



Memorandum on the Architecture of the National Preventive Mechanism (NPM) and its Role in Combating Torture and Other Forms of Cruel, Inhuman and Degrading Treatment and Punishment

From Professor Jeremy Sarkin on behalf of the South African Coalition for Transitional Justice (SACTJ) 25 October 2021.

Introduction

Torture and other forms of cruel, inhuman, degrading treatment and punishment were routinely and widely practised during the Apartheid era in South Africa. However, these human rights abuses are still rife in the country and need to be combated in a variety of ways. South Africa is obliged to take steps to eradicate torture and these other types of violations not only because of South Africa's Constitution (especially Section 12 of the Bill of Rights) but also because of the country's international obligations.

South Africa's international obligations stem from the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which South Africa has ratified.

To support CAT, an Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted in 2006, which South Africa joined when the country ratified OPCAT in 2019. Upon ratification, OPCAT requires countries to establish a National Preventive Mechanism (NPM) to monitor all sites of confinement, detention, or incarceration, that deprive people of their liberty in all forms.

South Africa is in the process of setting up its NPM, and while there are statements and documents that provide that civil society is to be included, and will play a role in the NPM, there are a variety of issues that the South African Coalition for Transitional Justice (SACTJ) wishes to

raise to ensure that the NPM is well structured and functions effectively. This is to ensure the NPM can be well equipped to fight the scourge of torture, and the other abuses, in places of confinement and detention in South Africa.

Therefore, the SACTJ has prepared this Memorandum on issues that ought to be addressed in the formation of the NPM. These recommendations are made to ensure that the NPM is best placed to play the role that NPMs are meant to play around the world.

This Memorandum is being delivered to the various partners of the NPM, and the coordinating process of the NPM, as well to other interested parties, to raise some of the issues of concern that SACTJ has regarding the creation of the NPM, and its modus operandi. SACTJ wishes to play a constructive role in this regard and stands ready to engage on these issues and the work of the NPM.

Making the NPM more democratic, the need for more resources and legislative reform.

While the initiative on the NPM is to be welcomed, there are various issues that ought to be addressed to ensure that the process is more democratic, open, transparent, and fit to deal with the matters under its umbrella. While in 2013 South Africa adopted the Prevention and Combatting of Torture of Persons Act, the legislation is quite limited and needs to be much further developed. For example, there is a need to ensure that places of detention, and issues such as detention registers, are covered by the law, to prevent torture and other abuses. There is a need to criminalise certain conduct to avoid human rights violations in places where such egregious conduct occurs. There is a critical need for the law to provide the NPM with unrestricted, unannounced, and anytime access to all places of confinement. The law should provide that restricting access to NPM officials, and the registers of such places, are criminal offences.

Resources are also necessary to ensure the NPM achieves its goals. Thus, a separate budget from the National Treasury ought to be allocated to ensure that the NPM is given the priority it deserves.

More inclusive and having a broader consultative process.

The NPM process needs to be more inclusive of all the various stakeholders including institutions that play a role in monitoring and dealing with all places that are affected by the acts of torture and other abuses. Thus, the Judicial Inspectorate for Correctional Services (JICS), the Independent Police Investigative Directorate (IPID), the Military Ombud, and the Health Ombud (and maybe others) should be equal partners with the South African Human Rights Commission (SAHRC), in the functional work of the NPM. All these actors should jointly determine the operational role of

the NPM, and issues such as the processes for appointment of detention visitors, the choices made for appointment in the NPM, as well as how the NPM is run and what it does.

Civil society also needs to be included to play a key role in the NPM to ensure that it is not only state institutions that make up the NPM. This will further promote independence and diversity, which are seen to be hallmarks of the best practices of NPMs. Civil society in South Africa played a key role in advocating for the ratification of OPCAT and, because of its status, role, and expertise, should have an important functional role in the NPM. Therefore, space should be provided for it to be permanently represented and play an active role in the NPM. A network of civil society organisations could also be established to meet every few months to ensure broad consultation and active interventions into the NPM.

Using existing expertise as well as civil society actors

Existing expertise such as the independent visitors of the Inspecting Judge ought to be used as they have the expertise and knowledge on monitoring places of detention. There are many civil society organisations (CSOs) with knowledge and expertise which could also be integrated. There could be a panel of experts as well as lay visitors monitoring places of deprivation of liberty. There is, however, no need to “reinvent the wheel” when the Inspecting Judge has been doing this for years. It is a matter of enhancing the process to ensure CSOs have more of a direct role.

Non-disclosure issues

The document on the “Role of Civil Society in The Work of The National Preventive Mechanism” prepared by the National Preventive Mechanism Unit of the South African Human Rights Commission, is problematic on a range of fronts, including its restrictive interpretation of when information can be released by those involved in the process. This serves to undermine the NPMs independence and transparency. CSOs, by their nature, get involved to improve democratic and human rights compliance by the state. While certain matters ought to remain confidential, the document has overly broad restrictions that are not compatible with the Constitution’s requirements of openness and transparency. The correct balance needs to be achieved between areas where confidentiality is required and the need to be able to bring criticisms, and checks of due diligence, to the fore when appropriate.

Liability

The document issued on the “Role of Civil Society in The Work of The National Preventive Mechanism” notes that the “NPM will not be liable for any risk, direct or indirect damage to property or person, costs and expenses, injury or loss incurred to any expert or monitor in the

course of the monitoring under the NPM mandate.” More problematically, it further provides that: “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.” This is both inappropriate and practically unfeasible. People who are injured while doing the work of the NPM need to be protected and should not have to indemnify the NPM for what occurs to them. An insurance scheme needs to be built into the NPM to cover people who are harmed. Without this, there will be reluctance for people to do the work. The purpose and character of the NPM is to protect people from undeserved harm, which should include those who carry out its work.