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Submission

to the

South African Law Reform Commission

on

Discussion Paper 166

Review of the Criminal Justice System: Reform of the Arrest Dispensation

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1.	Introduction.....	3
2.	Arrests by members of the public	3
2.1	Legal framework.....	4
2.1.1	International Instruments	4
2.1.2	Regional Instruments.....	5
2.1.3	Domestic Instruments	5
2.3	Recommendations.....	5
3	Private individuals to assist in arrest when called upon (section 47).....	6

1. Introduction

The Centre for Applied Legal Studies (“CALS”) is a law clinic registered with the Legal Practice Council and based at the University of Witwatersrand’s School of Law. CALS was established in 1978 and has been one of the leading human rights research, advocacy, and strategic impact litigation organisations in South Africa. It operates through five (5) programmes, namely, Business and Human Rights, Environmental Justice, Gender Justice, Home, Land and Rural Democracy, and Civil and Political Justice Programme.

The Civil & Political Justice programme advances civil and political rights, such as the right to protest, the right to freedom of expression, the rights of the arrested and detained, and the right of access to information. In addition to this rights-based work, the Programme aims to protect and promote the systems and institutions of South Africa’s constitutional democracy. This includes working to strengthen Chapter Nine institutions, supporting the transformation of the judiciary, and engaging with Parliament.

Furthermore, the Civil and Political Justice programme works closely with the Right2Protest project and both programmes are responsible for the safeguarding of the civic space and upholding the rights of activists. We have worked together to support activist and believe that we are experienced to make recommendations to the proposed amendments of the Criminal Procedure Act.

Our submissions will focus on the proposed amendments relating to arrests by members of the public, and private person when called by the police to assist in an arrest. In support of our recommendations, we will provide a brief analysis of relevant international and regional legal instruments to ensure alignment with human rights standards and best practices.

2. Arrests by members of the public

Arbitrary and unlawful arrests have a long and deeply troubling legacy in South Africa. During the apartheid era, human rights defenders and political activists were routinely arrested, detained without trial, and subjected to torture by the

police as a means of silencing dissent and enforcing the regime's dehumanising laws. These arrests were used as tools of fear and control, aimed at punishing those who dared to speak out against a cruel and oppressive system.

When South Africa became a democratic state, many believed that such injustices would be left in the past. Our Constitution promised dignity, freedom, and safety for all. It was meant to draw a clear line between the brutality of our past and the promise of a fair and just future.

But even now, decades later, we still see too many people being arrested unlawfully and without cause, often by the very institutions meant to protect them. The South African Police Service (SAPS) has repeatedly come under fire for making arrests that not only violate people's rights but also chip away at the public's trust in the justice system.

This is why reforming the Criminal Procedure Act (CPA) is so important. Many parts of it are outdated and still reflect the thinking of a time when justice was a very different concept. If we are serious about building a country where every person's rights are respected, then we need a justice system and a Criminal Procedure Act, that reflects the values of our Constitution: dignity, accountability, and fairness for all.

Private individuals, particularly private security personnel, play a significant role in efforts to combat crime in South Africa. However, without proper regulation and accountability, they can pose a serious threat to the fundamental rights of those they apprehend. Arrests need to be done within the legal parameters of the country and international instrument that South Africa is a part of.

2.1 Legal framework

2.1.1 International Instruments

International Covenant on Civil and Political Rights (ICCPR)

Article 9 of the International Covenant on Civil and Political Rights provides that *“everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”*.¹⁰

2.1.2 Regional Instruments

The African Charter on Human and Peoples’ Rights

The right not to be arbitrarily arrested and detained is enshrined in Article 6 of the Charter. It provides that *“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”*.¹¹

2.1.3 Domestic Instruments

The Constitution of the Republic, 1996.

Section 12(1)(a) guarantees the right not to be deprived of freedom arbitrarily or without just cause.

2.3 Recommendations

The Commission proposes the amendment as follows:

42 (4) *A private person must -*

(a) *ensure the safety of the arrested person while in his or her custody; and*

(b) *without unreasonable delay but not later than six hours after the arrest, hand over the arrested person to a police official.*

While we support the proposed amendment to section 42(4) of the Criminal Procedure Act, we disagree with the South African Police Service's recommendation to delete the words "but not later than six hours after the arrest". Removing this safeguard entirely would be deeply problematic. The alternative phrasing "*without unreasonable delay*" is far too vague and provides no meaningful limit or test. It leaves far too much discretion in the hands of private individuals and institutions, many of whom are not adequately trained or held accountable to the same standards as public law enforcement.

In our view, removing the time limit altogether could create the very conditions that the amendment seeks to address: unchecked power and potential abuse. Instead of deleting the time frame, we propose a revision to reduce it, requiring *'that any arrested person be handed over to a police officer within **two to three hours**'*. This strikes a more appropriate balance between operational practicality and the protection of individual rights

3 Private individuals to assist in arrest when called upon (section 47)

The proposed amendment by the Commission state that:

(1) [Every male inhabitant of the Republic] A police official may request a person of an age not below [sixteen and not exceeding sixty years shall, when called upon by any police official to do so,] eighteen to assist such police official-

(a) in arresting any person;

(b) in detaining any person so arrested.

(2) Any person who assists in making an arrest as contemplated in subsection (1) or who detains a person so arrested shall be exempt from liability in respect of such assistance or detention if it is later found that the arrest or detention was unlawful.

We welcome the proposed amendment that allows women to be requested to assist police in apprehending suspects. This is an important step forward, not just for gender equality, but also for the dignity and comfort of the person being arrested. Some individuals, whether due to personal, religious, or cultural reasons, may feel deeply uncomfortable being touched or restrained by someone of the opposite (or even same) gender. This amendment gives space for that sensitivity to be respected.

We also strongly support the proposed deletion of the current section 47(2), which makes it a criminal offence to refuse a police officer's request for assistance in making an arrest. Often, these requests are made to ordinary community members, sometimes even to family or neighbours of the accused. In a country grappling with high crime rates, gang violence, and fractured community trust, expecting untrained civilians to risk their safety to assist police is simply not fair. In reality, agreeing to help with an arrest can put someone in danger, not just in the moment, but long afterward. Community members might face retaliation, intimidation, or even isolation from their neighbours for helping the police. It's unreasonable to criminalise someone for wanting to protect themselves or avoid getting caught up in something they're not equipped to handle.

Furthermore, we welcome the proposed section 47(2) provision, which exempts members of the public from liability in cases where it is later found that the arrest or detention was unlawful. This is a necessary and fair protection. In most cases, members of the public who are asked to assist with an arrest are chosen on the spot. They are not involved in the investigation, nor do they have all the facts, yet they're expected to act on the instruction of a police official in a high-pressure situation.

It is only just that ordinary people should not be held legally responsible for participating in an arrest they believed to be lawful at the time. Protecting these individuals is not only about fairness, but it also helps to build and strengthen public trust in the justice system. When people know they will be treated fairly and

protected from undue consequences, they are more likely to cooperate with law enforcement in good faith.