



African Policing Civilian Oversight Forum

Submission to the Portfolio Committee on Justice and Correctional Services on the Correctional Services Amendment Bill 14 July 2023

The African Policing Civilian Oversight Forum (APCOF) is a not-for-profit trust working on issues of police accountability and governance across Africa. As part of its work, APCOF has a strong focus on mechanisms of criminal justice oversight, including governance, independence and functional issues relating to the Judicial Inspectorate for Correctional Services (JICS) and the National Preventive Mechanisms (NPM). Accordingly, we welcome the invitation from the Portfolio Committee on Justice and Correctional Services to make submissions on the Correctional Services Amendment Bill ('the Bill').

Our submission focuses on three aspects of the Bill for which we provide recommendations:

1. Financial independence of JICS
2. The role of JICS as a member of South African's National Preventive Mechanism (NPM)
3. The appointment of the JICS Chief Executive Officer

We have also contributed to the development of a separate submission by the Detention Justice Forum, of which APCOF is a member. We endorse that submission and urge the Committee to consider the recommendations made therein regarding the use of gender neutral language; the interaction between this Bill and the JICS Bill; segregation of inmates; the use of mechanical restraints; appointment of the Chief Executive Officer of JICS; expenses of JICS; and the mandatory reporting obligations of the Department to the Inspecting Judge.

APCOF is interested in making a verbal presentation to the Committee if provided with the opportunity to do so. For more information about this submission, please contact:

Sean Tait
Director
African Policing Civilian Oversight Forum (APCOF)
T: +27 21 447 2415
E: sean@apcof.org.za

African Policing Civilian Oversight Forum
Building 23B, Suite 16, Waverley Business Park, Wyecroft Road, Mowbray, Cape Town, 7925
PostNet Suite 63 Private Bag x11, Mowbray, 7705
Tel: +27 21 447 2415
www.apcof.org.za
Trust no. IT1900/2012
PBO 930041858, NPO 119 688- NPO
Trustees: T Gandidze (Chair), G Cronje (Treasurer), P Tlakula, E van der Spuy, A Van Wyk, S Africa

Recommendation 1: Financial independence

In its current form, the Bill does not implement the judgment of the Constitutional Court in Sonke Gender Justice NPC v President of the Republic of South Africa and Others¹ regarding the financial independence of JICS from the Department of Correctional Services (DCS). To remedy this, we recommend that the Bill be amended to remove the requirement in section 91(1) that the JICS budget be subject to a departmental vote.

In preparing our recommendation to the Committee, APCOF has considered the Constitutional Court's confirmation of an order of constitutional invalidity made by the Western Cape High Court in *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*,² and precedents relied on in that judgment regarding the nature of independence of investigative or oversight institutions.³ As the Committee is aware, the Applicants in the *Sonke* matter successfully argued that section 7(2) of the Constitution imposes an obligation on South Africa to establish and maintain an independent body, and that the Correctional Services Act does not meet the requirements of financial independence.

As the Committee is also aware, there is precedent at both the national and international levels to assist in the interpretation of independence, including financial independence, of statutory oversight mechanisms. Significantly, the duty to ensure the respect, promotion and fulfilment of South Africa's constitutional bill of rights, and requirement that reasonable and effective steps be taken to fulfil this duty, has been interpreted by the Constitutional Court in *Glenister* case to include the establishment of independent oversight mechanisms as interpreted under international law.⁴ To that end, South Africa's obligations under articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and its ratification of the UNCAT Optional Protocol (OPCAT) to establish the National Preventive Mechanisms (NPM), create a clear obligation to establish independent and effective oversight in places of detention with a view to preventing and combating torture. Given the legislative mandate of JICS, and its membership of the NPM, analysis of what independence means in this context is relevant.

Consideration of what independence means has been given careful consideration at the UN level by the Sub-committee for the Prevention of Torture (SPT), which has a mandate to oversee state party implementation of the OPCAT. Article 18 of the OPCAT requires that South Africa guarantee the functional independence of the NPM and its members, and to give due consideration to the Paris Principles.⁵ Article 2 of the Paris Principles provide that institutions should not be subject to 'financial control which might affect its independence'. The SPT has interpreted the requirement of independence to mean that institutions do not constitute any part of government, parliament, the judiciary or corrections system. This 'functional independence' is premised on an institution's legislative, operational and financial independence, with the latter a fundamental prerequisite:

¹ (CCT307/19) [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (4 December 2020)

² Ibid.

³ *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 189-193; *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC); *McBride v Minister of Police* 2016 (2) SACR 585 (CC); and *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* 2018 (2) SACR 442 (CC).

⁴ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 189-193.

⁵ Principles relating to the status of national institutions for the promotion and protection of human rights, UN General Assembly resolution A/RES/48/134 (Annex) of 20 December 1993 ('The Paris Principles').

- *Legislative independence* requires the mandate of the institution to be set out in a legislative instrument that establishes the mandate, powers, election process, terms of office, funding, and lines of accountability.
- *Operational independence* demands that the institution not be under the institutional control of an executive branch of government, and that the enabling legislation explicitly provide that the executive branch does not interfere with the mandate and operations of the institution. All members. It also requires that all members be experienced and independent and free from conflicts of interest, with legislative provisions that establish the appointment procedures of members detailing method, criteria, duration of appointment, privileges, immunities, and dismissal and appeal procedures.
- *Financial independence* entails the specific allocation of resources necessary to allow the institution to function effectively and independently to carry out its mandate. Enabling legislation should make provision for the source and nature of funding to the institution.

However, the court in the *Sonke* matter held that JICS is not reasonably independent insofar as South Africa's obligations under OPCAT and the Paris Principles, and that South Africa has not fulfilled its obligations under section 7(2) of the Constitution to ensure that JICS is sufficiently independent.

APCOF is particularly concerned about the issue of financial independence, which the Amendment Bill ostensibly seeks to remedy. The Heads of Argument⁶ provided by the Applicants in the *Sonke* case set out the key challenges, affirmed by the Constitutional Court, with respect to the financial independence of JICS. In APCOF's view, the proposed amendment to the Correctional Services Act does not satisfy the Constitutional Court's decision in *Sonke*, nor South Africa's obligations under the OPCAT. In section 91(1), the Bill proposes to maintain a relationship between JICS and the Department of Correctional Services through the requirement of a departmental vote on the JICS budget. We contend that the Department should have no control over the finances of JICS, and that the Amendment Bill is essentially maintaining the status quo by involving the Department in matters relating to JICS' financial matters. Accordingly, we recommend the amendment of section 91(1) to remove reference to the departmental vote.

Recommendation 2: References to the National Preventive Mechanism

Given the inclusion of JICS in the governance and operational mandates of South Africa's National Preventive Mechanism (NPM), the Bill should be amended to ensure that specific reference is made to this obligation, and for the need to ensure that the JICS budget includes a specific allocation to support its NPM work.

APCOF notes that there is a draft JICS Bill currently under development, and we have provided our comments on that draft to JICS in response to their 2022 call for inputs. We noted that the JICS Bill does not sufficiently detail the role of JICS in the governance and institutional work of the NPM, and that legislative consideration should be given to this issue in compliance with South Africa's obligations under the OPCAT. As detailed in relation to Recommendation 1 of this submission, above, a crucial element of establishing independence of an NPM is its legislative framework. The cooperative model adopted by South Africa to establish an NPM means that while the institutions delegated with NPM functions do have their own enabling legislation, this legislation requires amendment to ensure that the mandate, powers and lines of accountability and funding *vis a vis* the NPM is made clear.

⁶ Available at <http://www.saflii.org/za/cases/ZACC/2020/26hoa.pdf> (accessed on 26 June 2023).

In the absence of a JICS Bill for comment before the Committee, we recommend that the powers, functions and mandate of the JICS within the current Correctional Services Act be amended to include specific reference to its role within the South African NPM. We furthermore recommend that Act be amended by the Bill to provide for a specific budgetary allocation to allow JICS to undertake its work according to the NPM mandate.

Recommendation 3: Appointment of the Chief Executive Officer

The criteria for the appointment of the Chief Executive should be strengthened along the lines of other independent oversight mechanisms, specifically the Public Protector and the Auditor-General to ensure a fair and transparent process of recruitment that involves Parliament in the process, and is free from interference by the Department of Correctional Services.

APCOF has made similar submissions regarding the appointment and removal of the Executive Director of IPID within the context of the IPID Amendment Bill. While the institutions are different in terms of their establishment by law, and mandate areas, the process for recruitment are similar as they relate to both South Africa's obligations to ensure effective and independent mechanisms of accountability (as set out in relation to Recommendation 1, above) and to the confidence of the institution to fulfil its mandate.

Aside from the lack of detail provided in the Bill regarding the process, we are also concerned by the use of the phrase "career incidents" in 4(d) without providing a definition of what will constitute a 'career incident'. Given the role played by the Chief Executive Officer in overseeing the Department of Corrections, and the implied integrity and trust required of that type of role, we make recommendations below aimed at clarifying the attributes relevant to appointment.

Accordingly, we recommend that the Amendment Bill be revised to insert the following clauses into the Correctional Services Act as it pertains to the appointment of the Chief Executive Officer:

(1) Whenever there is a vacancy, a committee established by the National Assembly shall initiate the appointment of the Chief Executive Officer through an open, transparent and competitive recruitment process.

(2) The recruitment process referred to in subsection (1) shall be by way of applications, invitations or nominations.

(3) The Chief Executive Officer must -

(a) be a South African citizen;

(b) be a fit and proper person;

(c) be a suitably qualified person and must possess an appropriate qualification in law, administration of criminal justice or forensic investigation; and

(d) have knowledge and experience in the administration of justice, public administration and public finance management for a cumulative period of at least 10 years.

(4) The Chief Executive Officer shall be appointed for a period of non-renewable fixed term of not shorter than seven years and not exceeding ten years.

(5) The period referred to in subsection (4) is to be determined at the time of the appointment.

(6) The committee must submit its report and recommendations relating to the provisions of subsections (1) and (4) to the National Assembly after concluding the recruitment process.

(7) The report and recommendations referred to in subsection (6) shall be submitted within 14 days to the National Assembly if Parliament is in session or if Parliament is not then in session, within 14 days after its next ensuing session.

(8) The National Assembly shall, within 30 working days of the receipt of the report and recommendation by the committee referred to in subsection (6), confirm or reject such recommendation which shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.

(9) The period of 30 working days referred to in subsection (8) shall mean the period when Parliament is in session.

(10) The Chief Executive Officer shall not perform remunerative work outside his or her official duties.

(11) The Minister shall after confirmation of the National Assembly take steps to formalise the appointment of a person as the Chief Executive Officer.

(12) In the case of a vacancy, the National Assembly shall, fill the vacancy within a reasonable period of time, which must not exceed six months.