South African National
Preventive Mechanism

Towards a society free of torture

REPORT OF THE **SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

THE IMPLEMENTATION OF THE OPCAT IN SOUTH AFRICA **2019/20**

south african human rights commission

CELEBRATING 25 YEARS

Towards a Culture of Human Rights

To enhance visibility and the distinctive NPM identity, a logo has been developed. The logo signifies the oversight mechanism that monitors places of deprivation of liberty.

The **figure in the logo** represents a person who is protected and treated with dignity.

The **use of the cursive font** depicts that even in the world of zeros and ones, there are ways to humanise what we do. Using a cursive font, we can depict something important.

Colours
The grey represents safety and dignity.

The black represents power.

The purple contains energy and strength from the colour red, with spirituality and integrity from the colour blue.

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FOREWORD

In recognition of the intractable nature of torture and to entrench the absolute prohibition against torture, the United Nations adopted the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* At the same time, it was noted that persons who may find themselves deprived of their liberty may be subject to torture and other ill-treatment. On this basis, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted in 2002. This reflected a consensus among the international community that people deprived of their liberty are particularly vulnerable and to respond to this vulnerability, States Parties are required to institute measures to prevent torture and other ill-treatment.

Through the OPCAT, States Parties must establish a system of regular visits to all places where persons are deprived of their liberty by independent international and national monitoring bodies. States Parties can fulfil this obligation imposed by the OPCAT through the establishment of National Preventive Mechanisms (NPM).

While South Africa joined the international community in reaching the consensus that torture and other ill-treatment must be prevented, it has taken a long time to complete the OPCAT implementation process. The establishment of the National Preventive Mechanism (NPM) in 2019 marked almost 13 years since the Republic of South Africa signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The responsibility of leading the NPM has been assigned to the South African Human Rights Commission (SAHRC) by the Parliament of the Republic of South Africa after extensive consultation and benchmarking involving existing oversight bodies and civil society at the national and international levels.

While these developments are applauded, our task is not an easy one. We are often asked to rationalise our approach in advocating for strengthening the protection of those deprived of their liberty. Some of these persons have committed the most serious of offences while others have been incarcerated for minor ones. Among these, are some children in secure care centres. However, as a country, we come from a brutal past – a past we have vowed not to repeat. It is that past we have sought to change, among others, through transforming the prison system to corrections where the emphasis is on the rehabilitation of offenders. This is based on values of a society built on social justice and fundamental human rights. As a country, we have also made efforts to transform the police service to bring it in line with constitutional values. This is no way intended to ignore the shortcomings we have witnessed in the policing environment in the post-apartheid South Africa.

This is the first report that maps progress on the OPCAT implementation process in South Africa since its ratification. The report documents the OPCAT journey in South Africa and post-NPM establishment and its observations during baseline visits to various places of deprivation of liberty. It also highlights particular challenges now and those envisaged in future. Not only does it identify potential challenges, but it also makes proposals to strengthen the mandate of the NPM through, *inter alia*, the promulgation of legislation to regulate the powers and functions of the NPM.

While the NPM is a step in the right direction, it certainly will not be able to discharge its functions without the cooperation and assistance of the relevant state officials responsible for the various places of deprivation of liberty. Access to several places of deprivation of liberty was a challenge. There is therefore a need for further engagement with the state, including the consideration of appointing NPM focal persons. The role of civil society is fundamental to the realisation of the NPM's mandate. We will be focusing on public education to popularise the mandate of the NPM in the next financial year. In our efforts to build a truly independent and effective NPM, we will ensure effective collaboration with relevant oversight bodies such as the Judicial Inspectorate for Correctional Services. It should be highlighted that the independence of these bodies should be incrementally and adequately addressed.

Many people have travelled this journey with us and I must extend our sincere appreciation to the Deputy Minister of Justice and Constitutional Development, Honourable John Jeffery for his dedication in ensuring the ratification of the OPCAT and the eventual establishment of the South African NPM. Efforts from within the SAHRC have similarly sustained the determination to encourage South Africa's compliance with its international obligations – from that of previous Commissioners to the current Commissioners and particularly the Chairperson, Prof Bongani Majola. I wish to extend my gratitude to them all.

I must also thank Adv Tseliso Thipanyane, the current Chief Executive Officer of the SAHRC, for creating an enabling environment for the NPM within the SAHRC and his office in particular. We have been fortunate to receive good cooperation from the National Commissioner of Correctional Services, Mr Arthur Fraser and his officials, and the National Commissioner of Police, Gen Khehla Sitole and his officials. Their cooperation and assistance have created a supportive environment for us to effectively undertake our work. Lastly, to the SAHRC staff and particularly, the NPM team, led by Dr Kwanele Pakati, thank you for all the hard work drafting this report and efforts to ensure that we build the foundation for an effective oversight mechanism.

Chris Nissen
Commissioner – South African Human Rights Commission/
South African National Preventive Mechanism

July 2020

EXECUTIVE SUMMARY

The Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT or Optional Protocol) was adopted by the United Nations General Assembly on 18 December 2002 and came into force on 22 June 2006. South Africa signed the OPCAT on 20 September 2006 and has pledged to ratify it since 2007. At the same time, the government's position was that consensus was required on the structure of its National Preventive Mechanism (NPM) before formal ratification. In 2006, an ad hoc committee, the "Section 5 Committee", (now Section 11) was established by the South African Human Rights Commission (SAHRC) to promote the OPCAT ratification and implementation. Similarly, in 2008, the Centre for the Study of Violence and Reconciliation (CSVR) also published a review of national existing mechanisms for torture prevention and investigation, whose findings and recommendations were debated among national and international actors. Several workshops were also held over the years, involving the SAHRC, national and international non-governmental organisations (NGOs) and various government departments, such as the Department of Justice and Constitutional Development (DoJ&CD), the Department of International Relations and Cooperation (DIRCO), the Department of Home Affairs (DHA), the Department of Police and the Department of Correctional Services (DCS).

On 28 February 2019, the Cabinet referred the OPCAT to Parliament for ratification in terms of section 231 (2) of Constitution. The National Assembly and the National Council of Provinces approved the ratification of OPCAT on 19 and 28 March 2019 respectively. In compliance with Article 27, South Africa deposited its instrument of ratification of the OPCAT with the Secretary-General of the United Nations on 20 June 2019. Under Article 28 (2), the OPCAT came into effect for South Africa on 20 July 2019.

The NPM was established in 2019 under the aegis of the South African Human Rights Commission (SAHRC). This is its first report of actions taken as a mechanism created to monitor, and report on, instances of torture and other cruel, inhuman or degrading treatment or punishment in places of deprivation of liberty. It does so by making announced and unannounced visits to such places, which include institutions such as correctional centres, police stations, custodial centres such as those housing illegal immigrants, psychiatric institutions, and other secure care facilities. There are several significant findings relating to the places of deprivation of liberty and the work of the NPM going forward. The NPM is concerned that in some instances, conditions contravene statutory law in South Africa, and are in conflict with the right to human dignity in terms of South Africa's Constitution. The realisation of this right applies to both public and private entities.

While the SAHRC enjoys constitutional independence and protection as a National Human Rights Institution (NHRI) and a Chapter 9 institution, the mandate of the NPM needs to be clearly articulated in a legal instrument. Such mandate should clarify the powers and functions of the NPM, including the right to choose which places of deprivation of liberty the NPM may visit. Such legislation must include the protection of the NPM and its personnel against any reprisals. This is essential for effectiveness and independence, as, without it, its ability to work without fear, favour or prejudice will be compromised. Similarly, operational independence must be guaranteed, including the process of allocation of annual funding.

Several shortcomings were detected in the current oversight mechanisms with the potential to affect the wellbeing and protection of people deprived of their liberty. These shortcomings should be addressed for South Africa to have an effective and independent South African NPM. In this regard, the SAHRC will intensify efforts to improve collaboration with the relevant oversight bodies.

Structural concerns were identified at some correctional centres and police stations. Part of these structural defects can be linked to the fact that most of these facilities are old and so is the infrastructure. For instance, only a few correctional centres have been built recently. There is, however, a substantive difference between publicly run correctional facilities and those sub-contracted to private entities. This is best identified by an analysis of the variety of rehabilitation programmes offered at such centres. Public facilities are overcrowded, whereas those of the two private ones are not. It is also noted that remand detention disproportionately affects the vulnerable and marginalised. Remand facilities in many centres lack appropriate infrastructure, budgets, are in poor condition, and lack provision for the essential needs of those in custody, leading to inhuman or degrading treatment.

Highlights and recommendations:

- There is concern about the welfare of mental health care users housed in places of deprivation of liberty including the provision of adequate facilities and capacity to treat, care for, and rehabilitate such persons. Dedicated training is essential so that the understanding of mental disorders is enhanced, awareness of human rights is inculcated, and stigmatising attitudes surrounding mental health treatment are challenged.
- In respect of the state of facilities, there is a systemic failure to provide budgetary and other measures for the provision of adequate standards of accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental health care, and reading and other educational facilities and support services. While some centres are managed well, several correctional centres are in a state of disrepair. Instances such as no working lights, leaking taps, broken tiles and leaking roofs are among those noted.
- Concern is expressed at the condition of the Ladysmith Correctional Centre. The current environment leads to inhuman conditions and degrading treatment. As such, the NPM recommends that the facility must be completely renovated, and offenders transferred to other centres. Not only is it dilapidated but it is in a constant state of uncleanliness, is overcrowded and, for example, does not have proper waste disposal facilities.
- The DCS is urged to have discussions with the National Treasury and the Department of Public Works and Infrastructure to reinstate the artisan programme, which presents an opportunity to serve a dual role by providing a skills transfer mechanism for offenders, as well as repairing facilities and equipment and making uniforms for offenders and officials on site.
- In respect of kitchen equipment, food handling and preparation, and pest control, most correctional centres and some police stations do not have certificates of acceptability from local municipalities. The preparation and handling of food without certification contravenes the Foodstuffs, Cosmetics and Disinfectants Act and its regulations. Pest prevention and management is a challenge in some centres with rodents and flies prevalent. Management oversight should be improved to ensure that hygienic conditions are improved and maintained.
- Safety and security was found to be inadequate in some centres, with poor or no effective checks, thus enabling the smuggling of contraband and other unauthorised items.
- In respect of police stations, the custody infrastructure is generally in a state of neglect and decay, with the cleanliness of cells and other facilities widely found to be inadequate. Most stations were found with dirty blankets and toilets. Concern is expressed at the condition of the Imbali satellite station as well as lack of adequate infrastructure and facilities at Sebayeng and Boitekong satellite stations.

- Police stations must also improve their compliance with the regulations relating to food handling and preparation as some did not have certificates of acceptability. The provision of meals should also be consistently applied.
- Some police stations do not have Victim Empowerment Rooms (VERs) at all, which is a cause for concern, and, in some, counsellors provided by the Greater Rape Intervention Project (GRIP) have been withdrawn as a result of funding challenges. Without such services, rape and gender-based violence survivors are effectively disenfranchised. The Gender-Based Violence and Femicide National Strategic Plan should prioritise the capacitating of VERs across the country.
- The prolonged detention of undocumented migrants at some police stations is a major issue. In this regard, cooperation between the South African Police Service and the Department of Home Affairs is crucial to ensure that the repatriation process is rapid.
- In terms of children in conflict with the law, there appears to be sufficient personnel to care for young offenders, but there is a lack of, or insufficient training and development opportunities for such care workers. Some centres need to strengthen their security to provide a safe and secure environment for children deprived of their liberty.
- Concern is expressed about the material conditions in some secure care facilities. Issues such as a lack of running water, broken lights, and a dirty environment were noted. This included a child offender being found in a cell with stagnant water that produced a foul smell in the Molehe Mampe Centre in Kimberley. In addition, some ablution facilities were not working. Another cause for concern was the presence of shoelaces tied to the roof in most of the dormitories, apparently for hanging personal clothing. The delegation visiting the centre expressed its concern that there appeared to be no awareness of this practice and that it could create a fertile environment for offenders at risk of self-harm or suicide. The delegation recommended to the institutional manager that the shoelaces be removed immediately. Conditions in the secure care facility are unfit for the rehabilitation of young offenders, and it is recommended that the Department of Social Development (DSD) submit a progress report to the NPM on plans to improve the conditions of Molehe Mampe Centre.
- While the NPM is still at an institutional building phase, this baseline assessment will guide it in identifying its thematic approach and strategic priority areas to strengthen the protection of persons deprived of their liberty.

1. INTRODUCTION

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT or Optional Protocol) was adopted by the United Nations General Assembly on 18 December 2002 and came into force on 22 June 2006.[1] The Republic of South Africa signed the OPCAT on 20 September 2006 and has pledged to ratify it since 2007.[2] This was reiterated during South Africa's Universal Periodic Review (UPR) cycles when the government reaffirmed its intention to ratify the OPCAT. At the same time, the state indicated that consensus was required on the structure of its National Preventive Mechanism (NPM) before formal ratification. On 28 February 2019, the Cabinet referred the OPCAT to Parliament[3] for ratification in terms of the Constitution.[4] The National Assembly and the National Council of Provinces approved the ratification of OPCAT on 19 and 28 March 2019 respectively. In compliance with Article 27, South Africa deposited its instrument of ratification of the OPCAT with the Secretary General of the United Nations in New York on 20 June 2019. Under Article 28 (2), the OPCAT came into effect for South Africa on 20 July 2019.[5]

After more than a decade of national discussions,[6] consultation and comparative jurisdictional analysis, the government of South Africa designated a multiple body NPM to be coordinated and functionally led by the SAHRC with other oversight bodies potentially contributing to its work. The SAHRC is working with several statutory bodies such as the Judicial Inspectorate for Correctional Services (JICS or Judicial Inspectorate), Independent Police Investigative Directorate (IPID), Military Ombudsman, and the Health Ombudsman and will strongly advocate that these bodies meet the requisite independence standards as set out by the OPCAT.

This is the first report of the SAHRC in its NPM capacity setting out progress made on the implementation of the OPCAT in South Africa, particularly on institutional building, current and future work as well as challenges and proposals to guarantee an OPCAT compliant NPM. The report is in two parts. The first part focuses on the progress made on the implementation of the OPCAT in South Africa while the second contains some observations and recommendations made during the baseline assessment over the 2019/20 period. The baseline assessment is also key in framing the thematic focus of the NPM.

2. BACKGROUND

In recognition of the intractable nature of the challenge of torture, the UN also adopted the Optional Protocol which requires States Parties to institute measures to prevent torture. The OPCAT establishes a system of regular visits to all places where persons are deprived of their liberty by independent international and national monitoring bodies. States Parties can fulfil the obligations imposed by the OPCAT through the establishment of National Preventive Mechanisms.

1 Adopted on 18 December 2002 at the Fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Entered into force on 22 June 2006.

2 *Note verbale* dated 26 April 2007 from the Permanent Mission of South Africa to the United Nations addressed to the President of the General Assembly.

3 See Statement on the Cabinet Meeting of 27 February 2019 https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-27-february-2019 at para 14.

4 Section 231 (2) of the Constitution of the Republic of South Africa, 1996 states that, "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)".

5 https://treaties.un.org/doc/Publication/CN/2019/CN.293.2019-Eng.pdf.

6 In 2006, an ad hoc committee, the "Section 5 Committee", (now Section 11) was established within the SAHRC to promote the OPCAT ratification and implementation. In 2008, the Centre for the Study of Violence and Reconciliation (CSVR) also published a review of national existing mechanisms for torture prevention and investigation, whose findings and recommendations were debated among national and international actors. Several workshops were also held over the years, involving the SAHRC, national and international non-governmental organisations (NGOs) and various government departments, such as the Department of Justice and Constitutional Development (DoJ&CD), the Department of International Relations and Cooperation (DIRCO), the Department of Home Affairs (DHA), the Department of Police and the Department of Correctional Services (DCS).

On ratification, States Parties have an election under Article 24 to make a declaration postponing the implementation of their obligations for a maximum period of three years. No declaration was made by South Africa invoking the provisions of Article 24 in relation to its obligations to establish an NPM.

3. A BRIEF OVERVIEW OF TORTURE IN SOUTH AFRICA

South Africa's journey to combat torture embedded in its social and political landscape is a long and painful one. Indeed, it was the death in police custody of the globally renowned political prisoner, Steve Biko, in 1977 that led the General Assembly of the United Nations to develop and adopt the UNCAT.[7] It is in this regard that the global community, through the United Nations, adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (UNCAT), which South Africa has ratified. The prohibition against all forms of torture, including cruel, inhuman or degrading treatment is explicitly referred to in various international human rights frameworks such as the Universal Declaration on Human Rights (UDHR, Article 5); the International Covenant on Civil and Political Rights, 1966 (ICCPR, Article 7); and the UN Convention on the Rights of the Child, 1980 (UNCRC, Article 37). In terms of General Comment 3 issued by the UN Committee against Torture, victims of torture are entitled to adequate reparations in the form of restitution, rehabilitation, compensation, satisfaction and guarantees that acts of torture will not be repeated.[8] Moreover, the prohibition finds expression in Article 5 of the African Charter on Human and Peoples' Rights (African Charter), further expanded in the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).

Importantly, the South African Constitution, 1996, in addition to guaranteeing freedom and security of the person (which includes the prohibition of torture), also guarantees the right to equality, human dignity and life, applicable to both public and private entities.[9] This is partially in response to conditions and treatment that thousands of South African men and women who opposed slavery, colonialism and the apartheid system were subjected to for many decades. This is also in response to the global prohibition and condemnation of torture and related forms of punishment that violate human rights in the most fundamental and pervasive manner.

South Africa ratified the UNCAT in 1998; however, the country's domestic legislation to give effect to its international obligations was only promulgated 15 years later. The Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013) provides specific guidance to prevent and combat torture in South Africa.

However, despite the establishment of the country's constitutional dispensation and the ratification of the UNCAT, incidents of torture by both public and private actors frequently occur in democratic South Africa. The treatment of arrested persons in police custody has been of increasing concern for human rights advocates, including the SAHRC. For instance, during the 2018/19 financial year, the IPID reported investigations of 214 cases of death in police custody, 393 deaths as a result of police action, and 3 835 assault cases.[10]

7 Fernandez, L. & Mutingh, L., *The Criminalization of Torture in South Africa*, 2016.

8 UN Committee Against Torture (CAT), *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States Parties*, 13 December 2012. See also CSVR, Torture in South Africa: The Act and the Facts, 2014.

9 Constitution of the Republic of South Africa, 1996, sections 9-12. Section 12(1) of the Constitution proclaims that: "Everyone has the right to freedom and security of the person, which includes the right... (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way".

10 The Independent Police Investigative Directorate (IPID), *Annual Report: 2018/2019 Financial Year*, 2019, p38.

On 16 August 2012, South Africa and the world expressed outrage and concern regarding the police brutality towards striking workers at Marikana, which left more than 40 people dead. This incident of torture committed by the state was subject to investigation at the Marikana Commission of Inquiry, in which the SAHRC participated. Worryingly, protestors demanding the delivery of housing, education, and basic services such as water, sanitation and electricity continue to confront a police force that regulates crowd control with water cannons, tear gas, stun grenades, and rubber bullets.[11] Between 2004 and 2014, media reports estimate that at least 43 protestors were killed by police.[12]

The treatment of undocumented foreign nationals in state custody has also been the subject of scrutiny. Since 2016, in accordance with various court orders[13] and noting concerns expressed by the UN Human Rights Committee, the SAHRC has monitored the living conditions that undocumented foreign nationals are subjected to at immigration detention centres, particularly as it relates to overcrowding, inadequate access to hygiene and medical services, the unlawful detention of undocumented migrants in excess of legally prescribed timeframes, and the arrest and detention of suspected unaccompanied minors. Moreover, the SAHRC has previously expressed concern about the role of private entities that manage maximum security centres, such as G4S, in the provision of accommodation, administration, catering, health and safety.[14]

The SAHRC further notes with concern the alleged police abuse of sex workers in South Africa. Based on complaints to civil society organisations, police continue to treat sex workers in their custody in a manner that is the antithesis of the values that underpin the Constitution. These complaints against the police include allegations of stigma and discrimination; verbal, psychological, physical, economic and sexual violence against sex workers; arbitrary arrests; and the denial of appropriate access to justice.[15]

The widely reported deaths of 94 mentally ill patients who died in 2016 after the Gauteng Department of Health moved more than 1 300 patients from the Life Esidimeni mental health care facility to hospitals and non-governmental organisations (NGOs), resulted in the SAHRC conducting an investigation into the systematic and systemic review of human rights compliance and possible violations in respect of mental health. All of the 27 NGOs to where the patients were relocated were unlicensed, under-resourced and had no capacity to accommodate mental health care users (MHCUs). Consequently, it was found that the transfer process demonstrated a disregard of the rights of the patients and their families, including the right to human dignity; right to life; right to freedom and security of person; right to privacy; right to protection from an environment that is not harmful to their health or wellbeing; right to access quality health care services, sufficient food and water; and right to an administrative action that is lawful, reasonable and procedurally fair.[16]

Following the Life Esidimeni tragedy, the SAHRC has embarked on proactive monitoring of frail care centres run by NGOs. In 2017, the SAHRC received a complaint against the MEC for Social Development in the Eastern Cape, alleging that a proposed move of patients from established frail care centres would result in numerous human rights violations. The matter attracted the intervention of the province's Premier and was referred to a court appointed curator. In response, SAHRC visited the province and affected centres, and continues to closely monitor the situation.[17]

11 Right2Know Campaign, R2K Statement: We are concerned over the shrinking space for dissent in South Africa!, 2017; See also: SAHRC, Civil and Political Rights Report, 2017 and SAHRC, Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery, 2015.

12 Laura Grant, Research shows sharp increase in service delivery protests, *Mail & Guardian (*12 February 2014).

13 *South African Human Rights Commission and 40 others v Minister of Home Affairs and 4 Others, Case No. 41571/12 ("SAHRC v Minister of Home Affairs"); Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22.

14 SAHRC, National Human Rights Institution Report regarding the South African Government's 2nd and 3rd Periodic Report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted to the UN Committee against Torture for consideration at the 66th session, 23 April-17 May 2019.

15 Women's Legal Centre, Police abuse of sex workers: Data from cases reported to the Women's Legal Centre between 2011-2015, 2016.

16 Health Ombud *Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province: No Guns: 94+ Silent Deaths and Still Counting* (2017); see also SAHRC report to the Committee against Torture at note 10 above.

17 SAHRC, Press Release: Frail care homes inspected, 2017.

Although various institutions have been established by the government to monitor the conduct of State officials as it relates to torture, in addition to a number of SAHRC interventions, human rights advocates have long called for the need for a regular and independent oversight body specifically dedicated to strengthening the protection of those in places of deprivation of liberty in South Africa. Such a body is of great importance in adequately collating reliable data to monitor the prevalence of torture in South Africa, particularly in light of the country's vast social and economic inequalities.[18]

The ratification of the OPCAT coincides with significant jurisprudential developments that have recognised the brutality of various forms of physical and mental torture that has occurred both during the apartheid era and in democratic South Africa, specifically in the context of police detention. In 2019, the High Court in Johannesburg ordered that the trial investigating the murder of political activist Ahmed Timol which occurred in 1971 at the hands of the then security police, must proceed.[19] Similarly, in 2020 the National Prosecuting Authority supported interventions to criminally prosecute a former security police officer for the brutal murder of anti-apartheid activist, Neil Aggett, who was found hanging in his cell following days of interrogation and torture in 1982.[20] With the enforcement of the coronavirus pandemic national lockdown regulations, the courts have been asked to restate the right of citizens not to be subjected to torture, or to any other cruel, inhuman or degrading treatment or punishment.[21]

In 2018, transgender activist Jade September supported by a host of civil society organisations, challenged the Department of Correctional Services (DCS) for denying her the dignity of expressing her gender identity and for limiting her rights to equality and freedom of expression in a state run correctional facility. Ms September alleged that as a transgender woman, she was subjected to misgendering, harassment, verbal abuse and inhumane treatment in correctional facilities, resulting from a host of discriminatory practices coupled with a general lack of awareness on the part of officials located in the DCS.[22] In 2019, the Equality Court found that the DCS had violated Ms September's dignity on numerous counts, particularly as it related to her gender identity. Importantly, the Court held that until such time that Ms September had undergone gender reassignment treatment, she would be allowed to remain in a single cell in a male correctional centre, with the freedom to express her gender identity safely in accordance with DCS hygiene protocols.[23]

In its concluding observations on South Africa's second periodic report to the Committee against Torture submitted in 2017, the Committee recommended that responsible oversight bodies, including the SAHRC as the designated NPM, receive adequate resources to ensure regular visits to places of deprivation of liberty, including correctional centres, police detention cells and social care establishments. Importantly, the state must ensure that these oversight bodies can adequately deal promptly and effectively with complaints and investigations, and hold relevant authorities accountable.[24]

In addition to giving effect to its monitoring responsibilities under the NPM, the SAHRC has also concluded a memorandum of understanding (MOU) with the South African Police Service (SAPS) as part of its broader mandate to inculcate a culture of human rights within the country's landscape. As part of its MOU research and advocacy initiatives, the SAHRC will embark on regular human rights training and lectures in the hope that through continued and proactive engagements, relevant authorities will adhere to their obligations to prevent torture and other ill treatment in South Africa.

18 Pigou, P., Monitoring Police Violence and Torture in South Africa, CSVR, 2002.
19 Patel, AD., Application denied: Rodrigues to stand trial for Timol murder, *Mail&Guardian,* 3 June 2019.
20 Feketha, S., Neil Aggett inquest: Nicholas Deetlefs to face prosecution, *Mail&Guardian*, 21 February 2020.
21 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147 (15 May 2020).
22 https://www.genderdynamix.org.za/post/gender-dynamix-press-release-trans-prisoners-rights-to-gender-identity-and-expression-in-september
23 *September v Subramoney N.O. & Others* EC10/2016.
24 Committee against Torture, Concluding observations on the second periodic report of South Africa, CAT/C/ZAF/CO/2, par24-27.

4. WHY THE NPM?

Under Article 3 of the OPCAT, South Africa must establish, designate or maintain an NPM to prevent torture and other cruel, inhuman or degrading treatment or punishment among others, through regular visits to places of deprivation of liberty.[25] However, OPCAT gives some discretion about the particular NPM model that each State Party adopts. The activities of the NPM include making announced and unannounced visits to places of deprivation of liberty and thereafter report on findings and make recommendations to the relevant authorities. The preamble to the OPCAT states that 'the protection of persons deprived of their liberty … can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention'. Therefore, the core of the OPCAT lies in its preventive nature which is designed to realise systemic change as opposed to a reactive and remedial system. At a global level, these visits to places of deprivation of liberty are also undertaken by the SPT.

It is largely believed that a system of regular and unannounced visits to places of deprivation of liberty provides an opportunity for NPM officials to appreciate the real situation in such a places, without the authorities preparing in advance. The correlation between various aspects of deprivation of liberty warrants a systemic approach to averting risks to human rights standards.[26] In a constitutional democracy, there are also constitutional guarantees that are imperative for the protection of an individual's right even in a place of deprivation of liberty.[27]

In the work of an NPM, there are important features to support the prevention of ill treatment. The APT, has, for instance, set out the following main elements:

- *Proactive rather than reactive:* Preventive visits can take place at any time, even when there is no apparent problem or specific complaints from detainees.
- *Regular rather than once off:* Preventive detention monitoring is a systematic and ongoing process, which means that visits should occur regularly.
- *Global rather than individual:* Preventive visits focus on analysing the place of detention as a system and assessing all aspects related to the deprivation of liberty, to identify problems which could lead to torture or ill treatment.[28]

Preventive visits are part of an ongoing and constructive dialogue with relevant authorities, providing concrete recommendations to improve the detention system over the long-term. Article 4 (1) and (2) of the OPCAT provides a definition of 'places of deprivation of liberty' as well as some guidance on what deprivation of liberty means. Through the NPM's systemic analysis before, during and after monitoring visits (as well as follow-up visits), the NPM can identify trends, improvement or deterioration of the conditions of detention and provide recommendations to implement protective measures as underlined by international and domestic human rights norms and standards.

25 Articles 1, 3 and 17 of the OPCAT.
26 See rule 57(3) of the Mandela Rules: "allegations of torture or other cruel, inhuman or degrading treatment or punishment of prisoners shall be dealt with immediately and shall result in a prompt and impartial investigation conducted by an independent national authority in accordance with paragraphs 1 and 2 of rule 71".
27 See sections 12 and 35 of the Constitution.
28 Association for the Prevention of Torture Advisory Paper to the SAHRC on the practical considerations for the establishment of a National Preventive Mechanism in South Africa, 3 July 2017.

5. COMPOSITION OF THE SOUTH AFRICAN NPM

States Parties have several options on how their NPMs should be structured. The structural options are based on the specific context of each state as the OPCAT does not specify one single model for NPMs. For example, Article 17 makes clear that one or multiple bodies can carry out the NPM function. However, it is important that NPMs fulfil the key requirements provided by the OPCAT. So far, States Parties to the OPCAT have chosen different models, each of them with specific characteristics according to their context. Some States have given the NPM mandate to one or several existing institutions, including National Human Rights Institutions (NHRIs) and Ombud institutions. Others have created a completely new body, or several, to perform the NPM mandate. Other States have opted for a different model, for example combining existing institutions with new structures. Although States have drawn inspiration from observing the NPMs in other countries with similar characteristics, experience indicates that no model can be replicated precisely.

Similarly, the OPCAT offers a very expansive definition of places of deprivation of liberty – such places would not be the same everywhere. In the South African context, the Article 4 definition of places of deprivation of liberty includes both traditional and non-traditional forms of deprivation of liberty. These include correctional centres, CYCCs, Secure Care Facilities, mental health institutions, immigration detention centres, police and military detention facilities.

In line with the OPCAT obligation to set up an NPM, the government of South Africa designated a multiple body NPM to be coordinated and functionally led by the SAHRC. Under the coordination of the SAHRC, the South African NPM may include other institutions such as the JICS, IPID, Military Ombud and the Health Ombud. The South African NPM was launched on 19 July 2019, at the Castle of Good Hope in Cape Town. One critical requirement to be met by bodies who could constitute the South African NPM, is the OPCAT's requirement of independence. The OPCAT demands NPMs to be functionally, operationally, financially and legislatively independent.[29] In the South African context, most of the bodies identified are obliged to report to the same executive arm of the government they are meant to oversee. This is a critical risk the state must manage for an effective and credible NPM in South Africa. It is just as important to note that the designation of the South African NPM is designed to complement rather than replace existing oversight mechanisms such as JICS, and its functioning is aimed at promoting effective cooperation and coordination between preventive mechanisms in the country.

6. OPCAT REQUIREMENTS

Regardless of their structure, all NPMs should meet some minimum requirements provided by the OPCAT, which include the following:

6.1 Functional and personal independence

The independence of NPMs - and that of their personnel - from the institutions which establish and fund them, as well as from the institutions that they are meant to monitor, is essential to be able to prevent torture and ill treatment.

29 See article 18 of the OPCAT.

States must ensure that NPMs can make decisions and act independently, without any interference from State authorities. Having a strong legal foundation for the NPM is a guarantee in this regard. NPM personnel must also be independent, transparent and accountable in their work, as the way NPMs are perceived has a direct impact on their effectiveness.

6.2 Financial independence

Financial independence includes the provision of adequate resources to the NPM, but it is also closely linked to the source and process of resource allocation, and the NPM's autonomy to determine and submit its budget, and to use it without any interference. Article 18(3) of the OPCAT requires that States Parties provide adequate resourcing to fulfil the NPM functions. Without financial independence, the NPM would neither be able to exercise its functional independence nor be perceived as an independent institution. Financial independence should equally be accompanied by financial accountability for public resources.

For instance, on the resources challenges that currently face the SAHRC in its NPM coordinating role and future operations of an effective South African NPM, the Committee against Torture said: "it is concerned about the current limitations faced by oversight bodies in terms of mandates, budgets and institutional independence from the government departments that are supervised."[30] The CAT further expressed a concern that: "the Commission lacks the adequate financial and human resources to carry out all of its mandates."[31] In response to the above concerns and operational challenges for the Commission in its new role in the South African NPM, the Committee made the following recommendations for the consideration and implementation of the State party, the South African government:

> "The State party should ensure the financial and functional independence of the South African Human Rights Commission by providing it with the necessary resources to enable it to fulfil its mandate effectively, in accordance with the Paris Principles and the Guidelines on national preventive mechanisms of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."[32]

6.3 Adequate level of funding

NPMs' preventive mandate is a demanding and specialised task which requires regular presence in places of deprivation of liberty, specific expertise and dedicated personnel. Therefore, even if States designate existing institutions as NPM, additional resources must be provided to carry out this new function, not only at the moment of designation, but progressively.

NPMs within existing institutions can benefit from the logistical and human resources already available within the institution. However, experience from other OPCAT States Parties shows that these are often insufficient for the NPM to regularly visit all places of deprivation of liberty and adequately follow up its recommendations, and to perform all other activities required by its preventive mandate.

In the South African context, additional resources will be needed to: recruit new personnel to perform the NPM functions; remunerate external experts to support the NPM – where external expertise is required – such as medical doctors and psychologists; cover travel costs for NPM staff; conduct training for NPM staff and experts; develop specific communication and advocacy materials; publish reports; participate in international exchanges and seminars.

30 Concluding Observations on the Second Periodic Report of South Africa issued by the Committee against Torture (CAT) on 14 May 2019 (CAT/C/SR. 1750 held on 14 May 2019) at para 24.
31 *Ibid*.
32 *Ibid* at para 27.

6.4 Multidisciplinary and diversity

For an NPM to be effective, its institutions and staff must be independent, knowledgeable and have the relevant professional expertise. As an institution, the NPM should be multidisciplinary, taking into consideration the different professional expertise and knowledge relevant to deprivation of liberty. It should also be representative of the wider society, ensuring gender balance and representation of ethnic and minority groups.

6.5 Powers to access places, persons and information

Articles 20, 22 and 23 of the OPCAT provide the kind of support an NPM should receive from its State party:

- Access to all information concerning the number of persons deprived of their liberty in places of deprivation of liberty including the number of such places and their location.
- Access to all information referring to the treatment of persons deprived of their liberty and their conditions of detention.
- Access to all places of deprivation of liberty and their installations and facilities.
- Opportunity to have private interviews with persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national NPM believes may supply relevant information.
- Liberty to choose the places to be visited and persons to be interviewed.

NPMs must be granted access to all types of places of deprivation of liberty, as well as their installations and facilities, and to all relevant information, including disciplinary and medical records. They should also have the power to conduct unannounced visits. NPMs should also have the power to conduct private interviews with any person of their choice. This is closely linked to the need to protect interviewees from reprisals.

In accessing these places of deprivation of liberty, the state should ensure that both the NPM institutions and their staff enjoy such privileges as are necessary for the independent exercise of their functions.[33] Guidelines from the UN further emphasise that "while it is accepted that essential basic security measures are to be complied with for the benefit of all concerned, it is equally important that those working for the NPM are not in any way restricted in their work and that they do not feel that they might be subject to any form of pressure." As such, routine body searches and pat-downs contravene the spirit of the Optional Protocol.[34] NPM personnel are exempt from searches as they enjoy privileges and immunities in terms of Article 35 of the Optional Protocol and ought to include freedom from such searches. In terms of the OPCAT, confidential information collected by the NPM should be privileged. However, nothing should prevent the NPM from making public statements concerning any matter contained in its reports presented to Parliament that the NPM may consider in the public interest. Relevant organs of State must guarantee immunity against search or seizure, and compelled disclosure of confidential information held by the NPM.

The immunity should also include:

- Protection from personal arrest and detention;
- Protection from seizure of personal baggage;

33 See SPT Guidelines on National Preventive Mechanism (CAT/OP/12/5) at para 26.
34 *Ibid*.

- Protection from seizure or surveillance of papers and documents and absence of interference with communication; and
- Protection from legal action for words spoken or written, or acts done, in the course of performance of the duties of the NPM.

6.6 Power to report, make recommendations and comment on policy and legislation

One essential pillar to the NPM's preventive mandate is the power to make recommendations to the relevant authorities to prevent torture and other ill treatment. Recommendations often stem from the observations during the visits conducted to places of deprivation of liberty and are included in the NPM's visits, thematic and annual reports. The SPT has recommended, for instance, that:

> "The NPM should establish: (a) a mechanism for communicating and cooperating with relevant national authorities on the implementation of recommendations, including urgent action procedures, (b) a means for addressing and resolving any operational difficulties encountered during the exercise of its duties, including during visits; (c) a policy for publicising reports, or parts of reports including the main findings and recommendations, and (d) a policy regarding the production and publication of thematic reports."[35]

Furthermore, NPM's holistic mandate should include the power to comment on draft or existing policy and legislation. Equally, the state should inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow the NPM to make proposals or comments on any existing or draft policy or legislation. The state should consider any proposals or comments on such legislation received from the NPM.[36]

6.7 Protection for persons deprived of liberty and others

The OPCAT grants protection from reprisals for any person or organisation that communicates information to the NPM, irrespective of the accuracy of such information. It also provides that confidential information collected by the NPM should not be disclosed, unless the individuals give their express consent. Confidential information collected/received by the NPM is privileged, and personal data received by the NPM cannot be published without the expressed consent of the person so affected. No person or organisation shall be sanctioned or prejudiced for communicating such information to the NPM.

7. PRACTICAL CHALLENGES WITH THE CHOSEN MODEL

While the South African government adopted a multi-body NPM, designating multiple institutions as NPM has both advantages and challenges.

7.1 Advantages

- By integrating existing institutions, it is possible that a multiple body NPM would ensure greater regularity of visits than any single institution. Regular visits enable NPMs to develop a deeper understanding of places of deprivation of liberty, as well as to ensure follow up and implementation of their recommendations.

35 Subcommittee on Prevention of Torture, 2012, *Analytical self-assessment tool for National Prevention Mechanisms (NPM)*, CAT/OP/1, para 31.
36 Article 19.

- Designating multiple bodies as NPM is beneficial as it uses existing institutions. The NPM would thus potentially make use of the size and existing monitoring role of all existing monitoring institutions. Linked to this is the fact that such a system would involve a division of tasks between institutions with an existing monitoring role. Allowing each of them to concentrate on their field of expertise, while also benefiting from the powers and systemic overview of the NPM as a whole.
- Such a model also potentially allows for increased cooperation and exchange of practices between the institutions, particularly concerning the referral of cases and the identification of cross-cutting issues and themes.
- Geographical coverage may also be enhanced within a multiple-body NPM. South Africa's geographical reach presents particular challenges to NPM. Using the SAHRC's ten offices (nine provincial and one head office), plus the JICS's five offices (four regional and one head office), among others is likely to ensure that places of deprivation of liberty in a wide variety of regions, including remote regions, are visited as part of the NPM's regular work.

7.2 Challenges

- The main challenge of multiple body NPMs and particularly, South Africa, is ensuring coherence (including of approach, working methods, objectives, methodology, and other factors) within a diverse group of institutions.
- The complexity of a multiple entity NPM also poses challenges for institutional visibility. It may be difficult, for example, for civil society, State departments, places of deprivation of liberty or persons deprived of their liberty to understand what the NPM is or how they should interact with it or its constituent institutions. Another example would be the difficulty by inmates in correctional centres in making a distinction between the roles performed by both the NPM and Independent Correctional Centre Visitors (ICCVs) and the NPM vis-à-vis the SAHRC.
- NPMs within NHRIs may have difficulty attaining financial and operational autonomy if there are no laws or policies that provide for a separate status, visibility and relationship within the NHRI.
- A further major challenge relates to the requirements of the OPCAT. Every institution in a multiple body NPM should comply with the requirements of the OPCAT both as individual institutions. This means, for example, that each of the institutions comprising the NPM needs to be independent of the bodies they oversee. Each institution also needs the necessary powers, mandate and resources.
- The SAHRC and the potential NPM bodies work in a number of different ways, reflecting their specific history, roles and status. These differences are deeply embedded and are likely to be difficult to adapt. There is a risk that each institution continues with "business as usual", without adapting to the new reality of being part of an NPM.
- The SAHRC currently has a broad mandate which covers any possible human rights violation even in places of deprivation of liberty, while other South African monitoring institutions have narrower mandates in relation to correctional centres and police detention, for example. A significant challenge for a multiple body NPM will thus be to ensure that there are no gaps or overlaps in coverage of places of deprivation of liberty.
- This diversity of methods and approaches may also manifest itself in reports and recommendations that may not be of the same standard or may not reflect a coherent objective. This may make it more difficult for the NPM to achieve the changes it would like to see in places of deprivation of liberty.

8. THE (POTENTIAL) ROLE OF THE OVERSIGHT INSTITUTIONS IN THE NPM

8.1 Coordinating role of the SAHRC

The SAHRC has been designated to play two roles in the NPM. The first one is a coordinating function. The coordinating role of the SAHRC includes the following:

- Ensuring cohesion of methodology and coordination of work.
- Promoting collaboration, information sharing, cohesion and good practice between NPM bodies.
- Convening regular meetings of NPM bodies.
- Facilitating joint activities between NPM bodies.
- Liaising and facilitating engagement with international human rights bodies (e.g. SPT, other NPMs).
- Making joint submissions to international treaty bodies.
- Representing the NPM with Government and other national actors.
- Preparing the NPM annual report and other NPM joint publications.
- Make, in consultation with all relevant NPM bodies, any recommendations to the Government that it considers appropriate on any matter relating to the prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of detention in South Africa.

In addition to the challenges of a multi-body NPM identified above, specific challenges for the coordinating body include its role in facilitating decision making, knowledge management, setting objectives and priorities, speaking on behalf of the NPM, and following up on reports and recommendations.

8.2 Functional role of the SAHRC

The second role of the SAHRC is functional. The SAHRC has to monitor places of deprivation of liberty as lessons from other jurisdictions highlight that it is difficult for an NPM coordinating body to be effective if it does not also have a monitoring role. Without a monitoring function, it would be very difficult for any coordinating body at a practical level to understand the preventive approach, to harmonise the methodology of the different institutions, and to report and make recommendations effectively on behalf of the NPM as a whole, or to conduct the system wide analysis that such a body would be expected to contribute. This also renders the NPM coordinating body ineffective in filling the gaps in the monitoring of places of deprivation of liberty. Without the ability to adequately fill gaps in coverage, the effectiveness of such a body would also be severely reduced. Due to gaps in the applicable legislation in South Africa, certain places of deprivation of liberty such as police stations, military detention facilities, and psychiatric facilities are not adequately and independently monitored.

As an existing NHRI, the challenge for the SAHRC to receive an additional NPM mandate is that it would require additional resources. The Nairobi Declaration, for instance, underscores that NHRIs should only consider designation as NPMs “if the necessary powers and resources are made available to them.”[37] The Nairobi Declaration was adopted in 2008 at the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights. The conference was devoted to the role of NHRIs in the administration of justice. NPM work, particularly in a large country, is human resource intensive.

37 Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21-24 October 2008, operative par 39.

Likewise, the coordination role of the SAHRC in the South African NPM requires a separate and autonomous unit within the SAHRC with its budget and staff. In this regard, the United Nations provides:

> "Where National Human Rights Institutions (NHRIs) are designated as NPMs, the Subcommittee may recommend that such NPMs operate them as separate organizational units, with their own discrete Heads exercising operational autonomy. For example, NPMs should not become sections of legal departments, since this would diminish their independence and visibility. Ultimately, the organizational structure should reflect the Optional Protocol's requirements, including operational autonomy as regards their resources, work plans, finding, recommendations and direct (and, if need be, confidential) contact with the SPT."[38]

While the dual role of the SAHRC has been outlined above, a few observations have been made regarding other NPM institutions through several dialogues convened by the SAHRC.

8.3 Correctional Services oversight mechanism: the role of JICS

Section 35 of the Constitution provides for the rights of arrested, detained and accused persons and the Correctional Services Act, 1998 (Act No. 111 of 1998) (CSA) provides standards for detention, which are further detailed in Regulations and B-orders. Conceptually, a clear normative framework for monitoring deprivation of liberty through the JICS in Correctional Centres appears to be well established.

JICS has the power to visit all correctional centres in South Africa. JICS is responsible for monitoring and reporting on the conditions, and treatment of inmates, in correctional centres. At the same time, JICS's mandate is supported by ICCVs which undertake regular monitoring of correctional centres. At present JICS aims to visit each correctional services facility every three years. In terms of section 86 of the CSA, a retired judge is appointed by the President to lead the inspectorate as the Inspecting Judge (IJ). The Inspecting Judge continues to receive the salary, allowances, benefits and privileges attached to the office of a judge. The Chief Executive Officer (CEO) of JICS is the operational head and thus appointed by the IJ. He or she is accountable to the IJ. At the same time, the CEO reports to the National Commissioner of Correctional Services for all monies received by JICS.

ICCVs conduct visits to correctional centres and record interviews with inmates. Since April 2018, ICCVs must be present at correctional centres every weekday for at least three hours. Section 21 of the CSA provides for inmates to register complaints to the head of their correctional centre or any delegated official. ICCVs also report complaints to heads of correctional centres, who are responsible for ensuring their resolution. ICCVs also participate in monthly Visitor's Committees to discuss unresolved complaints.

Gaps and opportunities for reform

- There are several shortcomings in the correctional services oversight mechanism, including that:
  - The ICCV system is under-resourced and ICCVs require additional training and greater time allocation to improve the effectiveness of monitoring mechanisms and confidence levels in the ICCV system;
  - JICS's oversight role is compromised by the fact that it does not have independent investigative capacity and that it relies on DCS's internal complaints' investigations;
  - JICS is not sufficiently independent of the DCS and the current court challenge on JICS's independence provides an opportunity to re-examine and strengthen existing legislation;

38 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Guidelines on National Preventive Mechanisms* (CAT/OP/12/5) para 32.

- JICS's recommendations are not binding and the DCS is not required to explain why recommendations are not adopted or implemented; and
- Correctional Services officials are rarely prosecuted for human rights violations, despite thousands of complaints every year.

Given the pending *Sonke* judgement in the Constitutional Court, it will have to be decided whether the CSA will be amended to ensure that JICS is adequately independent and thus able to meet the essential conditions for being part of the South African NPM.

A positive implication of the decision is the recognition of Article 18 of the OPCAT. In this regard, the court said:

> "Article 18 [of OPCAT] does refer to a guarantee of functional independence of the NPM, as well as the independence of its personnel, and that States Parties shall make available the necessary resources for the funding of the NPM."[39]

The judgement also provides the basis and importance of the South African NPM and the functional role of JICS in its current form or a future revised one by highlighting that:

> "The importance of JICS in the correctional service sphere cannot be understated. It serves a crucial function, focusing on facilitating inspection and reporting on the vulnerable (the inmates), how they are treated and the conditions they are held in. Referring to inmates, who have offended society, as the vulnerable, sounds like an oxymoron. The vulnerability lies in the fact that they, for the most part, are at the mercy of others as to their living conditions and treatment or survival, once incarcerated. Whilst they have given up their right to liberty, other rights including the right to human dignity, are still protected by the Constitution. It is imperative to have a body, independent from that which enforces correctional measures or incarceration to watch over or report on the correctional enforcer's conducting of services, so as to give effect to the Bill of Rights."[40]

After the *Sonke* judgment and pending the Constitutional Court judgment, positive developments designed to address some of the shortcomings identified above have been noted. Hopefully, they will bring JICS in compliance with the OPCAT. The decision on JICS' independence must be made without delay as its lack or perceived lack of independence prevents it from being fully OPCAT compliant as an NPM component. Delays in addressing this situation will thus affect the effectiveness of the South African NPM.

8.4 Police custody oversight and the role of IPID

The Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011) (IPID Act) gives effect to the provisions of section 206 (6) of the Constitution. The IPID's role is limited to investigations of deaths and rape in police custody and complaints of torture or assault and systemic corruption as provided by section 28 of the IPID Act.[41] IPID can make recommendations for administrative action to the SAPS or refer matters to the NPA for prosecution. However, with regards to functions relevant for the NPM proactive mandate, IPID is not required by law to conduct preventive visits to police stations, but provincial IPIDs can and have conducted unplanned visits to police stations to obtain information on conditions of detention.[42]

39 At para 18.
40 At para 22.
41 Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011).
42 CSVR 'Review of Existing Mechanism for the Prevention and Investigation of Torture and Cruel, Inhuman and Degrading Treatment or Punishment in South Africa' (2008) p. 27.

There is a need to review the legislative framework of the IPID for the monitoring of police detention centres if a policy arrangement, or delegation of the SAHRC's mandate, or invoking relevant provisions of the South African Human Rights Commission Act, 2013 (Act No. 40 of 2013) (SAHRC Act), will not work.

Similarly, the SAPS Management Intervention Unit is responsible for monitoring SAPS conduct and operations through quality assurance frameworks and inspections. National Instruction 6 of 2017 also provides for service complaints against the SAPS. An internal inspectorate has been set up and its mandate is to conduct an audit of SAPS functions and conduct regular unannounced visits at SAPS facilities. The Provincial Commissioners appoint staff in their respective provinces, while the National Commissioner appoints staff at a strategic level. All staff report to the Station Commander and the Provincial Commissioner. Nonetheless, these are internal mechanisms within SAPS.

Similarly, the Civilian Secretariat for Police Service (CSPS) is responsible for civilian oversight of the SAPS. The CSPS and its Provincial Secretariats use the National Monitoring Tool (NMT) to conduct oversight visits (announced and unannounced) of police stations, including custodial settings. The NMT contains questions directly relating to monitoring SAPS custody management. The NMT's police custody questions are designed to monitor:

- Availability and capacity of police cells (holding and detention);
- Maintenance and state of repair;
- Administration of detainees and detention of juveniles;
- Provision of meals and drinking water;
- Inspection of police cells by Station Commander and CSC members;
- Availability of complaint mechanisms to allow detainees to lodge complaints;
- Incidents of escape by detainees and the extent of involvement of SAPS members; and
- Deaths of detainees in police custody and reporting to IPID.

Gaps and opportunities for reform

- There are several shortcomings in the police custody oversight mechanism, including that:
  - While there are various oversight mechanisms for police custody, there is no capacity for regular, independent monitoring visits; and
  - Current oversight and monitoring mechanisms are primarily concerned with compliance and service delivery issues and limited attention is given to the rights of those deprived of their liberty.
- Nonetheless, there are oversight opportunities for police custody including the use of lay people to visit police stations regularly.

Amendments to the IPID Act were approved by Parliament in compliance with a judgement of the Constitutional Court.[43] However, despite the availability of opportunities to expand the scope, these amendments were strictly limited to the invalidity of the powers of the Minister to suspend, remove or institute disciplinary proceedings against the IPID Executive Director in terms of section 6 of the IPID Act. Central to the litigation was "whether, in the light of the applicable statutory framework, IPID enjoys adequate structural and operational independence, as envisaged by section 206(6) of the Constitution, to ensure that it is effectively insulated from undue political interference".[44] The capacity and independence of IPID has again been raised recently in the *Khosa* matter.[45] As such, additional amendments to the IPID Act should be explored to include its possible role in the NPM.

43 *McBride v Minister of Police and Another* [2016] ZACC 30.
44 *Ibid* paras 8, 26-43.
45 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147 (15 May 2020) at par 138.

8.5 Mental health institutions and the role of Mental Health Review Boards

There are approximately 12 000 beds for mental health care users in psychiatric hospitals and care and rehabilitation centres, with many more people residing in profit, non-profit and community care facilities. Several categories of mental health care users reside in health facilities without their consent, with approximately 35 000 involuntary users admitted per year. Section 11(1) of the Mental Health Care Act, 2002 (Act No. 17 of 2002) provides that every person, body, organisation or health establishment providing care, treatment and rehabilitation services to a mental health care user must take steps to ensure that:

- Users are protected from exploitation, abuse and degrading treatment;
- Users are not subject to forced labour; and
- Care, treatment and rehabilitation services are not used as punishment or for the convenience of other people.

Provincial MECs for Health are responsible for establishing and appointing members of Mental Health Review Boards (MHRBs) for each establishment providing mental health care, treatment and/or rehabilitation in each province. These review boards cover every mental health establishment in the country and provide an oversight function relating to the provision of health care. The MHRBs are responsible for protecting users' rights and must investigate any allegations of exploitation, abuse, neglect, degrading treatment, forced labour, or use of care, treatment or rehabilitation as punishment or for the convenience of other people.

On the other hand, the Office of Health Standards Compliance (OHSC) uses norms and standards developed by the National Department of Health (NDoH) to conduct inspections at all health facilities, including psychiatric hospitals and care and rehabilitation centres. Recently, the SAHRC recommended that the NDoH should appoint a permanent advisory body in the department whose role is to monitor the observance of human rights in mental health service provision. This body should have a direct monitoring relationship with provincial mental health directorates, clarifying any challenges in reporting lines being confused, with special consideration being given to the right to participation of MHCUs. NDoH must ensure that any reports of human rights violations reported by a MHRB be submitted by the provincial mental health directorates to this body. The body must maintain a record of all such reports and monitor the implementation of remedial action taken at the provincial level to address the concerns raised in the reports to ensure that any such violations are addressed timeously.[46]

Gaps and opportunities for reform

- The oversight mechanisms for health facilities are currently underfunded and need to be strengthened. For instance, the NDoH reported to the SAHRC inquiry into the status of mental health care that MHRBs in six of the nine provinces were 'poor' by the department's own assessment and, with the exception of the Western Cape, were considered to be poorly resourced.[47]
- Concerns have been raised around South Africa's compliance with the Convention on the Rights of Persons with Disabilities, noting the recent General Comment on Article 12 that all countries must do away with legislation and/or practices permitting involuntary admission and involuntary care and treatment.
- In line with the SAHRC's investigative hearing report, an oversight mechanism should be established by the NDoH to conduct preventive visits in collaboration with MHRBs and the Health Ombud.

46 Report of the National Investigative Hearing into the Status of Mental Health Care in South Africa (https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf) p60.
47 Ibid at p37.

8.6 The role of the Military Ombud

Section 4 of the Military Ombud Act, (Act No. 4 of 2012) (Military Ombud Act) sets out the mandate of the Office of the Military Ombud. Section 6 details the powers and functions of the Military Ombud. These two sections clearly prescribe the role of the Office of the Military Ombud as an investigative body which acts on receipt of a complaint. Although the Military Ombud visits detention barracks in practice, the Military Ombud Act does not grant the power to conduct preventive visits to the Ombud. Amending sections 4 and 6 of the Military Ombud Act should be considered to give effect to the role of the Ombud in terms of the OPCAT by introducing the preventive mandate.

8.7 The state of immigration detention

It is said that detained undocumented migrants are among the most vulnerable in our society, with no political or social influence over the laws that govern them, often living on the margins of society, without communal support, assistance or influence to ensure compliance with the law by public officials.[48] The Immigration Act, 2002 (Act No. 13 of 2002) (Immigration Act) provides for the apprehension and detention of undocumented migrants in a manner and at a place to be determined by the Director-General of the Department of Home Affairs (DHA). Accordingly, the Lindela Repatriation Centre (Lindela), located in the west of Johannesburg was established. Subsequently, police stations have also been designated as places of deprivation of liberty in terms of section 34 (1) of the Immigration Act.[49] Presently, there is no oversight body other than the SAHRC monitoring Lindela. This has been largely based on a court order obtained in 2014. Since then, the SAHRC has been conducting some limited monitoring at Lindela to assess DHA's compliance with detention timeframes and the conditions of detention at Lindela. The order directs the Minister of Home Affairs and the service provider to provide the SAHRC, regularly and at least quarterly basis, with a written report setting out:

- the steps taken to comply with the court order; and
- full and reasonable particulars about any person detained at Lindela for a period above of 30 days from the date of that person's initial arrest and detention without adequate means to maintain a dignified standard of detention.

The visits by the SAHRC are either announced or unannounced. This has been done to ensure that the conditions of detention align with national and international human rights standards and that no person is detained in contravention of the law. The SAHRC may make recommendations by identifying, documenting and reporting on the effects of detention and ultimately on the deficiencies in the detention legal framework and practice.

Gaps and opportunities for reform

- Despite the SAHRC's presence at Lindela, there are some shortcomings in the monitoring mechanism for immigration detention, including:
  - The absence of a complaints' mechanism at Lindela;
  - General weak oversight of the private security industry; and
  - Challenges associated with holding migration related detainees in police cells where resourcing issues make it difficult to separate them from other detainees, as required by law.
  - The above is exacerbated by the repatriation delays. This results in migrants spending long periods in police custody where the facilities are not designed for long-term detention without adequate means to maintain a dignified standard of detention.

48 *Minister of Home Affairs v Rahim and Others* [2016] ZACC 3 par 23.

49 Government Notice 534. See also Determination of correctional facilities as places of detention of undocumented migrants pending deportation during Coronavirus COVID-19 lockdown, 7 May 2020.

8.8 Children in conflict with the law and deprivation of liberty

Child and Youth Care Centres (CYCCs) provide residential care to children outside of a family environment in accordance with a residential care programme. Some of these centres are classified as Secure Care Facilities. CYCCs are established under the Children's Act, 2005 (Act No. 38 of 2005) (Children's Act), which also sets out operational regulations, norms and standards. Provincial Departments of Social Development have primary oversight responsibility for CYCCs and Secure Care Facilities.

Section 211 of the Children's Act sets out the quality assurance process for CYCCs and includes provisions for independent teams to conduct assessments of centres and establish and implement organisational development plans for each CYCC. The 'Blueprint Minimum Norms and Standards for Secure Care Facilities in South Africa' (Blueprint Norms and Standards) provides further guidance on the quality assurance processes.

Gaps and opportunities for reform

- Several shortcomings in the oversight mechanism for CYCCs and Secure Care Facilities, include:
  - There are limited oversight mechanisms for CYCCs and Secure Care Facilities. Urgent legislative review is needed to strengthen the effectiveness of mechanisms provided for in the Child Justice Act, 2008, (Act No. 75 of 2008), the Probation Services Act, 1991 (Act No. 116 of 1991) and the Children's Act;
  - Many of these facilities do not have an established complaints' management system and there are inconsistencies in complaints reporting and management at these facilities;
  - The Child and Youth Care Application Information Management System, which records the number of children in care, is not consistently used;
  - Independent appointments to quality assurance teams are not funded, which creates difficulties in attracting qualified persons; and
  - There is no policy for sentenced children in Secure Care Facilities, resulting in process inconsistencies across provinces.

8.9 Concluding remarks

In line with the state's decision to designate multiple institutions as NPM bodies, the gaps and shortcomings identified above must be addressed. This will ensure that the South African NPM complies with the OPCAT. In assessing whether South Africa is fulfilling its NPM function, special attention should be given to ensuring:

- Each designated NPM body has a preventive mandate;
- There are clear lines of communication between the various entities designated as NPM bodies;
- Each NPM body has the necessary powers and independence to fulfil its mandate, set out in legislation;
- In ensuring that the NPM bodies have the necessary powers and functions, a mechanism should be established to clearly state the obligation of the relevant authorities to consider the recommendations of the NPM bodies and to enter into a dialogue with it regarding the implementation of its recommendations;
- Each NPM body has the requisite human rights expertise, including by way of training and education;
- Each NPM body is transparent in its operation, including by publishing its reports and recommendations; and
- All NPM bodies should report annually on activities undertaken to fulfil the NPM mandate. The SAHRC, as NPM Coordinator, should publish an annual report on the activities of the NPM.

In understanding South Africa's detention architecture, the SAHRC embarked on a baseline assessment and the following section represents the SAHRC's observations, findings and recommendations. The sample of places was chosen randomly while ensuring representativity of all places of deprivation of liberty in all the provinces.

9. BASELINE VISITS TO PLACES OF DEPRIVATION OF LIBERTY

Since July 2019, the NPM unit in the SAHRC has been working on identifying ways of strengthening its work over the next few years through conducting scoping visits to places of deprivation of liberty. The purpose of these visits has been to assess the treatment of persons deprived of their liberty as well as to provide various stakeholders with information on the NPM's mandate. As part of the scoping, the NPM unit undertook largely announced visits to some places of deprivation of liberty such as police stations, CYCCs, secure care facilities, mental health institutions and correctional centres. Undertaking announced visits has been adopted strategically to create an enabling environment where the preventive mandate of the NPM is introduced to the officials on one hand and, on the other hand, the NPM officials familiarise themselves with the South African deprivation of liberty architecture.

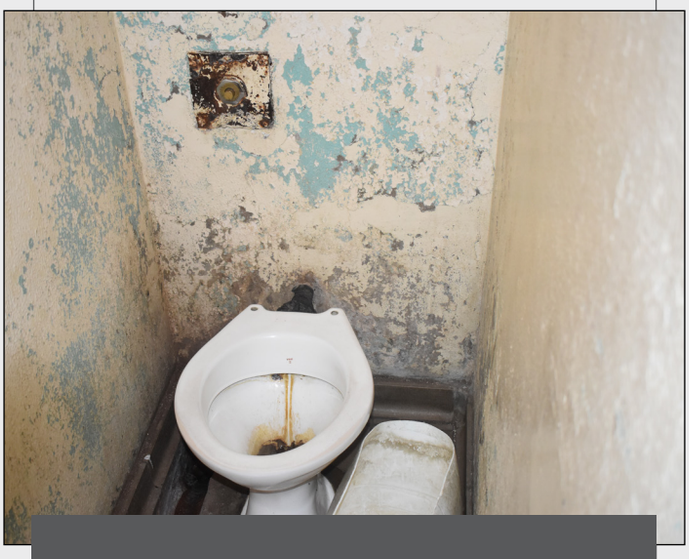
The delegation appreciates the support received from and commends the many officials for their assistance and cooperation. Nevertheless, access to some centres such as Rooigrond, Kutama Sinthumule and Grootvlei correctional centres was delayed due to a lack of understanding of the role, powers and functions of the NPM. The situation at both Kutama Sinthumule and Grootvlei was very unfortunate and regrettable to the extent that the delegation had to resort to requesting the National Commissioner of Correctional Services to intervene. Before the intervention of the National Commissioner, the delegation had taken a resolution to abort the visits until such time that there is a clear understanding of the mandate of the NPM. On a few occasions, access to police stations, such as Brixton in Gauteng and Musina in Limpopo, was also delayed. In both stations, some officials exhibited some hostility and were combative before the mandate of the NPM was explained to them.

As such, the NPM believes that there is a need for the state, through the relevant departments such as the Department of Justice and Constitutional Development to urgently establish better coordination at national and provincial/regional level to ensure that access to places of deprivation of liberty is rapid, and information about the mandate of the NPM is widely disseminated. The NPM hopes that the officials will take concrete steps to improve coordination to ensure that the situation described above is not encountered during future visits. The list of places visited is attached as an annexure to this report.

9.1 Observations at Correctional Centres

Several structural concerns were observed in some correctional centres. At the same time, it is important to share a few positive observations, including that some correctional centres have programmes where offenders give back to communities through various projects such as building and repair of dilapidated schools,[50] donating agricultural produce such as vegetables and correctional officials donating funds to build a library and purchase books for offenders.[51] The DCS should be commended for the new state-of-the-art correctional centre in Estcourt. However, adequate budgetary measures should be made available to ensure the centre runs at its optimum capacity. For instance, at the time of the visit, the hospital section did not have the required medical personnel despite the state-of-the-art infrastructure.

50 Newcastle.
51 Rooigrond.



Non-working toilet

Broken tiles

Ladysmith correctional centre in KwaZulu-Natal

Leaking taps

At the outset, the delegation notes that there appears to be a substantive difference between publicly run correctional facilities and those that are sub-contracted to private entities. This can be seen from the state of facilities, the available and variety of rehabilitation programmes offered at correctional centres. Save for a few centres, it is public knowledge that public facilities are overcrowded as opposed to the two facilities that are run by independent contractors.[52] For instance, in the two facilities sub-contracted to private entities, offenders are mostly in smaller cells of between two and four sentenced offenders per cell. Healthcare services at these centres are similarly outsourced to sub-contractors who have a full health care complement of staff available 24 hours a day and have to respond to emergencies according to specified contractual times. This is in no way meant to invalidate the allegations of torture, ill treatment and involuntary medical treatment of offenders, particularly at Mangaung Correctional Centre. However, most facilities run by DCS have several chronic challenges as will be shown below.

52 Kutama Sinthumule in Limpopo and Mangaung Correctional Centre in Bloemfontein.

9.1.1 Remand, prolonged remand detention and overcrowding

The state of remand and prolonged remand detention in correctional centres is a concern. It is the view of the NPM delegation that the number of remand detainees contributes significantly to overcrowding in correctional centres.[53] The problem with overcrowding is well known and widely acknowledged. In the words of the then Minister of Justice and Correctional Services, "the average number of inmates within the DCS system was recorded at 160 583 against the 118 723 approved bed space during 2017/18 financial year. The problem of overcrowding within the context of the South African correctional system has been identified as a key challenge, which negatively affects the ability of the South African correctional system to rehabilitate and secure offenders." While the living conditions of remand detention are a serious concern, the remand population contributes significantly to the overcrowding in correctional centres. Overcrowding is associated with the transmission of diseases with epidemic potential, such as acute respiratory infections, etc. In highly overcrowded conditions, disease outbreaks are likely to be more frequent and more severe.

It was observed that in a number of cases, remand detention disproportionately affects the vulnerable and marginalised who are unlikely to have had the means to afford legal representation and assistance or comply with conditions of bail. Remand facilities in many correctional centres lack appropriate infrastructure, budget, are of poor condition and provision for the essential needs of offenders in custody leading to conditions that amount to inhuman or degrading treatment. Communal cells often had poor ventilation and inadequate spacing between offenders' beds which can lead to the spread of infectious diseases or transmission of organisms such as bed lice. In some centres, remand detainees often had to share beds. The NPM draws to the attention of the DCS that the conditions in most remand detention centres contravene the provisions of section 7 of the CSA dealing with the accommodation of offenders under conditions conducive of human dignity.[54] This is also at odds with section 46 of the CSA, which makes provision for access to amenities by remand detainees. It is apparent that more needs to be done to ensure that persons deprived of their liberty are not at risk of ill-treatment and that the conditions in which they are held comply with the standards set by the law.

While DCS is required by section 10 of the CSA to provide every inmate with clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions, most remand detainees lack adequate clothing, which should be provided by the State. Remand detainees complained of boredom during their period of deprivation of liberty. Most centres neither had a library nor book collection, nor were there any training courses or other recreational activities provided to pass the time. It should be noted here that boredom may be associated with the high levels of aggression and violence reported among persons deprived of their liberty.

There are concerns of RDs defaulting on chronic medication while in transit between police and correctional detention facilities for chronic conditions such as MDR or XDR tuberculosis, which had been previously diagnosed, and those who are on antiretroviral therapy. The NPM wishes to underline that the failure to provide uninterrupted treatment for such conditions presents serious public health implications, for the affected inmates, their fellow inmates, the broader South African public, and communities.

53 Some of whom have been detained in remand for periods in excess of two years.

54 Section 7 Correctional Services Act, 1998 (Act No. 111 of 1998). See also Rule 17 of The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Similarly, there are concerns whether relevant courts are fully utilising the provisions of section 49 G of the CSA. The optimum use of section 49 G has the potential to reduce overcrowding in correctional facilities, especially in the remand population. In the same vein, section 49 G is a constant reminder of the presumption of innocence as well as the enjoinment that an accused person has the right to have their trial begin and conclude without unreasonable delay. While these cases must be dealt with on a case by case basis, there should be consideration on alternatives to incarceration such as community corrections for petty and first time offenders with the exclusion of certain categories of crimes such as violent crimes and sexual offences. At a systemic level, DCS should also ensure that pre-trial detainees have access to adequate recreational, vocational, rehabilitation and treatment services and that they are treated with respect and dignity.

9.1.2 State of mental health care in correctional centres

It was observed that most correctional centres accommodate mental health care users (MHCUs) – State patients under forensic psychiatry while they await bed space at mental health institutions and other inmates with mental disorders who require dedicated mental health treatment, care and rehabilitation. Attention is also drawn to the report of the *SAHRC inquiry on the state of mental health in South Africa* that was, for example, informed that there were 4 304 MHCUs in the correctional system in 2017. The inquiry further noted that the state of mental health services is especially poor in the criminal justice, forensic and correctional systems in South Africa.[55] To that end, the SAHRC report recommended that the NDoH, in consultation with the DCS, should ensure that no 'state patients' (people declared unfit to stand trial or found not to be criminally responsible for their actions by a court) are being housed in correctional facilities.[56]

The concern about the welfare of MHCUs is aggravated by the observation that DCS does not appear to have adequate facilities and capacity to treat, care and rehabilitate MHCUs. DCS officials require dedicated training to adequately treat and care for persons who suffer from mental health disorders who require specialised medical care, treatment and rehabilitation. The absence of dedicated expertise may also be influenced by the basis of the criminal justice system, which underlines the significance of deterrence, retribution and corrections as opposed to treatment, care and rehabilitation.

It is, therefore, recommended that there must be an urgent discussion between the NDoH, NPA, DoJ&CD and DCS to develop a plan of action for the gradual transfer of State patients who are currently in correctional centres to appropriate psychiatric institutions and/or State hospitals with psychiatric facilities at all stages of the criminal proceedings (arrest, prosecution, trial, imprisonment). The incarceration of people with mental disorders in correctional centres, due to lack of public mental health service alternatives, should only be allowed under exceptional circumstances. While the above may not be immediately realisable, urgent provision of training for officials is required to enable them to adequately care for MHCUs as an interim measure. The dedicated training is essential to enhance understanding of mental disorders, raise awareness of human rights, challenge stigmatising attitudes and encourage mental health promotion for both staff and offenders.

55 p 59.
56 pp 62 and 71.

Improper disposal of waste

9.1.3 State of facilities

In most centres, the NPM delegation observed that there is a systemic failure to provide budgetary and other measures for the provision of adequate standards of accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental health care, reading and other educational facilities and support services, in accordance with the CSA, DCS's own regulations and international human rights law. While some centres are managed well, several correctional centres are left to decay and are in a state of disrepair. For instance, most cells do not have working lights, paint peeling off, have leaking taps, broken tiles and leaking roofs. This should also be understood within the context of the aging infrastructure and that only a few new correctional centres have been built recently.

The delegation was extremely concerned particularly by the condition of Ladysmith correctional centre. The conditions of the facility amount to inhuman and degrading treatment. As such, it is the view of the NPM that the centre should be shut down so that it can be completely renovated. Not only is the centre in a dilapidated state, it is also in a constant state of uncleanliness. It is overcrowded and does not provide offenders with any of the activities as prescribed in the CSA. The centre did not have proper waste disposal facilities. Waste could be seen dumped behind the facility, just next to the car park area. The kitchen was infested with rodents, flies and cockroaches. Some offenders working in the kitchen could be seen attempting to repel the flies with kitchen towels while processing and handling food. A plan of action should be designed to consider transferring offenders to other centres in the region until such a time that the centre has been fully renovated. The Area Commissioner in consultation with the Regional Commissioner is required to submit a progress report on or before 31 March 2021.

9.1.4 Occupational Health and Safety

The delegation found that emergency equipment such as fire extinguishers and fire hydrants are not regularly serviced. Some centres did not have any emergency and fire equipment. The delegation was advised that DPWI is responsible for servicing of equipment such as emergency and fire equipment. In this regard, while it may be the responsibility of DPWI, heads of centres were requested to ensure that each centre is provided with fire fighting equipment which is serviced regularly. It is also incumbent

Expired fire extinguisher

on Area and Regional Commissioners to monitor this on a regular and continuous basis. Should this responsibility be assigned to an independent service provider to ensure correctional centres are in compliance with occupational health and safety standards, log books should be provided indicating the dates and the number of times each extinguisher or emergency equipment has been serviced. This task should also form part of the performance agreements of heads of centres. The National Commissioner is requested to cause for an audit of all emergency and fire equipment to be conducted. From this audit, a report indicating the outcomes of this process and remedial action implemented or to be implemented should be submitted to the SAHRC on or before 31 March 2021.

9.1.5 Kitchen equipment, food handling and preparation, and pest control

It was observed that a majority of correctional centres did not have certificates of acceptability from the local municipalities. This may be an indication that the kitchens at the centres are not certified to prepare food. Preparation and handling of food without certification is a contravention of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972) and its Regulations governing general hygiene requirements for food premises. A person who contravenes or allows the contravention of the Regulations is guilty of an offence. It was also noted that some centres did not keep food samples as required, while some are experiencing systemic challenges with kitchen equipment which is no longer functioning and has not been repaired and/or maintained. From the sample of centres visited, this issue was manifestly worse in Ladysmith and Upington correctional centres. It is understood that the lack of maintenance of kitchen equipment has been continuously reported to the DPWI which subsequently takes excessive amounts of time before a contractor is appointed to repair or replace the equipment. It is understood that in terms of the relevant supply chain and National Treasury regulations, centres are not allowed to repair the equipment themselves or directly employ the services of a contractor.

Packed lunch for children while they attended court in the Northern Cape

Pest prevention and management appeared to be a challenge in some correctional centres. Rodents and flies were found in some centres. This is despite the assurance that premises are fumigated at least on a monthly basis. Equally, a majority of the kitchens in correctional centres did not have measures such as UV light fly traps, to eliminate flies or other insects on food premises.

The regulations governing general hygiene requirements for food premises require a person in charge of food premises to ensure that effective measures are taken to prevent or eliminate flies, or other insects, rodents or any other pests on the food premises.[57]

From a regional and area management oversight, arrangements should be made to ensure that all centres are inspected and certified to prepare food for offenders in compliance with the relevant food handling and reparation Regulations. Through the National Commissioner, DCS should urgently engage with DPWI to develop a plan for correctional centres to comply with the occupational health and safety regulations as well as the maintenance of all faulty equipment. The Department of Labour should similarly conduct inspections to assess the level of compliance with occupational health and safety regulations.

9.1.6 Safety and Security

Safety and security in correctional centres cannot be overstated. It is designed not only to guarantee the wellbeing of offenders, but also the safety of officials, visitors and the public. It was observed that most correctional centres have no body scanners and those that do, are not functional at all. Closed-circuit television (CCTV) monitors are similarly not working in most correctional centres. It is believed that the security systems have not worked in some centres since the expiry of the contract between DCS and Sondolo IT.

It should be underlined that inadequate security measures such as the lack of body scanners and surveillance cameras in correctional centres present several safety and security concerns, such as the smuggling of prohibited items like mobile cellular phones, mobile cellular phone sim cards, and drugs by staff, visitors and offenders. Correctional centres are thus not able to adequately prevent the smuggling of contraband and other unauthorised items. As an early warning mechanism, the centres are similarly not able to detect and prevent any breaches to internal security, including the risk to harm posed by offenders against other offenders and officials, as well as officials against offenders. It must be underlined that any type of violence against persons deprived of liberty must be strictly prohibited as it constitutes a form of ill-treatment. As basic safeguard, DCS should ensure that all CCTV cameras are working as part of its efforts to prevent torture and ill-treatment, as well as to protect correctional centre officials against unsubstantiated allegations. Recordings of the CCTV footage should be stored securely. These recordings should be made available upon request. As this issue may have a national footprint, the national office should cause an audit of the security needs of all centres to be undertaken. This should include full body scanners, CCTV monitors and other relevant security installations. A plan of action with clearly defined timeframes and deliverables should be submitted to the SAHRC.

Some of the correctional centres visited had inadequate search areas which did not provide sufficient privacy for people being searched. While the delegation did not observe any bodily searches taking place, it nonetheless stresses that rights to dignity and privacy may be violated in this respect.[58] Heads of centres, including the Regional Commissioners and DPWI, must explore the remodelling of centres to ensure each centre has a secure search area that provides privacy and dignity. This will in turn assist in minimising the exposure of persons being subjected to an undignified body search by officials and will, hopefully, contribute to slowing the flow of prohibited substances in correctional centres.

57 Regulations 5 (3) (c) and 10 (3).
58 Section 27 CSA.

9.1.7 Allegations of ill treatment

Depriving persons of their liberty carries with it a duty of care to protect them from those who may harm them, including other offenders. During the visit to one centre, the delegation received allegations of severe ill treatment by DCS officials and observed that offenders were subjected to verbal abuse consisting primarily of insulting remarks made by officials towards them. One of the worrying complaints related to allegations of physical torture of an offender by an Area Commissioner. It was noted that while these allegations have been levelled against the Area Commissioner, no protective and proactive measures had been initiated while investigations were underway. While the presumption of innocence must always be preserved, failure to initiate protective measures can potentially defeat any trust in the ability of DCS to deal adequately with complaints from offenders. Allegations should trigger prompt and impartial investigations by an independent authority and, where there are sufficient grounds, the persons responsible should be prosecuted and adequately sanctioned. The NPM reiterates that in instances where allegations of torture, and other ill treatment, are levelled against persons in positions of power such as Area Commissioners, it is recommended that they should be placed on precautionary or special leave and/or suspension while investigations are underway. Such investigations must be undertaken without delay.[59] An assessment should also be undertaken to measure the feasibility of using body cameras by correctional officers.

9.1.8 Shortage of nursing staff and other medical professionals

The DCS is enjoined to provide, within its available resources, adequate health care services, based on the principles of primary health care to allow every inmate to lead a healthy life.[60] The NPM observed that some correctional centres visited had a grave shortage of nursing and other medical professionals in the form of general practitioners, psychologists, psychiatrists or dentists. The delegation was advised that in some centres, the medical staff component is inadequate considering the staff-offender ratio in each correctional centre. Medical staff become quickly overworked and/or explore greener pastures with private health care providers which in turn prejudices the offender's right to medical care.[61] As highlighted above, this is not an issue in the two facilities run by private entities. However, some centres still enjoy the services of medical personnel such as sessional doctors who consult at the centres on a weekly basis, while others do not even have dentistry or dietician services onsite.

The NPM is alive to the fiscal position of the country at this time. However, critical staff shortages faced by DCS must be addressed as a matter of priority. On that basis, the DCS should initiate discussions with the National Treasury to look into allocating a budget for the recruitment of critical staff such as medical personnel for correctional centres. This budget consideration should place the DCS in a competitive situation in which it provides market related salary scales for professional staff guided by the Public Service Act and its regulations. A national audit would also be desirable to assess which centres are most in need. The equivalence of health care requires that at the very minimum, all centres have adequate medical personnel. It is crucial at this point to underscore that health care at correctional centres should not be addressed in isolation from the health care of the general population since there is a constant inter-change between correctional centres and the broader community, be it through the correctional officials, the health professionals and the constant admission and release of inmates.

59 See rule 57(3) of the Mandela Rules: "Allegations of torture or other cruel, inhuman or degrading treatment or punishment of prisoners shall be dealt with immediately and shall result in a prompt and impartial investigation conducted by an independent national authority in accordance with paragraphs 1 and 2 of rule 71".

60 Section 12 of the CSA and Rules 24, 25 and 26 of the Mandela Rules.

61 Sections 27 (1) (a), (b) &(c); Section 28 (1) (c) and Section 35 (2) (e) of the Constitution.

9.1.9 Mother and Child Unit

In terms of the CSA, female inmates may be permitted to have their children in their care until such children reach the age of two or until such time that the child can be appropriately placed taking into consideration the best interest of the child. While the children are in the care of their mothers, DCS is responsible for food, clothing, health care as contemplated in section 12, and facilities for the sound development of the child for the period that such child remains in the correctional centre. The CSA also makes provision for the DCS to ensure that a mother and child unit is available for the accommodation of female inmates and their children.[62] While most correctional centres had designated mother and child units, it was observed that some of these units are inadequate for this purpose as they are small and do not have baby cots/beds where babies can sleep. Structurally, it was further observed that the cell doors make a banging sound similar to other cell doors when being closed, locked and unlocked. It is the view of the NPM that this can have an adverse psychological effect on children as they may grow up with engraved memories of the banging sound of correctional centre doors. The designated mother and child unit at Oudtshoorn female correctional centre was uniquely designed with separate rooms and ample space but it was concerning to note that it was heavily infested with cockroaches.

As such, it is recommended that DCS and DPWI should consider installing padding on the doors of the mother and child units to minimise the banging noise which has the potential of causing psychological harm to babies in the long run. Heads of centres must also ensure that mother and child units are only designated for inmates with young children in correctional centres and that sentenced offenders should be kept separate from remand detainees.[63]

9.1.10 Access to hot water

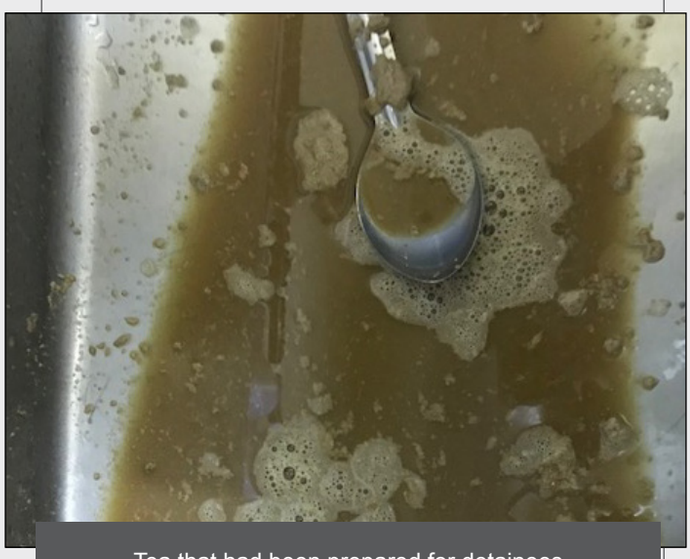
Regulations provide that DCS facilities shall include access to hot and cold water for washing purposes.[64] However, the NPM observed that at some centres, offenders had no access to hot water for bathing. In some centres, inmates have to use an urn to boil water for bathing purposes. While this may be an alternative to heating water for bathing, it has the potential to create a risk for the safety of offenders and officials from those who may want to harm them. Heads of Centres and the DPWI should ensure that each centre has adequate bathing and shower installations so that every inmate can have a bath or shower, at a temperature suitable to the climate.[65]

9.1.11 Lack of reading material and television sets

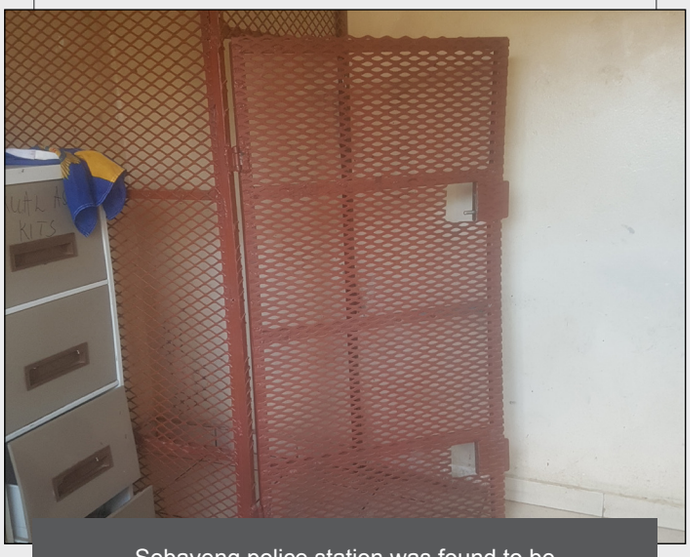
Section 35(2)(e) of the Constitution provides that: “Everyone who is detained, including every sentenced prisoner, has the right to … conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of reading material…”. In this respect, some centres did not have television sets or, at the very least, reading materials for offenders. The above situation is more prevalent specifically in centres for remand detainees. This leads to a situation in which, firstly, offenders do not have means to keep track of the outside world or, secondly, to keep themselves mentally stimulated. Heads of centres should ensure that facilities comply with the provisions of section 18 of the CSA.[66] Each centre should be provided with a fully stocked library which can provide offenders with appropriate reading material.

62 Section 20 (1) – (3) CSA and Rule 29 of the Mandela Rules.
63 Section 7 (2) (a) CSA.
64 Regulation 3 (2) (d) (ii).
65 See Rules 16 and 18 of the Mandela Rules.
66 See also Rule 66 of the Mandela Rules.

Boitekong satellite police station was found to be of poor quality



Tea that had been prepared for detainees at a police station in the Free State



Sebayeng police station was found to be of poor quality

Sewege running through a police facility in the Northern Cape

9.1.12 Concluding remarks

While ageing infrastructure is a major challenge, DCS is encouraged to initiate discussions with the National Treasury and the Department of Public Works and Infrastructure to consider reinstating the artisan programme. This programme can serve a dual role. It provides a skills transfer mechanism for offenders. Equally, facilities and their equipment can be readily and speedily repaired or maintained onsite. By doing so, correctional centres could become more self-sustainable. A similar model should be considered for uniforms for offenders and officials. For instance, each region or management area could produce uniforms for both inmates and officials according to their respective needs.

The SAHRC has initiated discussions with DCS on its observations and recommendations. For instance, at the invitation of the National Commissioner, the SAHRC presented its findings to all heads of centres and senior DCS management at two management forum meetings in Grootvlei and Durban-Westville. Nonetheless, the OPCAT requires relevant authorities to meaningfully engage with the NPM with the view to implement its recommendations through constructive dialogue.

9.2 Visits to police stations

The SAHRC has similarly visited police stations over the course of the previous financial year. This has been conducted at two levels. Firstly, as part of its NPM baseline assessment of police detention. Secondly, with support from the European Union (EU) and its technical partner, the African Policing Civilian Oversight Forum (APCOF), to scope the needs for the establishment of a system for the independent monitoring of police custody in South Africa through the use of lay visitors. The police custody visits that are the subject of this report are linked to efforts to develop independent police custody monitoring as a measure to reduce the risk of torture and other human rights violations in police custody. As part of the NPM monitoring system, the custody monitoring system is intended as a preventive mechanism to prevent torture and other cruel, inhuman or degrading treatment in police custody.

Every day across South Africa, thousands of persons are deprived of their liberty in police stations and court cells under the management of the SAPS. However, there is no system of regular station and cell inspections by persons independent of the SAPS to ensure that detainees are being held and treated in accordance with the law.

The observations below, therefore, serve to inform an understanding about general conditions in the police custody environment in South Africa. Similarly, the data generated by the Lay Visitors Scheme provides an insight into problem areas requiring attention by SAPS and its stakeholders, as well as good practice in custody management at station level, and trends through to the national level.

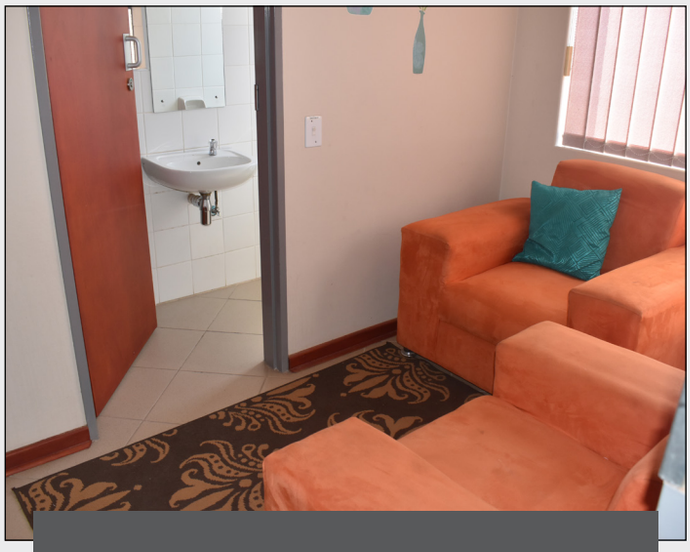
In several cases, the police cells observations indicated that police stations generally, and the custody infrastructure specifically, were in a state of neglect and decay. Several police stations reported that the quality of facilities was so poor as to mitigate against their use as custody facilities. Some of these cells have been subsequently condemned for use. When police cells are condemned for use, it then requires the detaining station to move the detained person in between various stations and courts. This has resource implications. The issues that are raised most widely concern the cleanliness of cells and other facilities. These often overlap with issues of maintenance. It was concerning that most detention facilities of police stations were found to be dirty. The overall condition of the water and sanitation infrastructure was also a problem in many stations, with leaking pipes and blocked toilets (and in some stations, leaking roofs). People in custody generally appeared to have access either to cold running water or to cold water provided by other means.

While infrastructure appeared to be a challenge, specific stations require urgent attention. Boitekong (North West), Sebayeng (Limpopo) and Imbali (KZN) satellite police stations were found to be of extremely poor quality. The three satelite stations' facilities were not of adequate quantity and quality. These stations require resources to be allocated to them for better facilities if they are to continue providing service to the public. Other issues relating to the treatment of people in custody highlighted by the inspections included:

9.2.1 Victim empowerment centres

The condition of victim empowerment rooms/centres (VERs) varied from one police station to another. Some stations did not have them at all, while some had VERs. The delegation was informed at various stations that VERs at police stations relied on expertise from volunteer counsellors provided by the Greater Rape Intervention Project (GRIP). GRIP counsellors provide onsite counselling and support to rape, sexual assault and domestic violence survivors in police stations. Some stations, did not have these counsellors as GRIP had withdrawn its services due to funding challenges. It was also a concern that there is no system to provide psycho-social assistance or care to these counsellors.

Without these services and adequately capacitated VERs, rape and gender-based violence survivors are disenfranchised of this important service. It is thus recommended that in responding to the gender-based violence and femicide crisis in the country, the Gender-based Violence and Femicide National Strategic Plan (GBVF-NSP) should similarly prioritise strengthening existing protection mechanisms by reprioritising some of its budget to adequately capacitate VERs at police stations across the country. Through the National and Provincial Commissioners and DPWI, a baseline assessment should be conducted to assess the capacity needs of VERs across the country. A progress report should be submitted by the SAPS National Commissioner to the SAHRC on or before 31 March 2021.



Victim Empowerment Rooms

9.2.2 Prolonged detention of undocumented migrants

The prolonged detention of foreign nationals also appeared to be a major issue mostly in larger police stations in the metropolitan cities such as Durban. The prolonged detention of foreign nationals was said to be caused by delays by DHA. There are also inconsistencies in the sentencing of illegal foreign nationals. Some courts sentence them to a custodial sentence ranging from thirty days to six months. Some are offered the option of a fine. In any event, even if the fine is paid, such persons end up detained at police stations until such time that they are repatriated or transferred to Lindela. In some stations, some of the persons referred to above were on a hunger protest. Structurally, the NPM is concerned that police stations are not designed to detain people for longer periods of time. In some stations, detained persons wore the same clothes they had at the time of their arrest. The NPM draws the provisions of section 34 of the Immigration Act to the attention of both SAPS and DHA.

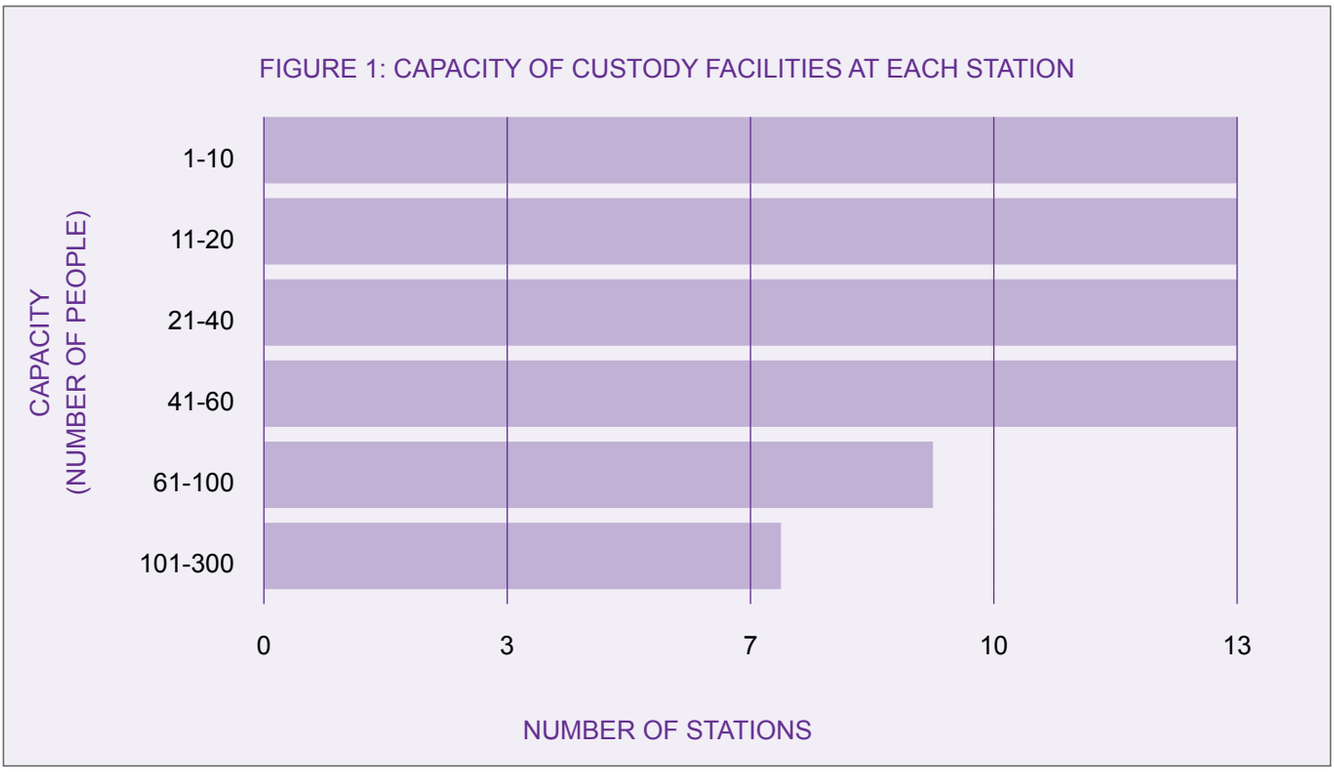
9.2.3 Separation of people in custody

Regulatory provisions requiring that men are separated from women and that children (i.e. children who have been arrested for alleged crimes) are separated from adults were consistently adhered to. However, the regulations also refer to other considerations that should be taken into account in allocating people to cells, subject to the number of cells that are available. For instance, men accused of violent crimes should, where possible, be held separately from other men in custody. In some instances, the requisite allocation of people to cells was not adhered to. For instance, several women with infants were found in overcrowded police cells in two police stations in Limpopo.

9.2.4 Bedding

Standing Order 361 states that 'a person in custody who is kept in custody overnight must be provided with a cell mat or mattress and blankets of a reasonable standard.'[67] However, in Rustenburg for instance, the visit indicated that detainees had only a blanket to sleep on (and another to cover them), while in Polokwane it was observed that detainees sleep on the floor. The cleanliness of the blankets that are provided is also an issue. In Boitekong, blankets are only replaced once a month. In Seshego, this is said

67 Section 13(2)(c).



to be once every two weeks. In Rustenburg and Polokwane, on the other hand, they are reported to be changed every week. At most stations, there were no adequate blankets, mats or other bedding materials for persons in custody. While some stations made efforts to ensure blankets are regularly washed and stored separately, blankets, mats or other bedding materials did not appear to be clean in most stations. Station commanders and custody managers must ensure that blankets are regularly washed.

9.2.5 Medical care and medication

Police at several stations indicated that there were people in custody who required medication, and some persons deprived of their liberty were suffering from an injury or illness that required medical attention. There were only a few complaints about medical attention and medication but there may have been more if this issue was examined more systematically. In some stations, the delegation found several people who required chronic medication. People in custody in Rustenburg, Witpoort and Tzaneen, all required medication of one kind or another for conditions like TB, or HIV. The minimal information that is provided indicates that some of them were satisfied with arrangements that had been made for them to receive medication.

9.2.6 Provision of food

While most police stations have meal plans, most of them do not adhere to them. This is largely attributed to lack of dedicated budgets. This issue is exacerbated in those stations that detain people for longer periods. Police detention facilities do not make provision for therapeutic diets for those who may need them. It should be noted that in most instances, the kitchens are not certified. In Welkom, for example, the delegation found tea with curdled milk being prepared for detainees. In both Seshego and Witpoort, there were indications that there are sometimes shortages of food. In Witpoort, for instance, it is reported that ‘sometimes the contractors do not deliver food on time or deliver less than is required.’

9.2.7 Custody facilities and number of people in custody

Custody facilities between different police stations vary substantially in terms of the number of cells, the number of people who may be held in individual cells and at the station overall. At two police stations, the individual cells were said to be suitable for holding as many as 20 people each. At others stations, cells were reported to only be suitable for holding a small number of people. (It is not clear to what degree these assessments of cell capacity reflect consistent application of standards regarding the number of people to be held in police custody.)

At a few stations, there was no one in custody at the time of the visit. In a few of these stations, the custody facilities are no longer in use. For the 60 stations where there was at least one person in custody, the average number of people in custody was 21. All of these stations had at least one adult man in custody. Up to 50% of them had one or more women in custody as well (data on this issue were inconsistent in some respects).

Table 1: Examples of stations affected by overcrowding

Station	How many can be held (capacity)?	Total number of detainees currently present in custody facilities at the time of inspection (+ additional people being held at station but not currently in custody)	% overcrowding when all persons are in custody
Butterworth	50	96 (+15)	122%
Cofimvaba	24	37	54%
Diepkloof	12	9 (+10)	58%
Elukwatini	20	54	170%
Hazyview	10	18 (+10)	180%
Polokwane	73	29 (+60)	22%
Seshego	56	60 (+17)	38%
Tzaneen	74	134	81%

Stagnant water in one of the dormitories in Molehe Mampe

Condition of holding cells in Mangaung One Stop Child Justice Centre

9.2.8 Allegations of police violence (assault, torture)

There were several stations where allegations of assault or torture were alluded to. Insofar as there was any detail on this (primarily provided by police), the issue that emerges most frequently is that arrested persons are subjected to excessive force during the process of arrest, and prior to their arrival and detention at the police stations. Allegations of abuse against foreigners also emerged in a limited number of cases (this issue is not examined systematically in terms of the current framework).

9.3 Concluding remarks

The value of independent custody monitoring and the NPM in the prevention of torture and other cruel or degrading and inhuman treatment or punishment is clearly evident for this initial exercise. It should be developed and maintained to achieve a comprehensive, regular and systematic coverage of all places of custody under the management of SAPS. From the limited sample, allegations of torture have been identified along with conditions that can be considered as cruel, degrading and inhuman treatment. This data provides the NPM with the ability to focus its efforts at identified areas of concern both in the geographic and substantive aspects. This focus will provide the NPM with the ability to develop targeted evidence based recommendations to the relevant mandate holders to address systemic issues which heighten the risk of torture and other cruel or degrading and inhuman treatment. It is recommended that SAPS management at the national level prioritise the upgrading of the identified satelite police stations. At the same time, issues of hygiene require regular attention. This includes ensuring that blankets are washed regularly, toilets are cleaned and repairs to infrastructure such as leaking toilets are attended to. VERs need attention at all police stations.

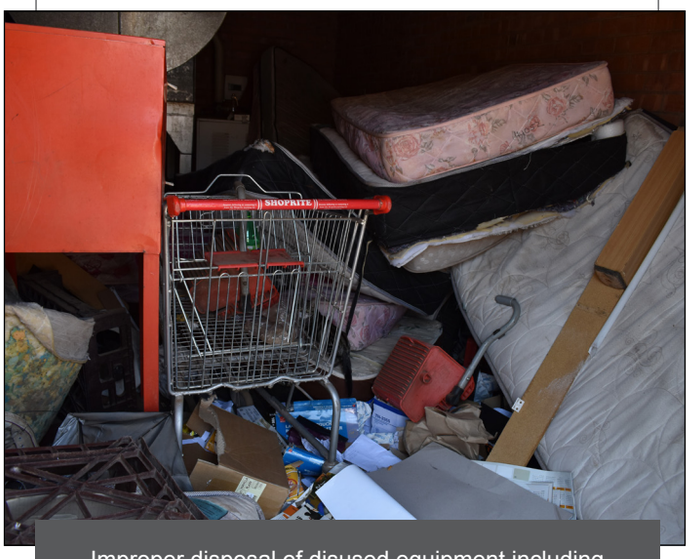
10. VISITS TO SECURE CARE FACILITIES

The observations below are only anecdotal and relative to the secure care centres visited by the NPM delegation. They do not present a general assessment of the conditions of places of deprivation of liberty where minors in conflict with the law are deprived of their liberty.

10.1 Material conditions

At the outset, it should be underlined that there appears to be an enormous difference in care, programmes, physical infrastructure and material conditions between those facilities previously run by private entities and those under provincial departments of social development. The NPM delegation observed that some facilities were poorly maintained leading to facilities being in total disrepair.

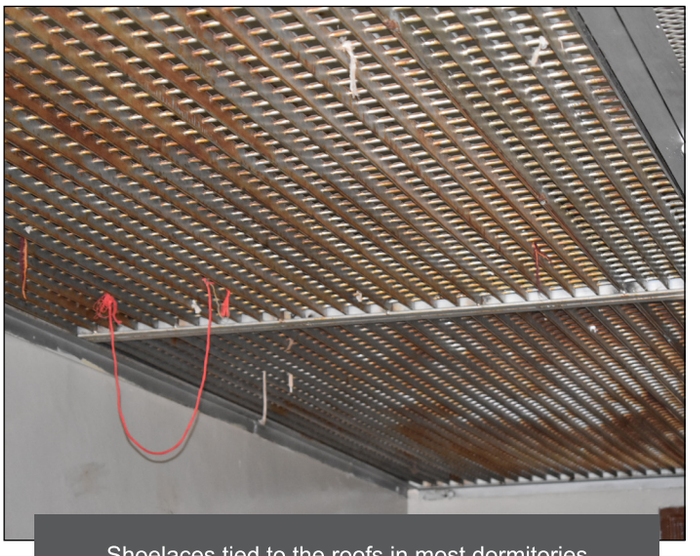
The Mangaung One Stop Child Justice Centre (Winkie Direko) is designed to provide a child friendly and rights based environment that adheres to the Minimum Standards for the Child and Youth Care System. However, on the day of the visit, the conditions of the holding cells were not suitable for children. Some cells had no running water, lights and were extremely dirty. The adjacent renovated Winkie Direko secure care centre exhibited poor workmanship. For instance, recently repaired floors and walls were showing cracks, and flushing mechanisms were not working in some toilets. As a result, the centre could not be used at the time. Children had to be transferred to and from other areas such as Qwaqwa to attend court.



Improper disposal of disused equipment including mattresses

At Molehe Mampe in Kimberley, for example, several issues were observed, including that there was no demarcated area for refuse disposal in contravention of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) as disused equipment, including old mattresses and waste were found dumped behind the facility without proper disposal processes being followed. The institutional manager could not provide a satisfactory answer on why this was the case other than that there was no handyman or cleaner at the facility.

Some of the dormitories reveal several failings that directly affect health and safety, including overflowing toilets. At the same centre, a child offender was found in a cell with stagnant water that produced a foul smell. There appeared to exist endemic poor, or lack of maintenance often blamed on the DPWI, with emergency and fire equipment not serviced, broken lights and leaking taps. Some of the ablution facilities were not functioning properly. In some instances, offenders are then forced to use buckets to flush the toilets. There cannot be any justification why a young offender can be detained in a room with stagnant water because of a blockage in the drainage system.



Shoelaces tied to the roofs in most dormitories in Molehe Mampe

The abovementioned centre is a cause for concern. In most of the dormitories, for instance, shoelaces were tied up to the roof apparently for hanging personal clothing, such as underwear of the young offenders. This is in contravention of the standards for Secure Care Facilities, which require that “washing lines must be provided outside living quarters for personal laundry.”[68]

68 Pg 85.

The delegation was equally concerned that the institutional manager appeared not to be aware of this and the possible associated risk, which could also create a fertile environment for those offenders at risk of self-harm or suicide. In this regard, it was recommended to the institutional manager that the shoelaces should be removed immediately.

Consequently, the conditions of the secure care facility are unfit for the rehabilitation of young offenders. It is recommended that the district office of the DSD should ensure that proper and/or adequate maintenance of the facility is improved with immediate effect. To this end, on or before March 2021, the provincial DSD should submit a progress report to the NPM with plans to improve the material conditions of the facility.

10.2 Staff-offender ratio, training and development

The delegation noted varying degrees of the child and youth care workers ratio in different facilities. Generally, there appeared to be sufficient personnel to care for the young offenders in secure care facilities. However, the delegation noted with concern that there is a lack of, or insufficient training and development opportunities, as well as ongoing in-service training of child and youth care workers. While child and youth care workers may have passion for the work that they do, the NPM observed that some may not be adequately qualified and/or trained.

It is recommended that the provincial departments should undertake a skills audit to ensure that child and youth care workers are sufficiently trained and possess the minimum level requirements to care for children in conflict with the law. Inadequate training and skills have the risk of seriously hampering the rehabilitation of offenders.

10.3 Security

While some centres had adequate levels of security, the delegation observed that some centres need to strengthen their security infrastructure. For instance, at Molehe Mampe in Northern Cape, there was a security scanner at the reception area but it has not worked for some years. In two centres, there were reported past escapes by child offenders. This was recorded at Molehe Mampe and Enkuselweni in the Eastern Cape. In some centres, it was similarly observed that CCTV monitors were not working, and had not been working for several years.

The delegation was informed that a request had been made for a service provider to undertake a security assessment which will determine the security needs of Molehe Mampe, including the functionality of the CCTV monitors. The NPM wishes to reiterate that without effective and functioning security measures, this may lead to a failure to provide a safe and secure environment for children deprived of their liberty. This may also have a link with the previously reported escape of offenders, as their escape could have been detected through CCTV monitoring.

10.4 Allegations of assault

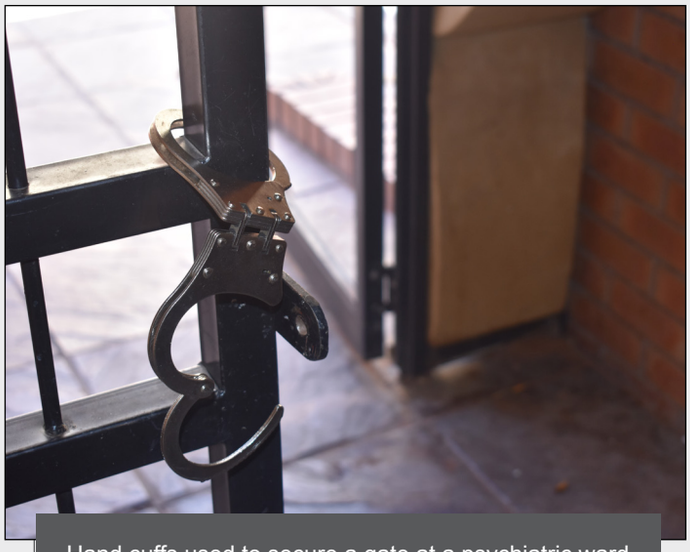
The NPM delegation was informed of allegations of rape against an offender by other offenders at one particular secure care centre. At another centre, it was reported that a young offender had died as a result of the assault by security personnel while trying to escape. This matter had been before the courts where the official was acquitted. The NPM reiterates that young offenders should be protected from self-harm or harm by others, including by officials. Allegations of cruel, inhuman or degrading treatment are required to be dealt with immediately and result in a prompt and impartial investigation conducted by an independent body.

10.5 Rehabilitation and care

It is a concern for the NPM that some centres appear to be neglected. This was apparent in Molehe Mampe. There was little evidence of programmes that contributed to the empowerment and improvement of the social functioning of children awaiting trial. Neither was there evidence of any integrated approach to the programmes that were being offered. Skills development programmes for offenders were not available. The district and the centre manager should also increase efforts to encourage community participation through regular community outreach programmes. This has the potential to minimise the stigma attached to offenders who may find themselves in conflict with the law.

10.6 Concluding remarks

Only a few secure care centres and child and youth care centres were visited across the country. Nonetheless, it is concerning that there is largely no regular oversight of these centres. This is fundamental to strengthen the protection of those deprived of their liberty in such centres. While most of the centres visited were in good condition, a few require regular inspections to ensure they are fully compliant and meet the required standards for detaining children in conflict with the law. More of these centres will be visited in the next financial year.



Hand cuffs used to secure a gate at a psychiatric ward in the Northern Cape

11. PSYCHIATRIC INSTITUTIONS

The delegation visited a few psychiatric institutions in three provinces. These were Evuxakeni in Limpopo, Rob Ferreira in Mpumalanga, Kimberley (specialised) Mental Health and Dr Harry Surtie Hospitals, both in the Northern Cape.

There appears to be a chronic shortage of space/beds in psychiatric hospitals across the country. This is also exacerbated by the fact that some of the psychiatric hospitals do not offer forensic psychiatry and, as such, do not accommodate State patients. As a result, State patients end up being deprived of their liberty in correctional centres that do not have adequate facilities and skills for this purpose.

There were no major challenges at Evuxakeni and Rob Ferreira. However, Rob Ferreira informed the delegation of its challenges concerning the following issues:

- Inadequate budget and human resources;
- Limited beds and inadequate infrastructure;
- Limited beds for 72 hour assessments; and
- Inconsistent availability of drugs at the depot.

The delegation was informed of several improvement plans that were under discussion to mitigate the identified challenges. This included the appointment of critical clinical personnel, such as a psychiatrist, and streamlining budgets for mental health. It should be noted that some of the issues are dependent on support from the provincial government.

The psychiatric ward at Dr Harry Surtie was a cause for concern. MHCUs are admitted to this ward for 72 hour assessment for acute stabilisation. Only one patient was admitted during the time of the visit. There appeared to be systemic challenges faced by the entire hospital and particularly, the psychiatric ward. The infrastructure was found to be inadequate and not fit for purpose. The ward did not even have a dedicated psychiatrist (sessional or full-time). Out of interest in the field of psychiatry, an internal medicine medical practitioner was currently assisting with attending to MHCUs.

The delegation observed, for instance, that the security officer working on the day of the visit had not received any specialised training to work in such an environment, and specifically with MHCUs. The delegation was informed of previous escapes and violent attacks and assaults on nursing staff by MHCUs.

Meanwhile, the specialised mental health hospital in Kimberley is a relatively new facility with immaculate facilities. However, the institution requires adequate human capacity resources to function at its optimal capacity. As a result, there is limited intake of patients due to the shortage of staff. At the time of the visit, 12 of the hospital's patients – State patients – were in correctional centres in the Northern Cape as the hospital is unable to accommodate them due to staff shortages. The child and adolescent unit was similarly not being used due to lack of capacity. There is also concern that without an adequate budget for maintenance, the hospital infrastructure will decay.

12. CONCLUSION

Through the NPM's systemic analysis before, during and after monitoring visits (as well as follow-up visits), the NPM can identify trends, improvement or deterioration of the conditions of deprivation of liberty and provide recommendations to reinforce/implement protective measures as required by international and domestic human rights law.

There are several concerns that the State, through the Department of Justice and Constitutional Development and the NPM itself, should address in the immediate future. There are several lessons learned by the NPM and through the Department of Justice and Constitutional Development, the following should address in the immediate future.

While the SAHRC enjoys constitutional independence and protection as an NHRI and a Chapter 9 institution, the mandate of the NPM should be clearly articulated in a legal instrument. This is largely because of the complexity and nature of a multi-body NPM. The mandate of the NPM is derived from the OPCAT which denotes the NPM's international mandate and responsibility. The mandate must be clear on the powers and functions of the NPM, inter alia, to freely choose which places of deprivation of liberty to visit in line with articles 4 and 19 of the OPCAT, whether such visits are announced or unannounced, access information and to make recommendations to the state. Similarly, there must be an obligation for relevant authorities to engage or enter into dialogue with the NPM to implement its recommendations.

Legislation must also create a mechanism for the protection of the NPM and its personnel against any reprisals. This is essential for the effectiveness and independence of the NPM. Without this protection, the NPM's ability to work without fear, favour or prejudice will be compromised.

The operational independence of the NPM must also be guaranteed. To do this, legislative provisions should set out the source and nature of the NPM funding. It should specify the process for the allocation of annual funding to the NPM. The independence of the NPM constitutive bodies is a matter which requires the urgent attention of the State through legislative review.

While the NPM has been launched, a strong system of cooperation and coordination among relevant stakeholders is essential for its effective functioning. For this reason, it is crucial to examine the legislative and policy framework governing the institutions which have been identified to undertake the NPM functions. Similarly, further discussions are necessary to identify possible roles and responsibilities, including areas for collaboration and challenges in operationalising the NPM mandate.

CORRECTIONAL CENTRES

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
Rooigrond CC	Mangaung CC (MCC)	Newcastle CC	East London CC (Female Section)	Thohoyandou CC	Goodwood	Nelspruit CC	Kimberly CC	
Losperfontein CC	Grootvlei CC	Ladysmith CC	East London CC (Remand Section)	Polokwane CC	Voorbrgurg	Barberton Maximum	Upington CC	
	Bizzah Makhate Female CC	Estcourt CC	St Albans CC	Kutama Sinthumule CC	Mossel Bay			
		Durban Westville Juvenile CC	Kirkwood CC		Helderstrom			
			Goedemoed CC		Caledon			
					George			
					Oudtshoorn Female CC			

POLICE STATIONS

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
Boitekong SAPS (Satellite)	Heidedal	Ladysmith	Mdantsane	Tzaneen	Nyanga	Nelspruit	Keimos	Kwa-Thema
Boitekong Main Station	Bainsvlei	Durban Central	Fleet Street	Sebayeng	Milnerton	Barberton	Upington	Brixton
Rustenburg	Kroonstad	Plessislaer	Mount Road	Thohoyandou	Athlone	White River	Kimberly	Johannesburg Central
Boitekong	Welkom	Imbali Satellite	Kirkwood	Musina	Still Baai	Kabokweni	Botlokwa	Diepsloot
Klerksdorp	Mangaung	Bhekithemba	Kirkwood Magistrates Court Cells	Polokwane	George	Kanyamazane	Campbell	Hillbrow
Mmabatho	Botshabelo	Amanzimtoti	Uitenhage	Seshego	Thembalethu	Belfast	Douglas	Sandton
Pudumong	Dewetsdorp	Chatsworth	Ado	Witpoort	Oudtshoorn	Badplaas	Galeshewe	Tembisa
Swartruggens	Ladybrand	Dududu	Kent on Sea	Alldays	Cape Town Central	Calcutta	Griekwastad	Pretoria Central
	Philippolis	KwaMashu	Ado Magistrates Court Cells	Giyani	Khayelitsha	Elukwatini	Kakamas	Diepkloof
		Westville	Tsomo	Mahwelereng	Kleinvlei	Hazyview	Warrenton	Honeydew
			Butterworth	Maleboho	Mfuleni	Komatipoort	Windsorton	Sunnyside
			Elliot	Waterpoort	Philippi East	Machadodorp		Wierdabrug
			Butterworth		Tableview	Malelane		Yeoville
			Cofimvaba		Wynberg	Mbuzini		Alexandra
			Dutywa		Laignsburg	Matsulu		
			Ngcobo		Kraaifontein	Ngodwana		

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
					Harare	kaMhlushwa		
					Rondebosch	Tonga		
					Langa	Waterval-Boven		
					Delft	Skukuza		
					Mowbray			
					Claremont			

SECURE CARE CENTRES AND CYCCS

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
Rustenburg	Mangaung One Stop		Enkuselweni	Mavhambe	Outeniequa	Hendrina	Molehe Mampe	Mogale City
	Winkie Direko					Ethokomala	Marcus Mbetha	
	Matete Matches							

MENTAL HEALTH INSTITUTIONS

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
	Free State Psychiatric Hospital			Evuxakeni Mental Health Hospital		Rob Ferreira Hospital	Kimberly Mental Health Hospital	
							Dr Harry Surtie Hospital	

REFUGEE RECEPTION CENTRES

North West	Free State	KwaZulu -Natal	Eastern Cape	Limpopo	Western Cape	Mpumalanga	Northern Cape	Gauteng
				Musina Refugee Reception Centre				Lindela Repatriation Centre

NOTES

South African National
Preventive Mechanism
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THE IMPLEMENTATION OF THE OPCAT IN SOUTH AFRICA 2019/20

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