Submission by Africa Criminal Justice Reform (ACJR) to the Portfolio Committee on Police on the *Independent Police Investigative Directorate Amendment Bill B21 of 2023*

by

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Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute at the University of the Western Cape. We are grateful for the opportunity to make a submission in response to the Independent Police Investigative Directorate Amendment Bill B21 of 2023 (the Bill).
2. The submission deals with a number of contextual matters, specific amendments addressed in the Bill as well as additional matters regarded as relevant to the work of the Committee.

Preliminary observations

3. We take note of the Portfolio Committee's meeting of 30 August 2023 where the Office of the Chief State Law Adviser was not prepared to certify that the IPID Amendment Bill is consistent with the Constitution.[1] It is not necessary to repeat the State Law Advisor's views here save that attention was drawn to the exclusion of Parliament in the appointment process of the IPID Executive Director.
4. In December 2022 we made a submission to the Civilian Secretariat for Police on the IPID Amendment Bill (2022) in which attention was drawn to the above issue in particular: "The bill then excludes Parliament entirely from the selection and appointment process. This fundamentally undermines independence and accountability of IPID and places it squarely under the control of the Minister.". The version of the bill now before Parliament have not addressed this concern.
5. The Committee's attention is also drawn to the amended section 6A of the IPID Act, the result of Act 27 of 2019, which the President has assented to, but is apparently awaiting proclamation. The amendment deals with the removal from office of the Executive Director of IPID. It is submitted that clarification be sought on why the proclamation remains wanting yet the legislature is asked to deal with another amendment to the same section. At face value the proposed section 6 and the existing, but not proclaimed, section 6A appear to pull in opposite directions.

Context

6. Section 2 of the IPID Act draws attention to the constitutional requirement for independent oversight over the police (SAPS and municipal police). The Constitution also requires the state

[1] Parliamentary Monitoring Group, 'PMG Report on the Meeting of the Portfolio Committee on Police on the Independent Police Investigative Directorate Amendment Bill, 30 Aug 2023' (PMG, 30 August 2023), https://pmg.org.za/committee-meeting/37388/.

to "respect, protect, promote and fulfil the rights in the Bill of Rights.".[2] In the context of policing, noting in particular the power to arrest without a warrant and the power to use force, even lethal force, it is in particular the right to human dignity, the right to life and the right to freedom and security of the person that are of particular relevance. Section 12(1) of the Constitution reads:

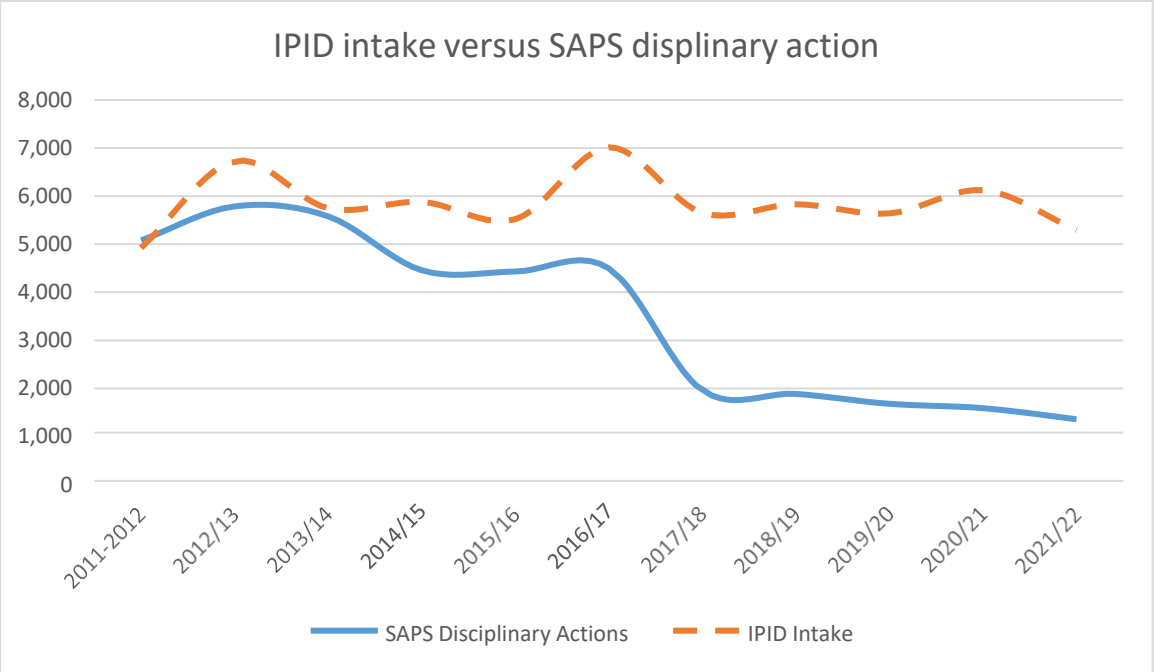
> Everyone has the right to freedom and security of the person, which includes the right -
>
> a. not to be deprived of freedom arbitrarily or without just cause;
>
> b. not to be detained without trial;
>
> c. to be free from all forms of violence from either public or private sources;
>
> d. not to be tortured in any way; and
>
> e. not to be treated or punished in a cruel, inhuman or degrading way.

7. The focus of IPID's investigations, as set out in section 28 of the IPID Act, is consequently closely linked to the provisions in section 12(1) of the Constitution. To this should be added that sections 10 (right to dignity), 11 (right to life) and 12(1)(d-e) (right to be free from torture and cruel, inhuman and degrading treatment or punishment) are non-derogable rights.[3]
8. Over the past ten years we have witnessed a precipitous decline in the number of disciplinary actions against police officials, while the cases taken on by IPID has remained largely stable as indicated in Fig 1. The implication is that SAPS management is simply failing to apply and enforce the disciplinary code. This observation is further supported by the growing number of claims against SAPS for transgressions, such as wrongful arrest and detention. In 2020 it was reported that SAPS had paid out R1.5 billion in the preceding five years for claims concerning wrongful arrest and that disciplinary sanctions are typically disproportionately light.[4] The 2021/22 SAPS Annual Report notes that in that year 4 598 claims were paid out to the value of R470 499 122 of which R346 220 870 (or 73.5%) were for wrongful arrest and detention.[5] The problem is thus not a new one, yet SAPS management seems unwilling if not unable to ensure that its officials fulfil its functions within the bounds of the law.
9. The scale on which transgressions by SAPS officials is happening places it well beyond the cliché of a "a few rotten apples spoiling the basket". The causes and results are systemic for which management must take responsibility. It makes little sense for IPID to investigate and

[2] 'Constitution of the Republic of South Africa' (1996), sec. 7(2).
[3] Constitution of the Republic of South Africa, sec. 37(5).
[4] Edwin Naidu, 'Big Payouts, Little Sanction' in SAPS Wrongful Arrest Cases', *IOL*, 18 October 2020, https://www.iol.co.za/sundayindependent/news/big-payouts-little-sanction-in-saps-wrongful-arrest-cases-09b45ef6-df6c-44bb-a5f0-360a92a7450e.
[5] SAPS, 'Annual Report 2021/22' (Pretoria: South African Police Service, 2022), 109.

even the NPA to prosecute, if SAPS management is seemingly oblivious to its constitutional obligations.

Figure 1

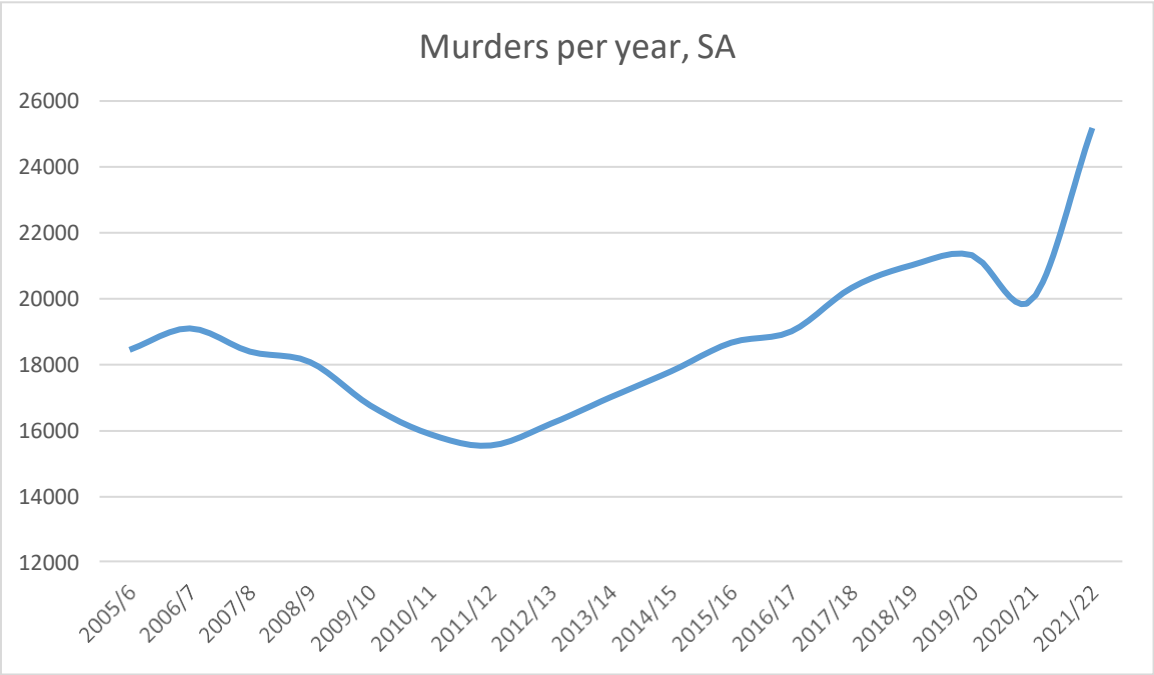


10. As noted above, claims to the value of some R470 million were paid out by SAPS of which R346 million were for wrongful arrest and detention. To place these figures in perspective, attention is drawn to the fact that the total expenditure for IPID in the same year was R347 million.[6] In short, what SAPS paid out in claims for wrongful arrest and detention in 2021/22 was nearly the same as the entire IPID budget. Clearly the causes must be addressed in order to correct behaviour of police officials and reduce the burden on the fiscus.
11. The enforcement of discipline rests in the first place with SAPS management and in this regard the accounting officer must comply with Treasury Regulations pertaining to the recovery of losses from officials when they are found liable in law.[7] It is submitted that the Committee requests from SAPS information on losses recovered as required.
12. The most recent IPID Annual Report reflect that 1887 cases were referred to the National Prosecution Authority (NPA) for a decision. It is reported that 34 cases or 1.8% resulted in prosecutions and in 1478 cases (or 78%) IPID is awaiting feed-back. [8]

[6] Independent Police Investigative Directorate, 'Annual Report 2021/22' (IPID, 2022), 12.
[7] National Treasury, 'Treasury Regulations for Departments, Constitutional Institutions and Public Entities', Regulations (Pretoria: National Treasury, 2001), sec. 12.7.
[8] Independent Police Investigative Directorate, 'Annual Report 2021/22', 67.

13. A culture of impunity in SAPS is thus fed from a number of sources: (a) failure by SAPS management to enforce the disciplinary code, (b) losses to the state are seemingly not recovered from the officials concerned as required by Treasury Regulations, and (c) the prosecution of police officials appear, in particular for rights violations, to be a fairly rare event. There is little for trust in the police to improve if police officials are not held to account for transgressions.
14. Other research by ACJR found that there is an association in the data between the number of disciplinary actions against police officials and the murder rate.[9] Simply put, data for the period 2012 to 2022 show that nearly 80% of the murder rate can be predicted by the number of disciplinary actions against police officials (R^2 = 0.7799). In short, this means that more disciplinary action predicts fewer murders. A possible interpretation of this predictive relationship is that disciplinary action is a strong indicator of how well the police service is functioning. Disciplinary action is indicative of and is preceded by a range of measures taken by management (e.g., training, proper supervision, rule setting and ultimately disciplinary action) and also the police officials at operational level. More disciplinary action means that managers are enforcing standards of performance and this leads to better general performance and better policing in general, which results in fewer murders. It is more than likely that it will similarly have a positive impact on the number of serious and violent crimes. It also means that management should also be reacting to minor infractions and not only to serious transgressions.

[9] Lukas Muntingh, 'Murder, Discipline and the Police', *News24*, 2 November 2022, https://www.news24.com/news24/opinions/analysis/analysis-lukas-muntingh-murder-discipline-and-the-police-20221102.



15. The proposed amendments to the IPID Bill must consequently be seen within the context of large-scale systemic and management failures within SAPS. Given that the number of murders has increased dramatically in the past ten years, that trust in SAPS is at an all-time low, and that prosecutions have been a rapid decline, it then raises the question if the proposed amendments are indeed a priority at this stage. The maintenance of day-to-day discipline is and must the responsibility of SAPS management. It is not the task of a specialist oversight agency like IPID to ensure that discipline is maintained in order to establish effective command and control. That responsibility rests with SAPS management. It seems that the systemic challenges faced by SAPS should rather be the focus of attention.

Clause 3

16. Section 206(6) of the Constitution requires that the structure that investigates complaints against the police must be independent. It is a constitutional requirement and the requirement flowing from this is that national legislation must enable this. It is through this lens that all proposed amendments need to be viewed.
17. In *Glenister II* the Court paid particular attention to the issue of independence, noting that there is no constitutional requirement for an independent corruption fighting agency as is the case with police oversight and IPID. It is because there is a direct link between the listed non-

derogable rights noted above, the IPID mandate and the powers afforded to the police that one can demand a higher standard where it concerns independence and oversight.

18. In *Glenister II* the Court noted the structural and functional requirements for independence, but then places much emphasis on the perception of independence and the duty of Parliament to create an institution that "appears from the reasonable standpoint of the public to be independent":

> [206] The main judgment notes that independence requires that the anti-corruption agency must be able to function effectively without undue influence. It finds that legal mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the DPCI has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference.
>
> [207] To these formulations we add a further consideration. This Court has indicated that "the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists.[10] This was said in connection with the appointment procedures and security of tenure of magistrates. By applying this criterion, we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.[11] [emphasis added]

[10] S v Van Rooyen, No. [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (Constitutional Court 11 June 2002).

[11] *Glenister v President of the Republic of South Africa (Glenister II)*., No. [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (Constitutional Court of South Africa 17 March 2011).

19. The proposed amendment by clause 3 to section 4(1) and the insertion of section 4(3) would then be supportive and enabling of this requirement. These set clear requirements that must be applied in assessing the merits of other amendments in the Bill.

Clause 4

20. Clause 4 proposes to amend section 6 with the effect that the Minister appoints the Executive Director of IPID with the concurrence of Cabinet. This is rejected as it structurally undermines the independence of IPID and excludes Parliament from the selection process. No provision is made for any public participation and the selection criteria would easily enable the appointment of former SAPS staff. The appointment of former police staff to police oversight agencies is generally regarded as a less than ideal practice and jurisdictions like England and Canda are drawing at least on a mix of staff from policing and other backgrounds.
21. Having the Minister appoint the Executive Director raises the question of whether IPID can be independent, as required by s 206(6) of the Constitution. The proposed amendment (in section 6(4)) also proposes that the Minister sets the remuneration, benefits and terms of service of the Executive Director. The bill then excludes Parliament entirely from the selection and appointment process. This fundamentally undermines independence of IPID and would seriously damage public perceptions about its independence, as was alluded to above in respect of *Glenister II*.

Clause 7 and 9

22. The Civilian Secretariat for Police Services (CSPS) is an advisory body to the Minister of Police and the functions thereto are set out in the Civilian Secretariat for the Police Service Act in sections 6 and 8. The Secretary is appointed by the Minister and there is fundamentally nothing sinister about the Minister having an advisory body. A similar example exists in respect of the Minister of Justice and Correctional Services with reference to the National Council on Correctional Services.[12] Section 6(1) sets out the functions of the Secretariat and it is not necessary to repeat here, save to note that these relate in broad terms to reporting to the minister on monitoring police performance, policy development and compliance, budget utilisation, SAPS compliance with the Domestic Violence Act and research findings.[13] The CSPS

[12] 'Correctional Services Act', Pub. L. No. 111 (1998), secs 83–84.

[13] Section 6 (1) The Civilian Secretariat must, in order to achieve its objects-

(a) monitor the performance of the police service and regularly assess the extent to which the police service has adequate policies and effective systems and to recommend corrective measures;

has the core task of providing the Minister with advice on systemic issues, such as overall performance, budget utilisation and so forth.

23. The mandate of IPID is fundamentally different. It is there to investigate complaints against police officials and that such complaints relate to misconduct or a criminal offence. Section 2(b) of the IPID Act reads: "(b) to ensure independent oversight of the South African Police Service and Municipal Police Services" and at section 2(d) "to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services".
24. Section 28 of the IPID Act then lists the complaints that IPID must investigate (i.e., deaths in custody, torture and so forth) and these generally relate to serious transgressions. IPID's mandate therefore relate to seeking the truth and enabling the prosecution service (and police internal discipline) to hold to account those police officials implicated in serious violations. The CSPS mandate is fundamentally different – it is not there to investigate and hold accountable, but to provide advice to the executive. This distinction is important when considering the proposed amendments.
25. This distinction is also important as it relates to South Africa's obligations under international law. Article 12 of the UN Convention against Torture (UNCAT) requires States Parties to make sure that there are prompt and impartial investigations when there are reasonable grounds to believe that someone has committed an act of torture or other ill treatment in any territory under the State's jurisdiction. The purpose of investigation is to find evidence of torture and/or other ill treatment so that perpetrators can be held accountable for their actions and the interests of justice may be served. The obligation to investigate is linked to the duty to

(b) monitor the utilisation of the budget of the police service to ensure compliance with any policy directives or instructions of the Minister;
(c) monitor and evaluate compliance with the Domestic Violence Act, 1998 (Act 116 of 1998);
(d) make recommendations to the police service on disciplinary procedures and measures with regard to non-compliance with the Domestic Violence Act, 1998;
(e) consider such recommendations, suggestions and requests concerning police and policing matters as it may receive from any source;
(f) conduct or cause to be conducted any research as it may deem necessary;
(g) enter into either memoranda of understanding or agreements or both, in consultation with the Minister, with civilian oversight groups and other parties and engage such groups and parties to strengthen co-operation between the various role-players;
(h) advise and support the Minister in the exercise of his or her powers and the performance of his or her functions;
(i) provide the Minister with regular reports with regard to-
    (i) the performance of the police service; and
    (ii) implementation of and compliance by the police service with policy directives issued or instructions made by the Minister; and
(j) assess and monitor the police service's ability to receive and deal with complaints against its members.

provide the right to access complaints mechanisms.[14] In its *Concluding Observations* on South Africa's Second Periodic Report to CAT, it noted as follows:

> 33. The State party should . . .(b) Ensure that all allegations of torture, excessive use of force and ill-treatment by law enforcement officials are investigated promptly, effectively and impartially by mechanisms that are structurally and operationally independent and with no institutional or hierarchical connection between the investigators and the alleged perpetrators.[15]

26. The proposed amendments appear to seek a greater centralisation - a blurring of the distinction in roles between IPID and the CSPS, and to bring the former closer to the latter, and thus under closer control of the Minister.
27. The Bill proposes in Clause 7 that section 9(e) be amended to firstly require that IPID review legislative needs in consultation with the Secretariat (an advisory body to the Minister) and then report on such matters to the Minister. The opportunity is then created for the Secretariat to play a gate-keeping function pertaining to legislative needs that IPID may identify. IPID is constitutionally mandated to be independent and must have the freedom to explore the legislative landscape as it sees fit without the requirement that it must do so in consultation with the Secretariat.
28. The Bill in Clause 9 proposes to amend s 16(2) as follows: ''(2) The Executive Director or Secretary, in consultation with one another, may invite any person or a representative from a government Department or Institution, not mentioned in subsection (1), to a meeting of the forum if a particular matter concerns such a person, government Department or Institution.''.
29. It is not clear why the amendment seeks to have an exclusionary effect – if it is a consultative forum, the aim should rather be inclusivity.

Clause 16

30. The Bill seeks to amend section 28 in a number of ways and this requires closer scrutiny.
31. The first question arises from the proposed phrasing of the amendment to s 28(1)(a) "any deaths in **[police]** the custody of a member of the South African Police Service, or a municipal police service". The question is whether it is clear in law when a person is in the custody of a member of SAPS, as opposed to under the control of the police – is this when the person is stopped on the street, placed in a police vehicle, once booked into the cells and so forth. The

[14] M Nowak and E McArthur, *The United Nations Convention against Torture – A Commentary* (Oxford: Oxford University Press, 2008), 414.
[15] UNCAT, 'Concluding Observations on the Second Periodic Report of South Africa' (Geneva: OHCHR, 17 June 2019), para. 33.

Committee's attention is drawn to Article 2(2) of OPCAT, which South Africa has ratified, which noted the following definition of the deprivation of liberty:

> 2(2) For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

32. The deletion of section 28(1)(c) is proposed, which deals with complaints about the discharge of a police firearm. Firearm management is already a problem with nearly two firearms going missing per day in the previous financial year; 712 in total.[16] In 2021/22 a total of 830 complaints concerning the discharge of a firearm were received by IPID, the second highest category of all complaints.[17] This is evidently an important part of the IPID mandate. The memorandum to the bill on this point notes as follows: "The complaint of a discharge of an official firearm has been deleted as it was thought that investigation should only be conducted if the discharge of an official firearm is linked to an allegation of attempted murder. As such, a new type of matter to be investigated by IPID, which is attempted murder in relation to a discharge of an official firearm has been inserted in the Bill.".
33. From the preceding it is already evident that SAPS management is not enforcing discipline and the proposed amendment would only serve to further dilute the seriousness of firearm management violations. Moreover, firearm management is already an acknowledged weakness.
34. It is furthermore not inconceivable that a police official may discharge his or her firearm with the purpose of at least intimidation – it would thus be difficult to prove that there was intention to murder. This would be an unlawful purpose and clearly not within the scope of legal use. To set the bar at attempted murder would simply encourage a culture of further impunity.
35. Attention is furthermore drawn to the definition of torture in the national legislation which does not restrict the crime of torture to physical harm and is inclusive of "severe pain or suffering, whether physical or mental". Setting the bar at attempted murder would simply exclude from the focus of IPID investigations a host of vile acts involving firearms (such as mock executions) that would meet the requirements of torture. As such the proposed deletion of section 28(1)(c) and the insertion section 28(1)(gG) would then be contrary to section

[16] SAPS, 'Annual Report 2021/22', 93.
[17] Independent Police Investigative Directorate, 'Annual Report 2021/22', 38.

28(1)(f)(i) of the IPID Act (as proposed) read with section 3 of the Prevention of Combating and Torture of Persons Act, 2013.

36. The proposed insertion of s 28(1)(f)(ii) seeks to set the bar for investigation at assault with intent to cause grievous bodily harm. This is contrary to the definition of torture referred to the immediately preceding (Act 13 of 2013). It must be emphasised that torture, as defined in our law, includes actions that do not involve physical harm. Threatening to rape a person or harm their family or child may very well meet the requirements of torture and it is simply not acceptable that the bar is set at assaults with the intent to cause grievous bodily harm. It is indeed the indulgence of lesser transgressions that lead to more serious transgressions and that the state has an obligation to take all necessary measures to prevent and combat torture and other ill treatment.[18]

Other matters

37. Since a process of amendment is undertaken, we wish to bring the following additional matters to the Committee's attention as they are of systemic importance. These are listed in brief below:

    a. The quality, scope and depth of reporting by IPID and SAPS to Parliament can be improved. In particular, disaggregated data need to be made accessible. Reporting needs to be done annually per precinct. There is a strong likelihood that a small number of police stations contribute disproportionately to IPID's case load and that targeted investigations, training and management interventions may have a positive impact.

    b. The NPA needs to report to IPID more comprehensively on decisions not to prosecute, or seeming delays to make a decision. The reasons need to be reflected in the IPID annual reports.

    c. There are major concerns about police performance with reference to deaths due to police action (esp. in KZ-Natal). There needs to be a thorough investigation into trends and underlying reasons.

    d. Consideration should be given to delegate some prosecutorial powers to IPID so that it is able to prosecute at least some less serious criminal matters. This may require establishing in-house legal capacity. The NPA Act enables this and possibilities in this regard need to be investigated.[19]

[18] 'UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1987), arts. 2 and 16, https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.
[19] 'National Prosecuting Authority Act', Pub. L. No. Act 32 (1998), sec. 8 (a-b).

e. It remains a fundamental weakness in the human rights architecture that police detention remains without a designated inspection and monitoring mechanism. A recent report by the SAHRC found abysmal conditions of detention at most police stations.[20] The need for such a mechanism was realised more than 25 years ago in respect of prisons and saw the establishment of the Judicial Inspectorate for Correctional Services with its system of Independent Correctional Centre Visitors. It is commonly accepted in the literature that the period immediately after arrest poses the highest risk of torture and ill treatment,[21] yet police detention remains without a basic monitoring and inspection mechanism.

f. Consideration should consequently be given to IPID as part of the National Preventive Mechanism (NPM) under OPCAT, and its powers and functions in relation to the requirements under OPCAT – to conduct regular monitoring visits to police stations. Alternatively, serious consideration should be given to a lay-visitor scheme to enhance transparency around police detention.

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2 Oct 2023

[20] SAHRC NPM, 'The Conditions and Treatment of People in Police Custody in South Africa - Report on Visits to Police Stations by Independent Custody Visitors - 2019-2020' (Johannesburg: SAHRC, 2021), https://sahrc.org.za/npm/index.php/npm-resources/general-reports.
[21] R Carver and L Handley, 'Conclusion', in *Does Torture Prevention Work?*, ed. R Carver and L Handley (Liverpool: Liverpool University Press, 2016), https://doi.org/10.2307/j.ctt1gpcbdt; 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.