



# African Policing Civilian Oversight Forum

22 October 2020

Mr. V. Misser  
Chief Executive Officer  
The Judicial Inspectorate for Correctional Services

By Email: [JICSbills@dcs.gov.za](mailto:JICSbills@dcs.gov.za)

Dear Mr. Misser,

## **Comment on the Judicial Inspectorate for Correctional Services Proposed Draft Bill**

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to provide comment on the Judicial Inspectorate for Correctional Services Proposed Draft Bill (JICS Bill). We commend JICS for inviting public comment at this early stage in the development of its legislation.

APCOF is encouraged by the clear reference to aligning the Bill with the requirements of the Optional Protocol to the UN Convention against Torture (OPCAT). We are an interested civil society stakeholder in the establishment and success of an independent and effective National Preventive Mechanism (NPM) and support the efforts of JICS to promote the fundamental tenets of OPCAT in its enabling legislation.

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Our comment on the JICS Bill focuses on the alignment with OPCAT, and makes recommendations to strengthen those efforts.

### Alignment of the JICS Bill with OPCAT

The adoption by the South African Human Rights Commission (SAHRC) of a coordination model for the NPM has significant implications for the independence and functioning of the institutions, such as JICS, that form part of the NPM structure. We note the reference to the functions of the JICS National office in section 13(1)(n) as including, *inter alia*, the conduct of inspections, investigations and other reports for the South African Human Rights Commission in terms of the provisions of OPCAT.

As JICS will be aware, the OPCAT and the authoritative commentary provided by the Subcommittee for the Prevention of Torture provide clear criteria for an effective NPM, which includes:

- Functional independence
- Expert and independent members;
- An effective and continuously reassessed strategy; and
- Fulfilment of key functions.

As part of the structure of the NPM, the obligation to ensure functional independence, and to fulfil all other key criteria, also extends to JICS. The remainder of our submission on the JICS Bill deals with the issue of functional and operational independence, and includes recommendations in terms of strengthening those provisions of the current Bill.

### Functional Independence

Functional independence in the context of OPCAT requires that the NPM not constitute any part of government, parliament, the judiciary or corrections system. Functional independence is premised on an institution's legislative, operational and financial independence.

- *Legislative independence* requires the mandate of the NPM be set out in a legislative instrument that establishes the mandate, powers, election process, terms of office, funding and lines of accountability. This includes the following functions and powers:
  - Freely select the place of deprivation of liberty in which visits are to be carried

out, select the timing of such visits, and determine whether they are to be announced or unannounced;

- Regularly examine the treatment of persons deprived of their liberty in those places;
  - Choose persons to be interviewed;
  - Access to all information, including personal and sensitive information, premises and persons necessary for pursuing the mandate;
  - Make recommendations to the relevant authorities and submit proposals and observations regarding existing or draft legislation.
- *Operational independence* requires that the NPM 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 the operations of the NPM. Operational independence also requires that all members be experienced and independent and free of conflicts of interests, with legislative provisions that establish the appointment procedure of members detailing method, criteria, duration of appointment, privileges, immunities, and dismissals and appeals procedures.
  - *Financial independence* entails the specific allocation of resources necessary to allow the NPM to function effectively and independently and carry out all OPCAT-related tasks. Financial independence is a fundamental prerequisite for independence, and enabling legislation should make provision for the source and nature of funding to the NPM (and, in this case, the composite institutions forming the NPM coordination model).

The JICS bill is intended to cover not only the work of JICS as part of the NPM coordination model, but its regular day-to-day functions as the oversight body for the Department of Correctional Services. However, APCOF submits that the tenets of independence provided by OPCAT are not only instructive in terms of meeting the basic requirements for an independent and effective NPM, but provide a solid basis for promoting greater independence and effectiveness of JICS more broadly. This is particularly so in the context of operational and financial independence.

## Recommendations

APCOF recommends that the Bill be amended to make specific reference to the NPM and the inclusion of JICS as part of the NPM's structure as it pertains to the monitoring and reporting of facilities under the management of the Department of Correctional Services.

At a minimum, this will require the following:

1. Include a definition of 'National Preventive Mechanism' in section 1 of the Bill;
2. Include a new sub-section in section 2 to include amongst the Objects of the Act to provide for the functions of JICS as a member of the NPM;
3. Strengthen the provisions of independence and impartiality in section 4 of the Bill to include concrete measures to protect the independence of JICS at an operational (including full operational independence from the Department of Correctional Services, and the exclusion of Department of Correctional Services from conducting investigations on behalf of JICS) and financial level (including specific reference to budgetary allocations independent of the Department of Correctional Services, made by Treasury, and reporting to Parliament – noting the current section 33 that references JICS' allocation as part of a budget vote of 'the department'), in accordance with the provisions of OPCAT and other recommendations of the SPT, set out earlier in this submission. At a minimum, the Bill should state that JICS functions institutionally and operationally independent from the Department of Correctional Services, and that it has full legal capacity, independence, and is subject only to the Constitution and the law, including this Act. Further, it should provide that JICS be impartial, exercise powers and perform functions without fear, favour or prejudice.
4. Include a reference in the powers, functions and duties of the Inspecting Judge in section 8 of the Bill as including exercising the powers of the NPM as assigned to them under legislation (in anticipation of the forthcoming NPM constitutive legislation).
5. Include in section 9(1) specific detail on the appointment of the Chief Executive Officer, rather than leaving the details to regulations. In accordance with the requirements of OPCAT, this includes, at a minimum, provisions regarding a candidate's experience, independence, vetting for conflict of interest, as well as clear provisions that establish the appointment procedure detailing method, criteria,

duration of appointment, privileges, immunities, and dismissals and appeals procedures. [APCOF has made a submission](#) on the appointment and dismissal of the Executive Director of the Independent Police Investigative Directorate, which we submit is instructive in the context of developing provisions for an equivalent oversight body.

6. Amend the reference in section 13(1)(n) to the South African Human Rights Commission (SAHRC) to read 'National Preventive Mechanism', as it will be to the NPM that JICS submits its inspection reports as part of its functions, not the SAHRC, who will only play a coordinating function as part of the NPM.
7. Include reference in a new sub-section in section 18(2) to the conduct of duties with respect to the NPM as part of the powers, functions and duties of Inspectors.
8. Review the powers of investigators set out in section 20 to ensure alignment with the requirements of OPCAT, particularly in relation to access to information and the powers of the inspector to take photographs or make other recordings with the consent of Department of Correctional Services officials.
9. Include reference in a new sub-section in section 30(1) to the conduct of duties with respect to the NPM as part of the powers, functions and duties of Independent Correctional Centre Visitors.

Again, APCOF commends JICS for inviting public comment at this early stage in the development of its legislation, and will make substantive comments on further drafts that have been subject to the statutory requirements of a legislative drafting process.

For more information or to discuss this submission in more detail, please contact the undersigned.

Yours sincerely,



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