***SUBMISSIONS TO THE MINISTER OF POLICE ON THE SOUTH AFRICAN POLICER SERVICE AMENDMENT BILL, 2020***

***Submitted by***

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***On behalf of the Social Justice Coalition***

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**SOCIAL JUSTICE COALITION**

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1. **Introduction**

The Social Justice Coalition (SJC) is a democratic, mass-based social movement organisation that campaigns for the advancement of the constitutional rights to life, dignity, equality, freedom and safety for all people, but especially those living in informal settlements across South Africa.

The SJC has since before the initiation of the Khayelitsha Commission of Inquiry set out to campaign, advocate and call for equitable and responsive police services for everyone in South Africa, but especially for the poor, black and working class people that live in Khayelitsha and other townships across the country.

It is with great enthusiasm that the SJC welcomes the introduction of this Amendment Bill, especially as it pertains to a further commitment to centralise the police service and in relation to public order policing.

The right to protest remains one of the core human rights of our constitutional democracy. It was protests of ordinary South Africans that led to the democratic and constitutional principles that guide our country today. This right remains fundamental to the realisation of the human rights of all people but is especially sacred to the realisation of human dignity of poor black people who live in informality. It is precisely the right to assemble and protest against state and private institutions who actively work to deny poor black people in South Africa of the rights and privileges envisioned by the creators of this democracy and the constitution.

In South Africa, the unreasonable, violent and egregious conduct of Public Order Policing units (POP units) towards protesters continues to be a major problem. The SAPS Amendment Bill is long overdue. Government has an important role to play in changing the mindset of the police regarding protest.

Unfortunately, in the years that have followed South Africa’s first democratic government, it has been state security forces that have used violence to repress the right to protest. The actions and legitimacy of the South African Police Service, Metropolitan Police Services and local Law Enforcement have all contributed to the assault and sometimes even death of protestors. The deaths of 33-year-old Andries Tatane in April 2011 and 16-year-old Nathaniel Julius in August 2020 are just two examples of the countless deaths as a result of violent police action during protests.

It is on this premise that the SJC lays out the following appraisals and grievances for this Amendment Bill.

1. **Objects of the Amendment Bill**

The SJC commends the emphasis on a single police service. In recent years political parties like the Democratic Alliance have called for the decentralisation of police services[[1]](#footnote-1). This would mean to give greater responsibility and authority to provincial and local policing services. In an attempt to increase the scope and authority of local law enforcement, the City of Cape Town earlier this year called for an amendment to Streets, Public Places and the Prevention of Noise Nuisances by-law. This by-law set out to elevate the abilities and powers of local law enforcement to include authorities and competencies that have largely only been designated to the SAPS officers[[2]](#footnote-2).

 It is the opinion of the SJC that calls for the decentralization of police services have a detrimental impact on the consistency and accountability ordinary citizens experience when interacting with the police. The resources and capacity for police accountability simply do not exist in comparison to the bodies and institutions that monitor the service of the SAPS. Attempts to decentralise policing services would need to include infrastructure and resource commitment to ensure that these services are monitored and held effectively accountable where human rights violations are committed.

It was the vision of the creators of the constitution that policing remain a national competency supported by provincial governments and local spheres of government where necessary. However, in order for policing to work effectively as a centralised and national competency, measures need to be put in place to combat present and historic mismanagement and unequal distribution of resources. It is incredibly concerning that whilst this amendment bill aims to reaffirm the mandate for single police service yet has not adopted the measures set out in the Khayelitsha Commission of Inquiry into policing to bring about this objective.

The SJC commends the inclusion of the Provincial Commissioner’s power and duties under clause 11, proposed amendment for Section 12 of the principal act that reads the following:

“Subject to section 11A, a Provincial Commissioner must, within the province in respect of  which he or she is appointed, be responsible for:

d) the provision, in general, of all other visible policing services, including—

(i) the establishment and maintenance of police stations;

(ii) crime reaction units; and

(iii) patrolling services;”

However, these provisions still fail to address the issue of visible policing in informal settlements. Recommendation Six of the Khayelitsha Commission of Inquiry highlights the need for the provincial commissioner to issue guidelines for visible policing in informal settlements. This recommendation is extremely important and the failure of this Amendment Bill to draw on the complexities around policing in informal communities where violent crimes occur means that the vision of a single police service that caters to the needs of all communities is greatly hindered.

Recommendation Seven of the Khayelitsha Commission of Inquiry and the precedents set in *Social Justice Coalition and Others v Minister of Police and Others[[3]](#footnote-3)* heard in the Western Cape Equality Court affirms that the current police resource allocation is discriminatory based on race and poverty. The SJC appraises the addition of clause 11A (3) that reads:

“A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her [jurisdiction] command in the province among the different [areas] districts, station areas, offices and units”

However this amendment to the principal Act fails to address the current allocation of resources as discriminatory and how the Provincial Commissioner attempts to redress this issue through reallocation of police resources within provinces, especially where there is a great discrepancy between police precincts with high human resource allocation and low levels of violent crimes such as murder, and that of police precincts situated in informal areas where there are scarce human resources in areas with the some of the highest murder rates in the country.

The Amendment Bill proposes several amendments to the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993) and how public order policing should manage crowds and use force during protest. The SAPS amendment bill proposes to address operational concerns raised in the non-notification of intended gatherings under the Regulations of Gatherings Act ("Regulation of Gatherings Act").[[4]](#footnote-4) The Amendment Bill seeks to remedy the Constitutional Court ruling in *Mlungwana and Others v The State and Another[[5]](#footnote-5)* which found section 12(1)(a) of the Regulation of Gatherings Act unconstitutional.

The Amendment Bill further proposes amendments to the Regulation of Gatherings Act, to provide that in the instance of a gathering or demonstration, a member of the Service may only use minimum force which is reasonably necessary and proportional in the circumstances. The Amendment Bill provides that that no automatic rifles may be used in crowd control, and that lethal force may be used for protection of property only. Firearms that are fully automatic, as defined in the Firearms Control Act[[6]](#footnote-6), may not be used for purposes of law enforcement during a gathering or demonstration.

The SJC favours the proposed amendments to provisions of both the 1995 SAPS Act and the 1993 Regulation of Gatherings Act, that govern police use of force. The proposals are to be welcomed. But, in reality, they will largely confirm established practise, and reiterate existing legal provisions that already exist.[[7]](#footnote-7) The use of force is regulated by the police’s own National Instructions as well as the Regulation of Gathering Act. Except for personal defence, police can only use force under the orders of the operational commander. Further live ammunition cannot be used in crowd management. As a result it would seem that there is a crisis of praxis instead of policy which begs the question of how this Amendment Bill will attempt to alter the behaviour and practices within the SAPS when policing protests.

The Amendment Bill also tries to give effect to the Farlam Commission Recommendations.[[8]](#footnote-8) There have been many calls to review and monitor the use of force in Public Order Policing. The Farlam Commission of Inquiry inspected Public Order Policing, after the tragic Marikana massacre in 2012. The Commission made several recommendations on how to improve public order policing. It recommended that SAPS revise the prescripts relevant to Public Order Policing (POP), investigate where POP methods are inadequate and implement training programmes for POP units. It also recommended that a panel of experts investigate public order policing in general in the South African context and to make appropriate recommendations. In the Amendment Bill, it mentions that the Minister has received the Report of the Panel of Experts and the relevant recommendations made by the Panel have been included in the South African Police Service Amendment Bill, 2020("Bill").

There is great concern regarding this amendment due to the fact that the Report of the Panel of Experts on Public order Policing has not been released to the general public before but the Minister has made use of the report. It shows that SAPS do not want to engage civil society in participating to strengthen and improve how the police in particular public order policing manage crowds and give better effect to the right to protest. The SJC is of the opinion that the Minister did not give effect to the public participation and necessary dialogue with the general public on the Report of the Panel of Experts on Public order Policing.[[9]](#footnote-9) These problems highlight the need for profound changes in policing in South Africa, and the expert panel provided direction on how to achieve this. Regrettably, more than two years after it was submitted to Police Minister Bheki Cele, the report still has not been considered by Parliament, nor released to the public.

1. **Amendment and changes to the Regulation of Gatherings Act**

The Amendment Bill proposes several amendments to the Regulation of Gatherings Act:

* Clause 75 of the Amendment Bill proposes amendments to section 2 of the Regulation of Gatherings Act, to address the effect of the *Mlungwana Constitutional Court Judgment*, on decriminalisation of the non-notification of gatherings by the convenor thereof. However, with due respect the wrong section has been cited in the Amendment Bill, it should be section 3 of the Act that deals with notice of gatherings by the convener and not section 2 of the Regulation of Gatherings Act. Also the notice period that the convener must give for a gathering was changed from 7 days to 4 days in section 3(2) of the Regulation of Gatherings Act -  The convener shall not later than  four days before the date on which the gathering is to be held give notice of the gathering to the responsible officer concerned.

The SJC would like to know the rationale of this change of days because by shortening the days will it benefit the convener and for practical purposes will it be sufficient time for the   local authority to respond?. We do raise this concern because in another addition to the Amendment Bill – the Bill states that *the convener of an assembly must appreciate that the larger the event and the impact thereof would be, the more complicated arrangements would be as well as a longer period for preparations.* Please see below the relevant addition:

The insertion of the following new subsections─ “(2A) Depending on the envisaged scale and potential disruptive impact of an assembly notice can be given thereof in terms of subsection (2) at any time longer than the required period of 4 days to allow for proper planning and coordination of the assembly. 101 (2B) The notification required is to allow the state authorities to facilitate the exercise of the right to freedom of peaceful assembly and take measures to protect public safety and order and the rights and freedoms of others and the ***convener of an assembly must appreciate that the larger the event and the impact thereof would be, the more complicated arrangements would be as well as a longer period for preparations*** *(*emphasis added).

* Clause 76 of the Amendment Bill – deals with Section 9 of the Regulation of Gatherings Act – deals with Powers of the Police

This clause proposes amendments to section 9 of the Regulation of Gatherings Act in order to align the same with section 13(3) of the principal Act, as amended in the Bill.  We have dealt with this in our submission above.

(d) by the addition of the following subsections: "(4) Firearms that are fully automatic, as defined in the Firearms Control Act, 2000 (Act No. 60 of 2000), may not be used for purposes of law enforcement during a gathering or demonstration.; (5) Any member of the police must, subject to the situation being faced, use a gradual response in law enforcement in respect of a gathering and use force only if non-violent means are ineffective or without any prospect of achieving the result of protecting the public or the members of the police.”.

* In Clause 77 of the Amendment Bill, there was a small change in section 11 of the Regulation of Gatherings Act, to address the effect of the *Mlungwana judgment*, on decriminalisation of the non-notification of gatherings by the convenor thereof. “(c) that he or she or [it]” and *including the giving of notice of the gathering.* This was a minor change, but the section did insert that notice must be given by the convener and organisation. This is an additional requirement and it is our submission and recommendation that this insertion is excluded.
* Clause 80 of the Amendment Bill amends section 12 of Regulation of Gatherings Act. Section 12 of the Regulation of Gatherings Act, 1993, is hereby amended— (a) by the deletion in subsection (1) of paragraph (a). This gave effect to the *Mlungwana* Constitutional Court judgment – after two years.

The SJC submits that the Regulation of Gatherings Act needs to be overhauled  - the *Mlungwana* judgment revealed the need for the Act to be revised in its entirety in order to give better effect to the constitutional right to protest and how police manage and control crowds.

1. **Recommendations:**

* It is imperative that the relevant unit of police be deployed in protest actions. SJC welcomes the objective of the SAPS Amendment Bill that it recommends that only the Public Order Policing Unit should be deployed to manage and control protest action. However, more work needs to be done on training POP officers on the use of force during protests. The Public Order Police are responsible for policing protests. Their training is meant to emphasise the importance of conflict resolution and de-escalation, even when being provoked by protesters.
* After more than two years the SJC welcome the confirmation of complying with *Mlungwana and Others v S and Another.* However, it is the SJC submission that the Constitutional Court directs that we should move away from the criminalised aspect in relation to the right to protest. The Court even went as far to comment that administrative fines might also be unconstitutional:

*“The respondents’ suggestion that this Court reads in liability for administrative fines if a convener fails to give notice is not a just and equitable remedy.  As explained above, it may be that administrative fines are also unconstitutional.  This would depend on the finer details of the administrative fining system, including most obviously the magnitude of fines and the consequences of failing to pay the fine.  As already indicated, this is a matter best left to the Legislature.”[[10]](#footnote-10)*

* It is our submission that the Regulation of Gatherings Act needs an overhaul - the Mlungwana judgement revealed the need for the act to be revised. The court held that It will be up to the legislature to revisit the act, if so minded, in whatever manner it sees fit. Instead, Parliament is engaging in deliberations on piecemeal amendments to a problematic apartheid-era piece of legislation. There are a number of aspects of the Regulation of Gatherings Act that require scrutiny in order for it to give better effect to the right to freedom of assembly. If Parliament is serious about ensuring the right to protest, revising the entirety of the Regulation of Gatherings Act.
* It is clear that, while many of the worst abuses of the Right to Protest are actually not lawful in terms of the Regulation of Gatherings Act, the Act itself does not do enough to promote the right to protest, and puts many restrictions on our ability to exercise a basic constitutional right. This could mean that it is unconstitutional.

1. <https://ewn.co.za/2019/01/13/da-led-wc-govt-calls-for-provincial-police-force> accessed on 19 November 2020. “*DA led WC govt calls for provincial police force*”. [↑](#footnote-ref-1)
2. <https://www.dailymaverick.co.za/article/2020-05-14-should-municipal-police-have-the-same-investigative-powers-as-the-saps/> accessed on 19 November 2020. “*Should municipal police have the same investigative powers as the SAPS”*. [↑](#footnote-ref-2)
3. *Social Justice Coalition and Others v Minister of Police and Others 2019 (4) SA 82 (WCC).*  [↑](#footnote-ref-3)
4. Regulations of Gatherings Act 205 of 1993 [↑](#footnote-ref-4)
5. *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018). (Mlungwana judgment). [↑](#footnote-ref-5)
6. Firearms Control Act 60 of 2000 [↑](#footnote-ref-6)
7. David Bruce, “Draft bill will not solve critical issue of police brutality”

   <https://www.dailymaverick.co.za/article/2020-10-08-draft-bill-will-not-solve-critical-issue-of-police-brutality/>, accessed 19 November 2020. [↑](#footnote-ref-7)
8. [*https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf*](https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf)*,* accessed on 19 November 2020. [↑](#footnote-ref-8)
9. [*https://issafrica.org/iss-today/marikana-experts-report-points-the-way-to-better-policing*](https://issafrica.org/iss-today/marikana-experts-report-points-the-way-to-better-policing), accessed on the 19 November 2020. [↑](#footnote-ref-9)
10. *Mlugwana judgment* at para 106. Also see [*https://www.pressreader.com/south-africa/cape-argus/20200930/281754156768452,* accessed](https://www.pressreader.com/south-africa/cape-argus/20200930/281754156768452,%20accessed) on 19 November 2020. [↑](#footnote-ref-10)