - That the Minister of Police should, over a month-long period, publicly advertise the posts for the position along with the responsibilities and functions of the post, and the minimum criteria required for shortlisting.
  - Applications be received and submitted to the panel with a shortlist of candidates who meet the minimum criteria.
  - To be shortlisted, candidates must not only possess the necessary expertise, experience, and qualifications, but must first be vetted for top security clearance and subject to a psychological evaluation for their suitability to the role.
  - The panel must then interview the shortlisted candidates in public against the objective criteria.

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<sup>9</sup> National Assembly, Portfolio Committee for Police, 'National Development Plan recommendations for Policing: SAPS, Civilian Secretariat for Police & Civil Society briefing', 12 September 2017, available at <https://pmg.org.za/committee-meeting/24985/> (accessed on 2 November 2020).

- The panel should also be able to receive submissions from the public on the shortlisted candidates.
- The panel must provide scores for each shortlisted candidate against the objective criteria, weighted by the most important functions of the post, and assessments of integrity.
- The panel should agree on a shortlist of no more than five candidates for the post, comprising those who achieved the highest scores from the assessment processes.
- The shortlist of candidates for the post is presented to the President, who in terms of their [Constitutional mandate](#),<sup>10</sup> will appoint the National Commissioner of the Service.

APCOF further submits that the following minimum criteria for appointment be included in a revision of section 6:

- At least 10 years' managerial experience in policing or police oversight, administration of justice, public administration, and public finance management.
- A post-graduate qualification in policing, sociology, law or security studies.
- Integrity, honesty and ethical leadership.
- No pending disciplinary charges, criminal investigations or charges.
- South African citizen.

## **12. Section 13(3) – use of force**

APCOF welcomes the intent behind the proposed amendment to the legal framework for the use of force by SAPS members, in particular limiting the use of potentially lethal force to the protection of life alone in section 13(b). However, we remain concerned that the proposed amendments do not align with international law. We recommend that the Amendment Bill be redrafted to ensure its alignment with South Africa's binding obligations under international law to safeguard the right to life, as interpreted in soft law instruments adopted at the level of the United Nations and African Union, and relevant international jurisprudence. Our specific concerns are set out below.

### **12.1. Principles governing the use of force**

We recommend that the principles that underpin the use of force by SAPS members included in section 13 are defined (namely, what is meant by reasonable and proportionate), and expanded to include the

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<sup>10</sup> Section 216(2)(a), Constitution of the Republic of South Africa, 1996, available at <https://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (accessed on 2 November 2020).

principles of precaution and de-escalation, and the requirement that these principles apply in relation to a legitimate law enforcement objective.

### 12.1.1. Definitions

In terms of definitions, we recommend that those provided in the Pan African Parliament's [Model Police Law for Africa](#) be adopted, as they reflect most recent international law on the subject of the use of force. They are as follows, with appropriate changes made to reflect South African-style legal drafting:<sup>11</sup>

- **Necessary** means that no reasonable alternative, other than resorting to the use of force, is available at the moment, to achieve a legitimate law enforcement objective as defined in this Act.
- **Proportionate** means relative to the threat posed by an individual, or group of individuals, and the offence that has been, or is about to be, committed.

APCOF further recommends that the following definitions also be included, based on our submission below that they be specifically referred to in the Act in terms of the framework for the use of force by SAPS members:

- **Legitimate law enforcement objective** means one that is recognised in national or international law, and that concerns the protection of the public, such as preventing the perpetration of a criminal offence, arresting a person suspected of having committed a criminal offence, or detaining a person pursuant to a lawful provision, order or sentence.
- **Precaution** means that a police officer must apply non-violent means before resorting to the use of force, unless such means are unlikely to achieve the intended legitimate law enforcement objective.

Providing definitions for key terms related to the use of force is important not only for statutory interpretation of the Act by the legislature, departments, courts and the SAPS itself, but to promote effective training of SAPS members in terms of their obligations, and limitations, with respect to force.

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<sup>11</sup> Pan African Parliament, 'Model Law for Police in Africa', section 2, available at <http://apcof.org/wp-content/uploads/pap-model-police-law-for-africa.pdf>, accessed on 4 November 2020).



### 12.1.2. Principle of precaution

The use of force provision proposed by the Amendment Bill includes specific reference to the principles of reasonableness, necessity and proportionality. However, international law has progressively developed to include the additional principle of ‘precaution’, which underpins the principles of necessity and proportionality.<sup>12</sup> It operates to impose a duty on the state to plan law enforcement operations in a manner that minimises the use of force. In its [General Comment on the Right to Life](#), the African Commission on Human and Peoples’ Rights affirmed the application of this principle in the interpretation of binding obligations with respect to Article 3 of the African Charter on Human and Peoples’ Rights, to which South Africa is a party. It describes the obligation in the following terms:<sup>13</sup>

The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to, the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations. States must adopt a clear legislative framework for the use of force by law-enforcement and other actors that complies with international standards, including the principles of necessity and proportionality.

Accordingly, we recommend that section 13 be amended to include reference to the precautionary principle, which can be defined in accordance with the suggested wording in the Pan African Parliament’s Model Law, as amended and provided in section 12.1.1 of this submission, above. We further recommend that the proposed changes to section 13 be amended to reflect all principles that underpin the use of force, in line with the wording proposed by the Pan African Parliament in the [Model Police Act for Africa](#) (as adapted for South Africa):<sup>14</sup>

*All police officers must ensure that they apply, as far as possible, non-violent methods before resorting to force. All police officers must ensure that the use of force is:*

- i. Exceptional;*

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<sup>12</sup> *McCann and Others v United Kingdom (App No 18984/91)* 21 EHRR 97, available at <http://hudoc.echr.coe.int/eng?i=001-57943> (accessed on 4 November 2020).

<sup>13</sup> African Commission on Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 4 to 18 November 2015 in Banjul, The Gambia, at 27, available at <https://www.achpr.org/legalinstruments/detail?id=10> (accessed on 30 October 2020).

<sup>14</sup> Pan African Parliament, ‘Model Law for Police in Africa’, Schedule 5, section 8 ‘Coercive measures’, available at <http://apcof.org/wp-content/uploads/pap-model-police-law-for-africa.pdf>, accessed on 4 November 2020).

- ii. *Only in pursuit of a legitimate law enforcement objective as defined in this Act;*
- iii. *Used in a manner that is non-discriminatory; and*
- iv. *Consistent with the requirements of precaution, necessity and proportionality as defined in this Act.*

### **12.1.3. Principle of de-escalation**

APCOF further recommends that the SAPS Amendment Bill make specific reference to the principle of de-escalation in the context of the use of force. Normative standards on the use of force, emphasise the obligation on police to take measures to de-escalate tension and violence before resorting to force. This can include, but is not limited to, a range of measures including communication and negotiation, as well as retreat. Specific guidance on de-escalation tactics in the context of public order management operations is provided by the African Commission on Human and Peoples' Rights in section 20 of their [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#).

## **12.2. Obligations before, during and after the use of firearms and other potentially lethal force**

The proposed amendment to section 13 of the Act does not include provisions regarding the steps under [international](#) and [regional](#) legal standards that must precede, occur during, then follow, the use of potentially lethal force.

APCOF recommends that the proposed amendments to section 13 of the Act be expanded to include an obligation on a SAPS member to:<sup>15</sup>

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<sup>15</sup> See, United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at 4, available at <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> (accessed on 9 November 2020). See also, African Commission on Human and Peoples' Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020); African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted during the 55<sup>th</sup> Ordinary Session, held from 28 April to 12 May 2014 in Luanda, Angola, section 3(c), available at <https://www.achpr.org/legalinstruments/detail?id=12> (accessed on 9 October 2020); and African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held from 4 to 18 November 2015 in Banjul, The Gambia, at 27, available at <https://www.achpr.org/legalinstruments/detail?id=10> (accessed on 30 October 2020).

- **Before** the use of a firearm or other potentially lethal force: identify themselves as a police officer and give a clear warning of their intention to use firearms with sufficient time for the warnings to be observed, unless to do so would be ineffective or would put lives at undue risk.
- **During** the use of firearms or potentially lethal force: exercise restraint, minimise damage and injury with a focus on preserving human life.
- **After** the use of a firearm or potentially lethal force: ensure that assistance and medical aid are rendered to any injured or affected person at the earliest possible moment after the use of force or firearms; that the discharge of a weapon, or the use of force causing injury or death be reported to superior officers as soon as possible, that a report in terms of the Independent Police Investigate Directorate Act is promptly made.

### **12.3. Automatic weapons**

APCOF welcomes the prohibition of automatic weapons. However, we submit that the word ‘capable’ must be inserted in the proposed amendment to section 13 to ensure the prohibition all assault weapons whose automatic component may have been disabled from being procured and deployed as part of the arms capabilities of the Service.

### **12.4. Protection of property**

APCOF welcomes the limitation on the use of deadly force to protect property. However, we recommend that the wording currently proposed in the draft Bill be amended to ensure that there is no scope for alternative interpretations. In particular, the use of the phrase ‘to protect property only’ does not give full effect to the intention of the Amendment Bill to absolutely prohibit the use of deadly force to protect property. Rather, we recommend that the wording in sub-section (iii) be amended to read:<sup>16</sup>

*(iii) only use deadly force in circumstances in which there is an imminent risk of death or serious injury to a person, and only when less extreme measures are insufficient to achieve these objectives.*

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<sup>16</sup> Wording adapted from African Commission on Human and Peoples’ Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21.2.3, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020);

### **13. Chapter 5, section 15 – vetting**

APCOF is encouraged by the provisions of the draft SAPS Amendment Bill which provide for the screening of all SAPS recruits. However, we are concerned that the vetting does not apply to members already in the employ of the SAPS, given the serious and persistent challenges related to allegations of [criminality](#) and [corruption](#), amongst others, levelled and often proven against current and former members. Rather than limiting vetting to a once-off process at the point of recruitment, we recommend that vetting be extended to include vetting and lifestyle audits on a regular basis for all SAPS members. This should be routine at the point of promotion, and in the event that any allegations of corruption or other abuse of power trigger an investigation or disciplinary process.

We further recommend that the criteria against which vetting is made be published, at a minimum, in the regulations to accompany the revised Police Act, and that an opportunity for public consultation on the criteria be provided. The process for vetting should also be made known and subject to public comment to ensure that what is proposed is consistent with the right to privacy under section 14 of the Constitution, and principles of procedural fairness. This is particularly so, given the proposal to collect and store DNA profiles of new recruits. APCOF recommends that a framework to establish for how long samples will be kept, how they will be used, and to whom access will be granted, be published for comment prior to the commencement of vetting and lifestyle audits. These provisions must be drafted to align with the Criminal Law (Forensic Procedures) Amendment Act, 37 of 2013, particularly in relation to the elimination index as provided in section 15L of the Act.

Finally, following on from our recommendation to establish a National Police Board in the draft SAPS Amendment Bill (see section 5 of this submission, above), we further recommend that the vetting and lifestyle audit function be delegated to the Board. The Board will be independent of SAPS leadership, which is an important consideration in terms of promoting community confidence in the vetting process and ensuring effective and functional independence of that process from the SAPS.

### **14. Chapter 7, section 17 – public order policing – direction, capacity and control**

The draft SAPS Amendment Bill proposes a number of changes to public order policing, with the stated policy aim of addressing a Constitutional Court judgment. We understand that the Secretariat has also been informed by the recommendations made by the [Panel of Experts on Public Order Policing](#), the body established on the recommendation of the Marikana Commission. APCOF is deeply concerned that the report of the Panel of Experts has not been released to the public, which makes the process of providing

comprehensive comments on the proposed changes to public order policing difficult. It is a resource that should be made available ahead of the closure of public comments on the draft SAPS Amendment Bill.

While APCOF welcomes the efforts of the Bill's drafters to address challenges inherent in the current legislative framework for public order management, we have five concerns with the draft Amendment Bill, and make the following recommendations to strengthen its provisions, based on the information available to us.

#### **14.1. Public order units v capacity**

The Amendment Bill proposes a language change from National/Provincial public order policing (POP) units to National/Provincial public order capacity. The explanatory memorandum that accompanied the release of the draft Amendment Bill does not provide a reason for language change, and it is not clear from the text whether the change from POP unit to capacity implies changes in the composition of what were previously known as formed POP units.

We are concerned that 'capacity' may result in the further dissipation of established units responsible for public order management. The move from 'public order police' units to 'crime combating units' in 2002 began a process that resulted in a concerning shift away from having professional and highly skilled units trained to manage public order incidents and gatherings.<sup>17</sup> One of the criticisms of this shift was that to function effectively in a public order setting, units should be training and working together as a team, and with the emphasis on general crime responsibilities over public order management, this capacity was dissipated as units were broken up and resources distributed to the clusters.

APCOF therefore suggests that the draft SAPS Amendment Bill be specific regarding what is understood by POP 'capacity' and clear in terms of the overall decision-making power of POP commanders to draw in additional capacity, in line with the recommendations of the Panel of Experts.

#### **14.2. Chain of command**

APCOF is concerned about the proposed changes to the SAPS Act as they pertain to issue of command and control in a public order management context. The proposals are confusing, contradictory, and will make it difficult to establish a clear chain of command for the purposes of ensuring operational and

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<sup>17</sup> David Bruce, 'Marikana is an important reminder of the need to strengthen public order policing in South Africa, ISS Today, 16 August 2019, available at <https://issafrica.org/iss-today/fighting-crime-shouldnt-trump-sas-public-order-policing>, (accessed on 23 November 2020).

command accountability. In its [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#), the African Commission on Human and Peoples' Rights unequivocally calls on African states to ensure that regardless of the configuration of public order management units, that there be a single and transparent chain of command that is as close to operational level as possible. In section 5.1, the Guidelines state:<sup>18</sup>

'Law enforcement agencies must establish a clear, transparent and single command structure for the policing of assemblies. The operational roles and responsibilities of law enforcement officials within the chain of command should be clearly established, articulated, and publicly known to ensure a single chain of accountability'.

Section 17(d)(3) states that 'where the national public order capacity is deployed...[it] shall perform its functions subject to the directions of the Provincial Commander'. Section 17(e)(3A) then goes on to state that 'where the National Public Order Policing Capacity...is deployed...[it] shall be subject to the general or specific directives of the national commissioner'. It is unclear what 'directions' and 'directives' mean and whether there is a substantive difference in their meaning. Section 17(d)(3B) states that 'when deployed in a Province...[the National Public Order Policing Capacity] shall operate under national command and control', a provision which seems to contradict section 17(d)(3). It is therefore unclear who has command and control, and thus accountability, for the conduct of the national public order capacity when it is deployed at the request of the provincial commissioner or at the direction of the Minister. Furthermore, the involvement of the Minister on operational issues is of concern – their role should be limited to providing policy directives to avoid political interference in civilian policing operations.

Accordingly, APCOF recommends that the proposed amendments be revised to make the chain of command and control in the deployment of national public order policing capacity absolutely clear, and to remove the Minister from any operational decision-making function.

### **14.3. Deployment of the national public order policing capacity**

Section 17(f)(c)(5) gives the Minister power to direct the National Commissioner to deploy the national public order policing capacity, following consultation with Cabinet. However, the draft Bill does not provide detail in terms of whether this can be done in circumstances where the relevant provincial

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<sup>18</sup> African Commission on Human and Peoples' Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 5.1, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020);

commissioner is clear that they do not require the assistance of the national public order policing capacity. It is also unclear whether the national commissioner has jurisdiction over the deployment of the national public order policing capacity without the involvement of the Minister which, as set out in section 14.2 of this submission, above, raises significant concerns for APCOF about the potential for political interference in operational policing decisions.

We therefore recommend that this section be amended to provide for the circumstances in which the national public order policing capacity can be deployed, and to make it clear that the decision is reserved for SAPS command, and not within the power of the Minister of Police.

#### **14.4. Withdrawal of national public order policing capacity**

The draft SAPS Amendment Bill proposes to also give powers to the National Commissioner to withdraw national public order policing capacity. However, the text does not elaborate on the circumstances in which this power can be exercised. APCOF recommends that the subsection be revised to provide for these circumstances, including that it be done in consultation with the relevant provincial commissioner (who may, in the current drafting, be faced with a situation of withdrawal despite the conditions for which the request being made not yet being achieved).

#### **14.5. Reporting**

Section 17(g)(8) proposes to require the National Commissioner to submit quarterly reports to the National Assembly regarding the deployment of the national public order policing capacity. While we welcome efforts to improve transparency and accountability in public order management by the SAPS, we are concerned that this reporting requirement is limited to national capacity, and does not extend to the requirement to the provincial public order policing capacity. Therefore, APCOF recommends that this section be revised to require quarterly reporting on both national and provincial deployments of public order policing capacities.

#### **14.6. Municipal police as first responders**

The SAPS Amendment Bill proposes to include a new section 64E(d) that provides for the role of municipal policing services as 'first responders' to gatherings or demonstrations. However, APCOF is concerned that the specific skill set required to facilitate a public gathering or demonstration is not contained in the current training for municipal police services, which makes them ill-equipped to conduct this function under the law.

APCOF recommends that the SAPS Amendment Bill include a provision that requires municipal police officers be required to undergo training in public order management prior to being made available for deployment. The conduct of an officer at an assembly or gathering can have an adverse influence on the way in which it develops, and without adequate training on issues such as communication, negotiation, de-escalation, and the gradual use of force, the deployment of officers is problematic.

For reference, Guideline 7 of the African Commission on Human and Peoples' Rights' [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#) sets out the basic minimum training that law enforcement officials should undergo before being deployed to a public order management operation. APCOF recommends that provision, not only in terms of our suggestions for training of municipal officers, but also for SAPS officials more generally. As a minimum, the training should cover:

- the right to assemble under the Constitution and international law;
- communication skills;
- understanding of participant behaviour;
- techniques in minimising conflict, and using negotiation and mediation;
- tactics to promote the de-escalation of tension and violence;
- the lawful use of force and firearms;
- the proper use of less lethal weapons;
- the safety and protection of persons and groups who are particularly vulnerable to rights violations in an assembly or gatherings context;
- the role and mandates of internal and external accountability mechanisms; and
- principles of accountability, including command and control, and internal and external reporting.

## **15. Section 17CA - appointment of the National Head and Deputies of the Hawks**

APCOF is concerned that the proposed amendment to section 17CA of the Act with respect to the appointment and removal of the head of the Hawks falls short of ensuring that recruitment is transparent and merit based. Given the importance of the Directorate, and the public confidence required in the persons selected as National Head and Deputy National Head, APCOF recommends that the process be amended in line with our recommendations regarding the appointment of the National Commissioner in section 11 of this submission, above, and provide for the following:



- The establishment of an independent panel, which we submit should be delegated to the National Police Board (which is considered in section 5 of this submission, above).
- The terms of reference for the panel will be:
  - To develop clear merit-based criteria for the post of the National Head of the Directorate and their Deputies.
  - To undertake a transparent and merit-based recruitment process that results in a shortlist of the individuals most qualified to effectively lead the Directorate.
- The process of appointment is clearly set out in law, and includes:
  - That the Minister of Police should, over a month-long period, publicly advertise the posts for the position along with the responsibilities and functions of the post, and the minimum criteria required for shortlisting.
  - Applications be received and submitted to the panel with a shortlist of candidates who meet the minimum criteria.
  - To be shortlisted, candidates must not only possess the necessary expertise, experience, and qualifications, but must first be vetted for top security clearance and subject to a psychological evaluation for their suitability to the role.
  - The panel must then interview the shortlisted candidates in public against the objective criteria.
  - The panel should also be able to receive submissions from the public on the shortlisted candidates.
  - The panel must provide scores for each shortlisted candidate against the objective criteria, weighted by the most important functions of the post, and assessments of integrity.
  - The panel agree on a shortlist of no more than five candidates for the post, comprising those who achieved the highest scores from the assessment processes.
  - The shortlist of candidates for the post are presented to the Parliamentary Portfolio Committee on Police, who will then make a recommendation to the Minister on the appointment of the National Head of the Directorate and their Deputies.

## **16. Chapter 6C – Police Intelligence Division**

APCOF has a number of concerns with the proposed amendments to Chapter 6C of the SAPS Act, which are set out in detail below.

### **16.1. Section 17P - reporting**

The proposed amendment to section 17P of the Police Act provide that the Divisional Commissioner of National Intelligence report directly to the National Commissioner, with the caveat that if it is in the interests of justice, public interest or the security of the Republic, they can report particular matters directly to the Minister. APCOF is concerned by this provision as it risks abuse for reasons of political expediency. The work of the Intelligence Division is in pursuit of the interests of justice, public interest and security, which are operational issues that should be reported to the National Commissioner, who then may report such matters to the Minister and the President. In our view, unless the National Commissioner is directly implicated in an investigation by the Intelligence Division, and reporting to them would compromise the investigation, all reports should be made to them. To protect against misuse of this provision, APCOF recommends that safeguards be included in a revised draft SAPS Amendment Bill to ensure that the line of reporting is clear, and the circumstances in which the National Commissioner does not receive a report from the Divisional Commissioner of National Intelligence are itemised.

### **16.2. Section 17S - vetting**

APCOF is further concerned by the process of vetting proposed in section 17S(b)(ii) related to other members of the Service, and persons determined by section 2A(1) of the *National Strategic Intelligence Act*. It is unclear whether *all* SAPS members are required to undergo vetting, and whether their employment requires that they obtain the appropriate security clearance. APCOF submits that the provision be amended to make it clear that all SAPS members are subject to vetting, must be issued with security clearances in order to remain in the Service, and that those who are unable to obtain the requisite clearance are removed from the Service.

### **16.3. Section 17V – appeals**

APCOF is further concerned with the appeal system proposed in the revised section 17V(5) of the Act, which gives the Minister power to confirm, set aside, vary or substitute a decision of the Head of Police Intelligence. To protect against political interference in the work of the police intelligence, we recommend that this section be revised to require that members affected by the decision of the Head of Police Intelligence have recourse to the courts, rather than the Minister.

## **17. Chapter 7, section 18 – community policing**

APCOF notes the proposed changes to community policing in the revision of Chapter 7, section 18. However, we have two issues with how the draft is currently presented. First, section 6E(6) proposes that the Civilian Secretariat for Police be the chairperson of the National Community Policing Board. We recommend that this position not be vested in the Secretariat in the interests of promoting a community voice in policing.

Second, we are concerned with the proposed inclusion of subsection (3), which provides for the provision of transport and office space to Community Policing Forums (CPFs) by police stations and districts. However, the amendments to the SAPS Amendment Bill on the issue of CPFs, when read as a whole, indicate that responsibility for CPFs is being moved to the Secretariat. In the interests of promoting a measure of financial independence for CPFs from their police stations and districts, and to ensure the equitable distribution of resources to CPFs across South Africa, APCOF therefore recommends that subsection (3) be revised to provide that the relevant provincial Secretariat be allocated budget for resourcing the work of CPFs.

## **18. Section 28A – integrity testing and lifestyle audits**

APCOF welcomes the proposed inclusion of section 28A in the principal Act, which introduces integrity testing and lifestyle auditing for all new recruits to the SAPS. However, given the challenges experienced by the SAPS in terms of [criminality](#) and [corruption](#), amongst others, levelled and often proven against current and former members, APCOF recommends that the audits and testing be extended to all current SAPS members, as well as new recruits. As set out in section 5 of this submission, above, APCOF further submits that this function be delegated to a National Police Board, which we recommend should be established in line with the NDP and the White Paper on Policing.<sup>19</sup>

We further recommend that the criteria against which lifestyle audits and integrity testing is published, at a minimum, in the regulations to accompany the revised Police Act, and that an opportunity for public consultation on the criteria be provided. The process for testing and auditing should also be made known and subject to public comment to ensure that what is proposed is consistent with the right to privacy under section 14 of the Constitution, and principles of procedural fairness.

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<sup>19</sup> Presidency of the Republic of South Africa, National Planning Commission, 'National Development Plan 2030: Our Future – Make it Work', 2013, at 390, available at <https://www.gov.za/issues/national-development-plan-2030> (accessed on 2 November 2020). See also, Civilian Secretariat for Police, 'White Paper on Policing', 2016, at 21, available at [http://www.policeseecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policeseecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf) (accessed on 2 November 2020).

## 19. Section 32 – training

Section 32 proposes that the National Commissioner and the National Head of Directorate will determine the criteria for education, training and development for SAPS members and recruits. APCOF recommends that this section be revised to prescribe the minimum standards for that training in terms of content and accreditation. We are concerned that there is currently no independent quality assurance body created in terms of the Act to determine the quality and standard of the SAPS curriculum. Given the concerns raised about training in the Marikana Commission of Inquiry report,<sup>20</sup> and the Western Cape High Court,<sup>21</sup> regarding training standards, the SAPS Act revision should ensure that minimum standards and independent oversight of training is provided. As set out in section 5 of this submission, we recommend the establishment of a National Police Board, in accordance with the recommendations of the NDP and the White Paper on Policing. This Board should be tasked with, *inter alia*, ensuring that training for the SAPS is consistent with international norms and standards.<sup>22</sup> In lieu of the establishment of the Board, we recommend in the alternative that an independent body be established in section 32 to provide guidance and oversight over police training, comprised of the National Commissioner, academics and policing experts.

## 20. Section 43 – suspension during periods of detention

APCOF notes with concern the proposed amendment to section 43 of the SAPS Act which deals with the suspension of members from the Service during periods of detention. In keeping with the presumption of innocence, suspension is the minimum action the Service should take with respect to a member being accused of a criminal offence, pending the outcome of the case. However, in the case of a conviction, the SAPS Act must be amended to provide for the automatic dismissal of any member convicted of a criminal offence during their employment, and their future disqualification from being appointed in any capacity to any position within the SAPS (as a sworn member or otherwise). No criminal convictions is a prerequisite for recruitment into the Service, so it is deeply concerning to us that a member can acquire a criminal conviction during the course of their employment with the Service, and it is not automatic grounds for dismissal. Given the numerous and serious reports of [criminality](#) and [corruption](#) within the Service, we urge

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<sup>20</sup> Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province, Recommendation B(8)(c), at 549 Government Gazette No. 38978, 10 July 2015, available at [https://justice.gov.za/comm-mrk/docs/20150710-gg38978\\_gen699\\_3\\_MarikanaReport.pdf](https://justice.gov.za/comm-mrk/docs/20150710-gg38978_gen699_3_MarikanaReport.pdf) (accessed on 14 November 2020).

<sup>21</sup> *Abdirahman Mohamed Said and Others v The Minister of Safety and Security*, Case No. EC13/08, Western Cape High Court, at 94.

<sup>22</sup> Presidency of the Republic of South Africa, National Planning Commission, 'National Development Plan 2030: Our Future – Make it Work', 2013, at 390, available at <https://www.gov.za/issues/national-development-plan-2030> (accessed on 2 November 2020).

the Secretariat to further amend section 43 of the SAPS Act to require the automatic dismissal from the Service of any member who is convicted of a criminal offence.

## **21. Section 71A – hoaxes, untrue and false information**

APCOF is concerned about the criminalisation of ‘hoaxes, untrue and false information’ as proposed in section 71A of the draft SAPs Amendment Bill on the basis that it poses a risk to constitutionally protected human rights, including particularly the right to freedom of expression.<sup>23</sup> Rather, APCOF recommends that the section be redrafted to take a rights-based approach to disinformation, which requires a clear legal requirement for objective harm to be caused before liability is attached to a particular piece of disinformation. APCOF recommends to the Secretariat the [‘Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda’](#), released by the African Commission on Human and Peoples’ Rights, the United Nations (UN), the Organisation for Security and Co-operation in Europe (OSCE), and the Organisation of American States (OAS). It provides guiding principles, including that consideration be given to protecting individuals from liability for the re-distribution, unmodified, of information for which they are not the author. It furthermore urges that general prohibitions on information based on broad concepts of falseness, amongst others, are incompatible with the right to freedom of expression.<sup>24</sup>

## **22. Amendment to the Regulations of Gatherings Act, 1993**

The draft SAPS Amendment Bill proposes to amend sections of the *Regulation of Gatherings Act, 205 of 1993*. While APCOF welcomes the overall policy objective of aligning the SAPS Act and other relevant legislation with a Constitutional Court judgment, which we presume to be the so-called [SJC10 case](#),<sup>25</sup> and to provide for the use of force and deadly force, we have two overarching concerns with the proposed amendments – namely notification and use of force, which are set out below.

### **22.1. Section 2 - notification**

In the SJC10 case, the Constitutional Court confirmed that section 12(1)(a) of the Regulation of Gatherings Act is unconstitutional as it imposes criminal sanction for the failure to give notice of a

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<sup>23</sup> Section 16, Constitution of the Republic of South Africa, 1996, available at

<https://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (accessed on 23 November 2020).

<sup>24</sup> United Nations, Office of the High Commissioner for Human Rights, Organisation of American States, Organisation for Security and Cooperation in Europe, and the African Commission on Human and Peoples’ Rights, ‘Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, 2017, available at <https://www.ohchr.org/Documents/HRBodies/SP/JointDeclaration3March2017.doc> (accessed on 23 November 2020).

<sup>25</sup> *Mlungwana and Others v S and Another (Equal Education, Right2Know Campaign and UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association as Amici Curiae)*, [2018] ZACC 45, available at <https://collections.concourt.org.za/handle/20.500.12144/34607> (accessed on 15 November 2020).

gathering, which is an unjustifiable and disproportionate limitation of the right to peaceful assembly in section 17 of the Constitution.<sup>26</sup> One of the key outcomes of the case was the notion that in providing notice of a gathering, a convenor is not asking for permission – rather, the function of notice should be to enable the municipality, convenor and police to make contingency plans and risk assessments to decide on how to proceed with the gathering. The position of the Constitutional Court reflects South Africa’s obligations under the [African Charter on Human and Peoples’ Rights](#), which guarantees the right of every individual to assemble freely with others under Article 11. In its interpretation of Article 11 in the [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#), the African Commission on Human and Peoples’ Rights made it clear that systems for notification will violate the right to assemble in Article 11 if they operate as *de facto* permission. Guideline 9.1 articulates it in the following way:<sup>27</sup>

Recognising the important expressive role that spontaneous assembly can play in a democracy, law enforcement agencies must have in place processes and procedures to ensure the facilitation of spontaneous assemblies, including in relation to known or scheduled political or social events, commemorative days, and in anticipation of decisions made by courts, parliaments and other state authorities. ***Lack of prior notification of an assembly does not render it unlawful and should not form the sole basis of a decision by law enforcement officials to disperse an assembly*** (emphasis added).

The draft SAPS Amendment Bill proposes to amend section 2 of the Regulation of Gatherings Act by requiring notice be given by the convenor of certain intended gatherings. New subsection 2B provides the justification for the notification requirement, which recognises the role of authorities in the facilitation of assemblies, and the need to make contingency plans. However, the provision in subsection (2) that “...the responsible officer may be notice to the convenor ***prohibit the gathering***” (emphasis added) if less than 48 hours’ notice is provided and the ‘responsible officer’ has information that traffic may be disrupted or that there is a risk to life in subsection means that the Regulation of Gatherings Act maintains, to a degree, a *de facto* system of permission, rather than notification. APCOF therefore recommends that subsection (2) be amended to remove the reference to a ‘prohibition’ of a gathering.

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<sup>26</sup> *Mlungwana and Others v S and Another (Equal Education, Right2Know Campaign and UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association as Amici Curiae)*, [2018] ZACC 45, available at <https://collections.concourt.org.za/handle/20.500.12144/34607> (accessed on 15 November 2020). See also, Wilmien Wicomb, *What does the Constitutional Court’s judgment on protest mean*, GroundUp, 20 November 2018, available at <https://www.groundup.org.za/article/what-does-constitutional-courts-judgment-protests-mean/> (accessed on 15 November 2020).

<sup>27</sup> African Commission on Human and Peoples’ Rights, *Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa*, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 9.1, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020).

## 22.2. Section 9 – use of force

APCOF has a number of issues with the proposed amendment to section 9 of the Regulation of Gatherings Act as it pertains to the use of force.

### 22.2.1. Subsection (2A)(a)

Further to section 12 of our submission regarding the legal framework proposed for the use of force in the draft SAPS Amendment Bill, APCOF recommends that the principles set out in subsection (2A)(a) be articulated in relation to the achievement of a ‘legitimate law enforcement objective’. We further recommend that this section include reference to the principles of precaution and de-escalation which, as per section 12 of this submission, underpin the principles of necessity and proportionality.<sup>28</sup> Further to the inclusion of these principles in the Regulation of Gatherings Act, APCOF also recommends that they be defined, in line with our recommendations for the same definitions to be included in the revised SAPS Act in alignment with the Pan African Parliament’s [Model Police Law for Africa](#).<sup>29</sup>

### 22.2.2. Subsection (2A)(b)

The use of deadly force in the Regulation of Gatherings Act, as proposed in the draft SAPS Amendment Bill, fails to provide for the requirement that the threat to serious bodily harm be ‘imminent’. The requirement of imminence is a settled principle of international law:<sup>30</sup>

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the *imminent* threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

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<sup>28</sup> *McCann and Others v United Kingdom (App No 18984/91)* 21 EHRR 97, available at <http://hudoc.echr.coe.int/eng?i=001-57943> (accessed on 4 November 2020).

<sup>29</sup> Pan African Parliament, ‘Model Law for Police in Africa’, section 2, available at <http://apcof.org/wp-content/uploads/pap-model-police-law-for-africa.pdf>, accessed on 4 November 2020).

<sup>30</sup> United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at 9, available at <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> (accessed on 9 November 2020). See also, African Commission on Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 4 to 18 November 2015 in Banjul, The Gambia, at 27, available at <https://www.achpr.org/legalinstruments/detail?id=10> (accessed on 30 October 2020).

The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has interpreted ‘an imminent or immediate threat’ to be ‘a matter of seconds, not hours’.<sup>31</sup> Where international law permits the use of firearms with exceptions to the requirement of imminent threat, it does not permit shooting with intent to kill. Imminence is always a prerequisite to the use of potentially lethal force.<sup>32</sup>

APCOF therefore recommends that the proposed changes to the subsection be redrafted to include the requirement of an ‘imminent’ threat.

### **22.2.3. Subsection (2A)(c)**

APCOF notes that the proposed wording used in subsection (c) of the Regulation of Gatherings Act in relation to the prohibition of the use of deadly force to protect property is the same as that proposed for the SAPS Act. APCOF restates its recommendation in relation to the wording of this section, as set out in full in section 12 of this submission, which is to remove any ambiguity by adopting the language of international law. Namely, that the section be redrafted to read:<sup>33</sup>

*(c) only use deadly force in circumstances in which there is an imminent risk of death or serious injury to a person, and only when less extreme measures are insufficient to achieve these objectives.*

### **22.2.4. Subsections (4) & (5)**

APCOF welcomes the prohibition on the use of automatic firearms during gatherings and demonstrations, as proposed in the inclusion of subsection (4). However, we recommend that this section be strengthened by reference to additional restrictions imposed on the use of firearms,

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<sup>31</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, at 59, available at [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/26/36](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/36) (accessed on 15 November 2020).

<sup>32</sup> See, Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council, Geneva Academy, November 2016, at 14, available at [https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6\\_WEB.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf) (accessed on 15 November 2020).

<sup>33</sup> Wording adapted from the African Commission on Human and Peoples’ Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21.2.3, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020);



which we submit are not an appropriate tactical tool for the policing of assemblies. If firearms are deployed, we recommend that additional restrictions be imposed including, at a minimum:<sup>34</sup>

- Prohibition on the use of all firearms unless in circumstances where there is an imminent risk of death or serious injury to a person involving a grave threat to life, and only when less extreme measures are insufficient to achieve these objectives. We further submit that the amendment to the Regulation of Gatherings Act include requirements for officers before, during and after the use of force and firearms, as set out in section 12 of this submission in relation to the equivalent use of force sections to the SAPS Bill.<sup>35</sup>
- Absolute prohibition on the use of firearms to disperse an assembly.
- Absolute prohibition of indiscriminate use of firearms to disperse an assembly.
- That firearms are carried only by designated firearm police officers who can only use such firearms in extreme circumstances to protect life, in self-defence and on instructions by an operational commander of the public order policing (POP) capacity.

We also recommend that the amendments proposed to the Regulation of Gatherings Act include provisions related to the use of crowd control weapons, including less lethal weapons. In accordance with guidance provided by the African Commission on Human and Peoples' Rights, APCOF submits that the limitations should include only where there are legitimate grounds for the use of force or for dispersal, and only when the use is necessary and proportionate in the

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<sup>34</sup> African Commission on Human and Peoples' Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020).

<sup>35</sup> See, United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at 4, available at <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> (accessed on 9 November 2020). See also, African Commission on Human and Peoples' Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020); African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted during the 55<sup>th</sup> Ordinary Session, held from 28 April to 12 May 2014 in Luanda, Angola, section 3(c), available at <https://www.achpr.org/legalinstruments/detail?id=12> (accessed on 9 October 2020); and African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held from 4 to 18 November 2015 in Banjul, The Gambia, at 27, available at <https://www.achpr.org/legalinstruments/detail?id=10> (accessed on 30 October 2020).

circumstances, when other less harmful means have been attempted and found to be ineffective or will be ineffective in the circumstances.<sup>36</sup>

### 23. Conclusion

Amendment to the enabling legislation for the South African Police Service is long overdue. APCOF welcomes the efforts by the Civilian Secretariat for Police to address some of the most critical challenges facing policing in South Africa: professionalism, accountability, public order management and the use of force. Our submission encourages the Secretariat to consider wholesale reform of the legislation through the development of a new Act, and the repeal of the existing Act. In the alternative, we have made a series of recommendations that are aimed to strengthen the work done by the Secretariat in articulating a legislative framework for policing that gives effect to the changes in the legal and policy environment since the 1995 Act, and to align the mandate of the SAPS with the Constitutional imperative to protect, and uphold human rights. APCOF is available and interested in providing additional information to the Secretariat about any aspect of this submission, and welcomes the opportunity for ongoing engagement.

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<sup>36</sup> African Commission on Human and Peoples' Rights, Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21<sup>st</sup> Extraordinary Session, held from 23 February to 4 March 2017 in Banjul, The Republic of the Gambia, at section 21, available at <https://www.achpr.org/legalinstruments/detail?id=65> (accessed on 9 November 2020).