



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



**Submission by Africa Criminal Justice Reform (ACJR) to
the Special Rapporteur on extrajudicial, summary or
arbitrary executions**

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A. Introduction

1. Africa Criminal Justice Reform ([ACJR](#)) is a project of the [Dullah Omar Institute](#) for Constitutional Law, Governance and Human Rights at the University of the Western Cape ([UWC](#)) in South Africa. ACJR engages in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.
2. This submission is in response to the [call](#) from the *UN Special Rapporteur on extrajudicial, summary or arbitrary executions (UNSR)* to collect information on practices for the investigation, documentation and prevention of deaths in custody in the criminal justice context to inform the report to be presented to the Human Rights Council in June 2023. The submission is made by African Criminal Justice Reform ([ACJR](#)), a project of the Dullah Omar Institute at the University of the Western Cape (South Africa).
3. The submission focusses on South Africa and pays particular attention to custody situations under the control of the police and the Department of Correctional Services (DCS). There are other places where people are detained, but fall outside our field of experience and expertise. A brief explanatory note is required as with regards to institutional mandates.
 - a. The *South African Police Service (SAPS)* is the national police and is governed by national legislation¹ under the political responsibility of a Minister of Police. SAPS has some 176 000 employees² and there are 1 185 police stations and SAPS executes some 1.4 million arrests per year, although in 2019/20 this was nearly 2.8 million,³ presumably due to the enforcement of COVID-19 restrictions. The Constitution provides that provincial governments can monitor the performance of SAPS, but their powers are constrained in this regard.⁴ The *Independent Police Investigative Directorate* (IPID; previously the Independent Complaints Directorate - ICD) is tasked

¹ 'South African Police Service Act', Pub. L. No. 68 of 1995 (1995).

² SAPS, 'Annual Report 2021/22' (Pretoria: South African Police Service, 2022), 316.

³ SAPS, 163–65.

⁴ 'Constitution of the Republic of South Africa' (1996), sec. 206(3).

to investigate serious complaints against SAPS and metro-police (see below) (including deaths in custody, deaths due to police action and torture) since police oversight is a constitutional requirement and IPID a creature of statute.⁵ IPID receives a separate budget vote from Parliament. Local authorities may establish municipal police services (MPS) that would deal with a range of offences affecting the municipality (e.g., traffic and by-law enforcement). IPID also holds investigative powers over the MPS and there are six MPS (i.e., Cape Town, Johannesburg, City of Tshwane, City of Ekurhuleni Metropolitan Municipality, eThekweni Metropolitan Municipality, and Nelson Mandela Bay Metropolitan Municipality). Municipalities may also establish Law Enforcement Services to focus specifically on by-law enforcement. The latter is, however, not subject to oversight from IPID. With respect to policing, it is only SAPS that operate places of detention, i.e., police holding cells. Persons arrested by MPS and municipal law enforcement must be handed over to SAPS without delay.

- b. The DCS is a department under the Minister of Justice and Correctional Services with a deputy minister dedicated to the portfolio and governed by the Correctional Services Act (111 of 1998). There are some 235 prisons with a prison population of 155 000, of whom roughly 30% are awaiting trial and the balance sentenced. The Judicial Inspectorate for Correctional Services (JICS) exercises oversight over the DCS and is headed by an Inspecting Judge.⁶ It should be noted that JICS has the mandate to “inspect and report on” the treatment and conditions of detention of prisoners, but does not have investigative powers similar to that of IPID (e.g., search and seizure, and *subpoena* witnesses). This is contested terrain due to JICS’s lack of independence from the DCS and the Constitutional Court has ruled that Parliament must affect the necessary legislative amendments to remedy the problem; it has been given until 31 Dec 2023 to do so.⁷
- c. The National Prosecuting Authority (NPA) is the only entity mandated to institute criminal prosecutions against individuals and companies.⁸ It therefore plays a critical

⁵ Constitution of the Republic of South Africa, sec. 206(6); ‘Independent Police Investigative Directorate Act’, Act 1 of 2011 § (2011).

⁶ ‘Correctional Services Act’, Pub. L. No. 111 (1998), chaps 9–10.

⁷ *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*, No. CCT307/19 [2020] ZACC 26 (Constitutional Court 4 December 2020).

⁸ Constitution of the Republic of South Africa, sec. 179(4); ‘National Prosecuting Authority Act’, Pub. L. No. Act 32 (1998).

role in the accountability architecture of the state and will be alluded to further. Deaths in custody must be seen against an overall backdrop of a *de facto* culture of impunity for rights violations, including deaths in custody.⁹ The impact of oversight agencies in addressing torture and ill treatment remains ultimately dependent on the willingness and ability of the prosecution service to institute and pursue prompt and effective prosecutions.

B. Existing practices

Existing practices for data gathering, analysis and reporting of deaths in custody, including the use of statistics and the disaggregation of data (e.g., by different categories and causes of deaths in custody; place of occurrence (e.g., on remand, in prison, in hospital, etc.); types and legal status of affected populations, etc.), including figures of deaths in custody documented in recent years;

4. Deaths in the custody of SAPS and DCS are subject to mandatory reporting to IPID and JICS respectively.¹⁰ A SAPS official who fails to comply with the mandatory reporting requirements “is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”¹¹ There is, however, no similar provision in the Correctional Services Act, but rather a broad duty on all DCS employees to implement the Act: “The Department and every correctional official in its service must strive to fulfil the purpose of this Act and to that end every correctional official must perform his or her duties under this Act.”¹² A more detailed description of the legal requirements is given in the following section.
5. The SAPS annual reports do not report on deaths in custody, but the IPID annual reports do. The DCS annual reports present national figures on natural and unnatural deaths and may disaggregate it to management region. A management region may include up to three provinces and is thus a large aggregate. In general, the data is reliable, but it is also noted that deaths in custody in DCS annual reports are reported on inconsistently; for example, it may be reported as a ratio, a percentage or a target reduction. **Deaths in custody ought to be reported in the departmental annual reports (or more regularly) in raw numbers per smallest functional unit (police station or prison) per date (dd/mm/yy).**

⁹ L Muntingh and G Dereymaeker, ‘South Africa’, in *Does Torture Prevention Work?*, ed. Richard Carver and Lisa Handley (Liverpool University Press, 2016), <https://www.cambridge.org/core/books/does-torture-prevention-work/F052646B3EFDE26F5D6BF44F34739838>; L Muntingh and G Dereymaeker, ‘Understanding Impunity in the South African Law Enforcement Agencies’, ACJR Research Report (Bellville: Dullah Omar Institute, 2013).

¹⁰ Independent Police Investigative Directorate Act, sec. 29(1)(a); Correctional Services Act, sec. 15.

¹¹ Independent Police Investigative Directorate Act, sec. 33(3).

¹² Correctional Services Act, sec. 96(1).

1.1 Deaths in police custody

6. Suspects in police custody must be brought before a court within 48 hours or on the next court day after the expiry of the 48 hours.¹³ It is only under unusual circumstances that a suspect may be held awaiting trial in a police holding facility and suspects are as rule, if detention is ordered, transferred to a prison under DCS. While the number of people arrested annually is reported by SAPS in its annual reports, this figure is not disaggregated any further with regards to geographical distribution, duration in custody, profile of arrested and detained persons, date and time of death and so forth. In the absence of such data is not really possible to establish trends or risk factors.
7. The IPID annual reports reflect an acceptable level of detail as shown in Table 1, which is a selection of the nationally reported cases to IPID for the period 2012/3 to 2021/2. These are further unpacked per province and reflected as the annual IPID intake per province in the annual reports. These are reported matters prior to investigation.

Table 1

| Year | Deaths in custody | Deaths due to police action | Rape by police official | Rape in detention | Torture & ill treatment | Assault |
|-------------|--------------------------|------------------------------------|--------------------------------|--------------------------|------------------------------------|----------------|
| 2012/13 | 275 | 415 | 146 | 22 | 50 | 4047 |
| 2013/14 | 275 | 431 | 146 | 22 | 50 | 4131 |
| 2014/15 | 244 | 396 | 124 | 34 | 145 | 3711 |
| 2015/16 | 216 | 366 | 112 | 23 | 145 | 3509 |
| 2016/17 | 302 | 394 | 112 | 20 | 173 | 3827 |
| 2017/18 | 201 | 436 | 105 | 9 | 217 | 3661 |
| 2018/19 | 214 | 393 | 124 | 13 | 270 | 3835 |
| 2019/20 | 237 | 392 | 120 | 11 | 216 | 3820 |
| 2020/21 | 217 | 353 | 80 | 15 | 256 | 4228 |
| 2021/22 | 223 | 410 | 99 | 2 | 192 | 3407 |
| Average | 240 | 399 | 117 | 17 | 171 | 3818 |
| Median | 230 | 395 | 116 | 18 | 183 | 3824 |
| Max | 302 | 436 | 146 | 34 | 270 | 4228 |
| Min | 201 | 353 | 80 | 2 | 50 | 3407 |

8. The reported deaths in custody for 2021/2 will be used below to show the nature and detail of reporting, which is regarded as an overall good practice insofar as transparency is concerned. However, questions may still be raised about the rigour of investigations and consequent classification; e.g., the determination of death due to natural causes.

¹³ Constitution of the Republic of South Africa, sec. 35(1)(d).

Nonetheless, as shown in Table 2, 84% of the 223 cases of deaths in custody reported to IPID in 2021/22 fell in three categories, being *Injuries sustained due to vigilante action* (24%); *Natural causes* (32%); and *Suicide* (28%).¹⁴ The IPID annual report also proceeds to selectively unpack the causes per province and the 2021/22 annual report does so in respect of suicide (N = 62), but not the other causes.

Table 2

| Category | Breakdown | N | % |
|--|--|------------|------------|
| Injuries sustained in custody (Inmates) | | 9 | 4,0 |
| | Assaulted | 8 | |
| | Suffocation | 1 | |
| Injuries sustained prior to custody (Crime related) | | 4 | 1,8 |
| | Assault | 1 | |
| | Shot with private firearm | 3 | |
| Injuries sustained prior to custody (SAPS) | | 6 | 2,7 |
| | Assaulted | 1 | |
| | Shot with service firearm | 5 | |
| Injuries sustained in custody (Suicide) | | 6 | 2,7 |
| | Poisoning | 3 | |
| | Suicide (Accidental suicide or other) | 1 | |
| | Suicide (Shooting) | 2 | |
| Injuries sustained in custody (SAPS) | | 2 | 0,9 |
| | Vehicle collision while in Police operated vehicle | 2 | |
| Injuries sustained prior to custody (Vigilantism) | | 53 | 23,8 |
| | Assaulted | 53 | |
| Natural Causes | | 71 | 31,8 |
| | Natural Causes | 71 | |
| Suicide | | 62 | 27,8 |
| | Suicide (hanging) | 62 | |
| Injuries sustained prior to custody (Suicide) | | 10 | 4,5 |
| | Poisoning | 2 | |
| | Shot with private firearm | 1 | |
| | Suicide (Accidental suicide or other) | 6 | |
| | Suicide (Shooting) | 1 | |
| Total | | 223 | 100 |

¹⁴ Independent Police Investigative Directorate, 'Annual Report 2021/22' (IPID, 2022), 42.

9. An important milestone in the investigation process for IPID is when a case docket reaches the stage of being 'decision-ready'. This is defined as follows:

To examine evidential data and produce technical reports, such as post-mortem, DNA, ballistic, histology, the Department still relies on other entities, namely the Department of Health and the National Forensic Science Laboratory. These technical reports are required for the investigation process to be completed (decision-ready), after which a case is referred to either the SAPS and the MPS for implementation of IPID's recommendations or to the National Prosecuting Authority (NPA) for prosecution.¹⁵

10. In 2021/2 it was reported that IPID had a case load (active and backlog) of 16 878 cases of which 4015 (24%) were decision-ready. This clearly illustrates the risks of dependency on other service providers, one of which is indeed the SAPS laboratory. Poor contract management by the SAPS resulted in a huge DNA case backlog at the National Forensic Science Laboratory in recent years which had an impact on IPID investigations.¹⁶
11. The IPID annual reports also report on the results of its recommendations or referrals. It may make recommendations for disciplinary action to SAPS (or an MPS) or it may refer a case to the NPA for prosecution. Feed-back on the disciplinary actions provide detailed information, covering the following: Province, case nr, police station; Nature of complaint as received by IPID; Number of members charged; and Sanction.¹⁷ The data shows that disciplinary convictions are rare and even more so for serious transgressions, such as deaths in custody.
12. As noted, cases may also be referred to the NPA for prosecution and detailed information is provided on this, but the results are less than encouraging with the IPID awaiting feed-back from the NPA on the majority of decisions at the end of the 2021/2 financial year as shown in Table 3.¹⁸ It should be noted that this is for all cases referred by IPID to the NPA and not only deaths in custody of which there were 11 cases.¹⁹ There were, however, no criminal convictions reported for deaths in custody in 2021/2.²⁰

¹⁵ Independent Police Investigative Directorate, 20.

¹⁶ L Matya, 'Parliament Slams National Forensic Laboratory for Failing to Provide Accurate Data on DNA Backlog', *SABC News*, 19 October 2022, <https://www.sabcnews.com/sabcnews/parliament-slams-national-forensic-laboratory-for-failing-to-provide-accurate-data-on-dna-backlog/>.

¹⁷ Independent Police Investigative Directorate, 'Annual Report 2021/22', 64–70.

¹⁸ Independent Police Investigative Directorate, 60.

¹⁹ Independent Police Investigative Directorate, 60.

²⁰ Independent Police Investigative Directorate, 73.

Table 3

| Category | N | % |
|-----------------------|-------------|------|
| Awaiting decision | 1401 | 57,7 |
| Prosecute | 48 | 2,0 |
| Declined to prosecute | 964 | 39,7 |
| Withdrawn | 14 | 0,6 |
| Total | 2427 | |

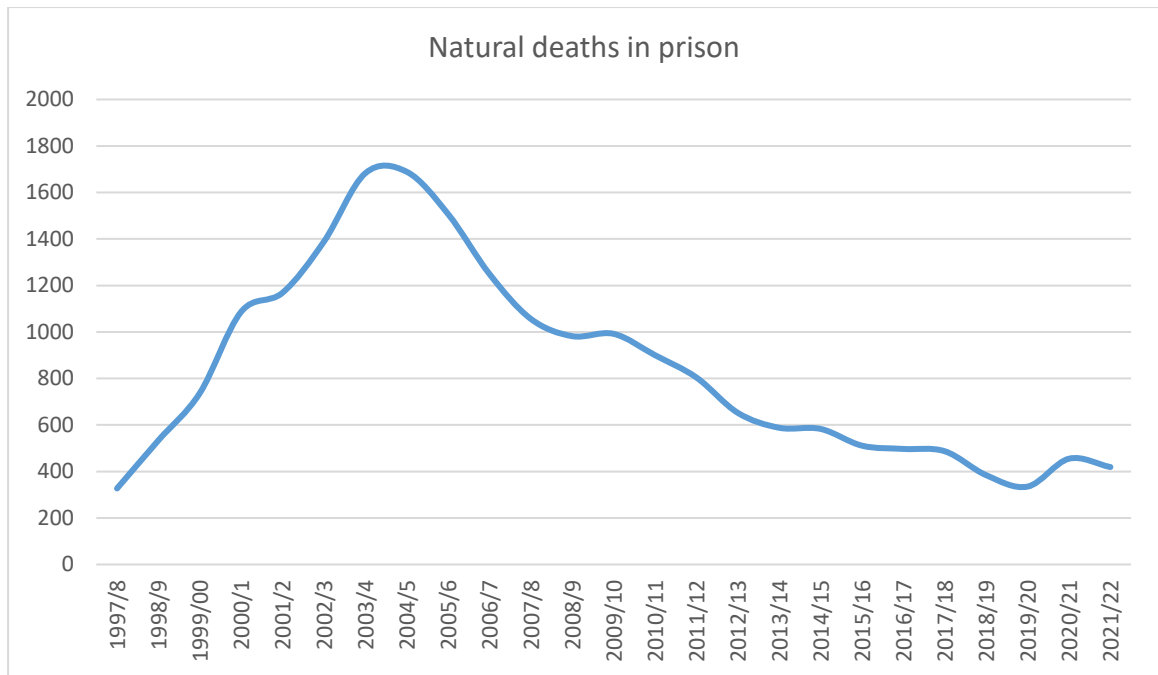
13. **By way of summary, it is concluded that while improvements can be made, the reporting done by IPID, as required by law, is in general satisfactory. It provides a useful level of detail; is collected generally in a consistent manner; is aligned to the legislation and should enable the legislature to use the data to hold the police accountable. The central recommendation would be that all data is disaggregated to police station level per case. Making such data available, especially to the research community and the legislature, in electronic anonymised format would assist greatly in strengthening transparency and accountability.**

1.2 Deaths in prisons

14. The Correctional Services Act requires that all deaths in prison be reported by the Head of the Correctional Centre (HoC) to a medical practitioner, JICS, as well as to the family or next of kin, or any other relative of the deceased. The Act further requires that if the death cannot be certified by a medical practitioner to be the result of natural causes, then such a death must be reported to the police as soon as possible.²¹
15. Fig 1 presents the number of natural deaths recorded by DCS and later JICS since 1996/7. The rapid increase from the mid-1990s to 2004/5 is generally accepted to be the result of AIDS and once ARV treatment became accessible, it resulted in the rapid decline as shown. In 2020/1 there was a slight increase again and this is most likely the result of COVID-19.

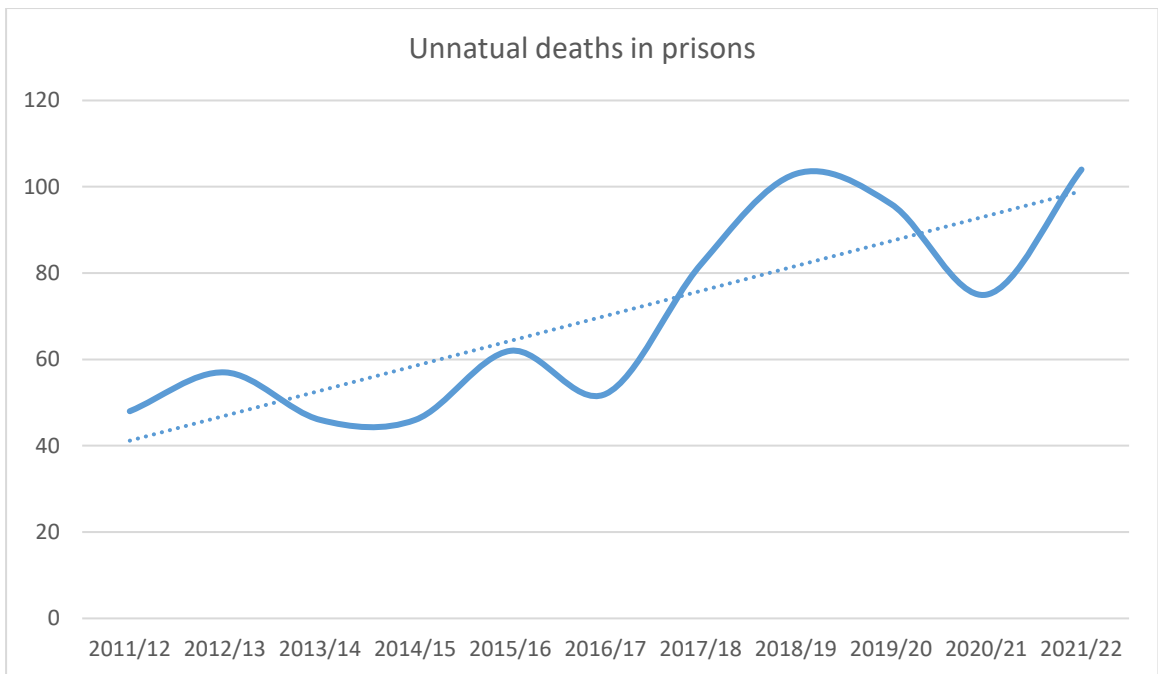
²¹ Correctional Services Act, sec. 15; 'Inquest Act', 58 § (1959), sec. 2.

Figure 1



16. The data on unnatural deaths are presented in Fig. 2 and shows a far more erratic pattern, but still a general upward trend over a ten-year period.

Figure 2

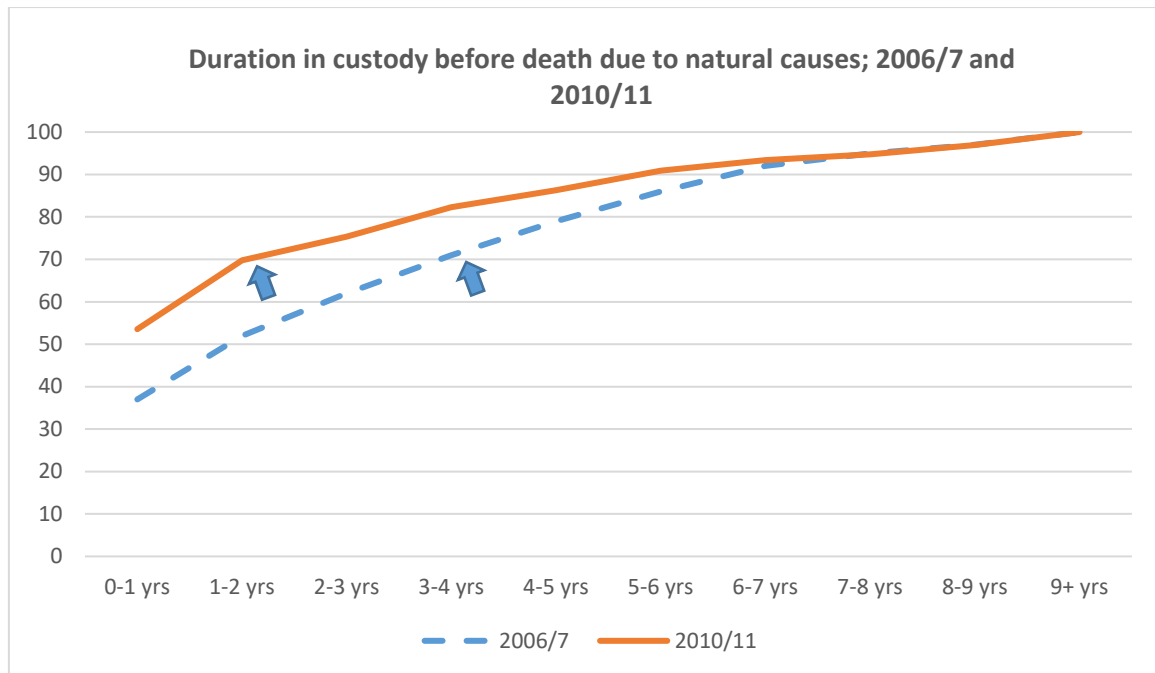


17. Both data sets are disaggregated further in the annual reports of JICS with reference management regions in which the deaths occurred and, in some instances, data is presented

on individual centres where deaths occurred, indicating unusual trends, or disproportionate contributions.

18. A significant shortcoming in the available data is that it is not cross-tabulated with the size of the prison population, and more specifically with the population size of a particular prison and whether the prison is accommodating prisoners within its specified capacity. The issue at stake is whether increases or decreases in deaths are reflections of the prison population size (national or at a particular prison) or whether there are other drivers, such as deteriorating health care and conditions of detention for example.
19. A more accurate reflection would thus be the number of deaths per 100 000 of the prison population. This is, however, also not without problems since the DCS annual reports present the prison population size as a date count (i.e., as on 1 April) and this would thus ignore the size of the prison population on the other days of the year. While this may be a robust and reasonably useful indicator, it is indeed the case that the prison population waxes and wanes and usually reaches its zenith in January-February due to the courts being in recess for the summer holidays. Certain sectors of the prison population may also be less stable than others; such as awaiting trial prisoners compared to sentenced prisoners.
20. The turnover or in- and out-flow of people in the prison system may thus be important in driving prison conditions and thus deaths in custody. It is in particular in the large metropolitan prisons that a high turnover of awaiting trial prisoners is observed. Many are typically detained for two weeks before their applications for bail are decided. The instability in the awaiting trial population may thus also hold important consequences for prisoners' health as well as safety. This is particularly the case in South Africa since the overwhelming majority of prisoners are housed in large communal cells (typically for some 20 people, but frequently overcrowded).
21. Prisoner deaths due to natural causes are not spread evenly across the duration of imprisonment. Even if the information presented below is dated, it provides a valuable perspective on prisoner deaths and should act as a flag to investigate further.
22. JICS undertook two analyses of trends in 2006/7 and 2010/11, respectively, and the results are presented in Figure 3 below. The 2006/7 sample found that 70% of deaths occurred cumulatively after four years in custody. The 2010/11 sample found that this level was reached after only two years in custody.

Figure 3



23. While the total number of deaths had declined significantly, it appears that the time lapse to death has also shortened significantly. Regardless of an exact explanation for this trend, it appears that people were admitted to prisons with a compromised health status (not only arising from HIV infection but also as a consequence of asthma, tuberculosis, diabetes and other illnesses) and that, due to inadequate health care services in the prisons, superficial health status examinations and unhealthy detention conditions, the state of health of many prisoners deteriorates rapidly, leading to their death after a relatively short period in custody.

1.3 National Prosecuting Authority

24. As noted above, the NPA is mandated to institute criminal prosecutions against individual and companies on behalf of the state. It therefore plays an essential role in the overall accountability architecture, and specifically so where state officials are implicated in rights violations. In the above it was reported that IPID refers cases to the NPA for prosecution, which would include cases of deaths in police detention where there is *prima facie* evidence of a crime. The NPA is also required by law to provide feed-back to IPID and the Minister of Police if it intends to prosecute.

25. Table 4 presents a summary of the results of cases referred to the NPA by IPID from 2015/16 – 2021/22; a period of six years covering more than 12 300 cases. The information was sourced

from IPID annual reports. Note that this is all cases and not only deaths in custody and is presented here to illustrate some concerning overall trends.

Table 4

| Province | Awaiting response | Declined to prosecute | NPA Query | Inquest | Prosecute | Withdrawn | Total |
|--------------|-------------------|-----------------------|------------|------------|------------|------------|--------------|
| E-Cape | 1230 | 398 | 38 | 6 | 31 | 4 | 1707 |
| Free State | 1502 | 557 | 0 | 0 | 96 | 6 | 2161 |
| Gauteng | 916 | 93 | 4 | 1 | 8 | 0 | 1022 |
| KZ-Natal | 406 | 73 | 10 | 1 | 2 | 0 | 492 |
| Limpopo | 663 | 214 | 16 | 1 | 34 | 1 | 929 |
| Mpumalanga | 555 | 438 | 35 | 15 | 39 | 1 | 1083 |
| North West | 671 | 286 | 6 | 0 | 42 | 1 | 1006 |
| N-Cape | 824 | 373 | 1 | 0 | 29 | 0 | 1227 |
| W-Cape | 2057 | 538 | 7 | 1 | 55 | 28 | 2686 |
| Total | 8824 | 2970 | 117 | 25 | 336 | 41 | 12313 |
| % | 71.7 | 24.1 | 1 | 0.2 | 2.7 | 0.3 | |

26. The most obvious trend is that in 72% of cases referred, IPID was awaiting feed-back from the NPA. It then appears that cases so referred remain in limbo for years, making it increasingly difficult to prosecute successfully as memories fade, evidence is lost and witnesses may be hard to track down or lose interest. It is also reflective of a lack of urgency in making decisions on serious allegations implicating police officials.

27. The second important trend is that in less than 3% of cases the decision was to prosecute. It is thus a rare instance when police officials are prosecuted for serious crimes committed in the course of their duties.

28. It is at this stage unknown if the NPA provides proper and detailed reasons to the IPID as well as the victim or family of victim, in the event of a death, if it declines to prosecute.

29. **Addressing deaths in custody, requires prompt and effective investigations in order to communicate clearly that perpetrators will be held accountable.**

C. Measures in place

Measures in place, including policies and good practices for investigating, documenting and preventing deaths in custody, in particular:

- Which legal provisions and requirements exist for cases of deaths in custody? (e.g., is an investigation into a death in custody mandatory or discretionary? Who is responsible for the decision and for the investigation?)
- Investigation procedures and accountability mechanisms for deaths in custody (e.g. administrative, judicial or other investigatory body? External oversight?)
- What is the level of forensic medical involvement in the investigation of deaths in custody (e.g., is a full post-mortem investigation required in every death in custody)?
- Availability and use of national or international protocols? (e.g., do investigations follow the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions (1989) and/or The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)?)
- Are there procedures in place for facilitating the participation of victims' families and their access to effective remedies?

1.1. Legal provisions

Prisons

30. The Correctional Services Act requires that when a prisoner dies that the HoC must call upon a medical practitioner to certify the cause of death, as either natural or unnatural.²² Where the medical practitioner certifies that the death was due to unnatural causes, the HoC must report the death to SAPS.²³ An investigation by SAPS is mandatory only in cases of unnatural deaths in prisons.

31. As noted already, the HoC also has an obligation to report all deaths to the Inspecting Judge. Although the Correctional Services Act does not grant JICS investigative powers, the Inspecting Judge may 'for the purpose of conducting an investigation, [the Inspecting Judge may] make any enquiry and hold hearings.'²⁴ The language used in the Correctional Services Act appears to suggest that the Inspecting Judge's decision to investigate deaths in custody is discretionary, in that they "may" investigate the death of an inmate. Under such conditions

²² Minister of Correctional Services, 'Correctional Services Act', Pub. L. No. 111 (1998), sec. 15(1), <https://www.gov.za/documents/correctional-services-act>.

²³ Minister of Correctional Services, sec. 15(2). The head of centre has a duty to report the death in terms of section 2 of the Inquests Act.

²⁴ Correctional Services Act, sec. 90(5).

the powers of the Inspecting Judge will be the same as those of a judge presiding over a commission of inquiry as provided for under the Commissions Act (8 of 1947). It may thus not be the most nimble or effective mechanism.

Police

32. The Constitution requires the establishment of an independent police complaints body and stipulates that “On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police services in the province.”²⁵ The Independent Police Investigative Directorate Act established IPID, as an independent police complaints body to ensure independent oversight of SAPS and MPS. Amongst others, the IPID must investigate any death in police custody.²⁶ SAPS and MPS officials are under a legal obligation to report all deaths to IPID for investigation.²⁷ In terms of the IPID Act, any officer who fails to report a death in custody is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.²⁸ The investigation is regulated by the IPID Act and its accompanying regulations.²⁹
33. IPID’s predecessor, the Independent Complaints Directorate (ICD) had a much broader mandate and the narrowed down focus of IPID seems at least to have brought more focus and improved efficiency.

1.2. Investigation procedures and accountability mechanisms for deaths in custody

Prisons

34. The JICS mandate is to inspect and report on the treatment and conditions of detention of prisoners. It does not have the authority to make bindings decisions on DCS (e.g., compel it to take disciplinary action) or refer matters to the NPA. DCS is also not obliged to respond to

²⁵ Constitution of the Republic of South Africa, sec. 206(6).

²⁶ Independent Police Investigative Directorate Act, sec. 28(1).

²⁷ Independent Police Investigative Directorate Act, sec. 29.

²⁸ Independent Police Investigative Directorate Act, sec. 33(3).

²⁹ Department of Police, ‘Independent Police Investigative Directorate Act: Regulations for the Operation of Independent Police Investigative Directorate’, Pub. L. No. Government Notice No. R. 98 (2012), <https://www.gov.za/documents/independent-police-investigative-directorate-act-regulations-operation-independent-police>.

recommendations from JICS. It relies largely on cooperation with the DCS (and SAPS) and its powers of persuasion. In addition, it submits quarterly as well as an annual report to Parliament (via the Minister of Justice and Correctional Services) and it can thus engage the relevant portfolio committee to exercise its oversight mandate over the executive. In practice, it appears that JICS reports cases to SAPS, make disciplinary recommendations to the DCS and follow up on cases with the NPA.³⁰

35. The limited powers and lack of independence of JICS has been the subject of constitutional litigation as noted above (see para 2(b)).
36. As noted, SAPS conduct official investigations into unnatural deaths in prisons. JICS as the oversight body also investigates deaths in correctional facilities, but it does so with limited powers as noted. There are no official regulations and directives available on JICS investigative procedures into deaths in prisons. The overall impressions gained is that both JICS and DCS are highly reliant on SAPS to conduct investigations. DCS also conducts a parallel investigation into serious matters such as deaths and case files perused indicate that DCS investigations, are done more from an employer-employee perspective and not a criminal justice perspective. The extent to which SAPS is willing and able to conduct thorough and independent investigation into prisoner deaths have been called to into question. Cases have also been observed where the SAPS investigation is highly reliant on the findings of the DCS internal investigation.
37. JICS has its own internal policy and procedures, but this is not publicly available. However, the following extract from South Africa's follow-up report on the CAT Concluding Observations on its Second Periodic Report, sets out the process in respect of deaths in prisons:

“All deaths in custody are reported to the Inspecting Judge under the auspices of the Judicial Inspectorate of Prisons (JICS) by the Department of Correctional Services (DCS). All deaths are enquired into by JICS' Independent Correctional Centre Visitors who obtain copies of the death certificate, BI 1663 and other relevant records. The ICCV [Independent Correctional Centre Visitor] also interviews the medical staff at the centre and peruse the inmate's medical records by completing a pro forma form (Record of Consultation). All documents are forwarded to the JICS' head office, Mandatory reporting unit. All reports received are evaluated and if necessary, referred to the JICS investigative unit. All unnatural deaths due to violence, suicide, and drug overdose are referred directly to the JICS investigative unit who conducts an independent

³⁰ Committee Against Torture, 'Information Received from South Africa on Follow-up to the Concluding Observations on Its Second Periodic Report CAT/C/ZAF/FCO/2' (United Nations, 20 April 2021), para. 3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/121/91/PDF/G2112191.pdf?OpenElement>.

investigation. The outcome of the investigation is reported to the Minister and Parliament in the JICS quarterly and annual reports. JICS also follows such deaths up with the SAPS and the National Prosecution Authority (NPA)."³¹

Police

38. As noted IPID has a statutory duty to conduct independent, impartial and quality investigations of identified criminal offences, including deaths in police custody.³² An IPID investigator has the same powers as that bestowed upon a peace officer or police officials regarding the following processes: the investigation of offences; the ascertainment of bodily features of an accused person; the entry and search of premises; the seizure and disposal of articles; arrests; the execution of warrants; and the attendance of an accused person in court.³³

39. The IPID Act mandates IPID to investigate the following offences:

- Any death in police custody
- Deaths as a result of police actions;
- Complaints relating to the discharge of an official firearm by any police officer;
- Rape by a police officer, whether the police officer is on or off duty;
- Rape of any person in police custody;
- Torture or assault against a police officer in the execution of his or her duties;
- Corruption matters within the police
- Any other matter referred to the IPID as a result of a decision by the Executive Director or, if so requested by the Minister, an MEC or the Secretary for the Police Service as the case may be.
- The Department may investigate matters relating to systemic corruption involving the police.³⁴

40. SAPS and MPS officials, are under a legal obligation to assist IPID to maintain its impartiality and to perform its functions effectively.³⁵ Any police official who fails to notify IPID of an alleged crime by a SAPS or MPS member or fails to cooperate with IPID as required under the

³¹ Committee Against Torture, para. 3.

³² Independent Police Investigative Directorate Act, sec. 2.

³³ Independent Police Investigative Directorate Act, 24(2).

³⁴ Independent Police Investigative Directorate Act, sec. 28(1-2).

³⁵ Minister of Police, 'Independent Police Investigative Directorate Act', Pub. L. No. 1 (2011), sec. 4, <https://www.gov.za/documents/independent-police-investigative-directorate-act>.

IPID Act, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years. The reporting and cooperation obligations of officials are set out in the IPID Act, requiring reporting the listed crimes, providing their full cooperation and availing themselves or any evidence so requested. ³⁶

41. In addition to investigating matters, IPID is obliged to make disciplinary recommendations for administrative action to SAPS³⁷ or refer matters to the NPA for a decision.³⁸
42. The investigation procedures for deaths in police custody are regulated by the IPID Act and in particular the IPID Regulations for the Operation of IPID which also sets out, amongst others, reporting and case processing mechanisms and the investigation of other criminal matters allegedly committed by SAPS and MPS officials.³⁹
43. Regulation 4 of the IPID Regulations, addresses the investigation of deaths in police custody or as result of police action. See below.

Reg. 4, Regulations for the Operation of IPID:

Investigation of deaths in police custody or as result of police action

(1) The investigation of the death of a person in police custody or the death of a person as a result of police action or omission or both must be done in accordance with this regulation.

(2) The Executive Director or the relevant provincial head, as the case may be, must designate an investigator to investigate the death of a person-

(a) in police custody, irrespective of whether or not such death has occurred as a result of the alleged involvement of a member of the South African Police Service or the Municipal Police Services; or

(b) who has died as a result of any action or omission or both on the part of a member of the South African Police Service or the Municipal Police Services.

(3) An investigator designated in terms of sub-regulation (2) must, as soon as is practicable, but within 24 hours of designation-

(a) attend the scene where the death occurred, ensure that the scene is secured in terms of regulation 8, oversee the scene and conduct a preliminary investigation;

(b) record the details of the deceased, including his or her name and surname, age and gender;

(c) identify and record particulars of all potential witnesses for purposes of interviewing them, and in the case of a death in police custody, record the particulars of the persons who had been on duty in the facility at the time when the death occurred;

(d) authorise the removal of the corpse, in consultation with a pathologist if a pathologist is available;

(e) collect, or ensure the collection, by forensic experts, of exhibits for processing by the Forensic Science Laboratory and ensure the proper registration, handling, transportation and disposal of exhibits;

(f) visit the deceased's next-of-kin to inform them of the death and to obtain statements that may assist in the investigation;

³⁶ Independent Police Investigative Directorate Act, sec. 29.

³⁷ Independent Police Investigative Directorate Act, sec. 30.

³⁸ Independent Police Investigative Directorate Act, sec. 7(4).

³⁹ Department of Police, Independent Police Investigative Directorate Act: Regulations for the Operation of Independent Police Investigative Directorate.

- (g) visit all identified witnesses for purposes of obtaining statements that may assist in the investigation;
 - (h) attend the post mortem and advise the person conducting the post mortem of observations made at the scene of death as well as areas that should be concentrated on; and (1) after collecting all evidence, statements and technical or expert reports, if applicable, submit a report on the investigation of the death containing recommendations regarding further action, which may include disciplinary measures to be taken against a member of the South African Police Service or the Municipal Police Services or criminal prosecution of such member, to the Executive Director or the relevant provincial head, as the case may be.
- (4) In the event of a death in police custody that has occurred as a result of the alleged involvement of a member or members of the South African Police Service or the Municipal Police Services, as the case may be, or a death which is the result of the action or omission or both of such member or members, the investigator, when visiting the scene of death, must, in consultation with the Executive Director or the relevant provincial head, as the case may be, make a determination as to whether such member or members must be arrested.
- (5) When effecting an arrest, the investigator must have due regard to the constitutional rights of the person who is arrested and the provisions of sections 39 to 53 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) relating to the arrest of persons.
- (6) An investigation into the death of a person in police custody and the investigation of the death of a person who has died as a result of police action or omission or both must be finalised within a reasonable period, which period may not exceed 90 days after designation, failing which the investigator must give reasons for failure to comply with this period in the report contemplated in sub-regulation (3)(1).
- (7) An investigator designated to investigate a death in terms of this regulation must inform the complainant, and the next-of-kin, if the complainant is not a member of the deceased's next-of-kin, in writing of the progress made with the investigation at least once per calendar month.
- (8) In the event of a late notification of a death in police custody or as a result of police action or omission or both, the investigator must, within a reasonable period, which period may not exceed 30 days of designation-
- (a) conduct a preliminary investigation or proceed with a full investigation;
 - (b) attend the post mortem if it has not yet been conducted;
 - (c) interview witnesses and obtain statements that may assist in the investigation;
 - (d) consider the desirability of reconstructing the scene of death; and
 - (e) submit a report on the investigation containing recommendations to the Executive Director or relevant provincial head.
- (9) For purposes of sub-regulation (8), the investigator must-
- (a) peruse the police docket;
 - (b) take the police docket over for further investigation;
 - (c) finalise and submit the police docket to the relevant Director of Public Prosecutions together with recommendations relating to further actions by the National Prosecuting Authority; and
 - (d) submit a report on the investigation containing recommendations to the Executive Director or relevant provincial head.

1.3. What is the level of forensic medical involvement in the investigation of deaths in custody?

Prisons

44. In prisons, a full post mortem is conducted by the Forensic Pathology Service only in cases of unnatural deaths. The Forensic Pathology Service forms part of the Department of Health. The

level of forensic medical involvement in the investigation of deaths in custody is listed in the Regulations Regarding the Rendering of Forensic Pathology Service.⁴⁰ The Forensic Pathology Services are mandated by law to only investigate deaths that are, or appear to be, due to unnatural causes.⁴¹ The following shall be deemed to be deaths due to unnatural causes, as contemplated in the Inquests Act 1959:

- (a) any death due to physical or chemical influence, direct or indirect, or related complications;
- (b) any death, including those deaths which would normally be considered to be a death due to natural causes, which may have been the result of an act of commission or omission which may be criminal in nature;
- (c) any death as contemplated in section 56 of the Health Professions Act, 1974(Act No. 56 of 1974); and
- (d) any death which is sudden and unexpected, or unexplained, or where the cause of death is not apparent.⁴²

45. Amongst others, the level of forensic pathology involvement/services includes:

- (a) commencing with a scene of death investigation in consultation with the investigating officer and or appropriate South African Police Service member who is on the scene, which includes but is not limited to, taking notes, questioning family and other witnesses, examining the death scene and photographing the deceased or any exhibit or specimens;
- (b) obtaining any information that is relevant to the medico -legal investigation of a death, including medical and social history, records, as well as taking witness statements;
- (c) taking responsibility for the collection of a body and its removal from the scene;
- (d) taking responsibility for the custody of a body from the scene of death until released for burial or cremation, and the processes attached thereto;
- (e) taking into custody, thoroughly documenting and maintaining evidence and specimens relating to a body and any associated items or articles at all times;
- (f) assisting, as far as is possible, with the process of identification of the deceased;

⁴⁰ Department of Health, 'National Health Act, 2003: Regulations Regarding the Rendering of Forensic Pathology Service Government Notice No. R. 359', 23 March 2018, https://www.gov.za/sites/default/files/gcis_document/201803/41524rg10811gon359s.pdf.

⁴¹ Department of Health, sec. 2.

⁴² Department of Health, sec. 1.

- (g) conducting a post mortem investigation, including external and internal examination of a body and retaining of material, tissue or fluids for evidentiary or diagnostic purposes;
- (h) requesting and conducting appropriate special investigations;
- (i) providing medico -legal reports, chain of custody statements, expert testimony and opinions;
- (j) archiving documents, specimens and related materials;
- (k) collecting, reviewing and analysing related data; and
- (l) providing information and advice to health or other government authorities or departments.⁴³

46. The regulations also contain specific provisions relating to the medico-legal investigations of certain categories of unnatural deaths.⁴⁴ After SAPS has been called to the scene of death, it must immediately notify the Head of the Clinical Department or Unit: Forensic Pathology of the region or province, of the deaths of persons who die of unnatural causes whilst in the custody of the Department of Correctional Services.⁴⁵ The post mortem examination may only be performed by a registered forensic pathologist, as designated by the Head of Clinical Department or Unit: Forensic Pathology.⁴⁶

47. There exists no legal obligation for the Forensic Pathology Service to inform JICS of a post mortem examination of persons found dead in correctional facility. This is contrary to the legal obligation placed on the Forensic Service in cases of police custody deaths, where IPID must be informed about the death before a post mortem can be performed.⁴⁷

Police

48. A full post mortem is conducted by the Forensic Pathology Service only in cases of unnatural deaths. The Forensic Pathology Service in South Africa forms part of the Department of Health. The level of forensic medical involvement in the investigation of deaths in custody is listed in the Regulations Regarding the Rendering of Forensic Pathology Service.⁴⁸ The Forensic

⁴³ Department of Health, sec. 3.

⁴⁴ Department of Health, sec. 18.

⁴⁵ Department of Health, sec. 18(1)(b)(c).

⁴⁶ Department of Health, sec. 18(2).

⁴⁷ Department of Health, sec. 18(3).

⁴⁸ Department of Health, 'Forensic Pathology Service Regulations'.

Pathology Services are mandated by law to only investigate deaths that are, or appear to be, due to unnatural causes.⁴⁹

49. The same requirement in the Inquests Act 1959 applies to unnatural deaths in police custody as to prisons set out in the above and need not be repeated here.
50. The Regulations contain specific provisions relating to the medico-legal investigations of certain categories of unnatural deaths.⁵⁰ SAPS is under a legal obligation to notify the Head of the Clinical Department or Unit: Forensic Pathology of the region or province, of deaths of persons who die whilst detained by the SAPS or who died as a result of police action.⁵¹ The post mortem examination may only be performed after IPID has been informed of that death.⁵² The post mortem examination may only be performed by a registered forensic pathologist, as designated by the Head of Clinical Department or Unit: Forensic Pathology.⁵³
51. The decision by a medical practitioner to declare a death as due to natural or unnatural causes is evidently a key one, since a declaration of an unnatural death sets in motion a chain of events drawing attention to the death that may have adverse implications for those in charge of custody. There may thus be an incentive to have an unnatural death declared as a natural one.
52. Two immediate measures are proposed to ensure that deaths are correctly classified. The first is that all deaths in custody are subject to a post mortem. This is in our view the desirable route forward and is indeed implementable. The second option is to make the process of death classification as natural more rigorous by, for example, requiring it needs to be confirmed by two medical practitioners, of which at least one must not be in the employ of, or contracted by SAPS or DCS.

1.4. Are there procedures in place for facilitating the participation of victims' families?

Prisons

53. There are limited procedures in place for facilitating the participation of victims' families. This appears to be limited to the notification of the next of kin of the prisoner's death by the HoC

⁴⁹ Department of Health, sec. 2.

⁵⁰ Department of Health, sec. 18.

⁵¹ Department of Health, sec. 18(1)(b)(c).

⁵² Department of Health, sec. 18(3).

⁵³ Department of Health, sec. 18(2).

as noted already and a request for the identification of the body by the Forensic Pathology Services.⁵⁴ Civil remedies are available victims' family and a criminal case can be made against the alleged perpetrators.

Police

54. There are limited procedures in place for facilitating the participation of victims' families. The procedures in place for facilitating participation appears to be limited to the notification of death to the deceased persons next of kin,⁵⁵ and the IPID investigator must inform the complainant, and the next-of-kin, if the complainant is not a member of the deceased's next-of-kin, in writing of the progress made with the investigation at least once per calendar month.⁵⁶ In terms of South African law, civil remedies can be instituted and criminal action can be taken against the alleged perpetrators. In the case of a death in custody, IPID will make a recommendation to the NPA to institute criminal proceedings against the alleged perpetrator, and the NPA will decide whether /not to prosecute the case. IPID can also make disciplinary recommendations.

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⁵⁴ Department of Health, sec. 15(1).

⁵⁵ Department of Health, sec. 4(3)(f).

⁵⁶ Department of Health, sec. 7(7).