PROMOTING THE EFFECTIVENESS OF SOUTH AFRICA'S NPM

THE CASE FOR CIVIL SOCIETY COLLABORATION

Abdirahman Maalim Gossar
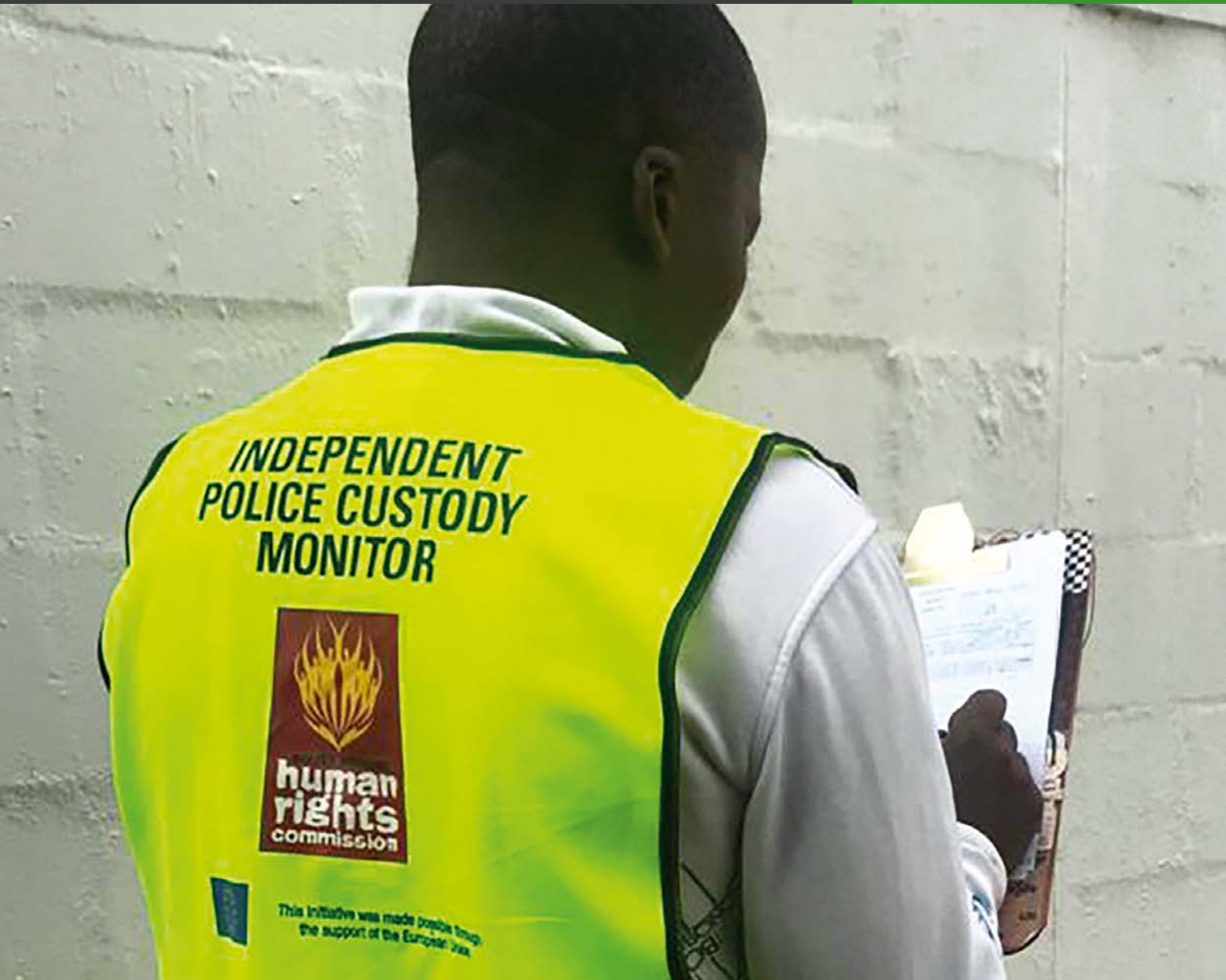
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INTRODUCTION

The use of torture has a long history in South Africa. Before the establishment of a new constitutional order in 1994, torture was routinely applied by the apartheid regime to subdue and punish those opposed to its discriminatory laws and policies.[1] While substantive progress has been made since the transition to a democratic society, the use of torture by security officers in South Africa persists, with the Independent Police Investigative Directorate (IPID) recording 1 077 allegations of torture in police custody alone from 2012 onwards. Actual incidents of torture are likely to be much higher than this official statistic, as, by its nature, torture often takes place in secrecy, in places where the perpetrators feel confident that their actions will escape the reach of monitoring and accountability mechanisms.[2]

Among international developments concerning torture prevention are proactive measures to prevent torture in places where the practice is likely to flourish, namely places of deprivation of liberty. The establishment of mechanisms for independent monitoring of all places of deprivation of liberty is one such measure envisaged as part of effective non-judicial mechanisms that can protect individuals deprived of liberty from the risk of torture and other forms of ill-treatment.[3] South Africa has ratified the key international agreements establishing this obligation, namely the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its Optional Protocol (OPCAT), and has subsequently established the OPCAT-required National Preventive Mechanism (NPM) to monitor all places of deprivation of liberty in the country.

OPCAT does not prescribe a specific organisational or operational structure for NPMs. It leaves it to individual states to determine the structure of NPMs according to their national contexts. In South Africa, the model adopted is 'cooperative', with coordination in respect of the NPM provided by the South African Human Rights Commission (SAHRC), which will draw on the work of existing monitoring mechanisms, such as the Judicial Inspectorate for Correctional Services (JICS), while establishing new mechanisms under the auspices of the NPM to address monitoring gaps, such as those pertaining to police custody and child and youth care centres (CYCCs).

Given the importance of the preventive and transparency strategy that underpins OPCAT, it is imperative that monitoring of places of deprivation of liberty not be undertaken by state institutions alone. Significant value and credibility will be added to the work of South Africa's NPM if civil society – as critical role players in efforts to combat and prevent torture in places of deprivation of liberty – is involved in the engine room of the NPM, as well as in its monitoring work, so as to promote the effectiveness, independence and legitimacy of the mechanism.

This paper explores the legal framework relevant to the establishment of NPMs, and considers the role that civil society organisations (CSO) in South Africa can play within it in order to enhance the mechanism's impact. It begins by establishing the international and regional framework for detention monitoring and the establishment of NPMs, before considering the formal and informal role that civil society actors can play in the activities of the NPM. It provides an analysis of actual examples of NPM collaboration with civil society and concludes with recommendations to the SAHRC, as the NPM's coordinating body, to strengthen the role of civil society in the operationalisation of South Africa's NPM.

SOURCES OF THE OBLIGATION TO MONITOR ALL PLACES OF DEPRIVATION OF LIBERTY

The prohibition of torture under international law is embodied in a number of universal human rights instruments, and has achieved the status of a *jus cogens* under customary international Law.[4] The United Nations (UN) elaborated on the specific obligation on states to prevent, detect and combat torture in UNCAT, which imposes clear duties on state parties to, among others, take effective measures to prevent torture in their territory.

Regionally, the African Charter on Human and Peoples' Rights prohibits torture and other forms of ill-treatment under Article 5. To give effect to this provision, the African Commission on Human and Peoples' Rights in 2002 adopted Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines), which is a normative, soft-law standard that sets out measures and guidelines on the prevention of torture in Africa, including the establishment of effective and independent monitoring mechanisms for places of deprivation of liberty.

South African laws also prohibit torture in all forms and in absolute terms. Section 12(1) of the Constitution protects freedom and security of the person, including freedom from torture and other forms of ill-treatment. In 2013, the National Assembly passed the Prevention and Combatting of Torture of Persons Act, giving effect to its obligation as a signatory to UNCAT to take effective legislative and other measures to prevent acts of torture.

The entry into force of OPCAT in 2006 was a watershed moment for the prevention of torture. OPCAT, as a supplementary instrument to UNCAT, is oriented towards the protection of human rights of persons deprived of their liberty by establishing a dual system of regular visits to places of detention by national and international bodies with a view to preventing torture and other ill-treatment. It establishes an international monitoring and support mechanism, the Subcommittee on the Prevention of Torture (SPT), and a domestic monitoring mechanism through the compulsory establishment of NPMs for all OPCAT state parties.

The emphasis on monitoring is premised on the idea that, because torture and other forms of ill-treatment usually take place in isolated places, their effective prevention can be achieved through a system of regular preventive visits to places of detention.[5] Under the OPCAT framework, state parties are required to establish, designate and maintain one or more bodies as NPMs within one year of their ratification or accession to the Protocol.

OPCAT establishes the minimum powers of an NPM and includes the powers to regularly examine the treatment of persons deprived of liberty, to make recommendations to state authorities with the aim of improving the treatment and conditions of individuals in detention, and to make proposals and observations regarding existing or draft legislation.[6] In the execution of their duties, NPMs are guided by established values of independence, transparency, cooperation and constructive dialogue. These principles must govern all aspects of the work of NPMs.[7]

OPCAT envisions a system of preventive visits to any place where persons may be deprived of their liberty, and obliges state parties to allow NPMs access to all relevant information pertaining to places of detention, physical access to all places of detention, and the opportunity to privately interview detainees or any other person with relevant information, subject to confidentiality requirements. NPMs also have the right to choose the places they wish to visit and the people they want to interview.[8]

South Africa's National Assembly ratified OPCAT in March 2019, which triggered the obligation to establish an NPM. The SAHRC was designated as the body intended to play a coordinating and functional role, together with other oversight agencies such as IPID, the JICS and the Military Ombud, among others. Following the official launch of the NPM by the SAHRC in July 2019, it became apparent that two key issues would need to be addressed for the effective functioning of South Africa's NPM: how to achieve comprehensive monitoring coverage of all places of detention, including places such as police custody where there is currently no systematic and independent monitoring; and how to conceptualise the role of civil society in both the decision-making and operations of the NPM. It is the latter question that will be explored in more detail in the remainder of this paper.

PARTNERSHIP AND COOPERATION WITH CIVIL SOCIETY

Prior to the ratification by South Africa of OPCAT, civil society played a critical role in advocating for ratification, thinking through NPM models that could work in the South African context, and promoting awareness of the importance of monitoring in the prevention of torture in places of deprivation of liberty. Civil society is already invested in the success of South Africa's NPM, and, given the expertise, experience and energy that exists within civil society regarding monitoring and related torture-prevention issues, identifying a formal or informal role in support of the NPM can, if managed well, enhance the effectiveness, independence and legitimacy of the mechanism.

Civil society organisations (CSOs), especially non-governmental organisations (NGOs), generally play a critical role in the effectiveness of human rights protection mechanisms.[9] Within the African human rights system, their contribution in creating conditions that are necessary to promote respect for fundamental human rights and freedoms can be recognised in their participation in the processes and procedures of the African Commission on Human and Peoples' Rights, the principal human rights body on the continent. The office of the UN High Commissioner for Human Rights notes that CSOs play a critical role in the prevention, monitoring and combatting of torture and in assisting victims in various parts of the world.[10]

Domestically, there are already examples of instances in which oversight bodies have decided to partner with civilians to monitor governmental compliance with human rights standards. One recent example is the establishment of a civilian monitoring structure by the SAHRC to participate in the monitoring of the enforcement of lockdown regulations, made under the Disaster Management Act of 2002 in order to combat the novel coronavirus. The Correctional Services Act also allows for the appointment of independent correctional centre visitors (ICCVs) to address the complaints of inmates through, inter alia, conducting regular visits to prisons, setting up private interviews with offenders, and recording complaints and monitoring the manner in which they are dealt with, as part of mechanisms for independent oversight over the provision of correctional services.

Although OPCAT does not expressly require NPMs to engage in strategic collaborations with CSOs, the SPT encourages cooperation and coordination between NPMs and CSOs. In its concluding observations and recommendations addressed to the NPM of Hungary, it recommends

> that the NPM engage more directly and independently with civil society organizations, including, at a minimum, through their increased participation in NPM visits, internal trainings, outreach activities, in report writing and in dialogue with the authorities.[11]

CSOs can make various contributions to the operations of an NPM within the framework of OPCAT. Drawing from examples across the world, CSOs can generally be categorised into two broad areas: CSOs with formal participation in NPMs; and CSOs performing other informal roles in order to support the work of NPMs.

CSOs playing formal roles in NPMs

The two most common forms of formal involvement in the work of NPMs are the direct participation of CSOs in the monitoring of places of deprivation of liberty, and the performance of advisory functions.[12]

Monitoring of places of deprivation of liberty

CSOs can be included in the performance of all of an NPM's formal functions, such as the monitoring of detention facilities in conjunction with other existing statutory mechanisms. In some jurisdictions, this practice is known as the 'ombudsperson plus model', signifying the partnership between a statutory mechanism, such as office of the ombudsperson, and CSOs in acting as an NPM.[13] The main advantage associated with this collaborative model is that it supplements existing expertise, as well as human and financial resources, in order to establish an effective domestic preventive mechanism.[14] The inclusion of qualified independent experts within CSOs, experienced in various fields, including the administration of justice, gives such NPMs a unique human resource advantage in ensuring the effective prevention of torture.

The argument for the formal incorporation of CSOs into NPMs is also supported by the idea that CSOs enjoy a greater structural independence from the executive branch of government.[15] By definition, CSOs enjoy a greater level of structural and operational independence. This institutional independence allows them to operate free of any influence or direction from state authorities. In addition, the sharing of substantive monitoring responsibilities with CSOs is also viewed as a means to bolster the credibility of the national monitoring mechanism in the prevention of torture and other forms of ill-treatment.[16] Genuine sharing of responsibilities with CSOs can generate enhanced confidence in the NPM and the outcome of its processes, particularly because the goal of most CSOs is the promotion of the interests of society.

The NPM model adopted in Serbia demonstrates the benefits of this mixed system. It is made up of the office of the ombudsman, provincial ombudsmen, and CSOs whose vision is the promotion and protection of human rights and freedoms. Expert reports highlight the invaluable contribution made by CSOs in strengthening the NPM.[17] This includes capacity building of the NPM in the field of human rights protection, particularly disability rights, through training and joint visits to places of detention – which also allows CSOs to train staff on site in forms and practices of ill-treatment that persons with disability are likely to encounter.[18] The significance of their role is also evident in the contents of joint reports and recommendations, which reflect expert knowledge in specific human rights norms and principles, such as international normative standards that govern disability.[19]

In Slovenia, the NPM consists of the ombudsman, CSOs and other humanitarian organisations involved in the protection of human rights. CSOs play proactive roles such as conducting visits and preparing concomitant reports and recommendations, in partnership with the ombudsman. The selection of CSOs is made on the basis of a public call.[20]

In Denmark, which has an 'ombudsperson plus NPM model', the Parliamentary Ombudsperson has entered into a formal agreement with the NGO, DIGNITY, and the Danish Institute for Human Rights (Denmark's national human rights institution in terms of the Paris Principles) to provide assistance in the execution of the NPM's mandate. This strategic cooperation ensures the contribution of civil society through thematic support for the NPM in the fields of medicine and human rights. Selected staff members of these three institutions form the OPCAT Working Group, which performs NPM tasks such as the inspection of detention facilities and the drafting of reports and statements regarding new legislation.[21]

In the United Kingdom (UK), the NPM is made up of 21 statutory bodies which, inter alia, include a system of independent custody visitors (ICVs). ICVs are volunteers from the community who visit all police custody facilities in order to monitor the well-being of detainees and ensure that their rights, dignity and entitlements are upheld. Within this arrangement, ICVs have the power to, among others, make unannounced visits to police stations, inspect facilities and all relevant custody records, and meet with detainees to discuss their treatment and conditions.[22]

Advisory role

CSOs can also fulfil a consultative role in support of the mandate of an NPM. The establishment of NGO advisory bodies is significant, as they serve to supplement the work of NPMs and promote their effectiveness by providing them with thematic, advisory opinions on any subject relating to the protective mandate of NPMs.

The Austrian NPM has a Human Rights Advisory Council, which supports the Austrian Ombudsman Board (AOB) – the designated NPM – in an advisory capacity. It has 16 members, including representatives of CSOs. It contributes to the work of NPM in various ways, including through: promoting the work of the NPM in various thematic working groups; providing consultation and advice on a regular basis on matters such as supervision of, and counselling for, police officers; the development of monitoring criteria for major police operations; and the establishment of investigative standards. It also analyses reports and contributes to the development of recommendations.[23]

The Norwegian model is also supported by an Advisory Committee. The Committee was established in 2014 to provide the NPM with expertise, advice, information and inputs. It is made up of representatives of 14 organisations – including CSOs – and professional groups working with individuals deprived of liberty and with other vulnerable groups. Together, they have extensive expertise and experience in areas of importance to the preventive work of the NPM.[24] In addition, the Norwegian NPM's staffing component is interdisciplinary and composed of experts in the fields of law, criminology, psychology, sociology, social science and human rights. This is significant, as, apart from conducting preventive visits, the NPM works strategically on knowledge sharing, competence building and advocacy, and maintains an ongoing dialogue with all relevant stakeholders, including CSOs.[25]

In Georgia, CSOs are represented on the NPM Advisory Council, along with representatives of academia and other organisations that work in the fields of torture prevention and criminal justice. The objective of the Council is to promote the effective functioning and transparency of the NPM. It meets every six months to evaluate the work and activities of the NPM.[26]

CSOs performing informal roles

There are several ways in which CSOs can support the work of NPMs and the preventive approach of OPCAT, even without being formally part of the mechanism. Areas of informal support and cooperation are extensive and include aspects such as participation in the NPM appointment procedure, the provision of research findings on torture and other forms of ill-treatment in places of deprivation of liberty, and the provision of training for the staff of the NPM.[27]

CSOs can be an important source of information for the NPM. This is particularly the case with respect to CSOs that have direct contact with individuals in detention. In this situation, the NPM can use such information to focus its visits on specific institutions or issues of urgent concern identified by CSOs, and can use CSO-generated research and data to determine the extent to which its observations and recommendations are being implemented in practice.[28] CSO information can also be used to strategically plan preventive visits and react decisively to unanticipated situations.[29] The provision of information by CSOs and its utilisation contribute significantly to strengthening the effectiveness of NPMs, especially in the context of limited financial and human resources.[30]

CSOs can also promote the work of NPMs by disseminating, and monitoring the implementation of, the findings and recommendations made by NPMs in their annual reports. Many CSOs are skilled in advocacy and can engage in targeted lobbying with a view to encouraging governments to implement NPM recommendations and engage in public dialogue with the NPM.[31] They can also draw the media's attention to NPM reports and recommendations. In the UK, for instance, organisations like the Howard League and Freedom from Torture offer responses to visit reports made by the HM Inspectorate of Prisons.[32]

CSOs can also provide NPM staff with professional training and capacity building. This then ensures that staff have sound practical knowledge so as to enhance their ability to execute the NPM mandate effectively.[33]

To ensure greater transparency within NPMs, CSOs can promote the accountability of NPMs by subjecting their work and activities to assessment, scrutiny and correction.[34] This is particularly important in environments in which the dividing line between the legislative and executive arms of government is not clear. The need to enhance the effectiveness and credibility of NPMs by securing their independence from institutions that establish and fund their work clearly indicates that such institutions are not the appropriate source of accountability and oversight for NPMs.[35]

LOOKING AHEAD: WHY (AND HOW) SOUTH AFRICA'S NPM SHOULD INCLUDE CSOs IN ITS WORK

CSOs play an undeniably critical role in the promotion and protection of human rights. South Africa has a robust, well-capacitated and assertive civil society landscape which has played a key role in maintaining the country's vibrant democratic culture.[36] From influencing governmental policy decisions, to litigating constitutional points to vindicate fundamental human rights and freedoms, to advocacy and targeted campaigns, South African CSOs have a rich history of human rights protection and promotion. Indeed, the Preamble to the Constitution of South Africa recalls that the people of South Africa adopt the Constitution to, inter alia, establish a society based on democratic values, social justice and fundamental human rights. These are principles espoused by most CSOs. The programme areas of many CSOs are informed by the desire to promote these values.

The recognition of the valuable role that CSOs can play in promoting the work of statutory authorities has a precedent in the South African Human Rights Commission Act, which states that, in order to achieve its objects, the SAHRC[37]

> must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission …

Therefore, as the NPM coordinating body, the SAHRC already has some degree of legal foundation that can serve as the underlying justification for any partnership with CSOs in the fulfilment of the objects of OPCAT. The nature of cooperation can be either formal or informal. However, if the SAHRC decides to establish any formal partnership, it will need to ensure that there is a clear definition and division of roles and responsibilities, and it will have to institute special mechanisms regarding confidentiality and information-sharing when the legislation establishing the NPM is promulgated.[38]

Considering the immense benefits of strategic partnerships between NPMs and CSOs highlighted in this analysis, the SAHRC, as the coordinating institution, must include CSOs in the work of the NPM. Collaboration can take any of the following embodiments.

Formation of an advisory group

South Africa's history and rights-focused Constitution means that the civil society sector is equipped with distinctive knowledge and experience in the promotion and protection of human rights. Those within the justice and human rights sector have vast experience of visiting places of detention, monitoring compliance with human rights standards, and providing research findings, policy-related guidance, strategic advice, and recommendations to prevent and combat torture. The NPM can profit from the experience of civil society by formally establishing an advisory group. The mandate of the group can, inter alia, include the provision of advisory opinions and guidance, advising the NPM on areas of strategic intervention, the provision of research and analysis to inform the work of the NPM, and reviewing the working methods and outputs of the NPM. The group should also be part of any steering committee established as part of the NPM, should meet on a quarterly basis, and should be representative of all key stakeholder groups.

Direct participation in monitoring and reporting

South African CSOs can play the formal role of monitoring places of deprivation of liberty, in conjunction with the other designated NPM bodies, and the preparation of post-visit reports. This approach will enhance the monitoring capacities of designated bodies and ensure greater regularity and consistency in monitoring and reporting. The monitoring of all places of detention in the country is a complex task that that must be based on a stable foundation of human resources so as to ensure the adoption of a self-sustaining and enduring mechanism. Among the places the NPM is expected to visit are police custody facilities, correctional centres, CYCCs, immigration detention facilities, and mental-health institutions. The primary challenge for the NPM is how to ensure regular, thorough and effective monitoring of these institutions.

Presently, the NPM does not have the capacity to ensure coverage of all places of detention not already subject to regular monitoring, such as correctional centres, which are subject to the mandate of the Inspecting Judge for Correctional Services. Police custody, in particular, poses a significant challenge, as there are over 1 100 police stations across the nine provinces. The utilisation of a lay visitors scheme – already piloted by the SAHRC, and studied by the African Policing Civilian Oversight Forum (APCOF), in terms of independent custody visits to police custody – has precedence in the lay visitors system in the UK and can provide adequate coverage.[39] Furthermore, the preventive monitoring of particular facilities, such as CYCCs and mental-health institutions, requires specialised training and skills that may not be available within the NPM staffing component. Targeted recruitment of lay visitors, including partnerships with professional associations or CSOs with expertise in, for example, child rights, psychology or the law, can address this challenge.

Advocacy

South African CSOs can play an important role in promoting awareness about the existence and work of the NPM, and in advocating for and monitoring the full and effective implementation of its recommendations. Although not a formal role in the functioning of the NPM, the capacity and effectiveness of CSOs taking on an advocacy role will depend on the relationship that develops between the NPM and its CSO stakeholders. To that end, the NPM should ensure that information is reported and shared with the public, to the extent possible under its mandate, and should engage in regular dialogue with CSOs on areas of mutual concern and interest. This arrangement could be semi-formalised through a regular forum or the establishment of a CSO reference group. This will enable interested CSOs to disseminate and advocate for the uptake of NPM findings and recommendations as well as provide feedback to the NPM on the effectiveness of its work.

CONCLUSION

Torture is a serious, universal crime for which there can never be any justification. Persons deprived of their liberty face increased risk of torture, primarily because of the inaccessibility of most places of detention. The ratification of OPCAT by South Africa and the establishment of the NPM are therefore welcome developments. Drawing on the legal and practical rationale for the establishment of NPMs, and reflection on the functioning of NPMs in other jurisdictions, this paper has provided recommendations to South Africa's NPM on how CSOs can play a critical role – both formally and informally – in supporting its full and effective functioning.

An integrated and flexible approach by the NPM to engagement with the CSO sector, if managed well, clearly has many strategic advantages. As the NPM engages in the difficult and lengthy process of institution building, serious consideration should be given to integrating CSOs into the formal workings of the NPM. This emphasis is guided by the availability of comparative international examples – some of which have been cited in this study– that have effectively utilised the absence of a specific, predetermined structural or organisational prescription by OPCAT, and have adopted preventive mechanisms that flow from their needs and contexts. It is key for any emerging mechanism to use these efforts as models of good practice.

The NPM should be encouraged to draw inspiration from the CSO engagement models presented in this paper, including CSO involvement in advisory, monitoring, research and advocacy capacities. The broad range of places of deprivation of liberty that fall within the mandate of the NPM, many of which are not covered by existing mechanisms, poses a challenge to the full and effective functioning of the NPM. So, too, does the specialised knowledge required to ensure the skilled monitoring of particular environments, such as CYCCs and mental-health institutions. The involvement of CSOs in advisory and monitoring roles, as illustrated by examples from Serbia, Denmark and the UK, can provide an efficient and cost-effective solution, as well as allow the NPM to tap into the specialised expertise within the CSO sector. By building a strong relationship with the sector, the NPM can also draw on support in order to disseminate, and promote implementation of its recommendations as well as encourage community engagement with the NPM and its work.

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