



African Policing Civilian Oversight Forum

# **Proposed Governance and Institutional Model for the National Preventive Mechanism**

## **Report of a review and modelling for the South African National Preventive Mechanism**

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**African Policing Civilian Oversight Forum**

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# 1 Executive Summary

The African Civilian Oversight Forum (APCOF) was commissioned by the South African Human Rights Commission (SAHRC) to conduct a review of the governance and institutional structure for the South African National Preventive Mechanism (NPM), in order to propose changes, and draft complementary strategic and human resource plans. This research formed the first part of a broader two-part project, which also includes a process of costing the proposed governance structure (the latter being conducted by a third party).

This research was undertaken to support ongoing reflections by the NPM member institutions on the challenges for the operation of the current multiple body NPM structure. Substantial research was undertaken over two and half months, with a document review, and numerous semi-structured interviews with key stakeholders, to identify the factors that the proposed governance structure, strategic and human resource plans, would need to address.

At the outset, consideration was given as to whether the current multiple body NPM model would be maintained, but strengthened by proposed changes to the governance structure, or if a new, standalone body should be established. It was determined that the most pragmatic option, in the short-to mid-term, was to keep the current model. Consequently, a governance model was developed that would strengthen the multiple body NPM model, drawing on the findings of the national research conducted, as well as the lessons learnt from comparative research of NPMs operating in other countries.

The experience of the NPM in South Africa is not unique and reflects the experiences of other NPMs formed of existing, and multiple institutions. Challenges include ensuring coherence, and compliance with OPCAT, among a diverse group of institutions, and to acquire the resources necessary to carry out the NPM mandate fully and effectively.

The governance model set out in this report proposes a number of key changes to strengthen the operation of the NPM in South Africa. First, it proposes that an NPM Coordinating Committee is established as a Section 11 Committee. To be fully effective, this Committee should be multidisciplinary, and be subject to specific powers and functions assigned to it by the SAHRC, in accordance with section 11(4) of the SAHRC Act, 40 of 2013. Second, it proposes that an NPM Secretariat be established to provide crucial support to the NPM Coordinating Committee. This NPM Secretariat should be based, at least initially, within the SAHRC but its work should be managed by the NPM Coordinating Committee. Neither the NPM Coordinating Committee nor the NPM Secretariat will carry out 'NPM visits'. The Secretariat will assist the NPM Coordinating Committee with the coordination, visibility and strategic development of the NPM.

Furthermore, the proposed governance structure also foresees greater engagement with civil society to assist the NPM as a whole with its preventive mandate.

The proposal set out in this report also reflects on the preventive mandate of the NPM, as set out under the Optional Protocol to the Convention against Torture (OPCAT), and suggests an approach to address the current lack of clarity in relation to what is an 'NPM visit', and the current NPM Unit in this functional role. The proposal removes the conflation of the functional and coordinating role from the current structure, and recognises that any visit to a place of deprivation of liberty by an NPM member can be preventive. The approach takes advantage of provincial offices of some of the NPM member institutions as a basis upon which to develop further the framework of regular visits to places of deprivation of liberty.

Finally, it is recognised that some of the challenges facing the NPM cannot be addressed by the governance proposal alone. However, these aspects are reflected in the draft strategic plan, as a basis upon which to strengthen further the operation, scope, and effectiveness of the NPM.

## **2 Background to the review**

### **2.1 Introduction**

In March 2019, South Africa ratified OPCAT, and established an NPM. One of the distinctive qualities of the OPCAT is that it does not prescribe any predetermined organisational or operational structure for NPMs, but allows state parties to adopt mechanisms that are reflective of and responsive to their own national needs and contexts.<sup>1</sup> In order to utilise fully the absence of a specific, pre-existing prescription on organisational form, some states have established new mechanisms, while others have opted to designate existing institutions, including national human rights institutions (NHRIs), as NPMs.<sup>2</sup>

The SAHRC was designated as the coordinator of a cooperative NPM model, with several other institutions proposed as functional members of the NPM. This proposal was subject to legislative changes of the SAHRC Act to ensure that the functioning of the NPM meets the OPCAT requirements of independence, power and functions:<sup>3</sup> The following institutions form part of the functional members of the NPM:

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<sup>1</sup> Article 17, UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199, available at: <https://www.refworld.org/docid/3de6490b9.html> (accessed 14 February 2022).

<sup>2</sup> For a list of designated NPMs, see Association for the Prevention of Torture, 'List of Designated NPM by regions & countries', available at <https://www.ap.t.ch/en/knowledge-hub/opcat-database/list-designated-npm-regions-countries> (accessed on 15 February 2022).

<sup>3</sup> National Preventive Mechanism, 'Who Forms Part of the South African NPM?', available at <https://sahrc.org.za/npm/index.php/about-the-npm> (accessed on 15 February 2022).

- Judicial Inspectorate for Correctional Services (JICS);
- Independent Police Investigative Directorate (IPID);
- Military Ombud; and
- Health Ombud.

In the first two years of its existence, the NPM operations have highlighted the complexity of the environment within which it operates. Critically, its operations also revealed the challenge inherent in balancing both a coordination and functional mandate, and the expectation of all stakeholders – NPM member institutions, other relevant departments, and civil society observers - without a clear governance and institutional structure to guide its operations.

APCOF has therefore been contracted by the SAHRC to conduct a review of the current governance and institutional framework for the NPM, and to propose a new framework to replace the current interim structure. The overall objective of this work is to design a framework to strengthen the functioning and capacity of the NPM, and to promote its compliance with the prescripts of OPCAT. APCOF's proposed framework draws on a review of the current interim structure; the governance and operational challenges identified through document review and interviews with key stakeholders; and analysis of the factors that set the parameters for a feasible NPM structure.

## **2.2 Methodology**

APCOF was commissioned to conduct an institutional review of the NPM. This report forms the first part of a two-part project, which includes a costing of the proposed governance and institutional structure. The second part of the project is being conducted by a third party appointed by the SAHRC.

APCOF's initial proposal envisaged a 12 months period to undertake the reviewing and modeling of the governance and institutional structure of the NPM. By agreement with the SAHRC, the outputs and methodology was revised to ensure completion of APCOF's deliverables within a 2.5 month period ending on the 28 February 2022. The following research phases were agreed to as follows:

- Phase 1: To carry out an institutional review of :
  - The SAHRC in its dual role of coordination and functional; and
  - The mandate and functioning of the other NPM institutions
- Phase 2: To carry out a governance review and develop a proposed framework to strengthen the NPM as a whole;
- Phase 3: To develop a draft strategic plan; and

- Phase 4: To develop a draft human resource plan.

In addition to the above, the APCOF consultancy team undertook a review of NPM needs during November – December 2021. This phase involved the following activities a review of key documents (see **annex 1**) to understand the functioning of the NPM under its current governance and operational framework, and to assess this against the requirements of OPCAT (which are set out as **annex 2**). It also involved a comparative analysis of the operational and governance frameworks adopted by similarly styled NHRI-coordinated NPMs, and multi-body NPMs in other jurisdictions.

This desk-based review was supplemented by semi-structured interviews with key stakeholders. A briefing on the project and requests for interviews were prepared by the consultancy team, and sent by the NPM to the list of stakeholders agreed (see **annex 3**). The consultancy team followed up and arranged meetings with stakeholders who responded to the request, and interviews were conducted with representatives of the following institutions (see **annex 4** for list of questions):

- National Preventive Mechanism (2 staff members);
- South African Human Rights Commission (2 Commissioners and 9 staff members at national and provincial levels);
- Judicial Inspectorate for Correctional Services;
- Sub-Committee for the Prevention of Torture;
- Department of Justice and Constitutional Development;
- Department of Social Development; and
- National Preventive Mechanism of the United Kingdom.

Requests for interviews were made to the Association for the Prevention of Torture, the Civilian Secretariat for Police Service, Department of Correctional Services, Department of Health, Department of Home Affairs, Department of Social Development, Independent Police Investigative Directorate, Military Ombud, and the South African Police Service. However due to a variety of factors, including lack of response and unavailability, interviews with representatives of these key stakeholders were not conducted.

The first phase of the project was completed with a presentation on the consultancy, its terms, and an opportunity for input into the methodology, made by the consultancy team to the NPM Steering Committee on the 7 December 2021.

The presentation to the NPM Steering Committee included an outline of a proposed governance and operational model to support the NPM, based on the institutional review, interviews and document review, was developed. That outline formed the basis of consultations with the SAHRC during January 2022

to confirm the feasibility of the proposal. A broad stakeholder meeting will also be held in March 2022, to assist in the outputs and decisions from this project gaining traction among key decision-makers and potential implementation partners, including government officials and civil society.

### **2.3 Interim structure of the NPM**

At its launch in 2019, the NPM Unit was considered to be an interim arrangement, located within the SAHRC with a ring-fenced budget. The NPM Unit operates as a business unit within the SAHRC and located within the Office of the Chief Executive Officer. This Unit comprises of a programme manager, a SAHRC staff member on secondment, and two contracted researchers employed by the SAHRC. The NPM Unit staff members are governed by SAHRC policies and procedures. The oversight function of the NPM is the responsibility of a designated Commissioner within the SAHRC who has an administrative assistant who provides the administrative support to the NPM Unit.

The SAHRC performs a coordination role of the NPM Unit and it currently involves:<sup>4</sup>

- Ensuring cohesion of methodology and coordination of work.
- Promoting collaboration, information sharing, cohesion and good practice between NPM bodies.
- Convening regular meetings of NPM bodies.
- Facilitating joint activities between NPM bodies.
- Liaising and facilitating engagement with international human rights bodies (e.g. SPT, and other NPMs).
- Making joint submissions to international treaty bodies.
- Representing the NPM with government and other national actors.
- Preparing the NPM annual report and other NPM joint publications.
- Making, in consultation with all relevant NPM bodies, any recommendations to the government that it considers appropriate on any matter relating to the prevention of torture in South Africa.

To strengthen the coordination of the NPM, a Steering Committee was established, comprising of NPM member institutions and departments mandated to manage the places of deprivation of liberty.

The Steering Committee meets quarterly, and receives updates on matters of NPM strategy and business from the NPM Unit and from the responsible Commissioner, and reports from NPM member institutions. The NPM Unit has facilitated the signing of a Memorandum of Understandings (MoUs) with JICS and IPID,

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<sup>4</sup> Report of the South African Human Rights Commission on the Implementation of the OPCAT in South Africa 2019/20. <https://sahrc.org.za/npm/index.php/npm-resources/general-reports>, p 9, (accessed 1 December 2021).



which define the relationship between the SAHRC, NPM Unit and these institutions. MOUs with the other NPM member institutions are yet to be concluded.

Although some progress has been achieved in setting up the NPM, the institutional arrangements for the functioning of the NPM are not yet formalised. For instance, there is no overarching legislative or policy framework defining the governance and institutional structure of the NPM, or the coordination and functional arrangements between the SAHRC and NPM member institutions. The NPM preventive mandate still needs to be developed and included in the enabling statutory instruments of NPM member institutions.

The other substantive work that is carried out by the NPM unit includes coordinating visits under the preventive mandate of the NPM, which also includes visits on an *ad hoc* basis at a provincial level by the SAHRC, and JICS. The data and information gathered during these visits is provided to the NPM Unit.

## **2.4 Maintenance of the co-operative approach for a South African NPM**

A critical question at the outset of this project was whether the current cooperative, multiple body NPM structure adopted by South Africa should be maintained, or whether to recommend the establishment of a new standalone institution directly vested with the OPCAT mandate.

As already indicated above, the current NPM structure brings together multiple oversight institutions that are mandated to collectively form the NPM, under the coordination of the SAHRC. This approach is not unique as it has been one adopted by a number of other state parties to OPCAT, as set out in **annex 5**. It is recognised that a multiple body NPM has a number of potential advantages, given the South African context.<sup>5</sup>

One advantage is that the South African NPM current model has the potential to make use of the existing and developed monitoring frameworks, expertise and infrastructure across most NPM member institutions. For instance, the SAHRC and JICS have similar mandates to the NPM, which includes conducting inspections of places of deprivation of liberty. The SAHRC conducts custody visits to a wide range of places of deprivation of liberty through the work of its human rights officers and human rights monitors from its provincial offices. JICS also conducts regular inspections, and has a presence in most correctional facilities through the system of Independent Correctional Centre Visitors (ICCVs). As discussed in more detail below, the lack of preventive monitoring mandates in the enabling statutes of IPID, the Military Ombud and Health Ombud undermines their involvement as part of a multiple body NPM.

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<sup>5</sup> Ibid, p 17.

A multiple body model has greater capacity for regularity of visits, to the broad range of places of deprivation of liberty required by OPCAT, than a single institution. A cooperative structure also provides NPM member institutions with the associated benefits of being part of a larger collective body with a common objective, and enables increased cooperation and exchange of practices among institutions, by creating the potential structure for joined-up strategy on cross-cutting issues and themes.<sup>6</sup>

The presence of NPM member institutions in the provinces can also significantly enhance the potential for the model to deliver a cost-effective enhancement of geographical coverage, ensuring that visits are carried out to places of deprivation of liberty in a wide variety of areas, including remote areas. Within the current operating parameters, the SAHRC has ten offices (nine provincial and a head office in Gauteng); JICS has five offices (four regional and its head office in Gauteng) but has ICCV coverage across all correctional centres in South Africa; IPID has eleven offices (one head office, one parliamentary office, and nine provincial offices); and the Military and Health Ombuds have a single office. Therefore, there is broad coverage within the country to draw from these institutions to enable a system of regular visits to places of deprivation of liberty as required by OPCAT.

The alternative to a cooperative model NPM was to suggest the creation of a standalone, single NPM model. In terms of this model, the NPM is created as an independent entity with its own legislation, governance structure, leadership structure, policies, processes and procedures, infrastructure and staff. Some state parties to OPCAT have taken the decision to establish a new body to carry out the NPM mandate.<sup>7</sup> Establishing a new, stand-alone body as the NPM has a number of potential advantages:

- It enables the body to be tailored to the exact requirements of OPCAT.
- A coherent and consistent approach to working methodologies, standards, and recommendations may be easier to develop.
- A new NPM would not be part of other oversight bodies, and therefore would not have other roles and responsibilities beyond the NPM mandate. This may assist with creating clarity over the role and enabling the necessary specialism required by the preventive approach prescribed by OPCAT.
- It may be more efficient and effective to create new legislation for a new body than to amend different pieces of legislation for existing bodies.
- A new body may not be encumbered with any historic perceived views on its impact, independence, or other reputational issues that may be directed at existing bodies.

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<sup>6</sup> Ibid.

<sup>7</sup> New standalone NPMs have been established in Bolivia, France, Germany, Guatemala, Honduras, Italy, Kyrgyzstan, Liechtenstein, Mauritania, Paraguay, Senegal, Switzerland, and Tunisia.

However, creating a new body to carry out the NPM mandate has several specific challenges and practical issues that need to be considered in South Africa, such as:

- Core resources will be required for its establishment, including office space, office equipment, vehicles etc., as well as the human resources necessary to carry out the NPM mandate fully;
- It may take time to adopt legislation for its establishment;
- It may take time to recruit persons with the necessary expertise to the NPM;
- There may be challenges with fitting into the existing system of oversight bodies, with whom it will need to build a relationship to avoid duplication and competition;
- The newly created NPM will be unknown to stakeholders and beneficiaries, which may hinder, or slow, its ability to engage with them;
- Staff of the NPM may require training before they can carry out the specific preventive mandate;
- New tools and data management procedures may need to be developed for the NPM to function effectively; and
- Dual mandates similar to the SAHRC and JICS which may create overlaps and dual activities and create confusion regarding monitoring of places of deprivation of liberty.

On balance, maintaining the current NPM model, despite its challenges, was the position identified by APCOF as the most pragmatic and feasible approach, and one that will create the least disruption to NPM activities as the governance and institutional model is implemented. A cooperative model is also aligned to the recommendations of the Asmal Report, which promoted a consolidation, rather than expansion, of human rights-aligned public entities.<sup>8</sup> It also responds to concerns from stakeholders interviewed regarding the lack of new funding available to support the additional OPCAT mandate imposed on member institutions, making the creation of an entirely new entity difficult to justify or envision in the current fiscal environment.

## **2.5 Challenges identified in the current governance and institutional structure**

Multiple body NPMs, with coordination located within a national human rights institution (NHRI), raise several practical considerations for the NPM to function effectively, and to conform to the OPCAT. The first two years of operation for the NPM in South Africa highlighted how complex the operational environment can be characterised by a set of distinct, but interrelated, factors. First, SAHRC by design – uses an operational model that relies on coordination and cooperation with other existing oversight mechanisms,

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<sup>8</sup> Parliament of the Republic of South Africa, 'Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A report of the National Assembly of the Parliament of South Africa', Cape Town, 31 July 2007, available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (accessed 12 February 2022).

each with their own separate statutory mandates (which may not always be fully compliant with OPCAT), strategic plans, operational budgets, and functional independence. The allocation to the SAHRC of both a coordination and a functional role has caused confusion in terms of mandates, responsibility and accountability of the NPM.

Further, in its first year of operation, the NPM was provided with limited resources, in a conservative fiscal environment, with Treasury indicating that no new money would be made available to government departments before 2023. The identification of an institutional structure that is efficient and cost effective, drawing to the greatest extent possible on capacity and resources already available within NPM member institutions, is necessary but remains outstanding.

Additionally, when multiple, existing bodies are designated to carry out the NPM function, this does not mean that it will be 'business as usual' for the member institutions. Typically, to carry out the specific preventive mandate of the NPM, a number of changes and actions will be required, including:

- Additional resources to enable the multiple bodies to carry out the specific preventive mandate of the NPM.
- Legislative reform to reflect the NPM mandate and ensure all member bodies of the NPM have the necessary independence, powers and guarantees set out in Articles 4, 18, 19 and 20 of OPCAT.
- A structure for coordination to ensure that there is a coherent and joined-up approach among the member bodies of the NPM. This will also require adequate resources to fulfil this function effectively.
- The creation of a distinct NPM 'identity' that is nurtured among NPM member bodies. There needs to be clarity over what activities are undertaken in the name of the 'NPM', and people with whom the NPM members are in contact need to understand the role of the NPM – what it can and cannot do.
- A change in 'mindset' may be required by individuals in existing bodies to carry out the specific preventive approach of the NPM, which is based on proactive, on-going constructive dialogue, rather than on responding to complaints, to which they might be more accustomed.
- Additional training for those carrying out the NPM role, to develop a preventive approach.

The SAHRC recognises some of the shortcomings of the current NPM structure, which are highlighted in its report on the implementation of OPCAT in South Africa 2019/20. This includes the challenge of ensuring coherence – including approach, working methods, objectives, methodology, and other factors, among a diverse group of institutions. From a coordination perspective, as with other NPMs that exist within NHRIs, there can be difficulty in attaining financial and operational autonomy if the NPM is not subject to its own legislative instrument that provides for a separate status, visibility and relationship with the NHRI. From a functional perspective, every institution in a multiple body NPM needs to comply with the requirements of

OPCAT – which means, for example, that each institution comprising the NPM needs to be independent of the bodies they oversee. This is not the case in South Africa.

On the issue of mandate, IPID has no statutory mandate to conduct preventive monitoring visits, and this will need to be addressed if it is to carry out visits to places of detention such as police holding cells, vehicles and court cells. Limited information was available about the work of the Military Ombud and Health Ombud – however, they are both complaints-oriented oversight mechanisms that will require some change to their legislative mandates to reflect the NPM preventive mandate fully and in compliance with the provisions of OPCAT.

Further complicating the functional aspects of a multiple body NPM's work is that the SAHRC and each of the member institutions work in a number of different ways, reflecting their specific and unique mandates, strategic priorities, approaches, history, role and status. These differences are deeply embedded and are likely to be difficult to adapt.

There is a risk that each institution may continue as it should to fulfil its statutory mandate, without adapting to the new reality of being part of an NPM, a fact that was evident from the interviews with key stakeholders during this review. This diversity of methods and approaches can manifest itself in reports and recommendations that may not reflect a coherent objective. This makes it more difficult for the NPM to achieve the changes it would like to see in places of deprivation of liberty.

The challenges in coordination and functional coherence have resulted in difficulties for NPM stakeholders, including civil society, state departments, places of deprivation and persons deprived of their liberty, who do not always understand what the NPM is or how they should interact with it or its constituent institutions. This has manifested in various ways. For example, the difficulty experienced by inmates in correctional centres in making the distinction between the roles performed by both the NPM and Independent Correctional Centre Visitors (ICCVs), and the NPM *vis-à-vis* the SAHRC.

A further issue facing the NPM is its current monitoring coverage. Article 4 of the OPCAT defines places of detention and deprivation of liberty broadly to ensure the greatest possible protection for individuals against torture and other ill-treatment. In South Africa, it is recognised that this will apply to both traditional and non-traditional forms of deprivation of liberty, such as correctional centres, child and youth care centres, secure care facilities, mental health institutions, immigration detention centres, police and

military detention facilities, among others.<sup>9</sup> However, the SAHRC annual report 2019-20 highlights a number of monitoring gaps and challenges in the current model:<sup>10</sup>

- There is limited provision for monitoring CYCCs and secure care facilities.
- There is weak oversight of the private security industry.
- There is no capacity for regular, independent monitoring visits of police stations.
- The ICCV system is under-resourced and additional training and greater time allocation is required to improve the effectiveness of monitoring.
- Visits to detention barracks are carried out by the Military Ombud but the Military Ombud Act does not grant the power to conduct preventive visits to these facilities.

Addressing the challenges within the current NPM framework requires a clear structure for governance and coordination. Key factors considered while reviewing and developing a new framework for the NPM included, *inter alia*, how to ensure it remains within prescripts of the Constitution of South Africa, the legislative mandates of the NPM member institutions, and the requirements of OPCAT regarding functional independence. The latter requires legislative, operational and financial independence, expert and independent members, effective and continuously re-assessed strategy, and fulfilment of key functions. Valuable lessons have also been drawn in this review from the experiences and observations of similar multi-member mechanisms in other jurisdictions.

### **3 Factors that set the parameter of the proposed governance and institutional structure**

#### **3.1 Introduction**

The overall purpose of the extensive document review, and semi-structured interviews with stakeholders was to capture key information, and draw on the experiences of those carrying out the NPM mandate, to propose the most effective, and pragmatic, governance and institutional structure for the NPM in the short to mid-term, and consider the future, incremental development of the NPM. Based on the research findings, the following key factors were identified as being significant to the proposal to address the current challenges for the NPM:

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<sup>9</sup> Report of the South African Human Rights Commission on the Implementation of the OPCAT in South Africa 2019/20, p.14.

<sup>10</sup> Ibid, pp.21 - 25.

- To define, and clarify, the relationship between the SAHRC and the NPM coordination function;
- To address governance issues related to a secretariat function vis-à-vis the SAHRC governance structures;
- To ensure all places of deprivation of liberty are covered by the NPM;
- To address the impact of the conflation of the coordination and functional role of the SAHRC;
- To reinforce and augment OPCAT compliance by member institutions; and
- To define the scope of civil society engagement with the NPM.

Whilst not all of these aspects can be addressed fully, or solely, through the governance and institutional framework proposed, they are reflected in the strategic plan.

### **3.2 Our understanding of OPCAT**

The approach to developing a governance and institutional model for the NPM was based on our understanding of the purpose, objective and functioning of the NPM as provided for by OPCAT. This understanding was informed by the review of the literature and analysis of different existing NPM models in the world.

First, our understanding is that OPCAT is premised on the idea that regular visits by independent bodies to places of detention and deprivation of liberty will prevent torture and other ill-treatment from occurring. This issue is discussed in detail in paragraph 3.6 below.

Second, OPCAT envisages that regular visits will be conducted as set out in articles 17 – 23 of OPCAT, which specifically requires that, the NPM body:

- Conduct regular visits;
- Is independent;
- Has the relevant expertise, gender balance and adequate representation;
- Can choose where, and can access, all places of detention or where individuals may be deprived of their liberty, at any time;
- Can access all information about persons deprived of their liberty;
- Is able to interview individuals in private;
- Has the mandate to make recommendations to the relevant authorities; and
- Their officials are protected against sanctions, and confidential information is privileged.

Third, NPMs are not static and should evolve to a position where they can fulfil all OPCAT obligations.

We acknowledge the current situation in which the NPM has been created and finds itself, and adopt a pragmatic and incremental approach to developing the NPM. Legislative amendments will be required, and this is factored into the incremental approach. The proposal builds on what the NPM bodies are currently doing. Therefore, while the SPT recommends that NPM functions be ‘located within a separate unit or department, with its own staff or budget’,<sup>11</sup> we consider that this may take some time to achieve within the current fiscal limitations, the strategic plan sets out the steps towards achieving this building upon the experiences and resources of the current members.

Fourth, OPCAT provides for civil society involvement and considers it crucial. We note that work has already begun to consider how civil society can support the work and overall aims of the NPM.<sup>12</sup> The proposal articulates a role for civil society to provide support to the NPM Coordinating Committee to address thematic issues and the preventive objective of the NPM as a whole (see below).

Finally, the proposal aims to ensure a transparent and accountable NPM Secretariat and Coordinating structure that will have the confidence of all key stakeholders, including the SAHRC, other NPM institutions, and the SPT.

### **3.3 The dynamics between the NPM within the SAHRC**

The current situation of the NPM Unit being housed in the SAHRC is not perfect and raises a number of challenges, as identified during the interviews:

- The lines of accountability for the NPM Unit staff remain within the SAHRC and some considered there to be a lack of involvement and ownership from other NPM members over the tasks of the Unit.
- There is a lack clarity as to who is accountable (and the accounting officer) for the NPM, and who is representative of the NPM to external audiences.
- While there have been efforts to coordinate the work of the NPM member institutions, such as through MOUs, the sharing of calendar visits between the NPM Unit and JICS, and quarterly reports by JICS to the NPM coordinator on activities and incidents of torture, we were informed that it was not always clear what happened to this information and how and where it was being utilised and reported.

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<sup>11</sup> Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘Guidelines on national preventive mechanisms’, CAT/OP/12/5, November 2010, para 32, available at <https://daccess-ods.un.org/tmp/8843376.04045868.html> (accessed on 12 February 2022).

<sup>12</sup> South African Human Rights Commission and South African National Preventive Mechanism, ‘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, 8 October 2020, available at <https://www.sahrc.org.za/home/21/files/DISCUSSION%20PAPER%20ON%20CIVIL%20SOCIETY%20ENGAGEMENT.pdf> (accessed 12 February 2022).



- Reports are not always shared among NPM members, and there is a lack of clarity as to which documents could or should not be shared (for example, financial statements).
- The NPM Steering Committee was described as ineffective by some, with key individuals not invited or present at meetings.
- When the SAHRC conducted an ‘NPM visit’ to places that were within the mandate of other NPM member institutions (e.g. correctional facilities under the mandate of JICS), monitoring reports were not necessarily shared with the member institution.
- There was a lack of understanding from both within and external to the SAHRC, as to what coordination of the NPM actually entailed, including confusion and conflation of the coordinating and functional mandates.

Multiple body NPMs elsewhere in the world have different ways of coordinating their members. In New Zealand, the Human Rights Commission is the Central National Preventive Mechanism (CNPM).<sup>13</sup> While it does not have the complication of also having a functional role, the following elements of their structure are relevant towards establishing an independent NPM:

- The annual report of the NPM simply outlines what each of the NPM members has been doing, including the Human Rights Commission.
- The CNPM’s role ‘entails coordinating NPM [members] to identify systematic issues arising from places where people are deprived of their liberty.’<sup>14</sup>
- The CNPM liaises with the SPT.
- The Human Rights Commission, in its coordinating role:
  - Facilitates annual meetings of the NPM members;
  - Meets with the SPT and other relevant international mechanisms;
  - Makes submissions to treaty bodies and to Parliament;
  - Provides communications, reporting and advocacy on behalf of the NPM; and
  - Provides support to the members of the NPM through the provisions, as required, of expert human rights advice.<sup>15</sup>

Lessons from other NPMs similar to the South African NPM demonstrate challenges that make it difficult for such NPMs to be effective and fulfil their mandates. Therefore, we propose the restructuring of the current framework by uncoupling the functional mandate (visits) from the coordinating role of the current

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<sup>13</sup> See, New Zealand Human Rights Commission, 2019-2020 Monitoring Places of Detention, Annual Report of Activities Under the Optional Protocol to the UN Convention Against Torture, 1 July 2019 – 30 June 2020, available at [https://www.hrc.co.nz/files/6516/3176/2141/Monitoring\\_Places\\_of\\_Detention\\_20192020\\_Online.pdf](https://www.hrc.co.nz/files/6516/3176/2141/Monitoring_Places_of_Detention_20192020_Online.pdf) (accessed 12 February 2022).

<sup>14</sup> Ibid, at 6.

<sup>15</sup> Ibid.

NPM Unit. Under this proposed new structure, the NPM Unit would not carry out visits but be established as a Secretariat to the NPM Coordinating Committee (see section 4 below) to provide vital coordination, research, and strategic support to the NPM Coordinating Committee.

The proposal also involves strengthening the NPM Coordinating Committee itself by establishing it as a Committee pursuant to Section 11 of the SAHRC Act, with clear foundation documents and terms of reference, as well as proposed additions to strengthen its composition and functions. A longer-term solution would require separate NPM legislation that establishes the Committee.

### **3.4 Secretariat and governance**

From the document review and interviews with respondents, the following challenges were identified with respect to the current secretariat arrangements for the NPM:

- There is some confusion with respect to the role of the Commissioner leading on the NPM and their reporting to the Board.
- There is a lack of clarity in terms of appointment and accountability of the head of the NPM, whether it needs its own accounting officer and to which parliamentary committee it should report.
- Consideration needs to be given to the role of the SAHRC Board of Commissioners in determining the strategic direction of the NPM, balanced against providing the NPM with the necessary autonomy.

Many of those interviewed, within and outside the SAHRC, did not have a problem with the NPM Secretariat being part of, or housed within, the SAHRC, as long as the issues of governance and accountability were clarified. Whilst some considered the establishment of a new public entity might be ideal, this was not assessed as practically feasible, given the known fiscal constraints and the findings of the Asmal Report.<sup>16</sup>

We did therefore considered whether the NPM Secretariat should operate outside the SAHRC, through, for example, a cluster approach adopted by Government in the Justice and Social and Economic Clusters, or a private entity of which the departments comprising the NPM members are directors.

We are not suggesting that such proposals be ruled out - rather that first, in the short term, the work of each NPM member be consolidated to bring it more into line with OPCAT and then, that an incremental

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<sup>16</sup> Parliament of the Republic of South Africa, 'Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A report of the National Assembly of the Parliament of South Africa', Cape Town, 31 July 2007, available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (accessed 12 February 2022).

approach be adopted to move towards a separate Secretariat further down the line. This would enable the following issues to be considered in the second part of the strategic plan:

- What form of legal identity would be required for the NPM Secretariat?
- What legislative changes to the current NPM designation would be required?
- What should be the governance structure for this NPM Secretariat?

Therefore, we propose for the immediate term that the NPM Coordinating Committee is supported by a Secretariat, housed in the offices of the SAHRC. The Secretariat will be tasked with the implementation of an annual strategic and operational plan, agreed with the NPM Coordinating Committee, who will ensure its performance management against the agreed outputs. Funding for the Secretariat and its staff will be budgeted by the SAHRC and should be ring-fenced, with IT, administrative and office support provided by the SAHRC.

The role of the Secretariat will be to:

- Support the work of the Coordinating Committee;
- Organise meetings of the Coordinating Committee and any other meetings and events proposed by the Coordinating Committee;
- Collate material from the NPM bodies;
- Maintain an up-to-date website on the work of the South African NPM; and
- Prepare reports and other documents, at the direction of the NPM Coordinating Committee.

It is proposed that ultimately the Secretariat will be independent and accountable to the Coordinating Committee. This could be provided in a state-owned enterprise model, allowing for independent fund-raising and promoting an independent identity for the NPM. However, this will need to be achieved incrementally.

### **3.5 Conflation of the coordination and functional roles of the NPM**

Linked to the above, the NPM Unit within the SAHRC has been operating to date with both a coordination and functional mandate, which has included the undertaking of 'NPM visits' to a number of places of deprivation of liberty, both independently and in partnership with NPM member institutions. From the interviews, it appears this approach has been criticised for a number of reasons:

- It is not clear whether a visit is an NPM visit and/or a SAHRC visit. This can be confusing for monitors, as well as those being monitored.

- There are some concerns that the lines of communication between the provincial offices and head office of the SAHRC were not clear, and it was not always apparent what happens to information obtained by the provincial offices on their NPM and non-NPM visits.
- There is concern that the role of responding to complaints does not sit easily with a preventive NPM mandate.
- Some considered that provincial offices lacked resources to undertake fully an NPM monitoring role and that this additional work was not necessarily taken into account in terms of performance targets and budgets.
- Labelling certain visits by the SAHRC as ‘NPM visits’ omits NPM work that the other NPM members may be doing, particularly when the SAHRC visits are to places of deprivation of liberty within the mandate of other NPM members. As one interviewee explained – ‘the NPM appears to be “just” the SAHRC’.

Accordingly, we propose that the NPM Unit no longer carry out ‘NPM visits’ and that it is re-established as the NPM Secretariat with a clearly defined coordination function. Furthermore, we recommend that the role of human rights monitors at the provincial level in the SAHRC be enhanced to ensure that they fulfil OPCAT functions in terms of regularity and coverage of places of detention. In effect, the ‘functional’ elements of the SAHRC’s engagement with the NPM would primarily reside with the provincial offices, with the ‘coordinating’ function vested in a Coordinating Committee, supported by a Secretariat.

The strategic plan of the NPM will then include the requirement that the NPM Coordinating Committee determine what is needed by each NPM member institution to ensure that their mandates and visits fulfil the criteria for independence, powers and guarantees, as set out in articles 17 – 23 of OPCAT.

### **3.6 Defining a ‘preventive visit’**

The NPM member institutions already conduct visits to a range of places of detention, where individuals are, or may be, deprived of their liberty. OPCAT is premised on the idea that visits themselves have a preventive role – accordingly, any visit to a place of deprivation of liberty by an institution designated or part of an NPM that satisfies the requirements set out in articles 17 – 23 of OPCAT could be considered as falling within the mandate of the NPM. However, over time, the concept of a preventive visit as something that may be distinct to other types of visits has evolved.

The preventive approach of NPMs is often described as being proactive rather than reactive; aimed at consistent, regular monitoring that the necessary safeguards against torture and other ill-treatment are in place and implemented, and that any risks, poor practices, or systemic issues are identified and addressed, before they escalate and worsen. Yet, in effect, any visit to a place of deprivation of liberty may be

preventive, therefore it is not always necessary, or practicable, to distinguish between an ‘NPM visit’ and another type of visit to a place of deprivation of liberty.

An examination of other NPMs, particularly those that have adopted a cooperative model, indicates that there are varied approaches to this issue. Some distinguish between an OPCAT visit and a visit under their statutory or constitutional mandates,<sup>17</sup> but others do not. For example:

‘The New Zealand Children’s Commission has two mandates, being a regular monitoring mandate and a specific mandate to carry out visits under OPCAT.... NZ Officers told the investigation that ‘whenever we go into a residence, we have two hats on.’ The Children’s Commission did not receive specific funding for the NPM mandate’.<sup>18</sup>

Similarly, for Her Majesty’s Inspector of Prisons (HMIP) in England and Wales, as noted by a standard paragraph in each of its inspection reports:

‘All inspections carried out by HM Inspectorate of Prisons contribute to the UK’s response to its international obligations under the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)’.<sup>19</sup>

Indeed, a number of stakeholders interviewed for this project considered that the SAHRC at the provincial level was ‘already doing’ the type of monitoring that OPCAT requires as part of its normal functions.

We therefore propose that current visits to places of deprivation of liberty conducted by each NPM member, as per their legislative mandate, be considered visits for the purpose of OPCAT, in their role as a member of the NPM. This interpretation, combined with clearly defining a new Secretariat role for the NPM Unit, will address some of the challenges with the current conflation of the functional and coordinating role, as discussed above. The NPM Secretariat can then, in accordance with the proposed strategic plan, develop and consult on a self-assessment exercise carried out by the NPM member

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<sup>17</sup> For example, JO Riksdagens Ombudsmån, ‘OPCAT Unit’, <https://www.jo.se/en/About-JO/NPM--National-Preventive-Mechanism/> (accessed on 12 February 2022).

<sup>18</sup> Victorian Ombudsman, ‘OPCAT in Victoria: A thematic investigation of practices related to the solitary confinement of children and young people’, September 2019, para 175, available at <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary--September-2019.pdf?mtime=20191216123911> (accessed on 12 February 2022).

<sup>19</sup> See, for example, HM Inspectorate of Prisons, ‘Report on an unannounced inspection of HMP Manchester by HM Chief Inspector of Prisons, 6-7 and 13 – 17 September 2021, p. 66, available at <https://www.justiceinspectores.gov.uk/hmiprison/wp-content/uploads/sites/4/2021/12/Manchester-web-2021.pdf> (accessed on 12 February 2022).

institutions, to determine how their mandates and working methodologies fulfil the criteria for independence, powers and guarantees as set out in articles 17 – 23 of OPCAT (see section 3.8 below).

### 3.7 Gaps in coverage of all places of deprivation of liberty

Linked to the above understanding as to what can be considered to be an ‘NPM visit’, is the need to address gaps in the current scope of the NPM as a whole.

Article 4 of OPCAT requires that NPMs should be able to visit:

‘any place under its jurisdiction and control 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 (hereinafter referred to as places of detention)’,

and

‘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’.

There are several places of detention in South Africa that are lacking independent oversight. There are particular concerns with Child and Youth Care Detention Centres (as the facilities which provide residential care for children), and police custody. However, there are also gaps in monitoring coverage of military detention, immigration detention, psychiatric facilities and private drug and alcohol treatment facilities, among others. Consideration has already been given to identify how some of those gaps can be covered.<sup>20</sup>

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<sup>20</sup> This includes work by APCOF: and Abdirahman Maalim Gossar, ‘Promoting the Effectiveness of South Africa’s NPM: The Case for Civil Society Collaboration’, APCOF Research Paper 28, available at <https://apcof.org/wp-content/uploads/apcof-research-28-effectiveness-of-the-npm-web.pdf> (accessed 12 February 2022); David Bruce, ‘The Risks of Police Custody: The Potential for Independent Monitoring of Police Custody in South Africa’, APCOF Research Paper No. 26, October 2019, available at <http://apcof.org/wp-content/uploads/026-risks-of-police-custody-the-potential-for-independent-monitoring-of-police-custody-in-south-africa-david-bruce.pdf> (accessed on 12 February 2022); Melanie Lue Dugmore, ‘Independent Monitoring of Police Detention Facilities in South Africa’, APCOF Research Paper 20, January 2018, available at <http://apcof.org/wp-content/uploads/no-020-police-detention-facilities-in-south-africa-melanie-lue-dugmore-.pdf> (accessed 12 February 2022); Zita Hansungule, ‘Questionable Correction: Independent Oversight of Child and Youth Care Centres in South Africa’, APCOF Research Paper 19, January 2018, available at <http://apcof.org/wp-content/uploads/no-19-child-and-youth-care-center-by-zita-hansungule-.pdf> (accessed 12 February 2022); Alexandra Hiropoulos, ‘Migration and Detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals’, APCOF Policy Brief 18, November 2017, available at <http://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf> (accessed 12 February 2022); and African Policing Civilian Oversight Forum, ‘Submission in response to the draft discussion paper on the role of civil society in the work of the National Preventive Mechanisms, 29 October 2020, available at <https://apcof.org/wp-content/uploads/apcof-submission-npm-and-cso.pdf> (accessed 12 February 2022).

However, how these places can be covered effectively by the NPM members requires more discussion and coordination. We recommend that a mapping exercise to identify any gaps in oversight should be a key priority in the first year of the NPM strategic plan, with a monitoring plan and supporting business case, as a key output.

### **3.8 OPCAT Compliance by NPM member institutions**

It is generally recognised within the NPM, and by its member institutions, that each member institution has issues regarding compliance with articles 17-23 of OPCAT, particularly as it pertains to independence and scope of mandate. The SPT has set out guidance to help develop and apply the NPM mandate in compliance with the OPCAT, which are set out in **annex 2**.<sup>21</sup> As part of this guidance, the SPT states that one of the basic principles for the establishment of NPMs is that their mandate and powers are clearly set out in a constitutional or legislative text.<sup>22</sup>

Therefore, we recommend that as part of the strategic plan developed to support this proposed governance and institutional structure, each NPM member institution undertake a self-assessment with respect to OPCAT criteria, to identify gaps and areas that need legislative amendment or operational changes. The self-assessment process may also assist in identifying where additional staffing needs may be required to fulfil the NPM functional mandate.

### **3.9 Civil society engagement**

It is essential for the legitimacy and credibility of the NPM that civil society is engaged and included in its structure and work. We note that in 2020, the SAHRC started a consultation process with civil society about how they could be integrated into the work of the NPM.<sup>23</sup> The draft discussion paper that formed the basis of the consultation proposed the establishment of civil society working groups on thematic areas including corrections, police detention, health and social facilities, administrative detention, and children in detention. Each working group would be comprised of independent experts and lay visitors, appointed for two years to act as special advisors to the NPM. The NPM Unit and SAHRC invited comment on its draft

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<sup>21</sup> See SPT, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5, 9 December 2010, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en); and SPT, Analytical assessment tool for national preventive mechanisms, UN Doc. CAT//OP/1/Rev.1, 25 January 2016, available at: [https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf)

<sup>22</sup> SPT, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5, 9 December 2010, para 7.

<sup>23</sup> South African Human Rights Commission and South African National Preventive Mechanism, '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, 8 October 2020, available at <https://www.sahrc.org.za/home/21/files/DISCUSSION%20PAPER%20ON%20CIVIL%20SOCIETY%20ENGAGEMENT.pdf> (accessed 12 February 2022).

discussion paper, with the final position on civil society engagement in the work of the NPM still to be made publicly available.

There is a strong argument to be made to bring civil society representatives into the coordinating structure of the NPM, rather than limiting their involvement to specialised working groups at the margins of the NPM's work. Drawing on previous research by APCOF,<sup>24</sup> and examples from NPMs elsewhere, we propose a range of ways in which civil society can be engaged in the work of the NPM. This structure accommodates the different strengths and expertise of individuals and organisations, and ensures inclusivity and that a variety of organisations can be included.

In the NPM Coordinating Committee, we propose that civil society be included on the Coordinating Committee as individual experts to provide advice and strategic direction to the NPM. There is precedent for this approach with civil society involved in, for example, the Advisory Committee of the Norwegian NPM.<sup>25</sup>

In the visits and other monitoring activities of each of the NPM bodies, depending on the results of the mapping exercise proposed as part of the strategic plan to assess OPCAT compliance and capacity of visiting teams, it may be considered necessary to involve civil society in monitoring visits. This could be achieved in a number of ways, such as through the creation of a roster of experts (or individuals and organisations) from which the NPM member institutions can draw. Careful consideration will need to be given to the clarification of roles, ensuring independence, relevant expertise, confidentiality and information-sharing agreements, as well as immunities. Examples such as from Georgia, where civil society is involved in a Special Preventive Group under the Public Defender, are instructive in this regard.<sup>26</sup> Fees (at least for covering costs) of CSO involvement may be required and this should be determined by the Coordinating Committee as part of its first year of activity.<sup>27</sup>

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<sup>24</sup> See Abdirahman Maalim Gossar, 'Promoting the Effectiveness of South Africa's NPM: The Case for Civil Society Collaboration', APCOF Research Paper 28, available at <https://apcof.org/wp-content/uploads/apcof-research-28-effectiveness-of-the-npm-web.pdf> (accessed 12 February 2022); and African Policing Civilian Oversight Forum, 'Submission in response to the draft discussion paper on the role of civil society in the work of the National Preventive Mechanisms, 29 October 2020, available at <https://apcof.org/wp-content/uploads/apcof-submission-npm-and-cso.pdf> (accessed 12 February 2022).

<sup>25</sup> Victorian Ombudsman, 'OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people', September 2019, para 128, available at <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary--September-2019.pdf?mtime=20191216123911> (accessed 12 February 2022).

<sup>26</sup> Ibid.

<sup>27</sup> A useful example of how this is determined is provided by the Serbian NPM: [https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Serbia\\_JulyDec2011.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Serbia_JulyDec2011.pdf); see also the summary of the process for a public call for CSO cooperation with the Serbian NPM: [https://npm.ils.rs/index.php?option=com\\_content&view=category&layout=blog&id=26&Itemid=17](https://npm.ils.rs/index.php?option=com_content&view=category&layout=blog&id=26&Itemid=17)



We also recommend that the NPM Coordinating Committee have regular meetings with civil society to provide information about its work, engage with their areas of interest, concern and expertise, and to encourage them to promote awareness of the NPM. This can be achieved in, for example, an annual civil society / NPM stakeholder forum.

## **4 Proposed governance structure**

### **4.1 Introduction**

The proposed governance structure for South Africa's NPM sets out a clear framework to respond to the challenges and factors that set the parameters of the review and modeling, as set out in Section 3 of this report. It is based on the in-depth research, including comparative research of NPMs operating globally, and draws on the experience and recommendations of stakeholders carrying out the NPM mandate under the current model. The application of the governance model in practice is also supported by the draft strategic plan and human resources plan. The proposed governance structure represents a pragmatic approach to enable the NPM mandate, and structure, to be strengthened in the short- and mid-term, while recognising that, in the longer term, the structure and working methods of the NPM will be further refined and strengthened incrementally, as necessary.

### **4.2 NPM Coordinating Committee**

We propose the establishment of an NPM Coordinating Committee pursuant to Section 11 of the SAHRC Act, comprising of representatives of each of the NPM members, civil society and other experts, with overall responsibility for the coordination and strategic mandate for the NPM.

This proposal draws on lessons from other NPMs (see *annex 5*), and the need for clarity on the regulatory and accountability elements of a coordinating mechanism, which is also more inclusive in terms of its relationship with members and stakeholders. Further detail on the parameters of its establishment, composition, role and responsibilities, and management is set out below.

#### **4.2.1 Establishment**

The SPT has emphasised the usefulness and importance of a legislative basis for the work of the NPM. As the structure vested with the overall strategic and coordination mandate for the NPM, the NPM Coordinating Committee therefore requires a legislative foundation. The designation to the SAHRC of the

coordination mandates makes available, in the interim, its own constitutive Act to provide a structure for the NPM Coordinating Committee through its establishment as a Section 11 Committee.

Using Section 11 of the SAHRC Act provides an interim legislative basis for the establishment of the Coordinating Committee, certainty regarding its role and functions, as well as much needed clarity on its relationship and accountability to the SAHRC, as the institution designated with coordination function. In the medium term, the strategic plan for the NPM includes provision for a review of the various mechanisms by which the NPM Coordinating Committee can be set up as a separate legal entity.

#### 4.2.2 Composition

Section 11(1) of the SAHRC Act makes provision for the appointment of individuals to a Committee. This has the potential to promote an inclusive Coordinating Committee comprising both delegates from each of the NPM member institutions, as well as experts on issues related to deprivation of liberty, the prevention of torture, and the types of institutions within the mandate of the NPM. The SPT has repeatedly emphasised the importance of ensuring that NPMs have the necessary expertise and experience to ensure the fulfilment of the prevention mandate. This includes through ensuring multi-disciplinary expertise across a range of areas including legal, medical, psychological, child rights and gender.<sup>28</sup>

Accordingly, we recommend that the NPM Coordinating Committee be comprised of the following members:

- Chairperson – a Commissioner of the SAHRC as required by section 11(3) of the Act;
- Coordinator of the NPM Unit (as an *ex officio* member);
- Two representatives of each NPM member institutions, one of whom must be the head of the institution:<sup>29</sup> SAHRC; JICS; IPID; Military Ombud; Health Ombud; and
- Independent experts, appointed through a competitive application process, on each of the following subjects pertaining to the deprivation of liberty and freedom from torture and other ill-treatment:
  - Law;
  - Medicine;
  - Psychology;
  - Child rights; and
  - Gender.

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<sup>28</sup> Article 18(2), OPCAT. See also CAT/OP/SWE/1, 2008, at 36.

<sup>29</sup> Determination of which position constitutes the 'head of the organisation' for each individual NPM member institution will be determined as part of the development of terms of reference for the Committee.

The terms of reference for the appointment, tenure, and related matters need to form part of the initial output of the NPM Secretariat, and is included in its strategic plan.

#### **4.2.3 Role and responsibilities**

In accordance with Section 11(4) of the SAHRC Act, the Coordinating Committee would be subject to specific powers and functions assigned to it by the SAHRC. These would need to be formally developed as part of its establishment as a Section 11 Committee, and framed in terms of its role to coordinate the activities of, and provide strategic direction to, the NPM. We recommend that it be provided with the mandate to:

- Promote collaboration, information sharing, cohesion and good practice between NPM members.
- Convene regular (at least quarterly) meetings of the Committee.
- Facilitate joint activities between Committee members.
- Identify patterns arising from visits by the NPM member institutions, and complaints submitted to the respective bodies.
- Advise on systemic issues.
- Provide expert advice to NPM members.<sup>30</sup>
- Represent the NPM with government and other national actors.
- Prepare the NPM annual report and other NPM joint publications.
- Make, in consultation with all relevant NPM bodies, any recommendations to the government that it considers appropriate on any matter relating to the prevention of torture and other ill-treatment.

#### **4.2.4 Management**

The Committee will report quarterly to the SAHRC on its activities, in line with terms of reference, directions and conditions, as established in accordance with section 11(4) of the SAHRC Act. A hosting agreement will need to be concluded, which provides clear parameters for that relationship. The Commissioner delegated as Chairperson of the Committee will make regular reports of its activities to the Board of Commissioners. To the extent possible, the Board of Commissioners should not interfere in the strategic direction set by the Committee, or its activities. Where a conflict arises between the NPM Coordinating Committee and the Board of Commissioners, the ordinary rules regarding the accountability and management of Section 11 Committees *vis-à-vis* the Board of Commissioners will apply. This underscores the importance of the medium to long-term strategy for the NPM, including a feasibility study into mechanisms by which the NPM Coordinating Committee can be set up as a separate legal entity.

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<sup>30</sup> See New Zealand Human Rights Commission, 2019-2020 Monitoring Places of Detention, Annual Report of Activities Under the Optional Protocol to the UN Convention Against Torture, 1 July 2019 – 30 June 2020, p.6.

### **4.3 NPM Secretariat**

We propose the establishment of an NPM Secretariat to support the work of the NPM Coordinating Committee, to be maintained as a business unit of the SAHRC. Details on the establishment, composition, roles and responsibilities, and management of the Secretariat follows.

#### **4.3.1 Establishment**

The NPM Secretariat will be established as an ordinary business unit within the SAHRC for the purpose of supporting the NPM Coordinating Committee in the execution of its mandate. It will therefore be housed in the offices of the SAHRC in Johannesburg. Funding for the Secretariat and its staff will be budgeted by the SAHRC and should be ring-fenced, recognising that the NPM Secretariat will make use of the SAHRC's IT, administrative and office support. It is proposed that, ultimately, the Secretariat will be statutorily independent of the SAHRC and accountable to the Coordinating Committee, possibly under a state-owned enterprise model. However, this will need to be achieved incrementally, and the feasibility of an independent model is factored into the medium-term strategic planning.

#### **4.3.2 Composition**

To effectively support the NPM Coordinating Committee, and to implement the proposed draft strategic plan, the composition of the NPM Secretariat will require a multi-disciplinary staff with a level of seniority that allows for a relatively flat management structure to maintain a cost-effective model. We recommend that initially, the NPM Secretariat maintain the following staffing, which reflects the key competencies required to implement the strategic plan in the short-term:

- Coordinator, with overall responsibility for the implementation of the strategic plan, and support to the NPM Coordinating Committee.
- Project manager/senior administrator, to lead the coordination of NPM members' activities.
- Two senior researchers, to support the research outputs, data management, annual and other thematic reporting.
- Communications manager, to implement the communication strategy.

#### **4.3.3 Role and responsibilities**

The role of the NPM Secretariat is to:

- Support the work of the Coordinating Committee;

- Organise meetings of the Coordinating Committee and any other meetings and events proposed by the Coordinating Committee;
- Collate and analyse material from the NPM bodies;
- Maintain an up-to-date website on the work of the South African NPM;
- Establish and maintain a database;
- Assist in the development and implementation of the NPM communication strategy; and
- Prepare reports and other documents, at the direction of the Coordinating Committee.

#### **4.3.4 Management**

While it remains as a business unit of the SAHRC, the accounting officer will be the Chief Executive Officer of the SAHRC, and the management of NPM Secretariat staff would be within the ordinary human resource processes of the SAHRC.

## **5 Overview of the strategic plan**

To assist further the incremental development and operation of the NPM mandate, a strategic plan for 2023 – 2025 has been. It proposes the following activities to support both governance-related and mandate-related strategies, and provides a monitoring and evaluation framework.

### **5.1 Governance based strategies**

To strengthen the effective functioning of the NPM, based on the current cooperative model, the following activities will be undertaken to strengthen the governance structure, and facilitate greater compliance with the OPCAT:

#### **5.1.1 Establishment and functioning of the NPM Coordinating Committee**

To support the process of strengthening the governance structure for the NPM the following activities will be undertaken as an interim measure:

- The NPM ‘Steering Committee’ will be restructured and become the NPM Coordinating Committee.
- Establishment of an NPM Coordinating Committee as a Section 11 Committee.
- Development of the terms of reference for the NPM Coordinating Committee.
- Development and finalisation of all outstanding memoranda of understanding with NPM member institutions.
- Development of a process to select civil society and other experts as members of the NPM Coordinating Committee.

- Development of a procedure for the sharing of documents, visiting schedules, and other relevant information among the NPM Coordinating Committee members.
- Scheduling regular meetings of the NPM Coordinating Committee.

### **5.1.2 Establishment and functioning of the NPM Secretariat**

To support the revised governance structure, and strengthen coordination of the NPM, the following activities will be undertaken:

- Establishment of an NPM Secretariat as a business unit of the SAHRC.
- Recruitment of staff in accordance with the NPM Human Resource Plan.
- Development of the terms of reference for the NPM Secretariat.
- Scheduling regular meetings of the NPM Coordinating Committee.
- Preparation of reports and other documents at the direction of the NPM Coordinating Committee.
- Development of a data management system to collate and analyse material from the NPM member institutions.
- Maintaining the NPM website.

### **5.1.3 Feasibility study for stand-alone NPM coordination function**

To support the progressive move towards ensuring the independent functioning of the NPM coordination function, a feasibility study into stand-alone coordination structure (while maintaining the cooperative model) will be conducted, involving the following activities:

- Conduct of research on the feasibility of an independent coordination structure for South Africa's NPM.
- Development of a position paper for NPM an independent coordination function based on that research.
- Consultation on the position paper with NPM member institutions and external stakeholders, including civil society.

### **5.1.4 NPM legislation**

To further support the independence, NPM legislation in addition to changes to the enabling legislation of NPM member institutions, will be required. This will be informed by, amongst others, the study into the feasibility of various NPM independent models, the mapping exercises related to the feasibility of a stand-alone structure (see above), strengthening the scope of the NPM visiting framework (see below), and strengthening OPCAT compliance of member institutions (see below). The legislative enactment and amendments will involve the following activities:

- Development of a position paper on (i) the legislative enactment required to ensure that the NPM is OPCAT compliant; and (ii) the legislative amendments required to the NPM member institutions to ensure OPCAT compliance.
- Consultation on the position paper with NPM member institutions and external stakeholders.
- Development and consultation of draft NPM legislation, and legislative amendments for NPM member institution.

### **5.1.5 Implementation of a communication strategy**

To assist the application of the revised governance structure, and strengthen coherence among the NPM member institutions, a communication strategy will be developed and implemented to include the following:

- Establishment and maintenance of the NPM website.
- Development of guidance on the use of the NPM logo by the NPM member institutions.
- Development of guidance for NPM member institutions on the use of the media to promote the NPM mandate and its work.
- Development of a procedure to ensure that information is provided from all NPM member institutions for the NPM annual report.

## **5.2 Mandate based strategies**

The following NPM mandate-based strategies are aimed at strengthening the preventive approach of the NPM member institutions, and compliance with the provisions of the OPCAT.

### **5.2.1 Strengthening the scope of the NPM visiting framework**

To ensure that the NPM mandate extends to all places of deprivation of liberty in South Africa, as required by Article 4 of the OPCAT, and to identify any gaps and propose solutions to address them, the following activities will be undertaken:

- A mapping exercise to identify all places where people are or may be deprived of liberty that currently exist throughout South Africa.
- Analysis of the mapping exercise to determine who is responsible for visiting the identified places of deprivation of liberty; and identify any gaps in the current visiting framework.
- Development and implementation of a plan to address any weakness and gaps in the current visiting framework to determine who should have responsibility for visiting these places, taking into account the mandate of the relevant NPM member institutions and potential for collaborative work.
- Development and implementation of a capacity and resource plan to support the revised visiting framework.

- Design of the self-assessment framework for OPCAT compliance for NPM member institutions.
- Implementation of the self-assessment framework, including collation, analysis and reporting of the results of the self-assessments.
- Development of a plan to implement the recommendations to address the gaps in compliance identified by the self-assessment framework.
- Establishment and implementation a visiting programme for NPM member institutions that identifies priority areas, and incrementally expands the scope of the visiting framework to all places of deprivation of liberty in South Africa.
- Identification of annual strategic focus area for thematic monitoring, and the design, research and publication of annual thematic monitoring reports.

### **5.2.2 Strengthening OPCAT compliance of the NPM member institutions**

To ensure that all the NPM member institutions have the requisite minimum guarantees and powers as required by the OPCAT to function independently and effectively the following activities will be carried out:

- A self-assessment exercise, drawing upon SPT guidance, will be conducted by each NPM member to examine the extent to which it has the requisite NPM guarantees and powers as required by the OPCAT.
- An analysis of the self-assessment exercise to identify any legislative, policy, or other areas in need of reform to bring the NPM member institutions in to conformity with the OPCAT.
- Development of a report to highlight any changes required.
- Based on the results of the self-assessment exercise, development and implementation of a plan to determine where additional resources may be required to ensure compliance with the OPCAT.

### **5.2.3 Increasing engagement with civil society**

To support greater engagement with civil society the following activities will be undertaken:

- Development of a process to select civil society and other experts as members of the NPM Coordinating Committee.
- Initial consultation with civil society organisations to discuss the implementation of the NPM's strategic plan for 2023-2025;
- Annual consultations with civil society to identify priority areas for NPM annual work planning.



## 6 Conclusion

The launch of the South African NPM in 2019 brought with it an ambitious agenda for immediate operationalisation of OPCAT while the process of institutional development of the NPM was still under-developed. Since an NPM unit was formally established within the SAHRC, it has conducted and coordinated some monitoring visits, participated in webinars, and released discussion papers on its proposed legislative mandate and structure, and the role for civil society. However, what remains outstanding is the formalisation of its governance and institutional structure, and the fulfilment of the commitment made during its launch event, which was to formalise a role for civil society in its structure and operations.

APCOF welcomes the opportunity to provide technical support to the NPM as it grapples with how to establish itself within the requirements of OPCAT, in a way that is both pragmatic and achievable, given the known operating and budgetary constraints. Adopting a cooperative model was the right choice for South Africa, but the challenge lies in ensuring effective coordination, ensuring that the necessary regulatory frameworks and operational systems are in place, and providing the support and clarity required to NPM member institutions to sustainably contribute to the preventive mandate. This review and modelling was designed to respond to this challenge and to support the progressive achievement by the South African NPM of full and effective compliance with the requirements of OPCAT.

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## **Annex 1**

### **List of documents reviewed**

#### **1. Legislation and parliamentary documents**

- Constitution of the Republic of South Africa
- South African Human Rights Commission Act 2013
- Parliament of the Republic of South Africa, 'Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: A report of the National Assembly of the Parliament of South Africa', Cape Town, 31 July 2007
- JICS Bill 2021
- IPIC Act 2011

#### **2. Documents of the NPM member institutions**

- NPM annual and thematic reports
- SAHRC annual and thematic reports
- JICS quarterly reports
- IPID annual reports

#### **3. Civil society and other documents**

- APCOF research paper 28, Promoting the effectiveness of South Africa's NPM the case for civil society collaboration, August 2020
- APCOF thematic reports and training materials
- APT briefing paper on National Human Rights Institutions as National Preventive Mechanisms: Opportunities and challenges, December 2013
- APT, Guide on the Establishment of National Preventive Mechanisms,
- R. Murray & E. Steinerte, Ireland and the Optional Protocol to the UN Convention against Torture, Irish Human Rights and Equality Commission Research Series, January 2017
- L Muntingh, Preventing and combating in South Africa A framework for action under CAT and OPCAT, 2008
- O. Streater, Review of Existing Mechanisms for the Prevention and Investigation of Torture and Cruel, Inhuman and Degrading Treatment or Punishment in South Africa, 2008

#### **4. UN documents**

- UN Optional Protocol to the UN Convention against Torture
- UN Subcommittee on Prevention of Torture, Guidelines on national preventive mechanisms, UN Doc.CAT/OP/12/5, 9 December 2010
- UN Subcommittee on Prevention of Torture visit reports to the Netherlands, New Zealand, Senegal and the UK

- UN Subcommittee on Prevention of Torture report on the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP/12/6, 10 December 2010
- UN Subcommittee on Prevention of Torture first annual report, UN Doc. CAT/C/40/2, 2008
- OHCHR, Professional Training Series No. 21, Preventing Torture The Role of National Preventive Mechanisms, 2018

**5. Other NPM and monitoring institution documents**

- France NPM annual reports
- Netherlands NPM annual reports
- New Zealand Human Rights Commission annual reports
- Paraguay NPM annual reports and legislation
- Serbia Protector of Citizens Ombudsman, report on setting up a national preventive mechanism, 2012
- Senegal NPM reports and reply to UN Subcommittee on Prevention of Torture
- Victorian Ombudsman, 'OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people', September 2019
- UK NPM annual reports, policy documents, terms of reference, and correspondence with the UN Subcommittee on Prevention of Torture.

## **Annex 2**

### **Requirements and Guidelines on National Preventive Mechanisms**

#### **Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

**Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.**

**Protocol is available for signature, ratification and accession as from 4 February 2003 (i.e. the date upon which the original of the Protocol was established) at United Nations Headquarters in New York.**

### **PART IV**

#### **National preventive mechanisms**

##### **Article 17**

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

##### **Article 18**

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

##### **Article 19**

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

## **Article 20**

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

## **Article 21**

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

## **Article 22**

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

## **Article 23**

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.



**Optional Protocol to the  
Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

Distr.: General  
9 December 2010

Original: English

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**Subcommittee on Prevention of Torture  
and Other Cruel, Inhuman or Degrading  
Treatment or Punishment**

**Twelfth session**

Geneva, 15–19 November 2010

**Guidelines on national preventive mechanisms**

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## Introduction

1. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Optional Protocol”) provides considerable, detailed guidance concerning the establishment of a National Preventive Mechanism (“NPM”), including its mandate and powers. The most relevant of these provisions are Article 3, 4, 17-23, 29 and 35, though other provisions of the Optional Protocol are also of importance for NPMs. It is axiomatic that all NPMs must be structured in a manner which fully reflects these provisions.
2. It is the responsibility of the State to ensure that it has in place an NPM which complies with the requirements of the Optional Protocol. For its part, the SPT works with those bodies which it has been informed have been designated by the State as its NPM. Whilst the SPT does not, nor does it intend to formally assess the extent to which NPMs conform to OPCAT requirements, it does consider it a vital part of its role to advise and assist States and NPMs fulfil their obligations under the Optional Protocol. To this end, the SPT has previously set out ‘Preliminary Guidelines’ concerning the on-going development of NPMs in its First Annual Report. It has had the occasion to further amplify its thinking in subsequent Annual Reports and also in a number of recommendations set out in its visit Reports. In the light of the experience it has gained, the SPT believes it would be useful to issue a revised set of Guidelines on National Preventive Mechanisms which reflect and respond to some of the questions and issues which have arisen in practice.
3. These Guidelines do not seek to repeat what is set out in the text of the Optional Protocol but to add further clarity regarding the expectations of the SPT regarding the establishment and operation of NPMs. Section I sets out a number of ‘Basic principles’ which should inform all aspects of the work of an NPM. This is followed in Section II by guidelines addressed primarily to States and concerning a number of issues relating to the establishment of NPMs, and in Section III by guidelines to both the State and to the NPM itself concerning the practical functioning of an NPM.
4. As it gains further experience, the SPT will seek to add additional sections to these Guidelines, addressing particular aspects of the work of NPMs in greater detail.

### I. Basic principles

5. The NPM should complement rather than replace existing systems of oversight and its establishment should not preclude the creation or operation of other such complementary systems.
6. The mandate and powers of the NPM should be in accordance with the provisions of the Optional Protocol.
7. The mandate and powers of the NPM should be clearly set out in a constitutional or legislative text.
8. The operational independence of the NPM should be guaranteed.
9. The relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM.
10. The visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol.
11. The necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol
12. The NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol.
13. The State authorities and the NPM should enter into a follow-up process with the NPM with a view to the implementation of any recommendations which the NPM may make.
14. Those who engage or with whom the NPM engages in the fulfilment of its functions under the Optional Protocol should not be subject to any form of sanction, reprisal or other disability as result of having done so



15. The effective operation of the NPM is a continuing obligation. The effectiveness of the NPM should be subject to regular appraisal by both the State and the NPM itself, taking into account the views of the SPT, with a view to its being reinforced and strengthened as and when necessary.

## **II. Basic issues regarding the establishment of an NPM**

### **A. The identification or creation of the NPM**

16. The NPM should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society. This should also apply to the process for the selection and appointment of members of the NPM, which should be in accordance with published criteria.

17. Bearing in mind the requirements of Article 18 (1) and (2) of the Optional Protocol, members of the NPM should collectively have the expertise and experience necessary for its effective functioning.

18. The State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest.

19. Members of NPMs should likewise ensure that they do not hold or acquire positions which raise questions of conflicts of interest.

20. Recalling the requirements of Articles 18 (1) and (2) of the Optional Protocol, the NPM should ensure that its staff have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate. This should include, *inter alia*, relevant legal and health-care expertise.

### **B. Designation and notification**

21. The NPM should be established within one year of the entry into force of the Optional Protocol for the State concerned, unless at the time of ratification a declaration has been made in accordance with Article 24 of the Optional Protocol.

22. The body designated as the NPM should be publicly promulgated as such at the national level.

23. The State should notify the SPT promptly of the body which has been designated as the NPM.

## **III. Basic issues regarding the operation of an NPM**

### **A. Points for States**

24. The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control.

25. The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol.

26. The State should ensure that both the members of the NPM and its staff enjoy such privileges and immunities as are necessary for the independent exercise of their functions.

27. The State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.

28. The State should inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow the NPM to make proposals or observations on any existing or draft policy or legislation. The State should take into consideration any proposals or observations on such legislation received from the NPM.
29. The State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual Reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website.

## **B. Points for NPMs**

30. The NPM should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest.
31. The NPM, its members and its staff should be required to regularly review their working methods and undertake training in order to enhance their ability to exercise their responsibilities under the Optional Protocol.
32. Where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget.
33. The NPM should establish a work plan/programme which, over time, encompasses visits to all, or any, suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within the jurisdiction of the State. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control.
34. The NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment.
35. The NPM should make proposals and observations to the relevant State authorities regarding existing and draft policy or legislation which it considers to be relevant to its mandate.
36. The NPM should produce Reports following their visits as well as produce an Annual Report and any other forms of Report which it deems necessary. When appropriate, Reports should contain recommendations addressed to the relevant authorities. The Recommendations of the NPM should take account of the relevant norms of the United Nations in the field of the prevention of torture and other ill-treatment, including the comments and recommendations of the SPT.
37. The NPM should ensure that any confidential information acquired in the course of its work is fully protected.
38. The NPM should ensure that it has the capacity to and does engage in a meaningful process of dialogue with the State concerning the implementation of its recommendations. It should also actively seek to follow-up on the implementation of any recommendations which the SPT has made in relation to the country in question, liaising with the SPT when doing so.
39. The NPM should seek to establish and maintain contacts with other NPMs with a view to sharing experience and reinforcing its effectiveness.
40. The NPM should seek to establish and maintain contact with the SPT, as provided for and for the purposes set out in the Optional Protocol.

## Annex 3

### List of stakeholders for interview

- South African Human Rights Commission
  - Adv. Bongani, Chairperson of the SAHRC
  - Commissioner Nissen, as Commissioner with the NPM mandate
  - Adv Tseliso Thipanyane, SAHRC CEO
  - Ms Chantal Kisoona, SAHRC COO
  - Dr. Kwanele Pakati, NPM Unit
  - Mr Siyasanga Giyose, Head of Strategic Support and Governance
  - Rest of NPM unit – Nokwanda Nzimande, Katleho Molapo
  - Provincial managers
  - Human rights officers
  
- NPM liaison / point of contact at the following NPM member institutions, and other relevant departments:
  - Independent Police Investigative Directorate – Matthews Sesoko & Fikile Mdhuli
  - Civilian Secretariat for Police Service
  - Judicial Inspectorate for Correctional Services – Justice Edwin Cameron and Mr Misser, CEO
  - Military Ombud
  - Health Ombud
  - Department of Health – Dr Evah Mulutsi, Forensic Psychiatry directorate
  - Department of Social Development – Steven Maselesele
  - Department of Correctional Services – Acting national commissioner or his delegated official
  - South African Police Service
  - Department of Home Affairs
  - South African National Defence Force
  - Department of Justice and Constitutional Development – Ms Kalay Pillay, DDG legislative development
  
- Relevant international, regional bodies and NGOs
  - Association for the Prevention of Torture
  - Office of the High Commissioner for Human Rights ROSA
  - Subcommittee on Prevention of Torture/ previous members of the SPT

## Annex 4

### List of questions used to guide semi-structured interviews

1. What do you consider coordination of the NPM to currently entail?
  - a. What should it entail?
  - b. What structures are put in place to coordinate activities with other NPM members (e.g. quarterly meetings, sharing of documents, etc.)?
  - c. How well do these work?
  - d. How do the focal points (e.g. with IPID) work?
  - e. What would the SAHRC need to undertake this coordination?
  - f. How do you share information on e.g. visits done by members, complaints and allegations of torture or ill-treatment, etc.; or on methodologies of visits?
  - g. Are there any gaps in the places of deprivation of liberty covered by the NPM?
  - h. What engagement have you had with the SPT?
2. Have there been any instances where there has been a disagreement by one NPM member with another as to how the NPM should proceed?
  - a. If not, how would you envisage this would be managed?
3. Branding of the NPM?
  - a. Does the SAHRC do work as the NPM under its own branding?
  - b. Where is the NPM logo used on SAHRC reports?
4. Do you think coordination should be undertaken by a separate body, not the SAHRC? And if so, who?
5. What activities does the NPM undertake to fulfil its mandate?
  - a. Which places of deprivation of liberty do you visit and how often?
  - b. Who organises these visits?
  - c. When you go on a visit do you go as the SAHRC or the NPM or both? How are those at the institution informed of who it is visiting?
  - d. Are all visits NPM visits?
  - e. Do you visit with other NPM members?
  - f. Who goes on these visits?
  - g. Have you had an external experts to support you in your work as NPM?
    - i. What have they done?
    - ii. Have they been paid and how much are their travel costs covered?
  - h. Do staff in the NPM and in SARHC need training on aspects of the NPM mandate If so, what? Who has provided this?
  - i. Is everything the SAHRC does on torture prevention NPM work?
6. How are the nine provincial offices engaged in NPM work, if at all?
7. Geographical coverage may also be enhanced within a multiple-body NPM.
8. Number of staff undertaking NPM functions and their roles?
9. Who line-manages NPM staff?
10. What knowledge and expertise do they have?
11. What role do other staff in the SAHRC play in the NPM?
12. Any instances where SAHRC not agree with staff of the NPM? How would this be managed?
13. Is the budget and staffing ring-fenced for the NPM? How does this work exactly?

14. How does the SAHRC engage with the NPM work? Structures, meetings, staffing, etc.? Policies on this?
15. To whom is the NPM accountable? Is this the same as each NPM member?
16. Who is the accounting officer?
17. Who presents the NPM report to Parliament?
18. Any areas where you think that the SAHRC does not comply with OPCAT?

## Annex 5

### Examples of multiple body NPM models in other states

#### 1. United Kingdom

**Structure:** The UK has designated 21 existing oversight bodies to carry out the NPM mandate. These bodies each have responsibility, sometimes jointly, to monitor places of deprivation of liberty in the UK. Currently there is no single piece of legislation governing the establishment and functioning of the UK NPM.

**Governance and coordination:** The government designated HM Inspectorate of Prisons (England and Wales) to coordinate the NPM. The coordination of the NPM is assisted by an NPM Secretariat, currently comprised of three members of staff based at the HM Inspectorate of Prisons offices.

The **NPM Secretariat** has responsibility to:

- promoting cohesion and a shared understanding of OPCAT among NPM members;
- encouraging collaboration and the sharing of information and good practice between UK NPM members
- facilitating joint activities between members on issues of common concern
- liaising with the SPT, other NPMs and other relevant international human rights bodies
- sharing experience and expertise between the UK NPM and NPMs in other States
- representing the NPM as a whole to government and other stakeholders in the UK
- preparing the annual report and other publications.<sup>31</sup>

In 2014, NPM members decided to appoint an independent chair, from outside the membership of the NPM, to strengthen its governance and to advise and support the NPM in fulfilling its OPCAT mandate. This is a voluntary position.

The **NPM Chair's** role is to:

- Represent the UK NPM in meetings with members, government, and international bodies;
- Chair NPM Steering Group meetings three to four times a year and NPM business meetings twice a year
- Support NPM members in developing and implementing NPM work and in fulfilling their NPM responsibilities
- Speak publicly on behalf of the NPM and represent the NPM at meetings with external stakeholders.<sup>32</sup>

The UK NPM members have also established a **Steering Group**, comprised of five representatives from NPM member bodies, and the NPM Chair. The role of the Steering Group is to:

- facilitate decision making relating to the NPM
- set the strategic direction for coordinated/joint NPM activity
- assist in planning future joint activities, e.g. thematic workshops, annual reports

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<sup>31</sup> <https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/npm-coordination/>

<sup>32</sup> <https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/npm-chair/>

- advise and support HMIP and the NPM Coordinator in their roles
- monitor and assess the value of joint activities
- promote engagement of all members in joint NPM activity
- act on behalf of the NPM
- represent all members of the NPM as best it can, taking into account the different roles of the members and the contexts in which they operate.<sup>33</sup>

Membership of the Steering Committee includes one member for each of the four countries forming the UK (England, Wales, Scotland and Northern Ireland) and consideration is given to strive for an equitable spread among types of places of deprivation of liberty and lay/professional bodies. Membership of the Steering Group is limited to two, two-year terms. New Steering Group members are elected by NPM members at Business Meetings.<sup>34</sup>

In addition, representatives from all NPM members attend twice-yearly **business meetings** and communicate throughout the year about their NPM work, which follows an annual business plan.<sup>35</sup>

Four **sub-groups** have also been created to provide specific focus on areas of detention, informing approaches and providing a space for sharing information and expertise on thematic issues. The sub-groups currently are i) the Children and Young People's Sub-group; 2) the Scottish Sub-group; 3) the Mental Health Sub-group; and 4) the Police Custody Sub-group.<sup>36</sup>

**SPT observations on the NPM:** The SPT carried out a visit to the UK in 2019. Among the issues raised in their visit report were the following key observations and recommendations relating to the structure and functioning of the NPM:

- There is a lack of legislation that sets out both the mandate of the NPM and that of its constituent bodies.<sup>37</sup>
- There is a need to amend the statutes of the individual bodies entrusted with the NPM mandate, as the specific NPM-related activities are not necessarily given the importance they deserve when members are working within their statutory mandate.<sup>38</sup>
- The powers and duties of the Chair of the mechanism and the coordinating role of Her Majesty's Inspectorate of Prisons are not recognised in legislation.<sup>39</sup>
- No member has explicit powers to visit extraterritorial places of detention, including temporary detention facilities set up by the State party's military abroad, the overseas territories and Crown dependencies of the United Kingdom.<sup>40</sup>
- Visits to military places of detention is by invitation only, which is incompatible with the purpose and objectives of the OPCAT.<sup>41</sup>
- The independence of the NPM personnel must be rigorously safeguarded and constantly reinforced, inter alia, by reducing the members' reliance on staff seconded from places of

<sup>33</sup> <https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/npm-steering-group/>

<sup>34</sup> UK NPM Steering Group Terms of Reference, available at:

<https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/npm-steering-group/>

<sup>35</sup> <https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/>

<sup>36</sup> <https://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/>

<sup>37</sup> UN Subcommittee Visit Report to the United Kingdom, UN Doc. CAT/OP/GBR/RONPM/1, para.20.

<sup>38</sup> Ibid. para. 36.

<sup>39</sup> Ibid. para. 35.

<sup>40</sup> Ibid. para. 41.

<sup>41</sup> Ibid. para. 40.

deprivation of liberty and enhancing the transparency of the selection process of the mechanism's personnel.<sup>42</sup>

- Some members of the NPM face challenges with the budgets necessary to carry out their national preventive mechanism functions. This is due to a range of factors, including recent budget cuts and budgets for the mechanism's work within the 21 bodies not being ring-fenced to carry out preventive work and thus being allocated alongside competing priorities.<sup>43</sup>
- Resources provided to the NPM Secretariat remain insufficient, the more so considering the complex institutional structure of the mechanism. The lack of additional resources for its secretariat impeded the realization of the full potential of joined-up work across member organizations, four nations and the different detention settings.<sup>44</sup>
- The "layered" structure of monitoring may present a risk of duplication and a risk of discrepancy in findings.<sup>45</sup>
- The NPM should increase its institutional visibility as a collegial body, design a strategy for raising public awareness of its Optional Protocol-mandated tasks and continue striving for stronger coordination and more cohesive work through strategic measures.<sup>46</sup>

## 2. New Zealand

**Structure:** The New Zealand NPM is currently comprised of four existing oversight bodies, with responsibility for monitoring specific deprivation of liberty settings, and a Central NPM for coordination:

- The Ombudsman: to monitor prisons and those in the custody of the Department of Corrections, health & disability places of detention including privately run aged care facilities, Immigration premises, children & young persons residences, Public Protection Order residences, court facilities
- The Independent Police Conduct Authority: to monitor police custody including court facilities
- The Children's Commissioner: to monitor children & young persons' residences
- The Inspector of Service Penal Establishments: to monitor the Defence Force
- The Human Rights Commission as the Central NPM.<sup>47</sup>

**Governance and coordination:** The establishment and functioning of the New Zealand NPM is governed by the Crimes of Torture Act 1989 (as amended). This Act includes provisions for the establishment of a Central NPM (CNPM) to facilitate coordination. The Human Rights Commission has been given a coordination role as the CNPM.<sup>48</sup> The functions of the CNPM are set out in S.32 of the Crimes of Torture Act as follows:

- To consult and liaise with National Preventive Mechanisms
- To review their reports and advise of any systemic issues
- To coordinate the submission of reports to the SPT
- In consultation with National Preventive Mechanisms, to make recommendations on any matters concerning the prevention of torture and ill-treatment in places of detention.<sup>49</sup>

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<sup>42</sup> Ibid. para. 55.

<sup>43</sup> Ibid. para. 57.

<sup>44</sup> Ibid. para. 58.

<sup>45</sup> Ibid. para. 63.

<sup>46</sup> Ibid. para. 68.

<sup>47</sup> <https://www.hrc.co.nz/our-work/torture-and-detention/monitoring-places-detention/>

<sup>48</sup> <https://www.hrc.co.nz/our-work/torture-and-detention/monitoring-places-detention/>

<sup>49</sup> Section 32 of the Crimes of Torture Act 1989,

<https://www.legislation.govt.nz/act/public/1989/0106/latest/DLM193222.html>



**SPT observations on the NPM:** The SPT carried out a visit to New Zealand in 2013.<sup>50</sup> Among the issues raised in their visit report were the following key observations and recommendations relating to the structure and functioning of the NPM:

- The NPM lacked an adequate number of staff, given the large numbers of places of detention within their mandates, and there was a lack of expertise in medical and mental health issues.<sup>51</sup>
- The status and visibility of the bodies of the national preventive mechanism should be enhanced.<sup>52</sup>
- There are gaps and overlaps in the mandates of the NPM members, which need addressing to ensure all places of deprivation of liberty are monitored.<sup>53</sup>
- Lines of communication regarding the implementation of recommendations arising from their visits needs to be improved among the NPM members.<sup>54</sup>
- The State should support the NPM member as they seek to develop and maintain a collective identity through, inter alia, joint visits and joint public reports, harmonized working methods, shared expertise and enhanced coordination.<sup>55</sup>

### 3. The Netherlands

**Structure: The NPM is comprised of five bodies, with a supervisory or advisory role in relation to people deprived of their liberty:**

- The [Inspectorate of Security and Justice \(IVenJ\)](#)
- The Health and Youth Care Inspectorate
- The Commissions of Oversight for Penitentiary Institutions
- The Commissions of Oversight for Police Custody
- The Detention Areas Supervisory Commission of the Royal Netherlands Marechaussee.<sup>56</sup>

The organisations work together in areas where their supervisory competences overlap.<sup>57</sup> Currently there is no single piece of legislation governing the establishment and functioning of the NPM in the Netherlands.

**Governance and coordination:** The IVenJ has been given the function of coordinating the NPM in the Netherlands. In this coordinating role, the IVenJ organises meetings amongst all the Dutch NPM member institutions, to exchange information, discuss working methods, and prepare the annual report.<sup>58</sup>

**SPT observations on the NPM:** The SPT carried out a visit to the Netherlands in 2015. Among the issues raised in their visit report were the following key observations and recommendations relating to the structure and functioning of the NPM:

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<sup>50</sup> UN Subcommittee Visit Report to New Zealand, UN Doc. CAT/OP/NZL/1,

<sup>51</sup> UN Subcommittee Visit Report to New Zealand, UN Doc. CAT/OP/NZL/1, para. 13.

<sup>52</sup> Ibid. para. 16

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> <https://www.inspectie-jenv.nl/english>

<sup>57</sup> Annual Report of the Dutch National Preventive Mechanism 2019, p. 11 and Appendix 1, available at: <https://www.inspectie-jenv.nl/english>

<sup>58</sup> <https://www.apr.ch/en/knowledge-hub/opcat-database/netherlands>

- There should be a separate legislative text regulating the NPM-specific functions, the NPM mandate, NPM powers and guarantees, and the relationship between NPM members and other bodies.<sup>59</sup>
- The legal framework should also require a separate budget line in the State budget for the funding of the NPM, in order to ensure its continuous financial and operational autonomy.<sup>60</sup>
- The NPM is largely invisible, and without a separate legislative mandate, specified NPM tasks, specially allocated resources and systematic cooperation with other national and international stakeholders, it is difficult to perceive the NPM as its own entity.<sup>61</sup>
- The NPM does not actively involve CSOs in its work and does not fully benefit from the expertise of other institutions sharing a human rights mandate.<sup>62</sup>
- The State may contribute to increasing the visibility of the NPM by, for example, coordinating public awareness campaigns, producing and distributing materials on the mandate and activities of the NPM in various languages to detention personnel, detainees and civil society, and by informing associations of service users, lawyers and the judiciary on the mandate of the NPM.<sup>63</sup>
- The proximity of the inspectorates to the ministries, both in their establishment and their functioning, threatens the NPM's credibility.<sup>64</sup>
- There are gaps in the monitoring framework with a lack of clarity for the monitoring of the places of detention in the Caribbean Netherlands, and lack of monitoring by the NPM of places of detention in the Netherlands that are leased by other states and accommodating persons detained by those states.<sup>65</sup>
- The NPM lacks adequate resources and funding should be provided to the NPM through a separate line in the national annual budget referring specifically to the NPM. This funding should be at such a level as to allow the NPM to carry out its visiting programme in all regions of the State party and to conduct follow-up visits.<sup>66</sup>

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<sup>59</sup> UN Subcommittee Visit Report to the Netherlands, UN Doc. CAT/OP/NLD/, paras. 24-27.

<sup>60</sup> Ibid para.27.

<sup>61</sup> UN Subcommittee Visit Report to the Netherlands, UN Doc. CAT/OP/NLD/, para.29.

<sup>62</sup> Ibid. para.32.

<sup>63</sup> Ibid. para. 34.

<sup>64</sup> Ibid. para. 36.

<sup>65</sup> Ibid. 41.

<sup>66</sup> Ibid. 48.