

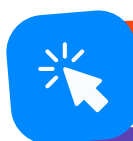


# **POLICE REFORM AND THE RIGHT TO PROTEST:**

**MARIKANA  
MASSACRE**

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# INTRODUCTION



This research report focuses upon the policing of collective protest. The term collective protest here refers to protests carried out by people assembled in groups or crowds.

Protests can also be carried out by individuals and by groups of people who are not necessarily assembled in a crowd. In discussing the policing of collective protest this report uses the term protest.

In South Africa, the right to protest is protected in terms of section 17 of the Constitution of the Republic of South Africa, 1996 which provides that everyone has the right to peaceful assembly.<sup>1</sup> Furthermore, it is regulated by the Regulation of Gatherings Act, No. 205 of 1993 (RGA).

Other types of mass gatherings that occur at sporting events or concerts for example are regulated by the Safety at Sports and Recreational Events Act, No. 2 of 2010 (SASREA)

On the 16th of August 2012, 34 miners who were exercising their right to protest were killed by members of the South African Police Service (SAPS) at the Lonmin Mine in Marikana.

This incident raised significant concerns about policing, particularly regarding the SAPS's adherence to its constitutional duty to act, teach, and require its members to act in accordance with the Constitution and the law.

The subsequent Marikana Commission of Inquiry uncovered various systemic issues within the SAPS, particularly at the senior management level, and in its capacity to manage complex crowd control situations.

In response to the Commission's recommendations, the Government established a High-Level Panel of Experts (the Panel) in April 2016 to address these challenges. The Panel's report was published on 27 May 2018.<sup>2</sup>

<sup>1</sup> Section 17 of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Panel of Experts Report on Policing and Crowd Management Established by the Minister of Police in Terms of the Recommendations of The Marikana Commission of Inquiry. 2018. Available at: [https://static.pmg.org.za/panel\\_of\\_experts\\_report\\_2018.pdf](https://static.pmg.org.za/panel_of_experts_report_2018.pdf) (The Report)



## THE PANEL'S TERMS OF REFERENCE AND THE STRUCTURE OF THE PANEL'S REPORT



According to the terms of reference of the Panel, the panel was tasked with addressing the broad issue of professionalising and demilitarising the SAPS, the more specific issue of protests (Chapter Two), and the law and crowd management (Chapter Three).<sup>3</sup>

In broad terms the Panel advocates for: a professional, demilitarised and accountable police service led by experienced, competent and credible leadership of unassailable integrity and for a system of crowd management that has, as its foundation, the responsibility to give full effect to the right to freedom of assembly embodied in section 17 of the Constitution, 1996.<sup>4</sup>

## WHAT WENT WRONG AT THE MARIKANA MASSACRE



The Panel was established specifically to address the events at Marikana in August 2012. Thus, the Panel's work needed to be guided by insights into the failures of the police operation at Marikana. These insights are derived from the Marikana Commission's report and the evidence submitted to it.

The Panel's report identifies the key factors that led to the killing of 34 strikers by SAPS at Marikana on 16th August 2012. The Panel concluded that: *"The situation was highly complex, beginning with a wage dispute that led to a strike outside the collective bargaining system. By the morning of Monday 13th August 2012, several violent clashes had already occurred, resulting in four deaths."*<sup>5</sup> Additionally, the presence of some strikers who were armed, primarily with traditional weapons, was a significant concern. This blurred the lines between whether the protest was peaceful or in fact violent.

<sup>3</sup> Chapter 2 and 3 of the Report.

<sup>4</sup> Section 17 of the Constitution of the Republic of South Africa, 1996.

<sup>5</sup> Page 20 of the Report.



The correct procedure should have been for SAPS to appoint a commander with appropriate training and experience in crowd management to lead the operation, adhering to the principles and procedures outlined in SAPS Standing Order 262.<sup>6</sup>

Importantly, the panel reiterates that force should only be used on the command or instruction of an operational commander and<sup>7</sup> that priority should have been given to ensuring that there was no further loss of life. Unfortunately, this proper procedure was not followed.

What occurred instead, was that a SAPS Major-General who had no recent training or experience in crowd management was tasked with intercepting the miners. Furthermore, the Panel reports that on the afternoon of the 13th of August 2012, he engaged with the crowd of strikers, some of whom were armed. The Panel acknowledged that his lack of experience is likely to have contributed to the violent clash that took place between police and strikers.

This left two SAPS members and three strikers dead, and another SAPS member seriously injured. The same Major-General remained in command of the SAPS operation over the following days.

On the 14th and 15th of August, the SAPS attempted to resolve the situation through negotiations. However, the Panel found that their efforts were undercut by their own provincial commissioner, who dissuaded Lonmin from engaging in talks, thereby strengthening Lonmin's refusal to communicate with the strikers. Consequently, this refusal thwarted the attempts to achieve a negotiated and peaceful resolution.

<sup>6</sup> Standing Order. (General) 262. Crowd Management During Gatherings and Demonstrations. Issued by Consolidation Notice 13/2004.

<sup>7</sup> Ibid.



On the night of Wednesday, 15th August, the SAPS operational commanders at Marikana received an order from the top leadership of SAPS, relayed through the Provincial Commissioner.

The directive was that if the strikers did not voluntarily disarm the next day, the police were to disarm them with force.

The Panel reports that the reasoning behind this order remains unclear but alludes to the Marikana Commission findings of a possibility that political influence may have been a factor.

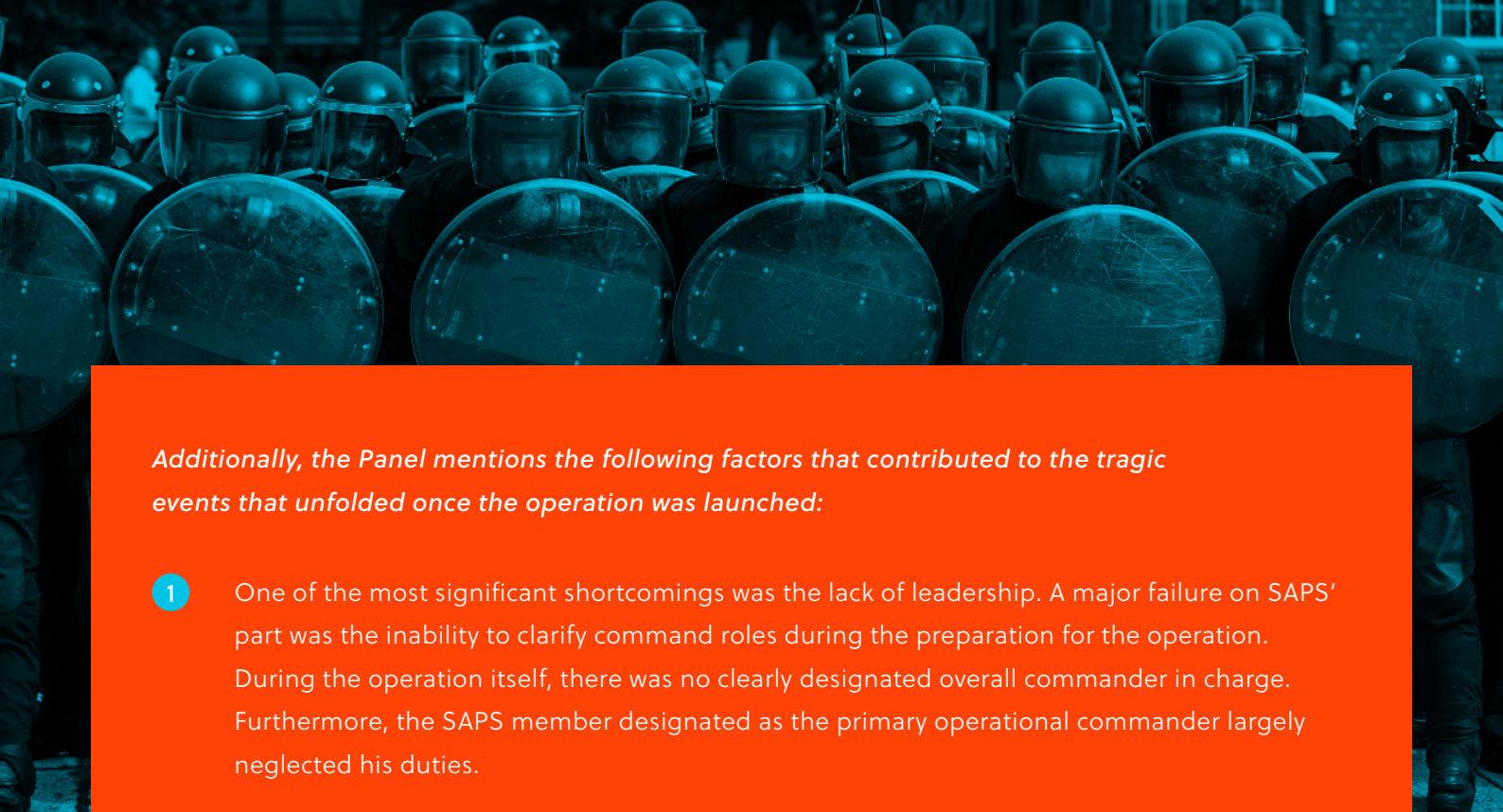
As a result, decision-making authority was taken away from the operational personnel at Marikana.

The decision to proceed with the operation was not based on the on-the-ground assessment of the police commanders at Marikana on the best way to handle the situation.

The Panel's report further highlights that the planning for the operation on Thursday, August 16th, was conducted without the proper involvement of any commander with recent Public Order Policing (POP) training or experience on the command team and that SAPS standing orders for managing crowd operations were ignored.

They conclude that instead of prioritizing the protection of life, as they should have, the commanders proceeded with the operation under the Provincial Commissioner's instructions, knowing that the operation was likely to result in the loss of life.





*Additionally, the Panel mentions the following factors that contributed to the tragic events that unfolded once the operation was launched:*

- 1 One of the most significant shortcomings was the lack of leadership. A major failure on SAPS' part was the inability to clarify command roles during the preparation for the operation. During the operation itself, there was no clearly designated overall commander in charge. Furthermore, the SAPS member designated as the primary operational commander largely neglected his duties.
- 2 The deployment of POP members was poorly planned and poorly executed. Consequently, the use of less-lethal weapons was both ineffective and counterproductive. Instead of stopping the strikers from advancing towards the police, the use of rubber bullets, tear gas, and stun grenades drove the strikers toward the line of armed Tactical Response Team (TRT) members.
- 3 The operation had an over reliance on members of the TRT, and other tactical units. A significant number of these unit members were equipped with R5 rifles, high-velocity firearms capable of automatic fire. The combination of these weapons, the deployment of members in a baseline formation, the lack of discipline in firearm uses by some members, and the absence of effective command and control were all major factors leading to the high number of fatalities at the Small Kraal where 17 strikers lost their lives.
- 4 There was a lack of communication between the different police units on the ground; this was a direct result of the poor planning and briefing as well as the absence of overall command and control. This led to SAPS members acting out of their own volition because there were no clear instructions.
- 5 Problems occurred with the provision of first aid because paramedics were prevented from tending to the wounded strikers by one of the SAPS commanders. In addition, limited SAPS members were trained in first aid.
- 6 Lastly the Panel found that the SAPS's approach to the Marikana Commission of Inquiry revealed a 'pervasive culture', reaching the highest levels of the organization, which enabled members avoid accountability for misconduct. This lack of accountability raised concerns about the effectiveness of both internal and external mechanisms designed to hold SAPS members responsible for their actions.

## KEY FOCUS AREAS AND RECOMMENDATIONS OF THE PANEL

### PROFESSIONALISATION, ACCOUNTABILITY AND THE DEMILITARISATION OF THE SAPS



The key focus areas determined by the Panel are the following:

- Policing that is competency and principle based;
- Greater accountability both within the governance of the police and within the SAPS itself;
- Measures to ensure that personnel at the leadership level are experienced, competent, credible and of unassailable integrity;
- Ensuring that the use of force by police complies with human rights principles;
- The provision of first aid to injured persons in terms of a duty of care; and
- Re-affirming the commitment to a service orientation and other measures to consolidate demilitarisation.<sup>8</sup>

#### 1

### Competency-based Policing

The Panel report acknowledges that professional policing requires the appointment of appropriate leadership and the need to implement a human resources management strategy that guarantees that tasks and duties are carried out by people with the necessary training, expertise, and experience. A SAPS member should unambiguously demonstrate the necessary competency to advance in rank.<sup>9</sup>

The existing SAPS approach gives rank precedence over a police officer's abilities, expertise, and experience. The Panel advocates that an individual's competence should be taken into consideration when determining their authority in a certain scenario, in addition to their rank and affirms that competency-based policing emphasises the need for police who have the relevant knowledge and expertise to also be given authority. The Panel report provides further that under certain circumstances, the senior ranking officer may have to defer to others who have the relevant knowledge and expertise for advice and leadership.

<sup>8</sup> Page 24 of the Report.

<sup>9</sup> Page 25 of the Report.

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## Principle-Based Policing

The Panel's recommendations were focused on strengthening the SAPS's adherence to a principle-based methodology. The SAPS Code of Ethics<sup>10</sup> and the SAPS Code of Conduct.<sup>11</sup> are two of the SAPS most significant codes. The Panel recommends that these two codes be combined into one concise code that is also required to give real-world examples of what is needed to direct the decision-making and behaviour of all law enforcement personnel (Panel Recommendation 5). Senior managers' performance reviews should include Key Performance Areas (KPA's) that reflect their commitment to advancing the values found in the Codes of Conduct and Ethics and assisting members in understanding them and putting them into practice (Panel Recommendation 6). Panel Recommendation 7 states that the SAPS ought to employ a decision-making model that aids law enforcement professionals in incorporating ethical awareness into their decision-making.

3

## Police Governance

Regarding police governance the Panel acknowledges that "the manner in which political direction and influence is exercised is such that there is often no record of it."<sup>12</sup> The Marikana Commission of Inquiry found that there was a likelihood that instructions given to the police at Marikana may have emanated from political directions given to the National Commissioner. The Constitution authorises the Minister of Police to determine national policing policy<sup>13</sup> and give 'directions' to the SAPS National Commissioner.<sup>14</sup> Therefore, the Minister has the authority to give directions. The Panel report notes that the operational independence of the SAPS, however, should not be affected by the Minister's authority to issue directives. The Panel advised that the Minister's authority to issue directives must be subject to the principles of accountability and transparency and suggests amending the SAPS Act<sup>15</sup> to ensure that all directions issued by the Minister are formally recorded. Furthermore, the Minister should ensure that a record of all directions is presented to the Portfolio Committee on Police on an annual basis (Panel Recommendation 12).

<sup>10</sup> The SAPS Code of Conduct. <https://www.saps.gov.za/about/conduct.php>

<sup>11</sup> The SAPS Code of Ethics. 2009/2010. [https://www.saps.gov.za/about/stratframework/annual\\_report/2009\\_2010/1\\_content\\_foreword\\_etc.pdf](https://www.saps.gov.za/about/stratframework/annual_report/2009_2010/1_content_foreword_etc.pdf)

<sup>12</sup> Page 26 of the Report.

<sup>13</sup> Section 206(1) of the Constitution.

<sup>14</sup> Section 207(2) of the Constitution.

<sup>15</sup> The South African Police Force Act No. 68 of 1995.



## Police Leadership

The panel affirms that building a moral, competent, and accountable SAPS requires maintaining a high standard of police leadership. The SAPS operates in a hierarchical structure. The behaviour of lower-ranking police officials is ultimately influenced by the dominant police organisational culture, which is shaped by the conduct and integrity of top police commanders.

Reforming the SAPS's upper administration has been acknowledged as essential to enhancing policing in both the National Development Plan (NDP) and the White Paper on Police. The Marikana Commission's support of the NDP recommendations also seems to hint at the problem.

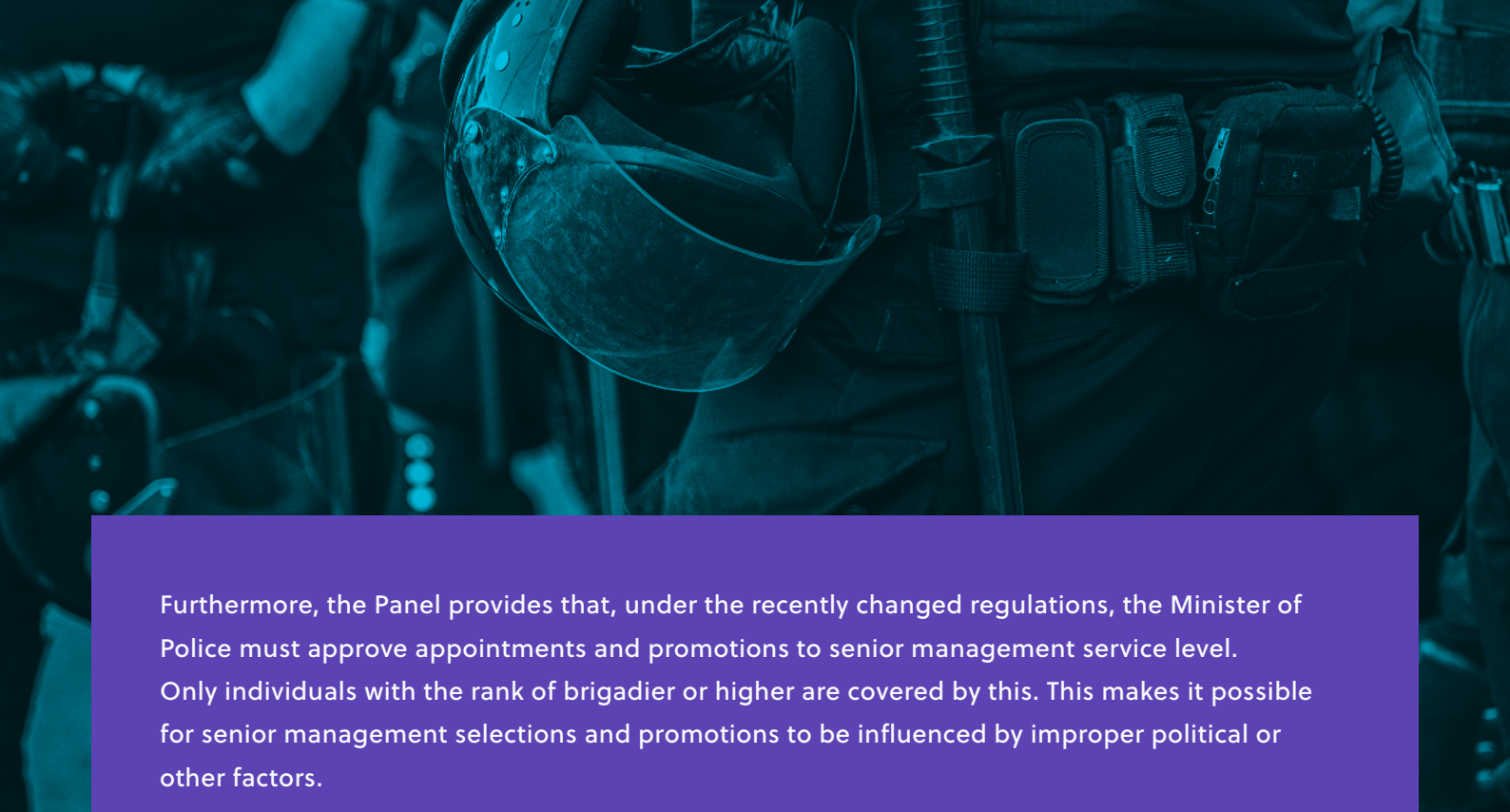
The NDP proposed that one of the critical steps is to establish an independent National Policing Board (Panel Recommendation 15) that will have the responsibility of establishing guidelines for the recruiting, selecting, promoting, and assigning of SAPS personnel.

Additionally, the Panel is of the view that overseeing an open, competitive, and merit-based hiring process will be a crucial duty of the proposed Board. It will help the President pick the SAPS National Commissioner when the position becomes open (Panel Recommendation 16). Additionally, Panel Recommendation 17 suggests that the NPB oversee evaluating applicants for the role of Provincial Commissioner.

The unevenness of the SAPS management echelon is caused, in part, by the implementation of inconsistent criteria in hiring and promotion, even at the highest level of the SAPS. Section 12 of the 1964 Amendment to the SAPS Act is one of the regulations that governs the SAPS and has provisions that contribute to inconsistencies.<sup>16</sup> In addition to this, Regulation 45(9) of the Employment Regulations also allows for the National Commissioner to deviate in promotion and appointment processes.<sup>17</sup> Panel Recommendations 18 and 19 addresses the need for amending the regulations to ensure that consistent processes are followed in creating and filling all posts in SAPS.

<sup>16</sup> Section 12 of the 1964 Amendment to the SAPS Act. Government Gazette, 1964.

<sup>17</sup> Regulation 45(9) of the Employment Regulations. Government Gazette, 2018.



Furthermore, the Panel provides that, under the recently changed regulations, the Minister of Police must approve appointments and promotions to senior management service level. Only individuals with the rank of brigadier or higher are covered by this. This makes it possible for senior management selections and promotions to be influenced by improper political or other factors.

Panel Recommendation 20 advocates for limiting the Minister's authority to approve the standards for appointments, promotions, and the formation of new posts; it should not be used to exert influence over the choices made about which individuals are appointed or promoted to certain positions.

The Panel concludes that the misuse of provisions that allow deviations from formal human resource procedures has resulted in a legacy of inappropriate appointments, including at senior management levels. Consequently, the Panel endorses the NDP recommendation to prioritize a competency assessment of senior management (Panel Recommendation 21).

This assessment should be conducted independently under the Civilian Secretariat for Police Service (CSPS). The Panel recommends that those who have been wrongly appointed, have a history of misconduct, or have failed to meet the demands of their critical roles should be reassigned or, if necessary, removed from the SAPS.

The Panel advised that these competency assessments should begin as soon as possible, as a capable top leadership is essential for the SAPS to address its challenges effectively and to earn respect and trust as a professional organization.



## Accountability

The lack of accountability within the SAPS are not only found at leadership and management but also at the rank-and-file level.

A major issue that permeates throughout the SAPS is the 'blue code of silence' - a culture of internal solidarity within SAPS which promotes members protecting each other from accountability for wrongdoing. In addition to this, the Panel found that rather than guaranteeing the quality and dependability of the underlying data used for performance assessments, the management culture frequently places more emphasis on projecting a positive image of the SAPS' success through key performance indicators and that it seems that critical reflection is neither supported nor encouraged in the SAPS organizational culture.

The Panel report notes, for instance, that the SAPS is more prone to take a defensive stance than to conduct an unbiased assessment of the facts when operations do not proceed as planned or when anything goes wrong. Consequently, little opportunity exists for organizational learning from experience. In general, the Panel found that honesty and truthfulness are not highly valued in the SAPS culture.

Therefore, by addressing various facets of the issue, the Panel's recommends that accountability be fully integrated into the operations of the SAPS.

This includes several actions to improve the operation of internal and external accountability systems (Panel Recommendations 26, 27, and 28) as well as initiatives to enhance an emphasis on truth-telling (Panel Recommendations 23 and 24).



Consistent with the focus on the behaviour and honesty of police leadership, the Panel suggests a strict method for handling disciplinary cases involving senior management service personnel (Panel Recommendation 32). Although they are currently understaffed, the Independent Police Investigative Directorate and the Civilian Secretariat for Police Service are meant to be important oversight and accountability mechanisms for the SAPS. The Panel suggests taking action to resolve this issue (Panel Recommendations 14 and 33).

Another key recommendation related to accountability is that the use of state protection for members in civil claims should be critically reviewed. In cases of gross negligence, malicious actions, or other clearly culpable conduct, the SAPS should seek to recover damages incurred from the responsible member (Panel Recommendation 1). The Panel affirms that ensuring accountability should be prioritized over maintaining loyalty to other SAPS members.

## 6

### The Use of Force – The Duty to Protect Life

Chapter Three of the report focuses on the use of force in crowd management. The Panel suggests that this involves ensuring that firearms capable of automatic fire are never employed in crowd management and implementing clearer standards and stricter controls on the use of less-lethal weapons. The Panel acknowledges that there are specific instances where force, and particularly lethal force, may be used by members of the SAPS<sup>18</sup> but affirms that the current framework for advising SAPS members about the use force is insufficient.

Primarily the Panel found that the current framework does not expressly articulate the protection of life as a guiding principle governing the use of lethal force by the SAPS and recommended that the Civilian Secretariat for Police Service, with input from the Panel, develop a use of force policy (Panel Recommendation 34).

<sup>18</sup> Section 1 of the Amendment to the Criminal Procedure Act 1997. Government Gazette, 2012.



## Provision of First Aid in Terms of a Duty of Care

The Panel recommended that the number of SAPS personnel with first aid training should be increased and that, that they be given explicit instructions outlining their obligation to administer first aid, and that they should be provided with the necessary tools to assist them in providing first aid to injured persons. In addition, the Panel suggests that in crowd control scenarios, first aid teams should be deployed (Panel Recommendations 36 - 42).

## Demilitarisation

In general, the Panel believed that many of the recommendations it made to further the professionalization process would also help address aspects of militarism that are inappropriate for community-oriented policing; these included transforming the militarized culture of SAPS management and training to one that supports a professional policing ethos. The topic of rank and rank authority was discussed together with demilitarization, with the observation that a greater emphasis on competencies, skills, and expertise should replace the current disproportionate reliance on rank authority. Recommendations pertaining directly to the demilitarization issue include the suggestion that the SAPS should reaffirm its dedication to a community-policing-oriented service ethos (Panel Recommendation 44) and that specific recommendations pertaining to the demilitarization include the suggestion that the SAPS should reaffirm its dedication to a community-policing-oriented service ethos (Panel Recommendation 44) and that an evaluation of the composition and operation of every unit involved at Marikana be conducted, with an emphasis on the National Intervention Unit (NIU) and TRT, both of which were heavily implicated in the Marikana killings (Panel Recommendation 45).

## PROTEST, THE LAW AND CROWD MANAGEMENT



The Panel acknowledges that there is a strong need for legislation governing protests, the administration of this legislation by municipalities, and the policing of protest to be consistently implemented in a manner promotes and facilitates the right to peaceful assembly provided for in Section 17 of the Constitution.

The Panel further raises the following significant points in Chapter Three:

- The need to ensure that POP units are maintained as specialized teams for crowd management.
- The need to not only enhance the capabilities of POP units but also to develop strategies that promote proactive conflict resolution and peaceful protest cultures to tackle the use of violence in protests.
- Prohibiting the use of automatic weapons such as the R5 in crowd control, while ensuring POP units are sufficiently prepared to deal with violent protests.
- Acquiring and using less-lethal weapons; encouraging transparency and accountability in crowd management practices; and
- Defining the responsibilities of various stakeholders involved in crowd control to guarantee that they follow uniform guidelines.

## THE RIGHT TO ASSEMBLE PEACEFULLY

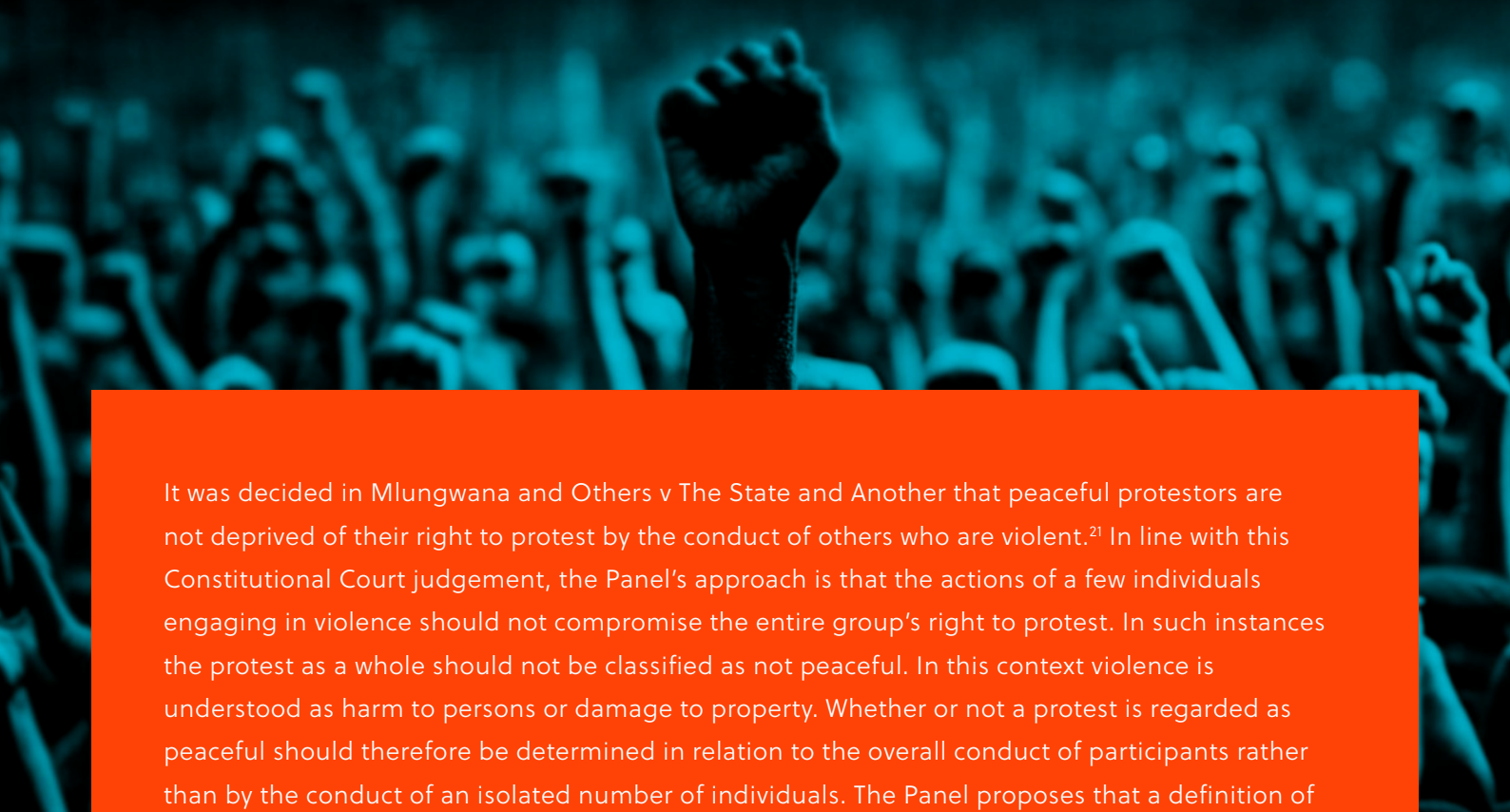


The major statutory tool for controlling protests is the Regulation of Gatherings Act<sup>19</sup>, while the main internal instruction for the South African Police Service (SAPS) is National Instruction 4 of 2014<sup>20</sup>.

The Panel concluded that neither of these instruments are well rooted in Section 17's description of the right to peaceful assembly, they do not clarify what constitutes a peaceful protests and does not provide guidance on how a protest should be categorised in instances where only a portion of the participants are armed. To improve the legal framework for crowd control, the Panel has made multiple proposals to reform National Instruction 4 and the Regulation of Gatherings Act of 1993.

<sup>19</sup> The Regulation of Gatherings Act 205 of 1993.

<sup>20</sup> Public Order Police: Crowd Management During Public Gatherings and Demonstrations National Instruction 4 of 2014.



It was decided in *Mlungwana and Others v The State and Another* that peaceful protestors are not deprived of their right to protest by the conduct of others who are violent.<sup>21</sup> In line with this Constitutional Court judgement, the Panel's approach is that the actions of a few individuals engaging in violence should not compromise the entire group's right to protest. In such instances the protest as a whole should not be classified as not peaceful. In this context violence is understood as harm to persons or damage to property. Whether or not a protest is regarded as peaceful should therefore be determined in relation to the overall conduct of participants rather than by the conduct of an isolated number of individuals. The Panel proposes that a definition of 'peaceful assembly' should be adopted that clarifies this point (See Panel Recommendation 64 and paragraph 440).

Facilitating the right to peaceful assembly should be the cornerstone of crowd management policing and the main justification for the creation of POP units, according to the Panel's conclusion.<sup>22</sup> Panel Recommendation 68 states that SAPS should develop a clear crowd management policy that protects the right to peaceful assembly. The SAPS needs to develop a logical framework for negotiated protest management to adhere to this proposed doctrine (Panel Recommendation 65). The main goal should be to reduce the likelihood of violence by defusing situations (de-escalation) and negotiating. Furthermore, the Panel recommended that SAPS ought to follow the principle of "differentiation" - SAPS should avoid the indiscriminate use of force in protests.

The Panel is of the view that strong legislation and SAPS internal guidelines alone is not the only way to protect the right to peaceful assembly. In terms of protest regulation, the accountable officers that are appointed by municipalities have significant authority under the RGA, which the Panel believes should be used to support the right to peaceful assembly. The Panel recommends that standards of how these authorities administer the Act should be raised and they should be required to mediate disputes with the consent of protesting organizations, this should guarantee that their authority is always used in a way that upholds the right to peaceful assembly (Panel Recommendations 50, 51, 52 and 61).

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<sup>21</sup> *Mlungwana and Others v The State and Another* [2018] ZACC 45.

<sup>22</sup> Page 34 of the Report.



## MAINTAINING A SPECIALISED CROWD MANAGEMENT CAPABILITY



The Panel recommends that POP units should be retained as a specialized unit with crowd management as their primary mandate (Panel Recommendation 71).

Additionally, the Panel recommended that POP should be centralised under one division within SAPS (Panel Recommendation 72).

Currently, most POP units are provincial policing assets that report to a provincial commissioner.

As a result, POP units are regularly utilized as a “stop gap” to augment the SAPS’s ability to combat crime. This causes POP units to be frequently deployed in relatively small numbers to crowd management situations which makes POP members more likely to use stun grenades, rubber bullets, and tear gas to disperse crowds.

Regarding this, the Panel suggests (Recommendation 72) that all POP units be placed under a single national command in order for them to be included in the national Public Order Policing unit that is specified in the SAPS Act.<sup>23</sup>



The Panel envisages that this centralisation would mean that POP units would generally be deployed at the request and in support of a Provincial Commissioner, but that the head of POP, acting on behalf of the National Commissioner, would be able to ensure their operational preparedness as a specialized unit is maintained consistently and in accordance with section 17(2) of the SAPS Act.

<sup>23</sup> Section 17 of the SAPS Act No. 68 of 1995.



The Panel's other recommendations are dependent on recognition of the need to maintain POP units as a specialised capability.

- POP deployments must guarantee that POP units are equipped to handle crowd management situations in a manner consistent with their specialized training, POP deployments must involve the deployment of a full section, or at least eight personnel (Panel Recommendations 83 and 84).
- To better assist the SAPS and POP units in understanding the difficulties and formulating solutions, it is necessary to enhance SAPS information gathering on the protest environment (Panel Recommendations 47, 48, 56, and 57).
- POP training should be tailored to operational realities and involve a consistent training cycle including periodic assessments (Panel Recommendations 78 and 80).
- A specific training centre should be established to provide POP members with crowd control instruction (Panel Recommendation 81).
- According to Panel Recommendations 77, police officers who are highly traumatized and unable to carry out their policing responsibilities should be removed from an operation and given the required psycho-social support. Psychological and wellness support services should also be routinely provided to POP personnel.
- To guarantee efficient inter-police contacts, revisions to National Instruction 4, crowd control training, and other actions should be made (Panel Recommendations 112, 113, 114 and 115).



8.0

## THE USE OF VIOLENCE IN PROTEST

**The panel's other suggestions are likewise meant to help the SAPS respond more effectively to violence associated with protests.**

The Panel acknowledges that to support and facilitate the right to protest, the RGA, the manner in which the RGA is administered by municipalities and the conduct of crowd management by POP units should not "narrow the space for peaceful protest or foment conflict and antagonism between police and protesting members of the public."<sup>24</sup>

In this regard the Panel provides that "It is necessary for POP units to ensure that situations of tension and confrontation are managed without unnecessarily exacerbating the potential for violence and that where violence takes place the response of the police serves to de-escalate rather than exacerbate it."<sup>25</sup>

The Panel made the following further recommendations:

1. In addition to negotiation and de-escalation, POP units should employ the principle of 'differentiation'. This is done in part to make sure that POP units do not unnecessarily incite hostility between themselves and the non-violent protestors, even in situations where force is employed against individuals. This is meant to reduce the possibility of a conflict escalation.
2. POP units should develop their agility and flexibility so they can react appropriately to different situations (Panel Recommendation 55). The Panel has suggested that each POP unit include a public order restoration capability, with one section for each platoon, to support this goal. With a focus on protecting lives, these sections should receive extensive training in accordance with the crowd management doctrine and basic principles regarding the use of force in crowd control (Panel Recommendation 74; Panel Recommendation 132 refers to the fundamental principles on the use of force in crowd management).
3. Panel Recommendation 66 advocates for actions to be implemented to enhance POP units' capacity to make arrests so that they can apprehend violent offenders. POP members must be given the proper protective gear to guarantee that they can handle situations in accordance with de-escalation and minimal force principles. Since burning barricades and petrol bombs are frequently used in crowd control scenarios, Panel Recommendation 109 advocates giving POP unit personnel fire retardant overalls.
4. The SAPS should investigate proactive and preventive strategies to deal with the issue of protestors carrying weapons (Panel Recommendation 49). When crowd members are armed, there may be a considerably higher risk to POP members and other people.

1

### Prohibition of Use of Rifles Capable of Automatic Fire and The Need for Specialist Firearms Officers

The Panel recommends that the Minister of Police create regulations prohibiting the use of the R5 rifle and other automatic weapons in crowd management. Such a limitation should apply not just to POP units, but also to other units that may be deployed to assist POP units in crowd management (Panel Recommendation 105).

<sup>24</sup> Page 38 of the Report.

<sup>25</sup> Ibid.





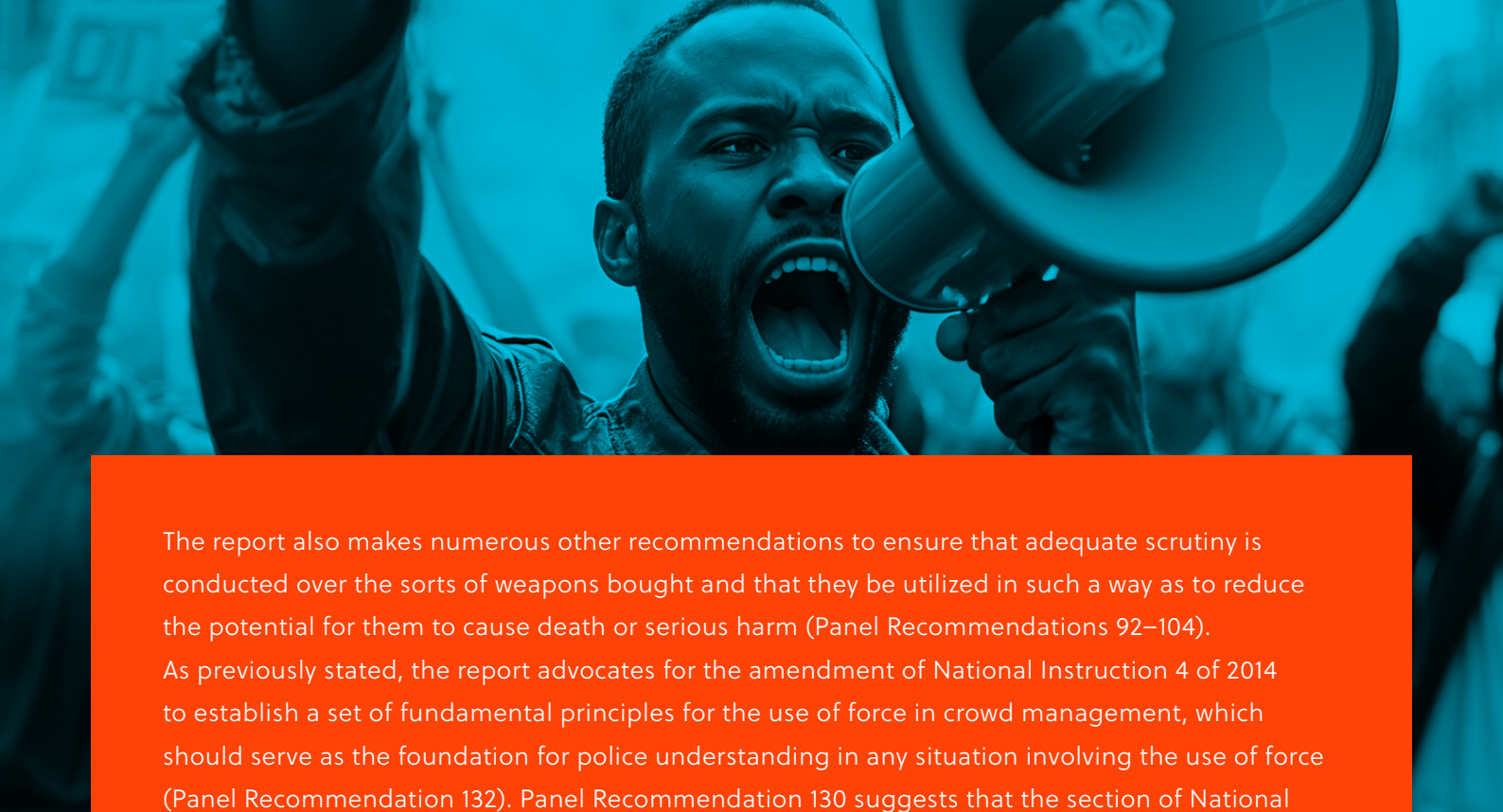
In addition to answering questions about automatic weapons, the Panel's terms of reference ask it to offer suggestions on tactics and measures that police should use when confronted with crowds armed with firearms and bladed weapons. The Panel has therefore recommended that specialist firearms officers be part of the restoration section established within each POP platoon to provide the capability for targeted intervention during crowd management operations where there is an imminent threat to the lives of police or members of the public (Panel Recommendations 106, 107, and 108).

## 2

### Less-Lethal-Weapons

The Panel acknowledges that most of the violence that occurs during crowd control incidents does not involve the use of bladed weapons or firearms, but rather the throwing of stones or other projectiles, frequently from behind a barricade. Petrol bombs and arson are also prevalent. While POP units must be prepared to defend themselves against lethal attacks, the LLWs that they primarily employ include teargas, rubber bullets, shock grenades, and water cannons. These weapons are sometimes described as non-lethal. The Panel, however, rightly affirms that in South Africa and elsewhere LLWs have the potential to be lethal, even if it is less likely to be as lethal as the use of firearms or live ammunition.

To promote recognition of their lethal potential, the Panel recommends that the SAPS should consistently use the term "less lethal-weapon" when referring to the class of weapons used in crowd management situations, acknowledging that all weapons, including those labelled as "less lethal," have the potential to cause injury and death (Panel Recommendation 91). A related proposal emphasizes that vulnerable people, such as young children and the elderly, are frequently the most vulnerable to injury from these weapons, and advocates for increased risk awareness through training (Panel proposal 58).



The report also makes numerous other recommendations to ensure that adequate scrutiny is conducted over the sorts of weapons bought and that they be utilized in such a way as to reduce the potential for them to cause death or serious harm (Panel Recommendations 92–104). As previously stated, the report advocates for the amendment of National Instruction 4 of 2014 to establish a set of fundamental principles for the use of force in crowd management, which should serve as the foundation for police understanding in any situation involving the use of force (Panel Recommendation 132). Panel Recommendation 130 suggests that the section of National Instruction 4 dealing with the use of weapons be improved for greater clarity.

While the Panel's recommendations on the use of LLWs is a step in the right direction, it is crucial that we consider their risks and closely analyse their impact on those who are subjected to their use. LLWs cause widespread and serious injuries. Beyond individual injuries, the true toll of LLWs must encompass the psychological trauma they create, the lifelong handicap they inflict, the social cost of LLWs borne by targeted communities, and, most importantly, the disproportionate impact LLWs have on certain vulnerable groups. Globally, understanding of the usage, hazards, and impacts of LLWs is growing. The spread of LLWs in all facets of policing will result in a proportional increase in deaths. The widespread use of LLWs in all parts of policing will result in a rise in death and injury, while novel mechanisms of injury will emerge as new LLW technologies are created and polished. Without effective and prompt action, these avoidable damages will worsen and spread. As a result, there is an urgent need for States to adjust their perceptions on the use LLWs in relation to the health and safety risks they pose to people in the context of crowd management, and impose more strict regulations on their use.

It would thus be worthwhile to make further recommendations beyond those outlined in the Panel Recommendations on the usage of LLWs. The use of LLWs in protests should be a last resort and only in relation to serious and imminent risks to safety, and only after all other options have been exhausted. If LLWs are used during protests, they should always be used in accordance with the criteria of legality, precaution, necessity, proportionality, non-discrimination, and accountability, and their effectiveness must be measured against the true threat encountered and in the pursuit of a legitimate goal. Where any of these principles cannot be met, LLWs should not be used. To maintain accountability and educate law enforcement professionals on the dangers of LLWs, authorities must investigate any injuries or deaths associated with their usage.

## TRANSPARENCY AND ACCOUNTABILITY IN THE CONTEXT OF CROWD MANAGEMENT



The Panel affirms that one of the most persistent barriers to accountability in crowd management is the inability to identify individual POP members when wearing complete protective equipment.

As a result, it might be difficult to hold persons suspected of abuse accountable. Panel Recommendation 111 encourages each POP member to have a clearly visible number on his or her helmet. Other recommendations to improve accountability in crowd control include recording and preserving radio and video communications (Panel Recommendation 125). However, the keeping of video footage calls into doubt other rights violations.

Panel Recommendation 116 calls for the RGA to be revised to establish rules for police information and data collection, including the creation of photographic, video, or other recordings of assemblies (see also Panel Recommendation 122).

Newer surveillance technologies such as Facial Recognition Technology (FRT) are slowly being implemented in the country. This technology could be used to track and monitor the movement of protestors and civilians at large. Surveillance technology is currently being developed in South Africa, specifically by Private Security Companies. The SAPS has been interested in Facial Recognition Technology (FRT) and has actively partnered with the private security sector to implement FRT throughout South Africa.<sup>26</sup> While members of the public seem to be in support of the new technology as it would be beneficial in addressing the high crime rates in the country,<sup>27</sup> FRT also poses threats to the right to privacy<sup>28</sup>

Furthermore, this technology has been found to be discriminatory and has resulted in false arrests which has disproportionately affected people of colour. In the United States for instance, there have been many cases of FRT falsely identifying black persons in criminal investigation.<sup>29</sup> Academics have argued that the use of surveillance technology in South Africa could potentially replicate the use of internal passports during Apartheid to monitor, restrict and control the movements of Black people.<sup>30</sup>

<sup>26</sup> Swart, H. 'Face-off: South Africa's population register is on course to becoming a criminal database – with your mugshot' Daily Maverick. 2021. <https://www.dailymaverick.co.za/article/2021-03-03-face-off-south-africas-population-register-is-on-course-to-becoming-a-criminal-database-with-your-mugshot/>

<sup>27</sup> Ibid.

<sup>28</sup> Section 14 of the Constitution.

<sup>29</sup> Hawkinson, K. 'In every reported case where police mistakenly arrested someone using facial recognition, that person has been Black' Business Insider. 2023. <https://www.businessinsider.com/in-every-reported-false-arrests-based-on-facial-recognition-that-person-has-been-black-2023-8>

<sup>30</sup> Hao, K & Swart H. 'South Africa's private surveillance machine is fuelling a digital apartheid' MIT Technology Review. 2022. <https://www.technologyreview.com/2022/04/19/1049996/south-africa-ai-surveillance-digital-apartheid/>



## OTHER ROLE PLAYERS IN CROWD MANAGEMENT



POP units are not the only role-players in crowd management; within the SAPS, visible policing officials are also involved. The Panel's approach to addressing the roles of these various entities has been informed by the knowledge that crowd control is a specialised competency. The Panel Recommendations include:

- SAPS visible policing personnel and municipal police should receive crowd management training at the first responder level, with their role being to intervene during crowd management situations to contain the situation until the arrival of more specialised, equipped, and trained POP units. In this sense, the South African Police Service Act of 1995 should be amended to include a mandate for municipal police services in relation to crowd management. (Panel recommendation 85).
- To improve coordination and cooperation during crowd management operations, SAPS personnel who may be involved in crowd control should participate in joint training exercises. (Panel recommendation 86), and
- SAPS should not deploy tactical units to support POP units in crowd management scenarios unless the appropriate POP commander requests their capabilities and they remain under the POP commander's overall command throughout the operation.

The Panel believes that all stakeholders in crowd management should be held to the same guiding principles and constraints, as well as public accountability and transparency norms.

## A HOLISTIC APPROACH TO ADDRESSING SOCIAL CONFLICT



The Panel acknowledges that South Africa's response to the problem of violent protests cannot be limited to POP units.

Given the evidence that more and more people see peaceful protest as unsuccessful, a bigger government-led strategy to encourage and strengthen South Africa's peaceful protest culture is required. One method to accomplish this is to strengthen local problem-solving and conflict-management processes.

The Panel recognizes that communities should be aware that peaceful protest is a tool that they can utilize to make their voices heard without encountering undue obstacles. They recommend that existing mechanisms be strengthened, or a new mechanism be established so that, where possible and desired by protestors, grievances and disputes that lead to protest and, in some cases, violence can be mediated and resolved without the involvement of the police (Panel Recommendation 52).

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## CONCLUSION



The Panel was successful in determining the shortfalls of existing regulations and highlighting in depth how the lack of regulations failed to prevent the bloodshed at Marikana.

By highlighting these gaps, the Panel has underscored the urgent need for regulatory reforms to prevent such incidents in the future and ensure more effective and humane management of protests. Not only would regulations need to be further developed, but internal changes in the SAPS needs to occur from the top command and below.

SAPS members with the correct expertise and qualifications should be appointed in heading future operations, with the goal of de-escalating violence instead of exacerbating it. The use of lethal force should be used as an absolute last resort and should be avoided at all costs when dealing with protest action that has already turned violent, or that may turn violent. The right to life needs to echo through the SAPS Act, the Regulation of Gatherings Act as well as the National Instructions that deal with Crowd Management.

While the recommendations lay the groundwork for an improved framework overhaul there does not seem to be a proposed timeline in which it would occur. Furthermore, these recommendations are not binding in law. It now lies in the hands of the South African Government to address the failure of the SAPS at Marikana. It would take acknowledgement of their fatal errors in their operation. Importantly, the report states that a proper investigation into Marikana needs to be conducted.

Those in charge that gave the orders need to be held accountable. It appears that years later, Marikana has been forgotten. This is an injustice to those that lost their lives at Marikana.

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