CRIMINAL (IN)JUSTICE IN SOUTH AFRICA
A CIVIL SOCIETY PERSPECTIVE
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<tr>
<td>AFU</td>
<td>Asset Forfeiture Unit</td>
</tr>
<tr>
<td>ANU</td>
<td>Australian National University</td>
</tr>
<tr>
<td>ATD</td>
<td>Awaiting Trial Detainee</td>
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<td>CAS</td>
<td>Criminal Administration System</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment</td>
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<td>CCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>CJS</td>
<td>Criminal justice system</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CRC</td>
<td>Criminal Records Centre</td>
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<tr>
<td>CRFSS</td>
<td>Criminal Record and Forensic Science Service</td>
</tr>
<tr>
<td>CROC</td>
<td>UN Committee on the Rights of the Child</td>
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<td>CSC</td>
<td>Community Service Centre</td>
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<td>CSM</td>
<td>Crime Scene Manager</td>
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<tr>
<td>CST</td>
<td>Crime Scene Technician</td>
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<tr>
<td>DCS</td>
<td>Department of Correctional Services</td>
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<tr>
<td>DNA</td>
<td>Di-ribonucleic Acid</td>
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<td>DPP</td>
<td>Director of Public Prosecution</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>DSD</td>
<td>Department of Social Development</td>
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<td>EMS</td>
<td>Exhibit Management System</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FCS</td>
<td>Family Violence, Child Protection and Sexual Offences</td>
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<tr>
<td>GHB</td>
<td>[Assault with intent to do] Grievous Bodily Harm</td>
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<tr>
<td>GWM&amp;E</td>
<td>Government-wide Monitoring and Evaluation</td>
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<td>ICCV</td>
<td>Independent Correctional Centre Visitors</td>
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<td>IMU</td>
<td>Integrity Management Unit</td>
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<tr>
<td>IO</td>
<td>Investigating Officer</td>
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<tr>
<td>IPT</td>
<td>Independent Project Trust</td>
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<tr>
<td>JIOP</td>
<td>Judicial Inspectorate of Prisons</td>
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<tr>
<td>LCRC</td>
<td>Local Criminal Record Centre</td>
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<tr>
<td>NCPS</td>
<td>National Crime Prevention Strategy</td>
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<tr>
<td>NDPP</td>
<td>National Director of Public Prosecutions</td>
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<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
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<tr>
<td>NPA</td>
<td>National Prosecuting Authority</td>
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<tr>
<td>NPS</td>
<td>National Prosecutions Service</td>
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<tr>
<td>OPCAT</td>
<td>Optional Protocol to the Convention against Torture</td>
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<td>PCLU</td>
<td>Priority Crimes Litigation Unit</td>
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<tr>
<td>PEP</td>
<td>Post-exposure prophylaxis</td>
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<tr>
<td>POWA</td>
<td>People Opposing Women Abuse</td>
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<tr>
<td>RAPCAN</td>
<td>Resources Aimed at the Prevention of Child Abuse and Neglect</td>
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<td>SACJA</td>
<td>South African Child Justice Alliance</td>
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<tr>
<td>SACSSP</td>
<td>South African Council for Social Service Professionals</td>
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<tr>
<td>SALRC</td>
<td>South African Law Reform Commission</td>
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<tr>
<td>SAPS</td>
<td>South African Police Services</td>
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<tr>
<td>SCCU</td>
<td>Specialised Commercial Crime Unit</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<td>-------------</td>
</tr>
<tr>
<td>SIU</td>
<td>Special Investigation Unit (of the National Prosecuting Authority)</td>
</tr>
<tr>
<td>SOCA</td>
<td>Sexual Offences and Community Affairs</td>
</tr>
<tr>
<td>SVC</td>
<td>Serious and Violent Crimes</td>
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<tr>
<td>UNICEF</td>
<td>United Nations Children's Fund</td>
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<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<td>UPVM</td>
<td>Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences</td>
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<tr>
<td>VEP</td>
<td>Victim Empowerment Programme</td>
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<td>VSC</td>
<td>Victim Support Centres</td>
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<tr>
<td>WPU</td>
<td>Witness Protection Unit</td>
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PREFACE

Prince Mashele

Crime is one of the scars that blemish the face of post-apartheid South Africa. Some describe South Africa as the world’s crime capital. While this is untrue, it is no hyperbole that the levels of crime in the country have reached exigent proportions.

The 2007/8 crime statistics show a disturbing rise in violent crimes such as house robbery (increased by 13.5 per cent between 2006/7 and 2007/8) and business robbery (that increased by 47.4 per cent in the same period). While murder rates declined by 4.7 per cent between 2006/7 and 2007/8, for more than 18 000 people to be murdered in a year makes South Africa seem like a war zone. This should, of course, be interpreted against the backdrop of South Africa’s history of violence both under apartheid and even before.

Although from 2003/4 to 2008 crime in general dropped by about 24 per cent, this seems not to have registered in the collective consciousness of our nation. The findings of the National Victims of Crime Survey conducted by the Institute for Security Studies in 2007 showed that an overwhelming majority of South Africans did not believe that crime is declining. Analysts have argued that one reason for this is that the trio-crimes of house robbery, carjacking and business robbery have not decreased; and that these crimes impact disproportionately on public perception because of the terror and insecurity they inspire.

How to deal with the crime situation in South Africa is a matter of debate. There are those who argue that priority should be given to addressing the social factors that create the conditions within which crime flourishes. Others believe
fixing the criminal justice system is the solution. It should, however, be said that these are two sides of the same coin. However efficient, a criminal justice system cannot solve the problem of crime if the social conditions that create and sustain high levels of inequality and poverty are not addressed.

In his book, *After Mandela*, Alec Russell argues that poverty…[ensures] a steady supply of new potential criminals. Investigations of carjackings in South Africa revealed these were largely coordinated by syndicates, which relied on desperate young men to steal cars to order and drive them to safe houses.¹

Those who place an emphasis on fixing the criminal justice system as the single most important way to address crime tend to downplay the contribution of socio-economic factors to crime. They would rather prefer harsher punishments for criminals and the tightening of institutional anti-crime mechanisms. This is indeed an old anti-crime approach. In his *Philosophy of Right*, G.W.F. Hegel argued for a punishment-centred approach to crime, based on the belief that

> The injury which the criminal experiences is inherently just because it expresses his own inherent will ... the injury is a right of the criminal, and is implied in his realised will or act.²

In South Africa, there are many who, like Hegel, believe that if we are to rid our country of the scourge of crime, we need harsher punishment for criminals as a dissuasive measure. Among these are those who call for the reinstatement of the death penalty. While it would be absurd to suggest that criminals should not be punished at all, harsher punishment has as yet not eradicated crime anywhere in the world.

Correctly, Karl Marx demurred to Hegel’s punishment-obsessed philosophical approach, and called for attention to be paid to the importance of social factors that complicate systemic interventions in dealing with crime. In this regard, he asked:

> is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones?³

Given South Africa’s high rate of recidivism, this question is relevant.

Indeed, South African prisons are brimming with convicted criminals and suspected offenders. The country boasts the unenviable position of having the
world’s seventh highest number of prisoners, about 166 000 in total while its bed capacity stood at 114 559 in March 2008. The facilities also have to cope with a high number of awaiting-trial detainees, staggering around 50 000. The recidivism rate is worryingly high (estimated at 94 per cent),4 and more work needs to be done to improve the rehabilitation services offered to offenders.

While the South African Police Service has grown exponentially in the recent past (from 120 000 in 2001 to 183 000 in 2009)5 the growth has not addressed the lack of specialised skills in the Service. As Omar shows in Chapter 3, in 2008 only 15 per cent of SAPS members were detectives. There were only 1691 crime scene experts, and 923 forensic experts had to service our entire Republic.

Given the shortage of specialised skills in the SAPS, it is barely surprising that a study conducted by the South African Law Reform Commission in 2000 found that only 6 per cent of serious and violent cases of crime that were tracked resulted in a conviction; three-quarters of the cases did not make it to court; and of those that did go to court, prosecutors withdrew half. The other half of these cases went to trial and only one-quarter of them resulted in convictions.6 This is indicative of a critically ill system.

Between the police and prisons lie courts that also play a critical part in the criminal justice system. If improvements were to be made in this regard, we would probably lessen the burden on the entire criminal justice system. As Iole Matthews, observes in Chapter 5 of this book, ‘Because so many people and departments are involved [in case flow inefficiencies] the problem of delays requires a cohesive and coordinated response from the entire criminal justice system.’

The current state of our court system leaves much to be desired. In his presentation to the Portfolio Committees on Justice and Constitutional Development, and Safety and Security, on 5th August 2008, former Deputy Minister Johnny de Lange made startling revelations.7 He revealed that across the country, regional courts had a 35 per cent case backlog. The hours spent in court were also low (closing at 3h30 daily). The average number of finalised cases by each regional court per month was only seven.

This is a criminal justice system that has a lot in common with a terminally ill patient in need of emergency treatment. An ordinary citizen who reports a criminal case cannot understand that his/her case is not efficiently processed due to systemic hiccups. Citizens rightly expect swiftness and efficiency in the handling of their cases, and they look upon the state to deliver justice.

South Africans expect courtesy and empathy when they make a call to 10111,
Crime Stop or to similar toll free numbers. In crisis situations, they do not understand why a police van or helicopter takes many hours to get to a crime scene. Indeed, the public is not aware that ‘the flying squads are not yet sufficiently staffed and equipped to reach every part of the country … and [that they] are … only operational in the major urban centres,’ as Johan Burger reports in Chapter 2 of this book. Similarly, citizens (both victims and accused) lose patience when courts keep on remanding cases many times before they are processed and finalised.

The public’s lack of understanding of how the arcane criminal justice system should or does work has implications for perceptions of state delivery. As it is observed in Chapter 4 of this book ‘the concept of bail is not well understood by the public whose concern is that suspected perpetrators should be prevented from reoffending.’ The pros and cons of the country’s minimum sentencing regime, as it is pointed out in Chapter 8, are yet to be well articulated for the public fully to comprehend.

This book is one of very few published in post-apartheid South Africa that reflect comprehensively upon a myriad of inefficiencies bedevilling our country’s criminal justice system. The strength of the book lies in the calibre of experts who have contributed chapters. They are experienced researchers, who have done a great deal of research in the criminal justice field. Written with the intention to make a practical contribution, policy makers will find herein important recommendations on how to deal with the complex challenges they face. At the same time, practitioners, academics and students stand to benefit from the wealth of knowledge contained in this book. While it is often taken for granted, basic information as to how South Africa’s criminal justice system works is scantly available in book form; this is another value that this book will add.

As you prepare to read, remember that the book focuses on the criminal justice system – not because we believe that an effective criminal justice system is the only way in which to exorcise the demon of crime. We are quite conscious that any attempt to address the ills that bedevil our criminal justice system would need to be linked to wider efforts aimed at addressing challenges that slacken the pace of our nation towards a safer South Africa. These include poverty, social disintegration and bad performance of important public institutions, particularly the decline of primary and secondary education.

Tswane
July 2009
NOTES

INTRODUCTION

John Cartwright and Clifford Shearing

The term ‘criminal justice system’ is a telling one. It assumes that justice is to be regarded and judged as a system, not merely as an accidental assemblage of disparate and disconnected elements with varied historical origins.

What are some of the consequences or implications of this assumption? From the point of view of the ordinary user/client/victim/citizen – as clearly portrayed in the story told in the first chapter of this book – there are certain expectations as to how an incident should ‘flow’ through the system in an orderly manner. It assumes that it is possible to lay a charge, manage a crime-scene, engage with detectives, conduct interviews and collect evidence, undertake trauma counselling, follow up, prosecute, conduct bail hearings, engage with social services, pass sentence, and incarcerate criminals or impose appropriate alternatives.

This user’s-eye view is a thread that runs through this book, surfacing explicitly now and then to provide a sobering perspective on the massive machinery-of-state response to crime and disorder. The typical citizen is uninterested in departmental boundaries and definitions, and simply wants to see results. But how realistic is the expectation from ‘outside’, and even from within government, that the group of state departments known collectively as the criminal justice system
is indeed an effectively functioning system rather than a shaky and occasionally coordinating assemblage of ‘silos’?

Chapter after chapter provide trenchant examples of the internal and systemic obstacles that impede the creation of the ‘flow’ so much desired by both citizen-users and ‘insiders’: inadequate training in essential and focused skills, poor management of human and physical resources, decisions (such as mandatory minimum sentencing) that are symptomatic of policy driven by sensation and ideology instead of evidence, and which may have seriously damaging unintended consequences.

What, then, are the conditions of governance and relationships that are most likely to create systems out of assemblages? What kind of trans-departmental regulatory or institutional framework might promote and enable the balance of coherence and flexibility that is required, identify systemic blockages and propose sustainable solutions? What kind of agreed ‘rules’ might there be to enable working together?

This collection of focused chapters by deeply engaged practitioners and academics is an attempt to give an unflinching and non-partisan picture of what works, what doesn’t work and what should work in the state-based group of departments that deal in their various ways with criminal justice and closely associated issues. Although critical at times, it is not about blaming.

Three crucial and interconnected points emerge from the book:

• The grouping known as the criminal justice system is an invaluable resource, assembling a diverse range of knowledges and capacities.
• However, these knowledges and capacities are on the whole neither effectively mobilised nor coherently integrated.
• Moreover, there is a whole spectrum of other knowledges and capacities beyond the domain of the state which are insufficiently recognised and even less effectively mobilised and integrated into the broad terrain of safety and security.

Let us consider what the structure of this collection of chapters has to tell us about the nature of institutional relationships. Each chapter may be seen as representing a sub-system within the broader criminal justice system (or an assemblage struggling to be a system), and each in turn is likely to have assemblages/systems within those, which may or not be functioning as mini-silos. The challenges of coherence and integration within these entities are therefore likely to be as press-
ing as the challenges across the wider system.

Consider, for example, the police. Under one metaphorical roof we will find training programmes, a research unit, forensics, detectives, crime scene technicians, regular operational officers, dog units – a world of its own, with its own culture and sub-cultures. What is the key to managing such an assemblage so as to achieve the best possible outcomes for those whom it is intended to serve?

In pursuit of an answer to that question, we must first take a step back and put the whole criminal justice system into an even broader context. The criminal justice system is after all one part of a wider system of the governance of safety and security. We can see this, either implied or explicit, in every chapter of this book. Neither the criminal justice system as a whole nor any of its constituent elements is the sole provider in its focused (we hope) area of activity.

Consider once again the police. The South African Police Services does not and cannot work alone, neither in relation to its state partners nor in relation to civil society. From place to place there is a dynamic (or potentially dynamic) relationship with, for example, other potential partners in the governance of security such as municipal and traffic police, Community Police Forums, private security companies, neighbourhood watches, civic and ratepayers’ associations, business associations and individual informants.

As with the police, so with all the pillars, silos, departments or entities that make up what we call the criminal justice system. In all of them, the responsibilities, activities and engagements that make up their special mandate spill over inevitably into connections with a varied range of civil society entities. Or, to change the perspective, a broad range of civil society knowledges and activities are constantly spilling over into and interacting with the domain of the state.

Which brings us back to the recurring question: how can this treasure house of multiple knowledges best be mobilised and integrated, in the common interest?

While this question is not the explicit central focus of this book, it is at least a strongly implied undercurrent, and actually comes to the surface in Chapter 5 (The National Prosecuting Authority) in relation to a recent innovative experiment in ‘community prosecution’ which

...entails a long-term, proactive partnership between the prosecution, law enforcement, the community, and public and private organisations, with a view to solving particular community crime problems, improving public safety and enhancing the quality of life of community members (p 109).
This development is ‘an integrated approach involving both reactive and proactive strategies’. It may be regarded as a carefully designed expression of the values of ‘restorative justice’ within a particular context. It is likely to provide prosecutors with a potentially valuable new option when assessing the risks and benefits associated with their decision regarding any given case.

There are, it seems, certain underlying design principles concerning the governance of security that enable and promote coherence and flexibility in the presence of multiple and varied sources of knowledge, insight and expertise.

Here we can mention a few other expressions of these principles within the arena of safety and security (of which, as we have noted, state-centred criminal justice systems are an important part). Most of these examples — from home and abroad – are concerned with ‘the police’ but, we suggest, the way of thinking that they embody is relevant across all the elements of this field.

The Nexus Policing Project was a four-year research and innovation project between the Victoria Police (Australia) and Australian National University (ANU). The project took the form of case studies of chosen issues in particular geographical areas: family violence; the relationship between the police and aboriginal communities; youth safety; the management of sex offenders post-release; and perceptions of safety on public transport.

The common thread in all these studies was ‘a linking together of different ways of defining, understanding and resolving community safety issues’, seeing the police as ‘part of a broad and diverse system for ensuring the public peace’. The crucial recognition in this project, from a state entity’s point of view, was that this was ‘an approach that does not rely on police being experts in every aspect of an issue. Rather it was one which urges police to both recognise the strengths of others and to link those strengths in new ways.’

The Nexus Policing Project is about an attitude, a set of assumptions, a way of thinking about the governance of security that mobilises both state and non-state entities and resources in order to find solutions to particular issues:

The way a problem is understood dictates how it is managed. For instance, if youth safety is understood in relation to health and well-being issues, then those groups and organisations in a community that offer health and other social solutions are deemed to be invaluable.

As Jennifer Wood and David Bradley emphasise in their review of the Nexus Policing Project:
the capacity to link knowledges, capabilities and resources across police organi-
sational units and outward to other state security agencies, the private sector,
and various community groupings (defined by space, interests, ethnicity or other
variables) is essential.4

Clearly, this is not an entirely new insight, but it is being articulated more clearly
and more frequently than before in response to the widespread recognition that
the institutions of the state – powerful and relatively rich in resources though
they may be – cannot go it alone. A two- (or four-) legged creature that attempts
to hop along on one leg is severely limited in its reach and mobility.

Indeed, far from being new, this attitude or way of thinking goes back to the
roots of modern urban policing in London in the early 19th century, when it was
agreed that

the success of policing depended upon the extent to which private interests, vol-
untary alliances and state agencies could be aligned into a complex skein of new
interlocking governance practices.5

Let us once again note that, while our examples happen to be taken from the field
of policing and security, the set of principles/attitude/way of thinking/sensibility
that these examples embody is just as applicable across all the other areas of the
state-anchored criminal justice system that are laid out in the successive chapters
of this book.

Here is a recent example from Northern Ireland, a deeply divided community
for which the example of post-1990 South Africa has been an inspiration. The
Report of the Independent Commission on Policing for Northern Ireland6 (com-
monly referred to as ‘the Patten Commission’) begins with the question: ‘How
can professional policing become a genuine partnership for peace on the streets
with those who live, work and walk on those streets?’ and goes on to assert that
‘policing is a matter for the whole community, not something that the community
leaves the police to do.’

This is perhaps a commonplace assertion (how many times have we heard
the term ‘community policing’ left hanging unrooted in the air?). But the Com-
mission goes on to propose innovative institutional arrangements that are likely
to enable and promote this assumption in practice, facilitating real operational
consequences rather than becoming just another nice slogan on a departmental
notice-board or website.

Chief among these recommendations was the establishment of an inclusive
‘Policing Board’ to replace the existing ‘Police Authority’, with a consequent Annual Policing (not simply Police) Plan and a policing (not just Police) budget. The responsibilities of the proposed Board were:

...to go beyond supervision of the police service itself, extending to the wider issues of policing and the contributions that people and organizations other than the police can make towards public safety.\textsuperscript{7}

More specifically, the Commission recommended that:

the Police Board should coordinate its work closely with other agencies whose work touches on public safety, including education, environment, economic development, housing and health authorities, as well as social services, youth services and the probation service, and with appropriate non-governmental organizations.\textsuperscript{8}

The function of this kind of institutional arrangement, therefore, is not primarily to control but to enable, to promote cooperative problem-solving by identifying and mobilising whatever resources (of which knowledge is the most important) are available and relevant. This is not rule from on high or by decree. As put by Bill Bratton, the famous New York Police Chief (who subsequently went on to the Los Angeles Police Department):

The only way you can control a police department from headquarters is if your aim is to prevent the police from doing anything.\textsuperscript{9}

Let us now come closer to home. The Dinokeng Scenarios Report\textsuperscript{10} released in June 2009, is intended:

to create a space and language for open, reflective and reasoned strategic conversation among South Africans, about possible futures for the country, and the opportunities, risks and choices these futures present.\textsuperscript{11}

The Report makes the following incisive but, in the context of the Dinokeng initiative, essentially constructive judgment:

A core aspect of our current reality is that we have a weak state with a declining capacity to address our critical challenges. Any suggestion that the solution to our problems lies in the state, with its already proven lack of capacity, assuming an even greater interventionist role in the development of the economy and society, is misplaced and a recipe for disaster. At the same time it is worrying that civil society has, since 1994, tended to adopt a very statist view of the country,
with the expectation that government should do everything. We believe that this too is a recipe for disaster.\textsuperscript{12}

This assertion is eloquently borne out in the chapters of this book. This is, however, not the end of the story. The ‘Walk Together’ Dinokeng scenario is based on a ‘Collaborative and enabling state [and an] engaged and active citizenry: an approach to governance that places value on building relationships between various sectors’.\textsuperscript{13}

We close with two linked examples of innovative and enabling thinking and practice in the governance of safety and security in South Africa.

In 2000 the South African Law Reform Commission (reporting to the Minister of Justice) established a Project Committee to look into and make recommendations on alternative dispute resolution structures in South Africa – in particular, the question of whether or not these structures (of which there are many different versions operating in communities throughout the country) should be in some way formally linked to the criminal justice system.

After wide consultation, the deliberations of the Committee moved from proposing a highly structured set of regional and local committees located within the Department of Justice, to an equally hierarchical system of ombud commissions. Finally, however, it came to the conclusion that any state-controlled regulatory framework would be inappropriate: by essentially disrespecting and underestimating the value of local ‘inexpert’ knowledge, such a system would undermine those alternative dispute resolution structures that were operating successfully, and would thereby disable one potentially important link in the chain of safety and security.

Instead, the Committee recommended some simple criteria of legal and community accountability that the Minister of Justice might take into account in responding to requests for assistance and support from alternative dispute resolution structures in the community.

Our final example is of precisely one such structure, the product of a collaboration between poorly resourced communities (the pilot site was Zwelethemba, in Worcester in the Western Cape) and a unit of scholars and facilitators (the Community Peace Programme, attached at that time to the School of Government in the University of the Western Cape).

Out of this collaboration evolved an institution that came to be known as a Peace Committee. This is a group of community members whose aim is to mo-
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bilise whatever insights and knowledge are necessary in order to facilitate agreement on a plan of action that deals effectively with the dispute in question. They operate in accordance with an agreed code (for example, no force is to be used at any time; no gossip; etc) and according to agreed steps in peacemaking, which produce a written report on each ‘peace-gathering’: details of those present, statements on the particular complaint; debate on the root cause of the problem; plan of action; monitoring arrangements.

After two years of Peace Committee operations, senior members of the South African Police Services in the region initiated discussions which led to the establishment of a mutually respectful understanding between SAPS stations and local Peace Committees. This understanding made it possible for SAPS members to advise complainants in particular kinds of local disputes (often regarded as trivial by the police, but clearly not by the disputants) that the Peace Committee might be a more suitable avenue through which to pursue their complaint. It is an arrangement based on a clear-headed recognition of who is best at doing what, in a common purpose: that purpose being to build a safe community.

The police have massive resources and a formal state-sanctioned mandate to enforce the law, if necessary through the use of force. The Peace Committees, on the other hand, have minimal material or financial resources, but their knowledge of their community (and of which other community members to invite to assist with particular cases) enables them to help their neighbours to find peaceful and sustainable solutions to disputes which the police, for all their strengths, are not in a position to resolve.

This kind of mutually recognised, respected and valued complementarity is the essential foundation for the effective mobilising and integration of different knowledges and capacities in pursuit of a common purpose, at whatever scale and across the spectrum of state and non-state organizations, in varying combinations depending on the issue at hand.

Archaeologists and anthropologists have long recognised that competition for territory and resources has been a vital factor in human behaviour from as far back as we have evidence. What we tend to under-emphasise, however, is that cooperative problem-solving and mutual respect have been equally vital in the survival of our species – and perhaps never more so than in our time, when economic shocks, crime and climate change cut across all our carefully constructed compartments and departments.

Let us apply these cooperative human capacities to to the South African crimi-
nal justice system. If we demonstrate the necessary maturity – as individuals and in our many and varied kinds of collectivity – we will find that we have the resources and the capacity to make South Africa a truly safe place in which to live.
NOTES


2. The Nexus Policing Project Toolkit, May 2008

3. Ibid.

4. Embedding partnership policing: what we have learned from the Nexus policing project, Police Practice and Research 10(3) (April 2009), 133-144.


7. Ibid.

8. Ibid.


11. Ibid.

12. Ibid.

13. Ibid.
In 2006, in a small town in the Southern Cape, a woman named Anna Juries was robbed and stabbed. Based on interviews, this is her account of the experience of the attack and her attempts to find justice.

On 8 November 2006 I was working alone in our small, old-fashioned general dealer in the quiet village of Verjaarsfontein. It was a warm summer evening and there was a slow but constant flow of customers in and out of the shop. At about half past seven (just before our eight o’ clock closing time) two men and a teenage boy entered the shop. The only unusual thing about them was that they were unfamiliar faces: Verjaarsfontein is a small village, so we know our customers well, and they vary little from day to day.

The three approached the service counter, greeted me and bought loose cigarettes and a handful of sweets. They left the shop, but returned a short while later after smoking their cigarettes outside. They bought some bread rolls and cold meat and sat on the stoep outside the shop to eat their food.

The shop radio was tuned to a popular music station. After a while the one who appeared to be the eldest, came back into the shop. ‘That’s my song,’ he said ‘do you mind if I stand here and listen? – it just really warms my heart when I hear this song.’
‘Of course,’ I replied and carried on packing peanuts into small bags for the next day’s sales. Although the conversation was easy, there was something about this man that made me uncomfortable. He listened to the song then walked back outside to join his friends.

Soon it was eight o’clock, and darkness had fallen. I walked outside to the stoep and told the three that I was about to close shop. They quickly stood and offered to help me carry the tables and chairs into the shop. After packing up they looked around at the sweets. ‘Ja, after supper I also always feel like something sweet,’ I said. But they chose instead to buy some of the large fresh apples from the fridge.

All of them looked poor, so I was surprised when the eldest peeled off a R100 note from a wad of notes. I noticed a tattoo on the inside of his arm as he reached across to pay for the apples. They left the shop. I closed the door behind them, allowing the Yale lock to slip into place.

I took the cash register from the till and walked to the small office at the back of the shop to count the day’s takings. Half an hour later, just as I was about to lock away the register, I heard a sound, like a person bumping against the outside wall of the shop. It frightened me. The thought ran through my head that the three may still be around. I locked the cash in the safe, put my handbag over my arm, and gathered together my cell phone and the bits and pieces from the shop that I would need at home. My instincts were screaming that something was wrong, so I picked up a small device that someone happened to have brought in as a sample. About the size of an electronic remote, the gadget was designed to produce a loud alarm-like wail when the metal pin at the top was disengaged.

I turned off the inside lights and made sure that the outside lights were turned on. Then I opened the door and walked onto the stoep, relieved to see that no one was around. I pulled the door closed and snapped the two padlocks into place. Then I realised that I had left my car keys inside, so I unlocked the padlocks and the Yale lock and went back in, closing the door behind me. My keys were on the counter. I picked them up and left again, going through all the motions of closing up and locking as before.

As I turned my back on the door about to cross the five metres to my car, I heard footsteps rushing towards me. Terror swept over me and I started shouting for help. The nearest houses are a hundred metres away, and at that moment the road was deserted. I could see only the silhouettes of the huge gum trees in
The deserted schoolyard across the road. I was pushed hard from behind and fell forward, my face striking the tarmac as I began to struggle.

I kept shouting, hoping it would put my attackers off. The man who had asked to listen to the radio put his hand in my mouth to shut me up. I clamped down, biting his hand, and he pulled it back. I felt someone holding my leg and another pulling on my arm. I was held down on the ground. I twisted and turned and kicked, and managed to dislodge the pin from the alarm. The loud wails surprised the men, and they pulled back. I felt one of them pull on the handbag over my arm, and I let it go. All three ran off.

With the alarm wails filling the air I stood up, adrenalin ringing in my ears. My right shoulder was painful, as if someone had burnt me. I felt my back and my hand came away covered in blood. The flesh on my left wrist was showing through a deep cut and when I looked down, I saw that my new red takkies were filling with blood from a wound on my leg.

My cell phone was still in my hand. Standing on the stoep, I called home. My 11-year-old son answered. ‘Call Lillian’ I said to him, ‘quickly’. She took the phone. ‘I’ve been stabbed’ I pushed the words out through my swollen, bleeding lips.

‘I’m coming’ she said.

Realising that I was completely exposed, I felt overwhelmed by fear. Quickly, I walked to the car, climbed in to the driver’s seat and locked the door. I dialled 10111. A woman answered. ‘I’ve been stabbed at the Verjaarsfontein kafee’ I told the operator.

‘When did it happen’ asked the operator.

‘Right now,’ I replied. ‘Please send the police’.

‘Where are you now?’

‘In front of the shop, will you call the police?’

I disconnected the call and sat back. Blood was coursing down my leg and I felt a small burn on my back just below my neck – as if a cigarette had been put out there.

I hadn’t been sitting in the car for long when the man who lives across the street came to the window, followed shortly by Lillian. I opened the door. Lillian looked down at me, put her hands on my shoulder and urgently asked ‘Who did this to you?’

‘Three men’.

‘Where are they now?’
I could hear the anger, panic and fear in her voice.
‘They ran that way, towards the church.’
‘I am going to get my car,’ the neighbour said, ‘we need to get her to hospital.’
‘Come, can you stand?’ Lillian asked.
I eased myself out of the car and stood, shaky and nauseous.
Then I disappeared into a dream. I was at the table having dinner with the children. Then I was pulled back to the hard tarmac under my back. The pain in my body, the grazes on my cheek and the gurgle in my lungs as I breathed in and out, made the nightmare real. Lillian was shaking me calling loudly, ‘Stay with me, stay with me, you can’t go now’.
‘It’s fine, I’m fine,’ I replied.
‘Here, can you get into the car?’
Lillian and the neighbour helped me into the back of his car. I was terrified that my gurgling lung meant something was fatally punctured. I forced myself to breathe shallowly and regularly. Lillian got into the front with the neighbour driving. The whole time the alarm was still shrilling, but none of them could find the device to get rid of it or shut it up.
The nearest hospital, a private hospital, was 45 kilometres away. As we raced along the highway I lay in the back, hoping I was going to live and forcing myself to be calm.
We arrived at the hospital. An orderly brought a wheelchair and I was wheeled into the emergency room and helped up onto a stretcher. The bright lights were a sharp contrast from the darkness outside – and starkly revealed the extent of my stab wounds. The wound in my right calf was at least 5cm in diameter. Blood poured from my shoes onto the floor as a nurse eased them off my feet. While she gently undressed me, Lillian was ushered away to fill in forms. When all my clothes were off, the nurse left. I was alone. I could hear Lillian talking to the clerks somewhere down the echoing passage, asking anxiously when a doctor would be coming.
Naked on the emergency room table, the horror of what had happened struck. They had stood in my shop, talking to me, helping pack away the chairs, then they tried to kill me. Had they been stalking me? Was it a game that hunters play with their prey? Why didn’t they just ask me for my bag …threaten me with their knives? Why want to kill me if they didn’t even know if I was carrying money?
Lillian hurried into the room, followed by the doctor. Two paramedics from a
private ambulance service came next. The operator from 10111 had dispatched them. Finding no one at the shop they had come to the hospital. After establishing that it was me who had called, they left saying 'Next time call our number directly, it's much quicker'.

‘Who is with the children?’ I asked Lillian.
‘I asked Jack and Francine [our neighbours] to come over’ she replied.
‘Are they okay?’ I wanted to know.
‘Yes, they’ll be fine. Do you want me to call your parents?’
‘No, let’s wait till we know if I’m going to be okay’, I said. Meaning that I was waiting to hear if I was going to live.

The doctor’s stethoscope soon confirmed that the gurgle needed further examination. An X-ray revealed that my right lung had been punctured, but before dealing with that, my other wounds had to be cleaned and stitched. She started with the knife wound in my back, then moved to the wrist, and leg, anaesthetising and stitching quickly. She had to stick her finger deep into the wound on my leg to dig out the bits of stone that had embedded themselves in my flesh.

I tell the doctor that I bit one of the men who attacked me, and may have drawn blood. She advises me to go onto anti-retroviral treatment in case he is HIV positive. I agree reluctantly.

Finally, stitched, and certain that I will survive, I am wheeled to a ward. Monitors are attached to my fingers and lungs. The ward is dark and quiet, it’s well after 10pm. I have sent Lillian home to take care of the children. It’s impossible to sleep – the scene plays incessantly through my head, a movie that will play for many months, over and over in my mind almost bringing some kind of perverse comfort.

Close to 11pm my parents arrive. Their presence brings a new wave of tears but I don’t want to cry, or seem weak, so I pull myself together. Soon they leave, back to their own fears and anger.

I wake the next morning early. My body is so painful it’s hard to move. A kind of dull sadness settles into my belly, and there it will stay for days on end. At 9am two uniformed policemen arrive to take my statement. They are from the police station in Bothaville. They tell me that they haven’t arrested anyone yet, but ask me to tell them as much as I can about the perpetrators. They are kind and sympathetic as they take down my statement, and talk about their own fears for their family while they are at work.

Soon after they leave Lillian arrives with the children. Our seven-year old
daughter, Moira, is reluctant to come too close to me. Usually affectionate, she now seems afraid to touch me, and holds back from coming close to the bed. Kevin, who is 11, is also awkward, uncharacteristically lost for words. It’s as if they don’t know how to act towards me. It makes me worry about them. I feel sad that somehow our family can’t deal with this situation the way we normally deal with difficult things in our lives.

The next two days are filled with pain, X-rays, prodding and poking by doctors and nurses alike. This routine is interspersed with a constant flow of well-wishers – people who ordinarily would have very little to do with me but who have come, curious and sympathetic in equal measure.

Although I can scarcely walk and every waking moment is defined by pain, I’m desperate to get home. I am afraid of leaving the children and Lillian alone for any longer. Also I need the normality of cooking and eating together, homework and daily family life. I finally convince the doctor to let me go home. So far, there is no news from the police.

Entering our home, I realise how it has shifted – from being a safe, secure space to being scarily unprotected. There is a constant sense of menace, a forbidding feeling of threat. And it is firmly located in space – over my right shoulder in the direction from where the attackers came at me. Before the attack, our refusal to add the usual paraphernalia of security to our property had been a statement to ourselves (and anyone who cared to notice) about how secure we felt. Now it seemed ridiculous. The open windows free of burglar bars, the open gate – all were potential entry points for the menace rather than expressions of freedom.

Soon after I got home, members of the small Verjaarsfontein community started arriving. This would become a constant flow over the next week. They were both afraid and curious. Many had already made up their minds about the motives of my attacker. Many said they were sure that the perpetrators were not from our area. Some constructed elaborate conspiracies about who might really be behind the attack, looking for drama to fuel the gossip networks. A few of the men who thought of themselves as having close relationships with the police brought scraps of information about how the police were looking for the suspects.
Five days later there was a visit by two plain-clothes detectives. As they came into the house I saw they had with them the handbag I had lost that night.

‘Is this yours?’ they asked.

‘Yes. Have you found the guys?’

‘Two of them.’

‘Which two?’

‘The young one, Laaitie and Freddy.’

‘Where did you find my handbag?’

‘On the side of the road, near the railway line at the bottom of the Verjaarsfontein hill.’

‘What about the older one?’

‘We’re still looking for him.’

‘Are the two in custody?’

‘No they were released.’

‘What, did they get bail?’

‘No, they were released on their consciences.’

‘Why? How did that happen?’

No answer.

‘Please, when you find the man that I bit, you must take him for an HIV test, is that possible? These ARVs make me feel awful and I just need to know if he is positive.’

Shrugs from the detective who seems to be in charge. Too many unanswered questions. And it’s clear that I have exhausted the quota of patience of these police. In their manner and body language, I am already an irritation.

My handbag is a private space, populated with personal, sometimes embarrassing, daily debris – the tobacco shaken loose from a cigarette, a well-used lipstick, dried dirty tissues, headache pills.

They lift my handbag and turn it upside down to empty the contents onto the dinner table. This makes me feel more exposed than I felt lying naked on the hospital stretcher after the attack. Impervious to my embarrassment, they begin to catalogue its contents, both absent and present. Formulating this into a statement, the most important aspect of which, they seem to assume, is the monetary value of what was stolen. Useful, I guess, for insurance purposes. Then they leave. But not before I take down the cell phone number of the detective.

I go upstairs and lie down again on my bed. My daughter comes in. She still can’t come very close to me and excuses this by saying she’s afraid to hurt me.
She stands against the cupboard and looks at me.
‘So you’ll only maybe die now?’ she asks.
‘I’m not going to die – I’m fine – just a bit hurt.’

Between my handbag being returned and the next meeting with the detective is a blur of daily activity dominated by fear. What do I call this thing that happened – ‘my attack’? (sounds like I did the attacking) – ‘the attack’? (sounds like it’s an absolute something). The police would call it robbery. I want to call it murder – I didn’t die, but something did. Something which means that now when my bladder wakes me up in the middle of the night I lie listening to Lillian breathing, hoping that she will feel my awakeness and wake up too. I don’t want to put on the light and wake her and the children. The bathroom is only four metres away at the top of the stairs. I debate with myself: Are you stupid, there’s no one in the house. What can you be afraid of? Okay get up. But I can’t. Then I wake Lillian. Like an old woman or a baby, I just need to have someone else awake while I wee.

I have become dependent in a way I have never been. There also seems to be a growing divide between before and after. Everything has changed: the way I feel every day when I wake up; the lack of normality in my daily life; my overwhelming sadness. ‘Before’ I was training for a half marathon. Now my leg is so sore I struggle to walk downstairs. Before I was strong and fit. Now I am pathetic. And whereas I am pained, fearful and sad, Lillian is angry. Furious with the attackers, and furious with herself for leaving me alone... for not having been there to fight them off. And the children are scared.

One of us made a mistake the other night and pressed the newly installed panic button in the lounge instead of the light switch. The wails of the alarm threw me back into the moment of the attack. I froze and panicked. My daughter started howling with fear and my son stood pale and paralysed. This is what defines us now, it seems.

The detective walks in one morning at about ten. The children are at school, Lillian is at the shop.
‘Can you come now to the hospital?’
‘Yes, why?’
‘We need to take a blood sample. We found blood on a knife at the one guy’s house. We need to test yours to see if it’s the same blood.’
‘What’s his name? What kind of knife?’
‘Freddy, Okapi.’
‘Where are the other guys now? Have you caught the third one?’
‘No. We think he raped someone. He stole a firearm in Bothaville.’
‘So you don’t know where he is now?’
‘No.’
We drive together in their white Toyota Tazz. The back seat is covered in docketts. I try to make conversation as we drive. It is stilted. We wait in the corridor of the hospital for the district surgeon to come.
‘Does he know we are coming?’
‘Ja.’
‘How soon will you get the results from the blood test?’
‘I don’t know. It can take a long time.’
The district surgeon looks like a piece of institutional furniture, his greying ginger hair looks as tired and resigned as he seems. But he’s friendly and chats as he fills in some forms. He asks me where my injuries are, looks at the plasters covering them and marks each injury down as a pen stripe or dot on the figure outlined on one of the forms. He takes blood and labels the vial. That’s it. We leave.
A few days later I am back in hospital. It feels as though I have handed my body over to doctors and institutions. I go from one medical professional to the next. A surgeon and nurse take out the stitches and check the wounds. An orthopaedic surgeon sees whether he can fix the severed tendon in my wrist, and sends me to a plastic surgeon to see if he can fix the nerve and the tendon. Someone attaches electrodes to my ankle and leg to see whether the nerves, severed when I was stabbed in the calf, will ever heal. The plastic surgeon is opening the wound on my wrist. He’ll make another cut too and try to find the tiny nerve endings and join them so that I can use all my fingers again. I dread the thought. It’s my right hand and I won’t be able to use it for weeks.
I get a call from someone at the police station asking me to come in for an identity parade. I try calling the detective several times but his phone is constantly on voicemail. So I am not sure what is going to happen at the ID parade, or whether they have caught the third guy. Whenever I phone the station the phones just ring, or I’m put through to people who don’t know where any of the detectives are.
I wear a skirt the morning of the identity parade, and feel uncomfortable with how feminine it makes me look and feel. I usually wear trousers, and I need the strength of more masculine clothes. But my arm is in a sling now and my fingers
trapped in thick bandages so doing up a button is just not possible. Lillian is as anxious as I am. Neither of us knows what to expect. The car is quiet as we drive the 25 minutes to the police station.

We arrive and ask the uniformed officer behind the front desk where to go. There is some shouting as information is passed around and we are told to enter the first office on the left of the corridor. There is an orange-suited prisoner washing the floor. I am afraid that my attackers are somewhere in the building and watch every face, every movement, anticipating the rush of fear.

There seems to be some confusion. There are many detectives around. Big-bellied moustachioed men with light brown crimplene trousers, reminding me of security branch officers from the past. The detective handling my case arrives. We are in a small office with about four detectives mulling around, someone is working the computer in the corner of the desk.

‘What is going on?’ I ask generally, hoping someone will answer.
‘We’re waiting for the guys to come here’ one of the detectives answers.
‘How is this going to work?’ I ask.
‘Hasn’t he told you?’ the detective asks looking pointedly and accusatorily at the man handling my case.

‘No.’
‘Why haven’t you told her?’ he turns on him.
Angry mumble from the other detective.
‘You’re going to go into the room down the passage and then when you’re inside you will tell us which ones robbed you,’ the first detective says.
‘What room – an office like this one?’
‘Yes.’
‘So I am going to be in a room with them? There’s no glass between us?’
‘No.’
‘I won’t. Why isn’t there a proper room with glass?’
‘Why? Are you afraid?’

I am furious and shaking. I don’t want to admit I’m afraid to these men. Why should they even ask? Isn’t it obvious that I would be afraid, or is my fear unusual – do most people find this okay?
‘Yes. I’m afraid. Don’t you have a room with one way glass?’
‘No. There’s one at Thembalethu.’
‘So why can’t we go there?’
‘Why didn’t you organise it like that?’ says the first detective aggressively to
the one who is supposedly in charge of the case.

Several of the other detectives also turn on this man and I feel irrationally responsible for having caused this dissent. Tired of being insulted and humiliated, the detective handling the case retaliates. Lillian and I watch as they exchange words, the atmosphere in the room is stifling.

‘Why can’t we go to Thembalethu?’ I ask.

‘We will have to hear if we can use the room. But the guys are here now for the ID parade.’

He is almost pleading for me to just go ahead and save the trouble. I can’t. Another detective interjects, ‘They use that room as a storeroom, we would have to pack everything out’. With that I am dismissed with a ‘We’ll call you.’

We leave, feeling frustrated, angry, and abused.

‘A storeroom!’ I fume. ‘There is a perfectly equipped room just up the road and I was put through this because it is being used as a storeroom.’ My fury persists all the way home. I feel completely out of control, partly because the men handling the case seem so incompetent.

It’s a week before we hear from the police again. This time it’s another detective who phones. I don’t catch his name. I am to go to the central city police station the following day, and from there I will be taken to the Thembalethu station for the ID parade. ‘Well let’s see what happens this time,’ I huff. ‘I wonder if they’ve managed to unpack the room.’

By this time I can manage to manipulate my fingers well enough in the cast to get on a pair of jeans. We meet a detective at the central city police station – not one of the men we have seen before. He drives us to the other side of town and we park outside the Thembalethu station to wait. He goes in to see whether they are ready for us. It’s 9am on a cool summers day.

He comes back to say that the detective in charge of the case has not yet arrived with the suspects, and nor have any of the other people who have to fill the parade.

‘Where are they coming from?’ I ask.

‘Outeniqua House’

‘Do you know these guys [the suspects]?’ I ask.

‘Ja, I know them well.’

While I am infuriated, I’m also relieved. Perhaps this is a chance to find out more about my attackers. I think: if you know them so well it must be because they have been in trouble before. But if that is the case why has nothing you’ve
done changed what they do?

I have a burning need to know what kind of knife was used to attack me. I’ve already been told it was an ‘Okapi’, but have no idea what that actually is. I ask the detective. He pulls a knife from his pocket. I become nauseous, my heart beating fast, but I force myself to look at it.

‘Where do these guys come from?’ I ask. He tells me that all three stay close to where I live. He also tells me that the youngest of the three comes from a family of people who are well known as housebreakers. He tells me his name as well as the name of the other two suspects. He tells me that the youngest of the three has been breaking into houses in the area since he was very young. That his mother is a drunk who moved away from the area leaving him to fend for himself. It seems too clichéd to be true, yet it helps me to know more about my attackers.

As we finish speaking and silence settles over the small car I look towards the police station and am horrified by my own thoughts – as if they belong to someone I didn’t know: What hope is there that these guys could ever bring happiness to their own or someone else’s life? What hope that if they get away with this act that they won’t hurt someone else? Kill them. Save society from them.

I am revolted by my own cynicism, but in that moment it is the only thing that makes sense to me.

A white Correctional Services van pulls up to the police station, passes us and enters the back gate. ‘Is that them?’

‘Yes. Just wait here I’m going to find out what’s going on.’

I am nervous. Will I recognise them? Will I be able to look at them? How far away from me would they be? Will they be able to see me? Will Lillian be allowed to come with me?

The detective returns and leads us to the back of the police station. A closed steel door greets us, and a detective with a clipboard. I am instructed to go inside, alone with the detective. As he opens the door, I feel my heart beating hard against my ribs. The darkened ante chamber with littered floor shares nothing about what is beyond. As we step past the door I see a line of young men behind the large glass window. I don’t know if they can see me but they know I am present. I’m certain of it, because they seem to stare into my eyes.

I see the youngest attacker first. I look at the others carefully before recognising the second one; he’s standing in the middle of the row. The youngest hangs his head, then lifts it, hangs it again – something none of the others do. The old-
er guy stands staring straight ahead of him. All ten of them look as if something has died behind their eyes. I tell the detective the numbers my attackers are holding. ‘Are you sure?’ he asks. That makes me feel completely unsure. I look at his face hoping for some clue and knowing he can’t give me one. ‘Yes, sure,’ I reply. It feels like the process takes hours. Almost two years later in court I heard that the ID parade took 30 seconds.

§

Christmas comes and goes. I return to the shop to help out. We have changed our way of working. No one works alone in the evening anymore, or even during the day. A retired security guard from the Verjaarsfontein community has decided on his own to take personal responsibility for our safety. He is the person who brought us the demonstration alarm gadget which saved my life that night.

He installs a lock on the office door and gives us long drawn-out lectures about how careful we have to be. For the last hour of every evening he and a friend stay with us to make sure we are safe. They ask nothing in return except that we listen to their old war stories, and tolerate their patronising of ‘us girls’.

I keep wondering what would have happened that night if my daughter or son had been with me. Would they still have attacked me? What would they have done to my children? Still, every day and every night the events of that night play through my mind like a B-grade movie. I can still feel my face against the drain in the tarmac outside the shop. Whenever I walk outside my eyes are drawn to it. For weeks my bandaged hand makes counting out the till in the evening slow and irritating. Conversations at home keep returning to whether we will ever feel safe again.

In January I receive another call to come to an identity parade. This time we are instructed to make our own way to the police station with the mirrored wall. This means that the third attacker has finally been caught. I am relieved.

Lillian and I arrive at the police station at half-past nine in the morning as instructed. We go into the charge office and tell the uniformed policemen at the front desk why we are there. ‘Just wait here’ we are told, and are shown the benches set into the wall. We sit and wait. We haven’t been sitting there for long when my attacker walks past the front desk, past me and through the door of the police station. There is no one else around. Suddenly – ‘That’s him.’ I grab
Lillian's arm.

‘Where?’

‘There, he's just walked past.’

‘Are you sure?’

‘Of course.’

‘What the hell is he doing here?’

Lillian pulls away and hurries out of the police station to look for him. I sit on the bench not sure what to do. I don't want to see him again but I also don't want to sit on the bench waiting, not knowing what's happening.

Later, once we've left the police station Lillian tells me that she watched as the man walked to the public phone and made a call. She watched intently, her anger increasing all the time, until, feeling her stare, my attacker dropped the phone and ran away, past Lillian outside into the courtyard.

‘What is going on here?’ Lillian demands loudly as she comes back into the police station, ‘what kind of circus is this?’

There's a flurry of activity as several of the detectives who we have seen before come into the charge office hearing the noise.

‘What happened here?’ one of them asks.

‘Eric just walked past us while we were sitting here?’ I say.

‘How did that happen?’ they turn on each other in a repeat of the performance we had witnessed previously at the police station.

‘Can we still go ahead?’ I want to know.

‘Ja, come’ one of them says.

‘Where is this guy now?’ another of them shouts.

‘I have him.’

‘Give him to me, I'll kill him’ Lillian fumes. She's no longer able to contain the anger that's been festering for weeks in the face of the fiasco that is unfolding.

‘No, take him away’ another detective shouts.

‘So what happens now?’ I ask the detective closest to me.

‘Wait, I don't know, I have to find out from the commander.’

He dials a number on his cell phone. I hear him insult the detective whose job it is to run the ID parade as he tells the commander what has happened and asks for instructions. Meanwhile the other detectives hurry Eric away, around the side of the building. The detective finishes his phone call. ‘We're going to go ahead.’

‘But won't this affect the legal standing of the ID parade?’ I ask. My question
is brushed off and I'm ushered into the same room as before. Again a detective accompanies me. I see Eric immediately and give the detective the number. ‘Five seconds’ he records.

Before leaving I demand the telephone number of the commander that the detective had called. I have to get answers somehow. Why has Eric been allowed to walk around the police station alone? Why has he not been arrested? Why would he have come voluntarily to the police station, especially after we've been told that he is wanted for rape and theft of a gun? I am angry, confused and frustrated by this system that I seem not to understand at all. Most of all I feel unprotected.

I call the commander as we drive off and again explain to him what has just happened. ‘Don’t worry,’ he assures me as if speaking to a child. ‘Actually what happened strengthened your case because you recognised him even before he went into the ID parade.’ That makes some sense to me, but it still doesn’t seem right. I know however that I’m not going to get any more information or clarity, the conversation is clearly at an end. I am assured however that Eric will be arrested immediately.

§

Months pass.

I take the children to see a private psychologist who spends a few hours with them. Afterwards she sends them to the waiting room so that she can report back to me and Lillian. ‘I asked them how they feel about the attack,’ she says. ‘Moira said that she was happy. Kevin said he was angry. That seemed more appropriate than your daughter’s response. But when I asked her why she was happy, she said, “Because my mum isn’t dead”. They seem to be handling their trauma well, but they both said that they are afraid now to be alone and afraid in the dark. They also get very worried when you go away. But how are you handling it?’

Not so well it seems. There has not been a night that I haven’t lain awake for hours replaying the scene. I have stopped drinking anything in the evening so that I don’t have to wake up in the middle of the night to relieve my bladder. And wherever I go there is a feeling of menace that peers constantly from across my right shoulder.

Two weeks before seeing the child psychologist I have to be away from home
for three nights to attend a meeting in Johannesburg. I am booked into a guest-house there. That means three nights sleeping alone for the first time since the attack. I leave the lights on the first night and try to read myself to sleep. The hours drag by, but sleep will not come. I try turning off the light at midnight, but am so overwhelmed with fear that I switch it back on again and read until the sun comes up. Each night is the same. I just cannot shake the fear. It's the randomness of the attack that was bothering me now. If it could happen once, there is nothing stopping it from happening again. Anyone I pass on the street might be planning an attack. It seems as though every report in every newspaper I read is about violent crime. Every discussion that I have with colleagues, acquaintances or friends seems to turn to an experience they or someone they knew has had that involves a violent crime. It is as though nothing else exists any more.

By now the bills for the doctors, hospitals and psychologists are flooding the letterbox and we sink further and further into an overdraft.

It is June 2007. There is still no news from the police or the prosecutors. News filters through the shop from someone who knows a policeman who knows something about the case: Eric was still in prison. The others are not. I know this because one day I'm driving my daughter to visit a friend, and I pass Freddy. He's standing on the side of the road trying to hitch a lift.

All my calls to the detective go unanswered – his phone stays on voicemail. Every time I call the police station I'm put through to extensions that just ring, or if someone answers it is to tell me that the person I was looking for was out, or not on duty at that time. Eventually someone is able to tell me that the docket was with a prosecutor at the regional court.

I called the court.

‘Regional court, hello.’

‘Hello, I am looking for a prosecutor who is dealing with a case I am involved in, I am not sure which prosecutor but is there someone who you can put me through to?’

‘Hold.’

‘Marais. Morning.’

‘Good morning Mr Marais. I am looking for the prosecutor who is handling my case. It’s case 268/11/2006. Can you tell me who’s handling that case?’

‘Wait, let me look…I think it’s Mrs de Koker, but she’s not in today.’

I wait a few more days before trying again. This time I find Mrs de Koker in. I explain that I am trying to find out what is happening with the case. Mostly
I want to know whether Eric is still in custody and why the other two aren’t.

She explains (but I don’t really understand) that they were not able to hold the other two men because when they first appeared in court there was nothing in the docket that showed that it was they who had been involved in the attack.

‘But what about the ID parade?’ I ask.

‘Ja, but they can’t be arrested after that because they were released on their own consciences and we can’t arrest them again.’

‘Will Eric stay in jail now until the case?’

‘I can’t tell you that.’

‘When will the case start?’

‘I don’t know. There is a problem with the docket, there’s not enough to go on. I’ll have to come back to you.’

She doesn’t.

§

One day in October a car pulls into the drive, and I am given a summons to appear in court on the 24th of April 2008. I stick it on the fridge where it stares at me every day for the next six months.

In March I try calling the court again. This time I am passed to another prosecutor. Mrs de Koker has left this court I am told. ‘Your case has been passed to Mr Steyn.’

Steyn is friendly and helpful, but can’t tell me very much about the case. He hasn’t had a chance to look at the docket yet and there is still a lot of time before the trial starts. But he assures me that I can come and see him to go through my statement a few days before the case comes to court.

April the 24th is a Thursday. I arrange to meet Mr Steyn in his office on the Tuesday to go over my statement. Actually what is more important for me than going over the statement is finding out what is going to happen, how much evidence they have managed to collect, and what is going to happen in court.

His desk is laden with brown, slightly tattered police dockets. Other pink and green folders provide a dash of colour to the otherwise cold and dreary office. I feel somewhat like an intruder, as if by coming here I am asking for more than I really should. What do other people do in these circumstances, I wonder?

He is friendly and hands me my statement to read after informing me that the three men are going to plead not guilty to the charges.
‘What charges are being brought?’ I ask.
‘Robbery, with alternate charges of assault GBH [police shorthand for assault with intention to do grievous bodily harm] and attempted murder.’
‘But isn’t attempted murder a more serious charge?’ I ask. It feels more serious to me. I don’t really care about the material things that were taken from me. Mr Steyn patiently explains that the robbery charge carries a minimum sentence and so is a more serious charge. It is as if he thinks I am interested in long punitive sentences – as if I want some kind of retribution. I don’t. I just want to feel safe again.

I read through my statement, and watch the movie that has played through my mind countless times replay again, this time in poor grammar and smudgy blue ink.

‘What does it really mean for me that they are pleading not guilty?’ I ask, feeling ashamed that I don’t know.
‘They say that they didn’t rob you and they will all have lawyers to defend them. In fact as far as I can tell they all have different stories for what happened.’
All that this tells me is that the whole process is going to be more painful, longer and more drawn out.

‘What is going to happen on Thursday?’
‘You must come here at nine in the morning and we’ll see from there.’
‘Where must I come to, which court?’
‘Come to the regional court. Don’t get your hopes up though, there can be many reasons why the case doesn’t go ahead.’

Thursday morning I brace myself, dress smartly and put on lipstick. I make breakfast and school lunch for the children as usual and arrange for them to go home with friends after school in case the case goes on late into the afternoon. Lillian and I leave the house early, not wanting to be late. I smoke a cigarette on the way, my hands shaking as I light up.

We get to the already overflowing court building and walk through the crowded corridors filled with the smell of unwashed bodies and freshly smoked cigarettes. We don’t know where the regional court is, but soon see the prosecutor and follow him into a courtroom that is filled with people, clearly here for another case.

We sit down on the wooden bench and wait. I see one of the men who attacked me enter the room and sit down at the back. The young boy comes in too, with a woman who must be his mother. Her face is swollen and discoloured
from too much cheap alcohol consumed over too many years. I feel icy cold and move closer to Lillian. Being so close to them again is frightening, even though I know that they won't do anything. I wish they didn't have to see me, and wonder whether they will recognise me.

We watch as the first case of the day is called. A man is testifying in his own defence. It’s a murder case, the man in the witness box is in leg irons. As the accused leads his own cross-examination of the witness, it becomes clear that the man in leg irons is the policeman who arrested him. We’ve come into the case half way through and nothing makes much sense except that it becomes clear that a woman was murdered and the accused seems to think that the policeman is lying. I feel pity for the accused, for the policeman, for the child whose mother drinks, for the magistrate and for the human drama that plays out between these four walls.

The murder case is postponed. People move in and out of the courtroom. Three lawyers come in and there is discussion between them and the prosecutor. Eric is led up from the cells and sits in the seats reserved for the accused. I recognise a policeman from the local police station sitting at the back of the courtroom. I stare at the three accused, wanting to try and see something that will tell me why they did this to me. I see just abjection and my irrelevance to their lives.

There is a long discussion happening between the lawyers and prosecutor – they are consulting their diaries. The court is quieter now that most people have left. We can hear that the case is going to be postponed. The one young lawyer, who looks like he didn't sleep much last night, approaches Eric and has a discussion with him. The prosecutor comes over to us and tells us that Eric hasn’t paid his lawyer, so the lawyer is pulling out of the case and there will be a delay. When the magistrate comes in to the courtroom the prosecutor informs her of the problem. The young lawyer makes a statement about the fact that he is completely willing to go ahead but it would be a problem because the case will not be completed today, and they will have to start all over again the next time the case comes to court because the accused will then have a new lawyer. It sounds like he is whining and I am irritated.

The case is postponed to 10 June. As we make our way out of the courtroom I watch the three accused men talk to each other. The one who is in custody passes something to one of them and asks the young man’s mother to buy him some cigarettes, handing her money. We get to the door at the same time as one of the men. I push myself against Lillian not wanting to be close to him.
A few days after this postponement, Lillian and I are driving home from doing our shopping. It’s around 5pm in the evening and the children are at home. When we are about a hundred metres from our house we pass three young men walking along the side of the road. Lillian recognises one of them as the youngest of the three attackers. ‘That’s Laaitie.’

‘Turn the car around,’ I say, ‘I didn’t see him properly, let me make sure.’ She turns the car abruptly. It’s him. He pulls the hood of his tracksuit top over his head, but not before I get a good look at his face. So close to my house. So close to the children.

‘He shouldn’t be here!’ I’m desperate to find some reason why he shouldn’t be close to me or my family. ‘He’s meant to be with his mother and she’s miles away.’ ‘Call the prosecutor’ Lillian says.

I do. ‘There’s not much I can do’ he tells me. And then, to keep me happy I guess, he adds, ‘I’ll get in touch with the investigating officer.’

I call the local satellite police station and tell the station most senior policeman. ‘Ag,’ he says, ‘I’ll see what I can do.’ I mention the name of the young man, and he knows exactly who I am talking about.

Silence. I don’t know what happened, if anything. I doubt anything happened, but I hope that Laaitie was as spooked as I was. Perhaps it will deter him from coming here again. Grasping at straws. At least if he tries something the police and the prosecutor will have been told, I comfort myself, while knowing that if he does try to hurt us it will be too late before any action is taken by the police.

The 10th of June approaches. I am filled with dread. It’s the middle of winter now and freezing cold. First my son comes down with flu, then my daughter. As they are all getting better, I get bronchitis. The trial is to start on the Tuesday but on Monday I am so ill that I struggle to move out of my bed. I see the doctor who gives me a medical certificate and I call the prosecutor. He’s on leave but the receptionist assures me he will be in to court the following day. I tell her my story and fax through the doctor’s certificate. I also phone the prosecutor and tell him I can’t be in court. He tells me that another date will be set for the trial to go on.

§

June passes and winter deepens. By mid-July there is still no news. Then at six one morning, before the sun has started to make an appearance and just after we
have woken to make coffee, a car pulls into the garden and hoots. It’s not a car we recognise. A white Tazz. There is no way I am going out to see who it is, but Lillian opens the door and holding up her pyjama pants, walks to the car. I put on the kettle and wait.

She comes back inside after 10 minutes, as the coffee is percolating, and I can see she is furious.

‘Who was that?’
‘The cops. They came here to arrest you.’
‘What? What for?’
‘For not being in court.’
‘You can’t be serious?’
‘It was four big men in that car. The one was completely rude. When I got to the car he said, “Is Anna Juries here”, so I say “Yes, why?”’.

‘I’ve come to arrest her, go and fetch her.’
‘What did you say? I ask.
‘I asked him why, and he said “Because she wasn’t in court”. So I thought it must be for a speeding fine and asked him “In relation to what?” and he says to me “I don’t know, she should have been in court on the 10th of June, and she wasn’t.” He didn’t have a warrant or anything. I told him that you had a good reason for not being there and that you had sent a medical certificate in.’

‘What did he say?’
‘He said “go and fetch her. I am taking her to the cells.”’
‘Is he mad? What’s going on, this must be a mistake, hey? So what did you do then?’
‘I told him that you were sleeping, that I was not going to call you and that they would have to get through me if they want to get you. They said that you must then come into court this morning to sort it out.’

Our coffee doesn’t taste so good after this. The time drags by until seven, when I feel it is a reasonable time to call the prosecutor. His wife answers his cell phone. I feel bad to be calling him so early, but he is up. I tell him what happened.

‘That’s **** rubbish,’ he says, adding an expletive. But he tells me this is no longer his case and that he has to ask what happened from the prosecutor who now has the docket. ‘I’ll come back to you just now.’

The phone rings at half past eight. He tells me that there was a warrant issued for my arrest, but that I should come to the court the following day and he will
sort it out. The next day I get to court at nine as he instructed me to. He is nowhere to be found. The prosecutor who is now handling the case is also not in her office. I find the control prosecutor in his office, though.

I am still bristling with anger and indignation that the court would issue a warrant for my arrest, and also for the manner in which the warrant was executed. My anger doesn't help my case. I guess the control prosecutor has to deal with many righteously indignant customers because he is immediately rude. But he does set off to find the docket, leaving me standing in his office. It is clear that he doesn't believe me when I tell him that the police came to arrest me for no reason. I guess he hears that kind of thing often too. I stand for more than half an hour waiting for him to return. When he does it is with a quite different attitude.

‘You have a right to be angry,’ are his first words. ‘I can’t find the docket, but I have found out that there were two warrants of arrest issued after the last court date for your trial. One for you, and one for the first accused. He didn’t come to court either that day. The clerk of the court was told to execute the warrant for the accused and hold yours over, but they got it mixed up and issued yours and held his over. I can’t tell you what trouble we have with the clerks. Some of them can’t even write.’

‘What do you mean the clerks can’t write?’

‘There are some here that can’t read or write and it gives us a lot of problems because they don’t know what they are meant to be doing. But I’ve sorted it out so you don’t have to worry now. Your trial is going ahead on 28 August so just make sure that you are here on that day.’

‘So the warrant has been withdrawn?’

‘Ja, I can’t find the docket, but it’s fine, you can go. And sorry about that.’

I am incredulous. I’m still angry that four men arrived at six in the morning to disrupt our lives for no good reason, but my anger is impotent in the face of the enormity of the problem. It’s no secret that the criminal justice system is in trouble, in fact it is splashed all over the newspapers and the television, but I didn’t think it was this bad. Mainly worried about what will happen with the trial now, I put those thoughts on hold.

By the time 28 August arrives, I have managed to speak to the new prosecutor and she has told me to meet her outside the court at nine in the morning. But she doesn’t sound convinced that the trial will go ahead. This time I don’t feel nervous, if anything I’m resigned. In fact I feel very little as we enter the packed
corridors to wait our turn. Just after nine I see a small, haggard looking woman making her way through the throngs of people wearing a black toga.

I approach her, ‘Are you Mrs Koekemoer? I’m Anna.’

‘Yes, hello. I must tell you this is a very weak case.’

Her opening words hit me as if she had physically punched me in the stomach.

‘What do you mean? What about all the evidence?’

‘No, there’s not much here and I have a problem because I don’t know if I can call the investigating officer. He was arrested last week on charges of attempted murder, or I don’t know, it could have been assault GBH. But there’s not much to work with here.’

‘I can’t believe this. How can this be?’

I want to shout and scream and shake someone, but it’s energy that has nowhere to go because in this situation I am powerless. I turn away and Mrs Koekemoer tells my partner to take me for a cup of coffee and come back in an hour, the case might start by then and she will take me through my statement. She tells us that I am probably the only witness today.

Walking down the road to a coffee shop I feel as though I’m in a parallel universe compared to every other person in the street. I’m shouting and crying. People walking past start staring at me as though I am mad. I hardly notice. I am so angry, frustrated, helpless. It’s the complete lack of control that I have over anything that is happening to me that infuriates me.

When we return to court an hour later I am a bit calmer, but only on the surface. We find the prosecutor alone in the court.

‘Come. Here’s your statement,’ she calls me over. I sit next to her and read through my statement. Then she asks me to explain what happened that night. I start, but haven’t even got to the attack before I am choked up with tears. I feel humiliated but I push on. Lillian sees my tears and comes to stand behind me. When we’ve gone over the events, it seems Mrs Koekemoer is satisfied that my account matches the statement. ‘Just tell it simply,’ she says to me. ‘You know, yours is not the only case where things have gone wrong. Last week an Inspector came to my office with a murder case and when I asked her where the affidavits were she asked me “what is an affidavit?” I can tell you stories that will make your hair stand on end about how this system isn’t working.’

I guess this is her way of making me feel better. In fact it just makes me feel as though my case is of no consequence at all. Of course, it is only one amongst
thousands, thousands that also go wrong.

‘Listen’, she tells me, ‘just remember one thing. The lawyers for the accused are not attacking you personally when they cross-examine you, they are just doing their job.’

Later, I was grateful for her warning.

We wait in the empty court for an hour. One by one the lawyers for the accused filter in and chat to one another, followed by the court translator and the stenographer, a uniformed policeman, and finally the three attackers. Two of them have been sitting waiting on the benches outside, while Eric comes up from the cells beneath the court. Again Laaitie, the youngest of the three, is accompanied by his mother, but she has very little interaction with him. While they were waiting in the corridor earlier, they had sat apart. Laaitie’s mother and Eric exchange a smiled greeting across the court.

When all have settled down, the uniformed policeman calls the court to order and the judge enters. I am called to the witness box. My position in the witness box puts me directly opposite the three men. Laaitie hangs his head to the one side and looks away. The other two stare at me.

I am sworn in and the prosecutor leads me through the incident, detail by detail. At first I am again almost overcome with emotion, but I don’t want to show my attackers any weakness. After every sentence I stop to allow the translator to change my words from English to Afrikaans. It makes the process very slow but also gives me a chance to compose my sentences. As I stand there telling my story I am struck suddenly by the realisation that with no other evidence, my testimony is the only thing that can get these three men convicted. So it’s up to me – if they are released back into the community where I live, it will be my fault.

When the prosecutor is through, and my story complete, the lawyers for the accused start challenging me. Finally, when I am released from the stand I’m shaking all over. I look at my watch. It is three and a half hours since I started testifying. There are no more witnesses to be called today. The case is postponed until the following Friday the 5th of September.

The following Friday the trial resumes in the Thembalethu court, because that is where the prosecutor is now working. Lillian and I arrive at 9.15am. Two of my attackers are sitting outside the courtroom waiting. They watch me as I come in and then look away, pretending not to see me. We sit down. The prosecutor tells us that we will have to wait because one of the Legal Aid lawyers has to
come from a nearby town and another had been attending a separate trial since first thing in the morning. There is no telling how long we will wait.

The toilets in the court building are filthy and stink.

At 10.30am all the lawyers arrive and Eric is brought up from the cells. He consults his lawyer quickly. I can't hear the exchange. The prosecutor tells us that she is going to try and make a deal because she has so little in the docket to work with. She can’t even use the police statements because one of the policemen had witnessed his own statement, making it invalid. Then, she says, there was the problem with the ID parade because I had seen and recognised the suspect before he was put in the line-up. There was also a problem with the statement made by the investigating officer. Apparently he would not be a good witness, because he had been in bed with another man's wife and had shot the woman's husband when he walked in on them.

Mrs Koekemoer tells us that her strategy is to get the youngest of the suspects to testify against his accomplices. She says Laaitie has admitted that he was present on the night of the attack and says it was the other two who robbed and stabbed me. He has also admitted that he had my handbag and sold my camera the day after the robbery. She was hoping that Laaitie would plead guilty to the lesser charges of dealing in stolen property in exchange for testifying that he witnessed the other two men robbing me. That would strengthen her case, she says, adding that it was really the only hope if we were to get a conviction.

The lawyers consult each other.

Laaitie's mother is in court with him again. She's wearing a bright red velvet shirt that makes her swollen alcoholic face shine. The three accused are sitting just in front of me, close enough to touch. I can see Eric is shaking. It is cold in the courtroom. He's shaking like I did when I left the witness box last week. I wonder if it's from nerves. Just before the proceedings begin again I see Freddy hand an envelope behind his back to Laaitie's mother.

The court is called to order. Laaitie's lawyer stands up. He tells the court that his client wishes to plead guilty to charges of dealing in stolen property. He reads out Laaitjie's statement. In it Laaitie admits that he was with the other two men on the night of the attack. He says he saw the two older men attack me with knives, but that he had been surprised, because there had been no discussion before that indicated that they were about to rob me. He says he ran away after the attack and met the two men about two kilometres away at a railway line where they removed the camera and money from the handbag and threw the
handbag away. The next day he sold the camera.

As the statement is read out to the court I look at the three men. Laaitie hangs his head throughout. The other two exchange looks. Eric shakes even harder and looks furious. I am glad I am not Laaitie.

There is an exchange between the judge and the lawyer about Laaitie's age. His mother apparently can't find his birth certificate, so there is no document to confirm his age. His lawyer confirms that he recently turned 18, which would make him 16 at the time of the robbery.

The identity parade documents (SAPS 329) are handed in to the court as evidence, unopposed by the lawyers. The medical certificate from the district surgeon is also handed in and accepted by the court.

The state calls a uniformed policeman to the stand. He testifies that he was present when Freddy was arrested. He tells the court that after the arrest he had searched Freddy's house and found a brown Okapi knife, its blade covered in dry blood, on a table in the kitchen. He starts to tell the court that he asked Freddy about the knife and he admitted it was his, but then his testimony is stopped by an objection from Freddy's lawyer. It seems that Freddy had confessed to the policeman but that the evidence may not be led. The policeman tells the court that he confiscated the knife and handed it in as evidence in the case (SAPS 13), but since he was not the investigating officer he didn't know whether it was sent for analysis.

Freddy's lawyer stands up to cross-examine the policeman.

‘When was the arrest made?’

‘On the morning before we searched the house.’

‘How did it come about that you arrested accused number two?’

‘I didn’t personally arrest the accused, I participated in the operation.’

‘What was the reason for arresting him?’

‘He was a fugitive in this case.’

‘The accused will tell the court that up to that time he knew of no offence, so why was he regarded as a fugitive?’

‘There was information that he and the other two were suspects. He wasn’t staying at home, he had run away and was staying in the bush.’

‘When did the incident take place?’

‘I can’t remember the exact date, but it was before the arrest.’

‘Was it 8 November?’

‘If that was the date of the incident it must be, but I don’t remember the exact
'My client was arrested on 14 November. What was your duty in the operation?'

'He wasn't staying at his house but he was in the area and we were looking for him.'

(At this point Freddy laughs.)

'So these bushes where he was staying, are they close to the house?'

'It's a stretched out area. I can't say how far it was from the house, but it is away from the house.'

'What makes you think he didn’t just go into the bush?'

'We had information from an informant that he was staying in the bush since the incident.'

'What did you find in the bush to show that he was there?'

'I didn’t arrest him in the bush.'

'Yes, but you are the one making the allegation…. You say you searched the house and found the knife on the table.'

'Yes.'

'The accused will tell the court that the knife wasn’t on the table but was in his bag. He will also tell the court that the knife was not bloodstained.'

'I already gave my evidence.'

'It is highly improbable that you would find a knife that was used on the 8th November on a table still covered in blood on 14 November.'

'I testified that the knife had dried blood on it.'

'Did you test the blood?'

'I wasn’t the investigating officer.'

'Did you assume the knife was the one used in the incident?'

'He said it was his knife and he had used it to stab the white woman at the Verjaarsfontein kafee. Accused two is well known to me. He admitted that it was him who was with Laaitie and Eric and that he himself had stabbed the woman at the shop in Verjaarsfontein.'

'Objection. He can’t tell the court this.' His lawyer turns to look at the judge. The judge interjects, 'I am afraid you asked the question so the witness may give the testimony.'

'Accused number two will say this is not true and that you made this up. The knife was in a bag.'

She then produces a Police Services computer form to show that the knife had
been handed in as evidence in the case and shows it to the policeman.

‘Does the information you gave appear in this form?’
‘No, I handed in the knife, and filled in the SAPS 13, some administrative assistant put it into the computer.’

‘It says here “een Okapi mes met ’n houthef [one Okapi knife with a wooden handle].’

‘Yes, that is what it says.’
‘Do you agree that the description is not of a bloodstained knife.’
‘No, there is nothing like that on the form.’
‘Don’t you think it’s strange that it doesn’t describe the knife as thoroughly bloodstained.’

‘No, I didn’t do the description.’
‘But isn’t it strange?’

I am beginning to be relieved that this lawyer is not representing me. I watch the backs of the three men in front of me and see Freddy and Eric exchange jackets. A few minutes later they call Freddy to testify and he is sworn in. His lawyer leads him.

‘On 14 November 2006 you were arrested at your house. Can you explain to the court how?’

‘I went to an uncle of mine the previous night and I heard that the police were looking for me. I came home to fetch R10 to get a taxi to the police station. I entered my yard and the police were there. They told me to put my hands behind my back. They made me lie on the floor and handcuffed me. They assaulted me while I was lying on the ground. I told them I know nothing about the incident. Then they kicked down the door and entered my house without my permission. They took my bag. Then they looked at me and said was I the one that stabbed this woman.’

‘What was in the bag?’
‘CDs, IDs, pencils and knives. There were lots of knives in the bag because we are not using everything in that house, it’s just the two of us, me and my wife.’
‘You heard the policeman’s testimony, what do you have to say?’
‘He lied.’

‘After they took you to the police station what happened?’
‘They assaulted me further. Then they put me and Laaitie in the back of a van and drove to the highway. They stopped on the side of the highway and a policeman got into the back of the van with us and assaulted us further. When they
got to the central police station they took me into the charge office and took off the handcuffs.

‘What do you know about the incident at the Verjaarsfontein kafee?’

‘We went there that night to buy food. We sat outside to eat and as the complainant also mentioned, we bought some loose cigarettes. We had dagga with us. It was about half past seven in the evening. I saw a police van drive past and we ran away because we had dagga with us.’

‘Who ran away?’

‘Me and Eric. Later Laaitie joined us. So there’s nothing I know about the incident.’

‘Who was involved in the stabbing and robbery?’

‘I don’t know.’

During cross-examination by the prosecutor, Freddy tells the court that he doesn’t really know the other two accused very well. The previous week, Freddy’s lawyer had told the court that Freddy had not even been at the shop that night. The prosecutor challenges him on this.

Eric then takes the stand. His testimony is brief, and he too denies knowing Freddy very well, but says he is a family friend of Laaitie. He denies being with Laaitie when he sold my camera the day after the attack. He says on that day he was in court in a dagga case.

When Eric returns to his seat, he looks at me with a level of hatred in his eyes that makes my stomach turn, and makes me fear for Laaitie’s life.

The prosecutor concludes her case, summarising the important details and the lawyers for Eric and Freddy – the two who have not confessed – add their final words.

Judgement is set for the 19th of September.

§

September the 19th is a freezing day. The courtroom is like a fridge. As we go in I pass Laaitie and Freddy. Today Laaitie is accompanied by another woman, not his mother. He looks not much older than my now 13-year-old son, and his baggy clothes sag and he keeps his head hung to one side. Freddy has had his hair cut – it’s high and flat on the top with short sides. He is wearing the jacket that Eric had passed him on the previous appearance.

We start late again. Nothing happens in the court for hours as we wait for the
lawyer to arrive from another town. At 11.30am we are called into court. We sit while Eric, who has spent all this time in custody, is brought up from the cells. Again I am so close to the three attackers that if I reached out my hand I could touch them. Other people file into the court; they seem to be family of one of the men. Each one’s face is more battered than the next.

The judge enters and the court is called to order. My stomach does somersaults.

There is still no birth certificate for Laaitie but his lawyer puts it on record that his client turned 18 eight days ago on 11 September.

The judge begins. Slowly we creep through the details. First the judge reviews my testimony at length. It is the first time since the assault that I’ve heard anyone in the criminal justice system saying that the case was serious. I am relieved to hear that.

As she goes through the events on the evening of the attack, I feel the hair on the back of my neck rise. I reach for Lillian’s hand. As she moves through the stories of the three men, the judge points to inconsistencies, things that just don’t add up. I get the impression that, against all expectations, this may be going in my favour (whatever that is).

I watch the three men as she reads through the long judgement. Laaitie is hanging his head to one side, a pose that looks like submission. The other two sit straight up, glancing at one another from time to time. Today Eric is not shaking. He looks firmly ahead, his lips clenched together.

‘There was only testimony from one witness’, the judge explains, referring to me, ‘and legal principles require that the court approaches the testimony of a single witness with caution.’ She goes on to give legal precedent in cases where there is one witness, concluding that my testimony was unshakable and had to be taken seriously. The court does not accept the denials of the three accused.

She pronounces all three guilty – rejecting the statement by the youngest that he was only involved in the sale of the stolen goods.

The court adjourns for a few minutes before sentencing. In those few minutes I try to figure out how I feel. Numb. The two men in front of me turn to pass gestured messages to their families. Freddy turns around to face the audience in court and laughs loudly at a joke made by Eric. Eric catches my eye and stares at me, holding my eyes. I refuse to look away, eventually he does. This man’s anger and hatred frighten me.

The prosecutor reads the sentences (SAPS 69), starting with some back-
ground of previous convictions:

The youngest of the three, Laaitie, already has three suspended sentences for cases of housebreaking, starting when he was 11. Laaitie's lawyer later explains that he left school when he was in Standard 4 (Grade 6), that he last saw his father years ago and that he is the eldest of three children.

The litany of convictions against Freddy is startling. At 34, he is the eldest of the three accused, and he has convictions dating back to when he was 10 years old. The prosecutor reads off his convictions and sentences for housebreaking after housebreaking, canings, following by suspended sentences, short terms of imprisonment and escapes. But surprisingly no convictions for violent offences, not on this rap sheet at least. This is strange because he is known in his community, or so I have been told by people who know him, for being quick to solve fights with a knife.

Eric started with housebreaking at a young age, and has a stock theft conviction against him dating back many years. Then another housebreaking – only three convictions in all. Yet outside the court last time, the police officer who testified told me that Eric was currently incarcerated for rape. Unlike the other two, all Eric's convictions resulted in imprisonment rather than suspended sentences, making me think that he must have been the instigator in the attack on me.

The judge's response is quick. She sentences the two older men to 15 years each and the younger one to 8 years. As she reads out Laaitie's sentence, there is a gasp from one of his family members.

The court falls silent as the judge finishes. She says that she wants to send a message to the community with these sentences – that the increasing crime rates and the high incidence of violent crime in the community are not going to be tolerated by the court.

When she leaves, Eric turns and communicates with his hands and eyes to an older man at the back of the court. He catches my eyes and holds my stare.

I tire of this game and swear at him – f.... you.

‘F.... you, bitch’ he bites back.

As he is led down to the cells he looks up with fury and hatred at me and says: ‘You will hang, f.. you.’
NOTES

1. Names of people and places have been changed to protect the privacy of those concerned
2 THE EMERGENCY RESPONSE SERVICES OF THE SAPS

Johan Burger

INTRODUCTION

Often the first contact a crime victim has with the authorities is through a call to 10111, as happened with assault victim Anna Juries described in the previous chapter. The 10111 call is often the first time the South African Police Service (SAPS) becomes aware that a crime has been committed. From the victim’s point of view, it is important that the person who answers the 10111 distress call is able to activate a quick response, whether for medical assistance or for police support.

This chapter considers how the 10111 centres and the flying squad operate. It describes where these units are based, and assesses their capacity and the factors that inhibit their performance. It attempts to provides a rough standard against which to measure the reaction of these services in relation to the Anna Juries case study. It gives a general background to the overall structure of the police service
and explains the command and control relationships between these emergency units and other arms of the police.

‘Emergency response services’, as defined in the SA Police Service’s Draft National Instruction of 2005 titled *Emergency Response Services: 10111 Centres & Flying Squad,*¹ are limited to the flying squads and 10111 centres of the police. The policy makes no mention of other units that could be regarded as emergency response units, such as highway patrol units, robbery reaction units, or Gauteng Province’s rapid response unit. The Draft National Instruction describes the 10111 centres as the ‘electronic front door’ to the rest of the organisation. Contact via 10111 is the ‘first line’ for the reporting of crime and for the dispatching of complaints to all radio equipped police vehicles (including vehicles attached to police stations or emergency response units) to ensure ‘a rapid response to crime’.² Flying squads are responsible for attending to ‘priority crimes’ or ‘complaints in progress’.³

The information in this chapter is primarily derived from the SAPS Draft National Instruction of 2005, the SAPS website (http://www.saps.gov.za); the SAPS Annual Reports; and from an interview with and report by Director MM Sellemela, section head of the SAPS Emergency Response Services in the Division Visible Policing at Head Office in Pretoria.

**GENERAL BACKGROUND**

The total number of police service employees as of 31 March 2008 was 173 241 according to the SAPS 2007/2008 Annual Report,⁴ made up of 35532 Public Service employees (civilian staff) and 137 709 South African Police Service employees (trained police officials). These employees are based at offices across the country, including head office in Pretoria, nine provincial head offices, 1115 police stations and the specialised 10111 centre and flying squad units. The police to general population ratio in mid-2007 was 1:347 with the national population just under 48 million, according to an estimate in the 2007/8 Annual Report.⁵ This compares favourably with the United Nations guideline of 1:400. Minister of Finance, Trevor Manuel, in his budget speech to Parliament on 11 February 2009, said that by the end of 2008 the SAPS employed 183 000 members. At the same time he announced that the new target for 2011/2012 was 204 000.⁶

Since 2000 the SAPS has undertaken a huge expansion drive. The FIFA Soccer World Cup in 2010 has no doubt provided substantial incentive for this, al-
though the country's serious crime problem must also have been an important consideration. The national police service's budget has grown from R15.5 billion in 2000/2001 to approximately R40 billion in 2008/9, and the numbers of SAPS employees has grown from approximately 120 000 in 2000/2001 to 183 000 in 2008. Thus in the eight-year period the SAPS has increased its numbers by more than 50 per cent and its annual budget has almost tripled. The police-public ratio has also increased.

The budget increase means the police should have the ability to procure necessary equipment, such as vehicles. It would be reasonable to expect a corresponding improvement in service delivery. Although it is not the intention in this chapter to evaluate the general level of service delivery by the police, I do consider how shortages in staff and vehicles impact on the service delivery of the 10111 centres and flying squads.

10111 CENTRES AND FLYING SQUADS

Location, staffing and vehicles

Tables 1 and 2 provide a summary of the geographic location and number of 10111 centres and flying squads by province, as well as the staffing of these units, and the number of vehicles attached to the flying squads.

While the information in the two tables is incomplete, it does reveal the startling fact that the substantial increase in overall numbers of the SAPS staff has benefited neither the 10111 centres nor the flying squads. For the 10111 centres (Table 1) current staff numbers are approximately only half of what the police regard as ideal. The flying squads (Table 2) are much closer (76 per cent) to their ideal staffing level, although the ideal figures for the Western Cape and North West Province were also not available.

As far as the flying squad vehicles are concerned, the ideal situation is unknown. The police do distinguish between current fleet (total vehicles) and vehicles that are serviceable. According to Table 2 only 77 per cent of the fleet is serviceable, i.e. in working order and operationally deployable.

An additional concern is that although, according to Director Selemela, the 10111 system covers all nine provinces, the flying squads are not yet sufficiently staffed and equipped to reach every part of the country, especially not the more remote areas, and are thus only operational in the major urban centres.
Table 1: Number of 10111 centres, location and staffing (2009)

<table>
<thead>
<tr>
<th>Location</th>
<th>Number of centres</th>
<th>SAPS staff: current</th>
<th>SAPS staff: ideal</th>
<th>PSA staff: current</th>
<th>PSA staff: ideal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gauteng (Midrand)</td>
<td>1</td>
<td>50</td>
<td>195</td>
<td>414</td>
<td>476</td>
</tr>
<tr>
<td>Free State (Welkom, Bloemfontein &amp; Phuthadijhaba)</td>
<td>3</td>
<td>96</td>
<td>179</td>
<td>34</td>
<td>60</td>
</tr>
<tr>
<td>KwaZulu-Natal (Durban, Hilton &amp; Richards Bay)</td>
<td>3</td>
<td>45</td>
<td>61</td>
<td>167</td>
<td>150</td>
</tr>
<tr>
<td>Western Cape (Cape Town)</td>
<td>1</td>
<td>28</td>
<td>Not available</td>
<td>168</td>
<td>Not available</td>
</tr>
<tr>
<td>Northern Cape (Kimberley)</td>
<td>1</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
</tr>
<tr>
<td>North West (Mafikeng)</td>
<td>1</td>
<td>8</td>
<td>48</td>
<td>20</td>
<td>Not available</td>
</tr>
<tr>
<td>Limpopo (Polokwane)</td>
<td>1</td>
<td>4</td>
<td>12</td>
<td>82</td>
<td>82</td>
</tr>
<tr>
<td>Mpumalanga (Witbank &amp; Secunda)</td>
<td>2</td>
<td>17</td>
<td>21</td>
<td>12</td>
<td>24</td>
</tr>
<tr>
<td>Eastern Cape (Uitenhage, East London, Mtata, Port Elizabeth &amp; Queenstown)</td>
<td>5</td>
<td>97</td>
<td>136</td>
<td>149</td>
<td>122</td>
</tr>
<tr>
<td>National total (10111 centres)</td>
<td>18</td>
<td>345</td>
<td>652</td>
<td>1046</td>
<td>914</td>
</tr>
<tr>
<td>--------------------------------</td>
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<td>----------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Gauteng (Midrand, JHB, North Rand, West Rand, Vaal Rand, East Rand, Soweto &amp; Pretoria)</td>
<td>8</td>
<td>577</td>
<td>857</td>
<td>258 (212)</td>
<td></td>
</tr>
<tr>
<td>KwaZulu-Natal (Durban, Hilton &amp; Richards Bay)</td>
<td>3</td>
<td>61</td>
<td>174</td>
<td>73 (63)</td>
<td></td>
</tr>
<tr>
<td>Northern Cape (Kimberley)</td>
<td>1</td>
<td>21</td>
<td>59</td>
<td>12 (12)</td>
<td></td>
</tr>
<tr>
<td>Limpopo (Polokwane)</td>
<td>1</td>
<td>56</td>
<td>100</td>
<td>16 (15)</td>
<td></td>
</tr>
<tr>
<td>Eastern Cape (East London, Mtata &amp; Queenstown) (No numbers available for Uitenhage &amp; Port Elizabeth)</td>
<td>5</td>
<td>82</td>
<td>113</td>
<td>32 (29)</td>
<td></td>
</tr>
</tbody>
</table>

Source: Adapted from a report by Dir MM Selemela, South African Police Service, Division Visible Policing, Head Office, Pretoria, 3 April 2009
The 10111 centres and flying squads are often accused of poor performance and ineffectiveness. The Pretoria News reported on 17 February 2009 that only four out of 24 vehicles of the Pretoria flying squad were fit for use. This means that of the 12 to 15 members per shift, only eight will be operationally active, and only four as opposed to six or seven vehicles can be deployed at any given time. According to the Pretoria News report, the flying squad blames the ‘unserviceability’ of many of its vehicles on incompetency at the police garage. The police garage in turn has accused flying squad members of poor driving, resulting in regular breakdowns. However, since flying squad vehicles are on the road almost 24-hours a day and are, of necessity, driven at high speeds, often on poor roads, it is vital that an effective and efficient mechanical support system be in place. This did not seem to be the case at the time of writing.

At the Pretoria flying squad, analysis of the mechanical support situation was complicated by uncertainty as to the number of vehicles attached to the unit. According to Director Selemela, in March 2009 the Pretoria flying squad had 32 vehicles of which 21 were serviceable. This information is clearly at variance with numbers provided by unnamed members of the Pretoria flying squad cited in the Pretoria News article of February 2009.

The poor service delivery by police stations and 10111 centres was commented on by the auditor-general, in his report to Parliament during March 2009. He referred to a performance audit of service delivery at police stations and 10111 centres, identified during 2006/07 as a critical focus area. The audit found (among other things) cases where the minimum time required to respond to calls was not adhered to. Some call centres were not properly equipped; and there was a shortage of trained personnel.

Functions and operations

The relationship between the 10111 centres and flying squads and their respective functions is poorly understood by the general public. To some extent this confusion can be ascribed to public perception being influenced by television and film portrayals of how squad cars operate in other countries. This is not helped by the lack of a proper public communication strategy that would address misconceptions. This section explains how the two entities function and relate to one another.

First of all, it is important to know that 10111 centres and flying squads have
their own separate command and control structures. The commander of a 10111 centre does not exercise any control over a flying squad, other than the authority to dispatch vehicles in response to emergencies or calls for assistance. Likewise, flying squads have their own command and control structures, and exercise no authority over 10111 centres.

At the provincial level, all flying squad units, 10111 centres and police stations fall under the command and control of the provincial commissioner of police, who, in turn, reports to the national commissioner of the SAPS. However police stations have separate command and control structures of their own. The only control exercised by 10111 centres regarding vehicles attached to police stations, is to dispatch them in response to emergencies or calls for assistance when a flying squad vehicle is not readily available, or if the situation otherwise justifies such a dispatch. The Draft National Instruction is not clear about what would happen if a flying squad or station vehicle failed to carry out the dispatch by a 10111 centre (See the discussion below: ‘Why the system doesn’t always work’).

According to section 10 (4) of the Draft National Instruction there are four kinds of commanders at 10111 centres:

- A 10111 centre commander, who is responsible for the day-to-day functioning of the centre
- A centre supervisor, who is responsible for the effective and efficient functioning of personnel during each shift
- An operational commander, who is responsible for the operational coordination of all radio equipped vehicles
- A zone or shift commander who, in cooperation with the operational commander, is responsible for the effective and efficient functioning of the flying squad in their area of jurisdiction

It would seem from the responsibilities of these supervisors and commanders that they would have the authority to follow up on dispatches, and hold their staff accountable for failing to properly act on these, irrespective of what unit or station they belong to. One would also expect that they could report offending members to their respective commanders and/or higher authority for the necessary action. However, the failure of the policy document to explicitly deal with this issue is a noteworthy shortcoming.
10111 centres

The purpose and nature of the 10111 centres is set out in the Draft National Instruction. Section 11 sets out the primary and secondary functions of the 10111 centres:

**Primary functions:**
- a. Provide a twenty-four-hour ‘professional and immediate emergency telephone service’ during an emergency involving a crime. This includes receiving and processing of all the information relating to calls made to the 10111 centre.
- b. Dispatch a SAPS unit by radio to attend to complaints received.
- c. Keep records of all complaints attended to, from the moment of receiving the complaint until the appropriate SAPS unit has attended to the complaint.

**Secondary functions:**
- a. Give advice on the police and emergency services.
- b. Assist all SAPS units, by activating back-up such as may be required to attend to high risk or emergency situations. This may include the Special Task Force, Organised Crime, Air Wing, Fire Brigade and Ambulance Services.
- c. Receive and process radio enquiries received from the police, such as information about suspicious vehicles and firearms.
- d. Serve as an early warning centre during hostage situations, major incidents or disasters by alerting and activating all role players, as well as coordinating their actions.

Section 2(4) defines 10111 centres as ‘all formally established centres that serve more than one police station area’. Essentially the 10111 call centres are meant to facilitate a rapid response to crime. But they can only do so if they are well-equipped and staffed by adequate numbers of sufficiently trained personnel who have the use of advanced equipment.

Unfortunately, as Tables 1 and 2 show, overall the 10111 centres are short-staffed and the flying squads do not have enough functional vehicles. In addition, the flying squads are not evenly distributed nationally, so large sections of the population do not benefit from the emergency service.

Interviews with senior SAPS members closely associated with 10111 centres and flying squads suggest that much more training is needed to fully equip staff for their roles. This includes the ability to take down reports for assistance prop-
erly, and to effectively dispatch vehicles in response to these calls.

The minimum requirements for employment within the 10111 centres (section 12 of the Draft National Instruction) are: (i) a senior certificate or equivalent qualification; (ii) computer literacy; (iii) the absence of a speech or hearing impediment; and (iv) meeting the requirements of the prescribed competency profile (to be developed by the Psychological Services of the SAPS because of the stressful environment under which members within Emergency Services perform their duties).

It is often argued in the media that deployment of civilian staff (Public Service Act personnel) in the 10111 call centres is preferable so as to free trained police officials for operational duties. To that extent the above minimum requirements appear to be sufficient. However, the disadvantage is that civilian staff in the call centre will always find it difficult to properly assess the operational realities faced by police officials whom they dispatch to emergency calls. Therefore, it is essential that at all times some trained and experienced police officials are deployed to call centres to assist and guide the civilian staff, even if this is done on a rotational basis. At the time of writing this was not the case.

In Gauteng, problems associated with the efficient dispatching of staff and vehicles appear to have been exacerbated by the centralisation of the 10111 centre to Midrand. This centre replaced the six that were previously distributed throughout the province. One problem of overcentralisation of call centres is that operators are less likely to be as familiar with the larger geographical area, and will therefore be less effective in taking calls and dispatching vehicles. This could be solved by deploying operational members (trained police) to the centre who are familiar with the areas served by the centre to assist operators who do not know the area well.

The motivation for the centralisation of the 10111 centre was the inability of the old analogue repeater system in Gauteng to cope with demand during peak call periods, and the negative impact this had on police response. In 2006 the six 10111 centres in Gauteng received 4.6 million calls. The new centralised centre was equipped with a digital system (Digital Trunked Radio Network) that ensures much better radio communication. According to the report by SAPS which covered October-December 2008, the Midrand centre received just over 1.4 million calls in those three months. The report did not provide the total number of calls for the year, so a direct comparison with the old decentralised centres is not possible.
**Flying squads**

According to section 2(3) of the Draft National Instruction, the flying squad ‘includes all activities and type of patrols with vehicles within the Emergency Response Services command and control structure’. Section 1 describes the flying squad as a crime deterrent, ‘as well as [serving] as a force multiplier to all the police stations in its service area during priority/serious and violent crimes in progress that requires an immediate response. It could also provide back-up for all the police stations in its service area if the police station might need assistance during life-threatening circumstances’.

The primary functions of the flying squad (section 11(3) of the Draft National Instruction) can be summarised as follows:

a. To provide a rapid response to priority, serious and violent crimes in progress in an attempt to:
   i. Attend to complaints
   ii. Apprehend suspects
   iii. Limit any possible further danger or damage

b. To stabilise the crime scene, including:
   i. Obtaining statements and contact detail of witnesses
   ii. Arresting of suspects and processing at nearest police station
   iii. Protecting and securing of the crime scene until the arrival of the investigating officer or relevant specialised unit

c. Provide a back-up service to all police stations during life threatening situations

d. Conduct ‘active visible policing/proactive crime prevention duties’ when not required for serious or priority crimes or complaints

One of the key shortcomings of this description is that it assigns the responsibility ‘to stabilise the crime scene’ to a member of the flying squad, if they are first on the scene. This places an enormous burden on the flying squad member, who is required to perform all the responsibilities required in terms of the Draft National Instruction as well as the more advanced steps set out in the SAPS Policy 2 of 2005 on Crime Scene Management for the first member (as will be discussed in Chapter 3), such as taking statements and setting up a crime scene command centre. These time-consuming expert activities would be better carried out by the responsible investigating officer or the relevant specialised unit or the crime
scene manager who takes over the crime scene from the first member. Members of the flying squad do not have this kind of expertise, and in any case they should not be tied down at a particular crime scene for longer than it takes to hand over to the responsible officer or unit.

Where flying squad members act as ‘first member’, that is when they arrive on a crime scene first, they should only be expected to do what is immediately required, such as carrying out arrests, taking down contact particulars of witnesses, and securing the scene. As soon as the investigating officer or relevant specialised unit or Crime Scene Manager arrives they should take over the crime scene, so the flying squad members can be available for the next emergency.

The secondary functions of the flying squad as described in section 11(4) of the Draft National Instruction are to:

a. Assist police stations (if required) to attend to less serious complaints
b. Serve as a back-up and a rapid response service for the policing of major events such as national elections, international conferences, etc.
c. Attend to major incidents
d. Stabilise crime scenes, for example by providing basic first aid to injured victims

e. Provide general assistance to the public, for example in cases of broken down vehicles

According to section 12(2)(c) of the Draft National Instruction, the minimum requirements for placement or transfer to the flying squad are, amongst others, that the member: (i) have a valid driver’s licence; (ii) successfully complete the advanced defensive driving course; (iii) successfully completed the Tactical Level Training Programmes; (iv) fit the competency profile (as developed by SAPS’ Psychological Services) for flying squad members; (v) pass at least two fitness tests annually; and (vi) have not been found guilty of a criminal offence that may have implications for the inherent requirements of the job. It is noteworthy that section 12(2)(iii) regards it as ‘a recommendation if the member has at least two (2) years functional policing experience, but this is not a prerequisite.’

SAPS management should reconsider the fact that functional experience is not a prerequisite for service in a flying squad, but merely a recommendation. A flying squad member needs to perform at a higher operational level than the average police patrol officer. Members of flying squads have to react to serious and violent crimes as a matter of course, more often than not when these crimes are still
in progress. They have to react swiftly, take quick decisions, and be able to take control of serious and often life-threatening situations. This requires maturity, expertise and experience that only comes with time and exposure. A member of the flying squad should be required to have had the experience of growing and developing as a station police official or patrol officer over time, during which he/she will have gained the necessary maturity that would equip him/her for the more advanced role required in a flying squad.

Why the system doesn’t always work

Poor response to legitimate calls for assistance from 10111 centres and flying squads should never be tolerated. However, prank calls (especially after school hours, over weekends and during school holidays) block the lines and slow reaction time as operators try to distinguish between real reports of emergencies and pranksters. The time of day when the calls occur suggests that most prank calls are made by children.

The 10111 centre in East London provides some idea of the scale of the prank call problem. This urban centre receives an average of 1000 phone calls every day. Only about a quarter of these are emergency calls, the remainder are prank calls. According to the police in that centre most of the prank calls come from young children who call for fun to abuse anyone who answers the call.21

According to an SAPS report, there were 3,2 million calls in the last three months of 2008 to 10111 centres nationally.22 Of these, about 220 000 (this excludes the figure for the Midrand centre in Gauteng, which was not given) are regarded as hoax or prank calls and 1,5 million as enquiry calls. A reliable estimate for the Midrand centre would be that a third of all calls to 10111 centres nationally are received there, so we can estimate that in the last three months of 2008 the 10111 centres received approximately 330 000 prank calls. Thus of the 3,2 million calls received at the 10111 centres, only about 1,3 million (or 40 per cent) were emergency calls. The auditor-general, in its report to Parliament during March 2009, found that in one particular call centre only 22 645 (17 per cent) of the 136 829 calls received during December 2007, required police action.23

The police service have tried various ways to address the prank call problem. For example, in 2007 the Soweto Police Emergency Services launched a 10111 project with the theme ‘Don’t abuse the 10111 line’, to discourage children and adults from abusing the emergency number.24 To enable a fast and efficient re-
Emergency Response Services of the SAPS

response by the 10111 centres and the flying squad, the police have issued some basic guidelines to the public about how to use the system.25

Although both the 10111 centres and the flying squads form part of the SAPS’s Emergency Response Services, each has its own particular responsibilities. A call to the 10111 centre will not automatically lead to the dispatch of a flying squad vehicle. Depending on the seriousness of the call or complaint, the 10111 centre may decide to dispatch an ordinary police station vehicle from one of the police stations within its jurisdiction. Normally, however, if the call is for a serious crime or a crime in progress, the flying squad (if available in a particular area) is dispatched. Where a flying squad does not exist or a vehicle is not available, the 10111 centre may dispatch any available vehicle within its area of jurisdiction, even a vehicle attached to a police station other than the station where the response is needed.

Police stations, by contrast, can dispatch only those vehicles attached to their particular station and only within their station areas. However, where they need assistance they can approach the 10111 centres, which can move station vehicles outside station areas if required.

No hierarchical relationship exists between 10111 centres, flying squads and police stations and therefore none of these entities has command over the other. If police employees fail to carry out the duties assigned to them by a 10111 centre, the centre can take action in certain ways. It can report the ignoring of a station vehicle dispatch or failure to carry out requested follow-up action to the relevant station commissioner, who can investigate and take action against the members involved. If the station commissioner fails to take action or is himself/herself involved in the failure to act in terms of the dispatch, the 10111 centre can refer the matter to the relevant Provincial Commissioner under whose control all the 10111 centres, flying squads and police stations in that province falls.

CONCLUSION

There is little doubt that the 10111 centres and flying squads have a crucial role to play in the fight against crime and in providing a quick response to members of the public who fall victim to, or feel threatened by, serious crime.

In the eyes of the general public, the mere existence of these services is (or ought to be) reassuring. However, there are a number of concerns that require urgent attention:
The national instruction: *Emergency Response Services: 10111 Centres & Flying Squad* of 2005, is still in draft form. This creates a climate of uncertainty and raises doubts about the commitment of the police to these services.

In spite of the large increase in police numbers over the last eight years, from 120 000 to 183 000; the 10111 centres and the flying squads continue to experience personnel shortages of 50 per cent and 24 per cent respectively.

There appears to be a serious problem with the management of the vehicle fleet of the flying squads, especially as far as responsible control and repair of these vehicles are concerned.

The un-availability of the flying squads in some areas of the country, especially the more remote rural areas, is an additional reason for concern and requires the attention of police management. It is essential that such an important policing service be extended to cover the whole country.

Police service members who are transferred or appointed to 10111 centres and flying squads should be chosen from those who have gained basic police experience at police station level. Such experience is indispensable, and this approach would also screen members and thus help to identify those who are best qualified and most suitable for this kind of work.

The responsibilities of the flying squad *vis-à-vis* crime scenes need to be reconsidered. The amount of time that flying squad members need to spend at crime scenes in order to fulfil all the tasks that they are expected to carry out is not compatible with their primary task of providing an ‘emergency response’ unit that is capable of quick reaction.

Finally, public education (with a focus on children) is necessary to overcome the problem associated with hoax or non-emergency calls that may block or overload the system and thus reduce police effectiveness. The police have launched a number of local initiatives to counter these abuses, but public education should be planned and implemented at a national level.
NOTES

2. Ibid, 4-6.
3. Ibid, 6.
5. Ibid.
8. Personal interview with Director M M Selemela, Section Head of the SAPS Emergency Response Services in the Division Visible Policing at Head Office, Pretoria, 3 April 2009. Director Selemela provided a written report and additional information on the staffing, location and vehicles of the 10111 centres and flying squads.
13. During the interview with Director Selemela on 3 April 2009, she insisted that the information in the SAPS report reflected the correct position.
16. It is difficult to understand why a national instruction should remain in draft form for over three years. It points to an absence of will to effectively manage the structures that it is intended to govern. This is bound to create uncertainty, with a perception that failure to adhere to the prescriptions of a ‘draft’ cannot be dealt with as seriously as would be the case if an approved national instruction were in place.
17. Telephonic discussions on 6 and 24 March 2009 respectively with two senior members of the South African Police Service who prefer to remain anonymous.
19. Personal interview with Director Selemela and SAPS written report, 3 April 2009.
20. Crime scene management is discussed in some detail in chapter 3.
21. It is unclear why the stabilising of crime scenes is also mentioned as a secondary function, when it is already indicated as a primary function, unless it was included by mistake.
23. Personal interview with Director Selemela and SAPS written report, 3 April 2009.
3 INVESTIGATION AND CRIME SCENE MANAGEMENT

Bilkis Omar

In Chapter 2 Burger analysed the problems experienced by the emergency services – often the first port of call for victims. This chapter takes us into the next part of the process, which is the management of a crime scene and the investigation carried out by the police after a crime has been committed.

Management of a crime scene is the process of ensuring the orderly, accurate and effective collection and preservation of physical evidence so that the evidence can be used to take legal action. Further scientific analysis of evidence may become the responsibility of the police’s forensic laboratory. According to McCartney, ‘forensic science can be considered broadly as the application of natural and physical sciences to the resolution of legal conflicts’.¹

This chapter describes the procedure for collection of physical evidence at crime scenes and identifies those involved. It also describes the investigative
process followed by detectives in solving the crime, as well as the procedure followed at the forensic science laboratory once evidence has been forwarded for analysis. It outlines the training that crime scene technicians and detectives need to receive, and the problems experienced in the real world of investigation and analysis. Expert opinion on facts pertaining to the case study of Anna Juries in Chapter 1 is offered. The chapter concludes with a set of recommendations aimed at policy-makers.

COMMAND STRUCTURE FOR AN INVESTIGATION

Figure 1 and 2 below illustrate the command and control structures of the Detective Service and the Criminal Record and Forensic Science Service divisions of the SAPS. Each division has its own command and control structure, with no horizontal command structure connecting them. Operational cooperation between the two divisions does take place and is guided by national instructions and policies.

Figure 1 demonstrates the command structure of an investigation undertaken by a detective at a police station. Figure 2 demonstrates the command structure of an investigation undertaken by a laboratory or crime scene technician. The detective’s role in an investigation differs from that of the laboratory or crime scene technician. While the detective is tasked to open a case docket for a particular crime, take down witness statements and continue further investigations on the case, a crime scene technician is tasked to collect physical evidence at a crime scene. (A detailed discussion on the two processes is provided later in this chapter).

COLLECTION OF PHYSICAL EVIDENCE

The procedure for the management of all crime scenes – irrespective of the scale and nature of the crime – is set out in SAPS Policy 2 of 2005. The policy provides guidelines to ensure that crime scenes are properly controlled, managed, and documented; and that the integrity of items with potential evidential value is unquestionable. Here we describe ten phases for managing a crime scene: 1) reporting and activation, 2) responding, 3) controlling, 4) hand-over, 5) planning, 6) investigation and processing, 7) debriefing, 8) restoring, 9) releasing and 10) evaluation.
Figure 1: Command and control structure of the SAPS Detective Service

SAPS Head Office
National Commissioner

Detective Service
Divisional Commissioner

Provincial Detective Head

Police Station
Station Commissioner

Visible Policing
- Social Crime Prevention
- Client Service Centre
- Community Policing
- Sector Policing

Crime Intelligence
- Statistical Analysis
- Crime Threat Analysis
- Crime mapping

Detective Unit
- SVC Detectives
- FCS Detectives
- General Investigation

Support Service
- Human Resources
- Financial Services
- Legal Services
- Communication Services

Source: Adapted from SAPS organogram
Figure 2: Command and control structure of the SAPS Criminal Record and Forensic Science Service

Source: Omar in SA Crime Quarterly no 23, 2008
Reporting and activation

The reporting phase is the first contact between a witness to a crime and the police.

The policy stipulates that any member of the police to whom a crime is reported (whether at a Community Service Centre, 10111 Centre, or Operational Room), must be trained to manage the actions that are required to respond to crimes reported to their offices. These members of the police must have up-to-date contact details for relevant units involved in crime scene management in the SAPS.\(^4\)

The call taker and/or dispatcher who receives a report of an incident must enter necessary and accurate information on a SAPS 297 form or on the SAPS computer system. S/he must also dispatch a member of the police (referred to as a first member) to the crime scene and continue to monitor the situation and provide support for as long as required.\(^5\) The monitoring and support provided by the call taker or dispatcher includes maintaining open lines of communication with the first member and activating back-up from other police members if necessary.

Responding

This phase refers to the actions taken by the first member at the scene of a crime. The correct management of the crime scene is one of the key determinants for the successful resolution of a case.

The prescribed procedure is for the first member on the scene to assess the situation, make arrests if required, remove unauthorised persons from the scene, and begin compiling a report.

Controlling

The first member must then take control of the physical area where the crime took place. S/he must secure the crime scene with physical barriers, such as SAPS-identifying tape, to prevent the destruction, disturbance or contamination of physical evidence. The SAPS recommends an inner and outer cordon.\(^6\)

Exit and entry routes to and from the crime scene must be identified and the first member must identify and begin to interview witnesses.\(^7\) An Access Log must be used to record the names of those who have access to the scene.

During this controlling phase the First Member must also record the particu-
lars of injured and emergency personnel in a *Casualty Log*, and make a note in the *Exhibits Log* of those exhibits that have to be moved to protect the integrity of the exhibits. In practice, police colleagues who are present at the crime scene usually assist the First Member, although this is not stated in Policy 2.

The first member on the scene must also establish a command centre for administrative functions and communication, identify potential witnesses, and gather information on suspects. These actions must be continued until the first member is able to hand the scene over to the crime scene manager.

A crime scene manager, according to SAPS Policy 2, is a ‘specifically trained member of the relevant investigation unit who manages the crime scene team on the crime scene’. She or he will be a senior ranking member of either the Serious and Violent Crimes (SVC) unit, or the Family Violence, Child Protection and Sexual offences (FCS) unit, depending on the nature of the crime.

<table>
<thead>
<tr>
<th>Crime committed</th>
<th>SAPS crime investigating units*</th>
<th>SAPS forensic science lab units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder with gun</td>
<td>SVC</td>
<td>Biology unit &amp; ballistics</td>
</tr>
<tr>
<td>Child rape</td>
<td>FCS</td>
<td>State pathologist and biology unit</td>
</tr>
<tr>
<td>Rape and murder of a family, including survivors</td>
<td>SVC, FCS</td>
<td>Biology and ballistics units</td>
</tr>
</tbody>
</table>

*Note that these units have been decentralised to police station-level since 2006.*

Hand-over

This phase refers to the devolution of responsibility and control of the crime scene by the first member to the crime scene manager. When the crime scene manager from the relevant unit, either, ballistics, biology or any other unit, depending on the type of crime, arrives on the scene (see Table 3), the first member must complete the ‘first member report’ and hand it to the crime scene manager. The first member must also give the crime scene manager any other documentation and logs relating to the crime, and must brief the manager about the crime and what action has been taken.
The crime scene manager now assumes control and responsibility of the crime scene. S/he must assign a command centre commander and an investigating official (also known as detective) to the crime scene.

Planning

The planning phase calls for an evaluation of the crime scene to determine what further actions need to be taken. The crime scene manager, crime scene technician (CST) and detective do this by taking a ‘first walk’ through the crime scene. They take note of the route used by the perpetrators and victims, and any evidence that might need to be processed prior to or after the walk through. The crime scene manager then decides on the direction the investigation should take. S/he determines the way and order in which resources must be used and the methods to be used during the investigation and processing of evidence. The crime scene manager must keep a report of all these planning decisions and processes.\(^{11}\)

This phase is important in determining the level of priority given to a particular crime. If the call taker or dispatcher who received the initial information does not determine the priority of the crime based on the information received, then the investigating official or the crime scene manager, based on guidelines and experience, can do so. Crimes against women and children and serious and violent crimes are two of the SAPS four operational priorities for the period 2005-2010.\(^{12}\)

The Local Criminal Record Centre (LCRC) in whose jurisdiction the incident occurred must provide a crime scene technician specially trained in his/her field, from a specific unit such as the biology unit or the ballistics unit. The technician, who reports to the crime scene manager, must evaluate the situation; decide on and appoint a crime scene processing team; identify, note and protect all possible physical evidence; determine what resources are required for the processing of the crime scene (for example, evidence collection kits, equipment to identify blood that has been cleaned up, or calling in other experts like blood spatter technicians); and must keep a record that will form the basis of a report about how the scene was managed.\(^{13}\)

Investigation and processing

During this phase, the detective begins conducting the actual investigation or gathering of information about the crime. His/her role continues until the case is finalised in court or withdrawn. (Later in this chapter under the heading ‘Invest-
tigating a crime’ there is a detailed account of the procedure for investigation).

The crime scene manager meanwhile continues to coordinate the processing of the crime scene where physical evidence is collected. The crime scene technician plays a vital role during this phase as s/he is the expert tasked to do the actual collection of the physical evidence.

These tasks are the responsibility of the crime scene technician:

- Ensure that the crime scene is photographed before it is altered and that the physical evidence is in its original position.
- Coordinate the processing of the scene for physical evidence, including ensuring that all evidence has been logged and handled according to the directives for the collection of exhibits, and ensure the continuity of possession and integrity of the evidence. The Locard-principle is used when searching for physical evidence. According to this principle, some or other clue is usually left behind when two objects or persons come into contact with each other. For example, when a person touches a windowpane his/her fingerprints are transferred to the windowpane. Investigators may therefore assume that there will always be physical evidence at the scene of the crime – they must simply search for it.
- Coordinate the gathering of information for event construction.
- In the case of a death, authorise the removal of the corpse in consultation with the pathologist.
- In the case where a suspect is known and/or arrested, a control sample of saliva and/or hair fibre should be taken for comparative purposes, so that the evidence found at the scene can be compared with known data on the SAPS database.
- Evidence collected must be preserved in evidence collection kits and forwarded to the forensic science laboratory for analysis.

The full resources of the necessary investigation agencies are not always available for every crime scene, so inevitably some evidence will not be collected, some will not be processed, and some will deteriorate before it can be secured. The critical duty of the investigator in charge is to ensure that the most valuable evidence is collected, so that good forensic reconstruction is possible.
Debriefing

During this phase, the crime scene manager conducts a final survey of the crime scene, reviews all activities that took place, determines if all objectives were met, and debriefs all members involved. S/he must identify all persons from whom control samples should be taken in order to eliminate or identify them, and ensure that all reports and documents are handed over to the detective for further investigation.

The crime scene technician must attend to any additional tasks identified, determine responsibilities and procedures for the gathered exhibits and evidence, and ensure that the crime scene technician's report is completed and handed over to the crime scene manager.

The detective updates the investigation diary to reflect decisions made at the debriefing session, obtains all relevant documentation, and deals with exhibits that are his/her responsibility. For example a set of keys found at a crime scene would probably not require analysis at a lab but would need to be kept in the evidence room at a station.

Restoring

This phase refers to returning the crime scene to an orderly manner. The crime scene manager and the detective must ensure that all equipment used at the crime scene is removed, that photographs of the crime scene are taken, that all evidence is accounted for and logged in the evidence management system, and that all documents are in the possession of the detective.

Releasing

In this phase the crime scene must be handed back to the owner of the premises or a person identified as responsible for the premises by the crime scene manager.

Evaluation

In the evaluation phase the crime scene manager, and all other SAPS members involved, make an assessment of the process followed at the crime scene and make recommendations for improvement.

The phases described complete the process of collection of physical evidence and the management of crime scenes. Table 4 lists the documentation that must be completed by the responsible SAPS member at a crime scene.
Table 4: Documents used during crime scene management

<table>
<thead>
<tr>
<th>Document</th>
<th>Person responsible</th>
</tr>
</thead>
<tbody>
<tr>
<td>SAPS 297</td>
<td>Call taker and/or dispatcher</td>
</tr>
<tr>
<td>First member report</td>
<td>First Member</td>
</tr>
<tr>
<td>Access log</td>
<td>First member and/or Commander of Joint Operational Centre (CJOCC) or Command Centre Commander (CCC)</td>
</tr>
<tr>
<td>Casualty log</td>
<td>First member and/or CJOCC or CCC</td>
</tr>
<tr>
<td>Exhibits log</td>
<td>First member or Crime scene technician</td>
</tr>
<tr>
<td>Witness log</td>
<td>First member and/or detective</td>
</tr>
<tr>
<td>Crime scene manager report</td>
<td>Crime scene manager</td>
</tr>
<tr>
<td>Crime scene technician report</td>
<td>Crime scene technician</td>
</tr>
</tbody>
</table>

Source: SAPS Policy 2 of 2005

FORENSIC ANALYSIS

The physical evidence collected is forwarded to the police biology laboratory for analysis. The laboratory administrative assistant receives the evidence, issues a lab number, and then registers the case on the Exhibit Management System (EMS), which manages and controls case files and items in storage. In this way the tracking of files and items to other storage areas and persons is simplified.

An analyst then begins the process of evaluating the evidence. This excludes DNA, which is only analysed when requested by a state prosecutor, or if a particular case has been prioritised. Recently, police labs have begun requesting prosecutors to furnish them with court dates when evidence will be reviewed.

If a request is made to analyse DNA, it is extracted from blood, semen, or tissue, and a match is sought. The result is then interpreted and the reporting officer compiles a report, which is reviewed by another senior reporting officer. The administrative staff will then dispatch the report and the exhibits.

An affidavit is then forwarded to the prosecutor or the investigating officer which may suffice to prove the state's case. However, there are many instances where analysts have to be available to testify in court.
INVESTIGATING A CRIME

Investigating a crime requires particular expertise and dedication. Here we outline the nine stages that have to be followed by all those involved in the process:

1. Opening a case docket

The Detective must open and maintain a case docket. Each docket is divided into three divisions – A, B and C – so as to provide easy access to information for a Prosecutor or Detective Commander.

Documents filed under ‘A’ are evidence material pertaining to the case – statements by complainants and witnesses, arrest warrants and search warrants, identity parade forms, bail information, reports from evidence analysts, J88 or examination form of district surgeon, photographs, and fingerprint forms.

Correspondence and administrative documents are filed under ‘B’. These include information on stolen property, wanted persons, replies from other police stations and media clippings relating to a case.

Investigation diary details are filed under ‘C’. These include the first member report, details of the crime scene, modus operandi, clues pertaining to the case, search of premises, victim and suspect details and whether the victim was insured.

2. Registering case docket

The case docket must be registered in the Crime Register or on the Crime Administration System (CAS) at the Community Service Centre (CSC) by the official on duty in the CSC. In some instances, a case is registered by the detective who attended a crime scene or attended to a complaint in his office.

3. Transfer of case docket

The case docket must immediately be forwarded to the Crime Office or the Detective Unit by the official on duty at the CSC or the detective who registered the case docket.

4. First information inspection

The Crime Office Commander or Detective Commander must acknowledge receipt of the case docket by signing for it. He/she must then conduct the First Information of Crime Inspection.
5. Assigning the case to a detective
The Crime Office Commander or Detective Commander must assign the docket to a detective – either the detective who attended the crime scene and registered the docket, or another detective – depending on various factors such as the experience of the detective or the number of cases a particular detective is investigating. A docket can be re-allocated when a detective takes leave or when his/her position has been changed.32

6. Investigation commences
The detective assigned to the case leads and manages the investigation. Depending on information required for a particular case, such as a suspects’ record of previous convictions that would be obtained from the Criminal Record Centre (CRC). General practice within SAPS is to allocate one detective per case. In complex cases such as one involving a criminal syndicate, a team of detectives is involved.

7. 24-hour docket inspection
After the detective begins the investigation, a 24-hour docket inspection takes place. Over the course of the investigation further docket inspections (monthly and six monthly) may also take place.33

8. Dockets sent to court
The docket is forwarded to a senior public prosecutor for a decision on whether to prosecute or not.34 There is no time limit with regard to the preliminary investigation and the prosecutor receiving the docket. The duration is determined by merits of each case, such as whether the detective has obtained all the witness statements, the case-load of the detective, and the priority of a particular case being investigated by the detective. The docket is then placed on the court roll and the court case ensues.

9. Further investigations and feedback
During the investigation process, the complainant must be provided with feedback on the case by the detective investigating the case. As mentioned above, general practice within SAPS to allocate one detective per case.
IDENTITY PARADES
Jerome Chaskalson and Ynze de Jong

Identity parades are one of the investigative tools available to detectives. South Africa’s law of evidence recognises the use of identity parades as a legitimate method for establishing the identity of alleged offender. There is a set of principles which govern their use. These principles have mostly been established in the course of criminal proceedings by South African courts.

Generally identity parades are used in criminal matters where there is a single witness. Since in these cases there is often no other corroborating evidence to link the accused to the offence, the courts need to be satisfied that the identification process itself was inherently fair.

The courts will assess the fairness of the identification process on the basis of a number of factors.35

- The witness should be told that the suspect might not be on the identity parade. The intention is to avoid the scenario where a witness makes the assumption that one of the people on parade must be the alleged offender and therefore feels a pressure to select a person from the line-up.
- The witness should give a description of the suspect before the identity parade takes place. Normally this description is given in a statement taken shortly after the incident. If for some reason this information was not recorded, a new statement must be taken prior to the identity parade being held. This check allows for a comparative analysis between the description that was first given by the witness and the offender who is identified during the line-up.
- There should be at least eight individuals in the line-up, reasonably similar in appearance to the suspect. Similarities, for example, include height, weight, complexion and hair colour.
- The suspect should not wear distinctive clothing. In other words all of the people on the line-up should be dressed similarly.
- The witness should not see the suspect in custody before the parade takes place. This is because the witness might make the assumption that the person is the alleged offender simply because they are in custody.
- No one may tell the witness whom to point out, or in any other way encourage the identification of a particular suspect. It is for this reason that the investigating officer should not be in charge of the identity parade. Ideally an officer who is not aware of the facts of the case should manage the identity parade.
• If there are several witnesses, they should be kept separate before the parade, and each witness should undertake the identification individually. This is done to avoid witnesses influencing each other.
• The suspect should be allowed to choose his or her place on the parade. This is to ensure that there is an element of randomness to each identity parade.
• If a witness knew the suspect before the identity parade this fact should be noted and subsequently disclosed.

While identity parades are a useful and important method of establishing the identity of a suspect it is important that the procedures followed during this process are inherently fair and that there is no attempt to influence the identification of a suspect by a witness.

Unfortunately these standard procedural checks, which are relatively simple to comply with, are often not followed in practice. This lack of attention to procedural requirements often prejudices the state's case.

In the case of Anna Juries, the admissibility of the identity parade was compromised in a number of ways. Firstly it was arranged and conducted by the investigating officer. It is somewhat ironic that his colleagues were scathing about him not arranging it properly, since in fact he should never have been involved. Also, the victim should never have been able to see the offender at the police station prior to going into the identification room. We assume that he was kept in an isolated area, but had requested permission to use the public telephone located at the front of the charge office. If that was the case, an SAPS official should have ensured that the victim had been moved.

TRAINING

Crime scene technician training

The crime scene technician places a vital role in evidence collection (see ‘Collection of Physical evidence; Investigation and processing, and Debriefing’ page 75, 65, 67). Training for this position should be intensive and provide sufficient knowledge and skills to:
• Correctly and thoroughly process a crime scene
• Correctly record and visually represent the crime scene
• Assist investigating officers to reconstruct the event and correctly identify role-players
• Correctly administer all the related actions
• Correctly present all findings in court

SAPS Policy 4 of 2003 governs the training procedure for crime scene technicians. According to the policy recruits have to complete the Basic Police Training Course and must attend a two-week in-service induction programme where new recruits are exposed to the LCRC environment, organisational culture and operational procedures.

Recruits then attend a 10-week Advanced Crime Scene Course. If the recruit successfully completes the course, s/he will be qualified as a crime scene technician and can commence duties at the LCRC. At the LCRC s/he is expected to work and gain a year’s practical experience, which includes close supervision and regular assessments by the Commander of the LCRC. Members who do not complete this course and the one-year practical training are not allowed to investigate cases or carry dockets.

A crime scene technician must then attend a 2-week forensic training programme. A time-frame for commencement of the training is not stipulated, apart from the requirement for completion of the one-year practical training for the advanced crime scene course. The aim of the forensic training programme is to train the technicians to interact with the forensic science laboratory and to recognise, collect, preserve, pack and dispatch crime exhibits for forensic analysis. The programme also trains them to assess fingerprints. If any trainee technician fails to reach the required competency level in the training course, s/he is given an opportunity for one more re-assessment. If s/he fails the re-assessment, s/he has to repeat the course.

After qualifying, a crime scene technician is required to attend a refresher course every five years. Regular reviews of training procedures are undertaken to keep pace with knowledge and scientific advances locally and internationally.

Detective training

Training for detectives includes a Basic Training course, a Detectives Learning Programme, and (for managers) a Detective Commanders Learning Programme.

The Detectives Learning Programme is a 14-week outcome-based programme ‘designed to train investigating officers in the SAPS to enable them to police in a way that is consistent with crime investigation principles and to render a profes-
sional service to the community they serve. The course is comprehensive and includes a broad range of subjects: criminal law, law of evidence, the Criminal Procedure Act, statement taking, docket administration, inquest investigation, crime scene management, hints for investigation of specific crimes, management of exhibits, investigative interviewing, witness protection, tracing resources, missing and wanted persons, crime information gathering, Interpol, informant handling, surveillance, pointing out, identification parades, granting and opposing of bail, and giving evidence.

Although the formal training of detectives appears to be very detailed and comprehensive, almost a quarter of those fulfilling the roles of detective have not undergone the requisite training. This is confirmed by the Policy Advisory Council report of 2007 which states: ‘The greatest problem with ensuring an effective detective service nationally is that 24 per cent (3 574) of investigators have not undergone the basic training in order to qualify as a detective.’

WHERE IS IT GOING WRONG?

A well-processed crime scene, good investigation, and successful conviction are dependent on a well functioning criminal justice system. Police policies and training are of a high standard and if they were implemented as directed, policing would be more effective and more crimes would be solved. In practice, however, there is a disparity between policy and practice within the police and within the Criminal Justice System as a whole.

Police

Policy versus implementation

SAPS Policy 2 of 2005 clearly defines the roles and responsibilities of members involved in a crime scene – from the call taker at the early stages to the crime scene technician at the closing stages.

Policy 2 has two serious shortcomings. Firstly, it is intended for very serious crimes and does not make realistic suggestions about dealing with less serious crimes. Secondly, it does not accommodate the realities of daily police work. For example, the policy requires a designated and separate crime scene manager, whereas in fact it is more likely that an individual police member will fulfil the function of two or more of the role-players laid down in the policy. Human re-
source constraints within SAPS, along with the high number of violent crimes in
the country, means that in reality not all the functions envisaged in the policy are
fulfilled. In fact it is rare for South African crime scenes to be processed in com-
plete adherence to policy requirements as in the Anna Juries case.

Policy 2 accords the first member a great deal of responsibility at the crime
scene; from taking statements, to keeping three different logs, to establishing a
command centre. Uniformed police from police stations or the Flying Squad
generally are first responders to crime scenes. Their functions should be limited:
they should be tasked only with cordonning off crime scenes and identifying and
restraining suspects and witnesses, after which they should hand over to a detect-
ive or crime scene manager (this is also discussed in Chapter 2).

Shortage of detectives and inadequate resources

The police service’s problems are exacerbated by a shortage of detectives. There
are currently approximately 24 600 detectives nationally\textsuperscript{40} - about 13 per cent of
the total SAPS personnel. This is insufficient. The figures for 2007 showed that
each detective was carrying some 150 dockets at any one time.\textsuperscript{41} Added to this
burden are insufficient resources such as vehicles, computers and furniture, al-
located to detective units by station commissioners.\textsuperscript{42}

Furthermore, the inadequate training of many detectives as well as a lack of
mentorship and in-service training raises questions about the ability of some de-
tectives to perform their duties.\textsuperscript{43}

Detectives and the collection of physical evidence

While Policy 2 of 2005 says the role of detectives at a crime scene does not include
collection of physical evidence, in practice this is often the case. The primary re-
sponsibility of detectives assigned to a crime scene is to investigate and manage
the case, while collection of physical evidence is the function of suitably qualified
crime scene technicians only.

However subsection 20 of the Criminal Procedure Act 51 of 1977 states that
the ‘State may seize anything...’ at a crime scene\textsuperscript{44} and seize certain articles in
order to obtain evidence for the institution of a prosecution...\textsuperscript{45} Act 51 is not
specific enough and implies that any government official can seize any property,
while failing to specifically address the collection of physical evidence at crime
scenes. National Instruction 2 of 2002 on ‘Search and Seizure’ is just as vague and
does not address specifically the collection of physical evidence at crime scenes.\textsuperscript{46}
There are several factors that compel detectives to collect evidence; namely:

- **Too few trained and qualified crime scene technicians**
  In South Africa’s 92 LCRCs during 2006/07, there were 1691 crime scene experts (tasked to collect physical evidence at crime scenes) and 92 forensic experts (working at labs analysing DNA samples). Table 5 shows the number of crimes requiring the expertise of Crime Scene Technicians in the same period.

<table>
<thead>
<tr>
<th>Crime Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murders</td>
<td>19 202</td>
</tr>
<tr>
<td>Rapes (between April and December 2006)</td>
<td>39 304</td>
</tr>
<tr>
<td>Attempted murder</td>
<td>20 142</td>
</tr>
<tr>
<td>Robbery with aggravating circumstances (not including street robberies)</td>
<td>35 537</td>
</tr>
<tr>
<td>Arson</td>
<td>7 858</td>
</tr>
<tr>
<td>Burglary at residential premises</td>
<td>249 665</td>
</tr>
<tr>
<td>Robberies at residential premises</td>
<td>12 761</td>
</tr>
</tbody>
</table>

Source: SAPS Annual Report 2006/07

Given the high number of cases, it is apparent that not every case will receive the necessary attention required, as there are simply too few crime scene technicians. If one takes into account the number of technicians on leave or attending training courses, the number is further reduced. The capacity concern regarding crime scene technicians was endorsed by the previous Deputy Minister of the Department of Justice and Constitutional Development, Johnny De Lange, to the Portfolio Committee on Justice and Constitutional Development and Safety and Security in 2008, in a review of the South African criminal justice system.

- **Inaccessibility of crime scene technicians**
  Crime scene technicians are often simply not available, which means detectives are frequently compelled to collect crime scene evidence otherwise the evidence may become contaminated or degraded. Many rural areas in South
Africa have no LCRCs, and the distance that members of the local LCRCs have to travel means that it is simply not feasible for them to reach many crime scenes.

- **Processing of less serious cases**
  In less serious cases in which there is no victim, but where there is, for example, a weapon at the crime scene that needs to be secured, a detective is permitted to process the crime scene and file the weapon as an exhibit at the local police station.

Cleary there are compelling reasons for detectives to step in and collect physical evidence. While this *de facto* situation is unlikely to change, the policy remains that officially detectives should not be collecting physical evidence at crime scenes at all. Assistant Commissioner Moonoo – at the time of writing Detective Service head of General Investigations – agreed that ‘detectives should not collect evidence at crime scenes.’

The implication being that the policy should remain in place. If that is to be the case, these other problems have to be addressed.

**Custody of evidence**

Maintenance and custody of the chain of evidence is an area of concern. There seems to be a general problem with evidence collection kits not being stored in a cool place, or the kits not being sent to laboratories as quickly as they could be, leading to a deterioration of the samples. Advocate Retha Meintjes, Gauteng Director for Public Prosecutions, says while the procedure for sending evidence to laboratories is not difficult, the problem seems to be that ‘there is no proper control at station level in this regard. Police need only prove that the exhibit was in safe custody and maintained until it reaches the court.’

Senior Superintendent Anneke Pienaar states that control at station level is the responsibility of the commanding officer at the station who is overseeing the case. She also states that it is the responsibility of the police to maintain the chain of evidence and ensure the prevention of contamination of the exhibit.

**Inspections of dockets**

Docket inspections are undertaken by the Detective Commander or Crime Office Commander in order to guide the detective during the investigation proc-
Docket inspections take place on registration, after 24 hours, monthly, six-monthly and pre-court. If inspections do not take place as prescribed, vital information can be overlooked leading to a case being lost in court. According to the Policy Advisory Council report, inspections are often not done in accordance with required standards and policies.55

Lack of coordination
SAPS members working in the different sections of stations, such as the Detectives Unit, VISPOL (members who do patrols and visible policing) and crime prevention, work in silos and do not share information, with the result that vital information that could have been used to solve a case is lost.56 UNISA senior lecturer in Police Practice, Marilieze van Zyl, contends that station level managers do not monitor and provide mentoring for junior members.57

Audits
The SAPS does not specifically monitor cases withdrawn by prosecutors or cases that are unsuccessful and struck off the court roll as a result of poor evidence collection or weak investigations. This makes it difficult to get a clear idea of the extent of weak investigation, and of which specific areas that may be problematic. (See Chapter 5: The National Prosecuting Authority).

Other problems
Other problems hindering effective investigations include the fact that police members are required to testify in court about investigations, and many members fear this task, mostly because of aggressive cross-examination by the defence.58 UNISA’s Marilieze van Zyl contends that there is the ‘problem of some members having a lack of pride in their jobs; lack of motivation to do better; feeling apathetic and having generally bad attitudes, which contributes to poor policing. There is no culture of walking the extra mile’.59

FORENSIC LABORATORY
Management of forensic fieldworkers at the 92 LCRCs that are tasked to collect physical evidence is inadequate. Prior to 2007, the LCRCs were decentralised and accountable to provincial commissioners. Since then, the centres have been cen-
Centralised and fall under the national office of the Criminal Record and Forensic Science Service (CRFSS).

Weak management of forensic fieldworkers impacts on the evidence collection process. Some concerns are:

- Insufficient training
- Poor quality samples due to degradation (exposure to environmental factors)
- Health care practitioners submitting incomplete crime kits
- Evidence collection kits not being stored in a cool place
- Kits not being sent to the laboratories as quickly as they could be

Advocate Retha Meintjes contends that a further concern is confusion about who is responsible for collecting reports from laboratories, once the evidence has been sent off for analysis. She says that it is a police function to keep track of results from laboratories. She adds that previously there was a functioning system at police stations whereby supervisors checked up on the status of cases and lab results, but that this is no longer happening.

**COURTS**

General practice regarding physical evidence processing requires a prosecutor to fill in a request form once evidence is collected. This form has to be attached to the samples, and forwarded to the laboratories. The form serves as a checklist for evidence that is forwarded to the laboratories and it also informs the lab of the date on which the results are required in court.

According to Advocate Meintjes, laboratory results are not always produced on the specified court days, with the result that matters have to be rolled over. She mentioned that there is a backlog of results from the laboratories, but at the same time it seems that prosecutors were not making requests on time, leading to laboratories not meeting their deadlines.

The court cycle time, from when a case is first put on the court roll to when a resolution has been reached (verdict of withdrawal), is nine months. However magistrates are becoming increasingly stringent in this regard – demanding that cases not be kept on the roll for more than six months. Reasons advanced for the change are that court and case flow management are the responsibility of magistrates, who are accountable for the time a case is kept on the roll. However, as the case study shows (and as discussed in Chapter 5) cases sometimes take much longer than this to be processed.
HOW WELL WAS THE CASE STUDY CRIME SCENE INVESTIGATED?

In the light of all the above, we can now ask how well the crime scene in the Anna Juries case was investigated. Experts consulted identified the following shortcomings:

The detective and LCRC members should have visited the crime scene to look for physical evidence that could be used in court against an offender.

The table and chairs that the suspects ‘helped’ the victim move into the shop before the attack were not dusted for fingerprints. Cigarettes could have been collected for evidentiary purposes.

The knife found should have been processed at a laboratory. The knife should have been left as found – LCRC members should have been contacted, photographs should have been taken and the exhibit should then have been collected and placed in an official evidence collection bag. A unique seal number for this bag should have been recorded in the member’s docket as well recorded in the crime docket by the investigating officer. The LCRC member should then have registered the knife as an exhibit at his/her respective offices (Forensic Register) and the exhibit should have been forwarded to the forensic science laboratory for analysis, such as DNA profiling.

According to Superintendent Pienaar, the accused pointed out that the knife was the particular knife that was used in the assault of the victim, and there was no need to have it processed at the laboratory. However, if the accused had at a later stage denied or disputed having pointed out the knife, then a laboratory report would have assisted in counteracting his denial. Furthermore, the commander inspecting the docket could have advised the investigating officer of the benefit of having the knife analysed at the laboratory.

Concerning the blood sample taken from Anna Juries, the office of the provincial head of Gauteng CRC is of the opinion that the idea was excellent, but that ‘unfortunately the idea was not followed through and there was a change of investigators as well. The prosecutors could have advised the process.’

According to the office of the Gauteng Provincial Head: Criminal Record Centre, if the LCRC were contacted, members investigating the crime scene would have taken full control of all physical and forensic evidence. Furthermore, even though detectives were contacted to investigate the crime scene, the LCRC could have still been summoned later to the crime scene and conducted all necessary fingerprint and forensic investigations.
RECOMMENDATIONS

The following recommendations are offered with a view to constructively assisting the South African Police Services.

- Policy 2 of 2005 is clearly intended for an ideal police service and is unrealistic in the South African situation, for two reasons. Firstly, it is aimed almost exclusively at serious crimes and does not consider the management of less serious crimes. Secondly, the shortage of expert staff makes adherence policy to the impossible. We urge SAPS management to realign Policy 2 to the country’s de facto realities.

- The role of detectives in collecting evidence at crime scenes needs to be clarified by SAPS management. Particular expertise is required to process a crime scene and detectives should not be undertaking this task. If the service continues to allow detectives to collect physical evidence, policies and national instructions should clearly reflect this, and extensive training in this regard must be provided.

- Human resource shortages within the detective service, laboratories and LCRCs have been an ongoing issue for many years. Low salaries and skills retention of scientists at LCRCs and labs, while having improved slightly since 2007, have not been addressed to any convincing extent. Given the speciality of detectives’ and technicians’ jobs, more attractive remuneration packages are needed to attract and retain suitable people. The training backlog of detectives must be addressed, and more importantly, new detectives must be provided with regular mentoring by senior detectives.

- SAPS detectives, laboratory staff and prosecutors should meet on a regular basis to iron out issues of concern in the crime scene process. While Policy 2 addresses this through a ‘debriefing phase’, in practice this is not done. In the same vein, new policies should be written in conjunction with the relevant criminal justice system departments and with other SAPS divisions, especially when there is an overlap in functions and responsibilities.

- Station Commissioners have to ensure that dockets are inspected regularly to ensure high quality investigation and detection. Commissioners also need to address the lack of coordination among station members and ensure that members talk to each other and share vital information. In addition, Commissioners should undertake audits of cases lost in court as a result of poor investigations so as to measure the performance of station members and detectives.
• The SAPS must begin using the existing oversight and accountability structures of Provincial and Divisional Commissioners, as well as the National Inspectorate and the provincial and national Departments of Community Safety, to address internal operational and organisational issues.
NOTES

2. This figure was taken from various SAPS structures and adapted by the author.
5. Ibid, 7-8.
6. Ibid, 10.
7. M van Zyl, senior lecturer, Department of Police Practice, University of South Africa, personal interview, Pretoria, 7 November 2008.
10. This table was created by the author.
15. M van Zyl, senior lecturer, Department of Police Practice, University of South Africa, e-mail correspondence, Pretoria, 26 November 2008.
16. Ibid.
20. Ibid.
22. Ibid.
26. Ibid.
27. Ibid.
28. Ibid.
29. Ibid.
30. Ibid.
31. Ibid.
32. Ibid.
33. Ibid.
34. Ibid.
37. Ibid.
38. R Behari-Ram, Director, SAPS Detectives Training Division, e-mail communication, 23 March 2009.
40. Ibid.
41. Ibid.
42. Ibid.
43. Ibid.
45. Du Toit et al, *Commentary on the Criminal Procedure Act*.
49. De Lange, Presentation to the Portfolio Committees.
53. Pienaar, personal communication, 10 February 2009.
54. Ibid.
57. Ibid.
58. Ibid.
59. Ibid.
60. Omar, The SAPS Criminal Record and Forensic Science Service.
62. Ibid.
63. Ibid.
64. Ibid.
65. Ibid.
66. Pienaar, personal interview, 10 February 2009.
68. Ibid.
70. Ibid.
71. Pienaar, personal interview, 10 February 2009.
73. Singh and Lambert, e-mail correspondence, 30 November 2008.
74. Ibid.
75. Ibid.
This chapter describes the concept and legislation governing bail in South Africa.

THE JUDICIAL CONTEXT

S35(1)(f) of the Constitution states that:

Everyone who is arrested for allegedly committing an offence has the right...to be released from detention if the interests of justice permit, subject to reasonable conditions.

The Constitution recognizes that there may be a tension between an individual’s right to freedom and the interests of justice generally. On the one hand South African law treats individuals as innocent until a court has found them guilty. Innocent people are entitled to their freedom and the law will not arbitrarily deprive them of this right. On the other hand, the law recognizes that in certain instances it is in the interests of justice to deprive or curtail an individual’s freedom. A bail
hearing is concerned with whether it is necessary, in the interests of justice, to interfere with an individual's right to freedom. In this context the interests of justice need to be determined with reference to the specific facts placed before the court, as described in the following quotation,

The common law and the Constitution demand an equilibrium between the importance of freedom and the broad interest of justice. The primary objective of the criminal process regarding the phase before the trial is to bring the accused before a court and there to confront him or her with the allegations of the prosecution. For that reason the court gives its support, where necessary, to steps aimed at preventing flight, obstruction of the police investigation, interference with State witnesses or concealment/destruction of real evidence. The courts have done this by means of bail conditions and criteria which have been thrashed out judicially over the years. See, for instance, S v Acheson 1991(2) SA 805 (NmH).³

Under apartheid, the South African State passed legislation that provided for the extended detention of individuals without affording them the right to bail. A person could, in certain instances, be deprived of their freedom by a simple administrative process. These administrative processes were often abused, and for many people who were detained there was no balancing of the individual's right to freedom against the interests of justice.

The post-1994 Constitution included two specific provisions in the Bill of Rights dealing with the individual's right to freedom and the rights of accused people. S12 guarantees the freedom and security of all people while s35 qualifies this right by allowing for the detention or arrest of people.

The Constitution therefore balances an individual's right to freedom with the interests of justice to arrest and detain people under appropriate conditions. At the same time it provides the broad framework for considering the release on bail of an accused pending trial.

Generally the concept of bail is not well understood by ordinary citizens. This is particularly true in crimes that provoke community outrage. It is easy, in such situations, to lose sight of the presumption of innocence and begin thinking that a person accused of a crime should be arbitrarily deprived of their liberty as some form of punitive response. While this emotive response is understandable, especially for serious crimes, it is built upon an incorrect understanding of the purpose of bail.
LEGISLATION GOVERNING BAIL

The granting of bail is governed by Chapter 9 of the Criminal Procedure Act 51 of 1977 as amended4 (‘The Act’). A general principle relating to bail is that anyone who has been arrested may not be detained for longer than 48 hours unless he or she is brought before a court which orders further detention.5 Previously it was possible for a detained person to request that a bail hearing be held after normal court hours. This right has been expressly removed by s50(6)(b) of the Act. The Act does however make provision for bail to be granted by certain police officers and prosecutors in less serious offences.6

The majority of bail proceedings and certainly all of those involving more serious offences are decided after a formal bail hearing held at court. Post 1994 the Act has seen a number of amendments which have impacted on the granting of bail. A new section 60 set out in detail both the substantive and procedural issues relating to bail in 11 specific sub-sections. Prior to the amendments the portion of the Act dealing with bail, merely stated that an accused was allowed to apply for bail and set out the relevant procedural requirements. In other words, no statutory guidance was provided to the courts as to the circumstances in which bail should be granted or refused.

The s60 amendments brought about three important changes. First, the new paragraph s60(1)(a) set out the right to bail if it is in the interests of justice that the accused be released.7 Second, sub-sections 60(4) to 60(9) provided a compendium of criteria that have to be considered in any decision to grant bail. These amendments are, for the most part, not contentious. The third major change relates to subsection 60(11) which singled out for special and more stringent treatment persons awaiting trial on certain categories of offences.

Section 60 confirms the principle that an accused person is entitled to be released on bail if the court is satisfied that the interests of justice so permit.8 The section sets out five considerations for determining when it is not in the interests of justice to release an accused person on bail:9

- The likelihood that the accused will endanger an individual or the public at large
- The likelihood that the accused will not present himself/herself for trial
- The likelihood that the accused will threaten the prosecution by interfering with witnesses or destroying evidence
- The likelihood that the accused will undermine the objectives of the criminal justice system; and
• The likelihood that the release of the accused will disturb the public order

S60 also lists specific lines of enquiry a court should consider when weighing up the interests of justice for each of the five considerations. These lines of enquiry are not exhaustive, and the court retains its discretion to make an appropriate order on a case-by-case basis.

Possibly the most contentious component of s60 are the provisions which deal with persons accused of having committed ‘serious offences’ (Schedule 5 offences)\(^{10}\) and persons accused of ‘extremely serious offences’ (Schedule 6 offences).\(^{11}\) S60(11) provides that:

Where the accused has been charged with a ‘serious’ (Schedule 5) offence, the accused may only be released if s/he produces evidence to satisfy the court that the interests of justice permit his/her release.

Where the accused has been charged with an ‘extremely serious’ (Schedule 6) offence s/he may only be released if s/he produces evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his/her release.

There are two components to the contentious nature of this section. The first relates to the exact legal meaning of the section while the second relates to the fact that the legislature has deemed it appropriate to curtail the freedoms of individuals charged with these categories of offences.

It is clear that the intention of the legislature when making the amendments was to make it more difficult for people charged with serious offences to obtain bail. This was no doubt a response to the South African crime situation and the perception that the state was weak on crime and protected the rights of accused persons over those of victims of crime. While it may be argued that this approach adversely limits a person’s right to freedom, the relevant sections have been tested by the Constitutional Court which upheld the validity of the legislation.\(^{12}\) Currently, in respect of s60(11), there is neither certainty on what evidence needs to be produced in order to satisfy a court that the interests of justice permit release, nor what evidence is required to convince a court that ‘exceptional circumstances’ exist which are in the interests of justice to permit release.\(^{13}\) Cowling writes in the *South African Journal of Criminal Justice* that:

In *S v Vanqa 2000 (2) SACR 371 (TKHC)* it was held that this provision places
a heavy onus upon an applicant for bail since it requires the applicant to adduce evidence of exceptional circumstances. Besides the question of onus the other cause of judicial controversy arising out of s60(11)(a) is determining the precise meaning of ‘exceptional circumstances’.

However, it nonetheless remains to give some form of meaning to this difference in wording between the various provisions. And, it is submitted the solution lies in the fact that this difference reflects a very fundamental and long-established principle of the bail process viz the fact that the more serious the offence with which the accused is charged the more difficult it will be to secure release on bail. Thus it was recognized in Dlamini’s case that the greater the seriousness of the offence the more heightened will be the temptation to flee as a result of the severity of the possible penalty. This has nothing to do with constitutional principles or the bail process but is simply a matter of practicality and logic.

The question then arises whether this confusion is best resolved by once again amending the section or simply allowing the courts to grapple with the legislation and come up with a coherent meaning which accords with both the intention of the legislature and our well developed bail jurisprudence. This question is the subject of ongoing discussion and debate.

SOME PRACTICAL CONSIDERATIONS

From a theoretical legal perspective, the South African bail system has a justifiable approach to the balancing of the individual’s right to freedom against that of the interests of justice. However, in practice, there are a number of challenges faced by the criminal justice system when conducting bail hearings.

One hurdle faced by the state when administering the bail system is the constitutional requirement that accused persons have to be brought before the court without unreasonable delay. For a court to properly consider the bail criteria listed above, it needs to know, at least, the correct identity of the arrested individual and his/her previous criminal record, if any. It is also useful to know whether there are any other pending criminal matters faced by the individual. Despite the fact that the arrested individual is statutorily required to disclose this information at a bail hearing practical experience has demonstrated that this disclosure of information does not always take place.

In practice this means that the prosecutor is dependant on records held by other state agencies. Getting hold of these records within a short time often poses
a challenge. Bail hearings are often postponed in terms of the Act for periods not exceeding seven days17 in order to obtain the relevant information. Unfortunately it is often the case that the information is not available by the time the court needs, in the interests of justice, to make a bail decision.

Any balancing of rights by the court would further benefit from a court having access to reliable information with respect to the accused’s personal circumstances. The need for this information is recognized by a 2007 amendment to the Act which provides that courts consider a pre-trial report if one exists. Such pre-trial reports are not currently widely available.

Let us take an example. Say a suspect accused of shoplifting is readily granted bail without the court being aware of the fact that the accused is currently being sought in terms of a schedule 5 or 6 offence. It is unlikely that this person will voluntarily appear before the court at the appropriate postponement date. To avoid such errors it is important that the criminal justice system at all times ‘knows its clients’.

In the absence of meaningful and accurate relevant information bail decisions can be flawed. As Cowling argues:

> And yet the costs on both sides are too high if the correct decision is not reached. In the *Carmichele* case18 an innocent woman was brutally and indecently assaulted as a result of an accused having being incorrectly released, whereas *S v Vanqa*19 the accused unnecessarily languished in jail for an extended period while his business failed, his health deteriorated and no progress as all was made with his case.20

Another practical difficulty faced by the State when granting bail is that the court normally grants an accused her/his personal liberty subject to certain conditions. There is no fixed list of conditions but, for example, the court may ask that a passport be surrendered to reduce the risk of flight. The court may simply decide to release an accused on warning to attend the next court proceedings.21 In practice, bail is often granted subject to a financial provision. An accused is set a financial amount, which if paid, secures her/his liberty. If an accused fails to attend proceedings the bail amount is forfeited to the State. However many accused people in South Africa are unable to afford bail, even when the amount set is less than R1 000.

The direct result is that South Africa has a significant awaiting trial detainee population who have been granted the option of paying bail but have not ex-
ercised this option. This category of awaiting trial detainees represent approximately 22 percent of the detainee population and costs the state approximately R2,2 million per day.\textsuperscript{22}

It should be noted that the Act makes provision for the head of a prison to request the court to reconsider the release or amendment of bail conditions of detainees charged with less serious offences on account of prison conditions.\textsuperscript{23} This provision is not widely used notwithstanding the wide-scale overcrowding in prisons.

The large awaiting trial detainee population imposes both infrastructural and financial pressures on the Department of Correctional Services. These pressures are intensified by the fact that it often takes long periods of time before a criminal matter is finalised. The Department of Correctional Services does not provide rehabilitative programmes or projects to awaiting trial detainees who also do not have access to the educational or recreational programmes available to convicted offenders.\textsuperscript{24}

Recently, in order to alleviate some of the financial and infrastructural pressures, the Department of Correctional Services in conjunction with the Department of Justice announced that it would release 10 000 awaiting trial detainees who could not afford to pay their bail of less than R1 000, but who were not considered to be a threat to society.

It would be beneficial to the criminal justice system to have a better understanding of the offences committed by the awaiting trial detainee population. For instance, if 78 per cent of these individuals have been denied bail, on what basis were these decisions made? Are all of awaiting trial detainees individuals accused of Schedule 5 and 6 offences who could not convince the court that it was in the interests of justice that they be released? Or, are there large numbers of detainees who have been refused bail for less serious offences? The answers to these types of questions will help shed light on both how the courts are applying the bail legislation and the impact of the legislation itself.

**BAIL IN THE ANNA JURIES CASE STUDY**

Anna was attacked by three people one of whom was a juvenile at the time. All three were charged with armed robbery, attempted murder and assault with the intent to do grievous bodily harm. These charges fall under the category of serious and extremely serious offences. As such any bail hearings would be governed...
by the provisions of s60(11) of the Act.

The police were able to apprehend two of the perpetrators shortly after the incident (and before the first identity parade). According to Anna, the juvenile and adult perpetrators were both released on warning. It is unclear from the case study whether this release was done by the police or by a court. Given the nature of the charges, however the police did not have the authority to release the perpetrators.

If the court convened a bail hearing it would be theoretically possible for it to have released the perpetrators on warning. They would have had to convince the court that this release was in the interests of justice. Anna was unable to obtain any information as to how or why the release took place. In fact, it appears from the case study that Anna was surprised that the perpetrators were not in custody. Anna also had real concerns that the accused might return and harm her. When Anna questioned the prosecutor on why they were not in custody she was informed that because they had been released on warning there was nothing that could now be done. This is incorrect. The Act makes provision for an amendment to bail conditions where appropriate. Even if the perpetrators were to remain on bail Anna might have felt more at ease if conditions were attached to their release or alternatively if there were any conditions, that someone had informed her of what these were.

The third perpetrator was arrested after the second identity parade and appears to have remained in custody until the conclusion of the case. Why the third perpetrator was treated differently to the other two is unclear. Anna was informed that the third accused was allegedly being charged with rape in a separate incident and this may provide the reason. However, this rape charge is not mentioned again and appears to have fallen away.

Certainly there appears to have been little attempt to communicate with Anna by either the police or the prosecution to keep her informed of developments. Such an approach would have been in line with the Carmichele judgement which held that a victim has an interest when bail is considered.

**CONCLUSION AND RECOMMENDATIONS**

When examining the current bail system in South Africa one is confronted by diverse views. Popular sentiment often holds that the South African bail system is soft on criminals and favours the rights of perpetrators over those of victims. On
the other hand, many legal commentators have remarked that the recent amendments to bail legislation mean that the system infringes on the individual’s right to freedom. As such it places a harsh burden on certain categories of offenders to show that they are deserving of bail. Irrespective of the merits of these arguments, the Constitutional Court has held that the amendments are constitutional. There are however a number of practical challenges facing the bail system.

Any court holding a bail hearing is required to balance the individual’s right to freedom against the interests of justice. Each enquiry focuses on the specific circumstances before the court. As such, relevant information is required to facilitate informed decision making. The obtaining of this information is often difficult and time consuming and can mean that the court is required to make a decision in the absence of meaningful information.

*It is recommended that there is a need to facilitate the sharing, between government departments in the criminal justice system, of timeous and accurate digital information relating to the identity, previous criminal history and pending charges relating to individuals who have come into conflict with the law. At the same time a strategy should be developed to enable the wider availability of pre-trial reports.*

In trying to evaluate the current functioning of the bail system it would be useful to have meaningful data on which informed analysis can be based. Currently data is collected by all role playing departments in the criminal justice system. However, this data is captured for the specific purposes of each department and the sharing of information between departments is, at times, poor. This makes researching the efficiency and effectiveness of the system difficult. The sharing of this data would enable more informed trend and impact analysis on the current functioning of the bail system. Research findings would then enable better strategic decision making and associated budgeting.

*It is recommended that there is a need for accurate information on bail data to be shared between role playing departments. The sharing of this data would enable more informed trend and impact studies on the current functioning of the bail system. Research findings would then enable better strategic decision making and associated budgeting.*

The criminal justice system faces challenges in communicating information to individuals who are the victims of crime. Traumatized victims are, through no fault of their own, often unaware of the workings of the criminal justice system and are reliant on role players for information which is sometimes not forthcoming. The lack of informed feedback can serve to alienate a victim from the crimi-
nal justice system which is meant to protect him or her (see Chapter 6: Victim Support).

It is recommended that there is a need for greater sensitivity to be displayed to victims of serious offences. Steps should be taken to avoid alienating or further traumatizing such victims by providing them with relevant and accurate information throughout the criminal process.
NOTES

2. It is beyond the scope of this chapter to examine this tension and how it has impacted on the development of the law relating to bail in South Africa. For such an overview see Project 66: Bail Reform in South Africa, South African Law Commission, December 1994.
4. Over the past ten years there have been numerous amendments to the Act. For the purposes of this chapter the most important amendments are contained in the Criminal Procedure Second Amendment Act 75 of 1995; Criminal Procedure Second Amendment Act 85 of 1997; Judicial Matters Amendment Act 34 of 1998; Judicial Matters Amendment Act 62 of 2000; Judicial Matters Second Amendment Act 55 of 2003; Criminal Law (Sentencing) Amendment Act 38 of 2007; and Criminal Procedure Amendment Act 65 of 2008.
5. Section 50(1) of the Act.
6. Sections 59 and 59(a) of the Act respectively.
7. Prior to a 2000 amendment to section 61 the accused had a right to bail unless it was in the interests of justice that he or she be detained. In other words the 2000 amendment has theoretically made it more difficult for an accused to obtain bail.
8. Section 60(1)(a) of the Act.
9. Section 60(4) of the Act.
10. Schedule 5 offences include treason, murder, rape, and indecent assault on a child under 16.
11. Schedule 6 offences include premeditated murder; murder of a law enforcement officer; murder of a witness; multiple rape; gang rape; armed robbery; robbery causing grievous bodily harm; and indecent assault on a child under the age of 16 years involving the infliction of grievous bodily harm.
12. *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (2) SACR 51 (CC).
13. South African law has generally treated bail hearings as inquisitorial in nature. A court must enquire into the circumstances before it in order to make an informed decision. Section 60(11) introduces a duty or onus on the accused to show why it is in the interests of justice for them to be released. This introduction of an onus on the accused has been the subject of criticism. ‘In purely practical terms the bail process (in the form of a sui generis inquisitorial proceeding) has been tried and tested and applied on a daily basis over the years. In broad terms the courts have a general understanding of how it works. There is no need to superimpose a series of onuses in order to effectively embrace the advent of constitutionalism’ (M Cowling, *The


15. Cowling, The incidence and nature of onus in bail applications, 204.

16. Section 60(11)(B) of the Act.

17. Section 50(6)(d) of the Act.

18. *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA). This case resulted in monetary damages being awarded against the State and being paid to the victim.


21. Release on warning may be done by a court or police officer in terms of section 72 of the Act in certain less serious offences.


24. It is beyond the scope of this chapter to consider the question of whether or not this approach is constitutionally sound.
INTRODUCTION

After response to a crime, managing the crime scene, and investigation, most of the work of the police is completed. The next phase is prosecution. The National Prosecuting Authority (NPA) becomes involved in a case at the point that the police hand over the docket to a prosecutor. The NPA has the responsibility of deciding whether the police have adequately investigated the case and presented enough evidence for the case to be heard to a court. The NPA, in the person of a prosecutor, will also consult with the victim (if there is a victim), and present the case to the court if it goes to trial.

This chapter presents the role and function of the National Prosecuting Authority. It considers the untenable caseload that individual prosecutors face and
the way they deal with cases. As is the case for most prosecuting authorities worldwide, the NPA tends to play a primarily ‘reactive’ role in relation to crime. However there has been an attempt, primarily in the form of a three-year community prosecution pilot study, to extend this role beyond the conduct of trial, in the direction of crime prevention. This chapter also presents the findings of an evaluation of the community prosecution pilot project, undertaken by the Independent Project Trust in 2007.

THE NPA

Section 179 of South Africa’s 1996 Constitution provided for a single prosecuting authority. This was followed by the National Prosecuting Authority Act (32 of 1998) which provided the legal basis for the establishment of the National Prosecuting Authority.¹ The NPA is headed by the Office of the National Director of Public Prosecutions (NDPP). The first two directors, Bulelani Ngcuka and Vusi Pikoli both left under controversial circumstances, suggesting the politicised nature of the position. At the time of writing (May 2009) there was still only an Acting National Director, Mokotedi Mpshe. In a young organisation involved in massive transformation processes, the turnover in chief officials has had serious implications. The discontinuities have resulted in uncertainty, low morale and constantly changing allegiances.

Four Deputy National Directors and several Special Directors report to the National Director of Public Prosecutions. The NPA is divided into seven core business units, all supported by a Corporate Services unit. The business units are:

- National Prosecutions Service (NPS)
- Integrity Management Unit (IMU)
- Asset Forfeiture Unit (AFU)
- Sexual Offences and Community Affairs (SOCA)
- Specialised Commercial Crime Unit (SCCU)
- Witness Protection Unit (WPU)
- Priority Crimes Litigation Unit (PCLU)

Of these, the National Prosecutions Service, managed by a Deputy National Director (currently acting) and nine provincial Directors of Public Prosecutions (DPP), is responsible for prosecutions in both the high and lower courts of South Africa.
The Constitution and the NPA Act provide the prosecuting authority with the power to institute criminal proceedings on behalf of the state and to do anything necessary related to this function. This includes supporting the investigation of a case, or discontinuing criminal proceedings where necessary. Unlike many other countries in which there is an obligation to prosecute once a case has been made, in South Africa the NPA has enormous discretionary power to decide whether or not prosecute.

According to the National Prosecuting Authority’s policy manual the prosecutor’s primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, to deliver a fair sentence based upon the evidence presented. At the same time the prosecutor represents the community in criminal trials.

Since its establishment, the NPA has promoted itself as ‘lawyers for the people’. This was emphasized in a 2000 speech in which Nelson Mandela urged the modern prosecutor:

> to build an effective relationship with the community and to ensure that the rights of victims are protected. It is your duty to prosecute fairly and effectively according to the rule of law; and to act in a principled way without fear, favour or prejudice.

In the same speech Mandela told prosecutors ‘it is your duty to build a prosecution service that is an effective deterrent to crime and is known to demonstrate great compassion and sensitivity to the people it serves’. A similar vision is repeated in the NPA’s mission statement that describes its purpose as being to ‘ensure justice for the victims of crime by prosecuting without fear, favour and prejudice and by working with our partners and the public to solve and prevent crime.’

While this sounds laudable, in practice the notion of ‘being lawyers for the people’ is often undermined by a strong focus to meet the needs of the state, which are often quite different from the needs of communities. In the 10 years since its inception, the NPA has been trying to balance these needs, with varying degrees of success.

Despite the difficulties, it must be acknowledged that the National Prosecuting Authority’s mission statement is groundbreaking. Most countries view the prosecutor’s role as limited to reacting to and solving crimes through the trial process. The South African NPA is the first prosecuting authority known to include crime prevention within its mandate. This extension of its mandate is often challenged by prosecutors used to the more traditional approach.
Since 2004 the NPA has been refining a strategy of improving court processes and proactively contributing to crime prevention through initiatives such as restorative justice and community prosecution. Advocate Mzinyathi, acting head of the National Prosecutions Service, has said:

> it is our vision that we will increasingly add a new dimension to our traditional role; we will become an advocate of proactive and alternate justice solutions and “a lawyer for the people” that extends its role beyond that of pure prosecution, to that of caretaker, resolver and preventer of victimization.

Thus there are two clear roles for the NPA, one where it resolves victimization through prosecution and various justice solutions, and another where seeks to prevent victimization.6

THE COURT PROCESS

Despite a commitment to crime prevention, the prosecution of crimes through the courts remains the primary focus of the National Prosecuting Authority. Prosecutors have a unique position in the criminal justice system in that they are the only people who regularly come into contact with every other part of the criminal justice system. The NPA is the link between the South African Police Service (the government department with whom crime victims may first make contact), the Department of Social Development (probation and assessment services) and the Department of Correctional Services (the holding place for offenders and those awaiting trial detainees).7 This means prosecutors potentially have a significant influence over the administration of justice in a community.

Trial preparation

The prosecutor becomes involved in a case when presented with a crime docket by the SAPS, normally an investigating officer or, in larger courts, a Police Services liaison officer. By this time the police should have investigated the crime sufficiently to link a perpetrator to the offence. If the perpetrator has been arrested and is in custody, the SAPS has a legal obligation to present the docket to the prosecutor within 48 hours of the arrest.8

In most fair-sized courts a Control Prosecutor has first sight of the docket. When the Control Prosecutor receives the docket s/he acknowledges receipt in the Official’s Register and registers the case documents in a NPA docket register.
The Control Prosecutor is generally an experienced prosecutor who has some managerial control and liaises between the prosecutors and Senior Public Prosecutors.

The docket will include the evidence the police have gathered, usually in the form of affidavits from witnesses, but it may include other evidence, such as the outcome of an identity parade or forensic evidence. An investigation checklist should also be included in the docket and the Investigating Officer (IO) should indicate against the checklist what evidence has already been obtained. Depending on the type of crime, a number of documents may have to be completed — for example in an assault case a J88 form would be required to record medical evidence (in support of the allegations of assault) that may be needed to obtain a conviction.

In medium to large courts with a high daily intake of cases there is usually an office where a number of prosecutors sort case documents (dockets) according to whether the case will be heard in a district, regional, high or specialised court. The dockets are also screened to ensure that there is sufficient evidence to support the accusations against the accused; that is, to ensure a *prima facie* case exists. Only cases with sufficient evidence are taken to trial. While the NPA has a well-established policy of ‘no case, no enrolment’ the general criteria for enrolment of a case is documentary evidence under oath in the docket that a crime has been committed and that the accused is linked to the crime.

In recent years the prosecution service has placed emphasis on this function of screening dockets on entry into the system and at later stages during the investigation process to ensure the correct enrolment of cases and the elimination of unnecessary cases which burden the heavy court rolls. Senior, experienced prosecutors — often Control Prosecutors or Senior Public Prosecutors themselves — are given this task.

After considering the information in the docket, the prosecutor responsible for screening the case has two options: they can decline to enrol the case in the absence of sufficient evidence (which is referred to as *nolle prosequi*) and give reasons for this decision in the docket; or they can draft a charge sheet and enrol the case. If the case is to be enrolled the docket and charge sheet are handed to a prosecutor with directives as to whether a plea can be taken immediately or whether the case should be postponed to allow for further investigation to be conducted.

There may of course be cases where the police open a crime docket and do not detain anyone for the offence (for any number of reasons). In such instances the
prosecutors receive the dockets as decision dockets and either give directives to the police about what further investigation is needed or, if they are satisfied that the evidence is sufficient to prove the case in court, arrange for a summons, warning notice or warrant of arrest for the offender to appear in court.

If further investigation is required, the prosecutor provides written directives to the police in the investigation diary portion of the docket. The directives are intended to assist the investigating officer to collect the information required for the case to go to court. Once the additional investigation has been completed, the investigating officer returns the docket to the prosecutor. In situations where the case was previously enrolled and postponed, dockets are required to be returned to the prosecutors at least three days before the next court date.

The prosecutors doing the screening need to have enough experience of the court environment to spot what may be missing from the docket. They also need to have sufficient time to screen the dockets properly, and they have to know how to instruct the SAPS investigating officers. Notwithstanding efforts to improve this area of work, these conditions are not always met as the NPA has a high staff turnover and many prosecutors lack sufficient experience.

There is also subtle pressure on prosecutors to enrol cases that are not adequately prepared, since for a detective an enrolled case is a positive performance indicator. In addition, the SAPS usually only regard cases as successfully concluded if there is a finding in court, irrespective of whether this is a conviction or an acquittal. This means that for the police there is a disincentive to support the diversion of cases out of the criminal justice system, for example by following a restorative justice approach. These are thus instances in which the requirements of the two elements of the criminal justice system potentially clash, and which can negatively affect co-operation and the outcome of a case for victim and perpetrator (i.e. end-users of the system).

Enrolled cases are placed on specific court rolls and remain there until finalised. But this does not mean that a single prosecutor will have responsibility for the case from beginning to end (as was clear in the Anna Juries case study). Prosecutors are regularly transferred between units; they are moved between regional and district courts; they are promoted and are used to fill in where there are staff shortages or high levels of absenteeism. Thus there are often incomplete cases left behind, most of them without a proper handover procedure. This is the source of consternation and confusion for many a victim who is left wondering who is dealing with their case, whether they interested, or whether they care? In many
ways this discontinuity amounts to ‘re-victimisation’. The Anna Juries case study showed this very clearly, and demonstrated the negative effect that such changes have on a victim’s perception of the effectiveness of the criminal justice system.

In fact almost every action in a case up to the point of enrolment happens without the knowledge or involvement of the victim, who will usually have had contact only with the investigating officer. Unless the victim is needed to provide evidence or testify in court, there may indeed be no contact with the prosecutor. During this process, as Anna Juries experienced, the victim will not know what is happening to their case, and may doubt that anything is happening at all, undermining their faith in the ability of the system to deliver justice.

Upon enrolment of a case, the prosecutor has to determine how best the case should be resolved to ensure a speedy and effective justice outcome. Proceeding to trial — the outcome usually expected by the public — is only one option. Other options available to the prosecutor are: making provision for an admission of guilt fine, plea bargaining, utilising alternative dispute resolutions — including diversions and mediation between victims and offenders, referring child offenders to special children’s courts, and requesting accused persons to be referred for psychological observation in appropriate cases.

Ideally the prosecutor is expected to consult with the victim before deciding on a course of action, to ensure that the victim’s needs are taken into account. However, the reality is that in a demanding environment, with limited capacity, time constraints and pressure to reduce the number of cases on the court roll, many prosecutors make decisions without consultation or with only minimal consultation with the victim.

If the case goes to trial, the prosecutor must prepare for this by evaluating the evidence, consulting, researching, and securing the attendance of state witnesses (including expert witnesses and the SAPS Investigating Officer). Prosecutors may also be involved in ensuring that interpreters, intermediaries and other role players who may also be required for the hearing, are arranged.

The attendance of a witness at a trial should be secured by a subpoena. Improper subpoena processes result in high numbers of complainants and other witnesses not attending court because they were either not subpoenaed at all, or were asked telephonically to attend court at very short notice (often the day before the trial date).9 In the case study, the subpoena process went horribly wrong. Not only did Anna Juries simply not receive a subpoena to appear in court for what amounted to the third hearing, but a confusion by the clerk of the court
resulted in a warrant for her arrest being issued, rather than for the accused, once again contributing to the trauma she experienced.

The prosecutor should also request information regarding the accused person’s criminal record (the SAPS 69) and, if the accused is under 18, a report from the probation officer which can assist in assessing whether the case is suitable for diversion (see Chapter 7: Policy Issues in Child Justice), again this does not seem to have happened in the Juries case. Consultation with the investigating officer, victim and other witnesses is crucial in order to ensure that the statements and the allegations they contain are correct, and to inform and guide the victim in respect the process to be followed.

For a prosecutor, these are the steps necessary to prepare for trial:

- Evaluating the evidence in the case docket received from SAPS
- Consultation with the investigating officer regarding the evidence, investigation, availability of witnesses and possible exhibitory evidence
- Consultation with the victim, witnesses and others who may be required to testify in court
- Drafting a charge sheet
- Researching the law, reported case precedents and other material necessary to support the case
- Preparing documentary evidence — documents, reports, files, photos, statements, and the like — which may have to be presented during the hearing
- Arranging and managing processes to ensure that witnesses are subpoenaed for the hearing
- Enquiring into, and examining, any previous criminal conduct of the accused person — normally through the SAPS 69 record provided by the police
- Securing exhibits for hearing dates
- Consulting with the defence about possible pleas in terms of Section 105(a) of the Criminal Procedure Act, or possible admissions in terms of Section 220 of the same Act, in an effort to expedite the trial
- Prepare an address or argument to present to court at the conclusion of evidence
- Prepare an address to assist the court in deciding on an appropriate sentence following convictions — this may be enjoined by further witnesses the prosecutor decides to call to support his/her address
All these requirements are time consuming and demand attention to detail, especially since a procedural error may result in an offender being acquitted, or the case postponed. In reality, there is no such time. Prosecutors at larger metropolitan courts handle between 100 and 300 dockets at a time and most receive case dockets less than two days before the date set for trial.

In addition to the normal pressure of case preparation, prosecutors also contend with constant pressure to reduce the high caseloads by targeting so-called backlogs. These are cases which have been on the court rolls for lengthy periods (six months in the case of district courts and nine months in the case of regional courts). These targets are then measured against performance indicators. Special project courts are created from time to time to cater for this focussed attention.

In 2001 the court backlogs were regarded as being so severe that justice officials at Pretoria Magistrate’s Court began a six-week stint of working over weekends to address the huge number of delayed cases facing their courts. This was followed by a national project known as the ‘Saturday Courts’ to try and eliminate backlogs. It was estimated in 2001 that it would take the courts two years to clear the backlog — provided that no new cases came before them in that time. In reality though new cases still came on a daily basis. In the seven-year period between 2001 and 2008, the reduction of backlogs was a major focus of the criminal justice system. In late 2008 the situation remained unresolved, even though R98 million was allocated to a special project aimed at reducing case backlogs. In March 2008 the number of case backlogs stood at 13 per cent in the high courts, 15 per cent in the district courts and 34 per cent in the regional courts. Or put differently – at the end of December 2008, 44 per cent of South Africa’s 50 284 awaiting trial prisoners had been in custody for three months or longer. In the Anna Juries case, one accused was held in custody awaiting trial for over a year.

There is little doubt that additional court sessions have contributed to the finalisation of a greater number of cases than would have been had the projects not been implemented. However, the sheer volume of court rolls, including backlog cases, combined with new incoming work — at a steady rate of around 1 000 000 a year nationally — means that the pressure on the courts is relentless, with no end in sight. This underlines the importance of focusing on crime reduction through social interventions, even if the effect of such projects on the criminal justice system will be delayed.
The trial

Once a trial begins, a formal process is followed. The trial begins with the presentation of the charges and the accused being requested to plead. The prosecutor then calls the state’s witnesses and leads their evidence. During this time any exhibits (evidence) are handed to the court for consideration. The defence then has an opportunity to cross-examine witnesses, and the prosecutor to re-examine witnesses. The magistrate may also ask for clarifications, if necessary. Once the prosecutor has finished questioning the state witnesses they are excused by the court and the prosecution’s case is closed. The process is then repeated for the accused. Once the prosecutor and defence have presented their cases and argued for a conviction or an acquittal, the magistrate pronounces judgment.

Strictly speaking the duty of the prosecutor is not to secure a conviction, but to ensure that all available relevant evidence is placed before the court. However in annual reports and other performance reports, the National Prosecuting Authority and the Department of Justice & Constitutional Development both emphasise conviction rates as a sign of success. For example, the Department’s 2007/8 annual report notes that ‘the Regional Courts have also exceeded their target of 70 per cent by achieving a conviction rate of 73 per cent (conviction of a total of 25 338 cases in comparison to 26 619 cases convicted in 2006/07).’

The tendency to measure prosecutors’ performance by their conviction rates means that very few prosecutors want to take on a case they are not likely to win. For the victim, however, winning the case may not necessarily be the most important aspect of the justice process. Victims need access to justice and fair treatment, information, assistance and services. They also need restitution, redress and apology. They need acknowledgment and they need to be given a voice. Few of these needs are high on the average prosecutor’s agenda (see Chapter 6 for a more detailed discussion of the needs of victims and the responsibilities of the National Prosecuting Authority).

Delays in the process

The National Prosecuting Authority has set a target of six months for the finalisation of a case in the district court and nine months for a case in the regional court. As mentioned above, the performance of prosecutors in relation to this target is measured. In 2007/8 around 34 per cent of regional court cases were on the roll for longer than nine months and 12 per cent of district court cases were taking
longer than six months. In December 2008 there were 1754 people in custody who had been awaiting trial for more than two years. Among the factors causing delays are:

- Incomplete and outstanding investigations
- Dockets being unavailable
- Unavailability of forensic laboratory and pathology reports
- The unavailability of legal aid (for an accused who cannot afford a lawyer)
- Interpreters not being available
- Witnesses, complainants and even the accused not being present. In the case of the accused this may be because they absconded when on bail or because they arrived late from detention facilities due to police transport being unavailable.

Delays are so commonplace that it has been noted within the South African Case Flow Management guidelines that ‘a management style has developed which is more adapted to dealing with adjournments than trials.’

Because so many people and departments are involved, the problem of delays requires a cohesive and coordinated response from the entire criminal justice system. The *Practical Guide to Court and Case Flow Management* for South African lower courts was published in October 2005 in order to ‘address issues pertinent to improving and maintaining the effective and efficient operation of criminal courts’. This guide, which was being revised at the time of writing, attempts to address the issue of coordination. It emphasises the need for all participants to be accountable for their own role in the system, since most of the postponements are acknowledged to stem from poor management and a lack of accountability.

The shift towards measurement of case flow management, and away from measuring court hours and case cycle times (time from enrolment of case to finalisation), has helped prosecutors to some degree. The removal of performance indicators such as number of court hours is a result of a recognition that the achievements of prosecutors may depend on factors outside their own control. These factors include the performance of magistrates, SAPS investigators, witnesses, interpreters and clerks. Time spent in court is therefore not a reliable indicator of a prosecutor’s effectiveness. What is needed are performance indicators that operate across the entire system and promote cooperation.
COMMUNITY PROSECUTION PILOT PROJECT

By 2001 it was evident that prosecution alone was not having sufficient impact on reducing crime, and the public did not view the criminal justice system as effective. In order to play its part in the National Crime Prevention Strategy (NCPS), the NPA underwent three years of managed change, from 2003 to 2005, which generated a new range of responses to crime that moved beyond the traditional role of processing cases.20

In late 2005 the NPA tested an alternative model for community prosecutions. The then National Director of Public Prosecutions, Advocate Vusi Pikoli, distinguished the role of the community prosecutor from that of the traditional prosecutor, thus:

the mission of the traditional prosecutor is to decide whether to prosecute a case; to prepare cases and try them in court; and to secure convictions by putting the truth before the court and to recommend appropriate sentencing. The community prosecutor’s mission is to reduce crime; to prevent crime; to build relationships and collaborate with the community and to deliver justice.21

By May 2006, a pilot programme was underway involving nine community prosecutors,22 providing a service that was responsive to community needs.

In the NPA’s draft guidelines on community prosecution the new approach to prosecution was described as,

a shift from case processing to community mending. This approach entails a long-term, proactive partnership between the prosecution, law enforcement, the community, and public and private organisations with a view to solving particular community crime problems, improving public safety and enhancing the quality of life of community members.23

The draft guidelines put forward the following elements as ‘inherent to community prosecution’:

- A focus on problem-solving, public safety and quality-of-life issues
- Inclusion of the community’s input into the criminal justice system, e.g. community impact statements that are considered during sentencing
- Partnerships with the prosecutor, law enforcement, public and private agencies, and the community
- Various methods of prevention, intervention and enforcement other than criminal prosecution to address problems
• A clearly defined targeted geographical area
• An integrated approach involving both reactive and proactive strategies

The draft guidelines note that both traditional and community prosecutors have as their primary function the prosecution of crime, with three overarching goals common to both:
• To promote the fair, impartial and expeditious pursuit of justice
• To ensure safer communities
• To promote integrity in the prosecution profession and coordination in the criminal justice system

Community prosecutors emphasise crime prevention and assisting victims to feel safe and less apprehensive about the threat of crime. As a consequence they are expected to show a greater concern for enhancing community relations, public safety and overall quality of life for residents than would traditional prosecutors.

Using these guidelines as a starting point, the National Prosecuting Service gave nine prosecutors two years to test and demonstrate the concept of community prosecution, with their work monitored and evaluated by an external evaluator. The key question informing the pilot project and its evaluation was: What should the South African version of community prosecutions look like, as opposed to those versions being implemented in the United States, United Kingdom and Europe? Nine pilot sites were selected using a set of the following criteria:
• The community is affected by high crime or else persistent levels of minor crime
• The potential exists to reduce crime
• The target site is clearly defined geographically
• SAPS high priority sites are included (eight out of the nine were high priority)
• Senior public prosecutors are available
• Access to the identified community is relatively easy
• Court infrastructure is available so that prosecutions that flow from the pilot can be speedily finalised
• Support structures and services are available and there are good working relationships with key partners
• The selected sites justify the costs and resources required to make the pilots a success
- There is potential for social and economic development

**Table 6: The pilot sites for community prosecutions**

<table>
<thead>
<tr>
<th>Site</th>
<th>Area type</th>
<th>Province</th>
</tr>
</thead>
<tbody>
<tr>
<td>Point (Durban)</td>
<td>Urban</td>
<td>KwaZulu-Natal</td>
</tr>
<tr>
<td>Windsor (Randburg)</td>
<td>Peri-Urban</td>
<td>Gauteng</td>
</tr>
<tr>
<td>Siyahlala (Nyanga outside of Cape town)</td>
<td>Peri-Urban</td>
<td>Cape</td>
</tr>
<tr>
<td>Mandela extension (Mamelodi outside Pretoria)</td>
<td>Peri-Urban</td>
<td>Gauteng</td>
</tr>
<tr>
<td>Phuthanang (Galeshewe near Kimberley)</td>
<td>Peri-Urban</td>
<td>Northern Cape</td>
</tr>
<tr>
<td>NU1 (Mdantsane near East London)</td>
<td>Peri-Urban</td>
<td>Eastern Cape</td>
</tr>
<tr>
<td>Ngangelizwe (Mthatha)</td>
<td>Peri-Urban</td>
<td>Eastern Cape</td>
</tr>
<tr>
<td>Bohlokong (Bethlehem)</td>
<td>Peri-Urban</td>
<td>Free State</td>
</tr>
<tr>
<td>Kudumane (Kuruman)</td>
<td>Rural</td>
<td>Northwest</td>
</tr>
</tbody>
</table>

The results of the study made a very strong case for community prosecution. For instance:

*Bundu Courts* were stopped in a high crime area of Nyanga called Siyahlala. In April 2006, at the time of the baseline study, about 13 people had been murdered owing to high levels of vigilantism. However the murder rate plummeted to zero from November 2006 to the end of piloting in October 2007 after the appointed senior prosecutor helped to develop a community police forum to replace the existing vigilante committee. This action greatly improved police-community relations.26
Stock theft plummeted in a rural area. Empowering community members in the law and selective prosecutions of cattle rustlers in a remote rural area overlapping the Northern Cape and North West Provinces (Kudumane) led to a huge drop in stock theft (from about 40-50 a month to 2-3 a month). It empowered an anti-stock theft organisation to the point that its membership is expanded rapidly across the northern areas of the country.\(^{27}\)

Unregulated taverns in peri-urban areas were regulated. Educating tavern owners in the law at five peri-urban sites led to much better regulated taverns. Once notorious sites in Mdantsane, Bohlokong, Ngangelizwe, Mamelodi and Siyahlala were considered much safer, and there was an overall drop in crime levels in three pilot sites (Siyahlala, Ngangelizwe and Mamelodi).\(^{28}\)

Illegal establishments were shut down and fined in Point to fund the CPF. At nearly all sites certain cases were selected to fast-track and prosecute in court, sending a warning that crime and breaking by-laws does not pay. For example, on 10 March 2007, Community Prosecutor Val Melis of Durban worked with police to shut down seven different nightclubs for breaking nuisance by-laws, holding inappropriate liquor licences and not being in compliance with the conditions of these licences (e.g. no liquor sales after 2am, and that food must be served). The Community Prosecutor directed these cases to the community court, where financial penalties were imposed. These fines were then paid over to community projects to fight crime.\(^{29}\)

Drug sellers were removed from the streets of Windsor. The community prosecutor in this area worked with SAPS on proactive policing strategies. The result was that drug sellers who were highly visible and loitering on the streets at the time of the baseline study were no longer evident by the evaluation 18 months later. The streets appeared cleaner and less littered.

A top hijacking hotspot was removed from the SAPS priority list. In Mamelodi, the worst hotspot in the area for hijacking at the time of the baseline study was eventually dropped from the SAPS hotspot list. This happened because the prosecutor worked with a municipal councillor to see that the land was developed and better street lighting was installed.\(^{30}\)
Building community trust was built. In Bohlokong, the community prosecutor teamed up with the Public Participation Officer from the Dihlabeng Municipality to offer outreach activities on crime prevention. This improved reporting levels and led to strategic partnerships to reduce crime in community-identified hotspots such as open fields where rape was common, and the closure of the most notorious tavern in the area.31

What these success stories have in common is that the community prosecutor either drove the partnerships or participated in crime prevention bodies. This stemmed from a wide range of activities:

- Selective prosecutions and fast-tracking cases (to send a message that crime does not pay).
- Educating the public, members of government departments and other targeted groups on the law (to improve reporting levels, service delivery and cooperation levels).
- Working hand-in-hand with the police, government departments and municipalities to use by-law infractions to close down crime-generating establishments such as illegal taverns or brothels.
- Developing partnership projects for crime prevention. A successful example was a vagrancy project in Durban involving several departments to find employment for those who were at high risk of turning to crime but still had a clean record.
- NPA participation in both departmental and community based-crime prevention activities (e.g. SAPS crime prevention and Community Policing Forums). The NPA’s role was to offer some expertise on the law to help resolve problems in a more efficient manner, for example using by-laws to shut down illegal traders.
- Ensuring that the community’s concerns were represented to various government departments and reporting back to the community on how to work with government policies and plans.

Seven of the nine target sites experienced visible reductions in crime problems based on before and after site observations by the evaluator, which included photographs and a baseline study. Over 90 per cent of research partners at eight pilot sites using round-table discussions, interviews and on questionnaires, found that the project had led to improved safety programmes.
Between the time of the May 2006 baseline study and the evaluation in late 2007, crime was reduced in four sites – Siyahlala, Mamelodi, Ngangelizwe, and Windsor. Focus group discussions, the results of questionnaires and interviews, all pointed to CMP led partnership activities as the cause of the drop in crime. Community members indicated much greater feelings of safety at six of eight sites. The only site that showed no improvements — Phuthanang in Galeshewe outside Kimberley — was one in which a community prosecutor was not placed for the whole period of the pilot due to ongoing changes in personnel.

These results were significant enough for the evaluator to recommend that the community policing project model be used for crime prevention on a larger scale. However the evaluator’s recommendations came with some provisos:

- The evaluator cautioned that owing to the small size of some pilot sites, crime was sometimes displaced from one sector to the next (for example drug related activities in Windsor).
- Success depends on how SAPS and the NPA work together and enlist other partners.
- Since different types of crime can be differently distributed across policing sectors, the evaluator recommended focusing on specific crimes across policing areas rather than a separate focus per policing area.
- Further monitoring and evaluation is essential: other countries have shown that at least six years is needed to direct police activities to maximum effect.
- The targeted areas should be SAPS priority zones (which can include more than one station). This is appropriate in South Africa because the NPA and SAPS can work together from a national level. Also the priority areas are defined nationally; and human resources are limited.

Despite its promising results the community prosecution project has not received widespread support within the NPA nor has it been mainstreamed into the operations of the NPA. The pilot sites continue to operate, but without extra resources and with no long-term support. In part this is because the focus of the NPA continues to be driven by the need to report reduced court rolls and improved turnaround times rather than crime reduction. As is often the case, what gets measured determines what gets done.
ANALYSIS AND RECOMMENDATIONS

Why is the criminal justice system so obviously inefficient? After all, the NPA has processes and protocols in place, it is committed to agreed case flow management principles, and it makes use of information management tools to provide an effective efficient criminal justice service.

Based on the 10 years during which the Independent Projects Trust (IPT) has worked within the system, we believe there are three core issues that, if tackled, would improve the performance of the South African criminal justice system. These are

- Improve the way the system is managed
- Put greater effort into crime prevention
- Take a broader and more integrated view of how to measure success in combating crime

Management

Poor management is a key impediment to service delivery within the system. A 2002 study by the Independent Projects Trust found that

many individuals in key provincial positions lacked the basic managerial skills needed to ensure an acceptable standard of performance. Fast tracked appointments lacked on-the-job experience and skills, whilst ‘old guard’ managers, shaped by the previous system, tended to be set in their ways and their entrenched practices were no longer relevant or acceptable. Furthermore there was no culture of organizational learning and any expertise in the system was neither transferred nor shared.32

After working with the National Prosecuting Authority for five years on a criminal justice strengthening project, IPT observed that the capacity of the organisation to manage human resources was extremely low:

The inability of the NPA to address the poor performance of its corporate services unit created one of the greatest hindrances to improved performance within the courts at a provincial level.33

The IPT found that managers at provincial levels were extremely demotivated by the lack of effective support from the national level. Attempts by provincial level managers to deal with lack of performance and abuse of sick leave were stymied by the fact that a large proportion of cases remain stalled at the national level due
Poor human resource management is indicated by the high level of vacant posts within the National Prosecuting Authority. In 2008 the acting head of the NPA, Adv. Mpshe, addressed Members of Parliament on the Standing Committee for Security and Constitutional Affairs in the National Council Of Provinces. He explained how staff shortages affected work of the NPA:

We have a suspended national director; I’m an acting national director. We have an acting head of National Prosecuting Services and an acting CEO. We have an acting director of the witness protection unit and an acting special director as an adviser in my office.

We have an acting spokesperson of the NPA, and acting DPP in Bloemfontein, an acting regional head in Durban, and an acting regional head of the DSO in East London. We have an acting DPP in Pretoria. To sum it all up, we are on stage, we are acting. The organisation is acting.

On a serious note, if you have so many acting positions, these are at senior level. We are talking of the leadership of the organisation. How on earth can you expect the organisation to prosper and to perform as expected? You can’t.34

While Adv. Mpshe was referring to a crisis at the most senior level, the situation at court level is no less serious. The Independent Projects Trust reported that in courts where it had worked, approximately a quarter of all posts were unfilled. NPA statistics give a slightly less bleak picture: statistics offered during the criminal justice review process state that unfilled posts were reduced from 24 per cent in 2007 to 17 per cent in 2008.35 Posts that are advertised take nearly six months to finalise, with many prime candidates finding other positions. The lack of a cohesive national strategy on human resources generates other problems, for example prosecutors are promoted to other provinces leaving serious gaps in their wake. The absence of succession planning is another example. Human resource practices common to most large organisations seem completely absent within the NPA.

Because cases are attached to particular courts, if a prosecutor moves, the substitute prosecutor needs to be briefed from scratch. In reality the hand-over process from one prosecutor to another is often done hastily, without following thorough formal procedures. The Anna Juries case study is a good example of how a crime victim experiences the effect of staff shortages, frequent movements of staff and the absence or non-observance of procedure. It is not uncommon to hear senior NPA managers discussing problems as if the problems were completely
outside of their influence. This comes from the lack of accountability around outcomes, and the way in which statistics predominantly measure volume of activities rather than the outcomes or impact of these activities.

All these problems are compounded by an organisational culture that is focused inwards — towards meeting the requirements of your superior, rather than outwards — towards meeting the requirements of your customer. This has been attributed to ‘a history of authoritarian leadership in which individual action was discouraged, and there is a tendency to focus on what the ‘boss wants’ rather than on responding appropriately to local issues.’ This organisational culture tends to become a permanent state of crisis management mode, as local plans and priorities are disrupted by urgent requests from national levels which seem to have little relevance to real time situations in the court.

Poor management within the NPA, and in fact within the broader criminal justice system, is widely acknowledged. Despite this, there seems to be little effort to demand accountability from managers at any level. A recent criminal justice review proposes ‘drastic transformation of court process in criminal matters’. One such drastic transformation is proposed as follows:

A major change will be the screening of cases, by a newly created Screening Mechanism consisting of the prosecuting authority and detective branch, at High Court/Regional Court Level and district court level (in cities and larger towns) to ensure that only prima facie cases and trial-ready cases, and cases requiring incarceration pending finalization of the investigation are certified and introduced into court.

In fact this process is already established, as described earlier in this chapter. But it does not work due to a lack of capacity, poor management and limited accountability. Unless these issues are addressed, no transformed court process is going to make any difference.

What is required is the vigorous introduction of professional human resources practices including:

- Formal succession planning
- Assessment of current deployment practices
- Assessment of current recruitment practices
- Training in management skills
Crime prevention

Criminal justice systems in most countries today tend to have two distinct and often competing strategies to reduce crime. The first strategy, as noted by Fogle-song and Stone, is to *remove as many criminals as possible from society*. The assumption is that removing individual criminals is directly linked to a reduction of crime and violence. In well-integrated and efficient criminal justice system, attempts to reduce crime levels would focus on maximising arrests, maximising convictions and handing down lengthy prison sentences. However in a broken or dysfunctional criminal justice system the police and/or community groups are tempted to remove the criminals themselves. In South Africa this concept has popular support, as demonstrated by the sometime violent attacks by communities on suspected criminals.

The second strategy of most criminal justice systems is to eliminate the immediate conditions that permit crime and violence to thrive: *to solve the proximate underlying causes of crime*. In South Africa to do this successfully would require serious attention to reducing poverty, illiteracy, inequality and other negative social conditions. This is clearly not a task for criminal justice system alone. Nevertheless the NPA’s pilot Community Prosecution project is an example of the how the criminal justice system can act to prevent crime. It has demonstrated powerful results in crime reduction and improved the public’s perception of safety in the areas where community prosecutors were appointed.

There is a need for all departments, especially those outside of the criminal justice system to recognise their role in preventing crime since it is clear that the emphasis on policing and prosecution as the primary way to reduce crime will not solve the problem in the long term.

This challenge can be backed up with evidence. David Bayley, a leading scholar of policing who has researched several countries, says the notion that the police reduce crime levels is a myth. As he put it, ‘the primary strategies adopted by modern police have been shown to have little or no effect on crime’. Visible policing may have an impact on reducing local crime, but is more difficult in the many high crime areas where communities do not consent to be policed.

The 34 per cent increase of resources going to the police — from R33 billion in 2006/2007 to R44 billion in 2009/2010 — needs to be assessed in relation to budgets for social services. The bulk of the Department of Social Development’s budget goes towards social security, which means very little is left for social serv-
ices. South Africa has some 11 000 social workers compared to over 190 000 police officers.

Increasing in the number of personnel in SAPS may detect more crime, but it will certainly contribute to an increased burden on the justice system already not coping with the total of 1 035 111 cases received during 2007/08.43 Couple this with a system of correctional services which is oversubscribed and it is not unreasonable to imagine that increased arrest rates could bring an already unstable system down on its knees.

We need to shift from a short term political vision whereby government has to been seen to ‘do something’ about crime to one in which we address the causal factors. Or as one researcher notes ‘We need to talk less about crime and more about safety. As long as we talk about crime we expect the police to fix it. When we talk about safety we open up the arena to a whole range of other role players’.44

Measuring achievement

Performance measures are most useful when placed in the context of goals or outcomes. Regarding crime, these outcomes should be viewed within a broader social context. Understanding outcomes such as crime, victimization and re-offending, and understanding why they happen requires information on both justice and partner system interventions — from education, social welfare and health sectors, to non-government organisations to individual, family and community influences.45 Understanding outcomes and motives is particularly important in relation to some of the newer South African legislation, such as the Sexual Offences Act and the Child Justice Act.

Incident response times, investigator and prosecutor caseloads, case cycle times and adjudication times can all indicate only one aspect of performance. And simple numerical indicators can be highly misleading. Independent Projects Trust researchers have worked with many police stations that were proud of their low domestic violence and rape rates – only to find that when they spoke to community members it became clear that cases in these categories were low because were simply ignored or rejected.46 In such situations targets such as ‘reduce the number of rapes’ simply mask the problem. A better target might be ‘improve the safety of women in the area’ which should motivate a different type of response.

Rather than numbers, measurement of performance is necessary. A basic first step is to ask whether people are doing the jobs they are employed to do. If in-
individuals simply came to work on time and did the work they were supposed to do, the system would improve dramatically, even if there were no other transformative processes. Needless to say, this first step to ensuring a working system is rarely followed.

Performance measurement needs to go further. The overall performance of the CJS has to be tracked from the perspective of the victim, who is rarely included in any data collection process. At present the primary objective is to complete a case in the shortest possible time, regardless that this is done at the expense of quality, participation, support, and ultimately, justice, for victims.

Communication across departments and integrated information management are priorities in delivering justice to both victims and perpetrators — and taxpayers. Currently, the Police Services record the charges laid, the NPA records the cases opened, and the Department of Correctional Services records the people jailed. Since these records are not coordinated, there is no means to track individuals (whether perpetrators or victims) through the system. If people use aliases, and fingerprint databases are not utilised, this makes tracking even more impossible. Among other things, it means we cannot measure the efficiency of justice system processes or correlate the number of crimes committed with the number of people in prison.

The measurement system needs to enable government to properly align the elements of the criminal justice system and measure public safety and justice rather than simply collecting numbers. The disparate elements of the criminal justice system will have to agree to aim for close alignment. These goals would require:

- Clear and precise standards/policy goals to which managers are held accountable
- Clearly articulated outcomes for the criminal justice system
- Evidence in respect of each indicator, i.e. what constitutes proof that something has happened or not happened?
- Clear and precise standards/policy goals to which managers are held accountable
- Targets of success that citizens feel relate to their protection rather than making the law enforcers look good
NOTES

2. Ibid.
5. Ibid.
8. Section 50(1)(c) of the Criminal Procedure Act, 1977 (Act 51 of 1977): an accused has to appear in court no later than 48 hours after his or her arrest if not released on bail or warning.
9. Interview with Senior Public Prosecutor, Durban, 16 April 2009.
11. In other words, this percentage of cases has been on the roll for longer than the prescribed period.
19. Justice College, *A practical guide for court and case flow management for South Afri-
can lower courts, 2004.


25. Ibid.


27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid.

31. In a number of sites crime was perceived to have been reduced by both SAPS and community members. SAPS statistics are collected within station areas, and some sites were smaller than those areas. Thus it was only possible to identify a reduction in crime statistics at certain larger sites.

32. I Matthews and M J Smith, Mending the fractures; lessons learnt from a five-year intervention to strengthen the criminal justice system in KwaZulu-Natal, Durban: Independent Projects Trust, 2009, 10.

33. Quoted in Matthews and Smith, Mending the fractures.


36. Matthews and Smith, Mending the fractures.

37. Review of the South African Criminal Justice System.

39. Ibid.
41. For further discussion around the concept that a country is policed only to the extent that it consents to be see J Steinberg, *Thin blue: the unwritten rules of policing South Africa*, Cape Town: Jonathan Ball, 2008.
46. This was the author’s personal experience in Hillcrest and Shongweni when working on a victim empowerment project in 2000/01.
47. Foglesong and Stone, *Measuring the contribution of criminal justice systems to the control of crime and violence*.
48. Ibid.
6 VICTIM SUPPORT

Andrew Faull and Poppie Mphuthing

INTRODUCTION

The night she was attacked, Anna Juries’ life changed dramatically. While she survived the crime, she felt that something inside her died. She felt ‘pathetic… pained, fearful and sad’ in the aftermath. Her son was angry, her partner filled with rage, her daughter only ‘happy’ her mother was still alive. The violence she endured shattered her sense of security and that of those around her. Throughout the two years between the attack and the conclusion of the trial she struggled to access information about her case as she was passed from detective to detective and prosecutor to prosecutor. At no point in her journey was Anna or her family offered any form of victim support. Instead the frailty of the system through which they sought justice meant they struggled until the end. This chapter explores the policy, structures and legislation that are intended to support victims of crime. It also looks at related matters such as the use of restraining orders as a form of victim protection and the administration of antiretroviral treatment, both for victims who have been physically attacked and offenders.

As illustrated in the Anna Juries case study, many victims of crime suffer not just the trauma of the crime itself, but may be subject to a series of subsequent
traumatic experiences because of the way in which they are treated within the criminal justice system. Secondary victimisation can happen anywhere in the criminal justice process and can result from a range of factors, whether from police officers who behave with indifference to the trauma of the victim, or perpetrators being released due to bungled police work.¹

South Africans are fearful about crime: we cannot avoid news of rape and murder and we go through daily rituals of locking and setting alarms. In terms of recorded figures the overall level of crime in South Africa has declined since 2001, however most South Africans continue to believe that the situation is getting worse.² It is also true that some types of violent crime have not followed the overall trend of decline. Whether one is a direct victim of crime or not, almost everyone in the country suffers some form of crime-related trauma.

A VICTIM-CENTRED APPROACH

The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power signified an important shift in the discourse around crime and victimisation that had begun to emerge in the early 1980s. The declaration (and related national legislation in some Western countries) was the result of interest groups advocating a shift away from ‘offender-focused’ justice systems. Their argument was that while states assumed the responsibility of judging and sentencing offenders, their responsibility to victims was less clear.³

The UN Declaration identifies the following as the needs of victims:⁴

- Access to justice and fair treatment
- Contact with the criminal justice system (to be recognised as a legitimate participant in the process)
- Safety (both within the criminal justice system, and a restored sense of overall safety)
- Information (the most commonly expressed need for victims)
- Assistance and services
- Continuity (in systems and across organisations and departments)
- To have a voice (to be heard, especially regarding what they have suffered)
- Validation and acknowledgement (that their feelings are normal)
- Restitution, redress and apology

In South Africa recent legislative developments have made significant contribu-
Revisions to the rights of vulnerable groups and victims. Two examples are the Child Justice Act of 2008 and the Criminal Law (Sexual Offences and Related Matters) Act of 2007. Although offender focused, the Child Justice Act serves to protect children in conflict with the law — many of whom will have been victims before offenders — from being re-victimised in the justice system. The Sexual Offences Act provides for victims by recognising a broader spectrum of sexual offences and providing victims with increased rights.

Besides these and other legislative developments, there are three key policy documents that attempt to address the needs and rights of crime victims in South Africa. Each was developed by a different state entity. Other government-driven initiatives and legislation, some of which are referred to below, make specific provisions for vulnerable groups and contribute to victim-oriented justice, although they may not be explicitly directed at assisting victims.

The first important policy document is the National Crime Prevention Strategy (NCPS) developed by the Department of Justice and Constitutional Development in 1996. This document sought to present a comprehensive approach to crime control and crime prevention, and promoted victim support as a central part of this agenda. This signified an important evolution in the approach to criminal justice that kept pace with international trends. The NCPS was the first policy document to prioritise the victims of crime and advocated for a victim-centred approach to justice. The processes related to the implementation of the NCPS resulted in the introduction of the Victim Empowerment Programme (VEP). Established in the late 1990s, the VEP is the longest running effort to develop a framework for the provision of services to crime victims, and to promote the prevention of victimisation. It has not however, to date, become official policy.

In 2004, the Department of Justice and Constitutional Development introduced the first and only cabinet-approved policy known as the Victim’s Charter.

The third document, introduced by the National Prosecuting Authority in 2005, is known as the Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences (UPVM).

In a 2007 overview of victim policy in South Africa, Cheryl Frank highlighted some of the problems that result from this three-document system. One key problem is that there is no clear rationalisation for victim policy in South Africa, as the three documents cite differing motivating factors. This chapter draws on and reflects Frank’s analysis.
The Victim’s Charter

In November 2007 the Department of Justice and Constitutional Development launched the ‘Service Charter for Victims of Crime’, three years after it had been approved by Cabinet. The charter outlines the manner in which the criminal justice system seeks to make victims its central beneficiaries. The motivation is to minimize secondary victimization, consolidate the standards of service that victims can expect, and provide recourse when these are not met. The charter sets out strategies and pledges to minimize victimization at each stage of a victim’s interaction with the criminal justice system.

Central to the Service Charter are seven rights of victims drawn from the United Nations Declaration of the Basic Rights of Victims of Crime and Abuse of Power. These are:

- The right to be treated with fairness and respect for dignity and privacy
- The right to offer information
- The right to receive information
- The right to protection
- The right to assistance
- The right to compensation
- The right to restitution

It is usually in the hours and days immediately after a crime that victims experience the most severe trauma. While many may turn to a health facility for immediate support, the most likely branch of the criminal justice system with which a victim will first engage will be the South African Police Services. It therefore makes sense that the SAPS should be well equipped to offer direct support to victims, or at least information about where they can access the necessary services.

While the Service Charter covers almost any form of mistreatment, certain wording, such as ‘where relevant’ and ‘where available’, offers officials of the criminal justice system escape clauses which can be used to justify inaction. Here are some examples:

- In relation to assistance from the SAPS – ‘you have the right to request assistance and, where relevant, have access to available social, health and counselling services, as well as legal assistance’.
- Court staff – ‘will designate, where available, staff and trained volunteers from Victim Support Services to assist you and your family at the court be-
The vagueness of the wording in the Service Charter provides a ready excuse for any public servant who fails to act in the interests of a victim. A further impediment noted by Frank, is that the Service Charter places the onus on the victim to request services, rather than on government and service providers to offer these services. In addition, the charter does not give victims any specific legal rights.

The Victim Empowerment Programme

The government introduced the Victim Empowerment Programme as a strategic focus to be driven by the Department of Social Development (DSD) in 1999.

The Victim Empowerment Programme is based on the principle that good quality support services should be provided to all victims of crime. This is to be achieved by:

- Providing victim sensitivity training to government service providers and justice system employees
- Establishing a referral system between service providers dealing with crime victims
- Implementing a multi-disciplinary victim support programme
- Providing victims with information to aid their engagements with the justice system

In 2008 the United Nations Office on Drugs and Crime (UNODC) took over the management of the VEP because the Department of Social Development had made little progress in almost a decade. Although the VEP has been repeatedly revised, after more than 10 years it remains in draft form. It has never been approved as a national policy, nor has an implementation guide been developed for it.

One useful outcome, however, has been that the South African Police Services began using the VEP in 2000. The SAPS drafted the following documents:

- Draft Manual for Victims of Crime
- Victim Charter for Victims of Crime in South Africa
- National Instructions for the Treatment of Victims of Sexual Offences
- National Instruction for Victims of Domestic Violence
- National Instruction of Sexual Offences

In 2001 a Victim Empowerment Training Manual was developed by the police in consultation with ‘victimologists’, academics, non-governmental organisations and government officials. The training focused on reducing secondary victimization, sensitising the police to a victim’s needs, teaching empathetic communication skills, and instructing members on referral systems. All police stations have been instructed to train members in victim empowerment, although it is almost impossible to ascertain to what extent this has been achieved. In addition, the SAPS provincial training divisions use the manual as a basis for three-day training workshops on how to work with victims.

Table 7 shows that 3 346 members of the police service have been trained since 2003. The actual number of members trained may be higher, as it is not clear if these figures include the sporadic training offered to provinces and stations by local civil society groups. Whatever the case, under 2 per cent of the estimated total of 185 000 SAPS members have been given victim empowerment training.

Table 7: SAPS members participating in victim empowerment training, 2003-2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of SAPS personnel trained</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003/2004</td>
<td>1 074</td>
</tr>
<tr>
<td>2004/2005</td>
<td>397</td>
</tr>
<tr>
<td>2005/2006</td>
<td>435</td>
</tr>
<tr>
<td>2006/2007</td>
<td>454</td>
</tr>
<tr>
<td>2007/2008</td>
<td>986</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3 346</strong></td>
</tr>
</tbody>
</table>

The SAPS has tried to establish ‘victim friendly rooms’ in all police stations for the purpose of taking statements from people who are traumatized. An instruction has been issued that police stations without victim friendly rooms should
ensure that there is an office space that can be used for these purposes. It is not known how many stations have formal victim friendly rooms.

By late 2008, most SAPS stations in Gauteng had established Victim Support Centres (VSCs), which vary considerably in quality from station to station. The centres are staffed by NGO trained volunteers, with People Opposing Women’s Abuse (POWA) providing the training in Gauteng. While these centres are to be welcomed, their presence may create the impression to victims, and the police themselves, that victims receive more substantial support than is possible for the volunteers to offer. In reality NGO volunteers are trained to ‘calm and contain’ the victim and provide them with referral information: the volunteers do not themselves offer counselling services.

According to POWA, many members of the SAPS do not understand this limitation and refer severely traumatised victims to Victim Support Centres. In such cases the volunteers may try to provide ad hoc counselling, which they are not equipped to do. The load carried by the police services and the Victim Support Centres is overwhelming, while formal qualifications and oversight of volunteers is lacking.

The voluntary counsellors have their own difficulties with the SAPS. A trainer from POWA alleges that SAPS members sometimes sleep, eat and mess in the rooms designated for the voluntary counselling.

The South African Council for Social Service Professionals has criticised the use of ‘counsellors’ as they exist in the VSC and other similar models. They suggest that counselling from individuals without recognised qualifications, and without recognised supervision, could be damaging to victims/clients. They point out that such counsellors are not bound by a code of ethics and could thus violate a victims’ confidentiality. There is therefore a need to professionalise and regulate VSC volunteers.

Restructuring the FCS units

The Family Violence, Child Protection and Sexual Offences (FCS) units of the SAPS focus on child and women victims of crime. Before the establishment of these units in 1995, the Child Protection Units (which had been established earlier, in 1986) played a similar role, although with a narrower mandate. The Child Protection Units and the early versions of the FCS units employed staff and investigators who were specialists in their field and had relevant resources at their disposal.
Then in 2006, a SAPS restructuring process resulted in the redeployment of members of the FCS units to police stations. The idea was to make FCS members more accessible to communities while positioning them to transfer skills to station-level detectives and officers. However a 2009 review of the FCS restructuring process by Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) found that the restructuring had negatively affected the ability of the SAPS to offer specialized investigations to women and children victims of crime. The report notes that there was a reversal of the progress made by FCS units, that the policy objectives to support women and children had not been realised.16

NPA initiatives and victim-friendly legislation

In addition to the Victim’s Charter and the Victim Empowerment Programme, in 2005 the National Prosecuting Authority introduced the Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences (UPVM). Through this document the NPA seeks to address the accountability and professionalism of those government departments and civil society groups that provide services to victims, including in the preparation of victims for court. The UPVM, which remains in draft form, outlines 16 standards to which service providers should adhere.17 Yet, the Anna Juries case study provides numerous examples of how the NPA can fail to provide adequate support to victims. Some of the factors responsible for this failure, such as untenable case loads and high turnovers of prosecutors, were discussed by Mathews in Chapter 5.

In addition, legislation (discussed below) was introduced to ensure the health and physical safety of victims. This allows for the testing of offenders (for HIV/AIDS) and the administration of antiretroviral therapy (ARVs) to victims of sexual offences. There is also legislation governing protection orders (also discussed below) to ensure the physical and emotional safety of complainants.

Antiretroviral treatment and testing alleged offenders

In the case study, Anna Juries was concerned about the risk of HIV, since during the assault she bit one of her assailants. Initially she asks a medical practitioner whether she should start on post-exposure prophylaxis (PEP).
I tell the doctor that I bit one of the men who attacked me, and may have drawn blood. She advises me to go onto anti-retroviral treatment in case he is HIV positive. I agree.

Later Anna talks to a police detective about making the attacker have an HIV test.

“Please, when you find the man that I bit, you must take him for an HIV test, is that possible? These ARVs make me feel awful and I just need to know if he is positive.” Shrugs from the detective who seems to be in charge. Too many unanswered questions. And it’s clear that I have exhausted the quota of patience of these police. In their manner and body language, I am already an irritation.

Both these interactions raise issues about the roles and responsibilities of officials and medical professionals in supporting the victim, as well the rights available to victims of crime.

This matter is dealt with in the Criminal Law (Sexual Offences and related matters) Amendment Act. The Act addresses the issue of the administration of ARVs in the event of physical attack, and the compulsory HIV testing of alleged assailants. In both instances its provisions relate specifically to sexual assault.

The Criminal Law (Sexual Offences and related matters) Amendment Act of 2008 (hereafter called the Sexual Offences Act) altered the paradigm in favour of victim empowerment. The application for the testing of an offender may be instituted by both the victim and the investigating officer. If the victim is making the application, they have to report the offence to a health establishment for medical advice and post-exposure prophylaxis within 72 hours in order to qualify to apply to a magistrate for compulsory HIV testing of the offender.

The investigating officer may apply for the accused to have an HIV test if such a test proves necessary for purposes of investigating or prosecuting an offence. After considering the application, the magistrate must make an order if s/he is satisfied that there is prima facie evidence that:

a. The alleged offence has been committed by the offender

b. HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence

If the application is granted, the alleged offender will be notified by the police and must undergo an HIV test at a designated health facility. Non-compliance with the court order constitutes an offence. The outcome of this HIV test is disclosed to the victim or the person acting on behalf of the victim, or the investigating officer, and to the accused.
However, even alleged offenders have a Constitutional right to privacy. Roehrs states that personal information is ‘considered private if the disclosure thereof will cause mental distress and injury to anyone possessed of ordinary feelings of intelligence’. According to Roehrs, in the case of NM and others vs Smith and others, the court recognised that ‘the disclosure of an indis status [their HIV status in this case], particularly within the South African context, deserves protection against indiscriminate disclosure.’ Roehrs argues that the legal provisions for compulsory HIV testing would still be justifiable if the test had a significant purpose that outweighed the alleged offender’s right to privacy.

A great deal of debate and analysis of these clauses took place during the review processes of the of the Criminal Law (Sexual offences and related matters) Amendment Bill. During a Justice Portfolio Committee meeting in September 2006, Chairperson Chohan-Khota pointed out that compulsory testing of perpetrators was part of an effort to relieve some of the psychological trauma suffered by the survivors of sexual assault. In the minutes of the meeting it was noted: ‘A victim who had a test result was able to make choices...Furthermore those test results could be used in a subsequent civil action. It was not a perfect mechanism...but it went some way to assisting the victims.’

However civil society groups, including RAPCAN, the National Working Group (NWG) and the Aids Legal Network, noted in the same meeting that compulsory testing amounted to a ‘human rights violation’ of the offender. Similarly, in a submission by the Commission on Gender Equality, it was noted that compulsory testing infringes on a number of constitutional rights of the accused, including:

- Section 9 (right to equality)
- Section 10 (right to dignity)
- Section 12 (right to freedom and security of the person)
- Section 14 (right to privacy)
- Section 35(1) (the right to remain silent)
- Section 35 (3)(h) (the right to be presumed innocent).

The Criminal Procedure Act of 1977 also provides for the testing of alleged offenders, section 37 states that any police official may:

Take such steps as he may deem necessary in order to ascertain whether the body of any person...has any mark, characteristic or distinguishing feature or shows any condition or appearance.
Under this provision, the police may order a medical examiner to take a blood sample if this is necessary to obtain evidence. Thus section 37 of the Criminal Procedures Act allows for an HIV test to be carried out on an alleged offender, but only if this is necessary to link a suspect to a crime. So while investigating officers may use this provision to apply for blood tests to be carried out, the purpose is not to help the victim directly, but to help solve the crime. According to Roehrs, at a meeting of the Justice and Constitutional Development Committee in 2003, a representative of the SAPS pointed out that section 37 of the provisions in the Criminal Procedures Act were ‘not written with HIV/Aids testing in mind and that magistrates were reluctant to issue such orders’.24

Despite that fact that provisions exist for the compulsory testing of alleged offenders, the degree to which testing actually serves to empower victims is a point of contention. As Roerhs argues, there is a window period of three to six weeks after infection with HIV during which the virus may not yet be detectable in the tested person’s bloodstream. Thus it is quite possible for an alleged offender to test negative, even if he or she is infected. This means there is a possibility that a victim could be told that the perpetrator is HIV-negative when they are HIV-positive, leading to a false sense of security.

The risk that Juries may have contracted HIV was slight, as there was no obvious mixing of bodily fluids. Had Juries had bleeding gums or mouth ulcers the risk would have been greater. But Anna Juries was not sexually assaulted, so even if there had been a high risk, neither the Sexual Offences Act nor the Criminal Procedure Act was applicable. The police should have explained this to her.

Witness Protection — Restraining orders and closed door proceedings

A restraining order is a document signed by a judge or magistrate that restricts or prohibits one person from being in contact or close proximity to another. A person can apply for a restraining order because of the possibility of violence by the other person.

Anna Juries was worried when she saw the perpetrator close to her house. In this case the alleged offender, who was not in custody, lived relatively close to the Anna’s home, which meant that it would have been difficult to prevent her from coming into contact with him.

The legal provisions relating to restraining orders are contained in Section 6 of
Victim Support

Act No. 85 of 1997 of the Criminal Procedures Second Amendment Act, which states that when a suspect is out on bail or has been served with a warning, bail may be revoked if:

any court before which a charge is pending in respect of which [The accused has been released on] bail has been granted may, upon information on oath that—

a. the accused is about to evade justice or is about to abscond in order to evade justice; [or that]
b. the accused [interferes or threatens or attempts] has interfered or threatened or attempted to interfere with witnesses; [or that]
c. the accused [defeats] has defeated the ends of justice; [or that he or she]
d. the accused poses a threat to the safety of the public or of a particular person; [or that]
e. the accused has not disclosed or has not correctly disclosed all his or her previous convictions or where his or her true list of previous convictions has come to light after his or her release on bail;
f. further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or
g. it is in the [public interest] interests of justice to do so.

Issue a warrant of arrest of the accused and make such order as it may [seem] deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that

a. he or she has reason to believe that—
   i. an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice; [or that]
   ii. the accused [interferes or threatens or attempts] has interfered or threatened or attempted to interfere with witnesses; [or that]
   iii. the accused [defeats] has defeated the ends of justice; or [that he or she]
   iv. the accused poses a threat to the safety of the public or of a particular person; [or that]
b. further evidence has become available which might have affected the decision to release the accused on bail; or

c. It is in the public interest to do so, issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

According to the insertion of Section 72(a) in act 51 of 1977 the provisions of Section 68(1) and (2) in respect of an accused who has been granted bail, are, with the necessary changes, applicable in respect of an accused who has been released on warning25 (see Chapter 4 for a detailed discussion about bail).

On the basis of an affidavit provided by relevant parties, a magistrate will review an application for a restraining order and make a finding, which may or may not be to revoke the bail of the suspect. If bail is revoked, a warrant for the arrest of the suspect will be issued.

The severity of the crime that a person is suspected of committing has no bearing on whether or not a restraining order should be granted, according to Advocate Henk Strydom26 who was consulted during the writing of this chapter. Threatening words or gestures are reason enough to apply for a restraining order. The criminal history of an accused person is considered only during bail applications and sentencing (with one exception: if it can be shown that the accused person has repeatedly used the same modus operandi, the rule of similar facts can be applied to grant a restraining order.

It must be borne in mind that those accused of having committed a crime have constitutional rights. Restraining orders infringe on these rights by curtailing the accused person’s movements. That is why strong evidence must be presented that the accused has actively attempted to interfere, or succeeded in interfering, with the applicant. Making a case for emotional intimidation is not easy, and in the case of Anna Juries it would have been difficult to prove that the accused was in the victim’s vicinity for the express purpose of threatening her.

In the Anna Juries case study, although Anna was afraid, the suspect had done nothing to warrant an application for a restraining order.

Another avenue for the protection of witnesses is reflected in Section 153 of the Criminal Procedure Act, that covers instances when prosecutions should take
place behind closed doors for the protection of the applicant or witnesses, or the accused. Either the defence or prosecutor can apply for closed-door proceedings if it can be shown that applicant, witness or accused could be in acute danger. According to Du Toit et al\textsuperscript{27} the prerequisite is that anticipated harm to any person who testifies must be a reasonable possibility and not remote, farfetched or fantastic. The court will consider the nature of the acts alleged in the charge, the atmosphere of the case, and the prevailing circumstances. In some cases the NPA or the police institute sophisticated witness protection programmes, but this is normally done only in very high profile, serious criminal trials.

In practice the state prosecutor is the representative of the complainant so there should exist a good relationship between the prosecutor and the victim, says Strydom. He adds that proper and thorough consultations should take place throughout the proceedings of the case file. In an ideal situation the investigating officer should establish the relationship between the prosecutor and the complainant. However, the Anna Juries case study shows that this ideal cannot be realised in a situation where there are many different prosecutors handling a case, and where both investigators and prosecutors are so overwhelmed by their workloads that the needs of the victim are not pressing concerns for them.

Age, gender and victim support

The Victim Charter is supported by a number of other acts and protocols including:

- the Child Justice Act No. 75 of 2008
- the Prevention of and Treatment for Substance Abuse Act No. 70 of 2008
- the National Gambling Amendment Act No. 10 of 2008
- the Criminal Law (Sexual Offences and Related Matters) Act No. 32 of 2007
- the Older Person’s Act No.13 of 2006
- the Children’s Act No. 38 of 2005
- the Domestic Violence Act No.116 of 1998
- the Child Care Act No. 74 of 1983
- the Charter of the Public and Private Health Sectors of The Republic of South Africa
- the Anti-Rape Strategy
- the National Guideline for Victims of Sexual Assault
In many of these laws and protocols it appears that the primary concern of the drafters was the protection and interests of women and children.

The Victim Empowerment Programme also prioritises women and children, the elderly and disabled, as well as those in rural settings. This focus emerges out of the belief that women and children have been, and remain, the most vulnerable of groups in South Africa. This approach is also a reaction to the high levels of crime against women and children. There are also other initiatives focussed on preventing and reacting to violence, such as the government’s ‘16 Days of Activism’ (against abuse of women) campaign and the ‘365 Days of Activism’ (against violence towards women and children).

In addition to relevant government departments having prioritised the care of women and children in their work, numerous civil society organisations – many of which are funded by the Department of Social Development – also work to support women and children, thus creating an important government-civil society support net. But, as was noted by Holtmann, one must be careful not to conflate victims, women and children, otherwise there is a sense that the three groups are inseparable.28

While men are more often the perpetrators of crime, including violence against women and children, they are also the victims of crime, more often than women and children. Both in South Africa and abroad, research and victim surveys indicate higher proportions of adult male victims, particularly of violent crimes such as assault, murder and robbery.29 A 2007 study of South African mortuary figures over a three-year period showed that only 13 per cent of murder victims were women and that most murders were the result of assault — a crime more prevalent among men. In a 2009 analysis of murder dockets in six South African police station precincts, only 11 per cent of murder victims were women. While it is true that sexual offences and domestic violence remain under-reported, it is possible that men are even less likely than women to report such abuse due to fear of stigmatisation. Although domestic violence figures are not yet established in South Africa, a 1999 Home Office study of domestic violence in the United Kingdom revealed that women were only slightly more likely than men to be assaulted in the home. Ninety-five per cent of assaults against men in the home were by women, although few men considered these to be a crime.30

There is also no doubt that levels of domestic violence and sexual assault in which the victim is a woman are high in South Africa. Women and children are extremely vulnerable and remain the repeated victims of heinous violent crime
Victim Support

at the hands of men. However, it is important to note that male victims remain comparatively unrecognised within policy and support structures.

A 2005 youth victim survey of 12- to 22-year-olds, conducted by the Centre for Justice and Crime Prevention, revealed that 40 per cent of young South Africans were victims of crime in the year preceding the survey. This compares to a national average of 22 per cent among all citizens over the age of sixteen. The youth victim survey also reveals that for most categories of crime, young men are more likely than women to become victims.

This data highlights the extreme vulnerability of young men, particularly poor young black men. Thus it is essential that victim support initiatives take into consideration the need to support all victims: male and female, young and old. It has been suggested that effective interventions and support of young male victims would help divert their later involvement as perpetrators of crime. Although the particular vulnerability of young men has featured in the victim discourse for more than ten years, it has yet to yield a targeted policy response.

CHALLENGES AND RECOMMENDATIONS

A victim-centred justice system, as envisaged both by the laws and policies described above, is yet to be realized in South Africa. Implementation of the victim-support policies that do exist remains patchy, as the setting up of services is heavily reliant on provinces being motivated to deliver in this area and commit money to delivery; and on civil society to do the work. Frank’s 2007 review of the Charter for Victims of Crime in South Africa, the Victim Empowerment Programme and the NPA’s Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences highlights the following problems and makes targeted suggestions:

A lack of shared rationale among the key documents

Frank recommended that the three documents should be integrated to form a strategy that defines a set of rights, services and standards of service that can be applied to all victims of crime. In their current forms, the three documents share no clear motivation or theory for the provision of services or for how these services would benefit society.
The need to improve relations between government and civil society, and to boost funding to civil society groups

There are currently inconsistencies in the way government departments engage and partner with civil society service providers. These need to be addressed through proactive partnerships between government and civil society service providers, as well as through realistic budget allocations that include subsidies for civil society groups.

Inadequate or inconsistent quality of services to victims, especially where volunteers are involved

Victim support systems laid out in the three key documents are heavily reliant upon volunteers for their implementation. Such systems require regulation to ensure that unsuitable and untrained people do not become involved.

It is also important that the quality of services is monitored and improved. This would involve developing a single set of minimum standards by which to measure providers, along with structures to do the measuring, and programmes to improve the skills of service providers.

Continued victimization while in state custody

There is a need to acknowledge and address the fact that those within state custody are often particularly vulnerable to victimization.

The need to address new trends in victimization

As technology develops, so too do new forms of crime (such as e-crime), and old forms are re-modelled. Victims of some of these new forms of crime may not always be considered to be victims by the definitions found in the documents.

Patchy implementation of policy

The existing policies do not seem to recognise the need to deal with the trauma experienced by those close to victims of violent crime. The policies do not engage vigorously enough with the question ‘who is a victim’, and restrict the label only to those who engage with the criminal justice system. Although providing services for all those affected by crime would be a mammoth task, it is something that government and civil society should explore in the long term. This does not have
to mean full provision of support for secondary victims; it could simply mean providing facilities, and awareness of such facilities – either state or NGO run – to which those affected can turn to channel their emotions and receive support.36 No provision is made in current structures to address the kinds of secondary trauma experienced by Anna Juries’s partner and children.

Recent developments in legislation, the Service Charter for Victims of Crime, Victim Empowerment Programme, Uniform Protocol for Victims and related documents symbolize an important shift in South Africa’s criminal justice system over the past 15 years. Inevitably, though, it is only through implementation that change will occur and it is in implementation that the challenges remain.

In her engagement with the SAPS, Anna Juries was granted very few of the rights that are afforded to her by the Charter or the Victim Empowerment Programme. She was not referred to any criminal justice system support officials, or to independent organisations that might have offered support. While not part of the criminal justice system, the private healthcare facility in which she was treated also did not provide her with, or recommend, any emotional or familial support service. Most importantly, had the police and prosecutors provided Juries with clear information about what she could expect from the investigation and the trial process, much subsequent trauma may have been avoided.

CONCLUSION

Anna Juries woke up in hospital aching in the aftermath of a bloody knife attack. While South African health facilities are the recipients of thousands of victims of crime each year, it is not the norm to offer these victims emotional support related to the crime. This is illustrated in the Anna Jurries case study where, despite lying in hospital for a number of days, she was not debriefed by hospital staff or police, or referred to a facility where she could receive victim-related support. Indeed, throughout her two-year ordeal, the only recognition of trauma she received from officials was some initial sympathy from the first policemen to take her statement, and from the judge who in handing down her judgement made reference to the serious nature of the crime. Indeed if anything, Anna’s engagement with the criminal justice system only caused more trauma.

Much of the post-crime trauma experienced by Anna and her family was caused by officials weighed down by incompetence and a dysfunctional criminal justice system. She was passed from prosecutor to prosecutor, and was at times
unable to contact either the detective or prosecutor. Mending these structural and systemic flaws would drastically improve the experience of victims engaging the criminal justice system. A justice system that functions smoothly and efficiently, and in which victims can trust, would go a long way to alleviating the trauma of the investigation and trial process. As noted by Mathews in Chapter 5, such a system should also recognise a victim’s need for redress, apology, and to be given a voice, and should not see successful prosecution as the only indicator that a victim’s needs have been met. However, besides these and other necessary improvements to the overall justice system explored in this book, this chapter has introduced a number of other ways in which victims’ rights should be realized. Some of these are mentioned under ‘Challenges and recommendations’ above. The remainder are mentioned here and are particularly relevant to the SAPS, which is the entry point of the justice system, but also to healthcare facilities, and to prosecutors when cases are taken to court.

Healthcare facilities at which victims of crime frequently seek treatment, should be prepared and obliged to offer counselling to victims. These facilities could help to prepare victims for their first post-crime encounter with police by briefing them on what to expect from that meeting. By engaging with hospital-bound victims after they’ve dealt with SAPS members, health facilities could provide a level of monitoring and feedback to the SAPS regarding members’ professionalism.

Perhaps most importantly, the detectives and prosecutors who engage with victims through the investigation and prosecution phases need to be aware of their obligations to them. Even though it is not the sole responsibility of the SAPS or the NPA to provide all victim support services, these bodies are central to the victim’s experience of the criminal justice system. They should be sensitive to the victim’s needs, and facilitate care of the victim by putting him or her in touch with relevant groups. The SAPS as first responder to victims must at least make victims aware of their rights and provide them with information about support services: it should not be up to victims to ask for this information first.

SAPS members should be trained, tested and monitored (starting in college) in engaging with victims in a professional and empathetic manner. This is important in both the ‘intake’ phase when a case is opened, and throughout the investigation process. The same applies to prosecutors who are well positioned to gauge a victim’s needs during the trial process. While some training in this regard already takes place, it is vital that police and prosecutors are monitored so that their constant engagement with new victims does not diminish the seriousness with which
they treat each case, or the quality of service they provide.

All South Africans, whether victims or not, should be made aware of the rights of victims of crime and violence. Information of this kind could be simply communicated through radio, television and print media campaigns, as has been accomplished in similar campaigns addressing human rights. Victim Charter posters could be displayed in spaces frequented by victims including police stations, counselling rooms health facilities and courts. Posters have already been developed by the SAPS, but are not on display in all police stations. The SAPS has also developed an information booklet on the Victim Charter, which is particularly easy to understand. But this is not always recommended to victims, nor does the booklet contain information about support services. It would be helpful if all complainants about crime were handed a one-page information sheet outlining their rights and containing basic contact information for help lines and support services working in their area. Such a sheet could also explain the normal phases of trauma such as shock, anger and denial. The sheet could have a space on which the case number is written before handing it to the victim or complainant, making it less likely to be casually discarded. Similar sheets could also be distributed via community awareness drives and community based organisations. When they begin engaging with the state prosecutor, victims should be reminded of their rights.

SAPS members and prosecutors should offer support-related information rather than leaving it up to victims to ask. Nevertheless there should be posters in Community Service Centres (in statement-taking booths, or on the counter) with a message such as: ‘If you require counselling or support services, please request assistance from any member on duty.’ The posters could also list the details of local or national organizations working in victim support.

In order to aid police in providing accurate information to victims, the SAPS side of the Community Service Centre counter should display a location-specific quick-reference guide, which members can consult when advising crime victims. This guide should list information regarding support facilities and options available. Some stations have already implemented such systems although this seems to depend on individual leadership and initiative. Template posters for such information could be produced nationally and then filled in at station level to reflect organisations serving the local area.

Ideally each police station would have trained trauma counsellors on duty or standby at all hours. This will not always be practical, but it would be possible to
establish the regional trauma centres each serving several SAPS stations. Police should provide transport to these facilities, as outlined in the Charter. This model would allow for a concentration of resources and personnel. In rural stations, police and other justice structures might need to coordinate the training of justice system employees or members of the public, in order to supply such services. Where severe trauma has been experienced, arrangements could be made to transport victims to urban centres with better services. It is important that counsellors are adequately trained, monitored and supervised.

Ideally the support or counselling process should extend beyond the victim to his or her close family or friends who may be suffering secondary victimization. At the very least, victims could be supplied with information brochures to give to family and friends, outlining the normal phases of trauma (with a focus on secondary victimization), and directing them to support structures. Once again this suggests a further exploration of how society chooses to define ‘victim’.

Although it remains imperative that extra attention be given to vulnerable citizens such as women and children, it is important that victim support structures and strategies recognize the disproportionate level of male victimization, especially with regard to violent crime. These structures should explore and challenge commonly held concepts of masculinity and bravado, and challenge perceptions that men cannot or need not seek emotional support.

The government should consider increasing funding to non-governmental organizations providing victim support services, and provide spaces and resources for these to grow and spread.

Many of the suggestions made here could be facilitated by Victim Service Centre volunteers, although it is still imperative that SAPS members engage with victims empathetically outside of the VSC, and in particular during the initial contact between SAPS and victim. VSC volunteers and SAPS members must be knowledgeable about other civil society structures working in their vicinity to which victims can be referred. It is important that victims are reminded of their rights, and related services, throughout their engagement with the criminal justice system. Ultimately though, it is imperative that the victim’s engagement with the justice system is as efficient and effective as possible. This requires unburdening SAPS members and prosecutors through bolstered workforces and vastly improved systems. Victims should have ready-access to any non-sensitive information regarding their case. Finally, all stakeholders must acknowledge that their primary responsibility is to the victim and their rights, not the system.
NOTES


4. Frank, Quality services guaranteed?

5. Ibid.

6. Ibid.


8. Frank, Quality services guaranteed?

9. E-mail correspondence with Assistant Commissioner Susan Pienaar, SAPS Crime Prevention, Head Office, 1 December 2008.

10. Frank, Quality services guaranteed?

11. A Faull, 20 February 2009, telephonic interview with Cheryl Frank, Director of RAPCAN.

12. E-mail correspondence with Ayanda Ngxubaza, Ikhaya le Themba, Gauteng Department of Community Safety, 1 December 2008.

13. A Faull, 1 December 2007, telephonic interview with Ms T Kodwa, POWA trainer, Gauteng.

14. Ibid.


23. Mashele, Personal communication with Roerhs.

24. Ibid.


31. The survey was repeated in 2008. Results were due to be released in October 2009 after going to press.


35. Frank, Quality services guaranteed?

36. A good example of such a system can be found in Canada with its focus on restora-
tive justice. There, victim services extend to anyone directly or indirectly affected by crime. These services are freely provided by the state and civil society groups. South Africa is not in a position to offer services as expansive as these, but simpler versions of such models should be considered. See, for example, http://www.johnhoward.ca/.
7 POLICY ISSUES IN CHILD JUSTICE

Lukas Muntingh

INTRODUCTION

In May 2009 the Child Justice Act was signed into law. This chapter highlights the key policy themes and implementation challenges in relation to child justice.

The policy themes central to the Act are:
- The best interests of the child
- The role of extraordinary cases in shaping policy
- Compliance with international instruments
- Measuring performance
- Restorative justice
- Resource requirements and inter-sectoral cooperation
- Custodial sentences
- Prevention

This chapter first outlines international criteria for measuring child justice, then looks at key objectives of the Child Justice Act and the requirements for good
Policy issues in child justice

policy-making. The child justice system is subject to the same problems and constraints experienced by the criminal justice system as a whole. Despite these constraints, the author asks what the child justice system should achieve in the medium to long term (15 to 20 years).

MEASURING CHILD JUSTICE

In 2003 the United Nations Children’s Fund (UNICEF) published a set of nine quantitative indicators by which a child justice process could be measured. In its 10th General Comment, the UN Committee on the Rights of the Child (CROC) noted the crucial importance of disaggregated statistical data on child justice and expressed its dissatisfaction with the general lack of such data. In view of this it urged states to:

systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC (Convention on the Rights of the Child).

The South African Child Justice Alliance (SACJA) assessed child justice in South Africa using seven of these nine indicators (omitting the two dealing with matters outside the criminal justice system). The findings are described below.

The SACJA found there were two limitations in applying the UNICEF indicators. The first was that being quantitative indicators omit important qualitative information. The second was that some of the information required to undertake such an analysis was not available: this in itself is an important finding in relation to the management and administration of child justice in South Africa.

(1) Existence of a child justice system

In South Africa, a child justice system is still in the making. Firm guidance will come from the Child Justice Act, signed into law in May 2009, but this will only be implemented in 2010. Nevertheless existing initiatives, such as the One-stop Child Justice Centres in Port Elizabeth, Port Nolloth and Bloemfontein, have done much to develop the practical procedures for a child justice system. In many regards the Child Justice Act describes what already exists in practice and has been demonstrated to be achievable.
(2) Children who come into contact with the criminal justice system

There is great uncertainty about the number of children who come into contact with the criminal justice system. The South African Police Services do not collect this information in any centralised or publicly accessible format. There is no central register that records the number of children who are tried, convicted or acquitted, nor is there a record of the number of cases converted to children’s court inquiries.4

However from figures used in various research studies, the Child Justice Alliance has estimated that approximately 101 000 children are arrested annually.5 Figures on the diversion of children’s cases away from the formal court procedure are equally murky but can be estimated as at least 22 000 per annum.

(3) Children in detention

Data is available from the Department of Correctional Services (DCS) for children sentenced to imprisonment. At the beginning of March 2006 there were a total of 2 729 unsentenced children in custody, of whom 57 per cent (1 556) were held in secure care facilities7 and 43 per cent (1 173) in prisons8. In all provinces the available secure care facilities were occupied below capacity. This is in part due to the fact that since 2000 the number of children in prison has decreased from a high of 4380 children in prison in the third quarter of 2000 to 1691 in December 2008,9 but the fact that there are still children in prison suggests also that these secure care facilities could be put to better use.

(4) Duration of detention

There have been significant changes in sentences of children since 1995. The most important is the lengthening of prison terms – children are more likely now to receive a prison term of longer than one year than they were in 1995. The average length of time awaiting trial is 48 days, although this figure hides the fact that there are many children who spent a year and longer in custody before their cases were adjudicated. Unsentenced children charged with aggressive crimes spent significantly longer periods in detention than those charged with other crimes.
(5) Separation from adults

Although legislation and policy state that children must at all times be separated from adults in prisons and police cells, this does not always happen. Difficulty with age determination results in adults being detained with children in prisons and police cells. Many police stations are also without the necessary cell capacity to enable the legally required separations of the sexes and children from adults. An additional concern is that the vehicles used by the SAPS to transport prisoners to court are not fitted to allow for the segregation of children from adults. No statistical information is available to show the extent of this problem. It is a matter of concern that despite concerted objections by child justice activists, the Portfolio Committee on Justice and Constitutional Development specifically allowed the inclusion of a provision (section 33(2)(c)) in the Child Justice Act to permit the transportation of children with adults in exceptional circumstances; despite there being a constitutional prohibition. The fact that it is legally possible, even under exceptional circumstances, to transport children with adults, poses a threat to the constitutional requirement of separation.

(6) Conditions for control of quality of services for children in detention

Magistrates and judges have the authority to visit prisons in terms of section 99 of the Correctional Services Act (111 of 1998), although they do not do so systematically. Reports about ad hoc visits to prisons are apparently forwarded to the Office of the Inspecting Judge of Prisons. Judges and magistrates can visit police cells, although there does not appear to be specific legislative provision for this, nor does it happen on any systematic basis. In addition, members of the Parliamentary Portfolio Committee on Correctional Services, the relevant committee of the National Council of Provinces, and members of the National Council on Correctional Services have unrestricted access to prisons.

The Judicial Inspectorate for Correctional Services and its system of Independent Correctional Centre Visitors (ICCV) is well developed, providing both oversight and a complaints mechanism for prisoners, including children in prisons. The Independent Complaints Directorate does not visit police cells proactively, however, which is a significant shortcoming.

There is as yet no system for independent oversight of child and youth care centres, which is a matter of concern.
(7) Protection from torture, violence, abuse and exploitation

There is no legislation criminalising torture in South Africa, despite the fact that South Africa ratified the Convention against Torture in 1998. The first country report to the Committee against Torture was submitted in mid-2005. The Committee acknowledged the progress that South Africa has made in promoting a human rights culture since 1994 but also noted the lack of legislation criminalising torture. It urged the South Africa to address this as a matter of priority, as criminalisation of torture under domestic legislation is a requirement of Article 4 of the Convention. South Africa signed the Optional Protocol to the Convention against Torture (OPCAT) in September 2006. The Protocol will provide for a National Preventive Mechanism that will be mandated to visit all places of detention. Discussions between civil society, government and the Human Rights Commission on how the state will meet its obligations under OPCAT were in progress at the time of writing.

The SAPS is the only government department that has a policy on the prevention of torture. Surprisingly, the Department of Correctional Services has no such policy. Concerns have been raised about the effectiveness of complaints mechanisms in prisons, police cells and child and youth care centres.

Key issues

By way of summary, the following can be considered to be the key issues:

- While the Child Justice Act has set a clear legislative framework, the challenge will to implement the provisions of the Act countrywide so as to ensure that all children in conflict with the law have equal access to services.
- Fragments of research, together with uncoordinated information from various government departments, provide the only publicly available quantitative information on children in the criminal justice system. The only way to obtain a comprehensive picture is if the state establishes the necessary information systems and makes the information available.
- Even though the known number of children in detention has dropped significantly in recent years, continued monitoring is necessary to ensure that children are not detained unnecessarily and that those detained receive the appropriate services.
- Oversight over all places of detention, not only of children, requires drastic improvement. While the Judicial Inspectorate oversees prisons, other facili-
ties such as police cells, child and youth care centres are effectively without oversight. It is these situations in which the risk of torture and ill treatment is greatest.

THE CHILD JUSTICE ACT

The Child Justice Act was adopted by the National Assembly in November 2008, and signed into law in May 2009, after six years of legislative process in Parliament. The first version of the Bill tabled in 2002 had the broad support of civil society and government departments. However, in the hands of the then Portfolio Committee on Justice and Constitutional Development, it underwent a metamorphosis, emerging as a harsh, punitive, and probably unconstitutional approach to children. The making of the Act was an ideological contest between a strictly justice approach (a hard attitude towards child offenders) and the approach of children’s rights and restorative justice as a way of dealing differently with crime.13

When it re-entered the public domain under a new portfolio committee, fundamental changes were made. The Child Justice Act that finally emerged was much closer to the original version. It reflected an approach to child justice that closely echoed constitutional principles and international legal processes pertaining to child justice. It also reflected years of experience by civil society and government in the administration of child justice. Thus the knowledge and experience gained over 15 years without a legal framework had a formative effect on the legislation.

Objectives of the Child Justice Act

Section 2 the Act sets out a number of objectives, which include:

- To protect the rights of children as provided for in the Constitution.
- To promote the spirit of ubuntu in the child justice system by fostering children’s sense of dignity and worth.
- To reinforce children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community.
- To support reconciliation by means of restorative justice responses involving parents, families, victims and, where appropriate, other members of the community affected by the crime, in order to encourage the reintegration of children.
- To provide special programmes designed to break the cycle of crime, which
aim for safer communities and encourage these children to become law-abiding and productive adults.

- To prevent children from being exposed to the adverse effects of the formal criminal justice system by using appropriate processes and services (such as diversion) more suitable to the needs of children and in accordance with the Constitution.
- To promote co-operation between government departments, and between government departments, non-governmental sector and civil society, to ensure a holistic approach to implementation of the Act.

Principles set out in the Child Justice Act

In section 3 the Act requires a number of principles to be taken into account when dealing with children’s cases, namely:

- All consequences arising from an offence by a child should be proportionate to the circumstances of the child, the nature of the offence, and the interests of society.
- A child must not be treated more severely than an adult would have been treated in the same circumstances.
- Every child should, as far as possible, be given an opportunity to participate in any proceedings where decisions affecting him or her might be taken, particularly in informal and inquisitorial proceedings.
- Every child should be addressed in a manner appropriate to his or her age and intellectual development. The child should be spoken to, and be allowed to speak in, his or her language of choice, through an interpreter, if necessary.
- Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- All procedures related to the Act should be conducted and completed without unreasonable delay.
- Parents and appropriate adults should be able to assist children in proceedings, and wherever possible participate in decisions affecting them.
- A child lacking in family support or educational or employment opportunities must have equal access to available services as a child who has had these opportunities. Every effort should be made to ensure that children receive similar treatment after committing similar offences.

Key procedural aspects of the Act

The Child Justice Act introduces a number of innovative and progressive procedural changes relating to the treatment of children in the criminal justice system. Key amongst these are:

• Changing the minimum age of criminal responsibility from seven to 10 years. In addition, the Act retains the rebuttable presumption that children lack criminal responsibility between the ages of 10 and 14 years with the onus being on the state to prove criminal responsibility. This means that under the age of 10 a child is presumed to have no criminal capacity; and between 10 and 14 the state presumes that that a child lacks criminal capacity, but this presumption is rebuttable if the state can prove the child has criminal capacity beyond a reasonable doubt. Providing clearer guidance to courts and probation officers regarding age determination.

• Prohibiting the arrest of children for certain petty offences unless there are compelling reasons, and providing for alternatives to arrest.

• Giving guidance on the detention of children awaiting trial, and providing for an alternative to detention.

• Providing that every arrested child must be assessed by a probation officer unless it is not in the interests of the child and the prosecutor or presiding officers exempts a probation officer from having to undertake such assessment.

• Introducing a new mechanism, the preliminary inquiry. This inquiry aims to gather as much information as possible regarding the child so that the inquiry magistrate, in consultation with the prosecutor, can make a suitable decision about how to manage the child within the criminal justice system. This includes an order by the inquiry magistrate that the child be referred to a children’s court.14

• Enabling the diversion of a child’s case at nearly every stage of the criminal justice process.

• Setting certain requirements regarding legal representation for children, and
allowing children to give independent legal instruction.

- Conducting trials of children in specialised child justice courts with the applicable status (district, regional or high court).
- Providing for the establishment of one-stop child justice centres.
- Providing presiding officers with specific guidelines on sentencing, and allowing automatic review of sentences under certain conditions.\(^{15}\)

A flow chart of the process is presented in Figure 3

The Child Justice Act has created an appropriate legislative framework for dealing with children in conflict with the law. However, implementation requires policies and procedures to guide officials and other stakeholders at operational level. The progressive nature of the Child Justice Act necessitates the careful development of effective policies and procedures to prevent officials reverting to a situation of ‘how things used to be done’.

What should good policies look like?

The implementation of the Child Justice Act depends on policies that support its objectives. Policies translate political vision into programmes and actions to deliver ‘outcomes’ — or desired changes in the real world.\(^{16}\)

The daily interpretation of statutory provisions and decision-making will determine how the Child Justice Act will be experienced. It cannot be assumed that the guidance given by the Act is automatically implementable in practice. New research findings may support or question the assumptions in the existing legislation. This means that monitoring and reviewing the legislation over time will be necessary.

Let us take an example. The Act states that imprisonment must only be used as a measure of last resort, and only for the shortest appropriate period of time (section 69(1)(e)). A number of questions immediately arise: How does one establish that it is indeed used as the ‘last resort’. How many other options must be assessed and found to be unsuitable before imprisonment is resorted to? How long is ‘the shortest appropriate time’? While the Child Justice Act, in section 69(4), provides some guidance in this regard, more detail is required.\(^{17}\) These are questions that policy needs to address, and such policy should be comprehensive and reflective of evidence. The Child Justice Act requires that a national policy framework for implementation be developed and this is discussed further below.
Child suspected of an offence is issued with a summons, written notice or arrested

Police must inform probation officer of written notice, summons or arrest of child. Probation officer must assess child with 48 hours of arrest or time specified in written notice or summons. Assessment report handed to prosecutor before preliminary inquiry.

Child who has been arrested for a schedule 1 offence must be released by police into care of parent or guardian or appropriate adult unless in certain circumstances. Child arrested for schedule 1 or 2 offence and not released by police may be released by prosecutor. Child arrested for a schedule 3 offence may not be released by police.

If child is charged with a schedule 1 offence the prosecutor may divert the child before the child appears at the preliminary inquiry. If assessment not yet complete prosecutor can dispense with assessment.

Child suspected of an offence is issued with a summons, written notice or arrested

Child who has been arrested for a schedule 1 offence must be released by police into care of parent or guardian or appropriate adult unless in certain circumstances. Child arrested for schedule 1 or 2 offence and not released by police may be released by prosecutor. Child arrested for a schedule 3 offence may not be released by police.

NOTE: A child under 10 years suspected of committing a crime may not be arrested and must be taken to a probation officer by police.
Criteria for good policy-making

Good policies are not easy to develop. They require significant energy and time. Drawing on experience from other jurisdictions and from research conducted on policy development, Bullock, Mountford and Stanley identified the nine criteria for use in good policy making:18

- **Forward-looking**: Policy-making should clearly define the outcomes that the policies are designed to achieve. Where appropriate, it should take a long-term view based on statistical trends and informed predictions of social, political, economic and cultural trends. This view should extend at least five years into the future.

- **Outward-looking**: The policy-making process should take account of influencing factors in the national, regional and international situation; draw on experience in other countries; and consider how policy will be communicated with the public.

- **Innovative, flexible and creative**: The policy-making process should be flexible and innovative, encouraging new and creative ideas, questioning established ways, or making the established ways work better. The process should be open to comments and suggestions by others. Risks must be identified and actively managed.

- **Evidence-based**: The advice and decisions of policy-makers should be based upon the best available evidence. Stakeholders from a wide range of experience and institutions should be involved both at an early stage and throughout the policy’s development. Relevant evidence, including that from specialists, must be available to policy-makers in an accessible and meaningful form.

- **Inclusive**: The policy-making process must take into account the impact on and/or meet the needs of all people directly or indirectly affected by the policy; and should involve key stakeholders directly.

- **Joined up**: The process must maintain a holistic perspective, looking beyond institutional boundaries to the government’s strategic objectives. It must seek to establish the ethical, moral and legal base for policy. Consideration should be given to the appropriate management and organisational structures needed to deliver cross-cutting objectives.

- **Review**: Established policy must be constantly reviewed to ensure it is really dealing with problems it was designed to solve, taking account anything new
that might have had an impact on the problem that the policy was designed to address.

- **Evaluation:** A systematic evaluation of the effectiveness of policy must be built into the policy-making process.
- **Learning lessons:** The process of developing policy must take into account experience of what works and what does not.

### KEY POLICY ISSUES

#### The best interests of the child

The Constitutional obligation to act in ‘the best interests of the child’ poses significant duties on the state as the child’s best interests ‘are of paramount importance in every matter concerning the child’.19 As mentioned above, section 3 of the Act provides a list of ten guiding principles to shape the implementation of the Act, so these are to be interpreted to promote the best interests of the child. In addition, section 7 of the Children’s Act provides a useful guide to factors which should be taken into account when deciding on the best interests of the child. These factors, although not specific to child justice, must nevertheless serve as a basis in all decisions affecting children.

Article 3 of the United Nations Convention on the Rights of the Child makes it clear that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. However, the UNCRC does not define these interests, and there is no checklist to be consulted to verify what is indeed in the best interests of a child.20

Writing about the United Nations Convention on the Rights of the Child, Freeman notes that ‘[t]he best interests concept is indeterminate. Different societies, different historical periods will not agree’.21 Thus, it is important to identify what is in the ‘best interests of the child’ in South African society currently.

The UN Committee on the Rights of the Child (CROC) regards the following five principles as being fundamental to a child justice policy: 1) non-discrimination; 2) the best interests of the child; 3) the right to life, survival and development; 4) the right to be heard, and 5) the right to dignity.22 CROC defines the best interests of the child as follows: ‘[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice (repression/
retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety. Freeman advises that to gain greater clarity, the question should be turned around: what is not in the best interests of the child? Asking this question within the context of child justice is indeed helpful.

Much domestic and international research has shown how criminal justice system decisions have not considered the best interests of the child. Apart from not serving children, this approach damages the longer-term interests of society as well. If we carefully analyse the available evidence, specific risk areas in relation to the ‘best interest of the child’ can be identified. Such risks are not necessarily common to all areas; rural areas may present different risks or in different intensities than urban areas. Risk analysis needs to be sensitive to such diversity.

Although somewhat crude, the nine indicators for child justice listed above are a useful starting point for identifying risk areas. These can be built on incrementally, as knowledge is gained about the system. It is necessary to be proactive when seeking conditions of the greatest risk. Section 7 of the Children’s Act provides guidance, and may be a useful point of reference.

The intention of the Child Justice Act is to strike a balance between the interests of justice, the interests of the community, and the interests of the child. It is thus unlikely that the Constitutional Court will, when faced with convincing arguments, make children’s rights subservient to the interests of justice and the concerns of society. This has implications for the arrest, prosecution and sentencing of children, especially when sentences result in the deprivation of liberty. The Constitutional Court and the Supreme Court of Appeal have on a number of occasions made their views clear regarding the rights of children in the criminal justice process.

Looking 20 years ahead, the state has to be mindful that policy and law reform may face the risk of continuous litigation if not carefully in line the Constitution. Civil society has proven to be a keen litigant for children’s rights since 1994.

**CHILD JUSTICE AND THE JURIES CASE STUDY**

Several issues relating to child justice arise in the Anna Juries case study. As the reader will recall, the youngest offender in the case study was thought to be 16 years old at the time of the offence (a child). His mother was not able to find his birth certificate so the court had no confirmation of his age. By the time the case
was concluded he had just turned 18.

He was not, but should have been tried as a child, with all the procedural implications that brings, including that the trial should have been held in camera, that he should have been considered for diversion and assessed by a probation officer (a social worker with specific training). The assessment should have included an assessment of his age. While it is not clear from the case study (which only presents the victim's perspective) whether he was indeed assessed, the court certainly did not refer to such an assessment, neither during the case, nor at the time of sentencing, suggesting that there was no assessment. Even though the case took place before the passing of the Child Justice Act, Section 1 of the Probation Service Act, as amended in 2002 (Act 35 of 2002) requires a probation officer to make an assessment of the impact of the crime on the child (this is covered in sections 12, 13 and 14 of the Child Justice Act).

Under the Child Justice Act the child will need to be comprehensively assessed. This assessment should include:

- Whether the child needs care and protection
- An estimation of the child's age
- Whether the child has been previously convicted, or diverted, or faces any other pending charges
- Recommendations about the release, detention or placement of the child
- The prospects for diversion
- Whether the child was used by an adult to commit the crime in question
- Any other information about the child that would inform actions in the best interests of the child. (Section 35, Child Justice Act, Act 32225, 2009)

If it is found by the social worker and the court that he had been used by the adults, they would have had to be charged for that offence too. The court will have to seek the best possible approach to dealing with the child as set out in the objectives and principles of the Child Justice Act, in particular a restorative justice approach must be considered as an option. If a restorative justice process is not followed, a social worker will at least have to provide a pre-sentence report to the court that will be used to inform the decision about the sentence, and an opportunity should be provided for the victim to make an impact statement before sentence is past.

Had the case taken place after implementation of the Child Justice Act, Anna too would have had an opportunity to present to the court a statement about the impact the crime had on her.
The ‘highly extraordinary’ case

The case of Venables and Thompson in the United Kingdom,28 that of P in South Africa29 and other rare cases where children commit serious crimes such as murder often lead to lawmakers taking a ‘tough on crime’ approach to child offenders (this is often encouraged by the media). Rhetoric surrounding such crimes frequently calls for extremely harsh punishments, trying children as adults and criticising current practice for being ‘soft on crime’.

The introduction of mandatory minimum sentences in 1997 for serious offences (See Chapter 8) is symptomatic of policy driven by sensation and ideology instead of evidence. The consequences of such policy shifts can have dire long-term consequences for the overwhelming majority of children who come into conflict with the law. It was only in July 2009 that the Constitutional Court ruled that the imposition of minimum sentences on children is unconstitutional. This will now require a review of all sentences imposed on children under the impugned provisions.30

The key issue is to regard highly extraordinary cases for what they are – highly extraordinary – and not to generalise such behaviour to all children, or worse, to inter-link a number of such cases to make it appear that a trend in serious crimes committed by children is emerging. Despite these highly extraordinary cases, the overwhelming number of child offenders are arrested for property crimes and other offences linked to their age, development and personal circumstances.

The lesson for policy development is that it must be based on evidence and not seduced by the few highly extraordinary cases.

Compliance with international instruments

Governments are universally renowned for signing international human rights treaties and then ignoring the treaties’ obligations. When confronted, a defensive attitude usually prevails, frequently supported by excuses relating to capacity, resources and technical expertise.

Since its establishment, the United Nations has developed a plethora of human rights instruments, especially in the child justice sector. Of particular importance are:

- UN Convention on the Rights of the Child
- UN Rules for the Protection of Juveniles Deprived of their Liberty
- UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)
• UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
• Guidelines for Action on Children in the Criminal Justice System\textsuperscript{31}
• UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)
• UN Committee on the Rights of the Child General Comment No. 10

The UN Convention on the Rights of the Child is the only instrument that is binding. All the other instruments are non-binding: so-called ‘soft law’.

Officials and members of the South African legislature are often ignorant of these instruments, or at least sceptical about anything that seems to impose on the sovereignty of the state or set unattainable standards. Nevertheless, as human rights and children’s rights are increasingly globalised and states increasingly reviewed by their peers, it will be wise to pay close attention to the requirements and guidelines of the international instruments.

Such attention requires regular reporting to the appropriate international bodies and ensuring that such reporting is fair and accurate. In short, domestic policy and law reform cannot be seen in isolation from international law. The Child Justice Act (see Preamble and section 3) makes a number of references to South Africa’s ‘international obligations’ but does not spell these out in any detail. Giving substance to ‘international obligations’ in the child justice sector will require further policy development.

Table 8 shows that South Africa’s reporting has not been on time for any of the treaties, and that several reports remain outstanding. Of particular concern is the second periodic CRC report that was due on 15 July 2002 and is now more than six years overdue, while the third report is now also overdue.

Although not listed in Table 8, the UN Human Rights Council’s Universal Periodic Review places a further obligation on reporting. South Africa was reviewed in 2007, but failed to submit a written report in advance, and little attention was given to child justice in the oral submission.\textsuperscript{32} It is evident that the current reporting procedures do not function adequately, if at all, and that drastic steps need to be taken to improve reporting to the UN human rights monitoring system.

In order to respond appropriately to the obligations agreed to in a globalised human rights framework, the following are noted as key areas for policy development:
Table 8: South Africa’s reporting on international agreements to which it is a signatory, 2000-2009

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Report due date and date submitted</th>
<th>Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT-Convention Against Torture and Other Cruel Inhuman or Degrading</td>
<td>2\textsuperscript{nd} report due</td>
<td>1\textsuperscript{st} report</td>
</tr>
<tr>
<td>Treatment or Punishment</td>
<td>31/12/2009</td>
<td>submitted 5 years late</td>
</tr>
<tr>
<td>CCPR-International Covenant on Civil and Political Rights</td>
<td>Initial report was due 9/3/2000</td>
<td>No</td>
</tr>
<tr>
<td>CEDAW-Convention on the Elimination of All Forms of Discrimination</td>
<td>2\textsuperscript{nd} report was</td>
<td>No</td>
</tr>
<tr>
<td>against Women</td>
<td>due on 14/1/2000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3\textsuperscript{rd} report was</td>
<td></td>
</tr>
<tr>
<td></td>
<td>due on 14/1/2005</td>
<td></td>
</tr>
<tr>
<td>CERD-International Convention on the Elimination of All Forms of</td>
<td>1\textsuperscript{st}, 2\textsuperscript{nd} and 3\textsuperscript{rd} reports submitted on 2/12/2004</td>
<td>1\textsuperscript{st}, 2\textsuperscript{nd} and 3\textsuperscript{rd} reports submitted late</td>
</tr>
<tr>
<td>Racial Discrimination</td>
<td>4\textsuperscript{th}, 5\textsuperscript{th}, 6\textsuperscript{th} reports due 9/1/2010</td>
<td></td>
</tr>
<tr>
<td>CRC-Convention on the Rights of the Child</td>
<td>1\textsuperscript{st} report submitted</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>2\textsuperscript{nd} report was due 15/7/2002</td>
<td></td>
</tr>
<tr>
<td>CRC-OP-SC-Optional Protocol to the Convention on the Rights of the</td>
<td>1\textsuperscript{st} report was due 30/7/2005</td>
<td>No</td>
</tr>
<tr>
<td>Child on the sale of children, child prostitution and child pornography</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

• The content of the signed treaties and their reporting requirements must be known and understood in the sector, by both government and non-governmental organisations. This requires sensitisation and probably training of management and operational staff.
• There must be a planned and widely publicised schedule for preparing reports. The necessary information needs to be identified and collected on a systematic basis throughout the period reported on.
• Effort must be made to ensure that reports are submitted on time to the applicable treaty monitoring body. Besides being a legal requirement, punctual reporting enables more accurate monitoring as the relevant committee can provide useful comments that can be acted upon without delay.
• Reports must be comprehensive, accurate and up to date, and provide a fair reflection of implementation.
• The UN treaty-monitoring bodies encourage state parties to consult civil society organisations in the preparation of state party reports, as these bodies play a critical role. Civil society organisations should not be hindered, obstructed or victimised in any form for submitting shadow reports that are critical of government’s actions and factual accuracy.
• The National Human Rights Institutions (NHRI) need to be directly involved in the preparation of state party reports and use their mandates to ensure that obligations are indeed fulfilled.
• The treaty monitoring bodies (such as Committee on the Rights of the Child and Committee on the Convention Against Torture) prepare Concluding Remarks after considering a state party’s report. The Concluding Remarks are usually available promptly, should be widely disseminated to all stakeholders. Furthermore, there needs to be a response plan to the Concluding Remarks that will ensure that the appropriate actions are taken.

There are significant domestic advantages to participating fully with the international treaty monitoring bodies. Compliance will encourage the systematic collection of accurate information that will be available to the state and it will ensure continuous monitoring of implementation. In addition it will promote national dialogue, improve skills and knowledge amongst staff, and promote inclusive stakeholder engagement.
monitoring performance

Measuring performance is not only about counting outputs. One way of monitoring would be to count the number of cases diverted out of the criminal justice system. But this would provide little insight as to how the diverted children’s rights had been protected, unless complemented by demonstrating accountability, transparency, and non-discrimination. In the context of child justice, measuring performance is about understanding the extent to which the rights of children have been upheld in the criminal justice system. A rights-based approach would pose two questions: (1) Is the state accepting responsibility for protecting the rights of children who come into conflict with the law? and (2) Is this protection (in the form of services, legislation, policies and implementation thereof) of an acceptable standard? Thus, numbers would have to be complemented by qualitative findings.33

The South African government has acknowledged the need to measure performance and has put in place a policy to enforce it.34 This policy is set out in the Government-wide Monitoring and Evaluation (GWM&E) system, launched in 2008. The GWM&E system fundamentally changes the ways policy-making and goal setting are conceptualised. The shift is away from vagueness towards targets (outputs and outcomes) that are empirically measurable. As target setting and attainment have budgetary implications, the message is: if you can’t measure it, don’t do it.

For the child justice system this presents a challenge. Some of the questions to be answered are: What should the standards of performance be? What are the indicators? What kind of evidence is needed? Short, medium and long-term vision is needed to describe what needs to be achieved and how progress will be measured.

The Government-wide Monitoring and Evaluation system aims to ‘provide an integrated, encompassing framework of monitoring and evaluation principles, practices and standards to be used throughout government, and function as an apex-level information system which draws from the component systems in the framework to deliver useful monitoring and evaluation products for its users’.35 Monitoring legislative compliance is a sensible starting point, for the simple reason that there are clearly articulated standards in the Child Justice Act against which performance can be measured. A number of research projects to monitor legislative compliance have been undertaken in recent years or are still continu-
ing; for example monitoring the implementation of the domestic violence legisla-
tion,\textsuperscript{36} the Correctional Services Act,\textsuperscript{37} and child justice.\textsuperscript{38} This research could be
tapped as a resource for child justice policies on monitoring.

RESTORATIVE JUSTICE

One of the aims of the Act is ‘to expand and entrench the principles of restorative
justice in the criminal justice system for children who are in conflict with the law,
while ensuring their responsibility and accountability for crimes committed’. The
idea of restorative justice has shown much promise on paper, and has occasion-
ally been supported by local examples, but in practice it has not made significant
inroads into the South African criminal justice system. In fact the Child Justice
Act is the only South African law that specifically provides for restorative justice.
It therefore presents an important opportunity to develop policies to give effect
to the concept.\textsuperscript{39}

In the Act restorative justice is defined as:

an approach to justice that aims to involve the child offender, the victim, the
families concerned and community members to collectively identify and address
harms, needs and obligations through accepting responsibility, making restitu-
tion, taking measures to prevent a recurrence of the incident and promoting rec-
conciliation.

Restorative justice is also referred to in respect of diversion programmes (section
53), while section 73 lists the restorative justice sentencing options available to a
child justice court.

The legislation does not provide guidance on what cases should be selected for
restorative justice options or would be most suitable, rather leaving this to the dis-
cretion of the appropriate official. Nor does the legislation exclude any children’s
cases from the possibility of a restorative justice option. While this may sound
optimal, it does pose a danger. It is known from past experience that restorative
justice options are seldom used because they take longer, are frequently more
complex, and the docket remains active until the agreed-upon requirements have
been met by the parties involved, or the case is returned for further prosecution.

From a policy development perspective, it is necessary to give guidance to
decision-makers and their advisors on how to better utilise restorative justice op-
tions. Given the ethos of restorative justice, it is not something that individuals
can be coerced into, but there are certainly ways in which it can be made more attractive to decision-makers (such as magistrates) as well as to the parties involved in the conflict. For the concept to become entrenched, it will need institutional confidence that will have to grow from policy and procedural guidance supported by the necessary resources.

A further issue is whether the criminal justice system and related systems have the capacity and resources to enact restorative justice. It would be unreasonable to expect prosecutors and magistrates to utilise restorative justice options if they are uncertain about the quality of services that will be rendered – or worse, if there is a risk of rights infringements. To address this issue, the Restorative Justice Initiative (RJI) commissioned the development of practice standards for restorative justice programmes. These can be regarded as minimum standards for restorative justice programmes and will hopefully be endorsed by government as a policy document.

Government is not currently investing in restorative justice on any significant scale. The mixed messages from decision-makers and the lack of actual investment in restorative justice pose serious threats to its effective implementation. If restorative justice is to be entrenched in the child justice system, the first step is to define its place at policy level.

RESOURCES AND INTER-SECTORAL COOPERATION

The child justice system requires new resources including in the form of skills. In the course of the child justice reform process, two cost assessments of the Child Justice Bill were drawn up. The second costing made it clear that after initial additional input costs, the implementation of the new Act would save government an estimated 20 per cent of current expenditure on child justice. Whether this costing is still valid remains to be seen.

The implementation of the Child Justice Act depends on appropriately trained probation officers (or similarly skilled people), legal representatives, prosecutors and magistrates; NGOs that are able to render the correct services; and nationally accessible services. Taking a 20-year vision, one can begin to map out what factors might limit the resources available for proper implementation of the Act so that contingency plans can be put in place.

Providing adequate resources is complicated by the inter-sectoral nature of
service provision in the child justice system — no less than seven government departments work with civil society organisations. Two of the departments — the Department of Social Development and Department of Basic Education – have their own provincial level departments, thus adding to the number of stakeholders. In addition, there are a significant number of non-governmental stakeholders (e.g. Khulisa, ChildLine and Nicro) with well-established interests in the child justice sector. Co-ordinating this number of institutions will require sound planning and competent people.

The Act, in section 94, makes provision for an Inter-sectoral Committee on Child Justice consisting of representatives from the relevant departments with the option to include representatives from civil society. It is the responsibility of the Inter-sectoral Committee to firstly formulate a national policy framework (sections 95 & 96) for the implementation of the Child Justice Act and then to oversee the implementation of this framework (section 96). According to the Act, the framework must ensure a uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice; guide the implementation and administration of this Act; promote cooperation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system; and enhance service delivery as envisaged in this Act by the development of a plan within available resources (section 93). The policy framework must also be adopted and tabled in parliament by the Minister of Justice within two months after the commencement of the Act (April 2010), after which it will be published for public comment. Given the complex range of policy issues and the requirements for good policy-making outlined above, it is proposed that adequate time should be allocated for inclusive and thorough consultations.

The success or failure of the inter-sectoral committee will to a large extent be determined by its ability to draw up a coherent, plan-based allocation of resources. In this regard the relationships between the two tiers of government (national and provincial) and civil society needs to be handled with great sensitivity. Planning the functioning of the inter-sectoral committee carefully and ensuring inclusivity will be critical.

Civil society organisations are a major stakeholder because they render the overwhelming majority of diversion programmes, conduct a large share of the assessments of arrested children, and train government officials on child justice related matters. Funding of these services is contentious, as civil society organisa-
tions frequently claim that they are not adequately compensated for their services. It is against this backdrop, and against changes in the funding model used by government, that Barberton and Stuart⁴³ call for caution. These authors state that provincial welfare departments’ decisions regarding the provision of diversion services should be based on an understanding of costs – whether these are costs of producing such services in-house, or by public-private partnerships or by purchasing them from independent suppliers. Such understanding requires the development of a consistent range of indicators to cost and measure the quality of diversion services that can be applied to both public and private sectors.

The inter-sectoral committee is a national structure. However experience has shown that many of the difficulties in the administration of child justice exist at a local level and often relate to practical issues such as the transport of children and their families. While the Act does not provide for the establishment of provincial and local inter-sectoral committees, such committees may be necessary to promote a flexible solution-oriented approach.

CUSTODIAL SENTENCES

Depriving children of their liberty is the most severe punishment that can be imposed and must always be used as a measure of last resort, and then for the shortest appropriate time. The Child Justice Act makes provision for two types of custodial sentences in sections 76 and 77, namely compulsory residence in a child and youth care centre⁴⁴ and imprisonment, although the latter is restricted to children aged 14 years and older at the time of sentencing. It is encouraging that the number of children in prisons has declined substantially in the past five years (see discussion above).

The Constitutional requirement in section 28(1)(g) that imprisonment should be a measure of last resort, and for shortest appropriate time, raises two important policy questions. Firstly, when is it appropriate to deprive a child of his/her liberty? This in turn is dependent on what a court thinks might be achieved by imprisonment. Secondly, how should children who have been imprisoned be treated, educated, supported, and protected? At this stage there are no clear answers.

The Child Justice Act provides more guidance to the courts than did the previous legislation, and it places particular emphasis on avoiding custodial sentences. The following principles for sentencing are set out in section 69(1):
• Encourage the child to understand the implications of his or her crime and be accountable for the harm caused.
• Promote an individualised response that strikes a balance between the circumstances of the child, the nature of the offence, and the interests of society.
• Promote the reintegration of the child into the family and community.
• Ensure that any supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

These principles are supported by additional factors that need to be considered when a court is contemplating a term of imprisonment (section 69(4)). These factors include the seriousness of the offence, the impact on the victim, the culpability of the child, the protection of the community, previous failures of the child to respond to non-residential interventions, and the desirability of keeping the child out of prison. Seen together, the principles and these factors are intended to answer the question of whether it is appropriate to imprison.

To some degree the Act presents a mixed message regarding the issue of imprisonment. It emphasises that imprisonment should be avoided and when used, used only for the shortest appropriate time. Yet it seems to override these broad principles by setting the lower age limit of imprisonment at 14 years, and providing for a maximum prison term of 25 years. There is good reason to believe those children currently serving prison sentences are not adequately protected and do not receive services enabling them to be reintegrated into society. Access to education, psychological services, substance abuse programmes, therapeutic services and post-release support in prison are all infrequent and lack minimum standards. The Correctional Services Act does not make provision for the development of minimum standards of services for children in prisons in the way that the Children’s Amendment Act (41 of 2007) makes provision for child and youth care centres (section 194(2)). It will be an important contribution to the coherence of the child justice system to develop minimum norms and standards applying to all situations where children are serving custodial sentences.
PREVENTION

The Preamble to the Child Justice Act states that one of its aims is:

> to recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending.

This brings us to the issue of prevention of crime by children. Much can be done by government and its stakeholders to reduce the overall risk of children coming into conflict with the law. It is not desirable or in the best interests of a child if the child has to wait until he or she has committed a crime before receiving the benefit of supportive services. It is important that the national policy framework to address this issue and investigate how primary prevention services can be improved.

In this regard specific policy guidance should be developed in relation to re-offending. Research in recent years has explored the success of different interventions in reducing the risk of re-offending, and there is an increasing body of reliable evidence indicating what is effective and what is not. This research has informed the development of the minimum norms and standards for diversion programmes by the Department of Social Development. What are needed are well-designed programmes, properly trained staff, and thorough monitoring and quality assurance of diversion programmes and sentencing options in both custodial and non-custodial settings. Developing norms and standards for rehabilitation and reintegration programmes will make a valuable contribution to achieving a key Child Justice Act objective.

CONCLUSION

Establishing a child justice system through effective policy development is an enormous and difficult task, especially within the context of an overburdened criminal justice system. Despite these challenges, many achievements have been made since 1994.

Policy development based on the nine criteria identified by Bullock, Mountford and Stanley will assist in ensuring that a sustainable child justice system is established. We can make the following recommendations according to these criteria:
• **Forward looking:** The more clearly that short, medium and long term goals are defined, the easier it will be to plan properly. It is unrealistic to expect all features of the child justice system to be in place within one year of the commencement of the Act. Setting clear time-linked goals within reasonable timeframes will assist in allocating sufficient resources, based on what poses the greatest risks to the rights of children.

• **Outward looking:** A real effort must be made to ensure that the South African child justice system continues to draw on lessons learnt elsewhere. The accessibility of international research, the growing depth of international networks, international human rights treaties and international technical assistance are all valuable resources that can be used to develop a comprehensive system.

• **Innovative, flexible and creative:** Resources should be made available for the testing of innovative approaches to child justice. The unlegislated environment in which child justice developed over the past 15 years contributed greatly to the generation of creative options for this. This is an important resource within the sector and should be cultivated and nurtured.

• **Evidence-based:** The value of research evidence cannot be underestimated. The research undertaken by academic and children’s rights institutions in the past 15 years has done much to enhance the skills of people working with children in the criminal justice system. This research has also made an invaluable contribution to the Child Justice Act. Future planning must cater for formal evidence collection and make resources available to this end. Respect for knowledge and evidence should be a core value. In fact the Act mandates research in respect of the minimum age of criminal capacity, which Parliament will review five years after the bill comes into operation.

• **Inclusive:** An inclusive inter-sectoral approach (for example, through the inter-sectoral committee) will ensure that stakeholders continue to provide inputs, take ownership of processes, and remain committed to overall goals. This inclusivity should make children part of policy development through well-managed child consultation processes.

• **Joined up:** Given the inter-sectoral complexities of the child justice system, coherent and overarching goals that facilitate inter-sectoral cooperation will be a requirement. These will have to relate to short, medium and long terms goals. Of particular importance are the provisions of the Act and the obligations created for the state towards detained children.
• **Review:** The Inter-sectoral Committee as well as individual departments must regularly review progress based on sets of reliable indicators that enable rapid assessment.

• **Evaluation:** Focussed research to assess output and impact achievements needs to be conducted on a systematic and planned basis. Research should be an integral part of managing the child justice system and not an add-on, nor should it be the exclusive domain of civil society organisations.

• **Incorporation of lessons:** As lessons are learnt from evidence, these need to be incorporated into training, policy-making and ultimately legislation. This in turn requires the wide dissemination of research and information on developments in the field.
NOTES


2. *Article 40* 5(4) (2003), Cape Town: Community Law Centre, University of the Western Cape.


4. Children’s court inquiries are hearings that are dealt with under the present Child Care Act 74 of 1983 and the Children’s Act 38 of 2005 once fully implemented. These hearings determine whether children are in need of care and protection and then, if so found, determine what interventions are necessary for the child. This procedure is a central process of the child protection system and does not form part of the criminal justice system. However, if a child in the criminal justice system is thought to be a child in need of care and protection, there are mechanisms under the Criminal Procedure act 51 of 1977 (to be replaced by procedures in the Child Justice Act) which allow for children to be referred to the child protection system.

5. This figure was partly confirmed by statistics presented to the Portfolio Committee on Justice and Constitutional development during the Child Justice Bill deliberations in 2008. These statistics suggested that around 10 000 children were being arrested a month.

6. ‘Diversion’ refers the removal of a child away from the formal court procedures in a criminal matter by means of the procedures of Chapter 6 and Chapter 8 of the Child Justice Act.

7. The Children’s Act has brought all the different types of institutions used to detain children under the umbrella term ‘child and youth care centres’. These include reformatories, schools of industries and secure care facilities. Children cannot/could not be held awaiting trial in a reformatory or school of industry. Thus the term ‘secure care facilities’ is used here.


12. Ibid.
17. Section 69(4) requires the child justice court to consider the following when contemplating the imposition of sentence of imprisonment: the seriousness of the offence, with due regard to the amount of harm done or risked through the offence; the culpability of the child in causing or risking the harm; the protection of the community; the severity of the impact of the offence on the victim; the previous failure of the child to respond to non-residential alternatives, if applicable; and the desirability of keeping the child out of prison.
23. Ibid, 3.
26. *M v the State (Centre for Child Law Amicus Curie)* 2007 (12) BCLR 1312 (CC); *S v Williams and Others* 1995 (3) SA 632 (CC); Centre for Child Law v Minister of Justice and Constitutional Development and Others CCT 98/08
27. See for instance the work of the Centre for Child Law in relation to, amongst others, inter-country adoption, children of mother’s serving sentences of imprisonment; protecting children from their identities being divulged by the media in divorce matters and sentencing of child offenders. Visit http://www.childlawsa.com/ for more information.
28. Venables and Thompson were both ten years old when they killed the two-year-old James Bulger.
29. P was 12 years old when she contracted a person to kill her grandmother (*DPP KwaZulu-Natal v P*, Supreme Court of Appeal, 363/05).
30. Centre for Child Law v Minister of Justice and Constitutional Development and
35. Ibid.
39. The Judicial Matters Second Amendment Act, 2003 (Act 55 of 2003) enables the participation of victims of crime at parole board hearings, but makes no mention of restorative justice. It is uncertain whether the legislation has such intentions.
42. Ibid, ii.
43. Ibid, 60.
44. A child and youth care centre refers, among others, to the institutions formerly known as secure care facilities, reformatories and schools of industry.
45. Muntingh and Fernandez, A review of measures in place to effect the prevention and combatting of torture with specific reference to places of detention in South Africa.
47. Bullock, Mountford and Stanley, *Better policy making*. 
INTRODUCTION

Mandatory minimum sentences are a feature of the South African criminal justice system. They were introduced as a political response to the escalating crime rate in the 1990s, based on the commonly held belief that harsh punishment would reduce crime. To date there is no evidence to support this belief.

It is important therefore to re-examine the philosophy behind setting minimum sentences for particular categories of offenders, and at the same time to ask some fundamental questions about how punishment relates to the Constitution. If we feel outraged by the high rate of violent crime in South Africa, this should not affect our purpose, which is find a sentencing regime that leads to the reduction rather than the exacerbation of crime.

This chapter examines South Africa’s Criminal Law Amendment Act (105 of 1997) which first established the legal framework for minimum sentences. The first part of the chapter assesses the inherent tension between an independent judiciary and a legislature that sets boundaries about sentencing. The second part provides a critique of the efficacy of minimum sentences by drawing primarily on international research.
THE WILL OF THE LEGISLATURE V. THE DISCRETION OF THE COURTS

When imposing punishment, courts do not have unfettered discretion. It is a well-established principle and practice that it is the legislature that can and does create and abolish crimes, and also develop and set parameters to the sentences that can be imposed for specific crimes by the courts. This does not mean that the legislature removes all discretion from the court’s jurisdiction, but it undoubtedly limits it. Prescripts by the legislature limiting judicial discretion are, as can be expected, often met with judicial hostility. However, to argue that there is and must be absolute separation of powers is unconvincing as the Supreme Court of Appeal (SCA) found in Malgas v S when it was seized with an appeal against a mandatory life sentence for murder:

No court exercising criminal jurisdiction in South Africa could convincingly claim to be the sole constitutional repository of power to do such things. Indeed, the courts have no inherent power to do any such thing. They cannot create new crimes. Nor can they invent a new kind of penalty such as, for example, physical detention under lock and key at some place other than a prison.

That the legislature can limit, in line with the Constitution, the discretion of the courts in respect of sentencing must be accepted. This should, however, be seen as different from ‘a legislative provision which does in truth deprive a court of any sentencing discretion at all, or so attenuates it that its existence is illusory’. It is with these issues in mind that we need to consider the minimum sentences legislation in South Africa.

The 1997 minimum sentence legislation, the Criminal Law Amendment Act (105 of 1997), was a response to the high rate of violent crime in the country. It gave a clear message that the legislature wished to see the courts impose harsher prison sentences for the serious crimes specified (see Table 9 for a summary of offences and sentences). The legislation prescribes mandatory minimum sentences for offenders convicted of certain offences, unless the court finds that there are ‘substantial and compelling’ reasons to deviate from the prescribed minimum sentence. Given its controversial nature, the legislation was given a renewable two-year life span.

In essence, the legislature sent a clear political instruction to the courts, but left the door of discretion open to the courts to ensure that the minimum sentences legislation passes constitutional muster, which it did in S v Malgas.
The 1997 Act differed from other sentencing legislation in that it prescribed a minimum period of imprisonment while not setting an upper limit. To the courts the Act communicated appropriate minimum punishments for certain serious crimes, but it left the conditions under which a court could deviate from the prescripts unclear, citing merely that ‘substantial and compelling reasons’ were needed. The South African legislature, in passing this legislation, took a similar approach to that of the British Parliament in the late 1990s and the early 2000s and several United States state legislatures. All reflected an international trend towards the imposition of longer prison sentences and limiting the discretion of the courts.

HISTORY OF MINIMUM SENTENCES LEGISLATION

In 1996 the then Minister of Justice, Advocate Dullah Omar, appointed a project committee in the SA Law Reform Commission (SALRC) to investigate all aspects of sentencing. The committee produced an issue paper in 1997 dealing mainly with mandatory minimum sentences; an issue that the government was then considering. However, even before public comment on the issue paper was received, the Criminal Law Amendment Act (105 of 1997) was before Parliament. Clearly, the soaring violent crime rate was placing the young South African democracy under immediate threat, the government had to be seen to do something. In effect the SA Law Reform Commission’s process was sidestepped and a policy shift in government led to the National Crime Prevention Strategy (NCPS) being downgraded to enable a tougher and more punitive approach to dealing with crime. Simultaneously government had to contend with a judiciary inherited from the previous regime, which appeared willing to perpetuate injustices of the past and indulge in preferential treatment of some. It was a difficult balancing act.

Shortly after releasing its issue paper, the first SALRC committee on sentencing reform was disbanded. Another committee was appointed in 1998. After extensive research, and consultation with a range of stakeholders, the second committee produced a discussion paper and draft legislation on comprehensive sentencing reform in 2000. However, the draft bill produced by this committee was never placed before Parliament.

Despite the flawed process, the Criminal Law Amendment Act was adopted by Parliament in 1997, coming into force in early 1998. Until 2007, the Act was duly renewed every two years. Then in December 2007 it was replaced by the Criminal
Law (Sentencing) Amendment Act (38 of 2007), which had no renewal requirement. In a parallel development, the jurisdiction of district and regional courts in relation to sentencing was increased. The Magistrates Amendment Act (66 of 1998) increased the sentence jurisdiction of district courts from 12 months to three years imprisonment, and of regional courts, from 10 to 15 years. The courts’ jurisdiction in respect of fines was also increased to R60 000 for the magistrates’ courts and R500 000 for the regional courts.

Taken together, the minimum sentences legislation and the increase in sentence jurisdiction create a far more punitive sentencing regime. The increase in sentence jurisdiction and the minimum sentences affirmed the policy shift in government-thinking based on a belief that harsher punishments would deter would-be criminals and therefore reduce crime levels. This belief ignores extensive research done over the past 30 years in Europe and the United States which has consistently found that sentence severity has no demonstrable effect on crime levels.

Minimum sentences 1997-2007

Section 51 of the Criminal Law Amendment Act states, in broad terms, that if a court (High Court or regional court) has convicted a person of an offence specified in the schedules to the Act, then it shall impose a minimum term of imprisonment unless it is able to find ‘substantial and compelling reasons’ to impose a lesser sentence. In such instances, these reasons must be entered on the record.

The amendment of the sentencing jurisdiction of the regional courts was clearly regarded by the legislature as insufficient to ensure harsh sentencing, because section 51(2) allows a regional court to impose a sentence of up to five years above the minimum sentence that it can impose in respect of section 51(2).

Table 9 provides a summary of the offences and stipulated sentences. It should also be noted that the offences are not clearly defined. For example, ‘aggravating circumstances’ in relation to a robbery is left to the prosecution and courts to define. In another example, the case of S v Malgas highlighted uncertainties around pre-meditation.

Section 52 of the Criminal Law Amendment Act allows for a split sentencing procedure. If a regional court has convicted a person of an offence listed in Schedule 2 (see Table 1) but before sentencing believes that the case warrants a harsher sentence than the court is entitled to impose (as set out in section 51), it must stop
## Table 9: Summary of the minimum prescribed sentences to be imposed\(^{13}\)

<table>
<thead>
<tr>
<th>Offence Description</th>
<th>Prescribed sentence in Years</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part I</strong></td>
<td>1st offence</td>
</tr>
<tr>
<td><strong>Murder when</strong></td>
<td></td>
</tr>
<tr>
<td>i. Planned or pre-meditated</td>
<td></td>
</tr>
<tr>
<td>ii. The victim is a law-enforcement officer or a potential state witness</td>
<td></td>
</tr>
<tr>
<td>iii. The death was connected to a rape or robbery with aggravating circumstances; or</td>
<td></td>
</tr>
<tr>
<td>iv. It was committed as part of common purpose or conspiracy</td>
<td>Life</td>
</tr>
<tr>
<td><strong>Rape when</strong></td>
<td></td>
</tr>
<tr>
<td>i. Victim is raped more than once by accused or others</td>
<td>Life</td>
</tr>
<tr>
<td>ii. By more than one person as part of common purpose or conspiracy</td>
<td></td>
</tr>
<tr>
<td>iii. The accused has been convicted of more than one rape offence and not yet sentenced</td>
<td></td>
</tr>
<tr>
<td>iv. The accused knows he is HIV positive; or when the victims is Under 16 years of age; A vulnerable disabled woman; Is a mentally ill woman; or Involves the infliction of grievous bodily harm</td>
<td></td>
</tr>
<tr>
<td><strong>Part II</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Murder</strong> in circumstances other than those above</td>
<td>15</td>
</tr>
<tr>
<td><strong>Robbery</strong> when</td>
<td></td>
</tr>
<tr>
<td>i. There are aggravating circumstances</td>
<td>15</td>
</tr>
<tr>
<td>ii. Taking of a motor vehicle is involved</td>
<td></td>
</tr>
<tr>
<td>Offence Description</td>
<td>Prescribed sentence in Years</td>
</tr>
<tr>
<td>---------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td><strong>Drug Offences</strong> if</td>
<td></td>
</tr>
<tr>
<td>i. The value is greater than R50 000</td>
<td>15 20 25</td>
</tr>
<tr>
<td>ii. The value is greater than R10 000 and is part of a conspiracy or common purpose</td>
<td></td>
</tr>
<tr>
<td>iii. The offence is committed by law enforcement officers</td>
<td></td>
</tr>
<tr>
<td><strong>Any offence</strong> related to</td>
<td>15 20 25</td>
</tr>
<tr>
<td>i. Dealing in or smuggling of arms and ammunition</td>
<td></td>
</tr>
<tr>
<td>ii. Possession of automatic or semi-automatic firearms, explosives, etc</td>
<td></td>
</tr>
<tr>
<td><strong>Any offence relating to exchange control, corruption, extortion, fraud, forging, uttering or theft</strong> when</td>
<td>15 20 25</td>
</tr>
<tr>
<td>i. It amounts to more than R500 000</td>
<td></td>
</tr>
<tr>
<td>ii. It amounts to more than R100 000 if committed in common purpose or as conspiracy; or</td>
<td></td>
</tr>
<tr>
<td>iii. If committed by a law enforcement officer when</td>
<td></td>
</tr>
<tr>
<td>iv. It involves more than R10 000; or</td>
<td></td>
</tr>
<tr>
<td>v. As part of common purpose or as conspiracy.</td>
<td></td>
</tr>
<tr>
<td><strong>Part III</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Rape</strong>, other than in circumstances in Part 1 above</td>
<td>10 15 20</td>
</tr>
<tr>
<td><strong>Indecent assault on a child under age of 16</strong>, involving infliction of bodily harm;</td>
<td>10 15 20</td>
</tr>
<tr>
<td><strong>Assault with GBH on a child under age of 16</strong></td>
<td>10 15 20</td>
</tr>
<tr>
<td>Possession of more than 1 000 rounds of ammunition.</td>
<td>10 15 20</td>
</tr>
<tr>
<td><strong>Part IV</strong></td>
<td></td>
</tr>
</tbody>
</table>
the proceedings and refer the case to the High Court for sentencing. The record of
the regional court can then, under certain circumstances, be accepted as a record
of the High Court, and the High Court must sentence the convicted person (as
required by section 51). If, based on the record, or other reasons, the High Court
is not satisfied with the plea or the finding of guilty, it may proceed with a sum-
mary trial and come to its own conclusions. The judge may also enquire from the
magistrate the reasons for the finding of guilty. The High Court may therefore
choose one of several courses of action:

• confirm the conviction and then impose a sentence (as contemplated in sec-
tion 51)
• alter the conviction to a conviction of another offence (referred to in Sched-
ule 2) and then impose a sentence (as contemplated in section 51)
• alter the conviction to a conviction of an offence other than an offence re-
ferred to in Schedule 2 and then impose the sentence the Court may deem fit
• set aside the conviction
• send the case back to the regional court with the instruction to deal with any
matter in such manner as the High Court may deem fit; or
• make any such order in regard to any matter or thing connected with such
person or the proceedings in regard to such person as the High Court deems
likely to promote the ends of justice14

This new sentencing regime introduced four additional features which add to its
already punitive nature. Firstly, it applied to children who were 16 years or older
at the time of the offence, although this was later successfully challenged in the
Supreme Court of Appeal (SCA) (Brandt v S). Secondly, the sentence imposed
by either the regional or High Court starts on the date of sentencing, and time
spent in prison awaiting trial cannot be deducted from the prescribed minimum

<table>
<thead>
<tr>
<th>Offence Description</th>
<th>Prescribed sentence in Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any offence in Schedule 1 of the Criminal Procedure Act (51 of 1977) not referred to above, if the accused was armed with a firearm intended for use in the offence.</td>
<td>5 7 10</td>
</tr>
</tbody>
</table>

Source: Gifford and Muntingh Open Society Foundation, 2007
as time served already. Thirdly, the sentence (or part of it) cannot be suspended.\textsuperscript{15} Fourthly, the Correctional Services Act requires that a person sentenced under the Criminal Law Amendment Act (sections 51 and 52) must serve four fifths of the sentence before he or she can be considered for placement on parole, compared to the general rule of one half of the sentence.\textsuperscript{16}

Even before it was passed, the new minimum sentences legislation was contentious. Challenges to its constitutionality followed soon after it was signed into law. Two Constitutional Court challenges and two decisions from the Supreme Court of Appeal were significant during this period. I consider the main conclusions and their impact on the interpretation of the Criminal Law Amendment Act.

The first Constitutional Court challenge came in August-September 2000 in \textit{S v Dzukuda}.\textsuperscript{17} This case was referred by the High Court – Witwatersrand, which found that the split procedure (provided for under sections 51 and 52) amounted to an unfair trial for the accused. The High Court sought confirmation from the Constitutional Court for the order of constitutional invalidity. The Constitutional Court was unconvinced, based on the evidence before it, and did not confirm the order of the High Court. The split procedure remained, and continued to lead to great dissatisfaction. Some of the consequences were: long delays in finalising cases, the repeating of trials in the High Court, overturned convictions, and repeat testimonies by already traumatised victims.

In the case of \textit{S v Malgas}\textsuperscript{18} the Supreme Court of Appeal had to decide in February 2001 whether the term of life imprisonment imposed by the high court, as required by law, was appropriate for a young woman (22 years of age) who shot and killed her abusive husband while he was sleeping. The Supreme Court of Appeal used the opportunity in two significant ways. It firstly dealt with the general relationship between legislature and the discretion of the courts, as alluded to above, and then proceeded to deal with the issue of the trial court’s discretion by providing guidance on the ‘substantial and compelling circumstances’ referred to in section 51(3) of the Act. As the legislation itself gave no specific guidance in this regard, the Supreme Court of Appeal provided guidelines.\textsuperscript{19}

Referring to these guidelines, as well as the facts of the case, the Supreme Court found that the imposition of life imprisonment on the appellant was too severe, and that the trial court had erred in not finding substantial and compelling reasons based on the facts before it. The sentence of life imprisonment was replaced with a term of 25 years.

The judgment was important because it drew attention to the severity of life
imprisonment. It was also important in giving consistency to the wide-ranging interpretations of ‘substantial and compelling’ found in preceding High Court judgments. Nevertheless, consistency in sentencing has remained elusive. The debate about ‘substantial and compelling’ reasons has not been settled, although in the 2008 amendment (discussed below) the legislature attempted to narrow down the factors involved.

The next Constitutional Court challenge came in \textit{S v Dodo} \textsuperscript{21} (March-April 2001). In this case the constitutionality of the legislation was attacked ‘on the basis that interference with the trial Court’s sentencing powers by the legislature breached the separation of powers doctrine, as a criminal trial before a court requires an independent judiciary to weigh and balance all factors relevant to the crime, the accused, and the interests of society in the sentencing process’. \textsuperscript{22} The Constitutional Court dealt with the issues in detail. It concluded that the constitutional rights of the accused were not violated and made specific reference to the discretion that the trial court had under the ‘substantial and compelling’ provision, concluding that a disproportional sentence could be avoided.

In \textit{Brandt v S} (November 2004) the Supreme Court of Appeal had to consider whether the imposition of life imprisonment for murder was appropriate for an offender who was under 18 years of age but older than 16 years at the time of the offence. Drawing on the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, the Court found that the rules and guidelines set out in these instruments lay the foundation for child justice to be (newly) approached from a children's rights perspective. Important in this regard is that detention must be used as a measure of last resort and then for the shortest appropriate period (see Chapter 7: \textit{Policy Issues in Child Justice}). In addition, the court noted the principle of proportional and individualised responses to offending and the emphasis in the Convention on the Rights of the Child in preparing the child offender for his or her return to society where detention has been deemed necessary. In addition, the Supreme Court of Appeal noted the principle of proportional and individualised responses to offending. It noted the emphasis in the Convention on the Rights of the Child on preparing the child offender for his or her return to society where detention has been deemed necessary. Taking into account all these factors, the court determined:

\begin{quote}
that sentence should be imposed under section 51(3)(b) where an offender is aged below 18 years. Thus the fact that an offender is aged below 18 but over
\end{quote}
16 at the time of the offence automatically confers discretion on the sentencing court, which is then free to depart from the prescribed minimum and to impose sentence in accordance with ordinary sentencing criteria.\textsuperscript{23}

What then, is the current status of minimum sentences legislation, taking into account the Acts of 1998 and 2007 and substantive issues dealt with by the Constitutional Court and the Supreme Court of Appeal? In summary, we can say that:

- the legislation does not impede the right to a fair trial
- it does not violate the separation of powers doctrine underlying the Constitution
- despite an effort by the Supreme Court of Appeal to provide clarity on ‘substantial and compelling’ circumstances, consistency of sentencing has not been secured
- when imposing sentence on a child convicted of an offence under the minimum sentences legislation, the court is free to depart from the prescribed minimums

In the Anna Juries case the offender who was 16 at the time of the offence received an eight-year sentence. It was not clear from the Anna’s account of the trial whether his sentence was shorter than those of his co-accused (who each received 15 years), because he was 16 at the time of the offence, or because he denied being physically involved in the stabbing. The two older offenders each received the prescribed 15 years for a first offence robbery with aggravating circumstances.

Minimum sentences after 2008

As mentioned, the legislation was renewed every two years since 1997, and subjected to more intense review in 2007, the year that the Criminal Law (Sentencing) Amendment Act (38 of 2007) was passed. This Act, which included substantive and procedural amendments, waived the requirement that it had to be renewed every two years.

In an attempt to address the problems arising from the split procedure (i.e. conviction in regional court and then referral to the high court for sentencing), regional courts since 2007 have been given the jurisdiction to impose life imprisonment. However, an amendment to the Criminal Procedure Act (section 309) gives a convicted person sentenced in a regional court an automatic right of appeal to the high court.
The jurisdiction of the regional court has been further bolstered by allowing it to deviate from imposing life imprisonment (which would result in an automatic appeal), and to impose a sentence not exceeding 30 years. Applying the four-fifths non-parole period requirement applicable to minimum sentences, this is effectively a sentence of 24 years before the offender can be considered for parole – one year shorter than for a sentence of life imprisonment. The difference is that when an offender sentenced to life imprisonment is released on parole, he/she would be on parole for the rest of his/her life, whereas an offender sentenced to 30 years imprisonment would be on parole only for a further six years.

The debate around ‘substantial and compelling’ circumstances did not escape the attention of parliament. In fact it was with particular reference to the offence of rape that the legislation was tightened. The following are now explicitly excluded from being considered ‘substantial and compelling’ circumstances in rape cases:

- the complainant’s previous sexual history
- an apparent lack of physical injury
- the accused person’s cultural or religious beliefs about rape
- any prior relationship between the complainant and the accused

Despite the Brandt decision, the legislature persisted in bringing children who were aged 16 and 17 years at the time of the offence within the ambit of minimum sentences. The prescribed minimum sentences still apply to 16 and 17 year olds. In what was probably intended as a magnanimous gesture, the amendment now enables the court to suspend as much as half of the sentence if the accused was aged 16 to 17 years at the time of the offence. At the time of writing the provisions dealing with 16- and 17-year-old offenders had already been successfully challenged in the Pretoria High Court and had been referred to the Constitutional Court.

The Amendment to the legislation showed that the legislature had no intention of dealing with the fundamental issues regarding sentencing reform raised by the SA Law Reform Commission and advocated for by several civil society organisations. Some of the most important recommendations from the SALRC included:

- basic sentencing principles to be set out in legislation
- factors such as deterrence and rehabilitation to no longer to be specific aims of sentencing
- sentencing guidelines to become the basis for more consistent sentencing
• sentencing guidelines to be developed by a Sentencing Council
• existing sentencing options to be overhauled, resulting in reparation as a substantive sentence
• victims to be given a greater role through the provision of victim impact statements\(^{27}\)

Instead the legislature preferred to focus on practical and procedural issues within a criminal justice system that had become increasingly dysfunctional and at times very close to collapse.

Less than a year after the legislation was adopted, the then Deputy Minister of Justice, Mr J De Lange, former chairperson of the Justice Portfolio Committee and a strong proponent of the minimum sentences legislation, admitted that the criminal justice system was in desperate need of an overhaul.\(^{28}\)

A SHORT CRITIQUE OF MINIMUM SENTENCES

Policy uncertainty

Ten years after the introduction of minimum sentence legislation, it is important to ask why it was originally introduced. According to D Rudman during the second reading of the Bill in November 1997, Advocate Dullah Omar, who was Minister of Justice and Constitutional Development at the time, cited the following reasons for the legislation:

• there is a public demand for more severe punishments for serious offences
• minimum sentences will restore confidence in the criminal justice system to protect the public
• minimum sentences will confirm government’s policy which aims to curb the increasing rate of violent crime and to protect the public against criminals
• the courts will retain discretion to deviate from the prescribed minimums
• the minimum sentences are designed to ensure that the courts will deal effectively, in terms of sentencing, with serious crimes\(^ {29}\)

The reasons articulated by Minister Omar require closer scrutiny. Addressing ‘public demand’, ‘restoring confidence’, ‘confirming government’s policy’, ‘allowing discretion’ and ‘effective sentencing’ say more about politicians’ needs to ap-
pease the public than they do about reducing crime. The message reinforced the popular view that removing offenders from society and waving the stick of long prison sentences would reduce crime.

The legislature had at its disposal a valuable resource in the form of the SA Law Reform Commission, but chose to ignore it, perhaps because the findings of the Commission did not support the policy direction that it wished to take. The SALRC had conducted its own empirical research; done extensive literature reviews of existing research; consulted extensively; and developed a comprehensive proposal for sentencing reform. For the SALRC, sentencing was the wrong place to focus. The SALRC project committee observed in its 2000 discussion paper:

> It remains to be seen whether the minimum sentence approach prescribed by the Act will lead to a noticeable reduction in serious crime. However, one of the most telling findings of this study is that a mere 5.4 per cent of more than 30 000 randomly sampled cases reported to the police resulted in a conviction. The question of sentencing therefore remains irrelevant to the vast majority of people who committed those crimes. Until the conviction rate improves dramatically, it is difficult to see how tough minimum sentences will be an effective deterrent to thousands of criminals who evidently do not get apprehended and successfully prosecuted.30

The manner in which Parliament dealt with the minimum sentences legislation is not uncommon and one may in fact indulge politicians for wanting to appease ‘public demand’ and to be seen to be ‘tough on crime’ by believing that tougher penalties would reduce crime. The problem, as Tonry notes, is that mistaken beliefs lead to seriously mistaken policies.31 Despite having access to the 2000 SA Law Reform Commission discussion paper, the legislature persisted in renewing the minimum sentences legislation and did not amend it or critically interrogate its purpose. The 2007 amendments only aimed to resolve problems around the split procedure and limit the scope of ‘substantial and compelling’ circumstances.

### The cost-of-committing-crime theory

Advocates of tough minimum sentences argue that heavy sentences act as a deterrent because the cost of crime to the criminal begins to outweigh the benefits of the crime. They would argue, for example, that a would-be hijacker, knowing that hijacking a car would result in a prison sentence of 15 years for a first offence and 20 years for a second offence, would decide that hijacking is simply not worth the
risk. This cost-benefit balance is an economist’s approach, and thus the criminal, thinking like an economist, will thus refrain from hi-jacking cars.

This argument is flawed in several important ways. Firstly, a far wider range of social controls influence criminal decision-making than the cost-deterrence model allows for. According to Ellickson’s five-level model of social control these are:

1. First party control (self control)
2. Second party control (other persons in direct contractual relations)
3. Social controls (informal social controls through norms)
4. Organisational controls (enforcement of organisational rules)
5. Government (legal) controls (state enforcement through law)32

The Ellickson model shows us that law enforcement (the fifth level) is only part of the picture.

Secondly, the economist perspective assumes that would-be criminals are familiar with and knowledgeable about the punishment. It assumes that they carefully weigh up the options and risks and come to an informed conclusion that the risks of severe punishment outweigh the potential benefits. But do criminals study the applicable changes in legislation and then draw calculated conclusions? Would they for example decide that 15 years for armed robbery is an affordable risk, but that killing a police official in the process may result in life imprisonment and should therefore be avoided at all costs? The answer is clearly no. The British Home Office came to the same conclusion in a 1990 White Paper on sentencing: ‘It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.’33

Thirdly, the economists’ perspective assumes that detection and conviction has a high probability. The reality, of course, is different. South African crime detection rates are extremely low, as alluded to by the SA Law Reform Commission. With such a low detection and conviction rate (5.4 per cent) the severity of the punishment becomes almost irrelevant. All it means is that a tiny group of offenders experience the maximum impact of law enforcement.34 While severe punishments may satisfy an emotive yearning for revenge, this is far removed from the logical cost-of-crime argument forwarded by the economists’ perspective.

For a harsher sentencing regime to have the desired deterrent impact the following conditions need to be met:
individuals must first believe that there is a reasonable likelihood that they will be apprehended for the offence and receive the punishment that is imposed by a court. Second, they must know that the punishment has changed. It does no good to alter the sanction if potential offenders do not know that it has been modified. Consequences that are unknown to potential offenders cannot affect their behaviour. Third, the individual must be a person who will consider the penal consequences in deciding whether to commit the offence. Finally, the potential offender who knows about the change in punishment and perceives that there is a reasonable likelihood of apprehension must calculate that it is ‘worth’ offending for the lower level of punishment but not worth offending for the increased punishment.35

At policy level it has important consequences to accept that harsh sentencing has no deterrent effect as it nullifies a well established objective of sentencing. This is being done in some countries, such as Finland, Canada and Ireland. These governments are moving away from relating deterrence directly to sentencing.36

The incapacitation theory

An important motivation underlying minimum sentences is the incapacitation argument: if we imprison dangerous offenders for lengthy periods they will be incapable of committing further crimes and therefore serve the purpose of public protection. Because we know that they are dangerous, either because of the specific crime they had committed or the number of crimes they had committed in the past, incapacitating them by means of a lengthy prison term would have a positive effect on the crime rate. Again the argument is neat and logical, and thus in need of critical examination.

The argument assumes that the criminal justice system is able to identify and then incapacitate the most dangerous offenders. However the evidence, as Ashworth points out, is that ‘incapacitative sentencing draws into its net more “non-dangerous” than “dangerous” offenders, with a “false positive rate” up to two out of every three.37 The broad and poorly defined crime categories in the South African minimum sentences legislation make little distinction between the robber who kills a bank teller and the woman who shoots her abusive husband in his sleep; both will receive life imprisonment, as was the case in S v Malgas.38 Even when there are no substantial and compelling circumstances motivating a deviation from the prescribed minimum sentence, the question needs to be asked
about how dangerous the offender is, and the risk for re-offending, especially when imposing life imprisonment.

Extensive research in the United States as well as the United Kingdom has demonstrated that most persistent offenders reach their crime peak in their late teens to mid-twenties. Their incapacitation thereafter, especially if they are imprisoned for the rest of their lives, serves little purpose in reducing crime. A double risk arises here: a person who is not ‘dangerous’ is imprisoned for a lengthy period or for life, and an offender is imprisoned at such an age that his imprisonment has little effect on the crime rate. In both instances enormous costs are incurred, human and monetary, with little effect on the crime rate.

The US state of California’s ‘three strikes and you’re out’ legislation requiring the imposition of 25 years to life for a third felony conviction, present probably the best example to study the effects of incapacitation. The sentencing trends following from this legislation have been studied extensively and analysed to see whether the three strikes system has had any effect on California’s crime rates. The results are remarkably unimpressive.

Perhaps the most significant finding is that the counties that most aggressively enforced the three strikes legislation experienced a lower decline in violent crime than the counties that enforced it least:

The six large counties using Three Strikes least frequently had a decline in violent crime that was 22.5% greater than was experienced by the six large counties using Three Strikes the most frequently...The six heavy-using counties also experienced slightly smaller declines in homicide rates (-51.2% vs. -53.4%) and index crime (-37.3% vs. -39.1) compared to those counties using Three Strikes less frequently.

Two conclusions can be drawn from this. Firstly, that factors other than incapacitation were influencing the crime rate, as both heavy-using and light-using counties experienced declines in the crime rate. Secondly, that incapacitation itself does not have the desired effect on the crime rate – the counties that implemented three strikes legislation aggressively showed a smaller decline in their crime rates. These findings are not restricted to California. Studies of the three strikes legislation elsewhere in the United States report that the legislation has not had any noticeable effect on crime trends.

South African evidence also shows the absence of a link between crime and incapacitation. South African data reported in South African Crime Quarterly in
Criminal (In)justice in South Africa

2008 compares the number of violent crimes reported annually to the police with the number of offenders admitted annually to serve prison sentences for the period 2003 to 2008. The two data sets are presented in Figure 4.

Figure 4: Violent crime and imprisonment, 2003-2008

As can be seen, from 2003 to 2008 violent crime remained fairly stable, deviating no more than 6 per cent in any one year from the full-term average. The number of sentenced admissions to prisons, however, dropped from 178,569 in 2003 to 94,566 by 2007/8, a drop of 47 per cent. The trends raise an important question: How can violent crime remain stable if nearly 50 per cent fewer offenders are sent to prison?

From the graph there does not appear to be any link between the number of violent crimes reported annually and the number of sentenced offenders admitted to prison. The number of offenders imprisoned does not appear to have any direct impact on the rate of violent crime. One would expect that from 2002 to 2008 the rate of violent crime should have climbed steadily because fewer offenders were imprisoned, but this did not happen either. We can conclude that incapacitation has no demonstrable effect on crime rates, even when sentencing legislation prescribes lengthy prison terms for serious offences.

There is also reason to believe that certain geographical communities and sub-areas in communities contribute disproportionately to the prison population. Communities experiencing high imprisonment rates exhibit a range of problems, from higher rates of teenage pregnancy and higher rates of sexually transmitted infections, to criminal involvement. In these communities the social cost of imprisonment needs to be critically examined: community instability,
fragile parental authority, strained power relations, lack of public safety, and lack of social cohesion fundamentally undermine efforts to create safer communities and prevent young men from becoming young prisoners. South Africa’s imprisonment rate is calculated to be 342 per 100 000 of the population, placing it in the top ten countries in the world, excluding non-democratic states and island states. A high incarceration rate is achieving exactly the opposite of creating a safer society: it continues to fuel conditions for crime and re-offending.

CONCLUSIONS

The history of the minimum sentences legislation has shown that it was conceived and delivered in policy vagueness with little, if any, reference to the available evidence at the time. The subsequent renewal of the legislation in 2007 continued to ignore the recommendations of the SA Law Reform Commission as well as civil society in-puts.

The implementation of minimum sentences resulted in the number of prisoners serving life imprisonment climbing from approximately 400 in 1995 to over 8 000 by March 2008. During that period, violent crime trends have remained fairly stable. There is no evidence to indicate that minimum sentences have had any impact on the rate of violent crime. In fact there is substantial evidence indicating that lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates.

A number of policy implications emerge from this review.

Firstly, the need for comprehensive sentencing reform remains. The continuous amendment of sentencing legislation in a piecemeal manner should be avoided, and the process should rather question the fundamentals of punishment and sentencing.

Secondly, even if the proposals of the SA Law Reform Commission Discussion Paper (of 2000) do not find broad acceptance, there is sufficient reason to reintroduce the ideas and proposals raised there. The review of the criminal justice system will suffer a critical deficiency if it ignores the work of the SA Law Reform Commission on sentencing.

Thirdly, sentencing reform cannot continue in a manner that marginalizes evidence on what works and what does not. The strained relationship between the reality and political interests has already caused great harm. There is a strong need to de-politicise punishment and sentencing.
Fourthly, it must be accepted that punishment and sentencing can only play a small role in managing crime. The emphasis must be placed on other efforts by government and civil society to reduce crime. Particular attention should be paid to social conditions that contribute to crime. There needs to be acceptance of the limited potential of punishment and sentencing to manage crime.
NOTES

2. Ibid, paragraph 2.
3. Ibid.
5. Section 51 of the Criminal Law Amendment Act states, in broad terms, that if a court has convicted a person of an offence specified in the schedules to the Act, then it shall impose a minimum term of imprisonment unless it is able to find ‘substantial and compelling reasons’ to impose a lesser sentence.
7. By 2004, a total of 23 US states as well as the federal government had adopted some form of ‘three strikes’ legislation applicable to repeat offenders: S Ehlers, V Schiraldi and J Ziederberg, Still striking out: ten years of California’s three strikes, San Francisco: Justice Policy Institute, 2004, 16.
10. Ibid.
11. Ibid.
14. Section 52(3)(e).
15. Section 297(4) of the Criminal Procedure Act.
16. Section 73(6)(b)(v). Section 73(6) of the Correctional Services Act states the general rule that one half of the sentence must be served when the court has not stipulated a
minimum non-parole period and/or the person has already served 25 years.


19. (A) Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2); (B) Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances; (C) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts; (D) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded; (E) The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored; (F) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process; (G) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (‘substantial and compelling’) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained; (H) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion; (I) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence; [and] (J) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided (S v Malgas at paragraph 25).
21. CCT 1/01.
23. Do minimum sentences apply to juveniles? The Supreme Court of Appeal rules ‘No’, *Article 40 7(1) (May 2005)*, p 2.
25. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (11214/08 TPD).
31. Tonry, Learning from the limitations of deterrence research, 282.
32. R Ellickson, in Tonry, Learning from the limitations of deterrence research, 291.
34. Doob and Webster, Sentence severity and crime, 174.
35. Ibid, 190.
38. The life sentence imposed by the High Court (South-eastern Cape) on the 22 year old Ms Henna Malgas for shooting her sleeping husband was only overturned by the Supreme Court of Appeal.
42. See Peter W Greenwood, Susan S Everingham, Elsa Chen, Allan F Abrahamse, Nancy Merritt and James Chiesa, *Three strikes revisited: an early assessment of implementation and effects*, Santa Monica, Calif: Rand Corp, 1998; James Austin, John Clark,


44. Violent crime is defined as murder, rape and aggravated robbery and used collectively as an indicator of violent crime in South Africa. Prison admissions refer to all sentenced admissions.

45. Figures on prison admission were supplied by the Judicial Inspectorate for Correctional Services. Figures for the second half of 2008 were projected as these were not yet available.


THE PRISON SYSTEM

Lukas Muntingh

We are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot ‘see’ how to replace it. It is a detestable solution, which one seems unable to do without.

INTRODUCTION

Throughout much of their history prisons have been notoriously failed institutions. Their capacity to effect positive change in incarcerated subjects and in the communities from which they come is contradicted by their tendency to produce more criminality than they inhibit, earning them the nickname ‘universities of crime’. While for some, prisons act as a deterrent to crime, for others, particularly in communities that produce a large number of prisoners, crime has become an aspiration and imprisonment an expected feature of life. The seeming ease with which imprisonment is accepted to be a meaningful solution to crime should be carefully interrogated. As we consider incarceration as a strategy for reducing crime, we should also consider a range of other methods, which are equally, if not more viable as methods of addressing the crime problem, such as community
service, diversion programmes, mass-based and targeted educational campaigns, socio-economic development services and the reduction of poverty and inequality.

As we have seen throughout this book, the components of the criminal justice system are closely linked, even if intersectoral cooperation remains a persistent challenge. For example, lengthy delays in the finalisation of trials contribute significantly to the size of the unsentenced prison population. The increase in the length of sentences since the mid-1990s, in part a consequence of the minimum sentencing legislation, has also added to the prison population and increased overcrowding.

Prisons house both sentenced prisoners and those awaiting trial. For sentenced offenders, prison is the last step in the process of a case. For awaiting trial detainees, those who are held in prison if they are refused bail or are unable to pay bail set by a court, this may be the start of a long wait while their case runs its course (bail is discussed in more detail in Chapter 4).

This duality in function of the prison system (holding awaiting trial detainees and implementing sentences of imprisonment) has been the source of many challenges, to such an extent that the DCS wishes to distance itself from the awaiting trial detainee (ATD) population. Ideologically the Department feels a far greater responsibility towards sentenced offenders than towards those awaiting trial, regarding the latter essentially as a nuisance inherited from the previous regime. It is clear that the DCS feels no great obligation towards the ATD population and regards them as an ‘overcrowding problem’ rather than an integral part of their mandate to which they have an obligation laid down in the Correctional Services Act. The reality is that many unsentenced prisoners spend long periods awaiting trial and many of them will be acquitted. During this period they will receive only the basic services required to house them. The Department of Correctional Services does not provide social work services, training or education services to unsentenced prisoners.

Of the sentenced prisoners, those with sentences of less than two years have had the services available to them curtailed. This has come about through legislative amendments initiated by the Department itself. The Correctional Services Amendment Act (25 of 2007) states in section 30(b) that only offenders serving a sentence of longer than 24 months must be assessed by the Case Management Committee and a sentence plan developed in consultation with them. The nett result of this seemingly innocuous amendment is that nearly 75 per cent of re-
leased offenders will not have had the benefit of a sentence plan during their term of imprisonment. This means, in effect, that they will not receive planned and focused intervention to assist them to lead crime-free and socially responsible lives after imprisonment as required by section 36 of the Correctional Services Act – they will simply have been locked up.

These shifts in legislation and policy are a move towards greater fragmentation and compartmentalisation rather than the coherence advocated for in the 2005 White Paper on Corrections in South Africa. These legislative amendments lessen the Department’s obligations to both sentenced and unsentenced prisoners. This is not in the best interests of reducing crime in South Africa, nor is it in line with the constitutional requirements for arrested and detained persons.

This chapter identifies the central problems faced by the Department of Correctional Services and proposes some corrective steps to achieve maximum benefits at the lowest cost. Because management of a large system, such as the prison system, is difficult and complex, changes to the system take time. Using the White Paper implementation target date of 2025, this chapter proposes changes that can be made over the next 16 years.

IDENTIFYING THE MAJOR PROBLEMS

Overcrowding

The profile of the prison population has changed significantly in the past 15 years. Changes in the size of the prison population and the awaiting trial detainee population, together with lengths of sentence and the duration of awaiting trial detention, have all had a significant impact on conditions of detention and adherence to human rights standards. The Department of Correctional Services is aware of these changes, but seems to have done little to better manage the risks associated with it.

The following figures highlight changes in the profile of the prison population:

- In 1995 South Africa had a prison population of just below 120,000. By 2005 this had grown to over 180,000, an increase of 50 per cent.
- The number of prisoners serving sentences longer than seven years increased from less than 30,000 in 1995 to nearly 69,000 by the end of 2008.
- The number of prisoners sentenced to life imprisonment increased from approximately 400 in 1995 to more than 8,000 by 2008.
• In 1995 the awaiting trial detainee population numbered 23,783, and by 2000 it had increased to 57,811. In 2005 it came down to 47,305, but then started climbing again. At the end of 2008 there were 50,284 awaiting trial detainees.9
• By the end of 2008, nearly 45 per cent of the awaiting trial detainee population had been in custody for 3 months and longer, and 26 per cent had been in custody for longer than 6 months.

To date the Department’s response to overcrowding has been to release large groups of prisoners to relieve the pressure on available capacity. The last such release took place in 2005 by remitting the sentences of prisoners. In this way 30,000 sentenced prisoners were released.10

However, as discussed in the previous chapter, the number of individuals incarcerated is determined to a large extent by policy and legislation.11 Any changes aimed at making the criminal justice system more effective will probably result in more successful prosecutions finalised over shorter periods. Unless there are specific measures in place to ensure that imprisonment is used sparingly, and even then, that the size of the prison population is carefully controlled, the impact of an improved criminal justice system may in fact be severe on the prison system and in particular on the conditions of detention and the working environment of DCS officials. If the prison population is to increase even moderately over the next 16 years, the problem of overcrowding may be so severe as to threaten the implementation of the White Paper.

Figure 5 shows three different projected rates of increase for the sentenced prison population over the next 16 years – at 1 per cent, 3 per cent and 5 per cent per annum. Bearing in mind that current capacity is 115,000 and plans are afoot to increase it to 139,000, it is clear that only the lowest estimated increase of 1 per cent can be met by planned capacity.12

Lack of capacity

The Department of Correctional Services employs a large staff, currently 42,000, however, it still lacks capacity. There are two reasons for this: firstly, staff do not in general possess the skills and knowledge to implement the White Paper and ensure compliance with the Correctional Services Act.13 Even the 2007/8 annual report cites lack of compliance with legislative and procedural requirements by
officials as being one of the most important risks facing the Department. Secondly, the Department experiences serious shortfalls in the area of professional skills – social workers, educators, nurses, doctors, and psychologists.

A further cause of reduced capacity is the increasing impact of HIV/AIDS. Although this affects the day-to-day operation of prisons and the ability of the Department to fulfil its mandate, it is a problem that has largely been ignored.

In fact the Department of Correctional Services is not short-staffed, save for the professional skills categories. With improved management and effective utilisation of existing capacity, much more can be achieved. In his 2007/8 annual report the Inspecting Judge of Prisons said of the lack of capacity: ‘steps will have to be taken to improve production levels, reduce absenteeism and enhance efficiency levels.’

Policy confusion

The Correctional Services Act was promulgated in October 2004. Shortly thereafter, in March 2005, the White Paper was released. The White Paper gave rise to a plethora of new policy documents. The unintended consequence has been that in many respects more attention has been paid to White Paper-generated policy development than to fulfilling the duties imposed by the Correctional Services Act.

Fundamentally there appears to be a fissure characterising the regulatory
framework of the department. There is authoritative tension between the Correc
tional Services Act (as operationalised by the Departmental B-Orders) and the 
White Paper as overarching frameworks.

This tension arises from the differing philosophies underlying the White Paper 
and the Act. The Correctional Services Act has a restrained and considered ret-
tributionist approach to corrections: offenders should be punished, and prison is 
the place to do that. The White Paper, in contrast, has a rehabilitationist approach: 
offenders are people whose behaviour can be changed, and prison is the place to 
effect that change. Although the Correctional Services Act sets out to restrict any 
gratuitous retribution in prisons and to provide for the protection of prisoners’ 
rights, the White Paper goes much further in acting on behalf of the prisoner, 
by casting prisons as centres for rehabilitation. The White Paper’s failing is that 
it does not stipulate in any detail how rehabilitation is to be effected. Even more 
seriously, the vision of the White Paper is at odds with the reality of South African 
prisons, which remain fundamentally retributive mechanisms for dealing with 
crime.

The policies derived from the White Paper have not been developed into new 
standing orders and job descriptions. Thus, young recruits to the Department, 
trained in the new rehabilitationist vision, have little direction as to how this 
vision is to be implemented into daily activities. Older Department members 
remain untrained in, and sceptical of, rehabilitation. The result is that prisons 
remain in practice excessively retributionist and largely without a rights-based 
agenda. A systematic rehabilitation programme is yet to emerge.

Irrational budgets

The Department of Correctional Services budget has increased meteorically since 
1994.19 Much of the budget has been allocated to infrastructural development 
(e.g. two new private prisons, TVs, CCTV, fencing, and a biometric security sys-
tem) and the employment of more staff. The trend towards increased budgets 
did not change after the release of the White Paper in 2005, and the percentage 
of the budget allocated to the Social Reintegration Programme of the DCS has 
remained stable at roughly 3,2 per cent of successive budgets since 2003/4.20 Thus, 
while the White Paper identifies rehabilitation and successful reintegration as the 
Department’s ‘core business’, the budget allocation places the emphasis elsewhere 
– on security and infrastructure development – at the cost of staff training, reha-
bilitation services, and post-release support for offenders. This disjuncture between budget allocation and policy priorities shows the Department has not yet made the paradigm shift outlined in the White Paper.

The question of how the Department should spend money on rehabilitation has also not been clearly addressed. Rehabilitation and social reintegration programmes do not involve large capital programmes or expensive equipment, as they are interventions aimed at cognitive behavioural modification of offenders, usually in the form of semi-structured programmes. These do not require significant expenditure above the personnel costs involved. Nor do post-release support services require any significant capital costs. However, securing the right staff, with the necessary skills and levels of motivation, are significant challenges. It is well known that the Department of Correctional Services finds it difficult to retain scarce skills. The Department may well find it easier to spend its budget on large capital works and technologically advanced security systems.21

Corruption, mismanagement and oversight

Between 1994 and 2000 there were attempts to transform the Department of Correctional Services in line with new democratic values. These attempts were disastrous. The Jali Commission found that the Department was fraught with corruption and not adequately under the control of the state.22 While prison systems worldwide have a tendency to resist accountability and transparency, these problems have proven to be particular challenges to the South African prison system in the new constitutional order.

Despite the efforts of the Office of the Inspecting Judge of Prisons and the Portfolio Committee on Correctional Services (especially from 2003 to 2008) the DCS has remained a difficult institution for non-DCS stakeholders to penetrate,23 resulting in the need to resort to continuous litigation on issues of prisoners’ rights.24 Financial management in the DCS has remained problematic as reflected in the five qualified audit reports from the Auditor General.25 The recently extended mandate of the SIU26 to start with further investigations regarding large contracts with service providers underscores the fundamental problems this department has with governance and accountability. The tainted image of this department amongst the public in general and, more importantly, amongst prisoners places the morality of the criminal justice process at great risk.

The Judicial Inspectorate of Prisons (JIOP), created by the Correctional Serv-
ices Act, has in many ways contributed to bringing some transparency to the prison system. It remains internationally a unique structure and is mandated to visit prisons on a regular basis and record complaints through its Independent Correctional Centre Visitors. The Inspectorate has not been without criticism, particularly from prisoners who have felt that their complaints have not been addressed. The powers of the JIOP were weakened by a 2002 amendment which removed reporting on corruption and fraud from the Inspectorate’s mandate. It is not within the mandate of the Inspectorate to discipline DCS officials or prepare cases for discipline, and the extent to which it can make binding decisions on the DCS is also limited.27 Mandatory reporting by the DCS to the Inspectorate is restricted to a limited range of incidents, such as deaths in custody. Even so, when serious rights violations have occurred, such as deaths in custody and mass assaults, the Inspectorate has limited powers and can only make recommendations to the Minister of Correctional Services.

The problems in oversight of the prison system were also noted by the UN Committee against Torture in 2006:

The Committee is concerned at the high number of deaths in detention and with the fact that this number has been rising. The Committee is also concerned at the lack of investigation of alleged ill-treatment of detainees and with the apparent impunity of law enforcement personnel (art. 12). The State party should promptly, thoroughly and impartially investigate all deaths in detention and all allegations of acts of torture or cruel, inhuman or degrading treatment committed by law enforcement personnel and bring the perpetrators to justice, in order to fulfil its obligations under article 1228 of the Convention.29

Infrastructural problems

The outdated architecture of many South African prisons is demeaning to the dignity of prisoners. Since 1994 only a few new prisons have been constructed and some of these have been dogged by controversy (e.g. Malmesbury, Goodwood, Kokstad and the two privately operated prisons). Smaller infrastructural improvement projects have not in the past 15 years been able to address basic shortcomings in infrastructure. As identified in the audit of infrastructure and conditions conducted by the Office of the Inspecting Judge, these include:

- Prisoners at 21 prisons are required to eat with their hands and are not issued with eating utensils and containers
- At several prisons surveyed, prisoners are required to sleep on the floor,
share beds with other prisoners, or are issued with inadequate bedding
• Searches are conducted in a dehumanising manner and male prisoners are required to strip naked in front of staff and other prisoners with no privacy afforded
• There are no facilities in 94 per cent of prisons to separate prisoners with contagious diseases
• Only 56 per cent of prisons are equipped, even on a limited scale, with class-rooms
• Only 40 per cent of prisons are equipped with workshops, and only 2 per cent of sentenced prisoners are involved in production workshops
• While 72 per cent of prisons have dining halls, the majority are not used for their intended purpose and meals are taken in the cells
• More than 40 per cent of prisons are without libraries, even though access to adequate reading material is a Constitutional requirement

Under these conditions it is unlikely that offenders, such as those in the Anna Juries case, will come out of prison better citizens after serving their lengthy sentences.

Persistent overcrowding is responsible for many of the problems identified by the Inspecting Judge. Overcrowding places prison management under enormous pressure, and makes it very difficult for managers to perform optimally. This is unlikely to be relieved by the building of new prisons, since the Department’s proposal to build eight new 3000-bed prisons to be operated by the private sector have not been received well, either by Parliament or civil society. There have been objections to the high costs of construction as well as the lack of transparency that has surrounded the process. The involvement of the private sector in operating prisons for profit on such a scale has been questioned, as have the enormously high costs involved and the burden this will place on the tax-payer for decades to come.

As already mentioned, an increase in the size of the prison population over the next 16 years of more than 1 per cent per year, will already exceed available and planned accommodation. While there must be an improvement in the nature and quality of prison accommodation, it is clear that South Africa will not be able to build itself out of the prison-overcrowding problem. A more sustainable solution must be found, one that is aimed at proactively managing the size of the prison population through prevention, sentencing and effective social reintegration pro-
grammes. Smaller prisons, located closer to prisoners’ communities of origin, would also facilitate contact with family members and assist in reintegration.

RECOMMENDATIONS

Coherent policy development based on evidence

As discussed in the previous chapter (Chapter 8), South Africa’s sentencing regime has, over many decades, resulted in the over-utilisation of imprisonment and the neglect of non-custodial sentencing options. This has now been exacerbated by the minimum sentencing legislation. Disparities based on race, gender, and financial status continue to characterise sentencing.

There is a dire need to reframe the purposes of imprisonment to give effect to the values of the Constitution. Such a reframing should not be limited to the immediate treatment of prisoners and their conditions of detention, but rather it should address more broadly the purposes of imprisonment, measured against the values of the Constitution. In a constitutional democracy, the purpose of punishment and the intended functions of imprisonment must be articulated with great clarity. How do punishment and imprisonment give effect to realizing the potential of each individual? How does imprisonment give recognition to the historical nature of South African society, how can it heal the divisions of the past? Failure to deal with such fundamental questions will prevent the transformation of sentencing in South Africa.

Despite its laudable objectives, the White Paper on Corrections released in 2005 is not in touch with daily prison realities such as the physical conditions of detention, staff morale, poor accountability and human rights violations. The White Paper has also not been subject to any independent public review that takes these realities into consideration. The policies that have been developed to give effect to the White Paper have hardly translated into any practical guidance at operational level. Policy and procedures must be based on knowledge and evidence, and subject to regular review. Intuitive notions of ‘what works’ have been shown too frequently to be ineffective, if not counter-productive. For example, there is no evidence from any reliable research that imprisonment reduces recidivism. There is indeed a growing body of domestic and international research describing effective and ineffective interventions, and this should be consulted.
Aligning the prison population size to available resources

Prison overcrowding is frequently used as an excuse for poor services, especially by the Department of Correctional Services, which claims such overcrowding is an ‘uncontrollable’ part of the criminal justice system. Decision-makers seem to believe that the size of the prison population is the result of an organic and uncontrollable interaction between law enforcement and crime. Meanwhile, studies on crime and punishment have shown convincingly that prison population size has less to do with the rate of crime than the policies and ideologies of governments with regard to incarceration. Even in a country with a high crime rate there is no logical reason why prison overcrowding must be accepted as a fixed feature of the prison system. Policy and practice across the criminal justice process need to be aimed at aligning the size of the prison population to both physical resources (buildings and infrastructure) and human resources (the staff and skills in the prison system). This is not a new idea, it was already proposed as an objective by the SA Law Reform Commission in 2002.

Efforts at promoting non-custodial sentences (where the offender is punished in some other way than prison) have not been hugely successful. In the same way that minimum sentencing legislation prescribes certain mandatory sentences, legislation needs to be developed for non-custodial sentences. Given the situation in respect of prisoners serving a sentence of less than 24 months, as described above, it follows that a non-custodial sentence should be the prescribed sentence if a court is contemplating a sentence of 24 months or less, unless there are substantial and compelling reasons to impose a sentence of imprisonment. The Criminal Procedure Act already provides for a number of sentencing options such as correctional supervision, restitution orders, suspended and postponed sentences, and community service orders.

Controlling the size of the unsentenced prison population has proven to be an extremely difficult problem. Many recommendations have been made in this regard, and some, such as increased court hours, have been implemented. A more comprehensive approach is required, which would make use of these options:

- A proper pre-trial service that offers verified information acquired before an accused person’s first appearance in court including the residential address of the accused, work and community ties, and income. In addition, it offers supervision of bail conditions by court or SAPS officials, ensuring that the likelihood of abscondment is lowered.
• Avoiding unnecessary arrests for minor offences and strengthening existing mechanisms (e.g. police bail) for the South African Police Services to deal with such offences in a manner that avoids detention.
• Screening cases early in the criminal justice process to verify that there is indeed a *prima facie* case on which to proceed, and avoiding unnecessary postponements for further investigations.
• Establishing a monitoring and liaison mechanism at prisons to deal with unsentenced prisoners. Such a mechanism needs to facilitate communication and cooperation between prison management, unsentenced prisoners, the Legal Aid Board, prosecutors and magistrates in specified magisterial districts.\(^{37}\)
• Establishing a mechanism that would enable and facilitate plea-bargaining soon after the prosecutor has made a decision to prosecute.

Aligning budgets to strategic priorities

There is a need to refocus the Department’s budget away from the current disproportionate investment in hi-tech infrastructure, private prisons, and high-cost prison construction. The budget should be used to attract scarce skills, set up rehabilitation and education programmes, improve existing infrastructure, provide post-release support services, and offer community-based sentence options. It should finance staff training to meet the situations envisaged by the White Paper, the Correctional Services Act and to comply with basic human rights. All these line items are currently neglected, yet they have the most potential to give the greatest effect to the aims of the Correctional Services Act and the White Paper. Refocusing the budget in this way will result in an alignment of finances to the strategic priorities of the Department, and would address concerns raised in the past by the Portfolio Committee on Correctional Services. The objective should not be just to spend more money on prisons, but rather to allocate funds to where they will have maximum impact and to ensure that current human resources are used optimally. This requires budgeting for a well-functioning performance management system to ensure that officials are performing their duties as required.

Strengthening oversight

While the Judicial Inspectorate of Prisons has established a significant presence in the prisons across the country, it remains a watchdog with small teeth. The
Inspectorate must be mandated to investigate human rights violations independently, and submit cases for prosecution to the National Prosecuting Authority. It should furthermore be mandated to compel the Commissioner of Correctional Services to take disciplinary action against officials. The Inspectorate should also be mandated to publish its inspection reports if a satisfactory response from DCS is not received in good time.

CONCLUSION

The South African prison system has faced many challenges over the past 15 years, some as a result of external influences, others of its own making. There is reason to believe that progress is being made and that the situation is improving. But the gains made need to be carefully protected and not inadvertently undone by decisions resulting from reviews that have not thought out all the consequences of their decisions. The greatest risk that the review process holds for the prison system is to marginalize it from the rest of the criminal justice system. The prison system is an integral part of the criminal justice system and not a dumping ground at the end of it for which only the DCS is responsible.
NOTES

1. The author wishes to thank Kelly Gillespie for her comments on an earlier draft.
4. Department of Correctional Services, *White Paper on Corrections in South Africa*, Pretoria: paragraph 2.6.3. Despite this policy shift, the Department of Correctional Services continued to be saddled with the responsibility of keeping awaiting-trial detainees within its facilities, as a legacy from the time when the Department of Prisons was administered under the Ministry of Justice and was perceived to have a single ‘custodial mandate’. There is a policy gap in relation to the responsibility for awaiting-trial detainees.’
5. The sentence plan must contain a proposed intervention aimed at addressing the risks and needs of the offender as identified during an in-depth risk assessment. The plan should spell out what services and programmes are required to target offending behaviour and to help the sentenced offender develop skills to handle the socio-economic conditions that led to his or her criminality. Programmes to enhance the offender’s social functioning must be included in the plan, as should time frames and responsibilities.
8. Ibid, 30.
10. Everyone (except those serving life sentences) received a remission of sentence; the result was that 30 000 prisoners were released with near immediate effect. Even a person with a sentence of 20 years got some time off. This remission applied to all sentenced prisoners who were in custody at the time.
12. Linear projections such as those in figure 1 should be treated with caution as they seldom turn out to be correct. However, they do serve to illustrate the impact of growth in the prison population on available capacity.
paragraph 8.1.3.

15. Ibid, 152.


18. By the end of the 2006/07 financial year 76 new policies had been registered and 45 approved by the Minister of Correctional Services: *Department of Correctional Services, Annual Report of the Judicial Inspectorate of Prisons 2006/07*, 16.

19. Civil Society Prison Reform Initiative, Submission by the Civil Society Prison Reform Initiative to the Parliamentary Portfolio Committee on Correctional Services, 4, 5.


23. The Portfolio Committee expressed itself as follows at the end of its tenure: “The Committee’s relationship with the entity and the department it oversees was generally very good. Unfortunately the relationship with the DCS’ Executive Authority was less so. The extent of the breakdown in the relationship between the Committee and that authority is starkly illustrated by the latter’s neglect to inform the Committee of the re-deployment of the former National Commissioner in November 2008: Portfolio Committee on Correctional Services, *Overview report of the oversight activities of the Portfolio Committee on Correctional Services (2004-2009)*, Cape Town: Parliament of the Republic of South Africa, 2009, 3.

24. In recent years, access to antiretroviral medication and decisions by the Correctional Supervision and Parole Boards have been the substantive foci of litigation against the DCS.


27. These refer to, for instance, detention in solitary confinement and the use of mechanical restraints.

28. Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe
that an act of torture has been committed in any territory under its jurisdiction.


31. Portfolio Committee on Correctional Services, *Overview Report of the Oversight Activities of the Portfolio Committee on Correctional Services*.


37. In 2008 the Judicial Inspectorate of Prisons (JIOP) implemented a pilot project that had broadly these objectives. The project was able to demonstrate significant successes in facilitating decisions in respect of unaffordable bail.
CONCLUSION

Chandré Gould

This book was inspired by the Department of Justice-led review of the criminal justice system that was underway at the time of writing. It was our view that civil society researchers have a contribution to make in informing the process of reviewing and improving the criminal justice system. The authors are researchers who have worked closely with state structures and have attempted to understand the enormous daily challenges faced by those responsible for holding the criminal justice system together and making it work. Our criticisms of faults in the system are intended to offer information to assist in fixing the problems. That is not to say that those working within the criminal justice system are not often themselves acutely aware of the problems and what needs to be done to fix them. Rather we hope that this commentary will strengthen the imperative for positive change.

The chapters follow the logical progression of a case, such as that of Anna Juries. By using the Anna Juries case we intended to infuse a sense of individual experience into an often-dehumanising system. It is intended to show policy makers and those working in the criminal justice system what the system looks like from the point of view of the end-user, in this case the victim. This view from below is important for the purposes of policy development. However, the focus on the victim in this book is not intended to negate the equally important perspective of the offender when it comes to dealing with the criminal justice system.
There are three important themes that emerge from the chapters in this book.

Firstly, that every single part of the criminal justice system is overloaded and overwhelmed by the sheer volume of cases it has to deal with. There are too many calls to 10111 centres for them all to be properly dealt with (even though a very large percentage of calls seem to be hoax or prank calls). There are too many cases for the number of detectives there are to investigate them; too many crime scenes for the number of crime scene technicians we have available to process them; too many cases for prosecutors to be able to give each one the attention it requires; too many prisoners and awaiting trial detainees for the prisons to be able to provide the services they are required to. No amount of fixing the criminal justice system will be able to fix this problem. In fact, as Matthews points out in her chapter, increasing arrests at the front end of the system will only cripple it further down the chain. In the long term the problem of crime has to be dealt with by addressing the social factors that contribute to high levels of crime. The view that crime can be reduced through law enforcement is a fallacy. Indeed, we cannot afford to delay dealing with the social factors that drive crime while we try to fix the criminal justice system.

Secondly, there is a dire shortage of skills throughout the system, and most importantly a lack of managerial skills. Very often those in the criminal justice system who are responsible for carrying large case loads are themselves overwhelmed by the mere fact that they do not have the skills to enable them to do the job required of them. Thus, merely increasing the numbers of staff employed in the criminal justice system cannot be a solution to the problem of inadequate service delivery. In addition, what we see throughout this book is a failure of management at various levels in the criminal justice system. For example, it is poor management that is responsible for the acceptance and implementation of performance indicators that serve only sectoral interests. In the absence of a coherent performance management system, managers cannot know what skills they lack and consequently what skills are needed. This in turn means that training may be provided that does not match the actual skill requirements of departments.

Thirdly, throughout the system there are very serious tensions between the policies of the departments. For example, while the White Paper on Corrections sees offenders as people in need of help, rehabilitation and care, the overt aim of the minimum sentencing legislation is to punish as harshly as possible.

In the final analysis it is the individuals who use the system, whether as victims,
suspects or convicted offenders, who bear the brunt of the failures. We are left
with a system that often appears to be (deliberately) indifferent about these lives
and the affects of crime and the criminal justice system on them. We are thus in
danger of fostering an increasingly damaged society by not only neglecting the
needs of those with a legitimate claim to justice, but also by further marginalising
the few offenders that do actually enter the system.

The next few pages summarise the conclusions and recommendations from
each of the chapters.

CONCLUSIONS AND RECOMMENDATIONS

Criminal justice system as a whole

Communication across departments and integrated information management
are priorities in delivering justice to both victims and perpetrators and ensuring
that taxpayers get value for money. Currently, the SAPS records the charges laid,
the NPA records the cases opened, and the Department of Correctional Serv-
ices records the people imprisoned. Since these records are not linked there is no
means to track individuals (whether perpetrators or victims) through the system.
If those accused or convicted of crimes use aliases, and no biometric data is veri-
ified (such as fingerprints) tracking remains impossible. Among other things, it
means we cannot measure the efficiency of justice system processes or correlate
the number of crimes committed with the number of people in prison.

The incoherence of performance indicators across the criminal justice system
is also a significant problem. For example, there is currently subtle pressure on
prosecutors to enrol cases that are not adequately prepared, since for a detec-
tive an enrolled case is a positive performance indicator. In addition, the SAPS
usually only regard cases as successfully concluded if there is a finding in court,
irrespective of whether this is a conviction or an acquittal. This means that for the
police there is a disincentive to support the diversion of cases out of the criminal
justice system, such as by following a restorative justice approach. These are thus
instances in which the requirements of the two elements of the criminal justice
system potentially clash, and which can negatively affect co-operation and the
outcome of a case for victim and perpetrator (i.e. end-users of the system).

In addition, the tendency to measure prosecutors’ performance by their con-

viction rates means that very few prosecutors want to take on a case they are not
likely to win. For the victim, however, winning the case may not necessarily be the most important aspect of the justice process. Victims need access to justice and fair treatment, information, assistance and services. They also need restitution, redress and apology. They need acknowledgment and they need to be given a voice. Few of these needs are high on the agenda of prosecutors. The same principle applies to all government actors in the justice process. As the Anna Juries case shows, the fact that the criminal justice system is intended to be victim-centred and several policy documents give expression to this, does not translate into actual support for victims at any stage of the process.

The shift towards measurement of case flow management, and away from measuring court hours and case cycle times (time from enrolment of case to finalisation), has helped prosecutors to some degree. The removal of performance indicators such as number of court hours is a result of a recognition that the achievements of prosecutors may depend on factors outside their own control. These factors include the performance of magistrates, SAPS investigators, witnesses, interpreters and clerks. Time spent in court is therefore not a reliable indicator of a prosecutor’s effectiveness. What is needed are performance indicators that operate across the entire system and promote cooperation.

South African Police Service

*Emergency response services*

There is little doubt that the 10111 centres and flying squads have a crucial role to play in the fight against crime and in providing a quick response to members of the public who fall victim to, or feel threatened by, serious crime. However, the following require urgent attention:

- The National Instruction on *Emergency Response Services: 10111 CENTRES & FLYING SQUAD* of 2005, is still in draft form. This creates a climate of uncertainty and raises doubts about the commitment of the police to these services. The National Instruction must be revised and finalised. In the final version of the policy the responsibilities of the flying squad *vis-à-vis* crime scenes need to be reconsidered. The amount of time that flying squad members need to spend at crime scenes in order to fulfil all the tasks that they are expected to carry out is not compatible with their primary task of providing an ‘emergency response’ unit that is capable of quick reaction.
- In spite of the large increase in police numbers over the last eight years, the
10111 centres and the flying squads continue to experience personnel shortages of 50 per cent and 24 per cent respectively. It is necessary to increase the number of trained staff at both 10111 centres and the flying squads. In addition, it is essential that such an important policing service be extended to cover the whole country.

- Police service members who are transferred or appointed to 10111 centres and flying squads should be chosen from those who have gained basic police experience at police station level. Such experience is indispensable, and this approach would also screen members and thus help to identify those who are best qualified and most suitable for this kind of work.
- Finally, public education (with a focus on children) is necessary to overcome the problem associated with hoax or non-emergency calls that may block or overload the system and thus reduce police effectiveness. The police have launched a number of local initiatives to counter these abuses, but public education should be planned and implemented nationally.

**Crime scene investigation and the processing of physical evidence.**

- SAPS Policy 2 of 2005 is clearly intended for a police service with greater human resource capacity than is currently the case. It is unrealistic in the South African situation for two reasons: firstly, it is aimed almost exclusively at serious crimes and does not consider the management of less serious crimes. Secondly, the shortage of expert staff makes adherence to the policy impossible. We urge SAPS management to realign Policy 2 to the realities of South African policing.
- The role of detectives collecting evidence at crime scenes needs to be clarified by SAPS management. Particular expertise is required to process a crime scene and detectives should not be undertaking this task. If the service continues to allow detectives to collect physical evidence, then over-reliance by the SAPS on the Criminal Procedure Act, which permits detectives to ‘seize anything’, must be addressed. Policies and national instructions should clearly reflect this, and extensive training and clear guidelines should be provided.
- Human resource shortages within the Detective Service, laboratories and LCRCs have been a problem for many years. Given the speciality of detectives’ and technicians’ jobs, more attractive remuneration packages are
needed to attract and retain suitable people. The training backlog of detectives must be addressed, and more importantly, new detectives must be regularly mentored by more experienced detectives.

- Station commissioners have to ensure that dockets are inspected regularly to ensure high quality investigation and detection. Station commissioners also need to address the lack of coordination among station members and ensure that members talk to each other and share vital information. In addition, station commissioners should undertake audits of cases lost in court as a result of poor investigations, so as to measure the performance of station members and detectives.

**Victim support**

- SAPS members should be trained, tested and monitored (starting in college) in engaging with victims in a professional and empathetic manner. This is important in both the ‘intake’ phase when a case is opened, and throughout the investigation process. While some training in this regard already takes place, it is vital that police and prosecutors are monitored so that their constant engagement with new victims does not diminish the seriousness with which they treat each case, or the quality of service they provide.

- SAPS members should offer victims information relating to available support structures, rather than leaving it to victims to request this information. In addition, there should be posters in Community Service Centres (in statement-taking booths, or at the counter) with a message such as: ‘If you require counselling or support services, please request assistance from any member on duty.’ The posters could also list the details of local or national organizations working in victim support.

- In order to aid police in providing accurate information to victims, the SAPS side of the Community Service Centre counter should display a location-specific quick-reference guide, which members can consult when advising crime victims. This guide should list information regarding support facilities and options available. Template posters for such information could be produced nationally and then filled in at station level to reflect organisations serving the local area.

- All complainants should be handed a one-page information sheet outlining their rights and containing basic contact information for help lines and
support services in their area. Such a sheet could also explain the normal phases of trauma such as shock, anger and denial. The sheet could have a space on which the case number is written before handing it to the victim or complainant, making it less likely to be casually discarded. Similar sheets could also be distributed via community awareness drives and community based organisations.

Department of Justice and the National Prosecuting Authority

**Bail**

There are a number of practical challenges facing the bail system.

Any court holding a bail hearing is required to balance the individual’s right to freedom against the interests of justice. Each enquiry focuses on the specific circumstances before the court. As such, relevant information is required to facilitate informed decision-making. Obtaining this information is often difficult and time consuming and can mean that the court is required to make a decision in the absence of meaningful information.

- There is a need to facilitate the sharing, between government departments in the criminal justice system, of timeous and accurate digital information relating to the identity, previous criminal history and pending charges relating to individuals who have come into conflict with the law.
- There is a need for accurate information on bail data to be shared between departments to enable more informed trend and impact studies on the current functioning of the bail system. Research findings would then enable better strategic decision-making and associated budgeting.

National Prosecuting Authority

Poor management within the NPA is widely acknowledged. Despite this, there seems to be little effort to demand accountability from managers. What is required is the vigorous introduction of professional human resources practices including:

- Formal succession planning
- Assessment of current deployment practices
- Assessment of current recruitment practices
- Training in management skills

There is a need for the NPA to reconsider the current measures of performance
that are used. The new measures should be measures of performance rather than of numbers (e.g. numbers of cases). Indeed, there is a need to assess whether officials are doing the jobs they are employed to do.

Child justice

Policy development based on specific criteria for good policy-making will assist in ensuring that an effective and efficient child justice system develops. The following recommendations relate to policy development in child justice:

- The more clearly that short, medium and long term goals are defined, the easier it will be to plan properly. It is unrealistic to expect all features of the child justice system to be in place within one year of the commencement of the Act. Setting clear time-linked goals within reasonable timeframes will assist in allocating sufficient resources, based on what poses the greatest risks to the rights of children.

- An effort must be made to ensure that the South African child justice system continues to draw on lessons learnt elsewhere. The accessibility of international research, the growing depth of international networks, international human rights treaties and international technical assistance are all valuable resources that can be used to develop a comprehensive system.

- Resources should be made available for the testing of innovative approaches to child justice. The unlegislated environment in which child justice developed over the past 15 years contributed greatly to the generation of creative options for this. This is an important resource within the sector and should be cultivated and nurtured.

- The value of research evidence cannot be underestimated. The research undertaken by academic and children’s rights institutions in the past 15 years has done much to enhance the skills of people working with children in the criminal justice system. This research has also made an invaluable contribution to the Child Justice Act. Future planning must cater for formal evidence collection and make resources available to this end. Respect for knowledge and evidence should be a core value. In fact the Act mandates research in respect of the minimum age of criminal capacity, which Parliament will review five years after the Act comes into operation. Focussed research to assess output and impact achievements needs to be conducted on a systematic and planned basis. Research should be an integral part of managing the child...
justice system and not an add-on, nor should it be the exclusive domain of civil society organisations.

- An inclusive inter-sectoral approach (for example, through the Inter-sectoral Committee) will ensure that stakeholders continue to provide inputs, take ownership of processes, and remain committed to overall goals. This inclusivity should make children part of policy development through well-managed child consultation processes.

- Given the inter-sectoral complexities of the child justice system, coherent and overarching goals that facilitate inter-sectoral cooperation will be a requirement. These will have to relate to short, medium and long term goals. Of particular importance are the provisions of the Act and the obligations created for the state towards detained children.

- The Inter-sectoral Committee as well as individual departments must regularly review progress based on sets of reliable indicators that enable rapid assessment.

- As lessons learnt emerge from evidence, these need to be incorporated into training, policy-making and ultimately legislation. This in turn requires the wide dissemination of research and information on developments in the field.

In order to respond appropriately to the obligations agreed to in the global human rights framework, the following are noted as key areas for policy development:

- The content of the signed treaties and their reporting requirements must be known and understood in the sector, by both government and non-governmental organisations. This requires sensitisation and training of management and operational staff.

- There must be a planned and widely publicised schedule for preparing reports to international treaty monitoring bodies. The necessary information needs to be identified and collected on a systematic basis throughout the period reported on.

- Effort must be made to ensure that reports are submitted on time to the applicable treaty monitoring body. Besides being a legal requirement, punctual reporting enables more accurate monitoring as the relevant committee can provide useful comments that can be acted upon without delay.

- Reports must be comprehensive, accurate and up to date, and provide a fair reflection of implementation.
The UN treaty-monitoring bodies encourage state parties to consult civil society organisations in the preparation of state party reports, as these bodies play a critical role. Civil society organisations should not be hindered, obstructed or victimised in any form for submitting shadow reports that are critical of government’s actions and factual accuracy of the state’s report.

The national human rights institutions should be directly involved in the preparation of state party reports and use their mandates to ensure that obligations are indeed fulfilled.

The treaty monitoring bodies (such as Committee on the Rights of the Child and Committee Against Torture) prepare Concluding Remarks after considering a state party’s report. The Concluding Remarks are usually available promptly and should be widely disseminated to all stakeholders. Furthermore, there needs to be a response plan to the Concluding Remarks that will ensure that the appropriate actions are taken.

There are significant domestic advantages to participating fully with the international treaty monitoring bodies. Compliance will encourage the systematic collection of accurate information that will be available to the state and it will ensure continuous monitoring of implementation. In addition it will promote national dialogue, improve skills and knowledge amongst staff, and promote inclusive stakeholder engagement.

**Sentencing**

South Africa’s sentencing regime has, over many decades, resulted in the over-utilisation of imprisonment and the neglect of non-custodial sentencing options. This has now been exacerbated by the minimum sentences legislation. Disparities based on race, gender, and financial status continue to characterise sentencing.

There is a dire need to reframe the purposes of imprisonment to give effect to the values of the Constitution. Such a reframing should not be limited to the immediate treatment of prisoners and their conditions of detention, but rather it should address more broadly the purposes of imprisonment, measured against the values of the Constitution. In a constitutional democracy, the purpose of punishment and the intended functions of imprisonment must be articulated with great clarity. How do punishment and imprisonment give effect to realizing the potential of each individual? How
Conclusion

does imprisonment give recognition to the historical nature of South African society, how can it heal the divisions of the past? Failure to deal with such fundamental questions will prevent the transformation of sentencing in South Africa.

The history of the minimum sentences legislation has shown that it was conceived and delivered in policy vagueness with little, if any, reference to the available evidence at the time. The subsequent renewal of the legislation in 2007 continued to ignore the recommendations of the SA Law Reform Commission as well as civil society inputs.

The implementation of minimum sentences resulted in the number of prisoners serving life imprisonment climbing from approximately 400 in 1995 to over 8 000 by March 2008. During that period, violent crime trends remained fairly stable. There is no evidence to indicate that minimum sentences have had any impact on the rate of violent crime. In fact, there is substantial evidence indicating that lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates.

A number of policy implications emerge from this review.

- Sentencing reform cannot continue in a manner that marginalizes evidence on what works and what does not. The strained relationship between the reality and political interests has already caused great harm. There is a strong need to de-politicise punishment and sentencing.
- It must be accepted that punishment and sentencing can only play a small role in managing crime. The emphasis must be placed on other efforts by government and civil society to reduce crime. Particular attention should be paid to social conditions that contribute to crime. There needs to be acceptance of the limited potential of punishment and sentencing to manage crime.

Department of Correctional Services

Despite its laudable objectives, the White Paper on Corrections released in 2005 is not in touch with daily prison realities such as the physical conditions of detention, staff morale, poor accountability and human rights violations. The White Paper has also not been subject to any independent public review that takes these realities into consideration. The policies that have been developed to give effect
to the White Paper have hardly translated into any practical guidance at operational level. Policy and procedures must be based on knowledge and evidence, and subject to regular review. Intuitive notions of ‘what works’ have been shown too frequently to be ineffective, if not counter-productive. For example, there is no evidence from any reliable research that imprisonment reduces recidivism. There is indeed a growing body of domestic and international research describing effective and ineffective interventions, and this should be consulted.

- The Correctional Services Act does not make provision for the development of minimum standards of services for children in prisons in the way that the Children’s Amendment Act (41 of 2007) makes provision for child and youth care centres. It will be an important contribution to the coherence of the child justice system to develop minimum norms and standards applying to all situations where children are serving custodial sentences.
- Efforts at promoting non-custodial sentences have not been hugely successful. In the same way that minimum sentences legislation prescribes certain mandatory sentences, legislation needs to be developed for non-custodial sentences. Given the situation in respect of prisoners serving a sentence of less than 24 months, as described above, it follows that a non-custodial sentence should be the prescribed sentence if a court is contemplating a sentence of 24 months or less, unless there are substantial and compelling reasons to impose a sentence of imprisonment. The Criminal Procedure Act already provides for a number of sentencing options such as correctional supervision, restitution orders, suspended and postponed sentences, and community service orders.

Controlling the size of the unsentenced prison population has proven to be an extremely difficult problem. Many recommendations have been made in this regard, and some, such as increased court hours, have been implemented. A more comprehensive approach is required, which would make use of these options:

- A proper pre-trial service that ‘offers verified information acquired before an accused person’s first appearance in court including the residential address of the accused, work and community ties, and income. In addition, this should include supervision of bail conditions by court or SAPS officials, ensuring that the likelihood of abscondment is lowered’.
- Avoiding unnecessary arrests for minor offences and strengthening existing mechanisms (e.g. police bail) for the SAPS to deal with such offences in a
manner that avoids detention.

- Establishing a monitoring and liaison mechanism at prisons to deal with unsentenced prisoners. Such a mechanism needs to facilitate communication and cooperation between prison management, unsentenced prisoners, the Legal Aid Board, prosecutors and magistrates in specified magisterial districts.
- Establishing a mechanism that would enable and facilitate plea-bargaining soon after the prosecutor has made a decision to prosecute.

There is also a need to refocus the Department's budget away from the current disproportionate investment in hi-tech infrastructure, private prisons, and high-cost prison construction. The budget should be used to attract scarce skills, set up rehabilitation and education programmes, improve existing infrastructure, provide post-release support services, and offer community-based sentence options. It should finance staff training to meet the situations envisaged by the White Paper, the Correctional Services Act and to comply with basic human rights. All these line items are currently neglected, yet they have the most potential to give the greatest effect to the aims of the Correctional Services Act and the White Paper. Refocusing the budget in this way will result in an alignment of finances to the strategic priorities of the Department, and would address concerns raised in the past by the Portfolio Committee on Correctional Services. The objective should not be just to spend more money on prisons, but rather to allocate funds to where they will have maximum impact and to ensure that current human resources are used optimally. This requires budgeting for a well-functioning performance management system to ensure that officials are performing their duties as required.

While the Judicial Inspectorate of Prisons has established a significant presence in the prisons across the country, it remains a watchdog with small teeth. The Inspectorate must be mandated to investigate human rights violations independently, and submit cases for prosecution to the National Prosecuting Authority. It should furthermore be mandated to compel the Commissioner of Correctional Services to take disciplinary action against officials. The Inspectorate should also be mandated to publish its inspection reports if a satisfactory response is not received in good time from the DCS.
Department of Health

Healthcare facilities at which victims of crime frequently seek treatment, should be prepared and obliged to offer counselling to victims. These facilities could help to prepare victims for their first post-crime encounter with police by briefing them on what to expect from that meeting. By engaging with hospital-bound victims after they’ve dealt with SAPS members, health facilities could provide a level of monitoring and feedback to the SAPS regarding members’ professionalism.


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