



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 Western Cape Provincial Parliament

Ad hoc Committee on Covid-19

By Lukas M. Muntingh

12 August 2020

1. South Africa is a party to the Optional Protocol to the Convention against Torture (OPCAT) and is required to designate a National Preventive Mechanism (NPM) to fulfil the domestic obligations under OPCAT. To this end the SA Human Rights Commission (SAHRC) was designated as NPM.
2. Shortly before the Covid-19 lockdown in South Africa the UN Sub-committee for the Prevention of Torture (SPT) issued a public advice to all NPMs regarding monitoring of places of detention during lockdown. In essence it advised that monitoring should not stop and that the lockdown should not serve as an excuse for rights violations in places of detention.
3. In response we used the public advice and developed a monitoring tool to assess the performance of the NPM (SAHRC) in fulfilling its obligations under OPCAT. Please see the attached report dated 29 May 2020.
4. It was in our view a fundamental failure in the drafting of the regulations that the Independent Correctional Centre Visitors of the Judicial Inspectorate for Correctional Services (JICS) was not included as an essential service and that monitoring consequently stopped. It is also apparent that the monitoring of other places of detention (e.g. police cells) also fell through the cracks.
5. It is our observation that JICS tried as best it could to engage in monitoring as best it could but that the situation only started to change by mid-June 2020. However, it remains unknown to this day who is or was monitoring other places of detentions such as child and youth care centres as is required under international law, i.e. OPCAT.
6. The report referred to in para 3 was submitted to the SAHRC on three occasions. We are yet to receive a response. In view of this situation the inevitable conclusion is that the SAHRC, as NPM, failed at the first hurdle it faced.
7. We are more than willing to supply additional information on the above.

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12 August 2020

Appendix

NPM performance checklist during COVID-19 lock-down

Date	29 May 2020			
Scope (tick appropriate box)	<u>National</u>	Provincial	Management area	Facility
Describe	Looking at prisons specifically.			
Done by	<p>Detention Justice Forum with inputs from:</p> <ul style="list-style-type: none"> • Africa Criminal Justice Reform (ACJR) • African Policing Civilian Oversight Forum (APCOF) • Just Detention International – SA • Sonke Gender Justice • Scalabrini Centre <p>The checklist was compiled by members of the Detention Justice Forum (DJF) with information collected from the Office of the Inspecting Judge for Correctional Services, state of disaster regulations and directives, information available in the media updates, press releases, and minutes of parliamentary portfolio committee meetings.</p>			
Background	<ol style="list-style-type: none"> 1. South Africa is a state party to the Optional Protocol to the Convention against Torture (OPCAT) since June 2019 and has designated the SA Human Rights Commission as the National Preventive Mechanism (NPM) as required by OPCAT. The Protocol requires the NPM to monitor and report on the situation of people deprived of their liberty with the aims to prevent torture and other ill treatment. It must be emphasised that under international law and the Constitution the prohibition of torture is absolute and there can be no derogation from this prohibition. 2. The South African government has designated the South African Human Rights Commission (SAHRC) to perform a coordinating and functional role in the NPM together with other oversight bodies such as the Judicial Inspectorate for Correctional Services (JICS) and it is thus the responsibility of the SAHRC to oversee and ensure co-ordinated oversight and monitoring at all places where people are deprived of their liberty. 3. For the purposes of monitoring it is necessary to establish what is known and what is unknown regarding the management of COVID-19 following the 			

	<p>Public Advice issued by the SPT in March 2020. This relates in particular to the specific recommendations from the SPT for NPMs.</p> <p>4. This report also serves to update the report in the same format of 30 April 2020 that was submitted to the Minister of Justice, SAHRC and NPM substructures. To date a formal response was received from the Inspecting Judge for Correctional Services' (6 May 2020), but no response was received from the NPM. We would like express our gratitude for the response received by the Inspecting Judge for his response as this enables civil society to play an important role in enhancing transparency and good governance.</p> <p>5. We remain concerned about the continued increase of COVID-19 infection rates amongst the inmate population and custodial staff and the lack of communication from government and oversight institutions concerning COVID-19 and its obligation under OPCAT and more specifically the Constitution and Correctional Services Act.</p> <p>6. We are deeply concerned that poor communication with prisoners will add frustration and heightens the risk for protest action that could result in violent confrontations. All efforts must be made to prevent this and that effective communication with the prison population is essential.</p> <p>7. A number of calls have been received by families to DJF member organizations, expressing their concern. There is concern that families of inmates are not being communicated with.</p>
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Nr	NPM actions	Response
1	Is the NPM exercising its visiting mandate during the coronavirus pandemic, subject to the necessary restrictions with reference to social contact?	<p>No. It was established that the Independent Correctional Centre Visitors (ICCV) of the Judicial Inspectorate for Correctional Services (JICS) stopped visits to correctional and remand facilities when the lockdown begun.</p> <p>In reply to our NPM performance checklist (dated 30 April 2020) the Inspecting Judge in a letter addressed this issue (6 May 2020). He noted that the cessation of visits was imposed on JICS and the ICCVs by the state of disaster regulations and not of its own volition. The Regulations (29 April 2020) does</p>

Nr	NPM actions	Response
		<p>not explicitly enable visits and leaves to the ministers to specify how. JICS personnel (including ICCVs) remain excluded from “essential services” which still make provision only for DCS officials and as a statutory body, it is not a constitutional oversight body (Chapter 9 institutions) which is listed as an essential service under level 4 of the Lockdown provisions.</p> <p>The Inspecting Judge noted that he conducted an oversight visit at Johannesburg Remand Detention Facility on 4 May 2020 to inspect conditions and evaluate the measures taken by DCS to prevent the spread of COVID–19 in the facility.</p> <p>In response to when ICCVs will resume their visiting mandate, the Inspecting Judge noted that JICS is urgently addressing the matter. The Inspecting Judge noted that they have raised the matter with the National Commissioner of Correctional Services. They have circulated a directive to all staff (including ICCVs) preparing them for a phased-in return to work subject to proper compliance with COVID-19 occupational health and safety measures in workplaces and the procurement and distribution of personal protective equipment.</p> <p>The extent of monitoring of immigration places of detention by the SAHRC (as NPM) is uncertain. We understand that the SAHRC visited the Lindela immigration detention facility, and that a report is anticipated in respect thereof but we are not sure if the visit was as a result of a court order or in terms of their NPM mandate.</p> <p>The NPM & Lawyers for Human Rights did visit Strandfontein Quarantine Site. It appears that authorities denied monitors accredited by the NPM access to quarantine facilities for the homeless.</p>

Nr	NPM actions	Response
		<p>There is very limited information available on the status of monitoring at police at child and youth care facilities. We are concerned about whether there is oversight and monitoring at police stations as well as child and youth care facilities and whether or not Covid-19 health protocols are being implemented and complied with.</p> <p>Is the NPM monitoring all places of detention that does not have a designated oversight body with a visiting mandate such as police and immigration detention facilities and child and youth care facilities?</p> <p>When will visits to DCS facilities by ICCVs commence?</p>
2	<p>Has the NPM devised methods of fulfilling its preventive mandate in relation to places of detention which minimise the need for social contact, but which nevertheless offer effective opportunities for preventive engagement?</p>	<p>No.</p> <p>The Inspecting Judge reported that the state of disaster regulations and directives curtailed their mandate in what they are able to do. No real attempts to find innovative methods of fulfilling its <u>complaints mandate</u> have emerged i.e. determining or setting up alternative communication channels to direct complaints effectively to substitute their visiting mandate.</p> <p>From the Inspecting Judge’s written correspondence (6 May 2020), it appears that Regional managers and ICCVs have remained actively in touch with correctional centres despite the lockdown. All incidents reported by correctional centres are reported to the JICS Management at least twice a week. It appears to be the case that JICS rely on the assistance DCS officials. We are not convinced that this allows JICS to effectively fulfil their preventive mandate as a substructure of the NPM.</p> <p>At a recent Portfolio Committee meeting (22 May 2020), JICS noted that Visitors’ Committee meetings have not been taking place. Considering the importance of this forum, we</p>

Nr	NPM actions	Response
		<p>question why these meetings have not occurred through the use of an online alternative.</p> <p>We furthermore question why ICCVs have not been authorised to continue their oversight mandate at correctional centres, but the SAHRC (as NPM) has accredited monitors to conduct monitoring and reporting on across various facilities.</p> <p>With regards to its <u>inspection mandate</u>, JICS has proposed conducting inspections electronically (i.e. through the use of questionnaires)– after lockdown <i>in loco</i> inspections will take place to confirm the electronic findings. We are not convinced that this is a sufficient alternative to in-person inspections or that it will serve to reduce JICS’ burden of fulfilling its planned inspection quota over the year. This concern was echoed by Members of Parliament at the Portfolio Committee meeting of 22 May 2020.</p> <p>It appears that mandatory reporting requirements continue during lockdown and mandatory reporting of segregations includes all COVID-19 segregations. Further, the use of force, mechanical restraints and deaths remain included in DCS reporting obligations. In the absence of ICCV visits it is of course difficult to establish the veracity of reports submitted.</p> <p>The Inspecting Judge, however, reported to Parliament’s Justice and Correctional Services Portfolio Committee (20 May 2020) that their visiting mandate to correctional facilities have been curtailed.</p> <p>There remains a lot of confusion regarding access of legal representatives to prisons. It seems that the instructions are</p>

Nr	NPM actions	Response
		<p>not consistently applied, or the instructions are unclear or inconsistent.</p> <p>The Inspecting Judge has engaged the media on matters related to people deprived of their liberty. There have been media discussions on the vulnerability of all persons deprived of their liberty in detention facilities to COVID-19 infections, the release of low-risk offenders. Further, the SAHRC (as NPM) has also had many media engagements on the Strandfontein quarantine site.</p> <p>It appears that local authorities denied monitor's access to quarantine facilities set up for homeless persons in Cape Town. The NPM is taking legal action to enforce their mandate with the assistance of Lawyers for Human Rights.</p> <p>Can the SAHRC clarify the status of accredited monitors? For example, are they mandated to visit and monitor places of detention, including correctional centres?</p> <p>Can the SAHRC verify why ICCVs have not been authorised to continue their oversight mandate at correctional centres when the SAHRC (as NPM) has accredited monitors to conduct monitoring and reporting across various facilities?</p> <p>Can SAHRC (as NPM) clarify whether they have devised methods of fulfilling or ensuring that the preventive mandate in relation to places of detention are complied with during this COVID-19 period?</p>

Nr	NPM actions	Response
3	Is the NPM discussing with relevant national authorities concerning the implementation and operation of mitigation measures?	<p>The IJ (supported by DJF) sent a letter to Minister of Justice and Correctional Services on 23 April 2020 to address a range of COVID-19 related matters in the prison system. It is unknown if the Minister responded. However, it was reported in the media that some of the recommendations were taken up by the Minister of Justice. (i.e. the release of low-risk inmates to reduce overcrowding during the pandemic)</p> <p>The Department of Correctional Services revised its Standing Operating Procedures (SOP) and the Inspecting Judge was given an opportunity to peruse it (4 May 2020). It has been reported that JICS already had a meeting with the National Commissioner on the Plan (5 May 2020) and supplied written comments on the SOP to the National Commissioner.</p> <p>It is our opinion that the SOP has a strict health related focus and does not address the human rights aspects of inmates during this period. For example – it doesn't address the rights of inmates to amenities, the measures or restrictions placed thereon or under what circumstances such restrictions will be lifted.</p> <p>Has JICS raised concerns on the content of the SOP? If so, what were the concerns?</p> <p>Does the SOP effectively embrace mitigating measures and still ensure that inmate's basic human rights are protected?</p>

Nr	NPM actions	Response
4	Is the NPM increasing the collection and scrutiny of data relating to places of detention during this period?	<p>This is unknown. If this is indeed done, it is not reported on externally. We need disaggregated daily figures on screening, tests and results of officials and inmates.</p> <p>Despite the lock-down there must be a continuation of mandatory reporting. JICS affirmed that mandatory reporting requirements under the CSA continue during lockdown and that mandatory reporting of segregations in terms of section 30 (1) (c) of the CSA embraces all COVID-19 segregations.</p> <p>Further, the use of force, mechanical restraints and deaths remain included in DCS reporting obligations.</p> <p>There is no established forum for engagement between civil society organisations, NPM structures and government departments. However, the SAHRC has accredited monitors under its Section 11 Committee to conduct monitoring under the state of disaster. There are, however, many uncertainties and its functionality is doubtful, especially in relation to places of detention.</p> <p>Despite oversight visits not being conducted by JICS, what efforts have been made by the NPM to obtain relevant data on places of detention?</p>
5	Have measures been put in place to use electronic communication as a means of consulting with those in places of detention?	<p>Video link-up for postponements are available at some courts. It seems that this is being used haphazardly and not consistently. Individual officials have been very helpful though.</p>

Nr	NPM actions	Response
		<p>There is lack of clarity on what communications channels are available. This is of particular importance to legal representatives.</p> <p>It is unclear if special arrangements have been made to enable prisoners to make telephone calls. Anecdotally, it appears that no measures were taken. This make particular reference to whether additional calls are allowed above what prisoners' security classification permits</p> <p>There are conflicting reports about awaiting trial prisoners appearing in court and from Durban it was reported that since 26 March 2020 no prisoners had been brought to court for appearance.¹</p>
6	<p>Have measures been put in place by the NPM to establish 'hotlines' within places of detention and secure e-mail and postal facilities which will allow inmates to lodge their grievances, in cases where NPMs are not physically visiting detention facilities?</p>	<p>No</p> <p>In addressing the issue as to how complaints are reaching JICS and the NPM, the Inspecting Judge noted (6 May 2020) that:</p> <p>'Regional managers and ICCVs have on a daily basis remained actively in touch with correctional centres. All incidents reported by correctional centres are reported to the JICS Management at least twice a week by our Regions and mostly more often. In addition, I personally and most of my senior managers are in receipt of complaints by members of the public and Members of Parliament on behalf of named inmates, directed to us personally, which in each case are processed for urgent attention.</p> <p>It appears to be the case that no measures have been put in place (or at least no attempt) for an effective alternative mechanism which will allow inmates to lodge their</p>

¹ Covid-19 challenges with prisoner logistics in Andile 'Bobo' Mbuthu court case, *News24*, 19 May 2020, <https://www.news24.com/news24/SouthAfrica/News/covid-19-challenges-with-prisoner-logistics-in-andile-bobo-mbuthu-court-case-20200519>

Nr	NPM actions	Response
		<p>grievances, in cases where NPMs are not physically visiting detention facilities. JICS seem to rely on the assistance and “good faith” of correctional services officials. We are not convinced that this allows them to effectively fulfil their preventative mandate.</p> <p>JICS currently doesn’t have a centralised ‘hotline’ to deal with complaints. When will JICS be establishing a hotline to lodge complaints?</p>
7	Is the NPM tracking the setting up of new/temporary places of detention?	<p>This could not be confirmed.</p> <p>The DCS Standing Operating Procedures makes provision for the setting up of separate quarantine sites for inmates tested positive for COVID-19 but it has not been confirmed whether there is adherence to the SOP or if there is tracking.</p>
8	What measures is the NPM taking to enhance the distribution of information concerning the work of the NPM within places of detention and ensuring that there are channels allowing prompt and confidential communication?	<p>There seems to be very few avenues of communication.</p> <p>In reply to how JICS communicates with prisoners or how family members lodge complaints the Inspecting Judge noted (6 May 2020) the following:</p> <p>Although JICS offices were closed, officials have remained active, working remotely. As indicated, we have received complaints directly from family members, NGOs and members of the Parliamentary Portfolio Committee. All complaints received have been dealt with and responded to.</p> <p>Allegations of assaults continue to reach DJF members as well as reports of tension amongst inmates concerning the lack of PPE.</p>
9	Is the NPM engaging with families of prisoners and their legal representatives to verify conditions of detention and treatment?	<p>This is not known.</p> <p>It could be the case that there is an effort to verify this amongst complaints that are received directly by JICS from</p>

Nr	NPM actions	Response
		<p>family members, NGOs and members of the Parliamentary Portfolio Committee.</p> <p>DJF member organisations have been receiving telephone calls from families who were concerned about their family members in prison.</p>
10	<p>Is the NPM engaging with civil society actors working with people deprived of their liberty on an on-going basis?</p>	<p>No, but SAHRC mobilised monitors under S 11 of the Act.</p> <p>The level of implementation is unclear and it does not seem as if the accredited monitors have accessed places of detention.</p> <p>In 2019, the NPM convened a meeting of an NGO working group to support the work of the NPM through consultation and advice. That working group could be reconvened as a matter of ordinary NPM business, but particularly during this period to promote consultation with the NGO sector.</p> <p>Will the SAHRC (as NPM) convene a meeting with civil society actors and brief them on oversight measures taken during COVID-19 at places where people are deprived of their liberty?</p>