IN THE MARIKANA COMMISSION OF INQUIRY

SAPS SHORT REPLY

A: INTRODUCTION

1. The various parties have filed written submissions as follows: The Evidence Leaders - 693 pages with 1694 footnotes; SAHRC - 610 pages with 1220 footnotes, including recommendations by SAHRC Commissioners; The Deceaseds' families - 426 pages with 904 footnotes; AMCU - 204 pages with 526 footnotes; The arrested and injured persons - 304 pages with 584 footnotes; Lonmin - 115 pages with 203 footnotes; LRC – 236 pages with 495 footnotes; NUM - 116 pages with 375 footnotes; the family of Warrant Officer Monene - 55 pages with 162 footnotes; the family of Warrant Officer Lepaaku and Lt Baloyi - 63 pages with 161 footnotes; the Minister of Police - 30 pages with 47 footnotes; The Deputy President Mr C Ramaphosa 31 pages with 51 footnotes; the families of Messrs Mabelane, Mabebe and Langa– 53 pages with 7 footnotes; Bapo Ba Mogale – 19 pages with 34 footnotes.

2. In a communication dated 30 October 2014, the Chairperson, with the Co-Commissioners concurring, made a ruling that any party wishing to reply must
do so in a short. Any reply to be submitted by 3 November 2014. For that reason and the volume of the written submissions; the repetition of argument made by several parties in respect of the same point, it is not practical, in the available time, to respond to each and every argument made by the various parties which would warrant a reply. For that reason, in these written submissions we address only the recommendations which some of the parties submit must be made by the Commission.

3. We deal with the key recommendations made by each party where a reply is warranted.

B: PROPOSED RECOMMENDATIONS BY THE EVIDENCE LEADERS

Ad para 1266

4. We have already made submissions in relation to the recommendations proposed by the three external experts on policing and do not propose to make further submission in that regard. However, in so far as the experts recommend the immediate withdrawal of the R5 rifle in crowd management operations, we point out that any such recommendation must not leave members vulnerable during high risk crowd management operations. We also highlight the provisions of Section 9(2) of the Regulation of Gatherings Act of 1993 which authorise the use of firearms and other weapons where dispersal is required in circumstances where there is a threat to life or damage to property. We also emphasize that the constitutionality of that section is not
challenged and remains good law. It is outside the remit of the Commission to question its constitutionality.

**Ad para 1268 – 1272**

5. It is proposed that the Commission recommends that the appointment of senior police members should be depoliticized. We do not understand the Evidence Leaders to suggest that the appointment of senior personnel should not be done as the law regulates. For instance, the appointment of the National Commissioner is regulated by the Constitution and the relevant legislation. The constitutional power of the President to appoint is not qualified. The constitutional injunction which addresses this concern is set out in section 199 (7) of the Constitution.

6. In a constitutional democracy and in line with the principle of separation of powers, the Constitution confers powers on the Executive which comprises of politicians. Where the Executive has the constitutional power to make an appointment, there is no doubt that there would be political considerations for that appointment. In a democracy a party that makes poor political decisions is corrected by the electorate. The Executive is constitutionally empowered to make an appointment that it deems appropriate, taking into account the requirements of that office. This is true for the police service. It is not in the remit of a commission to make a recommendation that has the effect of fettering this power of the Executive. However, we understand the recommendation to propose that political considerations should not trump merit in the appointments of senior police personnel. The police are required
to discharge their functions without fear or favour and it is indeed impermissible for police to take into account party political considerations in policing. This is reflected in section 199 of the Constitution.¹

7. The other proposed recommendation is that only persons with expert knowledge should be appointed to senior policing positions in which they would have any role at all in any operational decisions.² Whereas this proposed recommendations may have a particular appeal to common sense, it still remains within the power of those who the law authorises to make appointments to do so. For instance Section 203 of the Constitution vests the power to declare a state of national defence on the President. It cannot follow therefore that a President must have military credentials to enable him to declare a state of national defence.

8. The recommendation to establish an oversight body.³ To the extent that the proposed recommendations does not offend against the provisions of Section 208 of the Constitution, read with the provisions of Section 3 and 6 of the Civilian Secretariat for Police Service Act,⁴ the proposed recommendation is sound.

9. The SAPS Code of Conduct states that all employees shall act with integrity in rendering an effective service of a high standard which is accessible to

¹Sec 199 (7) provides that “neither the security services, nor any of their members, may in the performance of their functions, prejudice a political party interest, that is legitimate in terms of the Constitution; or in a partisan manner, any interest of a political party …”

²Para 1269
³Para 1270
⁴Act No.2 of 2011. Sec 3(b) provides for civilian oversight of the police service; sec 6 sets out the functions of the Secretariat which includes monitoring the performance of the police service and assessing the extent to which the police service has adequate policies and effective systems and to recommend corrective measures.
everybody, and continuously strive towards improving this service; act in a
manner that is impartial, courteous, honest, respectful, transparent and
accountable. Accordingly, the recommendation that the Code of Conduct
should explicitly prohibit the application of political, sectional or sectarian
considerations in decision-making with regard to policing is not necessary.

10. Parliament, as an oversight constitutional institution, would naturally hold the
Executive and consequently SAPS accountable for the use of force and that
there should be an honest account to the public. Naturally there must be
materially negative career consequences for failure to comply with a duty
imposed by law. SAPS code of conduct also provides that police officials act
in a manner that is impartial, courteous, honest, respectful, transparent and
accountable; this principle of public accountability is entrenched. This
recommendation must take into account the provisions of the disciplinary
policies and procedures of the SAPS, which in fact regulate such matters,
including failure to act in accordance therewith.\(^5\) It must also take into account
that the disciplinary policy and procedures is a document negotiated and
agreed with the unions and any changes would be subject to negotiation with
the trade unions.

**Ad para 1273 – 1276**

11. The demilitarisation of the SAPS is a matter which is dealt with in the National
Development Plan and is now government policy. To that extent, SAPS has
addressed the matter in the Lessons Learnt document submitted to the
Commission which sets out the present position.

\(^5\) Para 1272
12. The recommendation, in the proposed terms may not be appropriate. We respectfully submit that it cannot fall within the province of the Commission to direct that public declarations are to be done by the Executive. There are already established reporting structures and time frames in the relationship between the Executive, Administration and the Legislature for all programmes and plans of action by Government.

13. It cannot be a proper place for the Commission to determine the method for political accountability (public reporting, intervals of reporting, measures that have been taken to public the account, where there isn’t such political accountability, when compliance will occur). In a constitutional democracy there is a place for oversight constitutional structures as well as opposition political parties whose primary function is to deal with oversight matters.

14. It must fall within the statutory remit of the Civilian Secretariat for the Police Service to look into the culture and subculture of the SAPS and to critically review and assess any effects of militarisation, demilitarisation, and remilitarisation, if any occur, within the police service.

15. We accordingly do not support the recommendation.

Ad para 1277

16. Without conceding that there is evidence that the Minister of Police gave any operational directions or decisions in the operation in Marikana, a recommendation that in large and special operations, after consultation, the
Minister should, subject to security and other operational requirements, give policy guidelines which will be appropriately and securely recorded, appears to be sound.

Ad para 1278

17. Section 207(4) of the Constitution imposes on Provincial Commissioners the responsibility for policing in their respective provinces. A recommendation that seeks to exclude responsibility for public order policing from the powers of Provincial Commissioners would be incorrect and inconsistent with the Constitution. We therefore do not support the proposed recommendations.

Ad para 1279

18. We support, in principle, a recommendation that policing prescripts should state explicitly that contingency plans must identify and address a range of scenarios, from those thought to be highly probable through to those considered possible, but unlikely. However, care must be taken not to impose a burden to have a contingency or prescript for every possible scenario in policing and ignore the training, experience and discretion of police officers. Every scenario will differ and the police response will be dependent on many factors including but not limited to, the given capacity and equipment at their disposal at the time. If such caution as we urge is not taken, police action will be judged (in hindsight) strictly to the letter of such proposed prescript and with little or no allowance for situational appropriateness and circumstances at play at the time of the incident.

Ad para 1280
19. The revision of the Standing Order 262 to deal with armed and actual or potential violent gatherings in a manner proposed by the Evidence Leaders is correct provided that the provisions of Section 9 (2) of the Regulation of Gatherings Act are considered. This recommendation recognises that pure public order policing techniques alone could not contain the gathering such as we saw in Marikana in August 2012. The revision must not be read to mean that the SAPS must train, equip and maintain POP members to the level that they will have the ability to deal with all types of high risk scenarios. The SAPS does not have such capacity. High risk operations must still be the responsibility of units which are trained for that purpose. Amendments to SO 262 must provide for the integrated functioning of various police units in a single operation to be utilized according to their skills as an appropriate response to a particular situation.

**Ad para 1282**

20. To the extent that the proposed recommendation does not take away a police member’s common law right of self or private defence, a recommendation that where shooting may be necessary in violent crowd situations, prescripts should require the designation of particular members of a unit or line as having responsibility for identifying particular members of a crowd who are a threat to life, and dealing with it a manner consistent with the Criminal Procedure Act and the Regulations of Gathering Act, *prima facie* appears sound. However, the Commission must be alive to practical challenges such as if a crowd consists of a significant large number of people or is spread over a vast area, the proposed recommendation will require that a member who is
positioned further away than where the specific threat occurs should respond in protection of another member’s life.

Ad para 1284-1291

21. The SAPS supports the proposed recommendations to the extent that they do not offend the provisions of Section 9(2) of the Regulations of Gatherings Act, 1993.

Ad paragraph 1292 - 1295

22. We support the recommendation in respect of first aid provided that it is limited to a requirement that each section of the police involved in a crowd management operation where there is a high risk of casualties must include a person trained in basic level first aid. It is important that the recommendation takes into account the size of active police members and the budgetary constraints.

Ad para 1296

23. The questions when and how to pronounce on matters or events of public interest or controversy requires a difficult but fine balance. It can equally provoke public outrage with an event such as Marikana for officials to tell the public and the world that they offer no comment until such time as all the investigations have been concluded. The lifespan of the Commission is a case in point. We do not believe that the proposed recommendation is appropriate.

Ad para 1297 - 1298

24. Adequate recording of police operations and the requirement for an audit trail of those operations must indeed be done. “Adequate” is not a clear standard.
Provisions must be clear as to exactly what is expected, has to be practical and implementable given the different operational scenarios and available resources. It is correct that SAPS and its members are to accept that they have a duty of public accountability and truth telling because they exercise force on behalf of all South Africans.

Ad para 1299

25. Without accepting that there is evidence that any employee of the SAPS was subjected to adverse conduct as a result of criticising police operations, we support the recommendation that the SAPS must put in place measures that will protect employees to speak freely about SAPS operations.

Ad para 1300

26. There was no evidence before the Commission regarding the adequacy or otherwise of IPID resources. Accordingly, a recommendation such as is proposed has no basis on the facts.

27. A recommendation to remove any contradictions between the role of the Independent Police Investigative Directorate (IPID) and the duty of the police to render safe and secure an environment where weapons are used and to account for such, enjoys our support.

Ad para 1302

28. We submit that the provisions of Section 8(1) of the South African Police Service Act require as a jurisdictional fact, that Cabinet must have lost confidence in the National Commissioner for the President to establish an enquiry. There is no evidence that Cabinet has lost confidence in the National
Commissioner and a recommendation to that effect will be improper and without sound legal basis.

Ad para 1311 - 1312

29. Lt Colonel Vermaak, Constable Mguye and Constable Segweleya give different accounts of the circumstances of the death of Mr Sokhanyile. IPID is presently seized with the investigation into the death of Mr Sokhanyile and we do not believe that the Commission make a recommendation to IPID to investigate the death.

30. The matters which may be investigated by IPID are set out in section 28 of the IPID Act. This does not include investigation of the conduct of a member in providing evidence before the Commission. Accordingly, we do not support the recommendation that IPID investigate the conduct of Constables Mguye and Segweleya relating to the provision of statements before the Commission.

Ad para 1317-1319

31. There is nothing manifestly unlawful with the order given by Lt General Mbombo that people who were reasonably suspected of being responsible for the deaths of 7 people, injuries to many and damage to property should be dispersed, disarmed and arrested. There can therefore be no legal basis for any criminal prosecution of Lt General Mbombo for making that order. We have always understood that the criticism for the police operation of 13 and 16 August 2012 related to how those orders were executed. We accordingly do not support the recommendation.
Ad para 1321

32. It is easy, after the fact, to second-guess any decision taken in a given set of circumstances. We have made the submission that where there are multiple valid choices to unlock a violent public unrest situation, taking one choice which proves less effective cannot attract criminal liability. The recommendation for investigating the conduct of Brig Calitz for possible culpability in relating to the deaths at scene 1 would be unfounded for that reason and we do not support the recommendation.

33. To the extent that a recommendation for the possible prosecution of Brig Calitz is inspired by the so called McCann principle, we should hasten to point out that decision is not law in South Africa and can also not even have any persuasive effect in a commission. The reference to the McCann judgment by the Constitutional Court (Ex Parte Minister of Safety and Security and Others in re S v Walters and Another, 2002 (4) SA 613(CC)) was in support of a different proposition, namely, explaining the factors to consider when it is justifiable to use force in effecting an arrest.

Ad para 1324

34. With the evidence that some medical personnel refused to attend to the injured at scene 1 until it was rendered safe; that other medics were pelted with stones and were therefore unwilling to attend to the scene; that Mr Mdze arrived at the Saffy Hospital alive; that he was taken through for x-rays, that could have been done by the medical personnel who took him from the scene as well as the medical personnel upon his admission. If Major General Naidoo delayed medical attention for Mr Mdze, that by itself will not be
causally connected to the death of Mr Mdze. In any event, the circumstances of the death of Mr Mdze and all persons who died as a result of police action in Marikana are matters with which the IPID is seized and it is not necessary for the Commission to make a recommendation as proposed. Accordingly, we do not support the recommendation.

Ad para 1327 - 1328

35. Regarding the deaths at scene 2, we repeat our submissions why a possible prosecution of Lt General Mbombo would be misplaced, particularly where it is conceded that her order was not manifestly illegal.

Ad para 1329 - 1332

35. We accept that the Evidence Leaders reject the account of Major Generals Mpembe and Annandale. The evidence is that Major Generals Mpembe and Annandale were not informed by Lt General Mbombo on 15 August 2012 that the strikers must be disarmed on 16 August 2012. Major General Annandale was not informed by Lt General Mbombo during the telephone call of the 15th that a meeting of the NMF made a decision that the dispersal action must be implemented on the 16th. Neither was Major General Mpembe. Major General Annandale was informed by Lt General Mbombo about her discussion of the events at Marikana. He gave her feedback of the engagement with the trade union leaders and Lonmin and the belief that the protesters will voluntary lay down their arms at 09:00 on the 16th. It was agreed that the situation will be evaluated on the 16th given this belief of the voluntary disarming. Lt General
Mbombomo did not state that the police must disperse and disarm the strikers on 16 August 2012.6

36. With respect to whether Major Generals Mpembe and Annandale heard the shooting at scene 1, we point out that Mr Botes’ account of having heard the shooting at scene 1 must be approached with caution.7 On his own account, the JOC was not aware that there were two incidents of shooting. If that evidence is accepted, naturally the JOC would not have halted the operation. Only Brigadier Calitz and Lt Colonel Vermaak talked on the radio during the operation near the kraal. If Lt Colonel Vermaak was in the air in the helicopter and the gun shots would not have been audible over his radio transmissions. With Brigadier Calitz and the persons in his Nyala not hearing the shots, it stands to reason that when he spoke over the radio that no shots could be heard in the JOC either. No other police official was talking at the time when this event was happening. They would have been busy dealing with the situation they were facing. That the shots from scene 1 were audible in the JOC is not plausible. On his own admission, aspects of Mr Botes’ evidence are incorrect – his recollection of events as contained in his statement was corrected when he gave oral evidence. He also does not mention in his statement that he heard shooting from the JOC. There is also no record or entry in the OB; no recollection by the two police record clerks; no mention in the notes of Captain Van Heerden recording the shooting at scene 1. No other person in the JOC has stated hearing the shooting. There would have to be a

---

6 Day 82, p8582, line 3-11
7 Day 266, page 33744, line 1-11
conspiracy involving a large number of people who were in the JOC, including employees of Lonmin, for this to be concealed. There is therefore no basis to recommend the investigation of Major Generals Mpembe and Annandale for possible prosecution regarding the failure to halt and to reassess the operation after scene 1.

Ad para 1336
36. We support the proposed recommendation that those who can be identified to be in possession of armed and dangerous weapons must be prosecuted.

Ad para 1335
37. On the version of Brigadier Fritz, the teargas was used to disperse armed persons. Such conduct could not attract a possible criminal prosecution. On the version of Sergeant Venter, it was used to protect the police. On this version, the discharge of the teargas would have been lawful. We do not support the recommendation that Brigadier Fritz or Sergeant Venter should be charged with assault. The contradictions in their version may prove one or the other to have been untruthful - not guilty of an assault.

Ad para 1337-1338
38. The recommendation that disciplinary proceedings must be taken against those SAPS members who are found to have given false evidence before the Commission suffers from, at least, one flaw. The flaw is that the disciplinary committee would be bound by the opinion of the Commission that the evidence that was given was false. As we understand the position, it is the employer, as employer, who must hold a view that false evidence was given
before the Commission, before it can consider any disciplinary action. At best, the Commission may recommend that the SAPS investigate the conduct of such members.

**Ad para 1339 - 1340**

39. We repeat our submission that the powers of IPID to investigate police conduct do not include investigation of matters set out in the aforementioned paragraphs. Accordingly, we do not support the recommendation.

**Ad para 1333**

40. Major General Naidoo admitted to have taken command and control of the K9 members who were with him together with the NIU at koppie 3. He did not admit that he was in command and control of the operation at koppie 3. For that reason, a proposed recommendation that he could possibly be culpable in relation to some of the deaths at scene 2 is misplaced. In testimony, it was pointed out that due to the extent and nature of the terrain, it was impossible for Major General Naidoo to exercise effective control over the various incidents or know precisely about all activities taking place in the koppie. This problem was compounded by the known failure of radio communication.

**Ad para 1341 to 1347**

41. We are unable to offer comment in this regard at this stage as we await instructions. We will communicate the SAPS position in due course.
C: THE INJURED AND THE ARRESTED

42. With respect to paragraphs 829.1 and 829.2, we repeat our submission about the applicability of Section 8(1) of the Police Act, with the necessary changes pertaining to Lt General Mbombo.

Ad para 830 - 837

43. It is difficult to appreciate how, if the Executive, were disinclined to prosecute any of its members, a recommendation by the Commission will get the President sending those same members of the Executive to be prosecuted by the ICC. We make this submission without accepting that there are jurisdictional grounds for submitting anyone for criminal prosecution by the ICC.

D: LT BALOYI AND WARRANT OFFICER LEPAAKU

Ad Para 106

44. The Commission is invited to make a recommendation that disciplinary steps be taken against members of the police who were part of the operation resulting in the death of Warrant Officer Lepaaku. If there is any allegation of police culpability, we submit that this is a matter falling within the mandate of IPID. No recommendation is therefore required.

---

8 Para 106.1
45. The proposed recommendation that there must be an investigation on whether there was a contravention of any provision of Standing Order 262, is unwarranted.\textsuperscript{9} That is already a matter before the Commission and a matter on which the Commissions will be making a finding.

E: \textbf{FAMILIES}

46. The proposed recommendation that investigation and possible prosecution of those responsible for the deaths of the victims represented by the legal representatives of the Families, is unnecessary. This is a matter which falls within the jurisdiction of the IPID and with which IPID is seized.\textsuperscript{10}

F: \textbf{LEGAL RESOURCES CENTRE}

47. The LRC makes a proposal that the Commission must make a recommendation that all the members who were present in the extra-ordinary meeting of the NMF of 15 August 2012 must be referred for investigation.\textsuperscript{11} The proposal is without merit. As we point out, the decision that the armed protesters be disarmed after the death of seven (7) people, where it could reasonably have been as a result of some of those armed strikers, is not a decision which is manifestly illegal. It would be a different matter if those members of the NMF had given tactical instructions on how the decision was to be executed, which tactical instructions were not informed by relevant

\textsuperscript{9} Para 106.2
\textsuperscript{10} Para 415
\textsuperscript{11} Para 327.5
information. Even in such case, it would be doubtful whether such persons could be prosecuted as proposed.

48. The Evidence Leaders also correctly concede that the order by Lt General Mbombo was not manifestly illegal and therefore there was a duty on the police officers to obey the order. It must therefore mean that no culpability can attach to the members who were in the JOC or who were, in terms of the law, obliged to carry out a lawful instruction.

49. The proposal for the prosecution of other commanders of the police service who were deployed on the police operation in Marikana is not sound.\(^\text{12}\) It is important to appreciate that they were all executing a lawful order and such a recommendation as proposed can therefore not to be made. The Evidence Leaders correctly conclude that the shooters at scene 1 should not be prosecuted because they reasonably believed themselves to be under imminent threat. A recommendation for their prosecution is therefore unwarranted.

50. A proposal that the Provincial Commissioner North West must consider adopting a contingency plan for large scale industrial unrest in terms of paragraphs 5 of the Crime Scene Management Policy is a sound one.\(^\text{13}\)

\(^{12}\) Para 9 - Recommendations (p228)
\(^{13}\) Para 356
G: THE SAHRC

Ad Annexure A

51. The proposal that the Commission should make a finding that the State violated and undermined its various specified international obligations can simply not be made.\(^{14}\) By way of illustration, the Commission made the Ruling that SAPS does not have to call each and every person who discharged their firearm and no adverse inference will be drawn for failure to call all those members. To then call for a finding of fact that there were violations of human rights obligations would be improper.

H: THE WRITTEN SUBMISSION OF MR DAVID BRUCE

52. After the conclusion of oral evidence and during the submission of the Heads of Argument, Mr Bruce submitted written submissions to the Commission. There is no explanation why the evidence and opinions of Mr Bruce are presented in this manner. There is also no explanation why Mr Bruce did not testify. As a result, his evidence and opinions were not subjected to cross-examination. His opinions were also not presented to the three policing experts for comment. In so far as the opinions of Mr Bruce may coincide with the opinion of any of the expert witnesses, it adds no more value and should be disregarded. Where he expresses differing views, such should be disregarded as such views were not tested in cross-examination or interrogation by the policing expert witnesses who testified.

\(^{14}\) Para 3