

INDEPENDENT MONITORING OF POLICE DETENTION FACILITIES IN SOUTH AFRICA

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1. INTRODUCTION

South Africa's legal framework provides a comprehensive police accountability architecture. This is reflected in the mandates of the Independent Police Investigative Directorate (IPID), the Civilian Secretariat for Police (Civilian Secretariat), the National Assembly's Portfolio Committee on Police, and the South African Human Rights Commission (SAHRC). However, despite these oversight mechanisms, there is currently no regular, independent system for monitoring places of police detention. The result is that there is no reliable information on the use of, and conditions in, police custody in South Africa, including data (disaggregated by age, gender or otherwise) on the number of persons held in police custody, the average length of time spent by persons in police custody, or the extent to which procedural and other safeguards are upheld.¹

The prevalence of abuse against vulnerable groups in police custody is unknown owing to low levels of reporting by victims and the lack of available complaints mechanisms.² Research indicates that women (and particularly sex workers, who are at higher risk due to their type of work) have been raped by police members in police cells³ and that lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are at increased risk of violence and other forms of abuse in detention.⁴ Moreover, although the Child Justice Act 75 of 2008 (section 26(2)(a)) provides specific protections for children who are held in police cells, without regular, independent inspection of these facilities, the extent to which children detained are afforded their rights in this context is unknown.⁵

The absence of regular and independent monitoring of police cells is exacerbated by the impunity enjoyed by members of the South African Police Service (SAPS) and contributes to the continued violation of human rights of persons in police custody.⁶ Researchers have found that persons in police custody are typically detained in communal cells that are overcrowded, poorly lit and have bad ventilation, with temperatures becoming hot during the day and extremely cold at night.⁷

Available statistics provide insight into the scope of deaths and abuse in police custody. For the 2015/2016 period, 216 people were reported to have died in police custody and 23 people were raped in police custody (six by police officers and 17 by civilians).⁸ Causes of death included suicide, natural causes, assaults prior to detention, and injuries sustained during detention. During 2015/2016, 145 incidents of torture and 3 509 incidents of assault by police officers were reported to IPID. Incidents of torture increased by 88% in 2014/2015 compared with the previous year. Also of concern is prolonged detention in police custody, with detainees often being held for longer than

the legal maximum of 48 hours in such custody.⁹ Indeed, SAPS has acknowledged that unlawful arrest and detention are a challenge and attributes the 21% increase in the number of civil claims lodged against it in 2014/2015 compared with the previous year to a 'high rate [of] unlawful arrest and detention'.¹⁰

Identifying and addressing the causes and consequences of human rights abuses by the police are fundamental tenets of policing in a democratic state. South Africa's constitutional and legal framework advocates principles of a rights-based approach to policing based on democratic policing principles. However, the implementation of these principles is weak in certain areas. The absence of regular and systematic independent monitoring of police cells is one such gap in the oversight architecture of policing in South Africa. By addressing this, South Africa will be in a better position to safeguard the rights of persons who are in conflict with the law and deprived of their liberty by the police.

The establishment of a regular and independent system for monitoring police cells will assist in closing the gap between policing principles and practice in South Africa by:

- Increasing transparency with regard to the oversight of police cells;
- Contributing statistics and other relevant information on the use of torture and on conditions in police custody;
- Strengthening the promotion and protection of human rights, and access to redress, for persons who are held in police custody;
- Improving coordination among sector stakeholders, with a key role for civil society in the development and implementation of a system for police-cell monitoring;
- Identifying systemic issues relating to the use of, and conditions in, police custody that will provide an entry point for the development of remedial action by the relevant stakeholders; and
- Highlighting the challenges specific to vulnerable groups and providing an evidence base for targeted remedial action by the relevant stakeholders.

The present research paper sets out the international and domestic framework governing the protection of human rights of detained persons in South Africa. It reviews examples of independent custody monitoring in South Africa and internationally, and then makes proposals for the establishment of a system of police-custody monitoring for South Africa.

2. THE NORMATIVE FRAMEWORK FOR INDEPENDENT MONITORING OF POLICE DETENTION

2.1 International framework

International and continental human rights instruments impose a positive duty on South Africa to take measures to ensure the fulfilment of its human rights obligations. In a police custody context, this includes the provisions of international and regional human rights treaties on the right to life, liberty and security of the person, freedom from arbitrary arrest and detention, the guarantee of procedural safeguards during custody, habeas corpus, the humane treatment of detainees and respect for their inherent dignity, and freedom from torture and other ill-treatment.¹¹ Further specific rights and protections are afforded groups identified as having special needs or being particularly vulnerable to human rights abuses in a criminal justice context because of their status, or an intersection of one or more statuses.¹²

A state's obligation to ensure fulfilment of human rights in the context of police custody has been variously interpreted to require the establishment of mechanisms to enable the thorough, prompt and impartial investigation of all suspected and reported cases of violation of the right to life by the police,¹³

as well as measures to prevent torture and other ill-treatment. The preventive measures are relevant to the issue of independent monitoring of police custody in South Africa. They include measures aimed at combating impunity, such as the establishment of mechanisms to ensure that all persons deprived of their liberty have the right to lodge a complaint with a competent, independent and impartial authority,¹⁴ and the establishment of independent external oversight mechanisms with the mandate to conduct unannounced inspections of all places of detention.¹⁵ Accordingly, interpretation of the international human rights framework means that the independent monitoring of police custody is an inherent obligation for South Africa in order to ensure fulfilment of its human rights obligations under the relevant international and regional instruments.

South Africa has signed and ratified key international and continental human rights instruments and is therefore obligated to ensure their application. This commitment to the application of international law is enshrined in the Constitution of the Republic of South Africa (the Constitution), 1996, which requires that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international and foreign law (section 39(1)), with section 199(5) of the Constitution specifically reinforcing this requirement in respect of the security services:

The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

2.1.1 International Covenant on Civil and Political Rights¹⁶

South Africa has committed itself to upholding the International Covenant on Civil and Political Rights (ICCPR).¹⁷ The ICCPR¹⁸ requires states to take measures to protect certain rights, which include the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7), and to uphold the rights of persons deprived of liberty (Article 10). These obligations extend to preventive measures such as monitoring of detention facilities. The United Nations (UN) Human Rights Committee has given greater clarity to the nature of the obligations imposed by the Covenant and has emphasised the need for states to take preventive action. The Committee has noted that it is insufficient to merely prohibit treatment or punishment amounting to torture and cruel, inhuman or degrading treatment and has enjoined states to take other measures in addition to legislative, administrative and judicial steps to prevent such treatment or punishment.¹⁹

2.1.2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) sets out the obligations of states parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture.²⁰ The Committee Against Torture (CAT) has clarified the preventive component of this obligation, noting that monitoring of detention facilities and conditions during detention are a key component of prevention. Preventive measures, the Committee has reiterated, are not limited to those mentioned in the Convention, but include monitoring of detention facilities:

The provisions of article 2 reinforce this peremptory jus cogens norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.²¹

Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this general comment.²²

*Articles 1 to 16 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment. ... Other measures should include any or all of the following: civilian oversight of military and security forces; ... establishing systems for regular and independent monitoring of all places of detention. ...*²³

The Committee has also stressed the relationship between measures to prevent both ill-treatment and torture, reinforcing that measures to address ill-treatment and conditions during detention overlap with measures to prevent torture.²⁴ These pronouncements reinforce the obligations of states parties to the Convention to institute preventive mechanisms, including independent monitoring of all places of detention.

2.1.3 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Optional Protocol to the Convention against Torture (OPCAT)²⁵ and *Other Cruel, Inhuman or Degrading Treatment or Punishment* gives further expression to UNCAT by providing for the establishment of a system of regular visits to places of detention to be undertaken by independent international and national bodies (Article 1). OPCAT requires states parties to establish, or designate, and maintain national preventive mechanisms (NPMs) (Article 3), and to ensure access to places of detention (Article 4). Part II and Part III of OPCAT set out the function and role of the Subcommittee on Prevention of Torture. Part IV addresses in detail the function of NPMs. Whilst South Africa is a signatory to OPCAT (signed in 2006), it has yet to ratify this Protocol. In March 2016, the Human Rights Committee expressed its concerns regarding the lack of institutional independence of oversight bodies and the absence of independent monitoring of places of detention other than prisons.²⁶ It further urged South Africa: to address issues of independence, funding, and powers with regard to complaints of investigative bodies;²⁷ to speed up the ratification of OPCAT; and to establish a system for the *'regular and independent monitoring of all places of detention, as well as a confidential mechanism for receiving and processing complaints lodged by persons deprived of their liberty ... and improve conditions of detention'*.²⁸ These calls for the strengthening of systems of independent monitoring of police cells and for the adoption of OPCAT have also been made by the South African Human Rights Commission (SAHRC)²⁹ and civil society organisations.³⁰

2.1.4 African Charter on Human and Peoples' Rights

South Africa is a signatory to the African Charter on Human and Peoples' Rights, which binds it to adopt legislative and other measures to give effect to the rights contained therein (Article 1). Relevant to this discussion are: Article 4, which recognises the right to life and the integrity of the person; Article 5, which prohibits, among other things, torture or cruel, inhuman or degrading punishment or treatment; and Article 6, which articulates the right to liberty and security of the person and prohibits arbitrary arrest or detention.

The African Commission on Human and Peoples' Rights (ACHPR) has raised concerns regarding South Africa's failure to ratify OPCAT and to address conditions during detention. The ACHPR has urged South Africa to:

- Ratify OPCAT and establish the NPM, as well as fully comply with the Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines);³¹
- Allow non-governmental organisations (NGOs) to visit detention centres, other than for training and research purposes; and
- Make use of the Commission's Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) in order to deal with the challenges of arbitrary arrests and pre-trial detention.³²

Civil society organisations have been vocal in critiquing South Africa's state report, noting its failure to mention the absence of regular visiting and monitoring of conditions during police detention in South Africa.³³

The Luanda Guidelines³⁴ were developed by the ACHPR as part of its mandate to formulate standards, principles and rules for states parties on which to base their national legislation (Article 45(1)(b)). The Luanda Guidelines address: arrest; police custody; pre-trial detention; registers for use following arrest and detention; procedures for serious violations of human rights during police custody and pre-trial detention; conditions during police custody and pre-trial detention; vulnerable groups; accountability and remedies; and implementation measures. The Guidelines further specifically address the need for independent oversight and monitoring of police detention facilities:

42. Monitoring mechanisms

- a. *States shall ensure access to detainees and places of detention for independent monitoring bodies or other neutral independent humanitarian organisations authorised to visit them.*
- b. *A detained person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with the above principle, subject to reasonable conditions to ensure security and good order.*
- c. *Access to places of detention shall also be provided to lawyers, and other legal service providers, and other authorities such as judicial authorities and National Human Rights Institutions, subject to reasonable conditions to ensure security and good order.*

2.2 Domestic framework

The South African legal framework provides a clear normative structure articulating the responsibilities of the state to prevent torture or cruel, inhuman or degrading treatment or punishment of persons deprived of their liberty. The Bill of Rights (as contained in Chapter 2 of the Constitution) sets out the fundamental rights of persons deprived of their liberty. Section 12(1) provides for the freedom and security of the person, including freedom from violence from public and private sources, and freedom from torture, or other treatment or punishment that is cruel, inhuman or degrading. Section 35 provides safeguards for persons deprived of their liberty and establishes the right to humane conditions during detention. In addition to these safeguards, South Africa has enacted the Prevention and Combating of Torture of Persons Act 13 of 2013, thereby complying with its obligations under UNCAT to criminalise torture.³⁵ The Act defines torture and makes provision for offences and penalties, sentencing considerations, extraterritorial jurisdiction, education and awareness. The requisite oversight and monitoring mechanisms, which give effect to the prevention obligations of the state, are provided for through a range of institutions. An overview of these institutions is given below, and some of the gaps and challenges identified by research over the past years are indicated.

2.2.1 Independent Police Investigative Directorate

The Independent Police Investigative Directorate (IPID) is responsible for the investigation of deaths in police custody and 'as a result' of police action and other serious cases of criminality and corruption.³⁶ However, the change in mandate of IPID from that of its predecessor, the Independent Complaints Directorate (ICD), also saw the cessation of cell inspections previously undertaken by the ICD. Under the ICD, provincial offices carried out cell inspections,³⁷ their purpose being preventive in nature.³⁸

2.2.2 Civilian Secretariat for Police

The Civilian Secretariat for Police (Civilian Secretariat)³⁹ is responsible for monitoring the performance of the police service, conducting research, working with other oversight bodies, and

for advising and supporting the Minister with regard to performance of the police service. The Civilian Secretariat for Police Service Act 2 of 2011 further provides for the establishment of provincial secretariats in the provinces. The functions of provincial secretariats must be aligned with those of the Civilian Secretariat and include monitoring and evaluating the implementation of policing policy in the provinces, evaluating and monitoring police conduct in the provinces, and developing and evaluating safety models and monitoring tools to ensure alignment with the functions of the Civilian Secretariat. The powers of the Civilian Secretariat and provincial secretariats extend to inspections of police stations and, by implication, police cells. Section 9 of the Civilian Secretariat for Police Service Act sets out the powers to access police stations as well as the obligations of police members to assist therein. These are further detailed in the Civilian Secretariat for Police Service Regulations of 11 November 2016. A key mechanism in carrying out the Civilian Secretariat's oversight role is that of police station visits. The Civilian Secretariat and provincial secretariats undertake police station oversight visits as part of their functions in monitoring police performance and conduct. Information from police station visits is captured according to a national monitoring and evaluation tool (NMET), which examines various aspects of a police station, including custody management. The custody management component of the NMET focuses on:

- The condition of cells;
- The number of cells and categories, as well as the consistency between warrants of detention and names of awaiting-trial prisoners;
- The separation of juveniles from adults, the average period of detention for juveniles, and the frequency of visits by the station commander;
- The frequency of meals given to suspects;
- The mechanisms for laying complaints against the police, information on cell escapes, and the number of deaths in holding cells; and
- The presence of contraband material in cells.

However, oversight of police cells remains inadequate. In 2015/2016, the Civilian Secretariat reported a decline in national oversight visits conducted and attributed this to funding constraints. In 2012/2013, 826 visits were conducted compared with 155 in 2011/2012,⁴⁰ 1 219 in 2013/2014,⁴¹ and 585 in 2014/2015.⁴² While the NMET tool is a valuable development, providing an overarching framework to ensure consistency in data collection and so enable national analysis, there are a number of limitations. The focus of the tool is on compliance. The infrequency of station visits and a limited focus on custody management do not render it an effective tool for the protection of rights of detainees. Neither the Civilian Secretariat nor provincial secretariats have the power to enforce their recommendations or take remedial action. Several provincial secretariats augment the capacity of the Civilian Secretariat with regard to custody monitoring.

2.2.3 Western Cape Department of Community Safety

In addition to using NMET to monitor and report on the effectiveness and efficiency of policing,⁴³ the Department has initiated the Expanded Partnership Programme (EPP). The EPP provides a system of civilian monitoring of the police. This is supported by the fact that the Western Cape is the only province in the country which has promulgated provincial legislation on community safety. The Western Cape Community Safety Act (WCCSA) 3 of 2013 provides for the regulation of the functions of the province and Department of Community Safety (DOCS), and for support to the Provincial Secretariat and cooperation with the Civilian Secretariat.⁴⁴ Within the EPP framework, community police forums (CPFs) conduct station visits, including visits to holding cells at police stations. CPFs which are eligible can participate in the EPP, which includes 'first-level' oversight visits to police stations. The EPP is located within the Community Police Relations Division of the Provincial Secretariat.⁴⁵ The main aim of the EPP is to facilitate the 'co-production of civilian oversight data and information' with the CPFs in order to enable them to execute their oversight role as provided for in section 18 of the South African Police Service Act 68 of 1995.⁴⁶ Station visits by CPF members involve

collecting information contained in a set questionnaire, which includes information regarding custody management and cell conditions. This information is monitored and used by the Department to conduct in-depth oversight inspections where necessary. Findings of the inspections by CPFs are also reported to the Provincial Management of the South African Police Service (SAPS).⁴⁷ To incentivise CPFs to participate in the EPP, they may apply for funding, which is determined on the basis of levels of compliance of their monthly EPP reports. CPFs sign a transfer payment agreement (formerly a memorandum of agreement), after which each CPF or Cluster Board is required to submit monthly EPP reports based on predetermined standards of delivery.⁴⁸ CPFs receive R2 500 per month or part thereof based on monthly compliance with key performance indicators, which determines the proportion of the monthly incentive that will be paid out to each CPF. DOCS officials are sent information electronically. Other forms of verification include the entry in the Occurrence Book at the police station, the stamp of SAPS, and details of the date of the visit and name of the officer in charge of the police station. It is left to the discretion of each CPF how the monthly payment is administered and spent.

2.2.4 South Africa Police Service

SAPS conducts inspections of cells as part of its management interventions and compliance functions. SAPS has instituted various measures to address custody management, including through the establishment of policies and strategies.

The Policy on the Prevention of Torture and Treatment of Persons in Custody of 1999⁴⁹ sets out a system of checks and balances and provides guidelines for the treatment of persons in custody. In terms of the implementation of the Policy, all stations are issued with registers, including a Custody Register (SAPS 14) and Notice of Rights in terms of the Constitution (SAPS 14(a)).⁵⁰ In addition, SAPS has developed a number of standing orders governing custody management, including SO. 561 and SO. (G) 361.

The Detention Management Strategy 2016/17⁵¹ is focused on escape from police custody and is designed:

to improve detention management and to reduce the incidents and number of escapes. Although the purpose is to improve detention management the strategy [does] not address the safety of a person in custody as well as unlawful arrest.

This approach is reflected in the SAPS 2014–2019 Strategic Plan, which acknowledges detention management as a strategic risk but focuses primarily on escapes from custody and deaths; hence it lists 'compromised detention management, escapes from and deaths in custody' as strategic risks.⁵² The Management Intervention Division (a new division of SAPS which has incorporated the former Police Inspectorate) undertakes station compliance inspections. In addition, the Custody Management Division under Visible Policing is responsible for the management of police-custody facilities and undertakes inspections of police cells. However, these initiatives are internal measures adopted by SAPS. There is currently no regular independent monitoring of police detention facilities in South Africa beyond the limited compliance monitoring provided through the Civilian Secretariat and provincial secretariats.

3. COMPARISON OF MODELS OF INDEPENDENT POLICE CUSTODY VISITS

Various countries have introduced models to independently monitor police custody facilities. Much of the impetus in respect of such monitoring has been driven by the steady ratification of the Optional Protocol to the Convention against Torture (OPCAT) and the introduction of national preventive mechanisms (NPMs). These mechanisms range from locating this function within national human rights institutions (NHRIs) to the establishment of dedicated, independent visitor schemes.

3.1 National human rights institutions

Internationally, NHRIs are playing a key role in monitoring places of detention. Of 83 states that have ratified OPCAT, 65 have designated their NPM.⁵³ In Africa, at least four countries have designated their NHRIs as the NPM (Togo, Mozambique, Mauritius and Mali). Many NHRIs on the continent have also initiated measures to conduct visits of police detention facilities, including: the Kenyan National Commission on Human Rights; the Sierra Leone Human Rights Commission;⁵⁴ the Algerian Human Rights Commission;⁵⁵ the Comoros National Commission on Human Rights and Freedoms;⁵⁶ the National Human Rights Commission of Mauritius;⁵⁷ the Nigerian National Human Rights Commission;⁵⁸ and the Ugandan Human Rights Commission (which has developed a detention monitoring strategy that pays greater attention to pre-trial detention).⁵⁹

The Office of the Ombudsman of Namibia has integrated a pre-trial detention perspective into the Ombudsman's police inspections.⁶⁰ These inspections include impromptu visits and face-to-face interviews with detainees in the absence of police officials. The Ombudsman has also developed a monitoring tool and training programme for police officers.⁶¹

Whilst there are inherent advantages in designating an NHRI as an NPM⁶² and, by implication, assigning it responsibility to conduct monitoring visits to police cells, there are limitations to this approach. Firstly, the ability of an NHRI to undertake regular visits to every police station is impractical given the geographical spread and the capacity requirements this imposes.⁶³ Secondly, the focus of NHRIs generally is on complaints management and investigation. What is needed, however, is a preventive approach involving visits to places of detention, which has a very different focus, approach and skill to those of NHRIs.⁶⁴ The UN Subcommittee on Prevention of Torture has highlighted this challenge and recommended that, where the functions of the NPM are assigned to NHRIs, the NPM should be located within a separate unit or department with its own staff and budget in order to carry out core NPM work.⁶⁵ Other countries have responded by establishing dedicated systems of independent police custody monitoring. These may form part of a designated NPM, as in the case of the United Kingdom and New Zealand.

3.2 Malawi's Lay Visitors Scheme

Amendments to the Malawian Police Service Act of 2010 provide for the establishment of an Independent Police Complaints Commission and a Lay Visitors Scheme (LVS). The objectives of the LVS are:

- (a) *to observe and comment and report on the conditions under which persons are detained at police stations;*
- (b) *to observe the operation and implementation in practice of constitutional, international, statutory, or other rules governing the welfare of persons detained at police stations with a view to ensuring the observance by police officers of the human rights of the detained persons and securing greater public understanding and confidence in policing matters.*⁶⁶

Malawi has reported that the LVS is 'fully operational'⁶⁷: 'Under the Scheme every police station has a Committee made [up] of local people who have [the] power to inspect the conditions of detention for persons detained at a police station.'⁶⁸

3.2.1 Procedures for visiting and reporting⁶⁹

Lay visitors are expected to visit cells on a weekly basis (with all days of the week and all times of day being covered during a particular period). Lay visitors are provided with accreditation to facilitate access to police custody facilities and have access to all custody areas. Lay visitors are also expected to work in pairs. Visits focus on upholding the constitutional, statutory and administrative rights of detainees, as well

as on their welfare, control and treatment, and may include detainee interviews with permission (out of hearing of the escorting police officer). At the end of visits, lay visitors are required to produce a report, which is submitted to the police station, the Regional Commissioner and Malawi Police Service (MPS) National Headquarters, the Secretary of the Panel and the Community Police Forum (CPF). A quarterly report of all activities and recommendations must be submitted to the Minister, the Inspector General of Police, the Regional Commissioner of Police, the Officer in Charge, and the CPF. Complaints must be recorded in the Occurrence Book, and follow-up reports should be made to the LVS on remedial action taken. The MPS is also required to inform the Chair of the LVS Panel of deaths in custody.

3.2.2 Recruitment and training⁷⁰

The LVS is located within the MPS Community Policing Services Branch and consists of independent panels of at least eight local community members at station level. The Minister of Internal Affairs and Public Security makes appointments and may consult relevant CPFs. Lay visitors must be independent, must be aged between 21 and 65, reside in the area of the Scheme, and must not have been convicted of a punishable offence in the preceding five years or hold a position of judicial officer or police officer, or have formerly been a police officer.

The appointment of lay visitors is for a term of two years, which can be renewed once.

3.2.3 Management and administration⁷¹

Lay visitors are managed by a Lay Visitors Panel, which is expected to meet fortnightly. Monitoring, evaluation and logistical support for the LVS are provided by the MPS and Ministry of Internal Affairs. The LVS Guidelines encourage engagement between the LVS and CPFs, with regular reporting by the LVS to the CPFs, and provide for the attendance of CPF members at LVS Panel meetings.

There are a number of lessons that can be drawn from the Malawi experience, as it provides a rare African model of institutionalised, independent custody monitoring.⁷² As such, the challenges identified and the areas requiring attention with regard to the LVS provide critical learning for the development of an LVS in South Africa.

The challenges include dependence on the police for resources. This is reflected at an operational level in reliance on police members to provide transport, which impacts on the independence of an LVS and its ability to determine when and where to conduct visits. The absence of regular visits and the requirement to give the police prior notice further undermine the ability to provide an accurate assessment of conditions in police custody. A further challenge is the absence of standardised instruments for collecting data during visits (with the focus of visits being primarily observation of conditions) and the fact that detainees are rarely interviewed. The lack of a standard data-collection tool, which is key to providing baseline data to enable measurement over time and to facilitate data analysis, is obviously a concern. Accurate assessments of conditions during detention require a range of tools, including observation, direct interviews with detainees, and the ability to review documentation. The impact (or lack thereof) of the LVS reports has also been noted as a concern, with matters often being outside the direct control of the officer in charge and reports not being actioned at a higher level. An effective LVS must provide for a system by means of which reports can be escalated both within the police service to senior management and to external accountability bodies. Referral systems and accountability mechanisms are integral components of the accountability system, in that they provide for a system to escalate non-compliance and to enforce remedial action. These challenges are indicative of limitations in the operating model of the Malawi LVS, which reveals poor integration with other stakeholders in the criminal-justice sector and the need for a stronger operating framework supported by institutional measures such as police standing orders, monitoring, and a reporting framework. A further limitation of the Malawian model is the process of selection and recruitment of lay visitors. Recruitment is done by CPFs, with elections being conducted by the CPF and police. These challenges are further exacerbated by lack of ongoing training and a code of conduct.

3.3 United Kingdom lay visitors schemes

The United Kingdom was one of the first countries to introduce an LVS. This originated as part of an attempt to restore the community's confidence in the police after the inner-city riots of the 1980s. In practice, it is a system of announced and unannounced visits by accredited civilians to police holding facilities in order to monitor adherence to procedural and other safeguards in police custody facilities. The schemes now form part of the NPM.

The Independent Custody Visiting Association (ICVA), a company funded by the Home Office, promotes the effective provision of custody visiting nationally by raising awareness, providing advice on best practice for independent custody visiting schemes (ICVSs) nationally, and by offering training and support to the police and ICVSs.⁷³ The ICVA is an important resource, as it provides for standardisation of training and can invest resources in developing and improving capacity building in the sector. The centralisation of such a function in South Africa could relieve the pressure on oversight bodies to develop their own training and communication capacity.

3.4 Independent Custody Visitors Scotland⁷⁴

The Independent Custody Visitors (ICVs) of Scotland carries out regular announced visits to police stations and is a designated member of the NPM (since December 2013). The Police and Fire Reform (Scotland) Act of 2012 entrenches custody visiting in Scotland as a statutory function. The LVS is administered by the Scottish Police Authority, which is a public body responsible for holding Police Scotland accountable. The Authority is headed up by an independent board.⁷⁵

3.4.1 Management and coordination

Procedures for visiting and reporting are governed by Scheme Guidelines. Custody visits are arranged through the Coordinator, who prepares rosters for designated police stations. Training is continuous and is conducted at least once a year. ICVs attend local meetings. They are also issued with an official identify card for visits.

3.4.2 Procedures for visiting and reporting

The ICVs make unannounced visits in pairs to police stations (including evenings and weekends). A custody officer accompanies ICVs but remains out of hearing during discussions between ICVs and detainees. A report is compiled according to a set template, which is distributed to the police and the Scottish Police Authority. Visits include checking conditions of detention, health, well-being and legal rights and may include consulting detainees' records. Concerns are immediately discussed with the custody officer.

3.4.3 Recruitment

Recruitment is undertaken through the Scottish Police Authority. To be eligible as an ICV, a person must be 18 years of age or older and have no direct involvement in the criminal justice system. Attempts are made to engage people from different backgrounds and sections of the community. Appointments, which are subject to a six-month probation period, are for a three-year period and are renewable.

The ICVs model operates in a similar way to the Independent Correctional Centre Visitors Scheme in South Africa, which is located within the Judicial Inspectorate for Correctional Services. In the context of the police, the Independent Police Investigative Directorate (IPID) would be its closest counterpart, given that it is the only independent police oversight institution in South Africa which is financially and operationally independent from the South African Police Service (SAPS). However, IPID already faces challenges with regard to its effectiveness in discharging its existing limited mandate⁷⁶ – and an extension of this mandate is unlikely to be supported given the narrowing in its mandate as compared

with that of the Independent Complaints Directorate (ICD) (as discussed earlier). Another consideration would be the Civilian Secretariat for Police, but its lack of independence from the Ministry of Police is a key limitation.

3.5 The Independent Custody Visiting Scheme of the Northern Ireland Policing Board

The Northern Ireland Policing Board is an independent statutory body. The Board supports and administers the Independent Custody Visiting Scheme (ICVS), which is provided for in section 73 of the Police (Northern Ireland) Act of 2000.⁷⁷

3.5.1 Procedures for visiting and reporting

Independent Custody Visitors (ICVs) are volunteers from the community who work in pairs, making unannounced visits to police custody facilities in Northern Ireland at any time of the day or night. Such visits may include interviews with detainees (with their permission). At the end of each visit, a report must be prepared, which is submitted to the Policing Board and the police, and each year the Policing Board publishes a report on the work of the custody visitors. The Policing Board is responsible for deciding on action to be taken.

ICVs work in teams in the area in which they live or work. Each team has a designated police station, and a team coordinator who is responsible for drawing up a programme and assigning teams and visits. ICVs carry out around two to three visits a month, depending on the time available and the area. Custody visiting teams meet monthly or bimonthly to consider reports, visits and problems. Team meetings are held monthly or bimonthly and training is provided three times a year.

3.5.2 Recruitment and training

The Policing Board is responsible for recruitment of candidates and seeks to ensure broad representation. An effort is made to achieve a balance between men and women and between community background and age. Subject to police and reference checks, criteria for eligibility include being over 18 years of age with no direct involvement in the criminal-justice system. ICVs are employed for a three-year period (subject to six months' probation) and their appointment term may be renewed.

There is no payment, as ICVs are volunteers. However, the Policing Board pays their travel costs and out-of-pocket expenses. ICVs are also issued with identification cards. Training is provided by the Policing Board, which includes one day of training for new volunteers. Additional training is provided on an ongoing basis.

The Northern Ireland model gives rise to considerations similar to those discussed above in the context of the Scottish model. South Africa lacks a broad-based, independent police authority with these functions, which would be the obvious home for an LVS.

3.6 Independent Police Conduct Authority of New Zealand

The Independent Police Conduct Authority, an independent statutory body headed by a judge, is responsible for investigation of complaints against the police.⁷⁸ In addition to this function, it is responsible for monitoring of police cells in New Zealand as provided for in an amendment to the Crimes of Torture Act of 1989. The Authority is part of New Zealand's NPM and is one of five bodies of the NPM (which is coordinated by the Human Rights Commission).⁷⁹ Its functions include receiving complaints concerning misconduct and any police practice, as well as investigating incidents in which a police member causes, or appears to have caused, death or serious bodily harm.

Two key policy interventions include a national standard for police custodial facilities, which focuses on the management and care of detainees and was adopted and came into effect in November 2015

(People in Police Detention Policy), and standards governing physical infrastructure of police cells (Police Accommodation Code), which is still to be finalised.⁸⁰ The Authority employs between 25 and 30 full-time staff (including part-time and full-time staff). This staff complement comprises lawyers, investigators and support staff.

Monitoring of places of police detention is one of the four performance areas of the Authority. In terms of its functions, the Authority undertakes audits of police compliance with the People in Police Detention Policy through individual complaints, referrals or as part of its routine visits.⁸¹ In addition, the Authority is working towards a systematic, joint programme of audits with the police, which was due to be operationalised in January 2017. This programme includes analysis of police data, audits together with the police of custody units, and periodic inspections of police and court cells.⁸² The New Zealand model provides synergy between its prevention and investigation mandate and has efficacy. It undertakes similar functions to those of IPID. However, as noted above, the implications of extending IPID mandate to include cell monitoring as New Zealand has done is unlikely to receive support in South Africa given IPID's history and capacity challenges.

4. REVIEW OF EXISTING MECHANISMS OF CUSTODY MONITORING IN SOUTH AFRICA

In South Africa, a range of independent institutions undertake inspections of detention facilities. These include the judiciary, the Portfolio Committees of the National Assembly, and the Independent Correctional Centre Visitors Scheme (ICCVS) of the Judicial Inspectorate for Correctional Services (JICS). In addition, following a court order, the South African Human Rights Commission (SAHRC) conducts visits to the Lindela Repatriation Centre, a detention facility for illegal migrants. In this section, these existing initiatives are reviewed, highlighting the lessons learnt from JICS's ICCVS and its limited focus on police detention facilities.

4.1 Judicial Inspectorate for Correctional Services

The Correctional Services Act 111 of 1998 makes provision for the establishment of JICS, which is headed by an Inspecting Judge (section 85(1)). The objective of JICS is to facilitate inspection of the conditions and treatment of inmates in correctional centres (prisons) in South Africa. It has a head office in Cape Town and four regional offices (Free State/Northern Cape, KwaZulu-Natal, Western Cape and Northern Region), which are responsible for oversight of 243 correctional centres. As at 31 March 2016, the prison population stood at 161 779.⁸³ The core functions of JICS are inspections, investigations, and complaints management. JICS inspectors carry out inspections,⁸⁴ and their findings address conditions of centres⁸⁵ and the treatment of inmates.⁸⁶ During the 2015/2016 financial year, JICS inspected 81 centres (i.e. one-third of correctional centres).⁸⁷ Investigations are also conducted by JICS investigators. Section 15 of the Act requires the head of a correctional services centre to report all deaths in prison to the Inspecting Judge. JICS does not, however, have the mandate to investigate crimes committed in prison. These must be reported to the South African Police Service (SAPS) for investigation.

4.1.1 Independent Correctional Centre Visitors

Section 90 of the Correctional Services Act mandates JICS to deal with complaints by inmates. Independent Correctional Centre Visitors (ICCVs) and staff of the Complaints Unit are responsible for complaints. Complaints are received through ICCV's visits in the region or are submitted directly to the Complaints Unit.

4.1.1.1 Visitors Committees

ICCVs are organised into Visitors Committees (VCs) in the four regions. There are currently 50 VCs. A coordinator supervises each VC. Unresolved complaints are referred to the VC or Inspecting Judge (in the case of urgent matters). The main functions of the VCs are to deal with unresolved complaints, to refer

matters to the Inspecting Judge which they cannot resolve, to organise visit schedules, and to extend and promote community interest and involvement in correctional matters. Meetings of a VC are attended by a range of state institutions, non-governmental organisations (NGOs) and community-based organisations including the Public Protector, Legal Aid, SAPS, the Department of Justice and Constitutional Development (DOJ&CD), community police forums (CPS), and the Departments of Education, Home Affairs, Social Development and Health.

4.1.1.2 Appointment process in respect of ICCVs⁸⁸

ICCVs are appointed through a public call for nominations by organisations. There are currently 310 posts allocated to ICCVs, of which only 217 have been filled.

4.1.1.3 Training of ICCVs⁸⁹

Training includes induction training and paralegal training. Training is provided by JICS training staff who are currently not accredited with the Safety and Security Sector Education and Training Authority (SASSETA). ICCVs are also subjected to performance audits by appointed supervisors.

4.1.1.4 Functions of ICCVs

The functions of ICCVs include observation, interviews with inmates, and visits to all parts of a centre.⁹⁰ Section 93(1) of the Correctional Services Act indicates that 'regular' visits are required, and the Guidelines for ICCVs indicate that prison visits must be conducted at least twice a month. A monthly inspection report is submitted by the ICCVs to the Complaints Unit (Legal Services). The Complaints Unit is responsible for following up on matters referred to in reports, for monitoring whether the Department of Correctional Services (DCS) has attended to requests or complaints, and for mediating their resolution. ICCVs may conduct private consultations with inmates in order to address unresolved complaints. Directives have been developed by JICS to guide the work of ICCVs.

4.1.1.5 Remuneration of ICCVs⁹¹

ICCVs are registered as independent contractors and are required to invoice JICS for services rendered (supported by corroborating evidence).

4.1.2 Key challenges facing JICS

The challenges facing JICS are well documented and the subject of ongoing engagement at the Portfolio Committee on Justice and Correctional Services.⁹² These challenges include a lack of funding,⁹³ the lack of functional independence of the relationship between ICCVs and the DCS, the fact that JICS has no powers to enforce compliance, and the need for more ICCVs and improvements in the functioning of the Lay Visitors Scheme (LVS). These concerns were again articulated more recently by civil society organisations in a 2016 submission to the African Commission on Human and Peoples' Rights, titled *Thematic Alternate Report on Criminal Justice and Human Rights in South Africa*. Notwithstanding ongoing discussions on the strengthening of JICS from as early as 2006, arising from recommendations of the Jali Commission (which addressed strengthening its independence and proposed a prison ombudsman to address the deficits in the JICS mandate),⁹⁴ as well as deliberations in the Portfolio Committee on Justice and Correctional Services, reforms to strengthen JICS have not materialised. Given JICS' functions and its system of ICCVs, its possible role as contender to take on the role of the National Preventive Mechanism (NPM) has been mooted on several occasions. However, in 2011 this proposal was rejected by the former Minister and by the Commissioner of Correctional Services.⁹⁵

4.2 South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is an NHRI established in terms of Chapter 9 of the Constitution. In terms of its powers, it has the authority to conduct visits to places of

detention. The powers of the Commission include monitoring and investigation of human rights. The South African Human Rights Commission Act 40 of 2013 gives further effect to this mandate by setting out the Commission's obligation to monitor compliance with international and regional treaties and conventions⁹⁶ and by assigning the Commission powers to enter, inspect and search premises, search for, inspect and attach documents and other items, and remove articles for purposes of investigation.

In the course of its functions, staff of the SAHRC and Commissioners may undertake visits to detention facilities, including police cells. High-profile investigations have involved the inspection of, inter alia, the Lindela Repatriation Centre (2009)⁹⁷ and the Groenpunt Correctional Centre (2013).⁹⁸ In 2012, the SAHRC instituted proceedings against the Department of Home Affairs relating to the continuing unlawful detention of migrants. The judgment in *South Africa Human Rights Commission and others v Minister of Home Affairs: Naledi Pandor and others*⁹⁹ directed the Minister of Home Affairs and Bosasa to provide the SAHRC with access to the Lindela Repatriation Centre and to detainees on a regular (at least quarterly) basis.¹⁰⁰ The SAHRC continues to conduct inspections of the Centre and has an office there. To effectively fulfil its mandate and discharge its oversight functions, the SAHRC has obtained support by entering into partnerships with other organisations, for instance Doctors Without Borders and the International Committee of the Red Cross.¹⁰¹ The SAHRC does not have a programme of scheduled visits to places of detention. The SAHRC is also party to discussions with the DOJ&CD regarding its role in the establishment of the NPM, a requirement for when South Africa ratifies the OPCAT.

4.3 Judicial oversight

Judges and magistrates also have the authority to visit places of detention. Section 99 of the Correctional Services Act 111 of 1998 provides for a judge or magistrate to obtain access to a correctional centre at any time:

99. Access to correctional centres:

- (1) *A judge of the Constitutional Court, Supreme Court of Appeal or High Court, and a magistrate within his or her area of jurisdiction, may visit a correctional centre at any time.*

- (2) *A judge and a magistrate referred to in subsection (1) must be allowed access to any part of a correctional centre and any documentary record, and may interview any inmate and bring any matter to the attention of the National Commissioner, the Minister, the National Council or the Inspecting Judge.*

In 2009, judges of the Constitutional Court instituted a structured system of prison visits, commencing in 2010. In terms of this programme, each judge is allocated a number of prisons to visit per year. Prisons are usually notified of the intended visit. A report is then compiled which is made public and is submitted to the Minister of Correctional Services, the National Commissioner for Correctional Service, the Portfolio Committee on Justice and Correctional Services and the Inspecting Judge. The objectives of visits include enabling judges to be informed about prison conditions and how prisons work, assisting in the monitoring and improvement of prison conditions, and providing feedback to JICS, the National Commissioner, the Minister and the Parliamentary Portfolio Committee. The programme lends value to the oversight architecture of custodial facilities but is limited in coverage (prison visits are dependent on individual judges taking the initiative and the programme is limited to the Constitutional Court). A further limitation of this initiative is the ability of judges, given that they are acting in an ex officio capacity, to follow up and enforce their recommendations. Notwithstanding this, the fact that reports are made public add weight to efforts to highlight conditions in prisons, which efforts are given credence owing to the stature of the Constitutional Court and the independence of the judiciary. This makes judges 'powerful advocates for [the] humane treatment of prisoners'.¹⁰² A further advantage of the programme is that it sensitises judges to the impact of court processes and delays in the administration of justice on the lives of detainees.

NGOs have been campaigning to extend the reach of these initiatives, through the One Judge One Jail Campaign, to High Court judges as well, thereby enabling greater oversight of prisons.¹⁰³

4.4 Parliamentary committees

Other mechanisms of police oversight include the Portfolio Committees of the National Assembly. These committees are equipped with powers which permit them to visit custodial facilities (including prisons and police stations) as part of their functions as contained in the Rules of the National Assembly. In addition, section 99(3)(a) of the Correctional Services Act 111 of 1998 makes provision for the members of the Portfolio Committee on Justice and Correctional Services, the responsible committee of the National Council of Provinces and the National Council for Correctional Services to have unrestricted access to prisons, including access to documentation and records, in order to exercise the functions. The Portfolio Committees for Justice and Correctional Services and Police undertake regular visits to correctional centres and police stations, respectively. The Portfolio Committee on Police as well as individual members of the Committee conduct both announced and unannounced visits to police stations as part of the Committee's formal oversight programme.¹⁰⁴ These visits are conducted using a station-monitoring tool, which includes oversight of police cells.

The measures discussed above do not constitute adequate monitoring of police facilities, or police cells in particular. Currently, judicial officers do not visit police cells as part of the existing programme. Furthermore, whilst the National Assembly's Portfolio Committee on Police and the standing committees on police in the provincial legislatures do undertake oversight visits to police stations, their focus is on compliance rather than prevention. These oversight visits are conducted quarterly, with committees only being able to reach a small number of police stations. The focus of the visits is also on a broad range of issues, and, therefore, custodial facilities are not adequately addressed. Furthermore, oversight visits are, in the main, announced and are conducted during working hours during the week. Similarly, police station inspections undertaken by the Civilian Secretariat for Police and the provincial secretariats are compliance-driven, addressing a broad range of policing issues. Police stations are thus not subject to consistent or regular inspections.

5. KEY COMPONENTS FOR INDEPENDENT MONITORING OF POLICE DETENTION FACILITIES

Whilst the institutions discussed above provide some oversight of the police in South Africa, they do not meet the requisite standards of independence or provide regular monitoring of police detention facilities. The recognition of the inadequacy of the current framework has been the subject of discussions since 2006 by civil society, the SAHRC and the Department of Justice and Constitutional Development (DOJ&CD).¹⁰⁵ This section draws on these inputs and discussions as well as on recommendations arising from research and the contributions of UN bodies on the key requirements for a robust, regular and independent monitoring system for police cells. The necessary components for an effective independent monitoring mechanism for police detention facilities should include the following:¹⁰⁶

1. *An enabling legal framework*

This must address the location, mandate, powers and functions of the monitoring mechanism.

2. *Functional independence*

What is required is independence, both perceived and actual, which addresses:

- Location, i.e. where the mechanism is housed;
- Accountability (the reporting framework), i.e. to which entity the mechanism reports and its relationship with other oversight institutions (SAHRC, Parliament, etc.);

- Institutional and administrative autonomy, i.e. independent funding arrangements (such as access to finances that are not dependent on the agency being monitored) and administrative capacity; and
- Staff matters, e.g. monitors must be independent.

3. *Powers*

These need to address:

- Access to places of detention and their facilities;
- Access to information on the number of persons deprived of their liberty, the places of detention and location, etc.;
- Access to detainees of choice and privacy of interviews (with safeguards only in the interests of safety), with clear grounds for refusals of access (which must be justified);
- The authority to exercise discretion as to the place and time of inspection (through, for instance, unannounced visits); and
- The capacity to make recommendations.

4. *Legal protections*

These encompass:

- Protections against the application of sanctions in the event of the reporting of information; and
- Safeguards against the publication of the personal data of persons without their express consent.

5. *Resources*

There must be the necessary resources for the performance of functions, namely:

- Financial resources; and
- Human resources, i.e. sufficient staff with the requisite skills and professional knowledge to conduct regular monitoring of police detention facilities, to develop and maintain effective monitoring and reporting instruments, to compile reports, to collect, analyse and report data, and to refer complaints.

6. *Institutional management*

There must be a standard reporting instrument pertaining to data-collection processes and systems, as well as mechanisms to follow up reporting and to monitor the outcomes of complaints and recommendations.

7. *Legal remedies and sanctions*

These must address:

- Lack of cooperation on the part of police officials;
- Failures to implement recommendations;
- Procedures and avenues to escalate cases of non-compliance; and
- Obligations to respond to recommendations.

8. *Relationship to other institutions in the police oversight architecture*

This includes referral systems and processes to address complaints and allegations of abuse as well as obligations in respect of referrals (i.e. feedback/updates).

9. *Operating procedures*

Such procedures should address:

- Minimum requirements regarding frequency of visits (including day and night visits, and visits on weekends and weekdays); and
- Requirements in respect of reporting (to facility management, senior police structures, and oversight structures such as Parliament).

10. *Transparent and clear recruitment criteria*

Such criteria must focus on:

- Addressing recruitment requirements, including impartiality, police clearance, etc.;
- Minimum skills requirements in terms of qualifications and experience of lay persons, as well as in multidisciplinary fields such as health, law, the social sciences and human rights;
- Demographic representivity (including gender, ethnic and minority representation as well as core competencies); and
- Appointment procedures (including the probation period).

11. *Transparent and clear terms of employment*

There must be:

- An approved system for the verification of reports and visits;
- Standard reimbursements for travel and out-of-pocket expenses;
- Clear terms of service setting out the appointment period, the probation period, etc.; and
- An established code of conduct, as well as disciplinary procedures for misconduct and grievance mechanisms.

12. *Management structure and administrative capacity for the effective oversight of monitors*

There must be management systems to manage and coordinate monitors, e.g. a Visitors Committee (VC) to schedule visits, review reports, address unresolved complaints, develop and oversee work schedules, and ensure effective monitoring.

13. *Established guidelines for monitors*

Guidelines setting out procedures and protocols must be compiled, and these need to be updated and reviewed regularly.

14. *Training*

There must be ongoing and updated training programmes with learning materials (accredited with the relevant sector education and training authority (SETA)) for different levels, i.e. new recruits, management, etc.

15. *Peer-learning opportunities for monitors*

Mechanisms must exist for monitors to meet regionally or nationally in order to share experiences and challenges.

16. *Police responsibilities and obligations*

Such responsibilities and obligations encompass:

- The obligation of police authorities to consider and implement recommendations;
- The obligation to cooperate with the mechanism;
- Police nodal points for reporting and addressing problems/challenges reported by the mechanism;
- Standing orders and instructions affirming the obligations of the police, the role of the visiting scheme, and sanctions for non-compliance; and
- The integration of obligations and the role of the mechanism into training programmes.

17. *Data collection*¹⁰⁷

- Data-collection sources include: the monitor's own observations (regarding acts and omissions, including observations of changes in material conditions at different times); interviews with detainees and officials; photographic evidence; and examination of official and police-station records.
- Types of data to be collected include:
 - information on the location of detainees;
 - information regarding the duration of detention;
 - information concerning conditions during detention (including the gathering of empirical evidence on key issues, e.g. family visits, food distribution, and the physical conditions of cells);
 - custody records;
 - shift registers and officers' movements in and around cell areas (including the state and accuracy of record-keeping);
 - information re the accommodation of special needs and re the medical conditions of detainees;
 - complaints lodged against the police; and
 - registers (on the use of force and firearms, on disciplinary measures, on incidents and interrogations, and on the movements of persons in and out of police stations).
- Triangulation methods are key to data analysis and require the cross-checking of data from different sources. Data analysis should seek to identify not just immediate and individual cases but also systemic problems/root causes of ill-treatment. This is key to preventive monitoring and requires making recommendations on how to mitigate or eliminate risk factors and determining how to propose preventive measures.

18. *Public education regarding the mechanism*

Public awareness and education which reinforce the obligations of the police and the rights of detainees, is required.

19. *Annual publication of findings*

Distinctions should be made between: internal reporting (resulting from the operation of the visitors scheme); reports submitted to authorities for action, which may require confidentially and should be made public only when such authorities have replied or adopted a position; and public data submitted in annual reports on the work of the mechanism and on cross-cutting thematic issues. Reports should be submitted to the police and to independent institutions in the oversight architecture, including parliamentary structures responsible for police oversight.

6. RECOMMENDATIONS

The SAHRC reports that it is engaging with the DOJ&CD and is 'in advanced stages of discussions regarding the ratification and assignment of the [NPM] monitoring mechanism within the Commission'.¹⁰⁸ This provides an important opportunity to advocate for the implementation of an independent system to monitor police detention facilities. The above review of existing mechanisms seeks to make an input into this discussion. Drawing on the lessons and challenges experienced by other oversight mechanisms (including the JICS ICCVs) and on international best practice, and with regard to the limitations of current oversight arrangements, the discussion seeks to make a case for strengthening the architecture for police oversight by developing a mechanism for the independent monitoring of police custody facilities.

Given the challenges with the fiscus and the length of time required to formulate new legislation, in addition to the need for South Africa to adopt and comply with the requirements of the OPCAT regarding the establishment of an NPM, a phased approach is recommended. This research paper therefore proposes that an incremental strategy, building on the existing mandates and functions of institutions vested with the relevant power and authority, is the most pragmatic approach. Key to this discussion is the need for an independent monitoring system for police detention facilities to be integrated into, and to complement, the broader array of oversight mechanisms and institutions whose mandates extend to oversight of the police. These relationships should be dealt with in the pending review of the SAPS and of the IPID Act 1 of 2011, as well as in the implementation of the White Paper on Police.

Current legislative authority to conduct independent police station inspections (and cell inspections) is vested in the Civilian Secretariat for Police, CPFs, the SAHRC, Parliamentary Portfolio Committees and judicial officers. The monitoring system proposed herein is comprised of a range of stakeholders whose mandates complement and reinforce one another.

6.1 Proposal for an independent monitoring mechanism for police detention facilities

It is proposed that an independent monitoring system for police detention facilities be comprised of two components, namely a dedicated programme located within the SAHRC and a community lay visitor scheme (CLVS). A key challenge identified is the location of the CLVS. The proposal presents three options, with the first placing the responsibility for administration of the CLVS with the provincial secretariats (Option 1); the second locating the CLVS within the SAHRC (Option 2); and the third locating the CLVS within IPID (Option 3).

6.1.1 Proposed roles and responsibilities

1. *The role of the South African Human Rights Commission*

Proposals have been mooted as to the role of the SAHRC as the NPM, either as the sole NPM or as part of a multibody NPM playing a central coordination role (with or without a monitoring function).¹⁰⁹ Both proposals have legislative, resource and operational implications. However, the Association for the Prevention of Torture proposes that, in either model, it is advisable that the SAHRC retain a monitoring function. The SAHRC has a clear mandate to investigate, monitor, observe and report on human rights violations, including the treatment of detainees and conditions in police custody. Its powers also permit it to access police stations and police cells for the purpose of investigation and for executing its functions. The SAHRC has provincial offices which undertake investigations and make findings, where appropriate recommending remedial action or litigation. In addition, the national office is responsible for the preparation of national reports on the observance of human rights in thematic areas.

Recommendation: *That the SAHRC integrate the monitoring of conditions during police detention into its current strategic focus.*

The SAHRC should integrate the monitoring of conditions during police detention into its current focus area. This would achieve greater impetus in the focus area. It should also strengthen its existing capacity in its provincial offices in order to be able to review and analyse information on conditions during police detention, received through the CLVS and provincial secretariats, and so identify areas for further intervention for the purpose of conducting its own investigations and cell inspections at provincial and national level. The SAHRC should furthermore produce an annual report on its findings on conditions in police custody.

Recommendation: *That the SAHRC develop monitoring capacity at provincial and national level in respect of conditions in police cells.*

In view of the resource constraints and challenges that the SAHRC faces, the Commission should consider alternative measures for developing cell monitoring capacity in order to undertake provincial audits and high-level systemic investigations at national level. Alternative resource capacity could be drawn from civil society. For instance, increasing use should be made of interns (for data management and analysis functions), law graduates and the legal profession more broadly.

Recommendation: *That the SAHRC develop a memorandum of understanding between key stakeholders.*

The SAHRC should develop a memorandum of understanding between key stakeholders to formalise the structure, the operations of the Lay Visitors Scheme (LVS), reporting, information sharing, and referral protocols.

2. The role of communities – lay visitors schemes

The value of community-based visiting initiatives lies in their potential to address issues relating to the credibility of institutions, as well as accountability and ownership. The involvement of communities is also a key principle of the South African constitutional dispensation, which reinforces the role of the public in governance. This is further reflected in the National Development Plan, which advocates the need for an active citizenry and key legislative and policy instruments which reinforce the need for effective systems and partnership mechanisms for community participation, civil society engagement and public-private partnerships. The advantages of LVSs include the reduced cost of the system (which utilises the services and skills of volunteers who are not full-time paid staff) and strengthened relationships between the police and the community – and hence the strengthening of local accountability.

Lessons from the Western Cape Expanded Partnership Programme (EPP) highlight the importance of incentives and administrative systems, and these should be taken into account when considering community structures. The JICS's system of ICCVs also provides important insights into a model that includes laypersons and civil society practitioners. A key consideration in the development of a lay visitor and community-based model is that it should not be a stand-alone mechanism, but must be integrated into 'a wider network of oversight arrangements.'¹¹⁰ This will reinforce the effectiveness of the oversight system as a whole by complementing other institutions and their areas of focus and by strengthening the lay visitor/community model through the provision of reinforcement and support for its functions. The model developed in the Western Cape by the Department of Community Safety (DOCS) through the EPP should be adapted and replicated in other provinces. Moreover, the current

focus of the Station Monitoring Tool can be enhanced in order to address aspects of cell monitoring in greater detail.

In view of the challenge regarding the functionality of many CPFs, consideration should be given to the adaptation of the model in order to allow for other community structures such as community safety forums and NGOs, including advice offices to apply for funding to undertake CPF functions. The CLVS requires clear terms of reference that address recruitment criteria, accreditation, training needs, a code of conduct, reporting, remuneration, monitoring and evaluation, etc.

6.2 Location of the Community Lay Visitors Scheme

6.2.1 Option 1: That the CLVS be coordinated by provincial secretariats for police

Recommendation:

Provincial secretariats should:

- Establish systems for the effective administration and management of lay visitors;
- Utilise the criteria determined in the terms of reference to identify pilot sites for implementation;
- Utilise the criteria set out in the terms of reference to put in place systems to recruit and appoint lay visitors;
- Have dedicated capacity for collecting, analysing and acting upon the information obtained through the CLVS; and
- Ensure that remedial action is escalated to a dedicated team which assumes responsibility for:
 - engaging police management;
 - the referral of complaints to other structures, e.g. IPID in instances of criminality;
 - referrals to the SAHRC for escalation of cases in the event of non-responsiveness on the part of SAPS and/or remedial action in the case of systemic challenges; and
 - assessing the need for further inspections.
- Mechanisms for the escalation of complaints, non-compliance and failure to implement recommendations should address:
 - The strengthening of processes, e.g. escalation to the Provincial Commissioner, the Member of the Executive Council (MEC), the National Commissioner and the Minister as provided for in existing legislation and regulations;
 - The development of memorandums of understanding (MOUs) between provinces and SAPS as a mechanism for improving cooperation (these have in fact been developed in some provinces);
 - The use of existing forums for engagement between provincial secretariats and SAPS in the provinces; and
 - The strengthening of current regulations.

The information from community lay visitors should be integrated into a national database system which monitors, analyses and tracks complaints and their resolution. This system should be standardised across provinces. The provincial secretariats should also utilise data from community lay visitors to identify trends and challenges, and to verify SAPS compliance. This information should also inform the identification of target stations for both station and cell inspections. The existing Station-Monitoring Tool used by provinces can be improved so as to address cell inspections in greater detail. Furthermore, the provincial secretariats should produce quarterly reports on activities and findings of the LVS. These should be submitted to SAPS Provincial Commissioners, SAHRC provincial offices, the Standing Committee on Policing in the provincial legislatures and the Civilian Secretariat for Police at the national level, which should then collate a national report to be tabled with the Minister of Police,

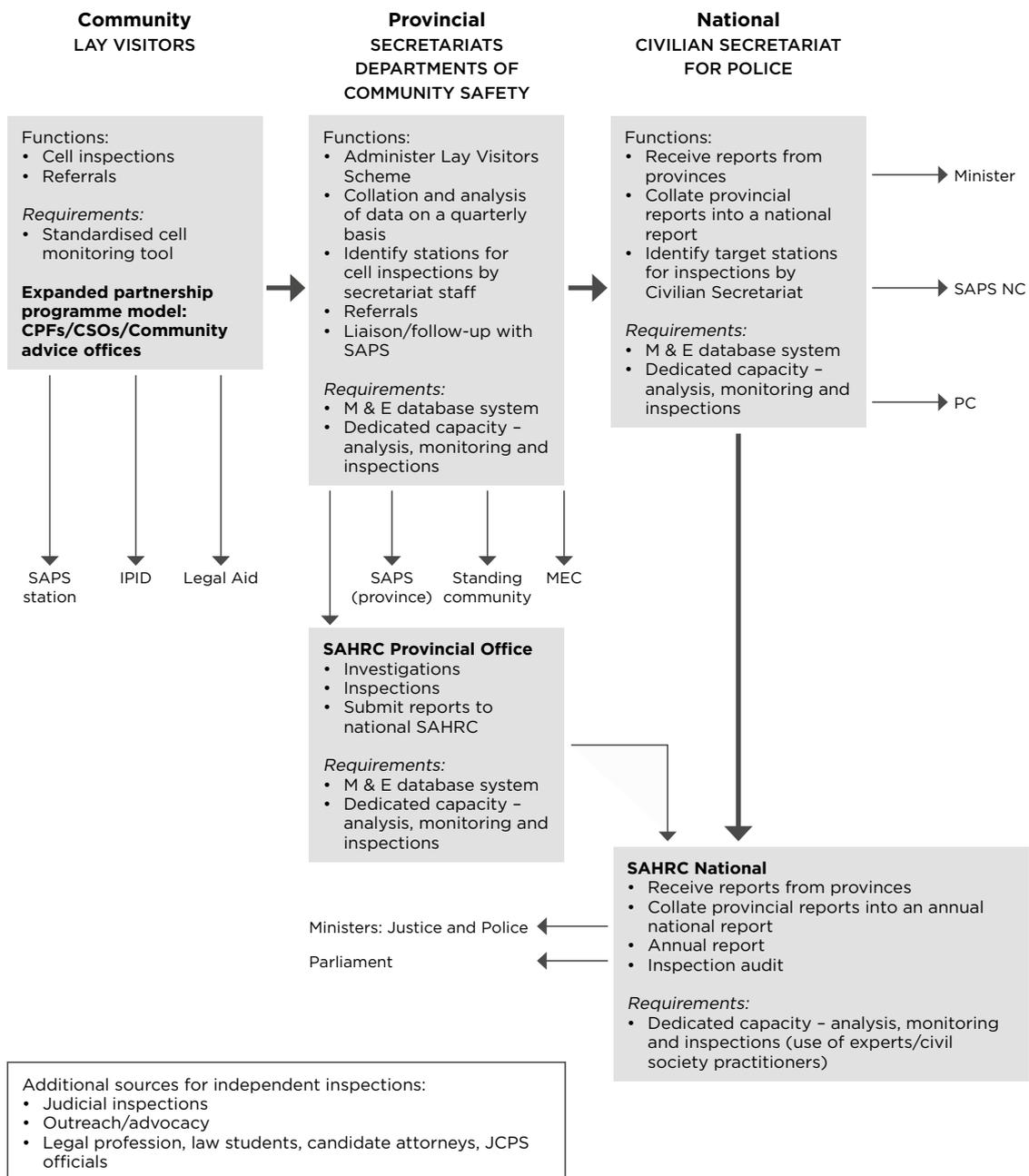
the National Commissioner of the SAPS (to address challenges and outstanding issues), the parliamentary Portfolio Committee on Police, and the National Office of SAHRC.

A key advantage of this option is that the proposal set out below draws on current legal competencies and functions of the respective institutions and therefore requires no legislative reform. Rather, it aims to maximise the functions of the three institutions by improving alignment and cooperation.

A key challenge, however, is the lack of autonomy and independence of the Civilian Secretariat and the provincial secretariats. This may therefore not satisfy the requirements of OPCAT, which directs that each body be independent of the body it oversees. Figure 1 illustrates the functions of the respective components of the monitoring mechanism for Option 1.

Figure 1. Option 1: Proposal regarding the independent monitoring mechanism for police detention facilities

6.2.2 Option 2: Location of the CLVS in the SAHRC



The CLVS could be located in, and administered by, the SAHRC through the establishment of a separate division in the SAHRC with national and provincial units. The challenge with this approach is that it will impose an additional financial, administrative and operational burden on the SAHRC. Given the geographical size of the country and the number of police stations, it would require substantial additional resources to establish new management and operational systems as well as the necessary capacity to conduct regular visits to all police stations.

6.2.3 Option 3: Location of the CLVS in IPID

The location of the CLVS within IPID would be consistent with international precedent discussed above (see the discussion on New Zealand, Northern Ireland and Scotland). Key advantages of this option are that: (1) it would comply with the independence requirements of OPCAT; and (2) IPID already has a regulatory framework in place addressing issues of access, powers and obligations of SAPS. This proposal would, however, be tantamount to a reversal of the earlier decision which saw the narrowing of IPID's functions (in comparison with those of its predecessor, the Independent Complaints Directorate, to the investigation of serious criminality in an effort to improve levels of efficiency. An expansion of IPID's mandate to encompass prevention would require an injection of funding and resources – and IPID is already struggling to receive the necessary resources merely to discharge its current functions.

7. CONCLUSION

A person arrested by the police is in a situation of particular vulnerability.¹¹¹ The police have control of all aspects of a detainee's life, and have all the power, including the power to use legal force. This imbalance of power creates a high-risk situation that could lead to abuse and torture. In addition to safeguards and remedies which address due process, the statutory prohibition of torture and abuse, and the availability of complaints mechanisms, the independent monitoring of police cells is crucial to the prevention of ill-treatment.

This research paper highlights the inadequate oversight of police detention facilities. Such oversight is key to ensuring compliance with humane conditions of detention and the prevention of human rights violations. The police custodial environment is not subject to any form of systematic, independent oversight. The mandate of the IPID (discussed above) is reactive and is limited to the investigation of serious cases of police abuse and to deaths in police custody. Responses to allegations by other institutions (such as the SAHRC) of human rights abuses are ad hoc, and oversight visits of parliamentary and legislature committees are intermittent. Whilst the Civilian Secretariat for Police and the provincial secretariats undertake some form of police station oversight, these inspections are not regular and are primarily compliance-driven. In the Western Cape, the DOCS has embarked on a programme that involves CPF members in police stations visits. This is one example of community involvement, albeit limited in scope. Efforts to address compliance and the protection of detainee rights during custody, as international best practice and human rights standards prescribe, must be accompanied by measures which improve independent civilian oversight of the police and include the implementation of a system which ensures regular and independent visits to police cells.¹¹²

The proposals set out in this research report seek to contribute to the establishment of an independent system for monitoring police cells by: building on the capacity and mandates of existing institutions; enhancing local accountability (through the establishment of a CLVS); and advocating for the strengthening and better coordination of other initiatives which can improve the scope of oversight of police detention facilities. These measures include: the extension of initiatives such as the inspection of prisons by Constitutional Court judges to all judicial officers (including magistrates), with a focus on police cells and not just prisons; the lobbying of law societies and bar councils to participate in police cell visits as part of their pro bono service requirements; and advocating for the integration of a practical service requirement that allows law students to work with the SAHRC in police cell monitoring programmes. These initiatives could go a long way towards augmenting the capacity of

the SAHRC to undertake its own high-level inspections and the drafting of systemic reports on conditions in police custody.

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9. SCHEDULES

9.1 Schedule of South African legislation

Child Justice Act 75 of 2008

Civilian Secretariat for Police Service Act 2 of 2011

Constitution of the Republic of South Africa, 1996

Correctional Services Act 111 of 1998

Independent Police Investigative Directorate Act 1 of 2011

Rules of the National Assembly

South Africa Police Service Act 68 of 1995

South African Human Rights Commission Act 40 of 2013

Western Cape Community Safety Act 3 of 2013

9.2 Schedule of international obligations

African Charter on Human and Peoples' Rights

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention on the Rights of Persons with Disabilities

Convention on the Rights of the Child

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)

Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)

International Covenant on Civil and Political Rights

Optional Protocol on the Convention against Torture

Universal Declaration of Human Rights

ENDNOTES

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