



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



Submission to the Subcommittee for the Prevention of Torture and Other and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

13 February 2023

Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape South Africa. ACJR seeks to carry out engaged research, teaching and advocacy on criminal justice reform and human rights in Africa. We welcome the opportunity to participate in this Civil Society consultation in preparation for the visit to South Africa by the Subcommittee for the Prevention of Torture and Other and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) in February - March 2023.
2. The timing of the SPT visit coincides with our focus on monitoring the functioning of the National Preventive Mechanism (NPM) in South Africa. To date, the NPM has not been fully functional and institutional arrangements for visiting places of detention under the banner of the NPM remain unclear.
3. For the purposes of this submission, we would like to raise a few direct issues:
 - Findings from the civil society assessment on the performance of the NPM
 - The situation regarding the police
 - Availability of disaggregated data on persons, places of deprivation
 - Restrictions on monitoring during COVID-19
 - The work of and relationship with the National Prosecuting Authority (NPA)

NPM monitoring conducted by ACJR and DJF

4. The uncertainty regarding the functioning of the NPM, prompted us to assess the performance of the NPM in relation to its obligations under OPCAT to carry out a visiting role to all places of deprivation of liberty. In August 2022, ACJR conducted an exploratory survey with civil society organisations (CSOs) who are members of the Detention Justice Forum (DJF) to gain an in-depth understanding of the extent to which the NPM is performing its responsibilities in their respective sectors of operation. Please see a copy of the draft report attached, with specific reference to the more detailed recommendations on pp. 15-17.

5. The overall observations from the survey indicate that:
 - the NPM has made limited progress in fulfilling its mandate under OPCAT;
 - there is a paucity in data on places of detention and people deprived of their liberty; and
 - there is a lack of sustained NPM-engagement with civil society.
6. It appears that there is an overall lack of strategy on the part of the coordinating NPM to address some of the immediate and systemic challenges. Although the NPM is not yet fully operational and regular monitoring visits are not taking place, we note the following:
 - Other methods of monitoring (i.e., data collection, external monitoring and reporting) that do not require physical visits, can be undertaken as a supportive measure to ensure that monitoring takes place.
 - It is recommended that current gaps and limitations of the NPM are identified and that alternative measures of monitoring and oversight are put in place
 - There needs to be a strategic and prioritisation plan setting out achievable goals and key performance indicators in a time limited period (e.g., three years).

Oversight, police detention and other places of deprivation without designated oversight bodies

7. While regular visits to correctional facilities are conducted by the Judicial Inspectorate for Correctional Services (JICS), regular visits to other places where people are deprived of their liberty, such as police cells, child and youth care centres, mental health facilities, military detention, etc., is lacking. There does not seem to be a coherent monitoring plan in place to address this shortcoming. We are particularly concerned about the situation in police detention as well as the behaviour of police officials.
8. There are 1 158 police stations in the country and in 2021/22 SAPS executed some 1.4 million arrests.¹ During 2020/1 (under the COVID-19 lockdown) this figure was nearly 2.8 million.² Earlier research by ACJR found that between one in eight and one in 13 adult South African men are arrested annually.³ Very few of these arrests (less than 15%) ultimately result in convictions⁴ and the overwhelming majority were consequently without purpose and tantamount to harassment. The sheer volume of people arrested

¹ South African Police Service, 'South African Police Service Annual Report 2021/22' (Pretoria, 2022), 20.

² SAPS, 'Annual Report 2020/21' (Pretoria: South African Police Service, 2021), 146.

³ L Muntingh, 'Race, Gender and Socio- Economic Status in Law Enforcement in South Africa – Are There Worrying Signs?' (Bellville: Community Law Centre, 2013), 21–22, <https://admin.acjr.org.za/resource-centre/Inequality%20paper.pdf>.

⁴ J Redpath, 'Key Issues in the NPA - Effectiveness and Efficiency', Collection (Bellville, 2022), <https://acjr.org.za/acjr-publications/research-reports>.

makes it virtually impossible to monitor police detention and conduct, but more importantly, creates a largely avoidable risk of torture and ill treatment.

9. All indications are that the South African Police Service (SAPS) enjoy extremely low levels of public trust at present.⁵ This is largely the result of poor management and poor performance, reflected in the virtual collapse of command and control, and internal discipline.⁶ It is common cause that the greatest risk of torture is during and immediately after arrest,⁷ and this will be under the authority of the police in most cases. There is in law for the police no designated independent oversight structure with a monitoring mandate as IPID's mandate is restricted to investigating serious complaints.⁸ The risks posed by police arrest and custody must be seen against the broader context of serious complaints reported to IPID, as shown in Table 1 for 2020/1 and 2021/2 with, for example more than 200 deaths in custody, 410 deaths due to police action in 2021/2, and more than 3400 complaints of assault. It should be noted that deaths due to police action is substantially above the norm in the KwaZulu-Natal province and may be attributed to poor resourcing of the police in that province.⁹ There is every reason to conclude that at least complaints of assault and torture are under-reported.

Table 1

Complaint	2020/1 ¹⁰	2021/2
Deaths in custody	217	223
Deaths due to police action	353	410
Rape by police officer	80	99
Torture	256	192
Assault	4228	3407

⁵ A Chingwete, 'In South Africa, Citizens' Trust in President, Political Institutions Drops Sharply', *Afrobarometer Dispatch* 90 (2016),

http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno90_south_africa_trust_in_officials.pdf; A. Chingwete, D. Dryding, and V. Dessein, 'Afrobarometer Round 7 - Survey in South Africa' (Cape Town: Afrobarometer - Plus 94 Research, 2018); M. Moosa and J. Hofmeyr, 'South Africans' Trust in Institutions and Representatives Reach New Low', *Afrobarometer Dispatch*, August 2021.

⁶ L Muntingh, 'Failing to Discipline in SAPS - Fostering a Culture of Impunity', *ACJR Fact Sheet* (Bellville: Dullah Omar Institute, 2021); Muntingh; Lukas Muntingh, 'Murder, Discipline and the Police', *News24*, 2 November 2022, <https://www.news24.com/news24/opinions/analysis/analysis-lukas-muntingh-murder-discipline-and-the-police-20221102>.

⁷ Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press, 2016), <https://doi.org/10.2307/j.ctt1gpcbdtd>.

⁸ 'Independent Police Investigative Directorate Act', Act 1 of 2011 § (2011), sec. 28.

⁹ J Redpath, 'The Centre Cannot Hold: The Role of Sub-National Governments in Policing South Africa.' (Unpublished PhD Thesis, Bellville, Univ. of the Western Cape, 2019).

¹⁰ Independent Police Investigative Directorate, 'Annual Report 2020/21' (Pretoria: IPID, 2021), 39; Independent Police Investigative Directorate, 'Annual Report 2021/22' (IPID, 2022), 37.

10. A report published by the NPM on visits by independent custody visitors to 150 police stations in 2021 highlighted abysmal conditions of police detention facilities and findings on torture which is a violation of international human rights standards.¹¹ We are not aware of any follow-up by the coordinating NPM to recommendations listed in its report.
11. The lack of independent monitoring of places of detention under the authority of the police is a fundamental shortcoming and *is recommended that it be regarded as the primary strategic priority*, as the situation of police custody also relates to immigration detention and the detention of vulnerable persons such as children and women.

Availability of disaggregated data on persons, places of deprivation

12. The lack of available, disaggregated and reliable data on places of detention and persons deprived of liberty results in ineffective monitoring and oversight. While some information is available on police detention, correctional facilities and secure care facilities, there is limited to no information available in the public domain pertaining to mental health facilities, military detention, and immigration detention. It should be noted that until March 2011 that the Dept of Correctional Services (DCS) shared detailed quantitative with civil society, which was extremely valuable and reflected a commitment from the Department to be transparent. For reasons that are unclear this stopped.
13. The information provided in NPM annual reports to date has been sparse and limited, and many questions remain unanswered in terms of the collection, collation and scrutiny of data relating to places where people are deprived of their liberty. *It is recommended that there is consistency and focus on how the NPM presents data and that information relating to places where people are or may be deprived of liberty are disaggregated to allow for thorough monitoring.*
14. *It is furthermore recommended that government departments depriving people of their liberty, keep and publish regularly up to date, anonymised and disaggregated data of persons placed in their care.*

Restrictions on monitoring during COVID-19

15. The South African government's restrictions on monitoring places of detention during the COVID-19 pandemic remains of deep concern. Good advice was ignored, but perhaps of more concern is that rights

¹¹ South African National Preventative Mechanism, 'Report on Visits to Police Stations by Independent Custody Visitors', 2021.

guaranteed under the Constitution were effectively suspended as the criminal justice system was placed in a holding pattern. Prisoners were denied the right to an effective and independent complaints mechanism, being JICS and legal representatives. The ease with which this happened, especially since Parliament was side-stepped, remains of deep concern as it demonstrated how easily rights can be pushed back and suspended on a systemic scale. It furthermore demonstrated the precarity of the current detention monitoring architecture. This calls for heightened vigilance in future by rights defenders and institutions established by the Constitution to protect democracy, especially when facing large scale stresses and calamities.

16. During the pandemic, the government declared a State of Disaster and issued regulations restricting movement and meetings. An important distinction was made between what was *essential* and *non-essential* services and activities. Despite the Advisory issued by the SPT emphasising that visits to places of detention must continue,¹² the State of Disaster regulations did not include JICS as an essential service, and it was consequently prevented in law from undertaking monitoring visits to prisons. Visits by legal representatives were similar prohibited, but a prisoner could have contact telephonically with his or her legal representative under exceptional circumstances with permission from the Head of Centre.¹³ This is not further explained in the regulations and presumably left to the discretion of the Head of Centre.
17. The restrictions on JICS were lifted some four months later, but data from this period demonstrate the immediate consequences of the absence of JICS, as shown in Table 1.¹⁴ In the three months prior to lock-down there were 123 cases of use of force reported by DCS to JICS as it is required by law to do (but commonly accepted to be under-reporting).¹⁵ In the three months from April to June 2020 this increased by 93% to 237 cases. The increased use of segregation should also be seen in the light of increased of isolation and uncertainty resulting in stress, frustration, and consequent violence and disruptive behaviour.

Table 2

	Jan – March 2020	April – June 2020	% Change
Use of force reported by DCS (s. 32(6))	123	237	93%
Use of segregation reported by DCS (s. 30(6))	733	1112	52%

¹² Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms Relating to the Coronavirus Pandemic' (SPT, 25 March 2020), para. 7.

¹³ Minister of Justice and Correctional Services, 'Regulations under the Disaster Management Act, 2002', GN No. 43225 § (2020), sec. 4(a).

¹⁴ L. Muntingh, 'South Africa', in *The Impact of Covid-19 on Prison Conditions and Penal Policy*, ed. F. Dünkel, S Harrendorf, and D Van Zyl Smit (London: Routledge, 2021), 497.

¹⁵ 'Correctional Services Act', Pub. L. No. 111 (1998), sec. 15(2), 30(6) and 32(6).

18. The NPM Unit of the SAHRC reportedly appointed 550 monitors through the Section 11 Committee to undertake monitoring roles during the lockdown, however, anecdotal evidence suggests that attempts to visit correctional facilities were unsuccessful.
19. *It is recommended that for future situations that all detention monitoring services and legal representatives are regarded as essential services and that access to places of detention by such bodies cannot be restricted, unless authorised as such by an act of Parliament with reference to a state of emergency.*

The National Prosecuting Authority (NPA)

20. It has been found elsewhere that the impact of detention monitoring is greatly enhanced with regard to the prevention of torture when there is close cooperation between the monitoring mechanism and the prosecution service.¹⁶ The NPA is the only entity mandated to institute criminal prosecutions on behalf of the state and it must do so without ‘fear, favour or prejudice’.¹⁷ While the NPA has no mandate with regard to monitoring detention, JICS and IPID have an interest in the prosecution of state officials implicated in rights violations. IPID has the power to refer cases to the NPA,¹⁸ but JICS has no such specific power and must rely on recommendations and the power of persuasion. In his annual reports the Inspecting judge has lamented the lack of prosecutions and limited feed-back received from the NPA on matters brought to the NPA’s attention.¹⁹
21. The following case exemplifies in many ways the apparent unwillingness of the NPA to prosecute state officials for human rights violations, feeding into a *de facto* culture of impunity. In 2015 officials of the DCS at Brandvlei Maximum Security Correctional Centre in the Western Cape assaulted and improperly deployed dogs on inmates. Fourteen prisoners were assaulted of whom five required hospitalisation, and one died – reportedly due to being bitten by a guard dog. On 31 January 2023, some seven years later,

¹⁶ R Carver and L Handley, ‘Conclusion’, in *Does Torture Prevention Work?*, ed. R Carver and L Handley (Liverpool: Liverpool University Press, 2016), 631, <https://doi.org/10.2307/j.ctt1gpcbdt>.

¹⁷ ‘Constitution of the Republic of South Africa’ (1996), sec. 179(4).

¹⁸ Independent Police Investigative Directorate Act, sec. 7(4).

¹⁹ Judicial Inspectorate for Correctional Services, ‘Annual Report 2020/21’ (Pretoria: Office of the Inspecting Judge for Correctional Services, 2021), 66; Judicial Inspectorate for Correctional Services, ‘Annual Report 2021/22’ (Pretoria: Office of the Inspecting Judge for Correctional Services, 2022), 42, 65.

the Director: Public Prosecutions in the Western Cape gave the go-ahead for the prosecution. On 7 February 2023 seven DCS officials appeared in court charged with murder and assault.²⁰

22. Data on IPID cases referred to the NPA is set out in Table 3 below, and sketches a less than satisfactory situation. At the end of the 2020/21 financial year, IPID was awaiting feed-back on 78% of cases referred to the NPA. In the following year this figure dropped to 57%, but the number of decisions not to prosecute increased from 369 to 964, or an increase of 162%. The number of decisions to prosecute increased from 34 to 48. In short, of the 4314 cases referred to the NPA by IPID over the two-year period, in 82 cases or 1.9% the decision was to prosecute.

Table 3

Category	2020/21	%	2021/22	%
Total referred	1,887		2,427	
Awaiting response	1,478	78.3	1,401	57.7
Declined to prosecute	369	19.5	964	39.7
Prosecute	34	1.8	48	1.9
Withdrawn	6	0.3	14	0.5

23. It is thus a rare occurrence that state officials (e.g., police and prisons) are prosecuted for serious offences, especially human rights violations. The reasons for this seem to lie, at least in part, in the *Prosecution Policy Directives*, a confidential document despite it containing important matters of policy.²¹ Of relevance here is that in Part 8 it deals with the prosecution of government officials (SAPS and DCS are listed) and where it concerns serious crimes (i.e., more serious than common assault), the prosecutor concerned needs the approval of the Director: Public Prosecutions (DPP) in his or her division. This would require additional work on the part of the prosecutor to submit such a motivation to the DPP with a real risk that it may not be granted. In practical terms and managing workload, there is thus a real incentive not to prosecute. The default position ought to be to prosecute and that permission not to prosecute should be obtained from the DPP.

24. *It is recommended that the NPA submits the Prosecution Policy Directives to Parliament for public comment and review.*

²⁰ J Evans, 'Prison Officers in Court Stand Accused of Killing Inmate Who Was Bitten by Dog, Beaten', *News24*, 7 February 2023, <https://www.news24.com/news24/southafrica/news/prison-officers-in-court-stand-accused-of-killing-inmate-who-was-beaten-bitten-by-dog-20230207>.

²¹ National Prosecuting Authority, 'Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions' (Pretoria: National Prosecuting Authority, 2014).

25. The NPA has one important monitoring obligation to Parliament set out in the Criminal Procedure Act, namely that it should submit a report twice per year to the Minister of Justice who must table it in Parliament on the profile of the awaiting trial prison population:

The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding -

(i) 18 months from date of arrest, where the trial is to be conducted in a High Court;

(ii) 12 months from date of arrest, where the trial is to be conducted in a regional court; and

(iii) six months from date of arrest, where the trial is to be conducted in a magistrate's court.²²

26. As far as could be established, this has never been complied with since the amendment was made to the Criminal Procedure Act in 2003. *It is recommended that the NPA complies with the requirement as set out above.*

27. The role of the NPA is critical to the efficacy of the NPM as it is the embodiment of accountability. An effective prosecutions service, committed to upholding the rule of law in a transparent and accountable manner will add tremendous value to detention monitoring. The reverse is equally true, in that a culture of impunity will drown the efforts at monitoring and rights compliance.

Conclusion

28. Despite the above-mentioned issues and the strategic challenges facing the NPM, there are opportunities for collaboration with civil society organisations to advance the work of the NPM. ACJR is open to engaging with the Committee.

29. We also invite the SPT to submit any further questions or comments to us.

²² 'Criminal Procedure Act', Pub. L. No. 51 (1977), sec. 342A(7)(a).

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