



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

An assessment of the National Preventive Mechanism (NPM) in South Africa

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December 2022

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Acronyms and abbreviations

ACJR	Africa Criminal Justice Reform
APCOF	African Policing Civilian Oversight Forum
CYCC	Child and Youth Care Centres
COVID-19	Coronavirus
ICCVs	Independent Correctional Centre Visitors
IPID	Independent Police Investigative Directorate
JDI-SA	Just Detention International – South Africa
JICS	Judicial Inspectorate for Correctional Services
LHR	Lawyers for Human Rights
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
SAHRC	South African Human Rights Commission
UNCAT	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

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ACJR engages in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.

Key aspects of our work include:

- Our explicit human rights focus. International and regional human rights law informs and guides all of our work and we partner with organisations with similar approaches. This distinguishes us from security-focused organisations.
- Our partnerships with local organisations. Partnerships ensure mutual learning and growth. Wherever possible we seek to support reform processes in partnership with government and civil society stakeholders across the continent, to ensure local ownership of reform processes and the transfer of skills.
- Our expertise in both social science research and legal research. We carry out empirical social science research to inform policy and processes, in addition to legal analysis and research.
- Our ability to engage in multiple languages. We have researchers fluent in English, French, Portuguese and Afrikaans, ensuring that we are able to engage with most countries in Africa.
- Our ability to translate law and research into plain language and multi-media. Where appropriate, our work is transformed for particular audiences.
- Our academic rigour. We are based at the Dullah Omar Institute which is in turn part of the University of the Western Cape. We regularly publish in academic journals.

Acknowledgements

We are grateful to the Open Society Foundations (South Africa) for supporting our work and making this research possible.

We hereby would like to acknowledge the Detention Justice Forum and its members for assisting us through this process. Special thanks is given to the following members for participating in the survey:

- African Policing Civilian Oversight Forum (APCOF)
- Cape Mental Health
- Just Detention International – South Africa (JDI-SA)
- Lawyers for Human Rights (LHR)
- Lawrence House Child and Youth Care Centre (Scalabrini Centre of Cape Town)
- Scalabrini Centre of Cape Town

1. Introduction

As a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the Optional Protocol to UNCAT (OPCAT), South Africa is obliged to take steps to prevent and eradicate torture as required by UNCAT, OPCAT and the Constitution.¹ After signing OPCAT in 2006 and ratifying it in March 2019, South Africa designated a National Preventive Mechanism (NPM), with the SA Human Rights Commission (SAHRC) being the coordinating structure. Parties to OPCAT are required to establish NPMs which are independent visiting bodies established at domestic level, composed of one or more structures for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.² The mandate extends to all places where people are or may be deprived of their liberty and would include, but not limited to police stations, correctional facilities, immigration detention centres, child and youth care facilities (including secure care), and mental health institutions.³

South Africa has 238 operational correctional facilities, six military detention barracks, two military correctional centres, 1158 police stations and 24 stand-alone psychiatric hospitals countrywide.⁴ Although the number of child and youth care centres (CYCC) could not be ascertained, recent reporting did indicate that there are on average some 14 500 children in secure care facilities at any one time.⁵ With the exception of data on people detained in correctional facilities, data on people deprived of their liberty at police stations, military detention, and so forth is difficult to establish and not readily available in the annual reports of the responsible government departments. The inmate population in correctional facilities was 143 244 at the end of March 2022.⁶ The number of people arrested in the 2021/22 financial year was 1 412 879.⁷ The duration of detention following arrest is uncertain as arrested people may be released on warning, police bail and so forth, or may remain in police custody until their first court appearance within 48 hours as required by law.⁸

As with regards to the NPM, South Africa adopted what is referred to as the 'coordination model', bringing several existing mechanisms under the umbrella of the NPM, rather than establishing a stand-alone institution.⁹ The SAHRC

¹ 'Constitution of the Republic of South Africa' (1996), sec. 12.

² UN, 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006), art. 17, <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel>.

³ UN, art. 4(2).

⁴ Judicial Inspectorate for Correctional Services, 'Annual Report 2021/22' (Pretoria, South Africa, 2022), 9; South African Police Service, 'Annual Report 2021/22' (Pretoria, South Africa, 2022), 45; Maqhina M., 'Phaahla Says 44 out of 357 Hospitals Have Psychiatric In-Patients Units', *IOL*, 4 July 2022, <https://www.iol.co.za/capetimes/news/politics/phaahla-says-44-out-of-357-hospitals-have-psychiatric-in-patients-units-d8b4b461-c093-4c88-8810-25b4582728aa>; SA. Minister of Defence and Military Veterans, 'Questions & Replies: Defence & Military Veteran', Parliamentary Monitoring Group, 31 December 2012, https://pmg.org.za/question_reply/407/.

⁵ Dept of Justice and Constitutional Development, '2020/21 Inter-Departmental Annual Reports on the Implementation of the Child Justice Act (Act 75 of 2008)' (Pretoria, 2021), 101.

⁶ Judicial Inspectorate for Correctional Services, 'Annual Report 2021/22', 9.

⁷ South African Police Service, 'Annual Report 2021/22', 20.

⁸ Constitution of the Republic of South Africa, sec. 35(1)(d).

⁹ South African Human Rights Commission, 'National Preventive Mechanism Annual Report 2020/21' (Johannesburg, South Africa, 2021), 14.

was designated by the government to coordinate the NPM, which is comprised of the SAHRC, the Judicial Inspectorate for Correctional Services (JICS), the Independent Police Investigative Directorate (IPID), the Military Ombud, and the Health Ombud.

Since ratification in March 2019, it appears that to date, the NPM has not been fully functional and institutional arrangements for visiting places of detention under the banner of the NPM remain unclear. There is uncertainty as to how the constituent parts of the NPM will fulfil the responsibilities under OPCAT. This is particularly the case where some of their mandates (and/or enabling legislation) lack adequate powers (i.e., lack of inspection powers, limited scope of mandate to conduct preventive visits, etc.) or they lack institutional independence.¹⁰

Nonetheless, it was reported that since the government designated the SAHRC as the NPM coordinating body, it is tasked to ensure the regular and independent monitoring of all places where persons are or may be deprived of their liberty.¹¹

As the NPM coordinating body, the SAHRC hosted a consultation meeting in April 2022 on the review of the NPM institutional structure and acknowledged that the first two years of the NPM were characterised by operational challenges.¹² This period provided the SAHRC's NPM unit an opportunity to identify and assess successes and weaknesses. A review of the NPM institutional structure was undertaken and this led to the development of a proposed new governance and operational framework which is considered by the SAHRC to be compliant with OPCAT. It is uncertain whether legislation will be drafted to formalise the structure. Furthermore, the extent to which the NPM is able to carry out a visiting role to all places of deprivation is also unclear.

In view of the above, the members of the Detention Justice Forum (DJF) agreed to assess the operational functionality of the NPM in the respective sectors of the DJF member organisations. This also provided an opportunity to identify issues for clarification on the NPM's mandate and its relations with other components as well as government departments responsible for places where people are or may be deprived of their liberty. What follows below is then to a large extent exploratory in nature with a view to give some account on the substantive work of the NPM, but also to identify methodological challenges. The intention was also to undertake two surveys reviewing the work of the NPM in 2022. Developing a methodology and consulting stakeholders on a data collection tool turned out to be more time consuming than anticipated. Efforts to gather information from government departments also turned out to be fruitless despite numerous efforts.

It should be emphasised that the findings presented here is part of a process that is very much a learning one from a monitoring point of view, and that the uncertainties regarding the NPM's functionality as well as the extent to which it has been able to engage in active monitoring place limitations on the possible results from this exercise. Nonetheless,

¹⁰ South African Human Rights Commission, 14–19.

¹¹ South African National Preventative Mechanism, 'The Conditions and Treatment of People in Police Custody in South Africa: Report on Visits to Police Stations by Independent Custody Visitors 2019-2020' (Johannesburg, South Africa, 2021).

¹² South African National Preventative Mechanism, 'Invitation: Consultation on a Review of the National Preventive Mechanism Institutional Structure', 20 April 2022.

the intention is to explore the methodological opportunities and challenges, and build support for complying with the requirements under OPCAT.

2. Overview and limitations of the project

The DJF is a civil society coalition, comprising of non-governmental organisations and individuals seeking to ensure that the rights and well-being of those who are detained, are respected as provided for under the Constitution, laws, and international human rights norms and standards.¹³

On 24 June 2022, the DJF convened a special meeting to discuss the work of the NPM. The main objective of the meeting was to learn about DJF members' engagements with the NPM, to note the concerns of various organisations regarding the functioning of the NPM and to develop a strategy on how the DJF can use its collective energy and expertise to motivate for a more effective, transparent and OPCAT-compliant NPM. Africa Criminal Justice Reform (ACJR), a member of the DJF, agreed to assess the performance of the NPM in terms of its obligations under the OPCAT, and developed a questionnaire, along with members of the DJF.

The questionnaire covered a six-month period (January - June 2022). Between 1 July and 5 August 2022, ACJR scheduled six individual meetings with civil society organisations who form part of the DJF and refer work to the NPM to collect data based on a questionnaire. The following organisations participated:

- African Policing Civilian Oversight Forum (APCOF)
- Cape Mental Health
- Just Detention International – South Africa (JDI-SA)
- Lawyers for Human Rights (LHR)
- Lawrence House Child and Youth Care Centre (Scalabrini Centre of Cape Town)
- Scalabrini Centre

This assessment is exploratory and the organisations interviewed were required to make observations in respect of the sectors they are active in. Their activities may also be geographically limited in scope and it should be emphasized that any findings and observations cannot automatically be generalised as their observations are sector- and area-specific unless otherwise stated. A summary of the observations is presented below.

¹³ 'Detention Justice Forum', Detention Justice Forum: About Us, 2022, <https://detentionjustice.org.za/>.

3. Overview of findings

3.1 Is the NPM exercising its visiting mandate in the sector your organisation covers?

One of the key functions of NPMs is to visit places of detention.¹⁴ There were widely differing responses from the various organisations in respect of their sectors. Most were unsure as to whether or not the NPM is fulfilling its visiting mandate. They were not sure whether visiting and monitoring is taking place at police cells, designated police immigration cells or facilities, CYCC and mental health facilities and if so, who were conducting them. Furthermore, although the JICS Independent Correctional Centre Visitors (ICCVs) are fulfilling its visiting mandate, questions were raised regarding JICS' role as part of the NPM and how the coordination filters down to the ICCVs. JICS, through ICCVs, are monitoring correctional centres as part of their mandates as the judicial oversight mechanism under the Correctional Services Act. There needs to be clarity on when they are functioning as part of the NPM, or only when specifically authorised to do so, or when they are functioning strictly under the authority of JICS.

APCOF indicated that the NPM published a report on visits to police stations in 2021. The report reflected on visits to 150 police stations in 2020/21 by independent custody visitors highlighting, amongst others, abysmal conditions of police detention facilities and also reflects on torture findings in Kwa-Zulu Natal.¹⁵ One can therefore conclude that some form of visiting and monitoring did take place during this period, at least in respect of police detention facilities. APCOF, however, noted that while IPID is part of the NPM, it is clear that the SAHRC is playing a functional role for police custody monitoring. However, there is no clarity on whether IPID is doing the necessary to execute the NPM mandate or whether this will remain a SAHRC competency and what the implication for IPID role in the NPM is or will be. Furthermore, it is unknown if visits were undertaken between the period January - June 2022.

The respondent from Lawrence House CYCC noted that in May 2022, a representative of the SAHRC visited the CYCC to gather more information regarding migrant children with them. The SAHRC representative wanted to interview the children, but since ethics clearance was not obtained from the Western Cape Department of Social Development this was not possible. An interview was done with the Director of Lawrence House.

During the interview, a conversation ensued concerning the status of the children and whether or not the children are 'in detention' or 'deprived of their liberty'. Lawrence House is a Level 2 CYCC. In terms of the Children's Act, a court must order the placement of a child in a CYCC.¹⁶ There are different levels of CYCC and it appears that the children at Lawrence House are not kept against their will as they are allowed external visits. The Western Cape Department of Social Development provides a Level 2 CYCC for placement of children in need of care and protection in less restrictive

¹⁴ UN, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4.

¹⁵ South African National Preventative Mechanism, 'The Conditions and Treatment of People in Police Custody in South Africa: Report on Visits to Police Stations by Independent Custody Visitors 2019-2020'.

¹⁶ 'Children's Act', 38 of 2005 § (2005), sec. 158.

CYCC residential care programmes for temporary placement or long-term placement; such as Lawrence House.¹⁷ Level 3 provides for more restrictive programmes and these are mainly specialised behaviour modification or assessment programmes or a secure care programme.¹⁸ Level 4 provides for the placement of children in conflict with the law (awaiting trial and sentenced children) in accordance with the Child Justice Act.¹⁹ These are also known as ‘secure care facilities’.

OPCAT mandates visits by the NPM ‘to any place where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.’²⁰ Moreover, deprivation of liberty means ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.’²¹ The interpretation of “places where the persons are or may be deprived of their liberty” in OPCAT is inclusive and there is thus not a closed list of places to be monitored. The definition and categories of CYCC cover a wide range of residential facilities and there are degrees of restrictions imposed on the children kept there. This required further exploration. Attempts were made to engage the Western Cape Provincial Department of Social Development to attempt to clarify this and determine whether the SAHRC has engaged them on the situation involving children in CYCC. Unfortunately, owing to bureaucracy and time constraints, we were unable to verify this.

With regard to immigration detention, a distinction should be made between a repatriation centre (Lindela Repatriation Centre, Krugersdorp) and police cells at police stations designated as immigration detention facilities.²² There does not appear to be a visiting or monitoring presence at designated police immigration cells, but the SAHRC does visit the Lindela Repatriation Centre.

Concerns were raised by the Scalabrini Centre and LHR regarding people detained in police immigration cells for longer periods than permitted by law and that this situation continues without monitoring. There does not seem to be a coherent visiting and monitoring plan, particularly with regard to police immigration detention. LHR noted that on a national front, the head of the SAHRC NPM unit has engaged LHR on a number of occasions and has been of great assistance in individual cases brought to their attention (i.e. cases of unlawful detention and access to medical treatment). Moreover, on one occasion, he was able to dispatch SAHRC representatives to a police station for investigation.

¹⁷ Department of Social Development, ‘Child Care and Protection Services’, Western Cape Government, 3 June 2022, <https://www.westerncape.gov.za/site-page/child-care-and-protection-services>.

¹⁸ Department of Social Development.

¹⁹ Department of Social Development.

²⁰ UN, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1).

²¹ UN, art. 4(2).

²² Department of Home Affairs, ‘Determination of Places of Detention of Illegal Foreigners Pending Deportation’, 2022, <http://www.dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation>.

The lack of capacity and financial resources preventing a presence at all places of detention were noted as concerns by LHR. However, one can argue that it is not a requirement or an expectation under OPCAT that the NPM must visit all places where people are or may be deprived of their liberty on a continuous basis. The requirement is to establish a system of regular visits and this may involve the voluntary participation of experts and civil society organisations. The greatest risk of torture is during and immediately after arrest²³ and this will be under the authority of the police in the overwhelming majority of cases. At present there is no independent monitoring of places of detention under the authority of the police and this is a fundamental shortcoming and must be regarded as strategic priority.

Additional questions raised by the organisations interviewed include:

- What is the coordinating relationship between the SAHRC and JICS?
- In the absence of a statutory mandate of the IPID to conduct monitoring visits and budgetary constraints, what is the NPMs plans to ensure that police cells are regularly monitored?

3.2 Has the NPM devised methods of fulfilling its preventive mandate in relation to places of detention in the sector your organisation covers which minimise the need for physical visits, but which nevertheless offer effective opportunities for preventive engagement?

All organisations interviewed were not aware if the NPM devised alternative methods of fulfilling its preventive mandate which minimised the need for physical visits, with the exception of one organisation that noted that this was not done at all in any places of immigration detention.

LHR and Scalabrini Centre indicated that there is no official complaints mechanism system at police stations. Lawrence House noted that not even the Department of Social Development has devised an alternative method because when dealing with children, a different approach is needed and people working in the sector need to be sensitive, skilled and capacitated to work with children.

Additional questions raised by the organisations interviewed include:

- Has JICS devised methods of fulfilling its preventive mandate in relation to correctional facilities which minimise the need for physical visits, but which nevertheless offer effective opportunities for preventive engagement?
- Has the NPM devised alternative methods of fulfilling its preventive mandate in relation to monitoring police custody cells, immigration detention centres which minimise the need for physical visits, but which nevertheless offer effective opportunities for preventive engagement? Do alternative forms of engagement exist?
- Does the NPM request from SAPS information including policies, instructions and data from their own internal monitoring and inspections of police cells? If not, why not?

²³ R Carver and L Handley, 'Conclusion', in *Does Torture Prevention Work?*, ed. R Carver and L Handley (Liverpool: Liverpool University Press, 2016), <https://doi.org/10.2307/j.ctt1gpcbdt>.

3.3 Is the NPM discussing with relevant national and provincial authorities the situation of people deprived of their liberty in the sector your organisation covers?

The majority of the organisations were uncertain whether the NPM was discussing and engaging with relevant national and provincial authorities regarding the situation of people deprived of their liberty.

Two organisations from the CYCC and mental health sector agreed that there was engagement between national and provincial authorities, although this takes place at a limited scale. There are stakeholder engagements and discussions at intersectoral level within the children and mental health sectors, but whether the NPM is directly engaging and having discussions with the national departments of these two sectors is unknown. In respect of CYCCs, the Lawrence House Director noted that there is coordination between the provincial Department of Social Development and the National Department for auditing purposes. Statistical information, such as admission information and so forth, are submitted to the Western Cape Department of Social Development. It was further noted that there is also an incident protocol, requiring that all incidents be reported to the Department of Social Development. An audit is conducted annually by the national department and the Auditor-General. Cape Mental Health also noted that there are fora and engagements between the Department of Justice, Department of Health and various provincial and other national departments.

With regard to prison oversight, JDI-SA noted that the extent of JICS engagement at provincial level is uncertain and not known and more information should be made available on such engagements.

A question raised by the organisations interviewed is:

- Is the NPM discussing with relevant national and provincial authorities regarding the situation of people deprived of their liberty in police holding cells and Lindela?

3.4 Is the NPM increasing the collection, scrutiny of data relating to places of detention in the sector your organisation covers?

The responses to this question was mixed. Most organisations reported that the NPM was not collecting and scrutinising data, or at least this had not occurred in the past six months, or they did not know if this was happening.

JDI-SA noted that JICS collects, checks and publishes data on correctional facilities on a quarterly and annual basis and that there is also the will to improve data collection on sexual abuse in prisons. It was further noted that JICS supported the training on sexual violence that JDI-SA provides and they are now conducting training with ICCVs on this issue. It is intended that this will enable more effective monitoring by the ICCVs.

Moreover, although the NPM did not release any reports publicly during the period under review, an NPM report on a pilot study relating to police custody was released in 2021, as noted above. This is an indication that some work was undertaken by the NPM.²⁴

According to Cape Mental Health and the Lawrence House Director, at provincial level, data related to children in detention and people in mental health institutions are being gathered by the state. It is uncertain if the NPM is collecting and scrutinising this information from the respective sectors or departments. Thus, the extent to which this data finds its way to the NPM, if at all, is not clear.

As for immigration detention, Scalabrini Centre indicated that the availability of data in the public domain is minimal and inconsistently released. It is important that such information is collected and made available in the public domain as it will promote transparency and support monitoring of immigration detention (especially overcrowding in police holding cells. Moreover, it is important to verify the detention periods of accused persons (which should not exceed 120 days) and verify if the accused was kept at a police holding cell designated for immigration detention.²⁵ LHR confirmed that as for the Lindela Repatriation Centre, up to a certain point information was collected because of a High Court decision in 2014 ordering the Department of Home Affairs to issue information regarding the people detained at Lindela, but this is not done for police holding cells.²⁶ They are not sure if the SAHRC is still receiving these reports. Before the COVID-19 lockdown, the SAHRC was receiving regular reports on the Lindela Repatriation Centre and LHR was reviewing these reports. LHR could determine from the data that the number of people detained beyond the maximum detention period of 120 days reduced drastically. This was also a mechanism to verify if there were any children in custody. The court order appears to have had a positive impact.

Additional questions raised by the organisations interviewed include:

- Does the NPM have a plan for the regular reporting and release of information relating to police cell monitoring?
- Is the NPM increasing the collection and scrutiny of data relating to immigration detention facilities (police holding cells and Lindela) and if so, is the data accessible and will this be done on a regular basis?

3.5 Is the NPM releasing quantitative (i.e. statistics) and qualitative information (e.g. case studies, case law etc) on the situation of people deprived of their liberty in the sector your organisation covers?

The overwhelming response by the organisations was that the NPM was not releasing adequate data on the situation of people deprived of their liberty in the police, immigration, mental health and CYCC sectors. As previously noted, JICS regularly publishes quarterly and annual reports and presents this to Parliament. The data in the annual reports of the

²⁴ South African National Preventative Mechanism, 'The Conditions and Treatment of People in Police Custody in South Africa: Report on Visits to Police Stations by Independent Custody Visitors 2019-2020'.

²⁵ 'Immigration Act', Pub. L. No. 13 of 2002 (2002), sec. 34(1).

²⁶ South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198 (28 August 2014).

SAHRC, Military Ombudsman, IPID and Office of the Health Ombud are insufficient and do not meet the NPM reporting requirements envisaged under OPCAT. To date the NPM has released two annual reports and the information provided therein is not of a sufficient scope, depth and detail to properly reflect the state of play.²⁷ As noted above, the SAHRC released a monitoring report on police detention conditions, but this information was published in 2021, thus predating the period under review here.

JDI-SA noted that JICS should release more detailed disaggregated data. Moreover, it was pointed out that there is a need to move away from gender binary approaches of reporting as this does not give a full account of the experiences and needs of non-binary groups.

Scalabrini Centre noted concerns that the annual reports of the coordinating NPM acknowledges the challenges of immigration detention, but there is no commitment by the NPM to do more about the situation and the report does not have substantive information on the extent of the problem.²⁸ Furthermore, in the past JICS' annual reports sometimes had a focus on children, and immigration but lately there is not much substantive information on these sectors. For example, in 2015 and 2016, JICS provided a breakdown of migrants detained in Pollsmoor prison and visits were arranged to ensure adequate representation to them. The Department of Home Affairs releases data on immigration detention only sporadically, and the data released is often unreliable.

Additional questions raised by the organisations interviewed include:

- Does the NPM have a plan for the regular reporting and release of quantitative and qualitative data relating to their police cell monitoring?
- Is the NPM collecting, scrutinizing and releasing quantitative and qualitative information on the situation of foreigners in detention (police cells and Lindela)? If so, can this information be made publicly available?

3.6 Have measures been put in place by the NPM to establish 'hotlines' (e.g., telephone, e-mail and secure postage) within places of detention in the sector your organisation covers which will allow inmates to lodge their grievances, in cases where NPM structures are not physically visiting detention facilities?

In general, all the organisations interviewed had limited knowledge about whether the NPM has put measures in place to establish 'hotlines' (e.g., telephone, secure e-mail and postal facilities) within places of detention allowing persons to lodge grievances.

With reference to immigration detention, none of the organisations were aware if such measures existed. LHR noted that prominent judges (Kollapen and Cameron) have visited the Lindela Repatriation Centre and consistently noted the need for a complaints mechanism. However, to date it appears little has been done to address this. Scalabrini Centre

²⁷ South African Human Rights Commission, 'National Preventive Mechanism Annual Report 2019/20' (Johannesburg, South Africa, 2020); South African Human Rights Commission, 'NPM Annual Report 2021'.

²⁸ South African Human Rights Commission, 'NPM Annual Report 2020', 11,24; South African Human Rights Commission, 'NPM Annual Report 2021', 35.

noted that civil society organisations have set up hotlines outside detention facilities during the COVID-19 period to ensure that there is a way in which the public can channel their complaints and queries. As a result of their good working relationships with migrant community leaders and immigration officers, Scalabrini Centre generally becomes aware of detained immigrants by word-of-mouth.

Lawrence House noted that the regulations governing CYCC require grievance procedures to be established in all CYCC.²⁹ At Lawrence House, there is a house committee which is the first level of contact for lodging grievances. The house committee is elected by the children residing there and they engage with staff and the board to ensure effective communication.

In terms of correctional facilities, beyond available postal facilities and making phone calls if the phones are working, it was not clear whether alternative methods of communication exist within facilities which would minimise the need for physical visits. It was noted that family members are able to lodge complaints directly with the JICS head office and that JICS social media and complaints email address have been useful tools for requests. Cape Mental Health noted uncertainty regarding resources and measures available in mental health facilities for lodging grievances. The organisation raised further concerns regarding engagement and appropriate methods for lodging grievances for people who have a mental health illness or an intellectual disability. For example, it is important to understand that people with intellectual disabilities may have difficulties using conventional formats of communication and may require more accessible means of lodging grievances, such as physical interaction.

An additional question raised by the organisations interviewed is:

- Is there a plan to establish 'hotlines', secure e-mail and postal facilities or other alternative mechanisms which will allow people who are or may be deprived of their liberty to lodge their grievances, in cases where NPMs are not physically visiting detention facilities?

3.7 What measures are the NPM taking to (a) enhance the distribution of information concerning the work of the NPM within places of detention in the sector your organisation covers and (b) ensuring that there are channels allowing prompt and confidential communication?

It appears that JICS is doing more to enhance the distribution of information on their work and ensuring that there are channels allowing prompt and confidential communication. JDI-SA noted that there are limited measures taken by the SAHRC to enhance the distribution of information concerning the work of the NPM. There seems to be general public awareness around ICCVs and their mandate because JICS strives to ensure that its channels of communication are prompt and confidential and the public is aware of them. Despite this, there is the perception amongst some inmates that ICCVs are staff of the Department of Correctional Services and some inmates may feel reluctant to lodge complaints with ICCVs. Cape Mental Health again indicated the need for appropriate engagement and communication channels with persons with mental disabilities. Moreover, it was indicated that besides one annual meeting and annual

²⁹ 'Children's Act - General Regulations Regarding Children', No. R. 261 Regulation Gazette § (2010), sec. 74.

report, there has been very little engagement between the NPM and civil society on the work of the NPM within places of detention.

An additional question raised by the organisations interviewed is:

- What measures are the NPM taking to enhance the distribution of information concerning the work of the NPM within police custody and ensuring prompt and confidential communication?

3.8 Is the NPM engaging with (a) families of people deprived of their liberty and (b) their legal representatives to verify conditions of detention and treatment in the sector your organisation covers?

There were mixed responses regarding the engagement of the NPM with family members and legal representatives. Access to legal representation for detained persons is provided for in the Constitution.³⁰

In respect of correctional facilities, JDI-SA noted that JICS engages with families and legal representatives and there is also an open communication channel for families to contact the Office of the Inspecting Judge and the JICS head office. As far as immigration detention is concerned, it is not clear whether such engagements take place, although the organisations interviewed noted that it might be done on a small scale, which they may not be aware of. It was further pointed out that although families can get access to loved ones at Pollsmoor prison through the SAHRC, it is not the case at all prisons.

Lawrence House noted that as far as CYCC's are concerned, the Department of Social Development and the NPM hardly engages with them.

APCOF and Cape Mental Health noted that they are not aware of any engagements between the NPM and families or the legal representatives of suspects in police custody or at psychiatric facilities.

Additional questions raised by the organisations interviewed are:

- Does the SAHRC engage (a) the families of immigrants in detention and (b) their legal representatives to verify conditions of detention and treatment of foreigners in police cells, Lindela repatriation centre and other places of detention?

³⁰ Constitution of the Republic of South Africa, sec. 35(2) (b-c).

3.9 Is the NPM engaging with civil society actors working with people deprived of their liberty on an on-going basis in the sector your organisation covers?

Civil society organisations and human rights NGOs should always be included in the process of deciding upon the NPM designation and structure for a given country and it is important that the NPM engages meaningfully with civil society organisations as this will further promote its independence.³¹

For example, the Slovenian NPM model embodies formal cooperation between an NPM and selected NGOs. Civil society organisations actively support and implement NPM duties including undertaking and reporting on visits to places of detention, as well as making recommendations to the NPM. This close corporation between the NPM and civil society fosters mutual ties and encourages the transfer of information.³²

The responses provided by the interviewed organisations suggest various degrees of engagement. For organisations operating within the correctional services sector, it was indicated that JICS and the Inspecting Judge, in particular, are helpful, responsive, open and transparent in engaging with civil society organisations. The majority noted that the SAHRC does not engage with civil society on a regular, sustained basis and their engagement has not been sector-specific.

Scalabrini Centre noted that it is possible that the NPM is engaging with civil society organisations in the immigration detention sector, but they do not have first-hand experience of this. This view was supported by LHR, noting that there is no proactive engagement between the NPM and civil society organisations in the sector. These two organisations also indicated that the NPM is accessible only at a national level, and there is no presence at provincial level. However, LHR felt that the Section 11 Committee (of the SAHRC) that was initially set up to discuss NPM-related matters was helpful and provided a sense of engagement with civil society.

APCOF indicated that it has a working relationship with the NPM in terms of an agreement with the SAHRC, but there has been no sector-specific engagement, particularly not in the last six months. Moreover, it was pointed out that the stakeholders' meeting held at the beginning of 2022 was aimed at stakeholder engagement on the proposal for a governance model and institutional structure and was not focused on substantial issues covering places of detention. With reference to CYCC, the respondents were not aware of any engagement by the NPM with organisations in this sector, at least not on an on-going basis.

Additional questions raised by the organisations interviewed include the following:

- What is the NPMs plan for finalising their position paper on the engagement with civil society organisations?
- When will the SAHRC engage meaningfully with civil society?

³¹ M Birk et al., 'Enhancing Impact of National Preventive Mechanisms-Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward' (Boltzmann Institute of Human Rights and the Human Rights Implementation Centre of the University of Bristol, 2015), 70, https://www.bristol.ac.uk/media-library/sites/law/hric/2015-documents/NPM%20Study_final.pdf.

³² P Doubek, 'The National Preventive Mechanism a Key Human Rights Component of Well-Functioning Democracy', *Taiwan Journal of Democracy* 15, no. 2 (2019): 192.

3.10 Has the NPM submitted an annual report to Parliament reflecting on the sector your organisation covers (e.g., police, correctional facilities, immigration etc.)?

An NPM should strengthen its visibility and credibility and regularly issue annual reports.³³ The majority of the organisations interviewed noted that the NPM submitted an annual report in 2021 to Parliament reflecting information related to their relevant sectors.³⁴ The lack of qualitative and disaggregated data in the NPM annual reports was raised as a concern by the organisations interviewed.

It was noted that although JICS submits an annual report, there is little to no information regarding immigration detention centres. Cape Mental Health and Lawrence House did not know if any sector-related information is contained in the NPM annual reports.

4. Concluding observations and recommendations

As previously mentioned, this report is exploratory in nature and provides an opportunity to understand the extent to which the NPM is functional since South Africa ratified OPCAT in March 2019.

The report makes the following key observations regarding the NPM:

Mandate and NPM coordination

1. It is evident that the South African NPM is not yet operational to the desired level. On the positive side, with reference to prison oversight, regular monitoring visits to correctional facilities are conducted by JICS. Nonetheless, questions have been raised regarding JICS' role as part of the NPM, how the coordination filters down to the ICCVs and what coordinating relationship exists between the SAHRC and JICS.
2. Unfortunately, regular visits to other places where people are deprived of their liberty is lacking and there does not seem to be a coherent monitoring plan in place. Moreover, clarification is needed in terms of who will be the *de facto* NPM for places such as CYCC or other children's facilities falling under OPCAT and whether this will be the SAHRC as the coordinating structure.
3. It is recommended that the uncertainty regarding the NPM's mandate and how the constituencies forming part of the NPM will fulfil the responsibilities under OPCAT needs to be addressed and the powers and limits of each NPM constituent component should be clarified in respect of inspection powers and scope to conduct preventive visits.

Interim measures and alternative mechanisms of monitoring

³³ Doubek.

³⁴ South African Human Rights Commission, 'NPM Annual Report 2021'.

4. Although the NPM is not yet fully operational and regular monitoring visits are not taking place, other methods of monitoring (i.e., data collection, external monitoring and reporting) that do not require physical visits, can be undertaken as a supportive measure to ensure that monitoring takes place. It is thus recommended that current gaps and limitations of the NPM (particularly capacity) are identified and that alternative measures of monitoring are put in place.

List of places subject to OPCAT monitoring

5. OPCAT does not prescribe a closed list of places to be monitored and broadly describes deprivation of liberty to mean 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'³⁵
6. As previously mentioned, clarification is needed as to whether visits by the NPM to CYCCs will only be limited to secure care facilities or all CYCCs. This also applies to the scope of NPM visits in the field of mental health and whether NPM visits will focus on specific mental health patients (i.e., state patients) and mental health facilities (i.e., psychiatric hospitals, sections of hospitals designated for psychiatric care). There may also be the less obvious places where people may be deprived of their liberty that should also be mentioned here as a note of concern, such as transit zones and court holding cells. It is thus important that a list of places that are subjected to oversight visits and monitoring is identified, published and continuously updated.

Concurrent national and provincial legislative competence

7. Health services and child care facilities are the responsibility of concurrent spheres of government. The Constitution lists health services as a functional area of concurrent national and provincial legislative competence.³⁶ Child care facilities are listed as a local government function and national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of child care facilities.³⁷ It is essential that places of deprivation that fall within shared governmental competencies are clarified. The question is who is accountable to the NPM?

Availability of data for monitoring and effective oversight

8. The collection, collation and scrutiny of data relating to various sectors and the on-going liaison and engagement with various sectors regarding the data on people deprived of their liberty is one way to ensure that some level of oversight occurs. However, the interviews conducted found that this does not seem to be taking place on a structured and on-going basis. The information provided in the NPM annual report is sparse and limited, and many questions remain unanswered. Effective monitoring and oversight will not be possible without appropriate disaggregated data. It is recommended that there is some consistency and focus on how the NPM presents data and that information relating to places where people are or may be deprived of liberty are disaggregated to allow for thorough monitoring.

³⁵ UN, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(2).

³⁶ Constitution of the Republic of South Africa, 1996, Schedule 4 pt. A.

³⁷ Constitution of the Republic of South Africa, Schedule 4 pt. B.

9. It is important to consider the points raised by organisations in the CYCC and mental health sectors regarding the sensitivity of the NPM to the needs of children and people living with mental and psychosocial disabilities. There may be a need for specialised form of monitoring when dealing with these vulnerable groups.

NPM engagement with civil society organisations

10. Finally, the observations from this report highlight that civil society organisations are important actors in the work of the NPM. The example of the Slovenian NPM illustrates that civil society organisations play an important role in providing knowledge, expertise, developing recommendations as well as providing assistance to the NPM, if offered the chance to do so. The interviews conducted in this report indicate that civil society organisations are keen to collaborate with the NPM, but this requires that the NPM is transparent, accessible and responsive. There is at present uncertainty amongst those interviewed on whether the NPM is conducting monitoring visits, collecting data and liaising with governmental stakeholders in the various sectors. Moreover, there was also confusion expressed regarding the organisational structure of the NPM. There is a clear need for substantial and sustained engagement between the NPM and civil society organisations.
11. It is recommended that the South African NPM effectively engages with various sectors of civil society including and not limited to the organisations interviewed in this report to strengthen the monitoring capacity and results.

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