



EMBARGO: FOR IMMEDIATE RELEASE

**PRESS STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
CONCERNING ITS RELEASE OF DISCUSSION PAPER 166 ON THE REVIEW OF THE
ARREST DISPENSATION: PROJECT 151**

The South African Law Reform Commission (Commission) has released Discussion Paper 166: Review of the Arrest Dispensation for general information and public comment. The Discussion Paper outlines the Commission's preliminary research findings and puts forward proposals for possible solutions.

The purpose of arrest is to ensure the attendance of accused persons in court. In certain instances, however, the police may need to arrest someone without a warrant, although the purpose of the arrest is not solely to ensure the person's court appearance. These instances include arresting suspects in order to protect them, arresting persons who are in the process of committing an offence in order to stop the commission of the offence, arresting persons who refuse to provide their full name and address as contemplated in section 41(1), and arresting persons who refuse to cooperate for the purpose of ascertaining their bodily features.

However, the high number of litigation and judgments on unlawful arrests have a significant impact on the fiscus and point to a misuse of the provisions on arrest. Therefore, the Commission recommends that the new Criminal Procedure Act (CPA) should refine the provisions on arrest to provide that a person may not be arrested for any reason other than ensuring his or her attendance in court, for reasons outlined in section 41(1) or to ascertain his or her bodily features as contemplated in sections 36A to 37, if he or she refuses to cooperate. Further, the CPA should allow for arrest in cases where failure to do so will likely result in harm to the suspect or a witness, the continuation of an offence, the interference with evidence or the undermining of the interests of justice. The Commission believes that this will ensure that those authorised to make arrests only do so in accordance with the law and not for any other reason. It is also important that an arrest must comply with the requirements for

a lawful arrest. These are: the arrestor must be a peace officer; the arrestor must entertain a suspicion; the suspicion must be that the suspect committed an offence referred to in Schedule 1; and the suspicion must rest on reasonable grounds.

Besides arrest, the attendance of accused persons in court can also be secured through a section 56 written notice, a summons (lower court) and an indictment (high court). However, police officials seldom utilise the option of a summons as it usually takes too long to obtain one. This is because the time frame for issuing summonses depends on several factors. These include the workload of prosecutors, the complexity of the case, the amount of evidence that needs to be reviewed, the need for further investigation, and the time required for the investigating officer to conduct further investigations. Also, the written notice procedure is meant for minor offences for which a fine not exceeding R5000 may be imposed. Hence, a police official cannot give an accused a written notice if a higher fine may be imposed. Due to these challenges, police officials often choose to arrest accused persons instead.

Securing the attendance of accused persons in court through a summons is ideal as it avoids unnecessary arrests that could result in unlawful arrests. Hence, the Commission recommends that the National Prosecuting Authority should review its internal processes to ensure that dockets assigned to prosecutors for deciding whether to issue summonses do not remain with them for an excessively long period.

The Commission further recommends that the number of unnecessary arrests should be reduced by expanding the use of the written notice procedure to cover more offences. This includes amending section 56 to provide that the amount of the fine be reviewed every five years. Reviewing this amount regularly will bring more offences within the ambit of section 56. The Commission further recommends amending section 40(1)(b) to exclude from arrest the offences of theft, fraud, forgery or uttering a forged document knowing it to have been forged, and offences relating to coinage, as contained in Schedule 1. This is because these offences do not involve physical violence. However, a police official should be able to arrest a person for any of these offences under specified circumstances. The Commission further recommends that the offences excluded from section 40(1)(b) should be incorporated under section 56(1) to broaden the offences for which a written notice can be issued.

Police officials are uncertain about the offences for which they can give a written notice because there is no uniform list of offences for which a section 56 written notice can be given. The Commission therefore recommends that the Minister of Justice and Constitutional

Development should publish the list of offences for which a suspect may be given a written notice, by notice in the Gazette.

Furthermore, the Commission recommends that the new CPA should provide that if a police official requests a suspect to accompany him or her to a police station to receive a written notice and the suspect complies or if the police official arrests the suspect for this purpose, this action should not be construed as an arrest.

The Commission also makes the following specific recommendations:

Although section 73 of the CPA provides that accused persons are entitled to legal representation from the time of their arrest, it came to the Commission's attention that arrested individuals are not provided with legal representation before their first court appearance, indicating that this provision is not being effectively implemented in practice. Hence, the Commission recommends that section 39 of the CPA should be amended to require a police official who makes an arrest to inform the suspect that he or she may apply for legal representation as provided for in section 73 of the CPA and assist the suspect in contacting the local office of Legal Aid South Africa.

A private person who arrests a suspect must ensure the safety of the suspect while in his or her custody and, without unreasonable delay, hand over the suspect to a police official. Furthermore, a police official who takes custody of the suspect must, within twelve hours, consider the circumstances surrounding the arrest with the aim of determining whether the arrest may be unlawful and release the person immediately if he or she suspects that the arrest may be unlawful and, if necessary, hand to the person a written notice in terms of section 56.

The Commission recommends amending section 49(2)(a) to make it clear that an arrestor may use deadly force only if the suspect poses an immediate threat to the life of the arrestor or any other person or an immediate threat of grievous bodily harm to the arrestor or any other person. Furthermore, section 49(2)(b) should be repealed as it could be considered as authorising extrajudicial killings because it allows police officials to kill a suspect who is resisting arrest if there are no other means, including the use of force, to overcome such resistance. The Commission believes that, given the proposed amendments to section 49(2)(a), section 49(2)(b) is unnecessary.

Section 334(1)(a) gives the Minister powers to expand the definition of peace officer by declaring additional categories of persons as peace officers. This is tantamount to amending the definition, which is perceived as plenary legislative powers of Parliament. Hence, the Commission recommends amending the definition of peace officer to encompass all relevant categories of individuals who should be considered peace officers. The Commission further recommends amending section 334 so that the Minister can no longer have the authority to declare persons as peace officers. Instead, the Minister will now only be able to specify which powers of peace officers can be performed by those included in the definition. The Commission further recommends that the completion of training at an institution or centre accredited to provide training for peace officers should be a requirement for issuing a certificate of appointment as a peace officer.

The Commission recognises the need for serving summonses as well as witness subpoenas electronically. The Commission is of the view that electronic service of summonses and subpoenas should be the exception to personal service of such documents and should only be permitted under specific circumstances. Hence, the Commission recommends that section 54 of the CPA be amended to allow for the service of a summons by electronic mail or facsimile transmission. The section should provide that a summons served in this manner has the same force and effect as a summons served in person, provided that the person identified in the summons acknowledges to the sender of the electronic mail or facsimile transmission that he or she received the summons and identifies himself or herself using his or her identification card or driver's license card. Section 144 should likewise be amended.

The Commission recommends broadening the definition of aggravating circumstances to include an imitation or toy firearm.

The discussion paper is available on the website of the SALRC at:

<https://www.justice.gov.za/salrc/dpapers.htm>

Respondents are requested to submit written comments or representations on the discussion paper to the Commission by no later than 31 March 2025 via email to CPAreform@justice.gov.za and copy LoRoberts@justice.gov.za.

Enquiries in respect of press statement should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
Pretoria

0001

Tel: (012) 622 6306

E-mail: NMatibe@justice.gov.za

**ISSUED BY THE SECRETARY: SOUTH AFRICAN LAW REFORM COMMISSION,
PRETORIA**

DATE: 20 FEBRUARY 2025