

STUDY ON THE USE OF BAIL IN SOUTH AFRICA

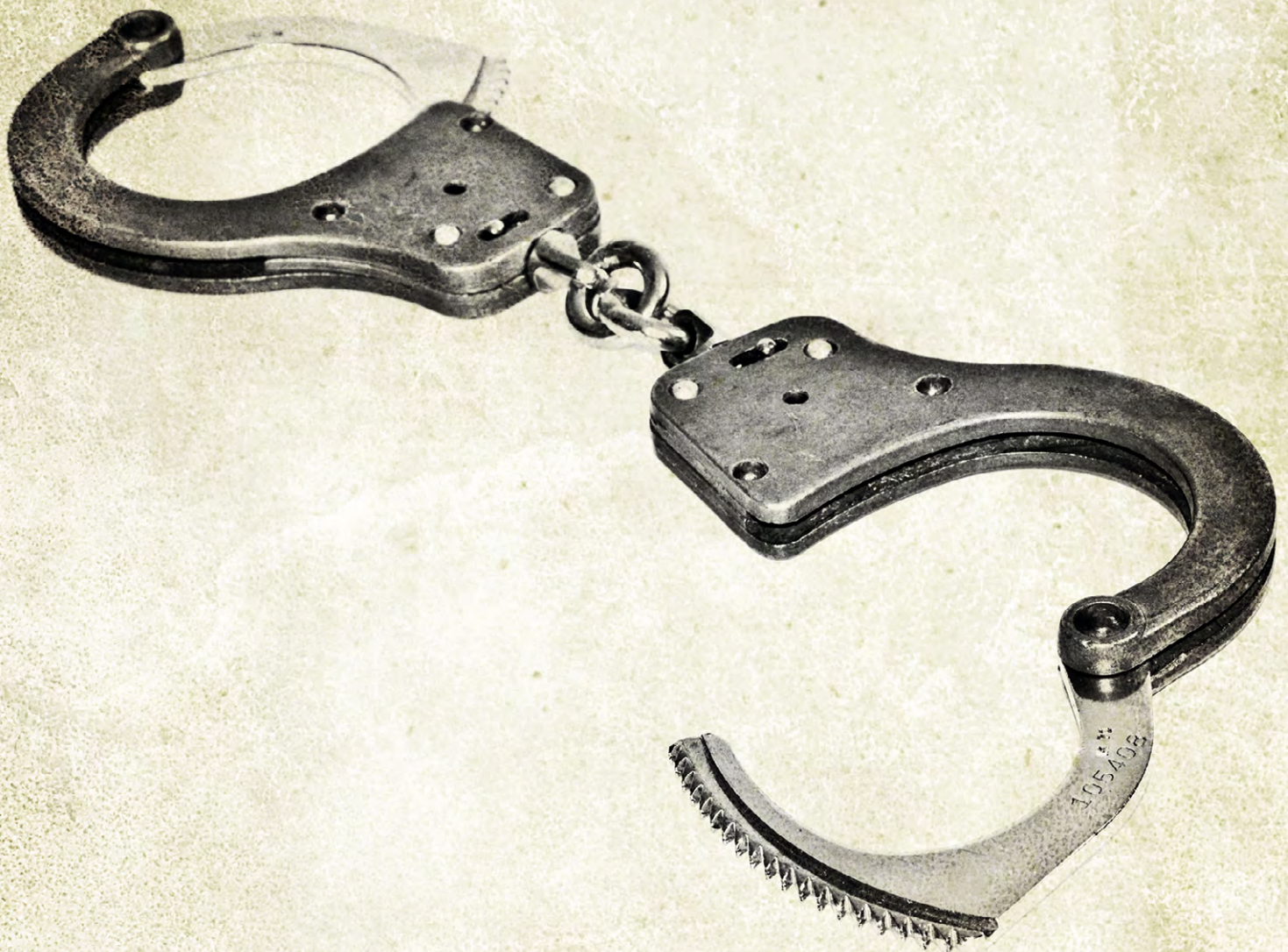
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EXECUTIVE SUMMARY

In 2015, a Baseline Study was undertaken to measure South Africa's remand system against the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) of the African Commission on Human and Peoples' Rights (African Commission). The Study identified various challenges in relation to the use and provision of bail and recommended that a further study be undertaken to understand the practical barriers encountered.

This report follows the Baseline Study and past research. It reviews current bail practices against the legal framework. Through semi-structured interviews with relevant experts and stakeholders, gaps and challenges in the way bail is used are identified. A number of findings are made, together with proposed recommendations for strengthening the practice and use of bail in South Africa.

South Africa has a comprehensive legal framework that is largely aligned to the Luanda Guidelines and related human rights norms and standards. Various legislative provisions recognise the fundamental rights of detained persons and provide for alternatives to remand detention.

Despite these provisions, there appears to be a general unwillingness to grant bail, particularly by the South African Police Service (SAPS), resulting in rights violations and inefficiencies in the criminal justice system.

This report finds that alternatives to remand detention are simply not used across the criminal justice sector. Some of the reasons why alternatives are not used include corruption, lack of knowledge of the legal framework, performance targets and rewards, and community perceptions of crime and violence and the resultant public pressure placed on the criminal justice sector. Ultimately, a long-term intervention is recommended in order to shift the mindset and the perception of measures, within communities and the sector, and thereby successfully reduce crime and keep communities safe. Such an intervention would address the root cause for the underutilisation of alternatives to remand detention. In addition, a long-term intervention supported by legislative reform, a review of performance targets, and the review (with the possible reintroduction) of pre-trial services will address some of the practical challenges in the use of bail.

1. INTRODUCTION AND BRIEF HISTORY OF BAIL IN SOUTH AFRICA

1.1 Introduction

The United Nations (UN) Secretary-General has highlighted the excessive use and length of pre-trial detention as one of the major causes of prison overcrowding. Shortcomings in criminal justice procedures, including the lack of legal aid, a shortage of judges, inadequate investigations and the loss of case files, and pressure from the media and public opinion to tackle insecurity by imprisoning offenders, were identified as dominant causes for high rates of pre-trial detention globally.¹

In 2015, a Baseline Study was undertaken to measure South Africa's remand system against the Luanda Guidelines of the African Commission. The Study identified various challenges in relation to the use and provision of bail.

In relation to the provision of bail by officials of the SAPS, practical barriers were identified, including a lack of awareness of the legal provisions and authority to grant bail, a general unwillingness to grant bail, and the absence of police officers authorised to do so.

Other challenges were also identified in the Baseline Study. These include gaps in the legal framework, in that it does not provide for a maximum period of remand detention with automatic release, and the fact that there is no provision for the intermittent review of bail decisions. The affordability of bail was also identified as a serious challenge in the South African context.

This report follows the Baseline Study. It reviews the current bail practices against the legal framework, identifies gaps and challenges in the way bail is used, and makes necessary recommendations for strengthening the bail system in line with the Luanda Guidelines.

1.2 Brief history of bail in South Africa

The legal framework governing bail has been subjected to a few amendments worth noting here. The first was an amendment in 1995 to section 60 of the Criminal Procedure Act 51 of 1977 (CPA). The amendment included the insertion of a new paragraph to the section proclaiming the right to bail unless it is in the interests of justice that the accused be detained.² Overall, the changes were an attempt by the legislature to align the principle of bail with the constitutional norm in the Interim Constitution and to tighten up and clarify the system of bail.³

Further amendments were made in 1997. Generally, these sought to make it more difficult for persons charged with serious offences to get bail.⁴ The amendments placed the burden of proof on the accused person to establish that release from custody is in the interests of justice. Various challenges to the constitutional validity of provisions of the law relating to bail were decided in the matter of *S v Dlamini, S v Dladla and Others, S v Joubert* and *S v Schietekat*.⁵ In a unanimous judgment, the Constitutional Court held that none of the provisions of the CPA impugned in the cases before it infringed the Constitution on any of the grounds that had been advanced.

Further amendments followed in 1998⁶, 2000⁷, and 2003⁸. It has been noted that, overall, the various amendments have progressively moved towards making it more difficult for an accused to be granted bail.⁹ Some have argued that the amendments are a direct response to negative publicity around crimes committed by persons on bail and the further perception among the public that accused persons have 'too many rights'.¹⁰

Despite the various amendments dating back to 1995, this general, negative public perception about crime and the criminal justice system remains.

2. RELEVANT FINDINGS OF SELECT STUDIES ON BAIL IN SOUTH AFRICA

This report is not the first study on the use of bail in South Africa. A large volume of important research exists around this topic and has been considered as background and to provide further context in this study. The findings and recommendations of select studies are included herein.

2.1 Implementation of the Luanda Guidelines: Review of Arrest, Police Custody and Remand Detention in South Africa (APCOF, 2016)

In 2014, the African Commission adopted the Luanda Guidelines. The African Policing Civilian Oversight Forum (APCOF), in supporting the Special Rapporteur on Prisons and Conditions of Detention in Africa, conducted a review of the implementation of the Luanda Guidelines in South Africa.

The review found that South Africa fell short in its implementation of the Luanda Guidelines as regards bail, with an unwillingness on the part of the police to grant bail. Below are some of the review's findings:

Finding	Remedy suggested
Unwillingness on the part of the police to grant bail	Further study
Practical barriers to the granting of police bail	Further study
Amount of bail set is too high	Sufficient inquiry into the affordability of bail
Frequent postponement of bail proceedings due to unavailability of information	Possible programme to be implemented like the 1997 pre-trial services project which produced reports containing relevant information

2.2 Barred (In)justice (CALs, 2014)

In 2014, the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand conducted research on the impact of bail proceedings in respect of remand detention in Gauteng. Selected magistrate's courts were monitored to determine whether the legal framework for bail was being adhered to. The research found, among other things, the following:

Finding	Remedy suggested
An alarming rate of postponements to verify the address of the accused before granting bail	Investigate alternatives to the requirement of a fixed address that can be verified
Lack of information available to the prosecution to decide whether to oppose bail	Streamline processes between the SAPS, the National Prosecuting Authority (NPA) and legal representatives
Failure of the courts to conduct a two-stage bail inquiry	Court to enquire into the accused's ability to pay bail
Quality and availability of court interpreters lacking	Quality control, ongoing training and regular assessments for interpreters
Varying bail amounts set by different courts, despite the offences and accused's means being the same	Courts should ensure that monetary amounts are equitable across different regions
Economic and property crimes are the most common crimes	Understand the underlying drivers of crimes that stem from poverty

2.3 Bail and Remand Detention: Entry Points into Evaluating Gauteng's Court Stakeholders (Wits Justice Project, 2012)

In 2012, a report by the Wits Justice Project on bail and remand detention in Gauteng courts identified problems in the administration of bail as well as systemic issues in the criminal justice system. The report called for further research into the role of the police in the use of bail. Below is a summary of the main findings:

Challenges in the administration of bail	Systemic challenges in Gauteng's criminal justice system
Problems verifying the identify and physical address of the accused	Problems with physical infrastructure and electronic systems in courts
Inability of the accused to afford bail	Clogged court rolls
Lack of personnel to implement the review of bail in terms of section 63A of the CPA	Lack of appropriate training for officials
Issues with the 'reverse-onus' provision for serious offences	Problems with case flow management

2.4 'Between a Rock and a Hard Place': Bail Decisions in Three South African Courts (OSF-SA, 2008)

In 2008, the Open Society Foundation for South Africa (OSF-SA) commissioned a study on bail decisions in three South African courts: Mitchell's Plain, Durban and Johannesburg.¹¹ The study built on an earlier baseline study conducted in 1997.

Overall, the study found that being held in custody awaiting trial was the norm in the three courts reviewed. It also found that judicial officers were more likely to grant bail for less serious offences, but that, with respect to serious offences, there was a very low release rate. The study further found that bail alone appeared insufficient to secure an accused's attendance in court. Finally, and most alarmingly, the majority of accused brought before the three courts under review were never ultimately tried, that is, most cases were eventually withdrawn or struck from the roll.¹²

The study found that that the most common offences before the courts were theft, followed by drug offences, robbery and assault.

The following were identified as the most common outcomes of cases:

- Transfer to a higher court;
- Cases withdrawn or struck off the roll;
- Warrants of arrest issued where the accused failed to appear in court; and
- Imprisonment, usually suspended with the option of the payment of a fine.

Looking at the proportion of cases where bail was granted at or before the first appearance, bail was granted to 3% of the accused on or before the first court appearance. In general, persons accused of the following offences were most likely to get bail: arms offences, driving offences, trading offences, kidnapping, extortion, obstruction of justice, and culpable homicide.

Of those who were offered bail, 95% of those who appeared in the district courts in Mitchell's Plain and Johannesburg could pay bail. A later analysis of the Durban regional court found that up to one-quarter of those offered bail could not afford to pay the amount set.¹³

In 71% of the cases where bail was granted, accused persons appeared in court as required to do so. The figures were significantly lower than this when accused persons were released on warning.

The study also looked at whether the presence of a legal representative influenced bail. In this regard, the data from Durban included information on legal representation. The data revealed a higher chance – almost 10% higher – of being released on bail if the accused was represented.¹⁴ Independent legal representation had a 1% higher release rate on bail than that of Legal Aid.

Interestingly, the chances of being released on warning were higher in cases where the accused was not represented. This advantage varied dramatically, depending on the severity of the charge, that is, more serious charges benefitted more from legal representation.¹⁵

Across the three courts surveyed, the study found the average bail amount to be R1 736, with R50 being the lowest amount and R50 000 the highest amount.¹⁶ There was also a relationship between the bail amount and the type of offence, and those who were granted bail were slightly less likely to have a prison sentence imposed.¹⁷

In terms of regional trends, the study found that bail was used more in Durban than in Mitchell's Plain and Johannesburg. Mitchell's Plain appeared to be focused on resolving cases speedily, resulting in a high number of withdrawals. In Johannesburg, bail remained rare, and, when bail was granted, the bail amount set was high.¹⁸

3. STATEMENT OF THE PROBLEM

Despite a comprehensive legal framework that is largely aligned to the Luanda Guidelines (and related human rights norms and standards), the police appear unwilling to exercise their power to grant bail. In addition, they appear to be faced with practical barriers to granting bail. The judicial authorities similarly face challenges in exercising the discretion to grant or deny bail. This results in rights violations and inefficiencies in the system.

Building on past research, and through consultations, challenges will be identified in order to propose recommendations for strengthening the practice and use of bail in South Africa.

Ultimately, it is hoped that the criminal justice sector – including the police, the prosecuting authority and the courts – will fully and effectively implement the legislative framework governing bail, and will do so consistently and in accordance with human rights.

4. METHODOLOGY

In conducting the study, a mixed research methodology was used, consisting of comprehensive desktop research and semi-structured interviews.¹⁹ Primary and secondary sources were consulted in the desktop research. These sources included:

- Legislation, judicial precedent, and international instruments;
- Academic papers, articles, and research reports; and
- Statistics and reports of government departments.

The semi-structured interviews were conducted with key role players in the South African criminal justice system. The data from these interviews was then analysed on the basis of particular themes. The interviews were conducted on a one-on-one basis, the aim being to ensure that the participants felt at ease in sharing their experiences and challenges regarding the use and practice of bail. Full informed consent was obtained prior to the interviews, with permission to record the interviews where possible. In addition, participants' anonymity was ensured.

The participants were selected from the following sectors to ensure a broad and accurate picture of the use of bail in South Africa:

- The National Prosecuting Authority (NPA);
- Legal Aid South Africa;
- The South African Police Service (SAPS);²⁰
- The Department of Correctional Services (DCS); and
- Civil society and private attorneys practising in the criminal justice sector.²¹

After conducting the semi-structured interviews, the data was, as indicated above, analysed according to themes. The thematic analysis reflects on the insights in the participants' answers, as against the legal framework.

5. AN OVERVIEW OF THE LEGAL FRAMEWORK REGULATING BAIL

A brief overview of the legal framework governing bail in South Africa is provided below.

5.1 International instruments

5.1.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), 1948, guarantees the right of accused persons to be presumed innocent until proven guilty in accordance with the law.²² It further provides that no one may be subjected to arbitrary arrest and detention.²³

5.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), 1966, to which South Africa is a party,²⁴ guarantees the right to liberty and freedom of security and outlaws arbitrary arrest and detention. The ICCPR favours release of awaiting-trial prisoners subject to guarantees to appear at trial and recognises the right to be tried without undue delay.²⁵

In interpreting Article 9(3) of the ICCPR, the Human Rights Committee has held that 'pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State Party'.²⁶

The Human Rights Committee has also opined that the fact that an accused is a foreigner should not in and of itself cause him or her to be held in detention pending trial.²⁷ State parties must substantiate concerns that the accused would leave the country and why these concerns cannot be addressed through bail with conditions attached. If state parties cannot do this, they may be in violation of Article 9(3) of the ICCPR.

5.1.3 United Nations Standard Minimum Rules for Non-Custodial Measures²⁸

The Rules call for the avoidance of pre-trial detention. In cases where pre-trial detention is used, it should be a measure of last resort and should not last longer than is necessary.²⁹

5.2 Regional instruments

5.2.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR/African Charter)³⁰ enshrines the rights to be presumed innocent and not to be detained arbitrarily.³¹ South Africa ratified the African Charter in 1996.

5.3 'Soft law' instruments

5.3.1 The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002

The Ouagadougou Declaration emphasises the importance of a criminal justice policy that controls the growth of the prison population and encourages the use of alternatives to imprisonment.

The Plan of Action³² put in place to implement the Ouagadougou Declaration sets out strategies for reducing the number of unsentenced prisoners. The strategies include detaining persons awaiting trial only as a last resort and for the shortest time possible through the use of increased cautioning of accused persons, improved access to bail through the widening of police powers, involving community representatives in the bail process, and setting time limits for people in remand detention.

5.3.2 The Robben Island Guidelines for the Prevention of Torture in Africa³³

The Guidelines set out safeguards for pre-trial detention, including access to legal representation, the right to challenge the lawfulness of the detention, and the right to be brought before a judicial authority promptly.³⁴

5.3.3 The Luanda Guidelines

The African Commission adopted the Luanda Guidelines in 2014.³⁵ The Guidelines provide best practice from the arrest of an accused until trial, focusing on the decisions and actions of the police, correctional services, and other stakeholders. The Guidelines contain eight key sections. Key principles in the Luanda Guidelines that impact on bail are set out below:

Key principle	Clause
PART 1: ARREST	
Everyone has the right to liberty and security of the person. Detention must be an exceptional measure of last resort.	1
Where appropriate, particularly for minor crimes, efforts should be made to divert cases away from the criminal justice system and use recognised and effective alternatives.	1
Alternatives to arrest and detention should be promoted under a framework that includes reasonable accommodation for persons with disabilities and that promotes the best interests of children in conflict with the law.	1
The rights of an arrested person include the right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.	4
PART 2: POLICE CUSTODY	
Detention in police custody shall be an exceptional measure. Legislation, policies, training and procedures shall promote alternatives to police custody, including court summons or police bail or bond.	6
All persons detained in police custody shall have a presumptive right to police bail or bond.	7
All persons arrested and detained have the right to prompt access to a judicial authority to review, renew and appeal decisions to deny police bail or bond.	7
The maximum period of police custody before bringing an arrested person before a judge shall be 48 hours.	7
States should establish a legal aid service framework for persons in police custody and pre-trial detention.	8
PART 3: PRE-TRIAL DETENTION (period of detention ordered by a judicial authority)	
Pre-trial detention is a measure of last resort and should only be used where there are no other alternatives.	10
Persons charged with a criminal offence that does not carry a custodial penalty shall not be subject to a pre-trial detention order.	10
Judicial authorities shall only order pre-trial detention if there are reasonable grounds to believe that the accused has been involved in an offence that carries a custodial sentence, and there is a danger that the accused will abscond, or commit further serious offences, or if the release will not be in the interests of justice.	11
Judicial authorities shall provide reasons for pre-trial detention and demonstrate that alternatives were considered.	11
Regular review of pre-trial detention orders shall be provided for in national law. Review should consider whether there is a need for continued detention, and whether continued detention is necessary and proportionate.	12

PART 6: CONDITIONS OF DETENTION IN POLICE CUSTODY AND PRE-TRIAL DETENTION	
States shall have in place policies and procedures to reduce overcrowding in police custody and pre-trial detention facilities, including through the use of alternatives to detention.	25
PART 7: VULNERABLE GROUPS	
A child may only be detained in police custody or pre-trial detention as a measure of last resort and for the shortest possible period of time. States shall enact laws that prioritise alternatives and diversion programmes for children in conflict with the law.	31

5.4 Domestic legal framework

5.4.1 The Constitution of the Republic of South Africa, 1996

Many rights in the Constitution of the Republic of South Africa, 1996 (the Constitution), impact upon the use of bail in South Africa.

Section 9 of the Constitution requires that all persons be treated equally, while section 10 of the Constitution enshrines the right of all persons to have their dignity respected and protected.

Section 12 of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

Section 35 of the Constitution provides for the rights of arrested, accused and detained persons. Everyone that has been arrested for allegedly committing an offence has the right, among other things, to be released from detention if the interests of justice permit, subject to reasonable conditions.³⁶

5.4.2 The Criminal Procedure Act 51 of 1977, as amended

Chapters 6 and 7 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act/CPA) deal with securing the attendance of an accused in court through the issuing of a summons or a notice to appear in court (as alternatives to arrest in certain cases).

Chapter 9 of the Criminal Procedure Act sets out the effect of bail and regulates the granting of bail. Bail has the effect of releasing an accused person from custody, on payment of a sum of money or the furnishing of a guarantee, on the basis that he or she will appear at the place and time appointed for his or her trial to proceed.

If the accused is granted bail, this will endure, unless terminated, until the court in question hands down a verdict, or, where sentence is not imposed together with the verdict, bail will be extended until the sentence is imposed. However, if the accused is convicted of an offence in Schedule 5 or 6 of the CPA, the court must consider the fact that the accused has been convicted of the offence, and the likely sentence that it might impose, when deciding whether to extend bail.³⁷

Police bail

Bail can be granted for lesser offences by any police official of or above the rank of non-commissioned officer, in consultation with the police official in charge of the investigation,³⁸ that is, the accused must be in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2.³⁹ Parts II and III of Schedule 2 include serious crimes such as murder, rape, arson, kidnapping and robbery.

To be released, the accused must deposit a sum of money that is determined by the police official. This type of bail is commonly referred to as 'police bail'.

SAPS Standing Order (General) 382 contains the procedure when dealing with money received from the public in respect of bail. It requires SAPS officials to explain to arrested persons the duty to appear in court, as well as the consequences of a failure to do so.

Prosecutorial bail

Bail can also be granted by a prosecutor, authorised in writing to do so by an attorney-general, for offences in Schedule 7.⁴⁰ This is commonly referred to as 'prosecutorial bail' and also requires consultation by the prosecutor with the police official charged with the investigation. Prosecutorial bail can only be granted for Schedule 7 offences, that is, public violence, culpable homicide, bestiality, assault, arson, housebreaking, malicious damage to property, robbery, theft, fraud, extortion (if the amount involved does not exceed R20 000), any offence relating to the illicit possession of dependence-producing drugs, and any conspiracy or incitement to commit any of the above offences.

Prosecutorial bail endures until the first court appearance of the accused. At the accused's first court appearance, the court may extend the bail on the same conditions, or amend the conditions, or add further conditions. The court may also consider the bail application and has the same jurisdiction as in the case of the bail proceedings set out in Section 60 of the CPA, which deals with a bail application in court.⁴¹

Bail in court

The court can release an accused person on bail at any stage preceding the accused's conviction if the court is satisfied that the interests of justice so permit.⁴² Before the court reaches a decision on a bail application, it must consider any pre-trial report, if available, regarding the desirability of releasing the accused on bail.

The interests of justice do not permit the release of an accused on bail where one or more of the following grounds are established:⁴³

- Where there is a likelihood that the accused will endanger the safety of the public or will commit a Schedule 1 offence;
- Where there is a likelihood that the accused will attempt to evade the trial;
- Where there is a likelihood that the accused will attempt to influence or intimidate witnesses or conceal or destroy evidence;
- Where there is a likelihood that the accused will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

Where, in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine public peace and security.

The CPA sets out many factors that a court may consider when assessing whether a ground has been established that indicates that the interests of justice do not permit the release of an accused on bail.⁴⁴ Examples of such factors include the following: whether the accused has threatened any person; the assets held by the accused; whether the accused is familiar with the identity of witnesses; any previous failure on the part of the accused to comply with bail conditions; and whether the safety of the accused might be jeopardised by his or her release.

In the case of accused persons who have been charged with offences under Schedule 5 or 6, the accused must be detained in custody unless he or she adduces evidence which satisfies the court that, for Schedule 5 offences, it is in the interests of justice to be released, and that, for Schedule 6 offences, exceptional circumstances exist which in the interests of justice permit release.⁴⁵

Once the court is satisfied that the interests of justice permit the release of the accused, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered. This is referred to as the 'two-stage' bail inquiry.

Bail and conditions

An accused's release on bail is always subject to essential conditions, that is, that he or she deposits a sum of money and agrees to appear in court to stand trial.⁴⁶ Bail can also be subject to 'special conditions',

such as the accused reporting to a specified person or authority at a specified time and place.⁴⁷ The court may add further conditions at any stage on application by the prosecutor.

Electronic monitoring as a condition

Electronic monitoring is a system used to track and record an offender's movements and location through a global positioning system (GPS).

Electronic monitoring is undertaken using a tag which resembles a wristwatch and is fitted to the ankle. The system stores the offender's data. The following benefits, among others, of using electronic monitoring have been identified: effective management of certain categories of offenders; increased public confidence in the criminal justice system; reduction of the negative effect of a custodial sentence on the offender; and reduction of the offender population in custody. It is appropriate to use electronic monitoring at various stages of the criminal justice system, including:

- The pre-trial stage (as a condition of, or alternative to, bail);
- The primary sentencing stage; and
- The post-sentencing stage.

Release or amendment of bail conditions due to inability to pay or on account of prison conditions

Section 63(1) of the Criminal Procedure Act allows the court to increase or to reduce the amount of bail set, or to amend or supplement any condition imposed, on application by the prosecutor or the accused.

The Protocol on the Procedure to be Followed in Applying Section 63A of the Criminal Procedure Act, 1977 (the Bail Protocol), was established as a joint effort between the SAPS, the NPA, the Department of Justice and Constitutional Development (Department of Justice) and the DCS in promoting and regulating cooperation in dealing with bail under section 63A of the CPA.⁴⁸ The main objectives of the Bail Protocol are to deal with congestion in prisons and to reduce the number of remand detainees in custody.

Section 63A of the CPA permits the release of certain accused persons from a correctional centre if the head of the centre is satisfied that the prison population is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused. The accused person must be charged with an offence for which a police official may grant bail in terms of section 59 of the CPA, or with an offence in Schedule 7. The accused must have been unable to pay the bail granted by any lower court.⁴⁹

5.4.3 Other relevant law

The Correctional Services Act 111 of 1998

Section 1 of the Correctional Services Act 111 of 1998 defines a remand detainee as a person who has been detained in a remand detention facility awaiting the finalisation of his or her trial and has not commenced serving his or her sentence.

Section 49G of the Correctional Services Act states that the maximum period for remand detention before an accused must be brought before court is two years. The Head of a Correctional Centre must apply to court for a review of the detention, which can be extended, or the accused can be released, subject to conditions.

The South African Police Service Act 68 of 1995

The South African Police Service Act 68 of 1995 recognises the need to provide a police service that ensures the safety and security of all persons and upholds and safeguards the rights of every person as guaranteed by the Constitution.⁵⁰

The Child Justice Act 75 of 2008

The Child Justice Act 75 of 2008 creates a separate system for children who are in conflict with the law. The aim of the Act is to keep children accused of crimes out of detention, mainly through diversion.⁵¹ Diversion is thus an alternative to being detained. It does not involve a criminal trial or a criminal conviction. It may result, for example, in the child being cared for in a rehabilitation centre or undergoing a drug treatment programme. Section 25 of the Act deals with bail and provides for a 'three-stage' bail inquiry when dealing with children. In addition to determining whether the interests of justice permit release on bail, and whether the amount of money being considered is appropriate for the child and his or her parents or guardian, the court must consider appropriate conditions where money cannot be paid.

The Immigration Act 13 of 2002

Section 34(1) of the Immigration Act 13 of 2002 provides that an immigration officer may arrest and detain an illegal foreigner for a period of 30 days without a warrant for the purposes of deportation. This period can be further extended by 90 days. However, the Constitutional Court, in the matter of *Lawyers for Human Rights v Minister of Home Affairs and Others*,⁵² declared section 34(1)(b) and (d) of the Act inconsistent with sections 12(1) and 35(2)(d) of the Constitution and thus invalid. The declaration of invalidity was suspended by the court for a period of 24 months to allow Parliament an opportunity to correct the defect. Pending the enactment of legislation, the court ordered that any illegal foreigner detained under section 34(1) of the Immigration Act be brought before a court in person within 48 hours from the time of arrest, or not later than the first court day after the expiry of the 48 hours if such period of 48 hours had expired outside ordinary court hours.

The Prevention and Combating of Corrupt Activities Act 12 of 2004

In terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004⁵³, it is a crime to offer a police official or a judicial officer or prosecutor any money or other form of 'gratification'⁵⁴ to act in an unlawful manner. If the public official accepts any unlawful gratification, he or she also commits a crime in terms of the Act.

5.4.4 Select principles from case law

- Detention of an accused person must not be a form of anticipatory punishment.⁵⁵
- An 'ongoing investigation' is not a sufficient reason to deny bail.⁵⁶
- What constitutes 'exceptional circumstances' in the case of serious offences cannot be looked at in isolation of the relevant facts.⁵⁷
- An accused should not be deprived of his or her liberty if the sentence that is likely to be handed down will be non-custodial, such as a fine.⁵⁸
- A prosecutor must consider each case on its merits and must not merely follow the recommendation of the police regarding bail.⁵⁹
- In setting the bail amount, there must be an investigation into the means and the resources of the accused. Setting the bail amount beyond the accused's means would nullify the decision to release him or her.⁶⁰
- Bail conditions that are added in terms of section 62 of the CPA must be feasible and capable of being implemented.⁶¹
- Finalisation of bail applications is always a matter of urgency.⁶²

6. GLOBAL TRENDS IN ALTERNATIVES TO REMAND DETENTION AND IN STRATEGIES FOR REDUCING REMAND DETENTION

6.1 Introduction

Goal 16 of the UN Sustainable Development Goals is to:

Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

One of the targets in achieving this goal is to ‘promote the rule of law at the national and international levels and ensure equal access to justice for all’. **In assessing whether this target is being achieved, an indicator is the percentage of unsentenced detainees as a proportion of the overall prison population.**⁶³ The socio-economic impact of remand detention has been extensively researched and documented and reflects that the achievement of health, gender equality, and universal education for all has been inhibited directly by the ‘significant expense incurred and opportunity lost when someone is detained and damaged through pre-trial detention.’⁶⁴ There is also a disproportionate impact on individuals living in poverty.⁶⁵

A reduction in the number of unsentenced detainees is therefore imperative for the achievement of Goal 16 of the Sustainable Development Goals.

6.2 Snapshot of alternatives to remand detention and of strategies for reducing remand detention⁶⁶

Below is an overview of strategies being used across different jurisdictions to reduce or prevent pre-trial detention:

Country	Alternative to remand detention/strategy to reduce remand detention
Alaska, United States	Establishment of ‘pre-trial services’ ⁶⁷
Argentina	Institution of a state policy to promote the use of alternatives to penalties entailing deprivation of liberty, focusing on pre-trial detention ⁶⁸
Armenia	Legislative prohibition of arrest and remand for certain offences
Australia	Pre-trial evaluation
Bolivia	Cap on the length of pre-trial detention as well as the granting of presidential pardons on humanitarian grounds
Canada	Restorative justice legislation
Colombia	Judicial authorities must demonstrate that pre-trial detention is the only way to secure the accused’s attendance at trial
Costa Rica	The use of restorative justice programmes ⁶⁹ and the use of drug treatment centres under judicial supervision
Finland	Expansion of diversionary mechanisms and mediation
Guatemala	Electronic monitoring of remand detainees ⁷⁰
India	Prison-based courts and automatic release from remand detention when unable to pay bail
Kenya	Legal aid clinics within prisons ⁷¹
Liberia	Prison-based courts
Malawi	Paralegal-based interventions ⁷²
Mexico	Pre-trial evaluation through pre-trial services and cap on the length of pre-trial detention
New Zealand	Diversion and community-based conflict resolution
Nigeria	Duty solicitors at police stations and prison courts
Peru	The use of ‘abbreviated trials’ ⁷³
Sierra Leone	Paralegal-based interventions
Singapore	Public campaigns and broad consensus on the part of the public to reform the penal system
Thailand	Settlement of minor disputes using community mediation
United Kingdom	The use of bail and duty solicitors at police stations ⁷⁴
United States	The use of bail and the establishment of ‘pre-trial services’ ⁷⁵
Wales	The use of bail (with and without conditions)

6.3 Examples of alternatives to remand detention

6.3.1 Expanded diversion/alternative dispute resolution mechanism

In 2015, the Restorative Justice Act was introduced in Manitoba, Canada. The purpose of the Act is to support the use of restorative justice programmes in this Canadian province. The Act includes the creation of a Restorative Justice Advisory Council and enables the Department of Justice to introduce new restorative justice policies and programmes.⁷⁶

The Canadian Criminal Code also promotes the use of restorative justice mechanisms, of which there are many in Canada, including:

- Victim–offender mediation programmes;
- Circles of support and accountability;⁷⁷
- Peacemaking circles;
- Healing circles; and
- Sentencing circles.

New Zealand similarly caters for restorative justice approaches through its Sentencing Act, Parole Act and Victim's Rights Act (all enacted in 2002). The Department of Justice has also produced the Restorative Justice Best Practice Framework (the Framework).⁷⁸

There are six principles⁷⁹ in the Framework, which are:

- Participation is voluntary;
- The victim and the offender are the central participants;
- Understanding is key to effective participation;
- Offender accountability is key to the process;
- The process is flexible and responsive to the participants; and
- Restorative justice processes are safe for participants.

Restorative justice processes can operate at different stages in the criminal justice system in New Zealand, with the Police Adult Diversion Scheme being one of the most common initiators of the process.⁸⁰

The Police Adult Diversion Scheme involves a Police Diversion Officer assessing the appropriateness of diversion and facilitating the signing of an agreement by the offender, which could include an apology, compensation and commitment to a restorative justice process.

Generally, the following requirements must be met for this type of diversion to apply:⁸¹

- It must be the offender's first offence;
- The offence must not be serious;
- The offender must have accepted full responsibility for the offence(s) as described in the summary of facts;
- The legal rights of the offender must have been explained to him or her; and
- The offender must agree to the terms of diversion.

A diversion scheme like that in New Zealand could be useful in South Africa, as it would allow for diversion that includes the police. To ensure consistency in the application of diversion, guidelines and/or a legislative framework for restorative justice in South Africa would also be useful.

6.3.2 Duty solicitors

In Nigeria, in 2004, the Legal Aid Council and the Open Society Justice Initiative embarked on a joint project aimed at reducing pre-trial detention. A central element of the project was the Police Duty Solicitor Scheme (PDSS), which sought to reduce pre-trial detention by providing free legal advice for suspects at police stations using newly qualified lawyers known as duty solicitors.

Duty solicitors interview arrestees and solicit key information, including details of family members and next of kin, as well as details about the alleged offence and court dates. The solicitors, in turn, provide detainees with information on their rights, as well as assist in bail applications. The PDSS was established in terms of a Memorandum of Agreement between the Inspector of Police and the Legal Aid Council as well as the Open Society Justice Initiative.

In 2011, a survey of the project was conducted⁸² and it was found that the PDSS had facilitated the release of over 10 000 suspects from police stations⁸³ and prisons in the period from 2005 to 2010. Nearly 80% of the releases occurred at police stations. The number of detainees released through the intervention of a duty solicitor increased dramatically over the duration of the project.

The PDSS was described by the Secretary of the Ondo State Judicial Services Commission as:

*a rescue scheme which targets the usually forgotten, sometimes unrecognized right to counsel at the earliest contact of the suspect with the justice system. It is also a constant reminder to the police to respect the suspect's rights while the investigation proceeds. It is worthwhile and truly deserves . . . national legislative approval.*⁸⁴

Duty solicitors also operate at police stations in England, Wales, Canada, Australia and New Zealand.

In the United Kingdom (UK), the duty solicitor system operates through a panel of criminal lawyers who either work in firms or are self-employed. To serve on the panel, the solicitor must be independent of the police and courts and must comply with certain requirements.⁸⁵

In Wales, lawyers must obtain two qualifications to satisfy the Law Society of their suitability to become a member of the Criminal Litigation Accreditation Scheme of the Law Society.⁸⁶ These are the Police Station Qualification and the Magistrates Court Qualification.

In most countries, duty solicitors are managed by the country's legal aid scheme. Given South Africa's already overburdened Legal Aid system, creative ideas for replicating such a duty solicitor model that take into account our Legal Aid Board's financial and human resource constraints will need to be considered. The South African Legal Practice Act, for instance, may offer opportunities relating to community service in this regard.

6.3.3 Strategies to mitigate the harm of monetary bail, and alternatives to monetary bail

The majority of people in pre-trial detention are poor and frequently belong to groups that are socially, economically and politically discriminated against.⁸⁷ Globally, a significant number of people remain in pre-trial detention simply because they are poor and do not have access to the necessary resources to post bail.⁸⁸

Reliance on monetary bail has been shown to unfairly disadvantage impoverished accused persons and to undermine community safety.⁸⁹ The inability of the poor to raise money for bail is not only a challenge in the developing world.⁹⁰ As a result, various strategies and initiatives have been implemented globally to mitigate the harm of monetary bail, or as an alternative to monetary bail.

Inquiry into the accused's ability to pay

In the US, some guidance has been provided on what an-ability-to-pay inquiry should entail.⁹¹ This has been further elaborated on in the context of bail to include the following procedures, among others:⁹²

- Notice to the accused person that bail determination must be individualised and that the ability to pay is a critical consideration in setting the amount;
- The use of a standard form setting out the accused person's income, assets, financial obligations and other financial information;
- A presumption about indigence or inability to pay monetary bail where at a certain threshold the accused is presumed indigent and unable to pay monetary bail as a condition of release; and
- Clearly articulated standards and definitions whereby terms such as 'indigent' and 'ability to pay' should be clearly defined.

As indicated above, an inquiry into the accused's ability to pay also requires that bail amounts be individualised. A rights-based approach in determining an appropriate amount of bail requires an individualised assessment of the accused person's circumstances and should never be set based on a predetermined schedule of amounts fixed according to the nature of the charge or other factors.⁹³

Laws banning pre-trial detention under defined circumstances

In some jurisdictions, the law prohibits remand detention for certain offences and/or potential sentences in an effort to reduce such detention.

For example, Article 135(2) of Armenia's Criminal Code of Procedure provides that 'arrest and its substitute, monetary bail, can be imposed against the accused only for crimes punishable by more than one-year imprisonment.'⁹⁴ In Mexico, the Federal Constitution prohibits remand detention for persons charged with offences in respect of which the sentence, on conviction, excludes imprisonment.⁹⁵ Similar laws exist in Chile, Ecuador and Brazil.⁹⁶ Not all these laws have been successful in reducing the use of remand detention, but have the potential to address the over-reliance on such detention if properly applied.

In India, where an accused person is unable to furnish any surety for bail within a week of arrest, the accused is deemed indigent and is released on personal bond without sureties for his or her appearance.⁹⁷

Pre-trial services

Pre-trial services encompass different interventions aimed at ensuring that an accused person appears for trial and is not rearrested during the pre-trial period. Pre-trial services can take various forms and serve as an important element of a system that replaces monetary bail.⁹⁸ Some of the interventions in terms of pre-trial services to ensure the appearance of the accused and protect public safety include the following:⁹⁹

- Court date notifications, which have been shown to be effective and improve appearance rates. They essentially serve as a reminder to accused persons of their upcoming court date. It has been found that accused persons' failure to appear at court is more often due to difficult, stressful or disorganised lives rather than an intentional effort to avoid adjudication.¹⁰⁰ Some of the reasons for missed court dates include loss of the paper with the court date, the inability to forgo earnings by missing work, lack of child care, and no resources for transport (among others).¹⁰¹

Notifications can take various forms, including telephone calls (in person or automated), letters or text messaging services. In one instance, the use of automated telephone reminders was associated with a 41% decrease in failures to appear.¹⁰²

- Pre-trial supervision, which is the practice of maintaining regular contact with accused persons to facilitate, support and monitor compliance with their pre-trial release

conditions. Practices vary, but pre-trial supervision can include contact with the accused (in person at home or by telephone), contact with those familiar with the accused person's situation, and regular criminal record checks.¹⁰³ Studies have shown that regular supervision reduces rates of failure to appear in court and rearrest.¹⁰⁴

- Risk assessments, which consist of independently verified information that assists a judicial officer in making more equitable bail decisions. Such assessments can provide information on the risk of an accused person failing to appear at court or of being arrested while awaiting trial. They provide judicial officers with evidence-based information which allows them to set appropriate conditions of release, thereby reducing the risk that an accused person will fail to appear in court or be a danger to the public.¹⁰⁵

When used properly, risk assessment tools offer great promise in terms of replacing monetary bail. However, such tools are not without concerns. Risk assessment tools must be properly calibrated to reflect a jurisdiction's specific population (even at the local level), resulting in complicated and costly determinations.¹⁰⁶ Even then, some tools may generate serious disparities along racial or other demographic lines.¹⁰⁷ Before risk assessment tools are developed, a reliable system of gathering data is imperative.

A pre-trial services project was piloted in South Africa in 1997 as a collaborative effort between the Vera Institute of Justice and the Department of Justice. The project was piloted in three of the busiest magistrate's courts: Durban, Johannesburg and Mitchell's Plain. It sought to provide magistrates with independently verified information about accused persons at their first appearance in order to make the bail process more efficient, equitable and informed.¹⁰⁸

The project was not continued beyond the pilot stage and produced mixed results. Success was seen in an increase in bail granted and in a reduction in bail amounts – although bail amounts generally remained high. At the same time, there was a significant increase in bail being denied.¹⁰⁹ Key findings of the project include, among others, the following:¹¹⁰

- The majority of accused persons (96%) were arrested before their appearance in court;
- Police bail and warning were used far less than legally permitted, resulting in 80 to 90% of accused persons being in custody at their first appearance;
- Most accused persons were charged with non-violent crimes; and
- Few accused persons absconded while on bail or warning.

Although the project was discontinued for various reasons, the Port Elizabeth Magistrate's Court incorporated a pre-trial service office as part of its Integrated Justice System Court Centre. A review of the Court Centre in 2001 showed a reduction in the time taken to prepare a trial-ready docket, improved docket quality and increased conviction rates, and facilitated bail applications with better bail decisions and a reduction in remand detainees.¹¹¹

The experience in the US with pre-trial services indicates that, when rendered effectively, unnecessary remand detention is minimised, costly prison services are avoided, public safety is increased, and the equity of the pre-trial release process is enhanced because there is less discrimination on the basis of income.¹¹² While there are definite budgetary implications in establishing pre-trial services, these implications must be considered in the context of the savings that will flow from decreased remand detention.¹¹³

7. ANALYSIS OF DATA AGAINST THE LEGAL FRAMEWORK

Everyone has the right to liberty and security of the person. Detention must be an exceptional measure of last resort.

(Part 1, Article 1, Luanda Guidelines)

The Constitution guarantees the right to freedom and security of the person through section 12, which includes the right not to be deprived of freedom arbitrarily or without just cause and the right not to be detained without trial. Section 35 of the Constitution sets out the rights attaching to arrested, detained and accused persons. Specifically, section 35(1) applies to persons arrested for allegedly committing an offence.

Section 39(3) of the CPA provides that the effect of an arrest is that the person arrested will be in lawful custody and will be detained in custody until lawfully discharged or released from custody. The serious consequences of an arrest are thus made clear in the legal framework, that is, as a serious restriction on a person's right to freedom. SAPS Standing Order (G) 341 provides for the procedures when making an arrest as well as minimum standards for the treatment of arrested persons. Although recognising the object of an arrest as securing the attendance of a person at trial, exceptions are provided and, of concern, include arrest for further investigation and arrest to verify a name and/or address.

In the 2016/2017 financial year, the SAPS made a total of 1 626 628 arrests.¹¹⁴ This is reflected in the Annual Report under 'Successes – Arrests'. A comparison of the number of arrests with the number of convictions shows that the SAPS may be arresting too easily and without a sufficient basis for doing so. For example, a total of 5 211 arrests were made for public violence, with the SAPS not achieving its performance target of a 71% conviction rate for criminal and violent conduct during public protests, but instead achieving 60.56%.¹¹⁵ The reasons for the deviation as provided by the SAPS include the fact that the investigation of these cases is a long and timeous process and, in most instances, dependent on forensic evidence like video footage, and that large groups of suspects are arrested and prima facie evidence must be obtained against each and every accused.¹¹⁶ Despite the acknowledgement by the SAPS that these cases take time to investigate, in practice large numbers of 'early arrests' are made, with a general reluctance to grant bail being reported. Similar low conviction rates are provided by the NPA.

A theme that developed through the interviews was that the SAPS arrests prematurely and before a prima facie case is established through proper investigation. A comparison, over the past ten years, of the number of arrests made with the number of convictions secured shows that, while SAPS arrests increased, the number of cases finalised decreased by 7%.¹¹⁷ An analysis of civil claims paid out by the SAPS over the past five years shows an increase of 175%.¹¹⁸ In 2016/2017, the SAPS paid R42 million in civil claims, of which unlawful arrests and detention constituted the majority.

Various reasons were provided in the interviews for the high number of arrests and the practice of 'early arrest' by the SAPS, including: performance targets and rewards linked to arrests;¹¹⁹ directives issued by commanders to address local problems such as high levels of drug abuse in a community; pressure from communities to arrest; lack of training of police officials; and the resultant failure to consider or apply alternative options available.

A further theme that emerged from the interviews was that the SAPS arrests and detains suspects in order to solicit bribes.

Interview participants¹²⁰ described various challenges occurring once a suspect is arrested. These include: failure to charge the accused timeously; missing dockets; inability to locate the investigating officer; and delays in verifying the accused's physical address. These challenges were described not only as inefficiencies in the system of police bail, but also part of deliberate attempts by the SAPS to frustrate the accused and open the door for bribes to be paid in order to facilitate release from police custody.

Corruption and the excessive use of pre-trial detention have been described¹²¹ as mutually reinforcing – with a criminal justice system that overuses pre-trial detention being susceptible to corruption and a corrupt environment leading to the overuse of pre-trial detention. This results in a vicious cycle and undermines rights-based, pre-trial justice practices.¹²²

To address corruption, an internal anti-corruption unit within the SAPS has been proposed that encompasses the following:¹²³

- Selecting the right people and leaders for the unit;
- Unit commanders having top security clearance;
- A dedicated budget;
- A secure database and information system for the unit;
- The amendment of the South African Police Service Act to provide for the powers and functioning of the unit; and
- Ongoing training of personnel.

The SAPS 2015/2016 Annual Report references the establishment of 'dedicated capability' within the SAPS to tackle corruption. The SAPS 2016/2017 Annual Report notes the establishment of an Integrity Management Service to address a number of key issues, including the establishment of an anti-corruption policy.¹²⁴

Recommendations

The SAPS should, through broad consultation, consider a review of performance targets in order to include measurable targets and indicators in relation to key duties of the police that enable a comprehensive assessment of performance, priorities and the use of time.

Instances of wrongful arrest should carry performance management implications for the individual officers involved, including personal liability for the associated claims.

The SAPS should review training as well as the emphasis placed on arrest and other methods to secure the attendance of an accused person. The SAPS should further provide clarity on the grounds for arrest under Standing Order (G) 341 so as to be in line with the provisions of the CPA, and, if required, make the necessary amendments.

The SAPS should prioritise the establishment of an independent anti-corruption unit as part of its anti-corruption strategy.

The Department of Justice, in consultation with the National Forum on the Legal Profession and the SAPS, should consider including the placement of legal practitioners at police stations as part of community service programmes.

Where appropriate, particularly for minor offences, efforts should be made to divert cases away from the criminal justice system and use recognised and effective alternatives.

(Part 1, Article 1, Luanda Guidelines)

Certain matters can be diverted from the formal criminal justice process through the use of alternative dispute resolution mechanisms (ADRM), including diversion and informal mediation. The Justice, Crime Prevention and Security Cluster has adopted a restorative justice approach in response to challenges faced by the criminal justice system and informed by indigenous and customary responses to crime.

In the 2016/2017 financial year, the NPA finalised 164 015 cases through ADRMs.¹²⁵ In the regional courts, 7.7% of finalised cases were finalised through ADRMs.¹²⁶ At the district court level, 34.3% of finalised cases were finalised through ADRMs.¹²⁷ In total, 48 030 matters were finalised through diversion, with 115 985 matters resolved through informal mediation.¹²⁸ There was also an overall decline of 5.5% in the number of children diverted compared with the previous year.¹²⁹

The Probation Services Act 116 of 1991 defines diversion as ‘diversion from the formal court procedure with or without conditions and, in the case of a child, also means diversion as contemplated in the Child Justice Act, 2008’.¹³⁰ Diversion is frequently used for children, as regulated by the Child Justice Act, but is not limited to children.

The aim of diversion is to avoid the need for a formal criminal justice process in respect of a person alleged to have committed an offence, thereby allowing the offender an opportunity to be accountable for and reconsider his or her actions without getting a criminal record. Prosecutors at local courts have the discretion to grant diversion.

Once granted, in consultation with the probation officer and affected parties, the offender will undergo a diversion programme intended to take place in the context of the family and the community. Should the conditions of the programme not be adhered to, the prosecutor may reinstate the charges.

Diversion and informal mediation are effective mechanisms that can be used for first-time offenders charged with minor, non-violent offences.

The feedback from the interviews conducted reflects **inconsistencies in the approach by prosecutors to ADRMs, including informal mediation and diversion**. Whether an ADRM would be an option depends on the individual prosecutor and court. There was a strong sense that matters which are diverted after being enrolled should not have been enrolled in the first place, and that, where the offender was arrested, such arrest would already have infringed his or her freedom of security.

Diversion and the use of ADRMs are broadly regulated by NPA’s policies, directives and guidelines. There is thus no legislative framework governing the use and application of ADRMs for adult offenders in South Africa.¹³¹

The NPA Policy on Diversion simply calls for a consideration of pre-trial diversion, but without providing any guidance to prosecutors on how to exercise their discretion to divert a case away from the criminal justice system. It has been argued that this lack of guidance falls short of the constitutional standard regarding sufficient guidance on the exercise of a discretion.¹³²

Inconsistencies in the approach of prosecutors to diversion that are apparently due to the lack of guidance provided in policy are illustrated by the table below, which shows the vast range, across different courts, in the use of diversion for possessing small amounts of cannabis.¹³³

Application of npa diversion policy in respect of small amounts of cannabis		
Jurisdiction	Percentage of cases diverted	Time period
western Cape	Small number of cases	Year ending March 2016
Kimberly	0%	The last five years
Upington	8%	2012-2016
Limpopo	0%	2013-2017
South Gauteng	50%	2014-2017
Witbank	11%	April 2016 to 2017
Sebokeng	2%	April 2016 to 2017
Middleburg	2%	April 2016 to 2017
Bronkhorstspuit	0%	January to October 2016

Application of npa diversion policy in respect of small amounts of cannabis		
Jurisdiction	Percentage of cases diverted	Time period
Mamelodi	3%	April 2016 to 2017
Nelspruit	0%	April 2016 to 2017
Pretoria North	0%	April 2016 to 2017

Informal mediation, which similarly lacks regulation, has also been flagged as potentially unjust and unfair.

According to policy directives, informal mediation is a process of resolving disputes between parties with the assistance of a mediator who facilitates the resolution of conflict between parties. The policy directives provide that the mediator may be the prosecutor and that informal mediation should generally be considered for less serious offences. Informal mediation should not be considered for murder, rape, robbery with aggravating circumstances, domestic violence, offences involving children, racially motivated offences, offences likely to attract a prison sentence, and offences involving repeat offenders.¹³⁴

Concerns have been raised regarding the lack of a central register to record informal mediations, the lack of oversight of informal mediation, and the lack of guidelines for informal mediation, all of which leave informal mediation open to abuse.¹³⁵

Recommendations

The Department of Justice should develop detailed guidelines for informal mediation, as well as an appropriate system of record keeping and oversight.

Diversion should be strengthened (through legislative reform, the promulgation of regulations or the development of detailed guidelines) to ensure consistent use with oversight and the provision of guidance to prosecutors in the exercise of their discretion.

The rights of an arrested person include the right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.

(Part 1, Article 4, Luanda Guidelines)

Detention in police custody shall be an exceptional measure. Legislation, policies, training and procedures shall promote alternatives to police custody, including court summons or police bail or bond.

(Part 2, Article 6, Luanda Guidelines)

All persons detained in police custody shall have a presumptive right to police bail or bond.

(Part 2, Article 7, Luanda Guidelines)

Section 35(1)(f) of the Constitution provides 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. A person who is in detention after an arrest must, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.¹³⁶ The effect of bail is the release of an accused who is in custody on payment of, or the furnishing of a guarantee to pay, a sum of money and to appear at the place, date and time as specified for trial or court proceedings.¹³⁷

Where an accused is granted bail, it will endure, unless terminated, until the court hands down a verdict, or, where sentence is not imposed together with the verdict, bail will be extended until the sentence is

imposed. Where an accused is convicted of an offence listed in Schedule 5 or 6 of the CPA, the court must, when deciding whether to extend bail, consider the fact that the accused has been convicted of the offence and the likely sentence to be imposed.¹³⁸

Section 59 of the CPA provides for bail before the first appearance of the accused in a lower court, commonly referred to as police bail. Police bail can be granted by any police official of or above the rank of non-commissioned officer, in consultation with the police officer in charge of the investigation. The police can grant bail for any offence other than an offence referred to in Part II or Part III of Schedule 2, Schedule 5, Schedule 6 and/or Schedule 7 of the CPA.

Various challenges were identified through the interviews that serve as barriers to the use of police bail. These include: inefficiencies on the part of police officials; deliberate frustration of the process by the SAPS; the high caseload of detectives/investigating officers; uncertainty on the part of the police regarding the legal provisions and authority to grant bail, resulting in a fear of making a determination on the release of an accused; and corruption (involving certain police officials and private attorneys).

A strong theme that emerged as a barrier to police bail is the community perception of high and violent crime prevalence in South Africa and the political/SAPS leadership response. It is worth noting some of the results of the 2016/2017 Victims of Crime Survey in this regard. Overall, only 30% of South Africans felt safe walking in their neighbourhoods at night, a trend that continues to decline. Crimes that are perceived to be the most common and feared in South Africa show a trend that the fear of crime is driven by experience rather than the severity of the crime. Housebreaking/burglary and home robbery were perceived as the most common crimes and were also the most feared, more than the crimes of murder and assault.¹³⁹ The percentage distribution of households who were satisfied with the police in their area showed a general decline since 2011.¹⁴⁰ Just over 12% of households indicated that they were satisfied with the police because they arrested criminals, and 2.9% of households indicated their dissatisfaction with the police because they released suspects too easily.¹⁴¹

The latter is a view shared by the political leadership. On 3 March 2017, President Zuma indicated that he had requested Ministers in the Security Cluster to review bail laws in order to make it more difficult for accused persons to be released on bail.¹⁴² This was confirmed at the Justice, Crime Prevention and Security Cluster Media Briefing in Parliament subsequent to the State of the Nation Address. At the briefing, the Department of Justice stated that the Minister had initiated a process to review the strengthening of bail laws to ensure that national security, as well as the concerns of the community and victims, is taken into account.¹⁴³

This illustrates a general lack of understanding of the purpose of bail as well as of the legal framework that governs bail. Communities are not sufficiently educated in this regard and expect the police to act through an immediate arrest without the option of bail. The problem is exacerbated by political promises and misleading statements regarding community safety and crime. This form of response with regard to communities does not only take place at the national level, but also at the local level, resulting in inconsistencies in the application of police bail at local police stations.

In many jurisdictions, public and political pressure placed on the police results in the police favouring detention over release.¹⁴⁴ Such pressure combined with the benefits offered by remand detention to police and prosecutors, namely the guarantee of the accused standing trial without posing a risk to public safety and the availability of the accused person, further embeds the problem.¹⁴⁵

Research indicates that there is no reliable evidence to suggest that more police and more people in prison equals lower crime rates.¹⁴⁶ Despite a 50% increase in budget, performance by the SAPS and its ability to tackle violent and organised crime and corruption have decreased.¹⁴⁷ Instead, addressing the impact of the current SAPS leadership crises on public safety and developing a society in which all persons feel they have a stake are what is needed.¹⁴⁸

Recommendations

The Department of Justice and the SAPS should consult Chapter 9 institutions and civil society organisations to create public awareness and educational campaigns concerning:

- a. The implementation of the National Development Plan (NDP) regarding the principles of civic participation in the creation of safer communities and the need for strong leadership and ownership by all in society; and
- b. The purpose of bail, the types of bail and alternatives to arrest, which should include community radio and institutions of education.

Pre-trial detention is a measure of last resort and should only be used where there are no other alternatives. Persons charged with a criminal offence that does not carry a custodial penalty shall not be subject to a pre-trial detention order.

(Part 3, Article 10, Luanda Guidelines)

Judicial authorities shall only order pre-trial detention if there are reasonable grounds to believe that the accused has been involved in an offence that carries a custodial sentence and there is a danger that the accused will abscond, or commit further serious offences, or if the release will not be in the interests of justice.

(Part 3, Article 11, Luanda Guidelines)

The South African legal framework contains different provisions that give effect to the principle that pre-trial detention is a measure of last resort. One of these is section 72 of the CPA, which provides that an accused may be released on warning in lieu of bail, that is, warning him or her to appear before a specified court at a specific date and time in connection with the offence. Section 72 is applicable to police and court bail, which points to the legislature's intention to ensure that no person remains in custody unnecessarily.¹⁴⁹

This provision is especially important for persons who are unable to afford even a small amount of bail. Thus, it has been said that 'there is little justification for granting bail (in objectively small, yet subjectively unattainable amounts) as a matter of course to impecunious persons rather than using the mechanism of the section in question.'¹⁵⁰

Feedback obtained through the interviews reflected numerous instances where persons had been granted bail yet remained in detention due to lack of affordability. This is supported by the 2016 South Africa Survey indicating that, in 2015, there were 7 468 detainees being held simply because they could not afford to pay bail.¹⁵¹ Of these, 76% could not afford bail set at amounts of R1 000 or less.¹⁵² Police officials seem unaware of, or hesitant to utilise, their authority under section 72 of the CPA. Similar reasons were provided for underutilisation of the section as were for 'early arrests' and refusal to grant police bail under section 59.

This may also be a factor contributing to formal bail applications utilising the most court time in the 2016/2017 financial year, across all courts. In district courts, formal bail applications accounted for 77.1% of court time, with the percentage being 58.8% in regional courts (a 27.4% increase over the previous financial year).¹⁵³

The provisions in the CPA that provide for alternatives to bail are not sufficiently utilised by police, prosecutors and the courts.

The right to be released from detention if the interests of justice permit is reflected in the provisions of the CPA. The essence of the principles underlying bail is simply that no person should remain in detention without good reason.¹⁵⁴ Bail cannot be refused merely because there is a risk or possibility of certain consequences arising – a finding on the probabilities must be made. The courts have interpreted ‘interests of justice’ to mean that, unless it can be found that one or more consequences (a danger that the accused will abscond or will commit further serious offences) will probably occur, detention of the accused is not in the interests of justice and the accused should be released.

Section 60 of the CPA provides detailed guidance to the courts when making a determination on the interests of justice. Broad grounds are provided which, if established, do not permit the release of the accused.¹⁵⁵ Additional factors for each ground are also provided for the courts to take into account, where applicable.¹⁵⁶

Accused persons charged with Schedule 5 or Schedule 6 offences are required, under section 60(11) of the CPA, to adduce evidence to the satisfaction of the court that, for Schedule 5 offences, it is in the interests of justice to be released, and that, for Schedule 6 offences, exceptional circumstances exist which in the interests of justice permit release.

Once the court is satisfied that the interests of justice permit the release of the accused on bail, and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay an appropriate sum.¹⁵⁷

Various factors should be taken into account by the court in the second stage of the bail inquiry.¹⁵⁸ It is also a well-established principle of law that the amount must not be so great that it practically amounts to a refusal of bail.¹⁵⁹ A proper investigation by the court into the accused’s means is required. Where a court is satisfied that an accused person will attend trial in any event, and regardless of the monetary bail set as a condition, the accused should be released on warning rather than bail.

A central theme that emerged from the interviews was that the **second leg of the bail inquiry is not properly applied at all**. Despite the court being satisfied that the interests of justice permit the release of the accused on bail, monetary bail is set without taking the individual circumstances of the accused into account. Further, it is infrequent that a court will release an accused on warning rather than bail under section 60(4) of the CPA, and conditions under section 62 are rarely imposed in lieu of a monetary amount.

This is confirmed through an audit undertaken by the DCS. The audit was conducted at Pollsmoor Remand, Pollsmoor Female and Mthatha Remand Detention Facilities in August 2016. It was found that there were 341 remand detainees who were being held despite having been granted bail, constituting more than 10% of the remand detainee population. Bail affordability (90.32%), unemployment (64.22% reported that they had no employed family members), and lack of family support (87.68% did not receive a family visit) were the main factors that played a role in their continued detention.¹⁶⁰

Recommendations

1. The Department of Justice should, with a view to the development of an appropriate model for South Africa, consider a review of pre-trial services that incorporates examples of practice in comparative jurisdictions, and which includes comprehensive research and an understanding of how each court functions, in order to ensure that the project is localised and responsive to the needs of particular courts.
2. The SAPS and the Department of Justice should consider incentivising and performance-managing police and court officials to utilise alternatives to monetary bail, where appropriate.

Regular review of pre-trial detention orders shall be provided for in national law. Review should consider whether there is a need for continued detention, and whether continued detention is necessary and proportionate.

(Part 3, Article 12, Luanda Guidelines)

States shall have in place policies and procedures to reduce overcrowding in police custody and pre-trial detention facilities, including through the use of alternatives to detention.

(Part 6, Article 25, Luanda Guidelines)

Section 63A of the CPA was enacted to address the ongoing challenge of accused persons being detained despite bail having been granted. The objective of the section, which allows the Head of a Correctional Centre to apply to court for the release of an accused person on warning or for the amendment of bail conditions, is to reduce the number of remand detainees in custody and thus assist in alleviating problems relating to overcrowding.

The application by the Head of a Correctional Centre is made when the prison population is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused. The category of persons that the provision applies to are those accused who are detained and who have been granted bail by any lower court in respect of specified (generally minor) offences but are unable to pay the amount of bail, and who are not in detention in respect of any other offence outside of the category of specified offences.

Where the magistrate to whom the application is made is satisfied that the application is in compliance with the requirements, he or she may order the release of the accused on warning or subject to a reduced amount of bail, and amend or supplement any bail condition as required.

A Protocol on the Procedure to be Followed in Applying Section 63A of the Criminal Procedure Act (the Bail Protocol) has been developed and entered into between the DCS, the SAPS, the Department of Justice and the NPA.

In the interviews conducted, some participants outside of state departments indicated that they were unaware of the mechanism created by section 63A. This may be due to the fact that the provision is triggered by the Head of a Correctional Centre, involves relevant government departments, is frequently granted in chambers by a judicial officer, and does not require action from an accused or his or her representative.

Overall, it emerged that, while the enactment of section 63A and the Bail Protocol are welcome developments, they are of very limited application. Although an example of effective cooperation between government departments, they are thus of limited value. **The impact of section 63A in line with its intended objective to reduce overcrowding will always be minimal.** This is due to the fact that, under the current protocol and practice, applications are submitted by the Heads of Correctional Centres during the third month of detention, despite the fact that more than 50% of remand detainees who have been granted bail are detained for a period of two months and less and have made the necessary arrangements to be in a position to pay bail by the third month.¹⁶¹

Although the intended impact of reducing overcrowding is minimal, the figures show success from a rights-based perspective for the individuals impacted. In the 2015/2016 financial year, of the 25 242 applications submitted to court under section 63A, 15 062 were successful. From April until December 2016, of the 19 225 applications submitted, 14 019 were successful.¹⁶² Successful applications are defined as: release on warning; placement under supervision of a correctional official; placement in a

secure care facility; reduction of bail; placement under electronic monitoring; and bail paid through DCS officials communicating with the families of remand detainees.

The high success rates of section 63A applications, after bail has been granted, appear to confirm the wholly inadequate use of, and under-reliance on, provisions in law providing alternatives to remand detention.

According to the DCS, there seems to be slightly more impact through the utilisation of section 49G of the CSA and the Protocol on the Maximum Incarceration Periods of Remand Detainees. Section 49G provides that the period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the facility without the matter being brought to the attention of the court. The section and Protocol provide for the procedure whereby the Head of a Correctional Centre refers such cases to court for a review of the detention, which can result in the accused being released or the detention being extended.

In the interviews conducted, concern was expressed regarding the manner in which courts assess these matters in order to make a determination, and that, frequently, 'bail review at the two-year period presents with the same challenges as bail at a first appearance.'¹⁶³

The Protocol on the Electronic Monitoring of Persons was utilised as part of an electronic tagging pilot by the DCS. Unfortunately, electronic monitoring for remand detainees was used in less than ten instances before the contract between the DCS and the service provider was cancelled. The initial contract had limited capacity for electronic tagging of 1 000 persons (parolees). The contract was cancelled following an investigation promulgated by the President to look into the procurement of the electronic monitoring.¹⁶⁴ As a result, no impact can be determined at this stage.

Recommendations

1. Civil society and advocacy groups should consider strategic impact litigation in cases where an accused is detained despite a determination being made that it is in the interests of justice that he or she be released on bail, and they cannot afford the monetary amount set, but alternatives were not considered.
2. Stakeholders to the Bail Protocol should consider amending the Protocol to allow applications to be brought to court in the second month of detention.

8. CONCLUSION, AND SUMMARY OF FINDINGS AND RECOMMENDATIONS

8.1 Conclusion

Overall, the South African legal framework governing bail is in compliance with international human rights norms and standards. The Constitution, as the supreme law, guarantees fundamental human rights.

There are various provisions in law that aim to operationalise the principle that remand detention should be a measure of last resort. Alternatives to remand detention in the legal framework include release on warning or bail, with or without conditions, and release under supervision. Despite the framework, practice shows that the police are quick to arrest yet remain reluctant to release individuals from custody after an arrest. If arrested persons are able to secure release from police custody following an arrest, it is through police bail and rarely through alternative mechanisms such as a warning to appear.

Various challenges impact the practice of police bail, including corruption, a lack of awareness of the legal framework, and continued community perceptions of a high and violent crime rate in South Africa.

Perceptions regarding crime and trust in criminal justice place pressure on the police from political and operational leadership and the community itself. Various amendments have been made to the legal framework over the last two decades in direct response to this public perception, making bail more difficult for accused persons. Despite these amendments, public perception and the pressure remain unchanged.

This seems to be a main contributing factor to some of the challenges with judicial bail as well. Various provisions in the legal framework providing for alternatives to remand detention are not properly applied by the courts. This conclusion appears to be supported by an analysis of successful section 63A applications over a 21-month period.

The legal framework does not provide for a mechanism by which remand/bail decisions are routinely brought under review. While intermittent reviews may be necessary, caution should be exercised when considering the percentage of court time currently spent on bail applications compared with demands on the criminal justice system and a shrinking budget.

Instead, the root causes for the unwillingness of the police, prosecutors and the courts to utilise alternatives to remand detention should be addressed. An analysis of successful section 63A applications raises questions regarding the proper application of the law in the initial bail decision. No additional grounds are required to be considered for a review under section 63A; the framework remains the same.

There are a number of recommendations included in this report and previous studies that will assist in achieving the objective of the Luanda Guidelines, that is, to reduce unnecessary and arbitrary arrest and custody and to promote alternatives to arrest and detention. Ultimately, in addressing the root cause for the unwillingness to use alternatives, it is necessary to shift the public mindset and the perception of measures that will be successful in reducing crime and keeping communities safe.

It is not only the police that require training – our communities need to be educated as well. South Africa remains one of the ten most violent countries in the world. Despite legislative amendments, as well as increased budgets, numbers of police and arrests, the murder rate has risen over the past five years. Communities need to know that more prisons and more police do not mean less crime.

A different and creative intervention is required, especially in the context of shrinking budgets and allocations of resources. Longer-term interventions at the community level will start to address the root causes. As such, a coherent approach with the following elements, among others, should be considered:¹⁶⁵

1. A need to understand what works in South Africa to reduce and prevent violence, together with a consideration of our history. Effective platforms are required to draw on the knowledge and experience of communities, non-governmental organisations (NGOs), academics and government to ensure interventions where and when they are needed.
2. A clear plan that takes into consideration the available resources. A national strategy that recognises resource constraints and works with what is available, harnessing resources that exist at community level, is required.

The South African framework contains the provisions required to achieve the objective of the Luanda Guidelines. However, the framework is simply not applied as intended. A number of recommendations are made in this report with a view to increasing the use of a rights-compliant approach to remand detention. In addition to the individual recommendations, a holistic approach to community safety, taking into account casual factors such as inequality, poverty and drug abuse is required.¹⁶⁶

8.2 Summary of findings and recommendations

The SAPS arrests prematurely and before a prima facie case is established through proper investigation.

1. The SAPS should, through broad consultation, consider a review of performance targets in order to include measurable targets and indicators in relation to key duties of the police that enable a comprehensive assessment of performance, priorities and the use of time.
2. Instances of wrongful arrest should carry performance management implications for the individual officers involved, including personal liability for the associated claims.
3. The SAPS should review training as well as the emphasis placed on arrest and other methods to secure the attendance of an accused person. The SAPS should further provide clarity on the grounds for arrest under Standing Order (G) 341 so as to be in line with the provisions of the CPA, and, if required, make the necessary amendments.
4. The SAPS should prioritise the establishment of an independent anti-corruption unit as part of its anti-corruption strategy.
5. The Department of Justice, in consultation with the National Forum on the Legal Profession and the SAPS, should consider including the placement of legal practitioners at police stations as part of community service programmes.

Inconsistencies exist in the approach by prosecutors to ADRMs, including informal mediation and diversion.

1. The Department of Justice should develop detailed guidelines for informal mediation, as well as an appropriate system of record keeping and oversight.
2. Diversion should be strengthened (through legislative reform, the promulgation of regulations or the development of detailed guidelines) to ensure consistent use with oversight and the provision of guidance to prosecutors in the exercise of their discretion.

Community perceptions of high and violent crime prevalence in South Africa and the political/SAPS leadership response is a barrier to police bail.

1. The Department of Justice and the SAPS should consult Chapter 9 institutions and civil society organisations to create public awareness and educational campaigns concerning:
 - a. The implementation of the National Development Plan (NDP) regarding the principles of civic participation in the creation of safer communities and the need for strong leadership and ownership by all in society; and
 - b. The purpose of bail, the types of bail and alternatives to arrest, which should include community radio and institutions of education.

The provisions in the CPA that provide for alternatives to bail are not sufficiently utilised by police and the courts.

The second leg of the bail inquiry is not properly applied at all.

1. The Department of Justice should, with a view to the development of an appropriate model for South Africa, consider a review of pre-trial services that incorporates examples of practice in comparative jurisdictions, and which includes comprehensive research and an understanding of how each court functions, in order to ensure that the project is localised and responsive to the needs of particular courts.
2. The SAPS and the Department of Justice should consider incentivising and performance-managing police and court officials to utilise alternatives to monetary bail, where appropriate.

The high success rates of section 63A applications, after bail has been granted, appear to confirm the wholly inadequate use of, and under-reliance on, provisions in law providing alternatives to remand detention.

1. Civil society and advocacy groups should consider strategic impact litigation in cases where an accused is detained despite a determination being made that it is in the interests of justice that he or she be released on bail, and they cannot afford the monetary amount set, but alternatives were not considered.
2. Stakeholders to the Bail Protocol should consider amending the Protocol to allow applications to be brought to court in the second month of detention.

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ENDNOTES

1. UN (27 September 2016) Report of the Secretary-General: Human Rights in the Administration of Justice A/71/405.
2. *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) at [13].
3. Ibid.
4. V Karth (2009) *Between a Rock and a Hard Place: Bail Decisions in Three South African Courts* (OSF Study).
5. 1999 (7) BCLR 771 (CC).
6. Judicial Matters Amendment Act 34 of 1998.
7. Judicial Matters Amendment Act 62 of 2000.
8. Judicial Matters Second Amendment Act 55 of 2003.
9. Karth (n 4 above), p. 6.
10. Ibid.
11. Karth (n 4 above).
12. Karth (n 4 above), pp. 31–32.
13. Karth (n 4 above), p. 21.
14. Ibid.
15. Karth (n 4 above), p. 22.
16. Karth (n 4 above), p. 23.
17. Ibid.
18. Karth (n 4 above), p. 29.
19. The interview questions are annexed to this report as Annexure A.
20. Unfortunately, despite identifying the SAPS as a key stakeholder, the SAPS did not participate in this study. This is noted as a shortcoming of this study.
21. Senior officials of government departments as well as senior legal practitioners and members of civil society participated in the interviews.
22. UDHR, art. 11.
23. UDHR, art. 9.
24. South Africa ratified the ICCPR on 10 December 1998.
25. Art. 14(c).
26. *Hill v Spain* Communication No. 526/1993 [12.3].
27. Ibid.
28. Adopted by General Assembly Resolution 45/110 of 14 December 1990.
29. See clause 6 of the UN Standard Minimum Rules for Non-Custodial Measures (1990).
30. ACHPR, 1981.
31. See art. 6 & 7 of the ACHPR.
32. See: <http://www.achpr.org/instruments/ouagadougou-planofaction/>.
33. Adopted by the Commission at the 32nd Ordinary Session, 2002.
34. See art. 21 to 32 of the Robben Island Guidelines.
35. Adopted by the Commission at the 55th Ordinary Session, 2014.
36. S. 35(1)(f) of the Constitution.
37. S. 58 of the CPA.
38. S. 59 of the CPA.
39. The Schedules to the CPA are annexed to this report as Annexure B.
40. S. 59A of the CPA.
41. S. 59A(5) of the CPA.
42. S. 60 of the CPA.
43. S. 60(4) of the CPA.
44. See ss. 60(5)–(8).
45. S. 60(11) of the CPA.
46. S. 58 of the CPA.
47. S. 62 of the CPA.
48. The Bail Protocol is annexed to this report as Annexure C.
49. See s. 63A(1) of the CPA.
50. See the Preamble to the South African Police Service Act.

51. See Chapter 8 of the Child Justice Act.
52. 2017 ZACC 22.
53. See Part 2, Sections 4, 8 and 9, of the Prevention and Combating of Corrupt Activities Act.
54. 'Gratification' is a broad term defined in the Act and includes offering favours and giving gifts.
55. *S v Acheson* 1991 (2) S A 805 (NMHC) at 822A-C.
56. *S v Kok* 2003 (2) SACR 5 (SCA).
57. *S v Bruintjies* (2) SACR 575.
58. *S v Moeti* 1991 (1) SACR 462 (B) at 463H.
59. *S v Hlopane* 1990 (1) SA 239 (O) at 242.
60. See *S v Mohamed* 1977 (2) SA 531 (A) at 544H.
61. *S v Fourie* 1947 (2) SA 574 (O) at 577.
62. *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) at 16.
63. See: <https://sustainabledevelopment.un.org/sdg16>.
64. Open Society Justice Initiative & UNDP (2011) *The Socioeconomic Impact of Pre-trial Detention* 5. Available at: <https://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pre-trial-detention-02012011.pdf> [accessed on 15 January 2018].
65. See: Criminal Justice Policy Program (2016) *Moving beyond Money: A Primer on Bail Reform* Harvard Law School, 6; Open Society Justice Initiative (2014) *Presumption of Guilt: The Global Overuse of Pre-Trial Detention*. Available at: <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf> [accessed on 13 January 2018].
66. Table compiled using data from the Inter-American Commission on Human Rights (2017) *Report on Measures Aimed at Reducing the Use of Pre-Trial Detention in the Americas*. Available at: www.iachr.org [accessed on 20 December 2017]; and Open Society Justice Initiative (2008) *Reducing the Excessive Use of Pre-Trial Detention*. Available at: <https://www.opensocietyfoundations.org/publications/justice-initiatives-pre-trial-detention> [accessed on 20 December 2017].
67. Pre-trial services enable the authorities involved in the decision-making process in respect of pre-trial detention to have adequate information before them, including information about the risks that will be evaluated.
68. Known as 'Justicia 2020' - see: <https://www.justicia2020.gob.ar/>.
69. In restorative justice initiatives, the victim, the accused person and any other persons impacted by the crime participate together to resolve issues stemming from the criminal act, usually with the help of a third-party mediator. The UN has developed basic principles for the use of restorative justice processes in criminal matters - see: <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-use-of-restorative-justice-programmes-in-criminal-matters/>.
70. This has been implemented in many countries but the Inter-American Commission on Human Rights has noted challenges in the use of electronic monitoring - see: Inter-American Commission on Human Rights (2013) *Report on the Use of Pre-Trial Detention in the Americas (Recommendation B: Application of other precautionary measures different from pre-trial detention)*. Available at: www.iachr.org [accessed on 20 December 2017].
71. Run by Muslims for Human Rights (MUHURL).
72. In 2000, the Paralegal Advisory Service Institute (PASI) was established in Malawi. PASI began as an initiative of Penal Reform International, which sought to link local NGOs with the Ministry of Justice and Malawi's Prison Service. PASI deploys trained paralegals to assist at all levels of the criminal justice system, including bail applications and advice regarding pre-trial detention - see: www.pasimalawi.org.
73. Abbreviated trials are characterised by reduced procedural time frames, confirmation of verdicts in less time, and the use of oral procedures. The Inter-American Commission on Human Rights has cautioned states when adopting abbreviated trials to ensure that measures are put in place to guarantee due process.
74. In a study conducted in England and Wales (see: Ed Cape & T Smith. (2016) *The Practice of Pre-Trial Detention in England and Wales: Research Report*. Available at: <http://eprints.uwe.ac.uk/28291> [accessed on 20 December 2017]) on the use of pre-trial detention aimed at finding ways to reduce the number of unsentenced prisoners, bail (with or without conditions) was found to be used extensively as an alternative to pre-trial detention. The study made the following recommendations, among others, aimed at improving the application of bail that could be helpful in improving the application of bail in South Africa:
 1. Judges, magistrates and prosecutors should receive training in up-to-date case law regarding pre-trial detention;
 2. Police officers should receive training in providing case summaries in order to ensure that they include a full account of evidence and other factors;
 3. More time and resources should be made available in magistrates' courts to remove the time pressure involved in conducting bail hearings;
 4. The training of judges and magistrates should stress the implications of the right to apply for bail and the importance of considering the likely sentence before deciding on bail;

5. Mechanisms for monitoring and enforcing bail conditions should be reviewed with a view to improving confidence in such bail conditions as an alternative to custody; and
 6. Consideration should be given to how the training of magistrates may be improved so that they are more able to provide reasons for their pre-trial detention decisions.
75. In the US, a Commission was established in Maryland to reform the pre-trial system. Pre-trial services enable authorities involved in the decision-making process in respect of determinations on pre-trial detention to have adequate information before them, including information about the risks that will be evaluated in deciding whether to grant bail. The Inter-American Commission on Human Rights has highlighted the following key recommendations that emanated from the Maryland Commission for improving pre-trial services:
1. Creating a uniform pre-trial services agency that assesses procedural risk and supervises persons released under pre-trial supervision;
 2. Promoting the use of pre-trial supervision as an alternative to pre-trial detention;
 3. Creating a system so that only one entity in the pre-trial process has to access and summarise the arrestee's record;
 4. Prompt presentment no later than 24 hours from arrest; and
 5. Producing data to effectively determine the impact of process and procedures on persons based on race, gender, language and indigence.
76. S Maimane (2017) Restorative Justice for Adult Offenders in South Africa: A Comparative Study with Canada, New Zealand, England and Wales. Available at: <https://repository.up.ac.za/handle/2263/62546> [accessed on 12 January 2018].
77. Used in cases of sexual offences.
78. See: <https://www.justice.govt.nz/.../restorative-justice-best-practice-framework-2017.pdf> [accessed on 12 January 2018].
79. Ibid.
80. Maimane (n 76 above).
81. See: <http://www.police.govt.nz/about-us/programmes-initiatives/adult-diversion-scheme/about> [accessed on 12 January 2018].
82. Open Society Justice Initiative: Lawyer at the Police Station Door: How REPLACE Provides Legal Aid in Nigeria. See: <https://www.opensocietyfoundations.org/.../pre-trial-justice-brochure-nigeria-2015031> [accessed on 12 January 2018].
83. The focus of the project was initially police stations in order to address problems at the entry into the criminal justice system, but was later expanded to include prisons.
84. The Honourable Ademola Enikuomehin.
85. See: <https://enlegal.co.uk/news/the-role-of-a-duty-solicitor/> [accessed on 12 January 2018].
86. See: <https://www.cardiff.ac.uk/law-politics/courses/law/professional-programmes/duty-solicitors> [accessed on 14 January 2018].
87. Open Society Justice Initiative (n 65 above), p. 33.
88. Open Society Justice Initiative (n 65 above), p. 36.
89. Criminal Justice Policy Program (n 65 above), p. 6.
90. See Human Rights Watch (2010) The Price of Freedom: Bail and Pre-Trial Detention of Low Income Nonfelony Defendants in New York City. Available at: <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pre-trial-detention-low-income-nonfelony-defendants-new-york> [accessed on 11 January 2018].
91. Criminal Justice Policy Program (n 65 above), p. 10.
92. Ibid.
93. Criminal Justice Policy Program (n 65 above), p. 12.
94. Penal Reform International (2012) Pre-Trial Detention and Its Alternatives in Armenia, p. 8.
95. Open Society Justice Initiative (n 65 above).
96. Open Society Justice Initiative (n 65 above), p. 134.
97. Open Society Justice Initiative (n 65 above).
98. Criminal Justice Policy Program (n 65 above), p. 14. See, also, Open Society Justice Initiative (n 65 above), p. 168, for the success of the Pre-Trial Services Agency for the District of Columbia in Washington DC.
99. Criminal Justice Policy Program (n 65 above), p. 16.
100. Human Rights Watch (n 90 above), p. 52.
101. Ibid.
102. Criminal Justice Policy Program (n 65 above), p. 16.
103. Ibid.

104. Ibid.
105. Criminal Justice Policy Program (n 65 above), p. 20.
106. Ibid.
107. Ibid.
108. C Ballard & R Subramanian (2013) Lessons from the Past: Remand Detention and Pre-Trial Services, *South African Crime Quarterly*, 44:15.
109. Ballard & Subramanian (n 108 above), p. 16.
110. Karth (n 4 above), p. 13.
111. M Schönsteich M (2002) Making Courts Work: A Review of the IJS Court Centre in Port Elizabeth, Monograph No. 75, Institute for Security Studies.
112. Human Rights Watch (n 90 above), p. 55.
113. See Open Society Justice Initiative (n 65 above), p. 28.
114. SAPS Annual Report 16/17, p. 108.
115. SAPS Annual Report 16/17, p. 154.
116. Ibid.
117. ISS Policy Brief (2017) Reducing Violence in South Africa: From Policing to Prevention, p. 8.
118. ISS & Corruption Watch (2017) Civil Society Initiative in Support of the National Development Plan: Overcoming the Serial Crises of Top Management in the Police in the Interests of Public Safety, p. 9.
119. Previous studies have highlighted some of the challenges with the manner in which performance targets of the police are framed and reported on – see D Bruce (2011) Measuring Outputs, Neglecting Outcomes: The Auditor-General's Role in SAPS Performance Assessments, *South African Crime Quarterly*, 38: 3. Recent statements made by the former Acting National Commissioner of Police, General Phahlane, to Parliament reflect a similar sentiment where the Commissioner argued that certain indicators and targets were meaningless – see PMG (2017) SAPS Annual Performance Plan: Programmes 2 to 5, with Deputy Minister. See, also, the Auditor-General of South Africa's Audit of the Predetermined Objectives 2016/2017 & the Combined Assurance Model, Report to the Portfolio Committee on Police (2 October 2017), which provides information on material and repeat audit findings regarding the performance of the SAPS.
120. Experiences of corruption in the SAPS were mainly described by the attorneys interviewed.
121. Open Society Justice Initiative (n 65 above).
122. Ibid.
123. J Burger & S Grobler (2017) *Why the SAPS Needs an Internal Anti-Corruption Unit*. Available at: <https://issafrica.org/research/.../why-the-saps-needs-an-internal-anti-corruption-unit> [accessed on 15 January 2018].
124. Given the lack of SAPS participation in this study, the effectiveness of this intervention has not been assessed.
125. NPA Annual Report 16/17, p. 24.
126. NPA Annual Report 16/17, p. 28.
127. NPA Annual Report 16/17, p. 29.
128. NPA Annual Report 16/17, p. 31.
129. NPA Annual Report 16/17, p. 35.
130. S. 1 of the Probation Services Act.
131. Maimane (n 76 above).
132. See the Heads of Argument of the Independent Amicus Curiae appointed by the court in the case of *Minister of Justice and Constitutional Development and Four Other v Garreth Prince* CCT 109/2017 at paragraph 70.2.
133. This table was compiled using data put before the court by the NPA in the case of *Minister of Justice and Constitutional Development and Four Other v Garreth Prince* CCT 109/2017, which data was summarised and analysed in the Heads of Argument of the Independent Amicus Curiae appointed by the court (November 2017).
134. L Muntingh, J Redpath & K Petersen (2017) An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future. Available at: <http://acjr.org.za/resource-centre/acjr-npa-2017-fin.pdf> [accessed on 12 January 2018].
135. Ibid.
136. S. 50(1)(b) of the CPA.
137. S. 58 of the CPA.
138. Ibid.
139. Statistics SA (2017) Victims of Crime Survey: 2016/17, p. 56.
140. Statistics SA (n 139 above), p. 64. See, also, B Roberts & S Gordon (2016) Pulling Us apart? The Association between Fear of Crime and Social Cohesion in South Africa, *South African Crime*

Quarterly, 55, where the link is drawn between greater fear of crime and being associated with more negative views of police effectiveness and overall police confidence.

141. Statistics SA (n 139 above), p. 65.
142. IOL (2017) Move to Tighten SA Bail Laws. Available at: <https://www.iol.co.za/news/crime-courts/move-to-tighten-sas-bail-laws-8065927> [accessed on 20 December 2017].
143. Ibid. See, also, PMG (2017) Justice, Crime Prevention and Security Post-SONA Cluster Media Briefing.
144. Open Society Justice Initiative (n 65 above), p. 102.
145. Open Society Justice Initiative (n 65 above), p. 104.
146. ISS Policy Brief (n 117 above), p. 9.
147. See ISS & Corruption Watch (n 118 above).
148. ISS Policy Brief (n 117 above), p. 13.
149. ISS Policy Brief (n 117 above), 10-2.
150. VG Hiemstra (2008) *Criminal Procedure* Lexis Nexis, 10-2
151. See: <https://www.iol.co.za/news/crime-courts/irrlaments-plight-of-prisoners-of-poverty-1998145> [accessed on 21 December 2017] and <https://mg.co.za/article/2016-03-15-irrlurges-lawmakers-to-assist-poverty-stricken-prisoners> [accessed on 21 December 2017].
152. Ibid.
153. NPA Annual Report 16/17, pp. 28-31.
154. Hiemstra (n 150 above), 9-10.
155. S. 60(4) of the CPA.
156. Ss. 60(5)-(9) of the CPA.
157. S. 60(2B)(a) of the CPA.
158. See, for example, *S v Budlender* 1973 (1) SA264 (C).
159. *Conradie v R* 1907 TS 455.
160. Information supplied by the DCS.
161. PMG (2017) Briefing by DCS, NPA, Legal Aid SA, Judiciary and SAPS: Bail Policy and Minimum Sentencing Legislation on Inmate Population Briefing. See, also, excerpt attached as Annexure D on 63A Bail Protocol and Its Impact on Inmate Population.
162. Ibid.
163. See, also, CALS (2013) '*Barred (in)Justice*' *A Study on the Impact of Bail Proceedings in respect of Remand Detention in Select Magistrates' Courts in Johannesburg*, p. 30.
164. PMG (2017) Briefing by Department of Correctional Services: Quarter 4 Performance.
165. ISS Policy Brief (n 117 above), p. 13.
166. PMG (n 161 above).

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