

# **Submission 2 of 2 on the Draft SAPS Amendment Bill: Sub-national government**

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# 1. Introduction

1. The proposed bill affects both local and provincial government. The proposed provisions which seek to legislate in relation to local government are highly problematic and should be removed in their entirety. Any provisions affecting local government should be consulted upon with organised local government *before* being drafted, should be subject to financial impact analysis, and should be drafted with the Constitution and local government legislation to the fore. Similarly, the proposed Bill affects the provinces by imposing an unfunded mandate in bolstering Community Police Forums (CPFs) whose role has not been critically assessed, and should also be removed.
2. Only a selection of the most concerning proposed provisions is addressed in this submission.

# 2. Local government

3. The provision which requires all law enforcement to be subsumed within a municipal police force within three months (section 64 EC inserted by clause 57) is (1) unclear and, on any reading, impractical (2) unconstitutional (3) contrary to section 66 of the Municipal Systems Act. These three points will be expanded upon below.
  - a. It is **unclear** whether the clause applies (1) to all municipalities (2) to those which have already established municipal police (3) to those municipalities who are seeking to establish municipal police. If scenario (1) then it is in effect forcing all municipalities to establish metropolitan police. This is highly onerous not only because by law (a) municipal police must run a 24-hour service (b) all municipal police officers must be qualified traffic officers (c) municipal police have a range of functions which are outside their direct functional areas, including the function of maintaining public order also imposed by this draft Bill. This has significant cost implications which are not necessary for the enforcement of by-laws, which is within municipalities' functional area. A 24-hour service is extremely expensive to run, and traffic officers have significantly different qualifications and training than law enforcement and SAPS members. If scenario (2) then persons who are not trained as traffic officers will somehow have to become traffic officers within three months, which is simply not feasible. If scenario (3), this will further hinder the establishment of municipal police among those municipalities who have not yet been able to do so, by imposing this onerous obligation and not permitting the incremental creation of the service.

- b. The Constitution in s151(4) provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. A municipality has the right to enforce its by-laws: Constitution s156(2) "A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer" read with S156(5) which provides "A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." Forcing municipalities to enforce their by-laws through municipal police, with the associated cost implications as outlined above, constitutes impeding their ability to exercise this power. Consequently, the proposed provision is **unconstitutional**.
  - c. Section 66 of **the Municipal Systems Act** provides that staff establishments of municipalities have to be approved by municipal councils and bars the employment of a person in a municipality if the post to which he or she is appointed is not provided for in the staff establishment of that municipality. Clearly the proposed provision which imposes a type of employment on municipalities within a short time-frame, is contrary to section 66, and amounts to dictating to municipalities the type of employment in its establishment. Furthermore, the provision has implications for labour law.
4. The draft Bill proposes to add the following function to municipal police functions: "the enforcement of the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993) ... as first responders ...". This clearly imposes an obligation on municipal police to be responsible in public order situations arising out of gatherings. Maintaining public order in section 205(3) of the Constitution is clearly allocated to the national South African Police Service (SAPS) which is now being imposed on municipalities, without costing and without funding. The Municipal Systems Act in section 9 requires that where there is an assignment of a function to municipal government there must be a referral to the Financial and Fiscal Commission to assess the financial and fiscal implications. In terms of section 10A the Minister must take steps to ensure funding if an assignment imposes an obligation on a municipality and the obligation imposed falls outside functional area and is not incidental to their functions. There has been no referral to the Financial and Fiscal Commission (FFC) and there is no provision for funding, as far as can be ascertained. While the Bill later provides that a municipality "may" have a public order capacity, the assignment of the function to municipal police is not optional. Furthermore, if it

is *de facto* the case that SAPS is relying on municipalities in this fashion then financial provision should be made accordingly, if municipalities are carrying out a SAPS function.

5. The proposed amendment to the crime prevention function of municipal police which provides as follows: “the prevention of crime, which does not include the investigation of crime” is in conflict with the vast range of investigatory-type powers which have already been conferred on municipal police and to a lesser extent, law enforcement via section 334 of the Criminal Procedure Act, including powers of search and seizure in relation to certain offences and jurisdictions. Exactly what constitutes “investigation of crime” is vague. If any definition of what is to be excluded is attempted, it is submitted that any such exclusion should be limited to formal investigation once a court process has commenced.
6. Given SAPS’ clear failings in investigating matters which affect municipalities, such as metal theft, land invasions and damage to municipal property, the amendment should instead be in the direction of empowering municipalities (but not obliging them) through municipal police in investigating matters directly affecting them, rather than excluding investigation from municipal police’ ambit. Indeed, there is a strong constitutional argument that municipalities already have such a power to investigate matters directly affecting them via their incidental functions. The plethora of empowerments via section 334 speak to the reality that the SAPS is unable to fulfil all the forms of investigation required properly to address all forms of offences and it does not serve the greater good to reverse this trend. Instead, changes to the law should reflect the growing reality of large metropolises as well as other municipalities addressing metal theft and other crimes through both patrolling and investigation.

### 3. Provincial government

7. The proposed amendments in essence seek to confer on Community Police Forums (CPF) some of the oversight powers constitutionally permitted to the provinces (and then later made obligatory by the Civilian Secretariat for Police Service Act of 2012) and then imposes the obligation on provinces to establish CPF, pay for the CPF to carry out these functions, and exercise oversight over the CPF. The proposed funding model contained in the draft Bill further seems to require provinces to spend funds in particular ways as determined by the national Minister, even down to determining the value of stipends to be paid. This is highly likely to be unconstitutional interference in provincial decision-making.
8. Further, it is not clear that proper fiscal process required by the Intergovernmental Fiscal Relations Act have been complied with in this regard, and section 35 of the Public Finance

Management Act, which provides that draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province. It is already the case that the provinces struggle to fund their own activities in exercising oversight over SAPS and these provisions seek to impose a large, costly and ultimately toothless bureaucracy on provinces. Indeed, the obligations imposed by the 2012 legislation also constituted an unfunded mandate, as repeatedly observed by the provinces in their annual reports. In the constrained financial circumstances in which the country finds itself this is more relevant than ever.

9. Furthermore, it is manifestly the case that CPF have been politically compromised entities for many years and to place such powers in their hands is unwise. No critical analysis of their role has been carried out, and it is indeed questionable whether they should continue to exist at all. Indeed, CPF seem to be the SAPS legislation's way of appearing to complying with the constitutional imperative in section 205(1) of the Constitution to be "structured to function in the local sphere where appropriate," when the obvious way of complying with this imperative is to align borders with and have linkages via elected local government.

## 4. Conclusion

10. In conclusion, the draft bill is overbroad in imposing a range of obligations on local and provincial government while at the same time emasculating them, without any regard to the associated financial and other consequences. The lack of compliance with relevant fiscal processes alone should scupper these provisions. It is difficult not to read these provisions as being entirely politically motivated and without any basis toward better policing in South Africa, in the absence of any coherent motivation for how these provisions will further the safety and well-being of South Africans.

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