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# **Tough Choices: Prioritising Criminal Justice Policies**

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## **INTRODUCTION**

The national treasury is taking the fight against crime seriously. Spending on the South African criminal justice system has been increasing in real terms for a number of years, and should continue to do so for some years to come.<sup>1</sup>

One-tenth of annual government expenditure is devoted to policing, prosecuting and incarcerating the country's criminals. South Africa—a country with the largest HIV+ population in the world—allocates the same amount of public money to fighting crime as it does on health-related expenditure.

Notwithstanding increased spending on the criminal justice system, public feelings of insecurity have worsened significantly since 1994.<sup>2</sup> Moreover, a range of legislative and operational initiatives to combat crime, and improve the effectiveness of the criminal justice system, have had only a limited impact so far. Many criminal justice performance indicators continue to show a worsening of the system's performance.

The poor performance of the criminal justice system is not simply an issue of governance. In South Africa it risks affecting the stability of the state and the well being of the constitutional order. Increasingly, communities are engaging in vigilante activity. This is largely a result of popular perceptions that the country's constitution and the criminal justice system are at best ineffectual when it comes to fighting crime or, at worst, afford greater protection to criminals than law abiding citizens.

To improve the performance of the criminal justice system, criminal justice policy makers face some tough choices. The development and implementation of new and better criminal justice policies is restrained by the following factors:

- *Resources:* Budget constraints and limited resources, given the country's many pressing socio-economic needs. That is, policy makers face an opportunity cost for every policy they adopt. Greater expenditure on one aspect of the criminal justice system, invariably requires a reduction in expenditure or a lost opportunity somewhere else.
- *Fairness versus public punitiveness:* The criminal justice system has to be transformed from an authoritarian system to one that operates within the rule of law, and is open, accountable and responsive to the needs of all South Africans. As a result, two key objectives of the criminal justice system often appear to contradict each other. On the one hand, the criminal justice system seeks to uphold the law and protect the rights entrenched in the country's constitution. On the other hand, the system seeks to protect the public from criminals and increase public feelings of safety. To feel safer, the public favour the swift punishment of offenders. The criminal justice system, however, devotes much of its resources on processing suspects in a legally and procedurally correct manner—something which is time consuming and allows for some offenders to get away with the crimes they commit.
- *Capacity:* South Africa has extremely high levels of violent crime. Much of the criminal justice system is operating at full capacity, and crisis management is the

norm for many departments. The criminal justice system lacks the capacity to devote sufficient time and resources to monitor its performance, and develop innovative solutions for identified problems. As a result, policy makers and senior officials struggle to develop innovative interventions and prioritise these to improve the performance of the criminal justice system in a fast, affordable and constitutionally and politically acceptable manner.

- *Time*: Policy makers need to undertake interventions that produce positive results within a short period of time. High crime levels, and popular perceptions that the criminal justice system is not performing adequately, result in huge economic costs, vigilantism, and a dysfunctional society where a significant proportion of young people grow up surrounded by crime and violence. Without economic growth, people's trust in the ability of the state to protect them, and a functional society, it will eventually become impossible to reduce crime to acceptable levels. The time that is available to policy makers to improve the performance of the criminal justice system is, therefore, limited.

Given the above constraints, what choices do criminal justice policy makers have, and what course of action should they follow? This paper seeks to answer this question by looking at the role of the criminal justice system, and identifying key interventions to improve the performance of the police and prosecution services. The focus of the paper is on the police and prosecution services because the key criminal justice blockages are situated there. While the prisons are desperately overcrowded, there is little the prison authorities can do about this. The department of correctional services has to accommodate all persons sent its way by the courts—suspects who are denied bail and awaiting trial, and convicted offenders sentenced to a period of imprisonment.

Thereafter, the paper argues that enhancing the capacity of the prosecution service should be a strategic priority. This should boost the performance of the entire criminal justice system within a short period of time in a cost effective way. This is not to deny necessary improvements in the police service. However, boosting the capacity of the prosecution service is both affordable and manageable, and promises to make the greatest impact on the performance of the system as a whole.

The paper identifies a number of performance indicators of the criminal justice system to identify the system's crucial weaknesses. Consequently, emphasis is given to aspects of the criminal justice system which do not function well. Readers should, however, be aware that many criminal justice functions are performing well, and have improved their performance over the last few years. Little attention is given to these successes, not because they are not praiseworthy in themselves, but because the paper's focus is on aspects of the system which fail to perform adequately.

## **ROLE OF THE CRIMINAL JUSTICE SYSTEM**

It is the purpose of the criminal justice system to combat, prevent and reduce crime. It seeks to do this by processing cases and offenders speedily and effectively and by handing down appropriate sentences (punishment) to those convicted of an offence.

South Africa's criminal justice system is not performing optimally.<sup>3</sup> In 2000, some 2.6 million crimes were recorded by the police. Of these approximately 610,000 (24%) went to court, and the prosecution service took 271,000 (11%) cases to trial. These resulted in slightly more than 211,000 (8%) convictions.<sup>4</sup>

Thus, out of the initial 2.6 million cases recorded, 8% resulted in the conviction of the perpetrators. For some serious crimes the number of convictions as a proportion of recorded cases was even lower. For car hijacking it was 2.3%, aggravated robbery 2.8%, arson 3.7%, residential burglary 4.7%, and rape 7.6%. In 2000, only one out of 43 car hijackers whose crimes were recorded by the police, were convicted and punished for their crimes.

The poor performance of a criminal justice system should not be interpreted as a cause of crime. Crime occurs because individuals make a decision to engage in activities which are against the law. Such individuals are motivated by, inter alia, hatred, revenge, greed, envy,

peer pressure or malice. These motives come about through a myriad of influences on people's lives, such as the opinion of significant others, childhood upbringing, substance abuse, or levels of poverty and inequality in a society. A criminal justice system, irrespective of its performance, neither causes such motives nor the factors that lead to their existence.

Nevertheless, how well a criminal justice system functions is important for several reasons. First, a relatively small proportion of offenders are believed to commit the majority of serious crimes, and especially organised crime. If these perpetrators are apprehended and convicted timeously, certain crimes can be reduced. Second, a functional system helps to deter some potential offenders from committing a crime. Third, an effective and efficient justice system inspires confidence among victims and witnesses and encourages them to participate in the criminal justice process, thereby leading to the arrest and conviction of offenders. Finally, criminal justice successes—especially if well publicised—are essential for boosting public confidence in the government's ability to reduce crime and make people feel safer.<sup>5</sup>

## **MEASURING POLICE PERFORMANCE**

It is difficult to identify useful and accurate performance indicators for the police service. It is the proclaimed purpose of the police service to combat, prevent and reduce crime. However, the performance of the police, in accomplishing this purpose, is influenced by a variety of factors—such as prevailing societal values, alcohol consumption, unemployment levels and the proportion of young men in a population—over which it has no control. It is consequently not very fair to evaluate the police's performance by looking at crime levels.

Rather, the police service needs to be evaluated according to criteria which it can control, such as the number of arrests, emergency response times, investigated cases sent to court and service levels.

In South Africa the available information on police performance indicators is limited. For example, no information is available on police response times or arrests executed. Some data does, however, exist on police service levels and investigated cases sent to court.

### **Service levels**

According to opinion surveys, members of the public who had contact with the police are satisfied with the service they obtained. A study conducted at 45 police stations during the second half of 2000, surveyed members of the public as they were leaving a police station.

Over three-quarters (76%) of respondents indicated that they were satisfied with the service they received from the South African Police Service (SAPS). This positive response was based on the 'professional, supportive and prompt service' the respondents received from the police.<sup>6</sup> The main weakness in service delivery was in the provision of follow-up information to complainants after they reported a crime to police.

### **Investigated cases sent to court**

Cases are sent to court by the police only after a suspect has been formally charged (and in the case of a serious offence, arrested) by the police. In essence, cases are sent to court only if there is fairly substantial evidence against a suspect to warrant him being charged with an offence.

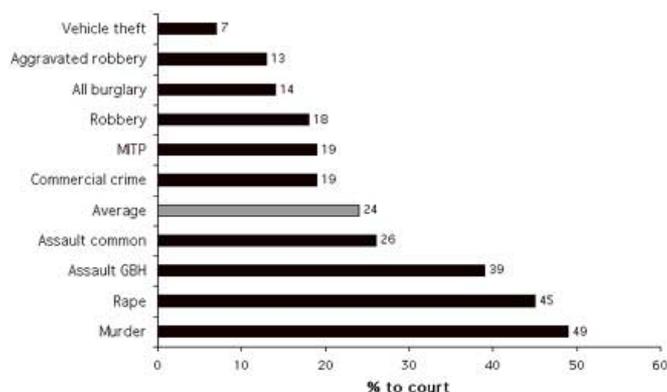
A suspect can be charged under a variety of circumstances. A suspect can be caught in the act of committing a crime and arrested by the police at the scene of the crime. A suspect can also be arrested on the basis that the police has a reasonable suspicion that he has committed a crime (e.g. driving a motor vehicle which has been reported stolen, or a complaint by a member of the public that he has just been robbed by the suspect). In both cases the suspect is arrested by the police and taken to a police station to be formally charged.

In some cases the speedy arrest and charging of a suspect after the commission of an offence is not possible. This is usually because there is insufficient evidence against a suspect to warrant his arrest. Often the police build up a case against a suspect, and only

once they are satisfied that there is sufficient evidence against a suspect, will they apply for a warrant of arrest to be issued against the suspect.

The number of cases sent to court as a proportion of the total number of cases recorded by the police differs between crime types (Figure 1).

Figure 1: Number of cases sent to court, as a proportion of cases recorded, 2000



On average just under a quarter (24%) of all cases recorded by the police are sent to court. The ability of the police to send cases to court is high in respect of crimes where the perpetrators are likely to be known to their victims, or those that are often committed in the presence of eyewitnesses.<sup>7</sup> An above average number of murder, rape, and assault cases are consequently sent to court. However, crimes where the perpetrators are likely to be unknown to their victims, such as burglary, robbery and vehicle theft are less likely to be solved by the police and sent to court. While these figures appear to be low, it has been reported that the police in the United Kingdom also fail to clear up about three-quarters of all offences.<sup>8</sup>

## IMPROVING POLICE PERFORMANCE

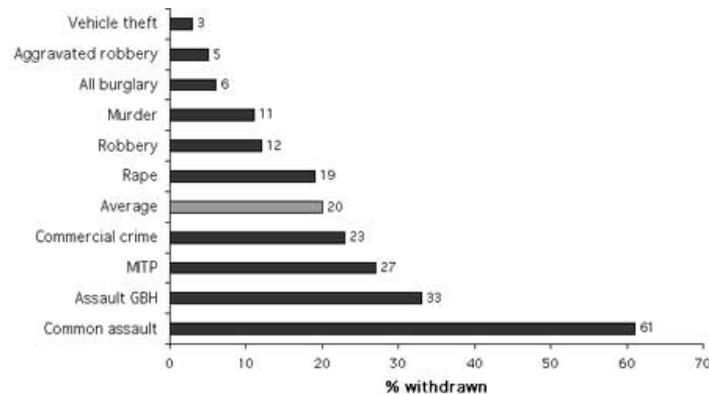
### Reducing withdrawn cases

Where a suspect has not been charged, the reported case against the suspect may be closed or 'withdrawn' by the police or the prosecution service.

An example is where two acquaintances get drunk in a bar on a Saturday night. They start arguing about something. The argument intensifies, eventually resulting in one of them assaulting the other with a blow to the eye with his clenched fist. The victim goes to the police, makes a statement, and opens an assault case against his assailant. Such cases are often not considered to be overly serious by police officials working at charge office level, especially when the complainant is no longer under threat of being assaulted further. As a result, and because the police often have their hands full on weekend nights dealing with other serious crimes, the suspect is not arrested and formally charged. As the weekend comes to an end, the suspect apologises to his drinking partner, who then goes back to the police on Monday morning asking that the case against the suspect be withdrawn. The police usually comply with such a request.<sup>9</sup>

In 2000, half a million of the total number of recorded cases, or every fifth case recorded by the police, was withdrawn before anyone was formally charged. Over half of all common assault, a third of all assault with the intent to commit grievous bodily harm (assault GBH), and around a quarter of all malicious injury to property (MITP) and commercial crime charges were withdrawn (Figure 2).

Figure 2: Number of cases withdrawn before going to court, as a proportion of cases recorded, 2000



The 535,000 assault (common and GBH) cases reported during 2000, make up one-fifth of the 30 most serious and prevalent offences recorded during 2000. Consequently, considerable police resources are wasted processing assault cases which end up being withdrawn.

No empirical research has been conducted to show why so many assault cases are withdrawn. It is likely, however, given the nature of the offence that most assault victims know their assailants fairly well. Many assaults happen in a domestic environment (between husband and wife, or intimate partners), and a social environment (between acquaintances in a bar or shebeen).

Many assault victims therefore continue to interact or live with their assailants after the assault has occurred. Many victims ask the police to discontinue with their case after they have been reconciled with their assailant. Moreover, especially in a domestic environment, many complainants are intimidated into withdrawing the case against their assailant. Some also feel trapped in the abusive relationship because of their dependence on partners for food, shelter, and money.<sup>10</sup>

To counter the high number of withdrawals, police officials at charge office level need to be trained to assist assault victims. Such victims should be informed of the implications of opening a criminal case. Namely, that they might be asked to go to court to testify against the person who assaulted them, and that the latter might have to pay a fine or even be imprisoned, should he be convicted.<sup>11</sup> If the assault in question is a minor one, victims should be informed of the alternatives to laying a criminal charge, such as contacting a social worker or a counsellor.

Victims who have opened an assault case against someone should be discouraged from withdrawing such a case. Police officers should make sure that such victims are not intimidated into withdrawing their case, and assist them in pursuing their case to the end.

### More trained personnel

By the admission of the Minister of Safety and Security, the SAPS requires more personnel to operate effectively. In December 2001, the SAPS employed some 120,600 personnel, of which 20,600 were civilians. Of the 100,000 police officers, 6,600 worked on SAPS head office related functions.<sup>12</sup> Of the remaining 93,400 officers in the provinces and police stations, a number worked in an administrative capacity at provincial and area level, and approximately 21,000 were detectives. In other words, the country has fewer than 72,000 police officers whose job it is to prevent crime. This figure is deceiving, however, as most uniformed members work in eight or 12 hour shifts. Consequently only about 20,000 uniformed police officers are at work at any one time—not enough to police a large country of 43 million people with high levels of serious crime.

The medium-term expenditure framework for 2002/03—2004/05 provides for the appointment

of an additional 16,000 SAPS members. However, the SAPS loses some 5,000 employees a year through natural attrition.<sup>13</sup> Consequently, the planned increases in personnel are moderate. By 2005, the SAPS' personnel numbers should be at similar levels to what they were in 1997.

There is a limit to the number of police officers the national fiscus can afford.<sup>14</sup> Consequently, the SAPS needs to train personnel who are able to meet the standards required of police officers in a criminal justice system based on the rule of law. Police officers who cannot take a coherent witness' statement or know how to collect evidence without infringing the constitutional rights of crime suspects, or those who cannot drive, or deal professionally with members of the public in the charge office, are unable to contribute to the effective performance of a modern police service.

The country's first detective academy, which opened its doors in 1997, has provided specialised training to detectives. However, given the training backlog and the high personnel turnover rate in the detective service, the academy is unable to train a sufficient number of detectives. Moreover, detective work cannot be easily taught and much is learnt through experience. However, the skills drain in the detective service has meant fewer mentors for new detectives.

In the medium to long-term, police officers who remain demotivated and are not trainable need to be moved out of the police service. They should be replaced by trainable and professionally minded recruits who are given the resources necessary to effectively fight crime.

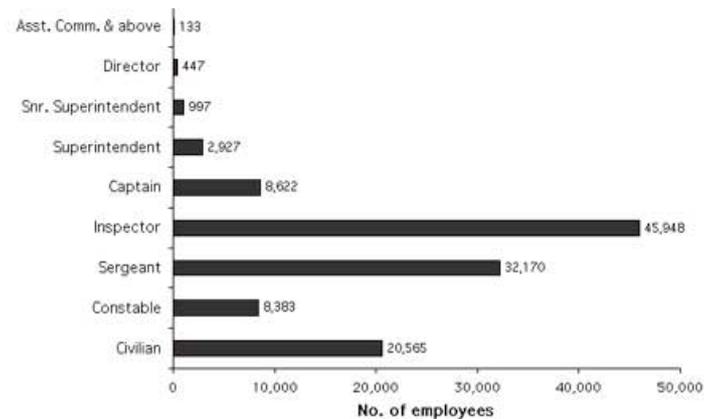
### **Intelligent resource allocation**

It is a trite point to make, but the SAPS—especially at stations situated in poorer communities and in many rural areas—lacks the resources its personnel needs to work effectively. Many police stations work with insufficient and/or old and inadequate equipment that form the basic tools of any police service: vehicles, radios, batons and even handcuffs.

Clearly, more and better resources cost money which is in short supply. It should, however, be possible to allocate existing resources in a more productive way. Inter alia, this could entail: reallocating head office-based police officers to police stations in high crime areas; placing more officers and supervisors on duty during the times when most crimes occur (Friday and Saturday evenings and at months' end); and transferring state vehicles used by officers performing administrative and managerial functions (and which are not used during the course of the day) to stations for direct policing duties.<sup>15</sup> The majority of the 2,800 body guards who are placed at the disposal of politicians by the police's VIP protection unit should be re-deployed to high-crime areas.<sup>16</sup>

Greater emphasis needs to be placed on having sufficient numbers of non-commissioned officers whose primary duties relate to visible policing work. Partly to meet ambitious affirmative action targets, and to increase the proportion of officers in higher rank-related salary categories, police personnel numbers at middle and higher management level have increased.<sup>17</sup> There is almost one commissioned officer (of the rank of captain and higher) for every seven non-commissioned officers in the police service. Out of 100,114 police officers employed by the SAPS in December 2001, only 8,383 (or 8%) were constables (Figure 3).

Figure 3: SAPS personnel by rank, December 2001



As a consequence of the relatively small number of junior ranked officers, the SAPS has become an over-managed organisation, where the higher management echelons devour personnel related resources at the expense of junior officers responsible for station and street level policing work. For example, in December 2001 the SAPS employed 447 directors, each of whom receives a salary package of about R350,000 per year.

### Reducing the workload through outsourcing

To reduce the workload on its staff, the police service should outsource a number of its non-core functions or services to the private sector. The SAPS could put out to tender the provision of a variety of services it currently performs, and set standards for the provision of these services with which private contractors would have to comply.<sup>18</sup> Encouragingly, the SAPS is investigating the viability of outsourcing non-core services and non-essential police support functions.<sup>19</sup> Examples of SAPS services suitable for outsourcing include:

- *Forensic investigation:* The lifting and comparing of fingerprints, taking photographs at crime scenes, and conducting chemical analyses and ballistic tests, is a specialised field of police work. Such work could be outsourced to companies or laboratories which have the staff and equipment to do forensic work.
- *Criminal investigation:* The investigation of commercial crime by private investigators and forensic accountants has taken place for some time in South Africa. Many private forensic accounting firms have become 'privatised commercial branches of the police comprised largely of ex-SAPS detectives'.<sup>20</sup> The SAPS could expand what is already happening on an ad hoc basis. For crimes where specialised skills are required for their detection—such as in the fields of commercial and environmental crime—the police could make greater use of outside skills on a regular basis.
- *Administrative functions:* Police officers perform a variety of administrative functions. There is a dual benefit in outsourcing such work to the private sector. First, police officers doing such work become available to fight crime. Second, the state could employ people who, in contrast to police officers, are actually trained to do administrative work.
- *Court orderly duties:* Each court room in the country has at least one or two court orderlies, the majority of whom are police officers. Such a function could be outsourced to private security guards.
- *Transporting prisoners:* Instead of using SAPS personnel to transport unsentenced prisoners between police stations, courts, and prisons throughout the country, private security companies could be contracted to perform such a function.
- *Other police services suitable for outsourcing:* Serving summonses; guarding crime scenes; guarding government buildings; security at private functions such as sporting events; and police training in fields such as driving or computer skills.

### KEY PROSECUTION WEAKNESSES

The performance of one part of the criminal justice system is closely linked to the performance of other parts of the system. For example, a performance measurement for the

prosecution service is the length of time it takes to finalise a case in court. However, this depends not only on the skills of the prosecutor but also on the proficiency with which the case is investigated by the detective service. A prosecutor has only limited control over the actions of the investigating officer of a case. A good prosecutor will exploit the limited control he has and guide the detective in the investigation of a case. The case processing rate thus remains a useful performance measurement for the prosecution service provided the limitations of such a measure are taken into account.

The prosecution service elects to proceed in the prosecution of a suspect, only where there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.<sup>21</sup> This is a luxury the police do not have. The police has to investigate all credible allegations that a crime has been committed. The performance of the prosecution service can consequently be measured on the number of cases prosecuted and convicted.

### Declining prosecutions and rising crime

The number of cases taken on by the prosecution service has declined at a time when recorded crime is increasing. In 1994/95, 350,200 prosecutions and 260,900 convictions took place. This decreased to 271,100 prosecutions and 211,800 convictions in 2000. The number of serious crimes, as recorded by the SAPS, increased by 481,000 between 1994 and 2000.<sup>22</sup>

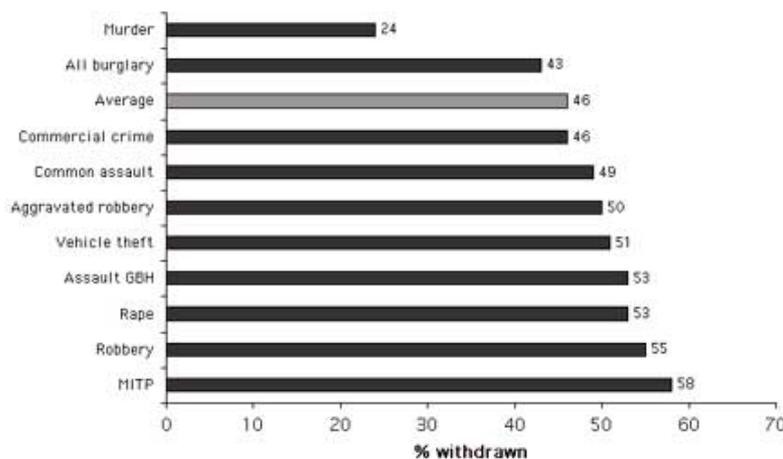
In other words, while the number of recorded serious crimes increased by 24% between 1994 and 2000, the number of prosecutions dropped by 23% and convictions by 19%. The chances of the average offender being caught and punished consequently declined after 1994.

There has been a slight increase in the number of prosecutions and convictions between 1999 and 2000. Figures for 2001 had not been released at the time of writing.

### Cases withdrawn in court

In 2000, 46% of the cases referred to court by the police, were withdrawn in court (Figure 4). This is not surprising in cases where the victim and the offender are known to each other and where the victim might decline to testify against the accused. Or, in cases where the trial might be unreasonably delayed due to outstanding investigations (e.g. a district surgeon's report). Unsurprisingly, therefore, as a proportion of the number of cases sent to court by the police, about half of rape and assault cases are withdrawn in court.

Figure 4: Number of cases withdrawn in court, as a proportion of cases referred to court, 2000



However, about half of all residential housebreaking, robbery, and car theft cases which were referred to court in 2000, were also withdrawn by the prosecution service. For these crimes it is unlikely that the victims are the reason for the high number of withdrawals. The more likely reasons are inordinate delays in the investigation of these crimes, and the failure of witnesses

to testify in court. The latter might be because many witnesses tire of going to court with the expectation to testify, only to be told that the case will be postponed because of outstanding investigations or because the court is too busy to accommodate their case.

Some witnesses are intimidated from attending court by the criminals they are supposed to testify against. Many burglaries, robberies and car thefts are committed by crime syndicates who would not hesitate to intimidate those who might testify against them. Moreover, some witnesses might have no faith in the criminal justice system, and elect not to testify for this reason.<sup>23</sup>

The number of cases withdrawn in court, as a proportion of cases referred to court, has risen consistently since 1996. In 1996, 34% of cases referred to court were withdrawn, thereafter increasing as follows: 36% (1997), 38% (1998), 42% (1999), and 46% (2000).

### **Outstanding and finalised cases**

Since April 1999, the National Prosecuting Authority's Court Management Unit has collected data on the number of finalised and outstanding criminal court cases. Between April 1999 and July 2001, the country's regional courts (which deal with the bulk of all serious criminal trials) finalised an average of 3,010 cases a month, but had an average of 43,500 cases per month outstanding on the courts' rolls.

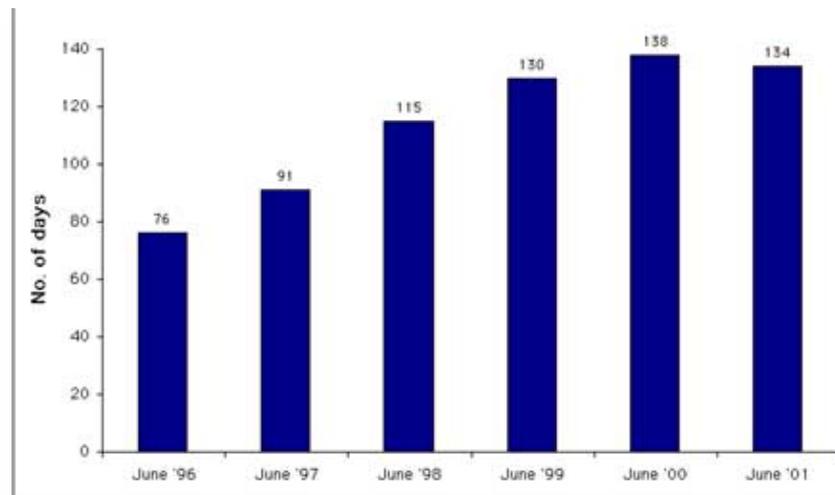
The actual number of cases finalised per month by the regional courts increased over the 28-month period, but the number of new cases coming into the system increased at a greater rate. As a result more cases were outstanding on the regional courts' rolls in July 2001 than in April 1999. (July 2001 was the latest period for which figures were available at the time of writing.)

### **Detention cycle time**

Some accused are incarcerated while they await the outcome of their trial. This is because the courts refuse to grant them bail, or because bail is set at an amount which is unaffordable to the accused. There are a number of factors which determine the length of time an accused spends in prison awaiting the finalisation of his trial. The speed with which the police finalise the investigation, the length of the trial, and the number of postponements the accused requests during the trial are all factors which lengthen the awaiting trial period of an accused, and over which the prosecution has little control. However, in most cases there are delays in the finalisation of trials because the courts' rolls are too full or badly managed, something over which the prosecution has some influence.

The detention cycle time, or the average length of time unsentenced prisoners remain incarcerated until the finalisation of their trials, rose considerably between 1996 and early 2002. In June 1996, the average unsentenced prisoner spent 76 days in custody—by February 2002 this had increased to 139 custody days. This means that, on average, accused persons are imprisoned for four-and-a-half months awaiting the finalisation of their trial (Figure 5).

Figure 5: Average period unsentenced prisoners were incarcerated, 1996–2002



Such delays in the processing of cases involving unsentenced prisoners place a considerable financial burden on the department of correctional services. A prisoner costs the department some R88 a day. Multiplied over an average of 139 custody days this comes to R12,200 per average unsentenced prisoner.

## IMPROVING THE PROSECUTIONS' PERFORMANCE

### Improved remuneration

One of the primary reasons underlying the high staff turnover in the prosecution service—and the resulting low experience and performance levels of prosecutors—are the salaries paid to prosecutors. Over the last few years salaries of prosecutors have increased at a greater rate than those of public servants generally. However, most prosecutors' salaries are significantly lower than those of magistrates, enticing the former to become magistrates.<sup>24</sup>

A careful analysis of the national budget and the government's expenditure priorities reveal that a substantial salary increase for prosecutors is affordable. In the 2000/2001 financial year the national salary bill for prosecutors was R263 million.<sup>25</sup>

The total annual salary bill for prosecutors amounts to about 10% of the justice department's budget, and only about 1% of the money spent on the three core departments of the criminal justice system (safety and security, justice and constitutional development, and correctional services).

### Reward competence

The existing salary structure for prosecutors rewards loyalty over competence. The longer a person works as a prosecutor the higher his salary tends to be. In theory there is some merit in such a system as it seeks to encourage prosecutors to remain in the prosecution service, thereby retaining their accumulated experience and knowledge. However, in practice the best prosecutors are not always those who have been in the system the longest.

In conjunction with prosecutors and their unions and staff associations, the National Prosecuting Authority should devise a weighting on a variety of performance related variables which influence salary levels.

For example, in addition to the one variable which links salaries to experience levels, variables measuring prosecutors' work output, and the type of court they are working in should also determine the level of remuneration they receive.

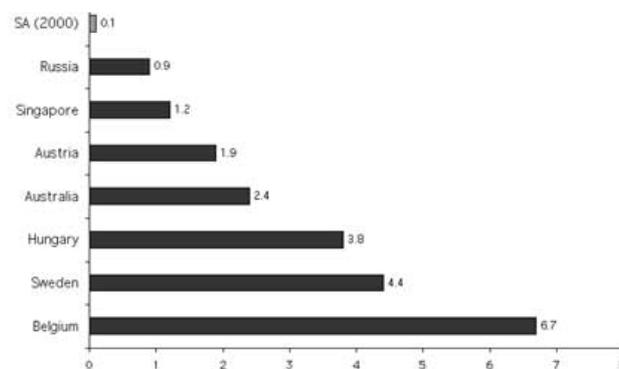
### Reducing the workload through outsourcing

Until recently, the number of new prosecutor posts created were not in proportion to the rise in the crime rate. As a result of the lack of staff—especially senior and experienced prosecutors—the prosecution service is unable to effectively deal with all the cases referred to it by the police. Between 1987 and the end of 1999 the number of prosecutors increased by 79%. Over the same period the number of serious crimes recorded by the police more than doubled.

The extent to which the South African prosecution service is overloaded with cases becomes apparent when comparing it with prosecutors' workload in other countries. In 1994, there were on average almost seven (6.7) prosecutors for every recorded murder in Belgium. Even in the crime ridden Russian Federation, there was almost one prosecutor per recorded murder.

In South Africa, however, (a country for which more recent figures are available), there was on average only one prosecutor for every ten murders recorded in 2000 (Figure 6).

Figure 6: Number of prosecutors per recorded murder, 1994



A number of outsourcing schemes could be devised to reduce the workload of prosecutors in the full-time employ of the state. Most prosecutors enter their profession directly from law school. Prosecutors have little or no training in subjects such as forensic accounting or computer science. As a result, computer related fraud and intricate commercial crimes are often not prosecuted, or are prosecuted unsuccessfully, because of the lack of technical knowledge on the part of prosecutors.

Such specialised prosecutions should be outsourced to the private sector.<sup>26</sup> Bruce Benson, an economist from Florida State University, argues that there are advantages in specialisation, and the use of specialised personnel:

One reason that the private sector might be expected to do well what the government criminal justice system does badly is that consumers generally have narrowly focused concerns. Thus, when they pay a private firm to alleviate those concerns, they can hire someone with expertise. When resources *specialise* in their area of comparative advantage, economic efficiency is enhanced. More is produced with the same resources, or fewer resources are needed to produce the same level of output.<sup>27</sup>

Certain crimes have a seasonal prevalence. Over the Christmas/New Year period there is an upsurge of drunken driving, shoplifting and assault cases. Many of these are normally not complicated cases to prosecute. Because of their sheer number, however, and the fact that many prosecutors go on leave over the Christmas period, a congestion of cases builds up at the beginning of every year. In the busier urban courts it can take up to six months to process these. The prosecution of such cases should be outsourced to articled clerks and junior attorneys in the private sector. This would assist the state to deal cost effectively with the seasonal increase in cases.

### Administrative assistance

Prosecutors perform a variety of clerical and administrative functions. For example, during 1997 alone, prosecutors at the Cape Town magistrates' court spent almost 3,000 hours

photocopying documents.<sup>28</sup> Moreover, some experienced prosecutors perform no direct prosecutorial functions and spend their working days on a variety of managerial and administrative tasks.

More clerks, administrative assistants and professional managers need to be employed to take the burden of non-prosecutorial functions away from prosecutors. Clerks and administrators are likely to be better at performing clerical and administrative functions than prosecutors who have no formal training in such fields.

## **Diversion**

Diversion is the channelling of cases from the formal criminal justice system on certain conditions to extra-judicial programmes, at the discretion of the prosecution.<sup>29</sup> Diversion is based on the premise that the formal criminal justice system with its familiar steps of arrest, trial, conviction and sentence is not the only recourse to criminal justice. There are other ways in which to treat offenders and their victims which will serve them and society in a more constructive manner which is often more likely to prevent re-offending than imprisonment.<sup>30</sup> One of these ways is diversion which, inter alia, aims to make offenders accountable for their actions, identify underlying problems motivating offending behaviour, provide educational and rehabilitative programmes to the benefit of all parties concerned, and reduce the case-load of the formal justice system.

Diversion in South Africa is still in its early stages, and while diversion is identified as a component of a number of governmental criminal justice policy proposals, there exists no legislation or regulations to govern a uniform diversion policy for the country.<sup>31</sup> Given the benefits of diversion, properly structured diversion programmes should be implemented in most parts of South Africa.

Diversion programmes reduce the workload of the courts and the prosecution service, especially in respect of minor offences and juvenile offenders. This permits the prosecution service to focus more of its energies on the prosecution of serious crimes and career criminals. The costing of the draft Child Justice Bill disclosed that diversion programmes for child offenders should cost less than the traditional and formal court-centred approach of dealing with young offenders.<sup>32</sup> It is estimated that the state will save R200 million a year once a comprehensive child justice system, as provided for in the bill, is operational.<sup>33</sup>

## **Training**

Training and skills development need to play a more prominent role in the development of prosecutors. The legal environment in which prosecutors operate changes constantly as new legislation is promulgated or old statutes amended, and the high courts hand down new interpretations of the law. Moreover, the ways in which criminals operate and try to hide their criminal activities evolve all the time. To stay abreast of new developments prosecutors must be continuously retrained and taught new skills. Training and professional development should be an on-going process for all prosecutors, and needs to be given greater emphasis.

The volume of cases flowing into and out of the magistrates' courts—especially in the district courts—is high. Lower court prosecutors could work more effectively if they had case flow management skills.<sup>34</sup> These are skills such as the ability to identify the status of a docket and determine how long the eventual trial will take, the ability to manage a court diary and to decide in which logical order a day's trials should be heard given the needs and availability of witnesses.

The more effectively prosecutors manage their cases and courts, the more time they have to prosecute cases. Justice College, a training institution for prosecutors, has identified this as a skills-gap. There is, however, no uniform court and case management procedure in the country and individual courts are managed in different ways.<sup>35</sup> This makes it impossible for the college to present comprehensive court and case management lectures to prosecutors who work in courts throughout the country.

A uniform management system, and a manual based on such a system, needs to be

developed for all courts and prosecutors' offices to overcome this problem and to provide Justice College with a national syllabus on which to train prosecutors.

## **STRATEGIC PRIORITY: THE PROSECUTION SERVICE**

Criminal justice policy makers—like all people working on a limited budget and with limited resources—have to prioritise. With high levels of violent crime, and growing public impatience with the state's ability to safeguard its citizens, South Africa does not have the time to develop a first-class criminal justice system with the hope of thereby reducing crime over the long run.

As a result of its central position in the criminal justice process, the performance of the prosecution service is crucial to the smooth running of the whole system. A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to accused persons' request for bail, the number of unsentenced prisoners goes up. This causes overcrowding in the country's prisons and makes it difficult for prison wardens to adequately look after sentenced prisoners and rehabilitate them.

Moreover, if the prosecution service does not operate optimally, witnesses are discouraged from testifying and many guilty accused are acquitted of the charges against them. This lowers police morale, and fosters public perceptions that crime pays, creating public disillusionment in the ability of the criminal justice system to effectively fight crime.

A number of new structures, institutions and strategies have been created to give teeth to the government's commitment to transform the criminal justice system, and to make it more effective in the fight against crime.<sup>36</sup> However, given the ambitious nature of some of the policy visions, the complex features of much of the new crime fighting legislation and the magnitude of the crime problem, it will take some time before the criminal justice system can extricate itself from the crisis it is in.

Two important components of the criminal justice system are too large and reliant on equipment and expensive buildings to be able to respond to the present crisis in a rapid and flexible manner. The police service employs over 100,000 police officers who rely on their equipment—from vehicles and radios to bullet proof vests—to properly perform their work. The department of correctional services employs 30,000 prison wardens and is dependent on the integrity of its costly prisons and the efficiency of the courts, to operate optimally.

Given the constraints under which the criminal justice system is operating, policy makers should prioritise key interventions which:

- will significantly enhance the performance of the criminal justice system in the short to medium-term;
- are affordable; and
- enhance public safety and protect the constitutional rights of all, including the rights of crime suspects and convicted offenders.

### **Boost performance quickly**

The prosecution service is in a position to respond positively to the crisis in the criminal justice system in the short to medium-term. There are a number of reasons for this. First, the prosecution service is small, comprised of around 2,500 prosecutors and state advocates. Personnel related and transformational problems are therefore manageable compared to the much larger and more complex police service.

Second, unlike most other government departments the prosecution service is staffed almost exclusively by university graduates. Most prosecutors consequently have the attributes of graduates: a high level of theoretical training, the ability to learn and work independently, discipline, and above-average levels of intelligence.

Third, the National Prosecuting Authority has accurately identified most of the problem areas which impinge on the ability of the prosecution service to function effectively. There is also general unanimity among the senior staff in the office of the national director of public

prosecutions about what the major obstacles are which need to be removed to fix the prosecution service.

### **Affordability**

It is cheaper to address problems in the prosecution service than those in other areas of the criminal justice system: It costs hundreds of millions of rand to construct a reasonably sized prison in South Africa, and another R30,000 a year for every prisoner.<sup>37</sup> The country's 55,000 unsentenced prisoners cost the department of correctional services R1.8 billion a year. The costs to the state of employing one prosecutor are the same as accommodating five unsentenced prisoners.

With more prosecutors and court rooms, it is possible to reduce the number of unsentenced prisoners. To its credit the treasury has substantially increased expenditure on the National Prosecuting Authority, and a few hundred new prosecutors were recruited in 2001/02. However, a strategic decision to divert spending from corrections to prosecutions is necessary. Instead of spending money on building prisons to accommodate the ever growing number of unsentenced prisoners, such money would be better spent employing more prosecutors and building court rooms. For example, if the number of unsentenced prisoners could be halved, the expected saving of R900 million would allow a doubling in expenditure on the National Prosecuting Authority.

### **Public safety and protecting rights**

By improving the performance of the prosecution service, policy makers will achieve two objectives which are usually difficult to reconcile: protecting the rights of accused persons and convicted offenders, and increasing public safety and improving the image of the criminal justice system.

A more effective prosecution service will reduce the time between an accused person's arrest and the finalisation of his trial, thereby enhancing the constitutional right accused persons have to a speedy trial.<sup>38</sup> Persons accused of minor offences who cannot afford to pay the bail amount set, or persons who have been denied bail, will spend less time incarcerated awaiting trial.

Moreover, a more rapid case processing rate will reduce prison overcrowding levels. Between June 1994 and December 2001, the number of unsentenced prisoners increased by a massive 183%. Over the same period the number of sentenced prisoners increased by 50%. In December 2001 the country's 239 prisons were holding 175,000 inmates but had an approved occupancy level of only 105,400. According to the department of correctional services, overcrowding has an 'adverse effect on offenders, staff and the safe custody of prisoners'.<sup>39</sup>

Overcrowding exacerbates tension, hostility and aggression between prisoners, and between prisoners and prison personnel. During 2000/01, 2,361 assaults by prisoners on prisoners were recorded by the department (up from 2,271 in 1999/2000), and 619 assaults by prison personnel on prisoners (up from 559).<sup>40</sup> High overcrowding levels also impede the department's ability to rehabilitate prisoners.

A more effective prosecution service should enhance public safety and public confidence in the criminal justice system, by increasing the likelihood of offenders being convicted and punished for their crimes. The faster trials are processed by the courts, the greater the likelihood that state witnesses will be willing to testify and remember what they witnessed at the crime scene. Petty criminals who presently cannot afford to pay bail, have to spend months incarcerated awaiting trial where they are often under the damaging influence of their fellow inmates. The likelihood of prisons being 'schools of crime' for petty offenders should be reduced once trials are processed with a minimum of delay. Moreover, communities will regain confidence in the criminal justice system if criminals are prosecuted and convicted without undue delay. This will encourage more people to report crime and testify against criminals, and reduce acts of vigilantism.

## **WHAT ELSE CAN BE DONE?**

### **Cheap, fast and high impact**

The criminal justice system has undertaken some successful high impact initiatives, such as opening additional and Saturday courts, setting up specialised commercial crime courts and devising joint training courses for prosecutors and detectives. There are, however, a number of other weaknesses in the criminal justice system which can be addressed at relatively low cost and within a short period of time, and yet make a significant impact on the system's effectiveness.

Policing is labour-intensive, and it is expensive to hire more police officers. It is, however, possible to boost the performance of the available police officers by providing them with basic equipment and training. There are numerous police stations which do not have enough hand-held radios, handcuffs and working flashlights for their operational personnel.<sup>41</sup>

The few thousand police officers who do not have a driver's licence need to be trained to drive without delay. In South Africa, with its large spread-out urban centres and expansive countryside, a police officer who cannot drive is of only limited effectiveness.

Over the last few years many prosecutors have received computers. However, many of them have not been trained in their use, with the result that some prosecutors have not been able to exploit the time-saving benefits a computer can provide. Many prosecutors' offices also lack photocopy and fax machines, which would permit them to function more effectively.

### **Better communication**

Effective communication is affordable, and has the potential of fulfilling one of the criminal justice system's primary objectives: making people feel safer. The way the various components of the criminal justice system communicate with the public is, with a few exceptions, inadequate.

Feelings of safety are often influenced by perceptions about the risk of crime rather than by the facts. Many people are fearful of crime, not because they face a high risk of being victimised, but because of the often sensationalist crime-related stories they read and hear in the media, or are told by their friends around the dinner table. Generally the most fearful people—the old and the wealthy—face the lowest risks of becoming victims of violent crime.

In South Africa the effective communication of criminal justice successes and what the state is doing to fight crime is particularly important, given the growing threat of vigilantism and popular beliefs that the constitution has given criminals too many rights. For example, few people—including senior politicians, let alone the average citizen—are aware of a 1998 law which provides for a mandatory life sentence for any adult convicted of, inter alia, premeditated murder or gang rape.<sup>42</sup> Similarly, few people know that persons accused of such serious violent crimes have to show 'exceptional circumstances' why they should be released on bail—a difficult onus to dispel.<sup>43</sup>

### **Faster implementation of key projects**

An important flaw in the government's approach lies in its inability to expeditiously rectify glaring weaknesses in the criminal justice system. For example, fingerprint records of convicted criminals are stored in a central registry in Pretoria. If prosecutors want to ascertain whether an accused has previous convictions, the registry must check its archives manually, which can take up to three months. An electronic fingerprint database would improve the operational effectiveness of the courts and prevent the erroneous release on bail of repeat offenders. The government has discussed the need to introduce an electronic fingerprint database since 1994. Yet such a system will be fully operational only in July 2002.<sup>44</sup>

In 1997, the department of correctional services concluded a study establishing that the electronic monitoring of offenders in community corrections is cost-effective and reduces the level of non-compliance when offenders are placed under house arrest. In early 1999, it was announced that electronic monitoring 'will become a major part of our community corrections

system during the year 2000'.<sup>45</sup>

At the time of writing the electronic monitoring of offenders has not yet been introduced, and it is unclear whether it will occur before the end of 2002.<sup>46</sup> Yet, such a system promises to be more effective and cheaper than the present system whereby departmental officials physically check on the whereabouts of parolees and persons on community corrections.

## CONCLUSION

Criminal justice policy makers will have to make bold and innovative decisions to rapidly boost the performance of the criminal justice system in a cost effective way. Moreover, they will have to make some courageous choices, motivated by a desire to improve the whole criminal justice system. Firing untrainable and unprofessional police officers, and outsourcing a number of criminal justice functions, will not be popular with trade unions and state employees whose jobs will be lost.

Such sacrifices will have to be made if the performance of the criminal justice system is to be enhanced, and to convince crime-ridden communities to reject vigilantism.

The department of correctional services is also likely to resist cutbacks in its budget in order to finance the building of court rooms, and the employment of more prosecutors and magistrates. However, given the present crisis the criminal justice system faces, it is crucial that bottlenecks within the system, such as the present case backlogs in the courts, are addressed rapidly. Policy makers will have to employ great skill and diplomacy to convince criminal justice departments that some will have to make short-term sacrifices for long-term gains.

Finally, it needs to be borne in mind that there is a limit to what the criminal justice system can do to reduce crime. Most violent inter-personal crimes are not premeditated and are committed by people who are known to their victims. Many of these crimes occur behind closed doors in private homes. Even by doubling its patrols and visible policing efforts, the police is unable to prevent most such crimes.

To change the widespread culture of violence in South Africa will take time. Crucially, it cannot be done by the criminal justice system alone. Peoples' beliefs and values are at their most mouldable during their childhood and early adolescent years. During this time young people generally have little contact with the police or criminal justice system. Their role models and those who have influence over them are their parents, siblings, extended family members, teachers, religious leaders, friends and other people in their age group with whom they mix on a regular basis. Such role models and age-group peers, and civil society organisations all exert informal social controls, or pressures to conform to the law and socially acceptable behaviour. This places an onus on all law abiding South Africans to play their part in changing the destructive values and attitudes that have been internalised by a large portion of the population.

## NOTES

1. M Schönteich, Justice the winner: The 2001/2002 criminal justice budget, [Nedbank ISS Crime Index 5\(1\)](#), January–February 2001, pp 25-28.
2. *Attitudes to National Issues in South Africa*, Human Sciences Research Council, Pretoria, 1994 and 2000.
3. Caution needs to be exercised when comparing the annual number of cases recorded with the annual number of cases withdrawn, sent to court, and prosecuted and convicted (also called the 'yearly-review' method). Cases recorded during one year, are often investigated and prosecuted during the following year. For example, the investigation of a complicated murder case reported in December 1999 might be finalised in mid-2000. The prosecution of the case may occur only in 2001. Rates based on the yearly-review method are premised on the assumption that the statistics are stable from year to year and that there is no growth or decline in backlogs. The advantage of the yearly-review method is that it is quick to collect data for an entire population. The yearly-review method is widely used both in South Africa and internationally. A study which tracked the outcome of individual cases (also called the

individual case tracking method) came to similar results as the yearly-review method. See R Paschke, *Conviction rates and other outcomes of crimes reported in eight South African police areas*, Research paper 18, Project 82, South African Law Commission, Pretoria (undated).

4. For a detailed description of the categories covered see M Schönteich, Assessing the crime fighters. The ability of the criminal justice system to solve and prosecute crime, [ISS Papers 40](#), September 1999, pp 6-10.
5. M Schönteich, Security, in J Kane-Berman (ed), *South Africa Survey 2001/2002*, South African Institute of Race Relations, Johannesburg, 2001, p 105.
6. *Annual report 2000/2001*, Department of safety and security, Pretoria, 2001, pp 25-27.
7. According to a 1997 Institute for Security Studies victims survey conducted in Johannesburg, the majority of assault, rape, and murder victims (or members of the victim's household in the case of murder) knew the offender by name or by sight. See, A Louw, et al, Crime in Johannesburg. Results of a City Victim Survey, [ISS Monograph Series 18](#), February 1998, pp 23-24.
8. Criminal Justice. Guilty as charged, *The Economist*, 9 March 2002, p 40.
9. Under such circumstances a case is withdrawn only after the complainant has signed a 'withdrawing affidavit' stating that he does not wish the case to proceed. Moreover, the decision to withdraw the case is made by the head of the CID branch at the police station where the case was opened. Should the CID head be in doubt whether to withdraw the case, he would refer the matter to the local prosecutors' office for a decision on whether to proceed with the case and charge the suspect in question.
10. A Louw and M Shaw, Stolen opportunities: The impact of crime on South Africa's poor, [ISS Monograph Series 14](#), July 1997, p 13.
11. It is not being suggested that police officials should discourage crime victims from reporting crime, merely that they should educate complainants of the implications of opening a criminal case against someone.
12. Staff employed in 'head office related functions' include: head office staff, all CIAC, CRC and forensic laboratory staff in the country, all protection service personnel, members of the anti-corruption units, detective academy staff, and members of specialised units that function on a national basis (e.g. the border police) who are based in Pretoria.
13. Interview, Senior Superintendent Johann Nelson, SAPS finance division, Pretoria, 8 February 2002.
14. See A Altbeker, Costly cops? Effective policing and the SAPS budget, [Nedbank ISS Crime Index 6\(6\)](#), November–December 2001, pp 11-14.
15. See Prime times: Analysing when crime occurs, [Nedcor ISS Crime Index 2\(3\)](#), July–August 1998, pp 16-18.
16. P Kirk, Closely guarded figures, *Mail & Guardian*, 21 October 2001.
17. Confidential interviews with senior police managers, February 2002, Pretoria.
18. For a discussion of the benefits to the state of outsourcing its functions see B L Benson, *To Serve and Protect. Privatization and Community in Criminal Justice*, New York University Press, New York, 1998, pp 26-40.
19. Interview, Louis Eloff, deputy national commissioner, South African Police Service, 23 June 2000, Pretoria.
20. Interview, Messrs Farouk Seedat and James Walker of accounting firm Deloitte & Touche, Cape Town, 30 September 1997. See also, S G Ghezzi, A private network of social control: insurance investigation units, *Social Problems* 5(30), 1983, pp 521-531, for a US perspective.
21. This is the test prosecutors use when deciding whether to institute a prosecution against a suspect. See National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, p A.3.
22. *The incidence of serious crime in South Africa between January and December 2000*, Crime Information Analysis Centre, Pretoria, 2001. E-mail to the author from Inspector Ina du Plessis, Crime Information Analysis Centre, Pretoria, 27 July 2001.
23. A 1996 survey of people on the Cape Flats (outside Cape Town) found that most disapproved of, and were dissatisfied with, the performance of the SAPS and the courts. Overall, perceptions of the police and the courts were worse among those who had been victimised. Moreover, perceptions of the police and the courts were the

- most negative among those who had laid a charge and had had contact with the police and the courts. See, C Africa, et al, Crime and community action: Pagad and the Cape Flats, 1996-1997, *POS Reports* 4, June 1998, Idasa public opinion service, p 11.
24. M Schönteich, Lawyers for the people: The South African prosecution service, *ISS Monograph Series* 53, March 2001, pp 119-121.
  25. Court Management Unit, National Prosecuting Authority.
  26. Section 38(1) of the National Prosecuting Authority Act no. 32 of 1998 grants the national director of public prosecutions the authority to engage, on behalf of the state, persons having 'suitable qualifications and experience to perform services in specific cases'.
  27. B L Benson, *The enterprise of law. Justice without the state*, Pacific Research Institute for Public Policy, San Francisco, 1990, p 237.
  28. F W Kahn, 1997 annual report submitted by the attorney-general of the Cape of Good Hope, Cape Town, p 15.
  29. L M Muntingh and R Shapiro (eds), *NICRO diversion options*, NICRO, Cape Town, 1997, p 3.
  30. *Ibid*, p 2.
  31. See *Justice Vision 2000*, Department of Justice, Pretoria, September 1997, p 28; *National Crime Prevention Strategy*, May 1996, national programme 1.6, pp 60-62.
  32. C Barberton, Reallocating expenditure to implement the draft Child Justice Bill, *Article* 40 2(2), May 2000, Children's Rights Project, University of the Western Cape, pp 4-8.
  33. Interview, Advocate Ann Skelton, chairperson, juvenile justice project committee, South African Law Commission, 15 November 2000, Pretoria.
  34. Interview, Hans Scheepers, head: prosecutorial training, Justice College, 16 August 2000, Pretoria.
  35. Interview, Cecille van Riet, head: justice college, Justice College, 16 August 2000, Pretoria.
  36. For example: National Prosecuting Authority, Asset Forfeiture Unit, Directorate of Special Operations, Independent Complaints Directorate, National Crime Prevention Strategy, Operation Crackdown, Rural Protection Plan, Inspecting Judge of Prisons.
  37. The construction cost of a prison is approximately R200,000 per prisoner space. The recently constructed Malmesbury prison, which can accommodate about 1,000 prisoners, cost R280 million to build.
  38. Section 35(3)(d), Constitution of the Republic of South Africa Act 108 of 1996.
  39. Department of correctional services presentation to the select committee on security and constitutional affairs, Cape Town, 7 June 2000.
  40. *Annual Report 1 January 2000 to 31 March 2001*, Department of correctional services, p 70.
  41. See T Leggett, More flash, fewer flashlights: Back to basic police equipment, *Nedbank ISS Crime Index* 5(6), November-December 2001, pp 20-23.
  42. See, for example, M Schönteich, Sentences are tough, but with few convictions, *The Citizen*, 4 July 2001.
  43. Section 60(11)(a), Criminal Procedure Act no. 51 of 1977, as amended by the Criminal Procedure Second Amendment Act no. 85 of 1997.
  44. S Tshwete, written reply, question no. 251, internal question paper no. 9, National Assembly, 2 March 2001.
  45. J S van der Merwe, Prisons without bars: Electronic monitoring and community corrections, *Crime & Conflict* 18, Summer 1999, p 21.
  46. Interview, R Mamabolo, Media liaison: department of correctional services, 23 January 2002, Pretoria.

## ABOUT THIS PAPER

Given the constraints under which the criminal justice system is operating, policy makers need to prioritise key interventions which significantly enhance the performance of the criminal justice system in the short- to medium-term; are affordable; and enhance both public safety and the constitutional rights of all. Given these constraints, what choices do criminal justice policy makers have, and what course of action should they follow? This paper seeks to answer this question by looking at the role of the criminal justice system, and identifying key interventions to improve the performance of the police and prosecution services. The paper

argues that enhancing the capacity of the prosecution service should be a strategic priority. This should improve the performance of the entire criminal justice system within a short period of time. Boosting the capacity of the prosecution service is both affordable and manageable, and promises to make the greatest impact on the performance of the system as a whole.

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