



ROLE OF CIVIL SOCIETY IN THE WORK OF THE NATIONAL PREVENTIVE MECHANISM

Draft Discussion Paper

Prepared by the National Preventive Mechanism Unit, South African Human Rights Commission

08 October 2020

Enquiries:
Dr Kwanele Pakati
National Preventive Mechanism
Email: kpakati@sahrc.org.za

Table of Contents

1. INTRODUCTION.....	3
2. BACKGROUND	3
3. WHY THE NPM	4
4. CURRENT PROJECTS WITH CIVIL SOCIETY PARTNERS	5
5. PROPOSED ROLE OF CIVIL SOCIETY	7
6. WORKING METHODOLOGY	7
7. NON-DISCLOSURE	7
8. REPORTING.....	8
9. LIABILITY	8
10. DO NO HARM PRINCIPLE	8
11. DISPUTE RESOLUTION	9

1. INTRODUCTION

1.1 South Africa completed the process for the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 20 June 2019. Under the OPCAT, States are required to designate, maintain or establish national bodies responsible for torture prevention known as National Preventive Mechanisms (NPM). On ratification, States parties have an election under Article 24 of the OPCAT to make a declaration postponing the implementation of their obligations for a maximum period of three years. However, no declaration was made by South Africa invoking the provisions of Article 24 in relation to its obligation to establish an NPM. The OPCAT came into effect for South Africa on 20 July 2019.¹ The South African NPM was launched on 19 July 2019, at the Castle of Good Hope in Cape Town.

2. BACKGROUND

2.1 NPM structures vary from one country to another, as the OPCAT does not specify one single model for NPMs, as long as they fulfil the key requirements provided by the treaty. So far, States parties to the OPCAT have chosen different models, each of them with specific characteristics according to their context. Some States have conferred the NPM mandate to one or several existing institutions, including National Human Rights Institutions (NHRIs) and ombuds institutions. Others have created a completely new body, or several, to perform the NPM mandate. Other States have opted for a different model, for example combining existing institutions with new structures. Although States have drawn inspiration from observing the NPMs in other countries with similar characteristics, experience indicates that no model can be replicated precisely.

2.2 The government of South Africa adopted a multiple-body NPM to be coordinated and functionally led by the South African Human Rights Commission (SAHRC). The South African NPM includes other institutions such

¹ Article 28 (2).

as the Judicial Inspectorate for Correctional Services (JICS), Independent Police Investigative Directorate (IPID), Military Ombud and the Health Ombud.

3. WHY THE NPM

3.1 The Preamble to the OPCAT states that ‘the protection of persons deprived of their liberty ... can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention’. Article 3 states that:

“Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.”

3.2 These regular visits are two-fold, namely, i) visits by the international body, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) established under Article 2 of the OPCAT and ii) visits by the domestic body, the NPM. At the national level, South Africa must in accordance with Article 3 establish, designate or maintain an NPM to prevent torture and other cruel, inhuman or degrading treatment or punishment among others, through regular visits to places of deprivation of liberty.

3.3 The activities of the NPM include making announced and unannounced visits to places of deprivation of liberty and thereafter report on findings and make recommendations. The core of the OPCAT, therefore, lies in its preventive nature which is designed to realise systemic change as opposed to a system which is reactive and only triggered by complaints.

3.4 While the South African NPM is a multi-body entity, it is envisaged that civil society will play a critical role. For instance, civil society plays a role in the success of monitoring and awareness by providing support to the NPM, including research. The NPM can tap on the existing civil society expertise to strengthen its work. Civil society can supplement the resources and expertise of NPM institutions.² These two systems have potential to complement each other.

² For instance, the NPM of the United Kingdom includes lay visitors and the NPM in Armenia has a panel of experts from civil society and professional bodies appointed as individual experts.

- 3.5 Notwithstanding, the unique nature of work and responsibility of NPM bodies, requires a careful balance through regulation. Confidentiality and the dialogue and cooperation aspects of the NPM should also be a factor to be considered in assessing the complementarity process. While the NPM does not have a unified legislative framework, the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) already recognises the role of civil society. As the NPM coordinator, the SAHRC intends to make use of its empowering legislation. In this regard, section 11 of the SAHRC Act provides that the Commission may establish one or more committees consisting of one or more persons for the purpose of advising or making recommendations to the Commission. This may include the participation of Civil Society and experts in the work of the SAHRC.
- 3.6 It is then desirable to identify relevant expertise and establish a mechanism for civil society integration at least at the level identified above. This proposed role of civil society and experts is through the provisions of section 11 of the SAHRC Act to complement the work of and assist the NPM in monitoring places of deprivation of liberty. The SAHRC wishes to establish the section 11 Committee to incorporate the thematic working groups as outlined in paragraph 5.1 below.
- 3.7 Care should be taken not to duplicate what NPM bodies are already doing but create a complementary and supportive structure to the activities of the NPM institutions.
- 3.8 At this stage, it must be underlined that the appointment of committee members shall be at the direction of the Commission and subject to the powers conferred and functions assigned by the Commission.

4. CURRENT PROJECTS WITH CIVIL SOCIETY PARTNERS

- 4.1 Every day across South Africa, thousands of detainees are held in police stations and court cells under the management of the South African Police Service (SAPS). However, prior to the ratification of the OPCAT and the establishment of the South African NPM, there was no independent system of regular SAPS station and cell inspections to ensure that those deprived of their liberty are being held and treated in accordance with the law.

- 4.2 To address this critical accountability deficit, the SAHRC, with support from the European Union Delegation to South Africa (EUD) and its technical partner, the African Policing Civilian Oversight Forum (APCOF), collaborated to scope for the establishment of a system for the independent monitoring of police custody in South Africa. The aim of the lay visitors' program is to reduce the risk of abuse of persons held in police custody through regular and unannounced visits to police stations across South Africa by trained and accredited individuals. This would be done through visual cell inspections and paperwork checks, e.g. Occurrence books (OB), using a digital survey specially designed for this purpose.
- 4.3 Under the OPCAT, the NPM must monitor places of deprivation of liberty with or without prior notice. However, the NPM unit which has been created in the SAHRC does not have adequate resources, including personnel to regularly monitor all places of deprivation of liberty across the country in its current form. This is a critical shortcoming noting that police stations, secure care facilities and immigration centres do not have dedicated monitoring bodies.
- 4.4 It is on this basis that civil society, including human rights organisations and experts such as academics and researchers, psychiatrists, environmental health specialists, forensic pathologists, social workers, policing and corrections specialists play a critical role in the success of monitoring and awareness throughout South Africa. These experts could assist with advice to the NPM and regular monitoring of places of deprivation of liberty throughout the country.
- 4.5 The inclusion of civil society and experts in some parts of the NPM work will ensure broader and more frequent monitoring of places of deprivation of liberty by persons who are knowledgeable in the different custody settings whilst alleviating the pressure off the NPM unit.
- 4.6 In order to ensure uniform reporting and collecting of information, a dedicated training programme and monitoring toolkit should be designed for each thematic area. The monitoring toolkit will inform the manner in which oversight visits will be conducted and which information should be recorded for the NPM annual report.

5. PROPOSED ROLE OF CIVIL SOCIETY

5.1 To create a systematic approach, it is proposed that thematic working groups where professionals or experts from CSOs and professional bodies can participate in their individual capacity, where such expertise is needed should be established. In such circumstances, the SAHRC on behalf of the NPM should be responsible for expenses associated with participation in the working groups (likely to be travel, accommodation costs). The following NPM working groups will be established:

- Working group on corrections;
- Working group on police detention;
- Working group on health and social facilities;
- Working group on administrative detention (immigration, military and other unofficial detention); and
- Working group on children in detention.

5.2 It is proposed that the independent experts and lay visitors should be appointed for an initial period of two years. The experts or lay visitors will be appointed to serve as special advisors in their individual capacities in the various working groups.

6. WORKING METHODOLOGY

6.1 The working groups shall meet at least once every quarter. The working groups may convene joint working sessions when dealing with cross-cutting thematic issues.

6.2 The working groups may participate in the visits to various places of deprivation of liberty with due regard to the mandate of the NPM and subject to the guidelines below.

7. NON-DISCLOSURE

7.1 Experts from CSOs and professional bodies will be required to sign agreements requiring them to adhere to the NPMs non-disclosure of information obtained

whilst conducting NPM related work and prohibiting monitors from communicating with the media without prior consent from the NPM.

7.2 Similarly, they should undertake to respect the confidentiality of the information they become aware of as a result of the execution of the NPM monitoring mandate. They will not disclose any confidential information unless required by applicable law, any court or regulatory body of competent jurisdiction. For this purpose, “confidential information” means any information that is not publicly known, or more generally accessible to the public, and concerning the work of the NPM.

7.3 Working group members shall be cognisant in recognising the sensitivities and confidential nature of the information under consideration.

8. REPORTING

8.1 Experts assigned specific monitoring tasks will provide interim and final reports to the NPM on the activities undertaken at specified intervals.

9. LIABILITY

9.1 The NPM will not be liable for any risk, direct or indirect damage to property or person, costs and expenses, injury, illness or loss incurred to any expert or monitor in the course of the monitoring under the NPM mandate.

9.2 At no time shall the working group experts independently institute any legal proceedings in their name or on behalf of any person as a result of the work undertaken in terms of this arrangement without the permission, consultation and consent of the NPM reduced in writing.

9.3 Working groups members agree to indemnify the NPM for any costs arising out of any action which will result in damages and in legal action taken against them.

10. DO NO HARM PRINCIPLE

10.1 The work of the NPM is guided by the ‘do no harm’ principle. This principle is a constant reminder of the vulnerability of persons deprived of their liberty. This

means that their safety should always be kept in mind by the NPM and those who interact with them. It is a precautionary measure to guard against any action or conduct which could endanger or expose to risk of reprisals an individual or a group of persons. With that in mind, the following principles must always underpin any monitoring of any place of deprivation of liberty:

- Credibility.
- Confidentiality.
- Respect – for persons deprived of their liberty as well as officials working there.
- Sensitivity and objectivity.
- Integrity.

10.2 All experts working with the NPM agree to execute their functions in good faith and to refrain from any action likely to cause harm to the NPM, officials working in places of deprivation of liberty and persons deprived of their liberty.

11. DISPUTE RESOLUTION

11.1 Should any dispute whatsoever arise between the NPM and any independent expert concerning the monitoring activities, such dispute shall be resolved by negotiation and the nature and fact of the dispute shall remain confidential at all times.