

THE RISKS OF POLICE CUSTODY

THE POTENTIAL FOR INDEPENDENT MONITORING OF POLICE CUSTODY IN SOUTH AFRICA

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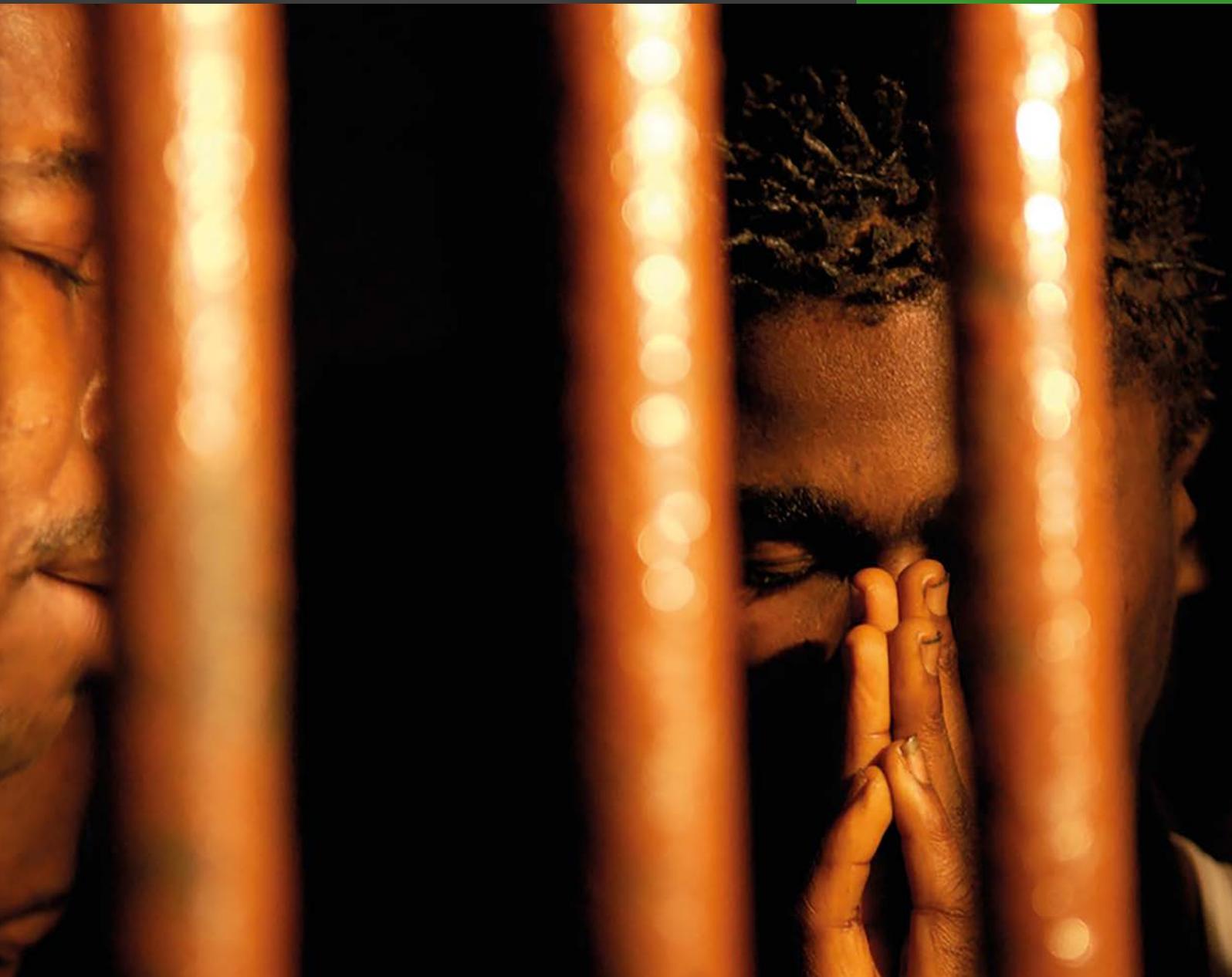


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1. INTRODUCTION

Independent custody monitoring systems provide for visits by independent visitors to custody facilities for the purpose of ensuring that people in custody are being humanely treated. Such schemes, sometimes called lay visitor schemes, exist in various countries. However, though there are mechanisms for the inspection of prisons in South Africa,¹ there is no system that is focused on inspecting the conditions under which people are held in police custody in the country² – this despite the fact that, if South African Police Service (SAPS) figures for persons arrested and charged are used as an indicator, in the region of 1.5 million people are held in police custody in South Africa each year (see Table 1).

It is not only because of the large numbers of people held in custody that this is a concern. As will be discussed in this paper, the evidence indicates that torture by the police continues to be a problem in South Africa. In addition, the death rate while in custody is high and there is the continuing issue of rape in police custody.

The relevance of the issue of custody monitoring has also been enhanced by the fact that, on 28 March 2019, both houses of Parliament ratified the Optional Protocol to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³ This means that South Africa is now obliged to establish a National Preventive Mechanism (NPM) to monitor places of deprivation of liberty. It is envisaged that, in this regard, the South African Human Rights Commission (SAHRC) will play a coordinating role ‘together with other oversight bodies such as the Judicial Inspectorate for Correctional Services (JICS) and the Independent Police Investigative Directorate (IPID):⁴

Table 1: Number of people arrested, and arrested and charged, by the SAPS

	2014/2015	2015/2016	2016/2017	2017/2018
Arrests for all crimes⁵	1 707 654	1 638 466	1 626 628	1 610 782
Persons arrested and charged⁶	1 660 833	1 556 794	1 510 940	1 467 217

The establishment of independent police custody monitoring system (IPCMS) is motivated by the premise that regular independent monitoring of police custody facilities should form ‘part of a suite of measures that reduces the risk of torture and other human rights violations’⁷ in police custody. In this respect, it is aligned with the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This states, in its Preamble, that ‘the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention’.⁸

This paper has its origins in discussions about a pilot South African IPCMS. The pilot IPCMS was developed by the African Policing Civilian Oversight Forum (APCOF), in cooperation with the SAHRC and the SAPS.⁹ The paper explores some of the issues and challenges of IPCMSs before making a number of suggestions intended to focus the discussion about the possible development of such a scheme in South Africa. The paper:

- Addresses the reason for developing an IPCMS that is focused on monitoring compliance by the police with the regulatory framework;
- Provides an overview of, and brief commentary on, the SAPS regulatory framework pertaining to custody management;
- Addresses the nature of the risks faced by people in custody; and
- Addresses some other issues that need to be considered in developing a police custody monitoring system.

2. REASON FOR CUSTODY MONITORING THAT FOCUSES ON COMPLIANCE WITH THE REGULATORY FRAMEWORK

IPCMSs are intended to serve as mechanisms for the prevention of torture. The approach taken by APCOF in piloting such a system for South Africa has been oriented towards examining compliance with the SAPS’s internal regulatory framework – as embodied in standing orders or national instructions¹⁰ – regarding the management of persons in custody (see further, below). This incorporated inspecting the custody facilities, and examining compliance with regulations as reflected in information recorded in the two main registers on the treatment of persons in custody, namely the Occurrence Book (SAPS 10) and Custody Register (SAPS 14), including evidence of the notice of constitutional rights being issued to persons in custody.

But is a system that is mainly oriented towards monitoring compliance with the regulatory framework likely to have a preventive impact?¹¹ The assertion that it is likely to have a preventive impact implies that stations that take care to comply with the regulatory framework will not provide an enabling environment for the abuse of people in custody. This appears to be a reasonable and credible contention. One question that it raises, though, concerns the adequacy of the regulatory framework.

3. THE SOUTH AFRICAN POLICE SERVICE REGULATORY FRAMEWORK REGARDING THE MANAGEMENT OF PERSONS IN CUSTODY

In November 1998, an SAPS Prevention of Torture Policy was released by the then Minister of Safety and Security, Sydney Mufamadi. The policy had been developed as a result of South Africa’s obligations as a signatory to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the obligation of the SAPS to adhere to the Bill of Rights as contained in the South African Constitution. SAPS standing orders were revised to bring them into line with the prevention of torture policy. The policy came into

operation together with the introduction, in 1999, of standing orders aligned to the policy as well as new custody registers.¹²

Since the introduction of the Prevention of Torture Policy, the SAPS has revised the relevant standing orders on various occasions. In some cases, standing orders have been replaced with new national instructions. As it stands currently, the regulatory framework regarding the management of persons in custody is primarily embodied in *Standing Order 361 (G): Handling of persons in the custody of the service from their arrival at the police station*. However, there are a number of other standing orders and national instructions that are also important parts of the regulatory environment in respect of persons in custody. These include:

- *Standing Order 341 (General): Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander;*
- *Standing Order 350 (G): Use of restraining measures;*
- *Standing Order 362 (G): Custody register (SAPS 14);*
- *National Instruction 8 of 2016: Medical treatment and hospitalization of a person in police custody;*
- *National Instruction 6 of 2014: The prevention and combating of torture of persons; and*
- *National Instruction 2 of 2010: Children in conflict with the law.*

It is anticipated that, during 2019, some of the existing standing orders will be replaced by a set of new national instructions dealing with the management of persons in custody. Once the new national instructions come into operation, the main national instruction on the management of persons in custody will be a national instruction known as *Management of persons in the custody of the South African Police Service*. This national instruction, which is currently in draft form, integrates, and will replace, the current main standing order (Standing Order 361), as well as Standing Order 350 (*Use of restraining measures*) and Standing Order 362 (*Custody register*). In addition to modifying certain provisions of the standing orders, it will also introduce some new provisions.

In addition, a new national instruction is being developed to replace Standing Order 341 (*Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander*). An entirely new national instruction is also being developed on the arrest and treatment of illegal foreigners. It would therefore appear that, once work on the new national instructions is completed, and the national instructions come into operation, the regulatory framework for the management of persons in custody will be defined by the new national instruction referred to above, namely *Management of persons in the custody of the South African Police Service*, as well as by:

- *National Instruction 2 of 2010: Children in conflict with the law;*
- *National Instruction 6 of 2014: The prevention and combating of torture of persons;*
- *National Instruction 8 of 2016: Medical treatment and hospitalization of a person in police custody;*
- A national instruction, *Arrest, treatment and the transportation of an arrested person* (to replace Standing Order 341); and
- A national instruction, *Arrest and treatment of illegal foreigners*.

Thorough analysis of, and engagement with, the current SAPS regulatory framework governing the management of police custody, including the draft national instruction, *Management of persons in the custody of the South African Police Service*, leads to the conclusion that the standing orders, national instructions, and draft national instructions place strong emphasis on recognition of the rights of detained persons and on their humane treatment, and are reasonably comprehensive in this regard. Evidence that there is a high level of compliance with this regulatory framework would be a strong indicator that SAPS management of custody facilities supports the humane treatment of persons in custody and does not facilitate torture and abuse.

Nevertheless, while the regulatory framework is of reasonably good quality, there are some aspects of the draft new national instruction, *Management of persons in the custody of the South African Police Service*, that should receive further attention. Notably, there appears to be no general provision dealing with the procedures to be followed in respect of complaints by persons in custody. Section 4 of National Instruction 6 of 2014 (*The prevention and combating of torture of persons*) focuses on the obligation to report torture, but National Instruction 6 is not referred to in the draft of the new national instruction.¹³ It is suggested that these reporting procedures should be integrated into the new, comprehensive national instruction on custody management.

4. RISKS IN THE CUSTODY ENVIRONMENT

Purposes of custody management

As indicated above, the principal motivation for the independent monitoring of police custody facilities is to reduce 'the risk of torture and other human rights violations'¹⁴ while in police custody. However, an examination of the regulatory framework highlights the fact that custody management has different purposes. These include:

- Preventing the escape of persons in custody – which may be seen as the primary purpose of a police custody system (this is a way of ensuring that people who are suspected of crimes can be brought before court for the court to examine the evidence against them. Once a case has been remanded, people in custody may be transferred to prisons that fall under the Department of Correctional Services);
- Ensuring the safe and humane treatment of persons in custody in compliance with human rights standards – which includes the prevention of torture;
- Ensuring the safety of the police and members of the public (this may include independent custody visitors who are monitoring custody conditions) who are lawfully present in custody facilities; and
- Preventing deaths in custody.

These purposes are not mutually exclusive. For instance:

- Ensuring safe and humane treatment includes the provision of medical treatment, which is also a means of preventing deaths in custody;
- Ensuring the safety of the police is also a means of preventing escape; and
- Safe and humane treatment is also a means of ensuring that evidence that is obtained is admissible in court, as evidence obtained under torture is at risk of being held to be inadmissible and is inherently unreliable.

Data on risks facing people in police custody in South Africa

This, then, gives rise to the question: Considering the background of the proposed custody monitoring system in the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, should a custody monitoring system exclusively focus on issues that are relevant to torture? Alternatively, should it also focus on other issues that are relevant to the humane treatment of persons in custody? The European Committee for the Prevention of Torture (ECPT) has, for instance, stated that custody visits 'should examine all issues related to the treatment of persons in custody'.¹⁵

The issue is worthy of attention in South Africa, because South Africa continues to record not only allegations of police torture, but also high death rates in police custody,¹⁶ as well as the continuing problem of rape in police custody. This is reflected in IPID's statistics relating to complaints or other cases occurring in police custody.¹⁷ As reflected in Table 2, over the six years since it started operating in 2012, IPID recorded 1 472 deaths in custody, 807 allegations of torture, and 127 allegations of rape in custody.

Table 2: Allegations of torture, rape in police custody, and deaths in police custody as recorded by IPID

	Allegations of torture	Rape in police custody	Deaths in police custody
2012-2013	50	22	275
2013-2014	78	19	234
2014-2015	145	34	244
2015-2016	144 (as well as one reported case against a municipal police department)	23	216
2016-2017	173	20	302
2017-2018	217	9	201
Total (six years)	807	127	1 472
Annual average	135	21	245

It should be noted that, in terms of section 28(1)(e) of the IPID Act, IPID is required to investigate the 'rape of any person while that person is in police custody'. In terms of section 28(1)(d), it is also required to investigate a separate category of rape, namely 'rape by a police officer'. At face value, the rape by a police officer of a person in police custody would fall under both section 28(1)(d) and (e). Though IPID does not state this explicitly, information reported in IPID's annual reports implies that alleged rape recorded under section 28(1)(d) excludes rape by police officers of persons in custody. Rape by the police of persons in custody, as well as rape by civilians in custody, are all recorded under section 28(1)(e).

Tables 3 and 4 present IPID's statistics on deaths in custody and rape in custody (as well as other rape by police officers) for the six years from 2012/2013 onwards.

As reflected in Table 3, the vast majority of deaths in custody during this period were due to: injuries sustained prior to custody (32%); suicide (32%); and natural causes (28%). In combination, these three categories accounted for close to 93% (92.8%) of all deaths in police custody. A further 6% of deaths in custody were the result of assaults in custody, with some being alleged assaults by the police, but most being assaults by other persons in custody. (Note that the category 'Injuries prior to custody' does not include injuries caused by the use of lethal force or other action by the police outside of custody. These are recorded elsewhere in IPID's statistics.¹⁸)

As reflected in Table 4, recorded rapes by police officers that took place outside of custody outnumbered rapes in police custody. Of the rapes in police custody, nearly two-thirds (65%) were apparently committed by other persons in custody, while just over one-third (35%) were allegedly committed by police officers.

Table 3: Causes of death in custody as classified by IPID, April 2012 to March 2018

	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	Total	%
Injuries prior to custody	80	81 (55 vigilantism)	93 (69 vigilantism)	66 (49 vigilantism)	95 (56 vigilantism)	63 (43 vigilantism)	478	32%
Suicide	96 (94 hanging 2 other)	86 (80 hanging; 6 other)	68 (65 hanging; 2 other)	69 (94 hanging; 3 other)	92 (89 hanging; 3 other)	63 (58 hanging; 5 other)	474 (452 hanging; 22 other)	32%
Natural causes	77	57	60	56	101	63	414	28%
Assaults in custody 1: Inmates	-	-	16	8	13	10	47	3.1%
Assaults in custody 2: Torture, assaults or other actions by the police	3 (torture)	-	3	15	1	-	22	1.5%
Assaults in custody 3: Perpetrator not specified	13	7	-	-	-	-	20	1.4%
Other/unclear	6 (4 in police vehicle during collision)	3 (3 in police vehicle during collision)	4	2	-	2	17	1.2%
Total	275	234	244	216	302	201	1 472	100% ¹⁹

Table 4: IPID data on perpetrators of rape in police custody recorded in terms of section 28(1)(e) of the IPID Act (1 of 2011) (Statistics on rape by police officers are also included.)

	Rape in police custody (section 28(1)(e))			Rape by police officers (section 28(1)(d) – presumably excludes rape in police custody by police perpetrators)
	Police perpetrators	Civilian perpetrators	Total	
2012–2013	13	9	22	146
2013–2014	6	13	19	121
2014–2015	14	20	34	124
2015–2016	6	17	23	112 (106 SAPS; 6 municipal police service)
2016–2017	5	15	20	112
2017–2018	0	9	9	105
Total (six years)	44	83	127	720
Percentage of rapes in custody	35	65	100%	(Not applicable)

Itemising the known risks

From Tables 2, 3 and 4, it would therefore appear that the risks that are faced by people in custody include:

- Torture and other abuse by officials – in addition to torture (Table 2), this also contributes to some deaths in custody (those in the ‘Assault in custody 2’ and some of those in the ‘Assault in custody 3’ category in Table 3).
- Injuries that are sustained prior to custody – this is the cause of almost a third (32%) of deaths in custody.²⁰
- Suicide – similarly, this is the cause of almost a third (32%) of deaths in custody. Of these deaths, 95% (452 out of 474) have been the result of suicide by hanging.²¹
- Deaths from natural causes – these have been responsible for between a quarter and a third (i.e. 28%) of deaths in custody. It is important to note that, though they are recorded as being from ‘natural causes’, they may reflect shortcomings in custody management, such as the failure to provide timely medical care or the failure to carry out cell inspections on a regular basis.
- Violence or abuse by other persons in custody – this includes the risk of rape and assault (including potentially fatal assault).

It is important not to underestimate the scale of the issue represented by the last of these categories (i.e. violence or abuse by other persons in custody). If one considers the figures relating to deaths in custody during the four-year period 2014/2015 to 2017/2018, there were 47 deaths as a result of assaults by other inmates, representing 5% of the 962 deaths in custody during that period. Though this is a relatively small number, it is likely that these figures represent the ‘tip of the iceberg’ concerning assault, intimidation and similar coercive behaviour by other inmates in custody. Most such assaults can be presumed to be non-fatal.

The danger posed by other inmates is also illustrated by the figures for rape in police custody. As indicated in Table 4, 65% of these were committed by civilians. IPID has not consistently reported data on the gender of victims of rape in police custody. However, in 2016/2017, it reported that 14 (70%) of the 20 victims of rape in police custody were male and six were female.²² This apparently indicates that a high proportion of rapes in custody are committed by male perpetrators against other men who are being held in custody with them in the same cell. As is commonly known, rape is frequently unreported. It is likely that the figures for rape in custody by civilians, as well as by police, do not reflect the scale of the problem.

Substance use as a major risk factor regarding deaths in custody

The preceding discussion of ‘risks’ in the custody environment omits at least one other factor that is likely to play an important role in contributing to deaths in custody. For instance, a 2018 report pertaining to England and Wales noted that 18 out of the 23 deaths of people (78%) who died in custody during the 2017/2018 year

were known to have a link to alcohol and/or drugs. This meant that at the time of their arrest they had recently consumed, were intoxicated by, in possession of, or had known issues with alcohol and/or drugs. Where cause of death was known, a pathologist said that alcohol or drug toxicity, or long-term abuse, was likely to be a contributing factor in their deaths for nine people.²³

This high proportion is not unusual. In the previous year, 79% of deaths (11 out of 14) fell into this category.²⁴ Another British report on deaths in custody, from 1990 to 1996, found that 25% of such deaths were related to substance abuse. In the 69 cases highlighted in the latter report, 45 involved alcohol, 16 drugs, and eight a mixture of alcohol and drugs.²⁵

Considering what is known about the relationship between alcohol,²⁶ drugs and crime in South Africa, there can be little doubt that a high proportion of people who are taken into custody are, or have recently been, under their influence. The issue appears to have last been analysed directly in the 1990s. Research conducted at nine police stations in Durban, Cape Town and Gauteng on levels of substance use by arrested persons found that

while interviewees who admitted to having used alcohol prior to committing the crime outnumbered those who admitted to having used drugs, blood tests on 878 arrested persons revealed evidence of the use of illegal drugs in 49% of cases.

The study also found that 'persons arrested in Gauteng for alleged illegal immigration were much less likely to test positive for drug use than the general arrestee population.'²⁷

The British evidence is that substance use plays a highly significant role in deaths in custody. In South Africa, it is also clear that substance use and crime are often closely related. It is therefore more than likely that substance abuse is also strongly implicated in deaths in custody in South Africa. However, up to this point, no recognition has been given to the issue in information that is provided on deaths in custody by IPID or its predecessor, the Independent Complaints Directorate.²⁸

Misinterpreting the symptoms of head injuries

In highlighting the issue of substance use, it is also important to note another risk that is referred to in the 1998 British report on deaths in custody. This is the risk that specific types of symptoms will be wrongly interpreted. The report states:

On several occasions, serious head injuries were interpreted as drunkenness by officers, ambulance crews or [forensic medical examiners]. These detainees were then processed as drunks, rather than getting the medical attention they needed. The symptoms of head injury and drunkenness can be very similar. Apparent drunkenness can mask conditions which are far more serious, and everyone concerned needs to remain vigilant in handling these cases, particularly when so many drunk people pass through police custody.²⁹

A holistic approach

Effective custody management and care does not only involve minimising the risk of abuse by the police, but also requires measures to minimise the risk of rape and other harm to detainees and to prevent deaths in custody. Insofar as a custody monitoring system is focused on compliance with the regulatory framework, it should be clear about the types of regulatory provisions that are significant to its work. As highlighted in Table 5, some provisions of the draft regulatory framework may be seen as more relevant to preventing abuse, while others may be more relevant to preventing deaths in custody. A custody monitoring system that is concerned broadly with the humane treatment of persons in custody, and not exclusively with the risk of torture, would therefore focus on compliance with this broad range of regulatory provisions and not only on those that are relevant to the prevention of official abuse or torture.

Table 5: Assessment of the relevance of types of regulatory provisions to the prevention of torture, rape in custody, and deaths in custody

Type of regulatory provision³⁰	Relevant to preventing official abuse or torture	Relevant to preventing rape and deaths in custody
Use of restraints³¹	Restraints may be used as a form of abuse or to facilitate it. Evidence of compliance with regulations is relevant to prevention.	Restraints may facilitate or encourage rape or deaths. They may, however, also protect persons in custody against potential harm, including preventing self-harm.
Medical treatment³²	A person who has been tortured may require medical treatment. A medical examination may confirm evidence of torture. ³³	Medical treatment is relevant for accurate diagnosis and appropriate treatment, and, therefore, in preventing deaths in custody. Medical examinations should also be undertaken following allegations of rape in custody.
Notice of constitutional rights³⁴	The notice of constitutional rights provides details of the standards that the police should comply with, including recognising the right to remain silent.	
Communication with a legal practitioner³⁵	Supports observance of rights by the police.	
Communication with next of kin³⁶	Supports observance of rights by the police.	May support 'resilience' against suicide by a vulnerable person. ³⁷
Searches of persons in custody and seizure of objects in their possession³⁸		In addition to being necessary for preventing escapes, search and seizure may prevent suicide and other self-harm, and protect persons in custody from harm by others. The seizure of drugs may prevent suicide or overdose.
Separation of categories of persons³⁹		Important for protecting those who may be vulnerable to rape, assault and other abuse by fellow inmates; hence it is relevant to preventing rape and deaths.
Accommodation, bedding, toilet, washing and exercise facilities⁴⁰	Compliance with these standards provides protection against torture and cruel or inhuman treatment.	
Visiting of cells by police officials⁴¹		Relevant to preventing deaths, including those of people who are sick, injured, inebriated, or who may have been identified as being at risk of suicide, as well as preventing harm to persons in custody by other inmates.
Clothing, drinking water and food⁴²	Compliance with these standards provides protection against torture and cruel or inhuman treatment.	
Risk profiling⁴³		In addition to preventing escapes, profiling is relevant to preventing rape and deaths in custody - including by identifying: people who may be a threat to other persons in custody; those who may be particularly vulnerable; those who may be at risk of suicide; and those at risk of death from various causes such as injury, sickness or infirmity, and the consequences of drug or alcohol use.
Recording of information in Occurrence Book (various requirements) and Custody Register⁴⁴	Is relevant to the prevention of torture insofar as it demonstrates an orientation towards compliance with the overall regulatory framework.	

5. ISSUES TO BE CONSIDERED IN DEVELOPING AN INDEPENDENT CUSTODY MONITORING SYSTEM

A developmental rather than an 'ideal-type' approach

This paper argues for an IPCMS that focuses on compliance with the regulatory framework. This is not to say that, in theory at least, the framework for visits by independent custody visitors could not be more extensive. The ECPT has, for instance, stated:

To be fully effective [visits by an independent authority] should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights; compliance with rules governing the questioning of criminal suspects; and material conditions of detention.⁴⁵

In its annual report, the JICS describes its visits to correctional centres as comprising

a full and detailed physical examination of the facility as well as an audit of all the registers, general records, and individual files of inmates, whose circumstances have been previously enquired into by the Independent Correctional Centre Visitor (ICCV) or an inspector. The extent of the enquiry during an inspection is informed by a number of indicators, namely the findings in a prior inspection that were identified to be rectified, serious violations of rights and systemic breaches by the facility under scrutiny.⁴⁶

However, it needs to be noted that, in order for a body to carry out visits of this nature, significant resources are required. The overall staff complement of the JICS numbers roughly 70 personnel.⁴⁷ This enables the JICS to carry out these types of inspections at roughly a third of the 243 South African prisons each year,⁴⁸ as well as performing certain other functions.

The reason for proposing that a South African system for police custody monitoring should focus on compliance is partly premised on the assumption that the resources available for this are likely to be fairly modest. Nevertheless, it is suggested that the approach taken should be one that is 'developmental' in nature. This would mean that the custody monitoring system that is implemented will not aim to start as an 'ideal-type' system and that there will be incremental improvements to the system oriented towards improving its effectiveness and impact.

Targeting visits

It is unlikely that any IPCMS that is established will be able to carry out routine visits to a large proportion of police stations, of which there are over 1 200. Resources, for instance, are likely to be a long-term constraint on such a system. Insofar as any system places a high level of emphasis on the number of stations visited, this is also likely to be at the expense of the quality of inspections undertaken. The focus of the IPCMS should rather be on visits to stations that are targeted. In this regard, IPID should be able to provide data on the cases that it receives (focusing on deaths in custody, allegations of rape in custody, and alleged torture or assaults) in relation to each station that will facilitate the targeting of visits to stations where there is an apparent problem. Rather than carrying out visits to a large number of stations on a once-off basis, the IPCMS should aim to conduct a series of unannounced visits to these targeted stations.

The body managing the IPCMS should also be able to develop detailed information about the police custody environment through leveraging existing information on the police custody system. In addition to information from IPID, this should include information from the SAPS and the Civilian Secretariat for Police Service (CSPS).

The SAPS should be able to provide some or all of the following information:

- Data on custody facilities, including number of custody cells and capacity of custody facilities at each police station;
- The number of arrests per station each year;
- Information regarding the SAPS's responsibility for the management of holding cells at the various courts;
- Information identifying holding facilities for 'illegal foreigners'; and
- The average amount of time that arrestees are held in police custody.

The CSPA also manages implementation of the National Monitoring Tool, which is used for the monitoring of police stations. The tool focuses on multiple issues but includes a custody monitoring aspect. The CSPA should be requested to assist in clarifying in what way the information gathered by means of the tool may support custody monitoring.

Information from these agencies, and particularly IPID, could therefore be gathered with a view to enabling visits to be targeted at stations where there appears to be a risk of abuse of detainees, or other evidence of recurring problems concerning custody management, such as high death levels in custody.

Risk of regulatory capture

'Regulatory capture' occurs when a group that is being regulated, or is subject to scrutiny (in this case the police), subverts the impartiality and zealotry of the regulator (in this case the staff of the IPCMS). One factor that contributes to vulnerability to regulatory capture is where the regulator relies on the organisation that it is monitoring in order to perform its monitoring function.⁴⁹

The IPCMS system will not be able to function without a high level of cooperation and assistance from the SAPS. One of the reasons why the pilot phase was able to proceed relatively smoothly was the high level of cooperation from the SAPS. Some of the SAHRC human rights officers who performed the function of custody visitors during the pilot indicated that the SAPS had assisted them very actively. Asked about the approach that they had used, and whether they had received assistance from the SAPS, some of them responded thus:

My approach was to go through the information requested on the app with the SAPS officials. They assisted me with all the information required during the inspection, and, all the time, I was accompanied by an SAPS representative. (Paraphrase of the original quote)

We were assigned an officer to accompany us throughout the visit and, where necessary, provide us with the information we would need. They guided us around the cells, ensured that we could get inside the cells, and made sure that we were aware of all the safety precautions as we conducted the inspections. (Paraphrase of the original quotation)

The police custody visitor system may therefore be subject to a high risk of regulatory capture. Rather than facilitating independent assessment and verification, SAPS members may seek to prescribe the type of assessment that is provided by custody visitors about the treatment of people in custody. Insofar as custody visitors assert the need for them to inspect facilities and registers in an independent manner, the risk is that they will find that the level of cooperation that they receive is reduced and that it is increasingly difficult to carry out their visits.

Individual custody visitors vs custody teams

One factor that will affect vulnerability to regulatory capture is the number of people carrying out each custody monitoring visit. In general, where custody monitoring visits are carried out by individual visitors, they will be significantly less able to assert their authority and independence,

though this will, of course, depend on the assertiveness and interpersonal skills of individual custody visitors. The 2018 APCOF report on independent custody monitoring highlights the fact that, in Scotland, each visit is carried out by two custody visitors, while, in Northern Ireland, there are independent custody visiting teams.⁵⁰ Arguably, custody visits in South Africa should be conducted by teams of two people. At larger stations (e.g. those in the top five per cent in terms of the number of people held in custody each year), teams of three people may be appropriate.

Announced and unannounced visits

In general, the framework that was applied during the pilot was that the SAPS was notified in advance about visits (there were cases where, after the first visit, subsequent visits were carried out on an unannounced basis). In addition, prior to the launch of the pilot, there was a process of briefing all of the stations so they had some advance knowledge that these visits would be conducted.

The potential for the police to feel threatened by independent scrutiny will obviously be reduced if visits are arranged in advance, but such scrutiny will be enhanced if visits are carried out on an unannounced ('surprise') basis. There can be no question that, for custody monitoring to be meaningful, visits should be unannounced. This, however, is itself likely to be a factor which contributes to police resistance to scrutiny by the IPCMS and to friction between it and the police. While any custody monitoring system may function on the basis of unannounced visits, there could be a preliminary phase (of perhaps six months) where visits are announced in advance for purposes of creating greater awareness on the part of the police about the custody monitoring system.

Inclusion of interviews with persons in custody

One question concerns the incorporation of interviews with persons in custody as part of visits. Torture is usually carried out in settings that are relatively isolated; in other words, it is unlikely to be carried out in custody facilities in sight of other prisoners. An IPCMS is therefore unlikely to deter torture because unannounced visitors will, in all probability, not come across incidents of torture in progress. Interviews are, therefore, one way of verifying that people in custody are being treated humanely.

As indicated above, the ECPT has stated that, in order 'to be fully effective', those involved in a custody inspection system 'should be empowered to interview detained persons in private'.⁵¹ The 2018 APCOF report on the independent monitoring of police detention facilities also refers to systems for independent police custody visits in Namibia, Malawi and Northern Ireland that allow for independent visitors to interview persons in custody.⁵² In South Africa, the JICS is also authorised to interview people in correctional centres.⁵³ As emphasised by the ECPT, and in all of the countries referred to in the APCOF report, in order to be meaningful, such interviews need to be carried out in private. They also require the consent of the person being interviewed.

However, including interviews with persons in custody is not necessarily a simple matter. Custody visitors who are required to carry out interviews will need a much higher level of training. In addition, interviews with suspects also raise issues about the safety of custody visitors, which go beyond those raised by visual inspection of the custody environment. Insofar as they may receive reports of alleged torture, it would also need to be recognised that this is an issue fraught with problems within the criminal justice environment. This is partly related to the concern that those in custody sometimes use allegations of torture to discredit evidence that the police have obtained by means of admissions or confessions. Interviews with suspects would also create expectations on the part of interviewees that action will be taken on their behalf. There would be a need to develop a framework and protocol around how custody visitors should respond to allegations of torture. Suspects being held in police custody who reveal information about abuse by officials, or by other persons in custody, may also be placed in a position of greater vulnerability if they are returned to the cells.

If custody visitors have the responsibility for carrying out interviews with people in custody, this will add to the complexity of maintaining the lay visitor system, partly as a result of the additional training involved. An alternative that might be considered is that interviews only be carried out by a centralised team of professional IPCMS staff possibly attached to the NPM. Interviews would not be carried out routinely as part of each visit. Instead, they would be carried out at selected police stations where information provided by IPID, the CSPS or custody visitors indicates that a specific station should be subjected to higher levels of scrutiny.

6. CONCLUSIONS

This paper argues that an IPCMS in South Africa should focus on compliance by the police with internal regulations pertaining to the management of persons in custody. Though this does not meet the standards suggested by the ECPT – notably, in that it does not provide for the interviewing of persons in custody – this should not necessarily be seen as a shortcoming at this point. South Africa is already replete with multiple examples where ‘ideal-type’ frameworks or policies are adopted but implementation falls short. As indicated, there is no established custody visitor scheme for police custody in South Africa at the moment, and it would not be likely that an ‘ideal-type’ scheme could be launched immediately.

The approach that should be taken is one that is ‘developmental’ in nature, meaning that it is based on incremental improvements rather than being initiated with the expectation that it will conform to the ideal type. The SAHRC as custodian of the NPM, and other agencies involved in an IPCMS, may need to develop greater understanding of the police custody environment. They are also likely to need time to build the capacity for custody visits to be conducted, as well as for exploring some of the issues that they will need to confront in developing custody visiting systems that conform more strongly to the ‘ideal type’.

An approach that focuses on compliance will therefore have advantages in terms of enabling custody monitoring mechanisms to develop greater familiarity with issues in the police custody environment, and with the logistical and administrative aspects of maintaining a custody monitoring system. Further, it will begin to habituate the police to the greater level of transparency that will be required of them in order for such a system to be properly implemented. Some of the issues that may need to be addressed as part of ongoing development of the custody monitoring system may include:

- Finalising a custody monitoring instrument for use in assessing compliance with internal regulations (during the pilot project, APCOF developed a template that may be appropriate for this purpose);
- Storing, analysing and responding to information gathered through the custody monitoring system (for instance, one of the ongoing questions will be about the interpretation of reports received by custody visitors, and when these should result in follow-up visits and more detailed scrutiny);
- Improving the effectiveness of visits through a targeted, information-based approach;
- Challenges in maintaining the independence and integrity of the custody monitoring system while maintaining police cooperation;
- Developing and updating the monitoring framework in relation to emerging areas of concern and interest, as well as changes to regulations (for instance, the treatment of alleged illegal foreigners in police custody, which is not a focus of the monitoring instrument developed by APCOF, may be an issue that is identified as meriting attention); and
- Expanding the scope of visits, including the possibility of incorporating interviews with persons in custody.

ENDNOTES

1. This includes the Judicial Inspectorate for Correctional Services (JICS) and the Independent Correctional Centre Visitors (Melanie Lue Dugmore, Independent monitoring of police detention facilities in South Africa, APCOF Research Paper 20, January 2018, 12-13).
2. Lue Dugmore (note 2).
3. SAHRC, Media alert: SAHRC to host a breakfast seminar on the National Preventive Mechanism (NPM), 24 April 2019, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1868-media-alert-sahrc-to-host-a-breakfast-seminar-on-the-national-preventive-mechanism-npm>.
4. Ibid.; African New Agency, SAHRC welcomes ratification of UN torture agreement, *The Citizen*, 4 March 2019, <https://citizen.co.za/news/south-africa/government/2095273/sahrc-welcomes-ratification-of-un-torture-agreement/>.
5. SAPS, Annual Report 2015-16, 108; SAPS, Annual Report 2017-18, 102.
6. SAPS, Annual Report 2015-16, 117; SAPS, Annual Report 2017-18, 89 and 112.
7. APCOF, Pilot of the Lay Visitors Scheme for independent police custody monitoring in South Africa, 2019, 1.
8. United Nations (UN), Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.
9. APCOF (note 8), 1.
10. It would appear that the difference between the two is nominal. During the apartheid era, police internal regulations were known as standing orders, and the name continued to be used for internal regulations that were revised or adopted in the post-apartheid era. However, at some point, the SAPS decided that, in future, internal regulations would be known as national instructions. The term 'standing orders' is therefore no longer used for new internal regulations, though old regulations that have not recently been revised continue to be referred to as standing orders.
11. Compare, though, the juxtaposition of compliance-oriented with preventive approaches in Lue Dugmore (note 2), 6 and 15.
12. One aspect of the policy, namely that of providing for the electronic recording of police interviews with suspects (i.e. interrogations) has never been operationalised.
13. Section 25(6)(f) refers to persons who report that they have been tortured, but, even in respect of this section, it is not clear by what process a station commander might come to be informed that a person alleges that he or she has been tortured.
14. APCOF (note 8), 1.
15. CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2013, quoted in Claire Ballard, undated, Expert report on the independent oversight of police stations, Khayelitsha Commission of Inquiry, 2014, 7, <https://acjr.org.za/resource-centre/Report.Oversight%20Clare%20Ballard.pdf>.
16. The statement that high death rates in custody are recorded is based on a comparison with England and Wales. The two countries (both of which are part of the United Kingdom) have a combined population of roughly 56 million, that is, a population similar in size to that of South Africa. During the 11 years between and including 2007/2008 and 2017/2018, the number of 'deaths in or following police custody' varied between 11 and 23 (Independent Office for Police Conduct, Deaths during or following police contact: Statistics for England and Wales, 2017/18, 5, https://policeconduct.gov.uk/sites/default/files/Documents/statistics/deaths_during_following_police_contact_201718.pdf).
17. The Independent Police Investigative Directorate (IPID) also records allegations of assault, which far outnumber allegations of torture. For instance, in 2017/2018, the total number of assault cases recorded was 3 661, while cases of torture numbered 217 (IPID, Annual Report 2017/18, 38). However, these are not included in this table, as it is not clear whether they pertain to people in custody or not. One of the defining features of torture is that it tends to be used against people who are in custody. It is not clear to what degree allegations of assault pertain to incidents in custody or not.
18. IPID is required to investigate deaths in custody in terms of section 28(1)(a) of the IPID Act 1 of 2011, and deaths as a result of police action in terms of section 28(1)(b).
19. Percentages in fact add up to 99.2 as a result of rounding.
20. If those who are fatally injured by the police were to be included in this category, the number would be greater. As indicated, however, if these are a result of fatal injuries caused by the police, particularly where they take place prior to arrest, they are recorded as 'deaths as a result of police action' under section 28(1)(b) of the IPID Act.
21. See, also, Amanda Dissel and Kindiza Ngubeni, 2000, The conditions of custody: Police holding cells, *Crime and Conflict*, 19, 32-36, <https://www.csvr.org.za/docs/policing/conditionsofcustody.pdf>.

22. IPID, Annual Report 2016/17, 45.
23. Independent Office for Police Conduct (note 17), 13.
24. Independent Office for Police Conduct (note 17), 11.
25. Adrian Leigh, Graham Johnson and Alan Ingram, 1998, Deaths in police custody: Learning the lessons, Police Research Series, 23, London, Home Office. A factor contributing to the high proportion of deaths in custody may be the frequency with which British police arrest people for being drunk and disorderly (see Leigh et al., 9, Table 2).
26. Examples from the literature illustrating this are: Debbie Budlender, Money down the drain – the direct cost to government of alcohol abuse, *South African Crime Quarterly*, No. 31, Institute for Security Studies, March 2010, <https://oldsite.issafrica.org/uploads/CQ31Budlender.pdf>; Nomonde Phetlho-Thekisho, Elizabeth Hermina Ryke and Herman Strydom, Heavy drinking and interpersonal violence at and around different alcohol outlets in the North West province, South Africa, *Social Work/Maatskaplike Werk* 2013, 49(1), <http://socialwork.journals.ac.za/pub/article/view/76/67>.
27. Antoinette Louw and Charles Parry, 1999, Drugs, alcohol and crime: A survey of arrestees, Nedbank ISS Crime Index, 3/6. Pretoria, Institute for Security Studies.
28. David Bruce, Gareth Newham and Themba Masuku, In service of the people's democracy: An assessment of the South African Police Service, Centre for the Study of Violence and Reconciliation, 142-145.
29. Leigh et al. (note 26), 76.
30. The provisions selected are all contained in the draft SAPS National Instruction, Management of persons in the custody of the South African Police Service.
31. SAPS, Management of persons in the custody of the South African Police Service (draft national instruction), section 6 to 14.
32. *Ibid.*, section 16. As indicated, the main national instruction on medical treatment of persons who are arrested and/or in custody is National Instruction 8 of 2016: Medical treatment and hospitalization of a person in police custody.
33. *Ibid.*, section 6(2).
34. SAPS, Management of persons in the custody of the South African Police Service (draft national instruction), sections 18 and 19.
35. *Ibid.*, section 21.
36. *Ibid.*, section 22.
37. However, it is important to note that visits do not always have positive emotional consequences for people in custody (Jillian J Turanovic and Melinda Tasca, 2019, Inmates' experiences with prison visitation, *Justice Quarterly*, 36:2, 287-322, DOI: 10.1080/07418825.2017.1385826), and the same observation would apply to other communication with next of kin.
38. SAPS, Management of persons in the custody of the South African Police Service (draft national instruction), sections 18, 19 and 24.
39. *Ibid.*, section 25(1).
40. *Ibid.*, section 25(2) and (3).
41. *Ibid.*, section 25(6).
42. *Ibid.*, sections 25(7) and (8).
43. *Ibid.*, section 30.
44. *Ibid.*, sections 33-38.
45. CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2013 (note 14).
46. JICS, Annual Report 2017-18, 23.
47. As of 31 March 2018, it was 68 (JICS, Annual Report 2017-18, 73).
48. JICS, Annual Report 2016-17, 14.
49. See Toni Makkai and John Braithwaite, 1992, In and out of the revolving door: Making sense of regulatory capture, *Journal of Public Policy*, 12, 61-78; S Savage, Thinking independence: Calling the police to account through the independent investigation of police complaints, *British Journal of Criminology*, 2013, 53, 94-112 at 101; David Bruce, 2017, Strengthening the independence of the Independent Police Investigative Directorate, APCOF, Policy Brief No. 16, <http://apcof.org/wp-content/uploads/2017/03/016-strengthening-the-independence-of-the-independent-police-investigative-directorate.pdf>.
50. Lue Dugmore (note 2), 10-11.
51. CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2013 (note 14).
52. Lue Dugmore (note 2), 8-11.
53. *Ibid.*, 13.

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