



# 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 Mechanism

29 October 2020

### 1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to provide this submission in response to the draft discussion paper on the role of civil society in the work of the National Preventive Mechanism (NPM). We commend the NPM unit of the South African Human Rights Commission (SAHRC) for seeking to conceptualise a role for civil society in the workings of the NPM, and for providing an opportunity to engage with this strategy while it is still under development.

From the draft discussion paper, we understand that the NPM envisages a formal relationship with civil society in two ways:

- in an advisory role through the establishment of thematic working groups under section 11 of the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act); and
- to augment the capacity of the NPM by including civil society in the monitoring of places of deprivation of liberty.

As the SAHRC will be aware, APCOF recently [published a paper](#) entitled 'Promoting the Effectiveness of South Africa's NPM: The Case for Civil Society Collaboration', which was launched at a [webinar](#) on 21 October 2020 that involved inputs from the NPM, as well as the Subcommittee for the Prevention of Torture, the UK NPM and the Association for the Prevention of Torture. This submission draws on the findings of the APCOF research report, as well as outcomes of the webinar, to make recommendations with respect to the potential role of civil society in the working of South Africa's NPM.

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## **2. Summary of recommendations**

APCOF recommends that consideration be given by the SAHRC to amending the discussion paper to reflect a three-tiered approach to the formal engagement by the NPM with civil society organisations. Based on practices in other jurisdictions, and the unique engagement by South African civil society with issues of torture prevention and detention monitoring, we recommend that the NPM frame its formal relationship in the following ways:

### **2.1. Reference group for engagement with civil society organisations – advisory capacity**

APCOF recommends that there be a mechanism for a formal dialogue between the NPM and civil society organisations in the form of a civil society reference group.

### **2.2. Thematic working groups – advisory capacity**

APCOF then recommends that thematic working groups, comprised of independent experts, be established under section 11 of the SAHRC Act, to provide technical support to the NPM in the development of strategy, research, training, reporting and ad hoc visits.

### **2.3. Lay visitor schemes – monitoring capacity**

Finally, APCOF recommends that the capacity of the NPM to visit places of deprivation of liberty be augmented by the formal establishment of a lay visitors scheme, drawn of community members with an interest in visiting places of detention in their local communities, and thematic experts in the case of specialist institutions, such as mental health institutions.

## **3. Defining civil society, and its various roles**

In section 4.4 of the discussion paper (which focuses on current projects) civil society is defined as including ‘human rights organisations and experts such as academics and researchers, psychiatrists, environmental health specialists, forensic pathologists, social workers, policing and corrections specialists’, who can provide capacity to the NPM in terms of advice and monitoring. In section 5, which details the proposed role of civil society in the NPM, the discussion paper refers to ‘professionals or experts from CSOs and professional bodies [who] can participate in their individual capacity’ in thematic working groups. The role of those working groups is presumably a mixed methodology of advisory and monitoring, with reference in sub-section 5.2 to the appointment of ‘experts or lay visitors’ as ‘special advisors (5.2), and to conduct ‘visits to various places of deprivation of liberty’ (section 6 ‘working methodology’). Section 8 then imposes an obligation on ‘experts assigned specific monitoring tasks’ to provide reports to the NPM of their activities, and it is not clear whether that refers to activities conducted by working group members, or a separate mechanism for the appointment of independent experts for monitoring activities.

While APCOF welcomes the broad intent of including civil society experts in the work of the NPM we recommend that the discussion draft be amended to provide clarity on what constitutes civil society, experts and lay visitors, and is clear on the mechanisms for facilitating this collaboration. In that regard, we have recommendations in relation to the establishment of a formal mechanism to allow the involvement of civil society organisations in the work of the NPM (section 3.1), clarity on the advisory role of independent experts in the context of thematic working groups (section 3.2), and clarity on the role of independent experts or ‘lay visitors’ in monitoring activities (section 3.3).

### **3.1. Mechanisms for engagement with civil society organisations**

The discussion paper uses a variety of terms to describe what is broadly understood as civil society, including NGOs, professional associations, while also using the language including independent experts and ‘lay visitors’ when discussing visiting places of deprivation of liberty. Taken broadly, civil society includes not only NGOs and professional associations, but community-based organisations, community groups, unions, and faith-based organisations. Civil society organisations have been strong and effective advocates of freedom from torture in South Africa, and while more formal structures such as NGOs and professional organisations have motivated for the establishment of the NPM, and conduct oversight visits to places of detention, it is community-based organisations that can provide a direct link to the ultimate beneficiaries of an effective and functioning NPM. While noting that some functions of the NPM are best served by experts operating in their personal capacity (more detail on this is provided below), we strongly motivate a role for relevant civil society organisations (broadly defined, as above) in an advisory role to the NPM, given the intuitional knowledge and experience, as well as constituencies, they bring.

During the launch of the NPM, there was a loose commitment made by the SAHRC to convene regular meetings between civil society organisations and the NPM to allow for dialogue and information flow. An initial meeting was held at the Cape Town office of the SAHRC (attended by APCOF), where broad support for the idea was expressed by both the SAHRC and civil society organisation in attendance. There are many benefits of a more regular, structured and formalised exchange between the NPM and civil society organisations, including building confidence and trust in civil society about the work of the NPM, assisting in the identification of issues that have arisen as a result of the torture prevention and combating work of civil society organisations, and as a forum from which the NPM can draw additional capacity and expertise as identified and needed, to name a few.

Accordingly, APCOF recommends that in addition to the role for civil society set out in the discussion document (i.e. the establishment of thematic working groups with individual experts, and the use of ‘lay visitors’ for monitoring), that there be an overarching mechanism to promote dialogue and information

between civil society organisations and the NPM. APCOF's recently published paper proposed the establishment of such a mechanism in the following terms, which we repeat here for emphasis:<sup>1</sup>

### ***Advocacy***

South African [civil society organisations] 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.'

### **3.2. Thematic working groups**

The discussion paper notes that the SAHRC will utilise its mandate under section 11 of its enabling legislation to convene thematic working groups on corrections, police detention, health and social facilities, administrative detention, and children in detention. APCOF strongly support this idea, and welcomes the inclusion of expertise from civil society in a formal way.

However, we recommend that section 11 of the SAHRC Act only be utilised to convene these working groups until such a time as the NPM has its own enabling legislation, with an equivalent to section 11. Ensuring the institutional visibility of the NPM and its functional independence from the SAHRC is critical to its effectiveness and success, as well as meeting the basic requirements of the OPCAT, and it should have its own power to convene and manage advisory committees.

We further recommend that the powers and functions of the proposed thematic working groups, as well as the process for selection of independent experts, be further elaborated in the discussion paper.

On the issue of scope, in APCOF's [recent publication](#) on civil society involvement in NPMs, trends in terms of the formal involvement of civil society in the work of NPMs were identified, and include the direct participation of civil society in monitoring places of deprivation of liberty, and the performance of advisory functions.<sup>2</sup> The discussion paper hints at a role for the members of the working group in relation to both these potential formal functions, but does not establish the scope of this work or the structural considerations that will then inform the development of clear terms of reference and rules of engagement.

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<sup>1</sup> Abdirahman Maalim Gossar, 'Promoting the effectiveness of South Africa's NPM: The case for civil society collaboration', *APCOF Research Paper No. 28*, August 2020, at 10, available at <https://apcof.org/wp-content/uploads/apcof-research-28-effectiveness-of-the-npm-web.pdf> (accessed on 23 October 2020).

<sup>2</sup> *Ibid*, at 6.

To this end, we recommend that the discussion paper delink the technical advisory role of the proposed thematic committees from the establishment of so-called ‘lay visitor’ schemes as, in our view, while one will inform the other, they are separate mechanisms that will need to be subject to their own terms of reference.

Therefore, we recommend that the NPM establish thematic working groups as proposed in the current draft of the discussion paper, with a clear mandate to undertake the following tasks, drawn from the discussion paper, in addition to other examples of good practice engagement by NPMs in other jurisdictions, as set out in APCOF’s recent publication:

- Developing monitoring and training toolkits for the thematic area, and roll-out to NPM staff and lay visitors who will be conducting monitoring visits;
- Informing the NPM’s strategy in the thematic area, including the formation of recommendations, advice regarding follow up and implementation of recommendations and findings, identifying issues of concern, identifying systemic issues based on review of monitoring data and reports, and providing expert advice, research and development of advocacy materials to address systemic issues;
- Participating in select monitoring visits as an accredited NPM visitor, based on the strategy and priorities of the thematic working group.

The appointment of independent experts to the thematic working groups will then need to be subject to an open and transparent process, which is subject to clear recruitment criteria and terms of reference for their engagement. However, APCOF urges the NPM to consider broadening the membership of thematic working groups beyond independent experts, to tap into the institutional knowledge and expertise of civil society organisations, similar to the model adopted by the Danish NPM (which has formal arrangements with particular NGOs in strategic and specialist thematic areas to augment knowledge and capacity).<sup>3</sup> To ensure consistency of methodology across the working group, the NPM should be represented in each working group, with clear lines for accountability and reporting on working group activities established in a terms of reference.

### **3.3. Lay visitor scheme**

Separately to the establishment of thematic working groups, the NPM should then have a system of lay visitors to augment the currently limited capacity of the NPM to visit all places of deprivation of liberty in the Republic. The establishment of such schemes have precedent in the UK NPM, and has been piloted by

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<sup>3</sup> Ibid, at 7.

the SAHRC as part of its partnership with APCOF on the development of a system for the independent monitoring of police custody.<sup>4</sup> As APCOF noted in its [recent publication](#):<sup>5</sup>

Presently, the [South African] NPM does not have the capacity to ensure coverage of all places of detention not already subject to regular monitoring... 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 visitor scheme – already piloted by the SAHRC and studied by [APCOF] in terms of independent visits to police custody – has precedence in the lay visitors system in the UK and can provide adequate coverage. Furthermore, the preventive monitoring of particular facilities, such as [Child and Youth Care Centres] and mental health institutions, requires specialised training and skills that may not be available with 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.’

The management of the lay visitors scheme (including recruitment, training, oversight and reporting) would be the responsibility of the NPM, who will need to ensure the development of a training and monitoring toolkit and code of conduct, with expert advice on the development of these documents by the thematic working groups. Consideration needs to be given to the cost implication of lay visitors, as it may be necessary or appropriate in the South African context to cover the transport, insurance and data costs of lay visitors, based on mapping and needs assessment that we recommend be undertaken as part of the process of establishing lay visitor schemes beyond that already piloted for police custody.

#### **4. Conclusion**

APCOF welcomes the efforts of the SAHRC to provide some definition to the role of civil society in the operations of the NPM and commends the SAHRC on opening this issue to consultation at this early stage.

Our overarching recommendation that there be three separate, but interlinked, formal mechanisms for civil society involvement is not without precedent, and given both the expertise that exists within civil society on issues of torture and detention monitoring, coupled with the need to ensure the relevance and visibility of the NPM at a community level, we hope that they will be considered as the discussion paper is finalised.

We welcome any further opportunity to comment or provide additional information on this important issue.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid, at 10.

