

## **Implementation of the Luanda Guidelines: Review of arrest, police custody and remand detention in South Africa**

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### **PART I INTRODUCTION AND OVERVIEW**

#### **Introduction**

The unnecessary and arbitrary use of arrest, police custody and pre-trial detention is a major contributing factor to prison overcrowding across Africa. It also feeds corruption, exposes detainees to the risk of human rights violations, and has significant socio-economic impacts on detainees, their families and communities.<sup>1</sup> Concerned about the impact of prison overcrowding and the consequences of arbitrary arrest and prolonged pre-trial detention, the African Commission on Human and Peoples' Rights (ACHPR)<sup>2</sup> adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa ('the Luanda Guidelines')<sup>3</sup> as part of its mandate to formulate standards, principles and rules on which state parties to the African Charter on Human and Peoples' Rights (AChHPR) can base their national legislation.<sup>4</sup>

The AChHPR provides all people with the rights to life, dignity, equality, security, a fair trial and an independent judiciary.<sup>5</sup> The Luanda Guidelines provide an authoritative interpretation of the application of these provisions, and are a guide to law and policy-makers and criminal justice practitioners, to strengthen day-to-day practices in terms of arrest, police custody and pre-trial detention. In doing so, they reinforce the importance of a criminal justice system built on core human rights principles. They aim to ensure fewer arbitrary arrests and a more rational and proportionate use of pre-trial detention to promote a more effective use of human and financial resources, for example targeted towards legal aid and crime prevention. The Guidelines are also a reflection of the collective aspirations of African states, national human rights institutions and civil society organisations (CSOs) in terms of normative standards for criminal justice systems in Africa.<sup>6</sup>

The adoption of the Guidelines by the ACHPR was an important first step in its work to promote a rights-based approach to criminal justice in Africa. The success of the Luanda Guidelines in achieving this aim will be measured by the extent to which stakeholders, including state parties to the AChHPR, implement the Guidelines.

Against this backdrop, APCOF is providing technical assistance to the ACHPR Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (the Special Rapporteur), to promote the implementation of the Luanda Guidelines in South Africa.<sup>7</sup> As a state party to the AChHPR, the Luanda Guidelines are relevant to South Africa for two important reasons. First, South Africa will be expected to reflect on the Luanda Guidelines in its state report in terms of Article 62 of the AChHPR. Second, its status as a soft law instrument has legal relevance to the arrest and remand detention environment in South Africa by providing a clear normative standard for arrest, police custody and pre-trial detention against which this review of the current legislative and policy environment for remand detention in South Africa, and future planning, can be made.

The review is divided into five parts:

- Part I: Overview
- Part II: A review of arrest, police custody and remand detention in South Africa: Coordination and institutional reform
- Part III: A review of arrest, police custody and remand detention in South Africa: Process issues
- Part IV: A review of arrest, police custody and remand detention in South Africa: Vulnerable groups
- Part V: Recommendations for reform

The South African framework generally aligns to the Luanda Guidelines, with a few notable exceptions, particularly in terms of how that framework is implemented. These challenges are generally known to the key stakeholders within the criminal justice system, and in the course of making this review, APCOF has noted that significant efforts are already being made at a national level to address the challenges through, in particular, the Office for the Criminal Justice System Review (OCJSR), the Intersectoral Committee for Child Justice (ISCCJ)<sup>8</sup> and implementation of the White Paper on Remand Detention Management in South Africa by the Department of Correctional Services (DCS).<sup>9</sup> This review has taken these priorities and efforts into account in terms of making recommendations and identifying the entry points for reform.

## **A methodological framework for the review**

On 14 October and 15 December 2015, APCOF, in collaboration with the National Development Committee of the Justice, Crime Prevention and Security Cluster (JCPS) (DevCom) held a consultation in Pretoria on the terms of reference for this review with stakeholders from various government departments and organisations.<sup>10</sup> A framework for measuring the performance of South Africa's remand system was proposed by APCOF<sup>11</sup> and refined by participants. Six categories of measurement were proposed, which take a holistic view of measuring remand detention. This approach aligns with the purpose and scope of the Luanda Guidelines and avoids framing the remand detention challenge in terms of simply counting the number of remand detainees as a proportion of the total prison population. The categories are:

- Category 1: Risk to freedom of movement
- Category 2: Duration of remand detention
- Category 3: Accused persons' compliance with conditions of release
- Category 4: Effectiveness and efficiency of the criminal justice system
- Category 5: Conditions of detention
- Category 6: Community perceptions of the effectiveness and efficiency of the criminal justice system

For each category, high-level indicators were assigned, with provision made for the review and analysis of disaggregated data from identified data sources.

The scope of this review does not extend to a complete statistical analysis in terms of the categories and their corresponding indicators (provided in Annexure 1). To complete a study of this kind requires time and resources beyond those available to APCOF.

APCOF has, however, used the categories as a way to frame the collection and analysis of information available including, but not limited to the Constitution, and relevant legislation, policies and other standing orders or instructions, jurisprudence, reports from relevant departments within the criminal justice system, and independent and evidence-based research reports from academia and civil society in South Africa.

Publicly available information was collected and analysed to provide an indication of the extent to which the legislative and policy framework for remand detention in South Africa is achieved in practice. During the consultations in Pretoria on 14 October and 15 December 2015, additional information was provided to APCOF by participants. Where this information was verifiable through publicly available information, a footnote is provided, and where supporting documentation was not available, a footnote is provided to note the source of the information (e.g. to identify the informant's department or agency).

## **Summary of the international normative framework**

The Luanda Guidelines were developed by the ACHPR as an authoritative interpretation of African Charter rights such as life, security, non-discrimination and freedom from torture, and contributes to the development of normative standards for criminal justice at the continental and international levels. Other relevant treaties and norms that are specifically contemplated by the Luanda Guidelines include, but are not limited to: the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the Convention on the Rights of the Child, the UN Minimum Rules for the Treatment of Prisoners (the 'Mandela Rules'),<sup>12</sup> and the UN Standard Minimum Rules for Non-Custodial Measures.<sup>13</sup> In doing so, the Luanda Guidelines reinforce the importance of a criminal justice system built on core human rights principles. They aim to ensure fewer arbitrary arrests and more rational and proportionate use of pre-trial detention. This enables a more effective use of human and financial resources, for example targeted towards legal aid and crime prevention.

The Guidelines trace the steps from the moment of arrest until trial, focusing on the decisions and actions of the police, correctional services and other criminal justice stakeholders such as the judiciary and prosecution. They contain eight key sections covering the framework for arrest and custody, important safeguards, measures to ensure transparency and accountability and ways to improve coordination between criminal justice institutions. Each part is discussed in turn below.

### ***Part I: Arrest***

Arrest covers the grounds for arrest, procedural guarantees and the rights of suspected and arrested persons, including the requirement that they be notified of their rights. The aim of Part I of the Guidelines is to reduce the number of unnecessary and arbitrary arrests, and to protect persons who are under arrest from human rights abuses.

The rights to life and liberty are central to the construction of this part, and the grounds for arrest limit the use of arrest to exceptional circumstances and as a measure of last resort. The Guidelines promote alternatives to arrest, where appropriate, for minor crimes, and encourage state parties to the African Charter to establish diversion systems.

The Guidelines set out in detail a range of procedural guarantees for arrest, including the requirement for officials to identify themselves, limitations on the use of force and firearms, a framework for the conduct of searches, and provision for the maintenance of arrest registers. The rights of an arrested person are set out at length in Guideline 4 and include the rights to:

- Freedom from torture and other ill-treatment;
- Information on the reason for arrest and charge in a language and format understood by the arrested person, and the necessary facilities to exercise rights;
- Silence and freedom from self-incrimination;
- Access to legal assistance, family or other person of choice and medical assistance;
- Humane conditions of police custody;
- Information in an accessible format;
- Release on bail or bond as the presumptive right;
- Challenge the lawfulness of arrest;
- Freely access complaints and oversight mechanisms; and
- Reasonable accommodation for persons with disabilities.

### ***Part II: Police custody***

Part II of the Luanda Guidelines sets out in detail the procedural and other safeguards for persons who are deprived of their liberty in police custody. The provisions are designed to promote freedom from arbitrary detention and emphasise the use of police custody as an exceptional measure of last resort. To promote the rights of persons who are held in police custody, the Guidelines highlight the need for independent monitoring of police cells, and provide safeguards for detainees who are subject to questioning and interrogation. Guideline 7 provides guidance for police agencies who have the statutory authority to grant bail, which are the same as the guidelines set out in Part III for judicial decision-makers (see below).

Guideline 8 sets out the requirement for the provision of legal assistance services to accused persons. The use of the term 'legal assistance' rather than 'lawyer' is deliberate, as it acknowledges that there are a range of legal service providers, such as paralegals, who can provide legal information and assistance to accused persons. However, this expanded definition does not diminish the importance of access to qualified lawyers, which must remain at the centre of any national legal aid scheme.

### ***Part III: Pre-trial detention***

Part III of the Guidelines establishes a detailed framework to promote a rights-based approach to decision-making in relation to remand orders, and safeguards for persons who are subject to such orders. As with police custody, the Guidelines emphasise that remand detention should only be ordered as an exceptional measure of last resort, and encourages state parties to the African Charter to establish and maintain alternatives to remand detention. Part III shifts the focus of the Guidelines from the police to the judiciary, providing guidance on the framework for decision-making in terms of judicial orders for remand, and review of remand orders. It also sets out procedures in the case of delays in investigation or judicial proceedings that may result in prolonged remand detention. Lastly, it establishes safeguards for persons who are subject to remand orders, including that remand detainees be held in officially recognised places of detention and have access to a lawyer.

### ***Part IV: Registers and access to information***

Part IV of the Luanda Guidelines sets out the requirement for registers at all stages of the arrest, custody and remand process, and provides for access to registers by detainees, lawyers, family members, oversight authorities and any other organisation with a mandate to visit places of detention. This Part sets out the minimum information to record in a register, such as key identifying information (e.g. name and address), details for the next of kin and any observations on the physical and mental health of the person subject to arrest, police custody or remand detention.

Guidelines 39 and 40 (which are in Part VIII of the Guidelines) deal specifically with data collection and access to information. These provisions require that state parties establish processes for the systematic collection of disaggregated data on the use of arrest, police custody and remand detention, and ensure that there are systems and processes in place to guarantee the right of access to information for accused persons, their lawyers, family members and others.

### ***Part V: Procedures for serious violations of human rights in police custody and pre-trial detention***

State responsibility to account for death, injury and violations of human rights in a custodial setting underpin Part V of the Luanda Guidelines, which set out a range of procedures for state parties to institute to ensure effective, impartial and independent investigations into death and human rights violations. Part V is premised on the requirement by states to establish independent oversight and accountability mechanisms, which is discussed in detail in Part VIII of the Guidelines.

#### ***Part VI: Conditions of detention in police custody and pre-trial detention***

Acknowledging the comprehensive framework for physical conditions of detention provided in the recently updated UN Standard Minimum Rules for the Treatment of Prisoners ('the Mandela Rules'), the Luanda Guidelines focus on the procedural safeguards to ensure the safe custody of persons held in police cells and remand environments. The Guidelines emphasise that all fundamental rights and freedoms apply to accused persons, except those limitations that are demonstrably necessary by the fact of detention itself. Amongst the safeguards promoted by the Guidelines include:

- Alternatives to detention to reduce overcrowding;
- Limitations on the use of force and firearms, permissible restraints, disciplinary measures and solitary confinement;
- Legislative, budgetary and other measures to ensure adequate standards of accommodation, nutrition, hygiene, clothing, bedding, exercise, physical and mental healthcare, contact with the community, religious observance, reading and other educational facilities, support services, and reasonable accommodation;
- Health assessment screenings and harm-reduction strategies;
- Procedures for the safe transfer of accused persons;
- Provision for adequate and efficient staffing;
- Separation of categories of detainees; and
- Appropriate communication facilities, and access by accused persons to those facilities.

#### ***Part VII: Vulnerable groups***

Part VII focuses specifically on the rights of persons identified as vulnerable to rights abuses in arrest, police custody and remand detention settings. It contains general provisions that encourage state parties to enshrine the right to freedom from discrimination in national law, and outlines specific protections in relation to all categories of persons afforded protection in the AChHPR, as well as the following specific groups:

- Children: definition of a child as anyone aged below 18; primacy of the best interests of the child; laws and policies to promote diversion and alternatives to detention; safeguards for arrest, police custody and remand detention; right to be heard and provision of legal assistance services; a framework for conduct of officials and establishment of specialised units; access to third parties.
- Women: safeguards for arrest and detention, including separation from male detainee populations; provisions for accompanying children.
- Persons with disabilities: definition of disability which includes physical, mental, intellectual or sensory disability; legal capacity and access to justice; accessibility and reasonable accommodation.
- Non-nationals: specific protections for refugees, non-citizens; stateless persons in terms of access to third parties and translation services.

#### ***Part VIII: Accountability and remedies***

Part VIII of the Guidelines set out an accountability architecture that is comprised of internal and external oversight, judicial oversight, complaints and monitoring mechanisms, and provision for remedies. It also sets out the minimum standards of conduct for officials, and provides for a system of inquiries.

#### **Part IV: Implementation**

The final Part of the Guidelines promotes implementation by state parties to the AChHPR through a range of measures, including review of existing national frameworks, national training and reporting against the Luanda Guidelines to the African Commission as part of the state party reporting procedures in the AChHPR.

### **Overview of South Africa's performance against the Luanda Guidelines**

South Africa's constitutional and legislative framework for arrest, police custody and remand detention contains a number of strong protections that align with the Luanda Guidelines. However, there are challenges in relation to the framework for arrest<sup>14</sup> and bail,<sup>15</sup> and broader challenges about the implementation of the overall legislative and policy framework. Identifying entry points to address the framework and implementation challenges in South Africa is, on the one hand, a complex exercise, given the vast array of stakeholders with responsibility for the care, management and oversight of persons in conflict with the law. However, the existence of a national coordinating mechanism, through the Department of Justice and Constitutional Development (DoJ&CD), in addition to a national development and policy focus on remand detention at the DoJ&CD and individual departmental levels, does provide a clear parameter within which this review, and the formulation of recommendations, can be made.

Over the past few years, the issues posed by overcrowding in South Africa's correctional facilities has been the subject of review and policy reform. Overcrowding was identified in South Africa's National Development Plan (NDP) as a critical challenge, and significant efforts have been made to both address the coordination and effectiveness of the criminal justice system in the management and treatment of remand detainees, and to reduce the number of suspects held in remand detention.

The management and care of remand detainees in South Africa is not solely within the purview of the DCS, as the department responsible for the management and administration of remand detention facilities. Rather, South Africa's remand detention system co-opts a variety of role-players across the criminal justice system, requiring significant coordination, communication and cross-sectorial support. This is particularly so if a holistic view of remand detention justice is taken, in line with the Luanda Guidelines, and considers the various preconditions to remand detention, such as stop and search, arrest and police custody, in addition to ancillary factors such as court utilisation, access to legal assistance services and the performance of prosecutorial services.

For example, the performance of the South African Police Services (SAPS) in terms of timeous and thorough investigations of crime have a significant effect on the ability of the National Prosecuting Authority (NPA) and the courts to ensuring an accused person's right to a speedy trial. Prolonged remand detention as a result of trial delays not only jeopardises the constitutional protections guaranteed to remand detainees, but can have a deleterious effect on the administration of justice, and on confidence in the criminal justice system as a whole.

Over the past few years, the progress made to reduce the number of remand detainees in DCS facilities has been commendable and encouraging. However, this review has identified a number of gaps that must be addressed if South Africa is to achieve a rights-based approach to remand detention that is both consistent with the Luanda Guidelines and the country's own constitutional framework.

## **PART II REVIEW OF SOUTH AFRICA AGAINST THE LUANDA GUIDELINES COORDINATION AND INSTITUTIONAL REFORM**

### **Introduction**

The review of South Africa's constitutional, legislative and policy framework for arrest, police custody and remand detention is made against the framework provided by the Luanda Guidelines. The Guidelines trace the steps from the moment of arrest until trial, focusing on decisions and actions of the police, correctional services and other criminal justice stakeholders. They contain eight key sections covering the framework for arrest and custody, important safeguards, measures to ensure transparency and accountability and ways to improve coordination between criminal justice institutions.

Using the parameters set by the Luanda Guidelines<sup>16</sup> and the categories of measurement proposed by APCOF<sup>17</sup> in consultation with other stakeholders, APCOF reviewed the constitutional, legislative and policy framework for arrest, police custody and remand detention in South Africa, and identified a number of challenge areas in terms of the implementation.

This part of the review considers the challenges in terms of coordination between criminal justice system institutions, and the need for legislative and institutional reform.

### **A coordinated approach**

The Luanda Guidelines promote a holistic approach to the management of pre-trial justice systems, with coordination between the main sector institutions responsible for the care and management of accused persons: the police, correctional services, judiciary, prosecution, legal aid, health services and others.

South Africa's approach to remand detention management applies this key Luanda Guidelines objective.

In 2007, the South African government established a committee to review challenges within the criminal justice system and to develop a plan to make it more effective and efficient. The aim of the review was to enhance coordination between government departments in the justice, crime prevention and security (JCPS) cluster, namely the SAPS, the DoJ&CD, the NPA, the DCS, and the Department of Social Development (DSD). The result of the review was the 7-Point Plan, which was approved by Cabinet in 2008 and later endorsed by the NDP in 2013.<sup>18</sup>

Together, the 7-Point Plan and NDP aim to establish a criminal justice system that is modernised, integrated and effectively managed under a single coordinating structure at every level of governance,<sup>19</sup> and is further reflected in the JCPS Delivery Agreement as Outcome 3 and the Medium-Term Strategic Framework (MTSF) for 2014–2019.

Central to improving the efficiency and coordination of the criminal justice system is the role of the DoJ&CD. The implementation of the 7-Point Plan is coordinated by the Office for the Criminal Justice System Review (OCJSR), which is located within the DoJ&CD and supported by an intersectoral secretariat. The DoJ&CD is therefore an important coordination point for improving effectiveness and efficiency across the criminal justice chain.

The 7-Point Plan and the NDP emphasise the importance of establishing an effective and efficient criminal justice system not only to create sustainable development and build safer communities, but also to promote a culture of human rights.<sup>20</sup> The 7-Point Plan, in particular, sets out to modernise the systems that integrate the various players in the criminal justice system by adopting a single vision and

mission and responsible structures, improving court processes and performance, modernising and integrating information and technology systems, and engaging the community in the criminal justice system.<sup>21</sup>

Further, since Cabinet's adoption of the NDP (which endorses the implementation of the 7-Point Plan), every line function department is required to align its strategic and annual performance plans to achieve the objectives of the MTSF, which sets forth a five-year strategy for the long-term achievement of the NDP.<sup>22</sup> In this regard, the Department of Planning, Monitoring and Evaluation (DPME) within the Office of the Presidency is mandated to monitor the performance of every department in meeting its targets under the MTSF.<sup>23</sup>

The coordination efforts at a national level have resulted in marked improvements in the care and management of accused persons in South Africa. For example, coordination efforts have seen the number of remand detainees in South Africa decrease; so too the average length of remand detention. However, challenges in terms of overall coordination as well as individual institutional challenges have hampered the implementation of the overarching policy objectives.

Key challenges are discussed below.

### ***Resisting a 'tough on crime' approach to policing***

During consultations on this review, participants noted that any discussion on the challenges experienced by criminal justice actors in the implementation of an effective and rights-based remand detention system must be viewed in the context of South Africa's high crime rates. Context is critical to ensuring that legislative and policy developments are relevant and capable of application, and therefore any recommendations or actions to promote the Luanda Guidelines in South Africa need to take account of the existing policy framework for safety, crime prevention and policing, which were developed for the unique South African context, and provide specific responses to a rights-based approach to safety, security and crime prevention.

The NDP identifies six priority areas for achieving a safer South Africa:<sup>24</sup>

- Strengthening the criminal justice system;
- Professionalising the police service;
- Demilitarising the police service;
- Increasing the rehabilitation of prisoners and reducing recidivism;
- Building safety and using an integrated approach; and
- Increasing community participation in safety.

Since the adoption of the NDP in 2012, the Civilian Secretariat of Police (CSP) has circulated two key policies for public comment: the draft White Paper on Policing<sup>25</sup> and the draft White Paper on Safety and Security.<sup>26</sup> Recognising the shifting nature of crime and violence in South Africa, and the consequential need to realign the 1998 White Paper on Safety and Security with the objectives of the NDP, both White Papers call on the criminal justice system to take a more integrated and developmental approach to crime and violence.<sup>27</sup> More specifically, the Draft White Paper on Police aims to establish a framework for 'an accountable, professional, competent, and highly skilled police service',<sup>28</sup> while the Draft White Paper on Safety and Security promotes interventions to confront risk factors at individual, family, community and societal levels.<sup>29</sup> Accordingly, the two policy directives work together to create an intersectoral, multidisciplinary response to crime and violence in South Africa.

Further, it is imperative to note here that an explicit commitment to human rights principles, specifically the fundamental rights provided in Chapter 2 of the Constitution, is central to both White Papers.<sup>30</sup> In this regard, each White Paper aims to protect and promote the rights of persons in remand detention, specifically those of arrested, detained and accused persons under Section 35.<sup>31</sup>



Safe societies are grounded upon mutual trust of, and respect for, the police service and the communities in which it serves. Trust is earned by exhibiting an unwavering knowledge of, and commitment to, the rule of law. Respect is earned when laws are enforced in a manner that does not violate fundamental rights of the person, including the rights to dignity and freedom and security of the person, regardless of whether the individual has been suspected or accused of committing a crime. Accordingly, the approach to reform of the remand detention environment in South Africa, whether on the basis of legislative or policy review, or in terms of the performance of the criminal justice system in implementing the framework, should be grounded on a rights-based approach, as articulated in the current policy framework offered by the White Paper on Policing and the White Paper on Safety and Security.

### ***The Police Act, detective services and the impact on delays***

The White Paper on Policing and subsequent Police Act Amendment is an opportunity to provide a clearer policy framework for policing that is consistent with the role of the police in terms of the Constitution, and the recommendations of the NDP. Legislative amendments should be framed in terms of the principles that underpin the NDP and the Constitution, and implemented in a way that responds to the challenges and situational analyses provided in this broader framework, including the role of the police in a democratic South Africa<sup>32</sup> and the key components of democratic policing.<sup>33</sup>

Given the discussions in Part III, below, about the extent to which the SAPS contributes to delays and within the criminal justice system, the upcoming Police Act amendments provide an opportunity to engage with the evidence-based findings and recommendations contained in the SAPS Policy Advisory Council Reports (2006/7 and 2007/8), Parliament's Detective Dialogue (2012), the NDP (2012), the Khayelitsha Commission of Inquiry (2014) and the SAPS National Inspectorate Report (2015), particularly in relation to:<sup>34</sup>

- Effectiveness of current resource allocation systems and its impact on operational and management choices;
- Challenges within police leadership;
- Poor internal systems of control and particularly with regard to firearm management;
- Inefficiencies in police disciplinary systems; and
- Challenges in responding to/policing certain crimes/incidents (i.e. public demonstrations, xenophobia, domestic violence, violence against children, etc.).

Amendments to the Police Act to align the role and function of the police to South Africa's constitutional framework, and to the new policy framework provided by the White Paper, is a critical and urgent next step. The challenges identified above should inform the amendments to promote a framework for policing that is both rights-based and an evidence-based response to the known challenges and opportunities for policing in South Africa.

### ***Remand detention management***

In terms of the remand detention system, in March 2014, the DCS released the White Paper on Remand Detention Management in South Africa in an effort to cater for the needs of people awaiting trial who, at the time the White Paper was concluded, comprised one third of the total DCS inmate population.<sup>35</sup> The responsibility of the DCS to manage the population of remand detainees emanated from a decision by Cabinet in 2009 that resulted in the creation of a new branch within the DCS, which required an alignment of existing legislation and policies to meet the separate and distinct set of needs of remand detainees.<sup>36</sup> Implementation of the White Paper (though in its infancy) has resulted in positive developments (discussed in more detail in Part III of this paper), such as a reduction in the overall number of remand detainees held in DCS facilities, and a reduction in the average time spent in remand detention. Recently, the DCS also concluded protocols in terms of: (i) the referral of remand detainees to court for consideration of their length of detention; (ii) referral of terminally ill or severely incapacitated remand detainees to court; (iii) bail; (iv) temporary release of remand detainees to the SAPS for further investigation and early arrivals in court; and (v) a protocol on placing remand detainees on electronic monitoring systems.<sup>37</sup>

As the White Paper notes, effective implementation requires coordination from all criminal justice stakeholders, and the White Paper outlines the roles and responsibilities of various stakeholders, including the SAPS, DCS and the DSD. While the DCS has made commendable improvements to both the numbers of remand detainees, and the average length of remand detention, as set out in Part III of this paper, coordination challenges remain, particularly with respect to the trial-ready case dockets, court utilisation time, and conditions of detention, all of which coopt other criminal justice stakeholders (including the SAPS and the judiciary), which has resulted in fragmented implementation and impact. As part of this review, APCOF has identified key challenge areas, and will address some of the key coordination issues, with a whole of criminal justice system approach to measuring and monitoring performance as a first step.

### ***Custody monitoring***

#### *Coordination*

The accountability architecture for South Africa's criminal justice system is the most comprehensive system in Africa, and largely reflects the oversight and accountability framework provided by the Luanda Guidelines. However, to improve coordination between the current accountability mechanisms, and to address the gaps in the current system, consideration should be given to establishing a mechanism to ensure cohesion between all accountability and oversight actors, including the development of shared frameworks for inspections.

#### *Remand*

In terms of remand, monitoring of the treatment and conditions of detention is within the mandate of the Judicial Inspectorate for Correctional Services (JICS) and, in terms of the development of a National Preventative Mechanism, as required by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT), the South African Human Rights Commission may be moving towards a more comprehensive approach to monitoring all places of detention (including in relation to immigration, mental health and medical detention, where there are current accountability gaps).

The JICS is mandated to facilitate inspections of correctional service centres and remand detention facilities, and to report on the treatment of inmates, conditions of detention, and on any corrupt or dishonest practices within the DCS. However, in recent years, the effectiveness of the JICS has been questioned, given that its financial and administrative support comes directly from the DCS, not National Treasury.<sup>38</sup> The 2006 Jali Commission recommended reform to promote the JICS' independence and to expand its mandate, and further recommended the establishment of a Prison Ombudsman, with powers in line with that of the former Independent Complaints Directorate.<sup>39</sup> Research into the performance of the JICS indicates that the failure to implement the Jali Commission recommendations has left the JICS 'unable, due to limitations of its mandate, to hold officers accountable, to place sufficient pressure on the NPA to effect prosecutions' or compel the DCS to provide reasons for refusing to accept its recommendations.<sup>40</sup> Consideration should therefore be given to promoting the financial independence of the JICS to promote broader independence and effectiveness of this key oversight institution, and to promote public confidence in its work and findings.

#### *Police cell monitoring*

One of the key gaps in the current monitoring system is the lack of sustained and systemic oversight of police cells. Since responsibility for cell monitoring was moved from the former Independent Complaints Directorate to the CSP, there have been limited cell inspections.

Consideration should therefore be given to the establishment of a lay visitor's scheme as part of the CSP's mandate to inspect police cells. Twenty years ago, a lay visiting scheme began to emerge and was absorbed into the Community Policing Forum (CPFs) structures – however, few CPFs provide regular monitoring, and the monitoring that does occur is not against a comprehensive or agreed framework.

## **Prosecutions**

The NPA plays an important role in the criminal justice system in terms of the prosecutorial discretion to elect or decline to prosecute. The Constitution provides that the NPA must exercise its functions without fear, favour or prejudice.<sup>41</sup> In the prosecution process, prosecutors must adhere to the prosecution policy and policy directives issued by the National Director of Prosecutions.<sup>42</sup> In terms of the policy directives, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of successful prosecution in deciding whether or not to institute criminal proceedings against an accused person.<sup>43</sup> Decisions to prosecute or not to prosecute can be subjected to internal review by an escalating level of seniority, including up to the level of the National Director, at the instance of the accused person as well as a complaint or person with sufficient interest in the particular matter. The process of representations is further supplemented by the possibility of a decision not to prosecute being taken on review before a judicial officer where the decision is not in accordance with the law.

Some commentators have argued that the current internal accountability systems within the NPA, including reporting to Parliament and the Auditor-General, do not have the necessary independence or sufficiently broad mandate, to provide the type of oversight that will enhance public confidence, and improve the efficiency and effectiveness of the NPA.<sup>44</sup>

Consideration should be given to establishing a dedicated oversight mechanism for the NPA to review NPA performance, particularly regarding reasons for the decision not to prosecute, practices in terms of opposing bail, and the caseload and efficiency of prosecutors.

## **PART III REVIEW OF ARREST, POLICE CUSTODY AND REMAND DETENTION PROCESS ISSUES**

### **Introduction**

Part III reviews the process for arrest, police custody and remand detention in South Africa against categories of measurement that are designed to track the efficiency and effectiveness of the system as a whole, as against the objectives and terms of the Luanda Guidelines.

This review of arrest, police custody and remand detention in South Africa is made against the following categories:

- Risk to freedom of movement;
- Duration of remand detention;
- Conditions of detention;
- Accused persons' compliance with conditions of release;
- Effectiveness and efficiency of the criminal justice system; and
- Community perceptions of the effectiveness and efficiency of the criminal justice system.

Each section below provides an explanation of the particular category of measurement, and is based on the current legislative and policy framework, available data and other research, and consultation with relevant stakeholders.

### **Risk to freedom of movement**

#### ***Risk to freedom of movement as a category of measurement***

Measuring the risk to freedom of movement provides an insight into the number of people in contact with the criminal justice system,<sup>45</sup> and the extent to which the stop, search, arrest, custody or detention of such individuals is proportionate, justifiable and necessary. The objective of the Luanda Guidelines is to reduce unnecessary and arbitrary arrest and custody, and promote alternatives to

arrest and detention where persons are in conflict with the law, with a view protecting the fundamental rights, reducing overcrowding and easing the burden placed on the criminal justice system.

Measuring the risk to freedom of movement takes into account the various stages at which a person may be deprived of their freedom of movement, and provides insight into the statistical relationship between arrest and remand detention. This category of measurement can also provide information on how arrest and detention levels change over time, and provides a picture of the volume of cases entering the criminal justice system, and the commensurate implications for human and financial resources.

Statistics were available for most of the categories of proposed high-level indicators, with the exception of police custody. The data available were not disaggregated to provide an accurate indication of the population groups most likely to be affected by restrictions on freedom of movement in the pre-trial justice context.

- Number of people stopped and searched: 3 049 586 stop and searches and 15 361 826 personal searches reported in 2014/2015;<sup>46</sup>
- Number of people arrested: 1 707 654 reported in 2014/2015;<sup>47</sup>
- Number of people charged: 1 660 833 persons 'arrested and charged' in 2014/2015;<sup>48</sup>
- Number of people detained in police custody: figures not available; and
- Number of people in remand detention: annual average of 41 717 remand detainees, from a total prison population of 159 563,<sup>49</sup> and the average number of remand detainees held for two years or more was 1 733 at 21 March 2015.<sup>50</sup>

### ***Review of risk to freedom of movement***

The right to liberty<sup>51</sup> in the South African is expressed through three distinct, yet interconnected rights: the right to freedom and security of the person,<sup>52</sup> the right to privacy<sup>53</sup> and the right to freedom of movement.<sup>54</sup> Restrictions on the right to liberty manifest in the criminal justice context are reflected in police powers to stop and search, arrest, charge and detain, as well as the imposition of remand orders by the courts.

Generally, South Africa's legislative and policy framework adequately provides for the safeguards against restrictions on liberty and movement as set out in the Luanda Guidelines. The following highlights some of the key gaps and challenges, both in terms of current law, and application of the law.

#### ***Stop and search***

Statistics on the use of stop and search by the police raise significant concerns about the extent to which these powers are used in terms of the requirements of necessity, proportionality and procedural fairness in section 22 of the Criminal Procedure Act (CPA), and whether the approach is effective in deterring and detecting crime, and the best use of limited policing resources. In 2014/2015, there were 3 049 586 stop and searches (an increase of 206 128 on the previous year) and 15 361 826 personal searches<sup>55</sup> whereas the number of arrests made over the same period, across all crime categories, was 1 707 654.<sup>56</sup>

The issue of stop and search was raised during the consultations on this review, with general support for the powers of the police to engage in broad ranging stop and search operations, based on a perceived need to take a 'tough on crime' approach to policing in the South African context. However, the nature of crime and violence has evolved in South Africa, necessitating the development of a more nuanced approach to building safer communities.<sup>57</sup> Although discussions concerning safety have traditionally revolved on the role of the police, the NDP and White Papers on Policing and on Safety and Security advocate an approach that is less police-centric and more focused on addressing the underlying causes of crime and violence.<sup>58</sup> Support for broad-based stop and search operations, which yield few arrests based on the available statistics, is not found in the new policy framework for policing in South Africa. Rather, evidence-based and targeted operations conducted within the broader context of crime prevention should be part of policing policy and practice.<sup>59</sup>

Further concerns are apparent in the framework for the use of force in the conduct of a search, which permits the use of force as may be necessary to overcome resistance, without requiring proportionality or reasonableness in the exercise of that power.<sup>60</sup>

### *Arrest*

There is no statutory definition of arrest in South African law, which is problematic from a rights-based perspective as a person only becomes entitled to protections under section 35(1) of the Constitution when they assume the status of an arrested person. Those rights include the right to remain silent,<sup>61</sup> the right to be informed of the right to remain silent and the consequences of not remaining silent,<sup>62</sup> the right not to be compelled to make a confession,<sup>63</sup> and the right to be brought before a court within 48 hours of arrest.<sup>64</sup>

The SAPS Standing Order 341(G) governs the procedures that SAPS officials must follow when making an arrest, and provides minimum standards for the treatment of arrested persons. Section 4 states that, as a general rule, the object of an arrest is to 'secure the attendance of such persons at his or her trial' and that an arrest cannot be used to 'punish, scare or harass' a person.<sup>65</sup> Exceptions to the general rule for making an arrest are provided, and include (i) arrest for the purpose of further investigation; (ii) arrest to verify a name and/or address; (iii) arrest to prevent the commission of an offence; (iv) arrest in order to protect a suspect; and (v) arrest in order to end an offence.<sup>66</sup>

Despite there being a statutory basis grounding Standing Order 341(G), the current framing of the grounds for arrest is problematic. An arrest constitutes a serious restriction on a person's right to personal liberty, triggering the protections under section 35(1) of the Constitution; accordingly, arrest must be supported by 'just cause' and must be necessary and proportional to achieving the penological objectives of the state. In this regard, an arrest on the basis of 'further investigation' and/or to verify a name and/or address arguably ignores less restrictive measures that can be used to obtain the information, such as calling the person in for questioning, obtaining a search warrant, or any number of other actions as part of an intelligence-led approach to investigation.

The Standing Order also provides that failure to provide a name or address is a stand-alone ground for arrest.<sup>67</sup> However, this is in direct contrast to the CPA which permits the use of arrest powers only where the person is reasonably suspected of having committed offence who then fails to provide a name and address.<sup>68</sup>

Particularly in relation to minor and non-violent crimes, SAPS should consider whether there are less extreme measures to bring a suspect before the court to face charges before using arrest powers.<sup>69</sup> However, serious questions are raised about the extent to which the police are both equipped and supervised to exercise their discretion to arrest in accordance with this requirement, and what alternatives (such as a warnings and summons) are being used in practice. Police are reported to use arrest quotas, with performance management linked with rates of arrest by individual officers.<sup>70</sup> If the number of arrests made by individual officers are formally linked to police performance indicators, this requires urgent review, as arrest for non-priority and less serious crime has been identified as a contributing factor to court backlog and overcrowding in remand detention facilities.<sup>71</sup> Persons subject to temporary detention are arguably more vulnerable to abuse of their rights than arrested persons because, unlike arrested persons, persons subject to temporary detention do not, under current South African law, enjoy the same safeguards.<sup>72</sup>

It is unsurprising that, given the problematic legislative framework, the SAPS acknowledges unlawful arrest and detention as challenges. In 2014/2015, it attributed a 21% (to 9 877) in the number of civil claims lodged against the SAPS from the previous year, to 'a high rate in unlawful arrest and detention', coupled with greater community awareness of their rights and the means to enforce them.<sup>73</sup> During the 2014/2015 financial year, SAPS made 5 317 payments totaling R302 558 900, the majority of which were for court judgments, up from 3 773 payments / R 209 926 038 in 2012/2013.<sup>74</sup>

Consideration should therefore be given to providing the statutory grounds of arrest that are limited to a person's involvement or suspected involvement or attempted involvement in the commission of a

criminal offence, and only when there are reasonable grounds for the arresting officer to believe that the person's arrest for this purpose is necessary. By providing a clearly statutory guideline for the grounds of arrest consistent with the provisions of the Luanda Guidelines and other normative standards for the deprivation of liberty, South African law would provide a framework for fewer arbitrary arrests.

In terms of the use of force during arrest, the wording of section 49 of the CPA,<sup>75</sup> which governs the use of force, provides that the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or other person, or the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later. However, the Guidelines, which reflect international normative standards on the use of deadly force by law enforcement personnel, limit the potential use of lethal force through resort to firearms to 'the arrest of a person presenting an imminent threat of death or serious injury; or to prevent the perpetration of a serious crime involving a grave threat to life, and only when less extreme measures are insufficient to make the arrest'. This is a higher threshold than section 49 as it does not permit the use of firearms based on suspected involvement of a serious crime.<sup>76</sup>

### *Charge*

At the first court appearance after a person is arrested, which should occur within 48 hours of the arrest, the person has the right to be released, or to be informed of the reasons for their continued detention, or to be charged to an offence.<sup>77</sup> If the person is charged with an offence, the right of the accused to a fair trial under section 35(3) of the Constitution takes effect, which includes the right to be informed of the charge brought against him/her,<sup>78</sup> and the right to have sufficient time and resources to prepare an adequate defence.<sup>79</sup> Chapter 14 of the CPA expands on issues relating to the charge by extending to the accused a number of rights, which align with the Luanda Guidelines.<sup>80</sup>

Section 84 of the CPA deals with the essentials of the charge, which aim to ensure the accused has sufficient detail about the nature of the charge(s) against them,<sup>81</sup> and section 76 deals with the detail required on a charge sheet.<sup>82</sup> Despite the numerous grounds upon which the accused can object to the charge, the CPA provides the state with sufficient opportunity to conduct a successful prosecution. Not all omissions or imperfections in the charge sheet will invalidate the charge,<sup>83</sup> and if they do, the state can still charge the accused with commission of all or any criminal offences which may be supported by facts that can be proved, or by curing a defective charge sheet with the introduction of additional evidence.<sup>84</sup>

In 2014/2015, the SAPS arrested and charged 1 660 833 persons.<sup>85</sup> Over the same period, there were 908 364 new cases enrolled.<sup>86</sup> However with these available statistics, persons arrested cannot be accurately compared with cases, as cases may have multiple accused persons. The SAPS should be encouraged to release disaggregated statistics on the number of persons charged, and the number of charges against a person.

Further research is therefore required to understand the trends in terms of the number of arrests compared with the number of individual persons charged, so as to make findings on the number of persons charged who appeared in court, and the reason for any non-appearance. For example, the SAPS can release a person that has been charged on a warning and set an admission of guilt amount, which, if paid, means the person need not appear in court. Such statistics may also provide an insight into the quality of police investigations and the preparation of trial-ready dockets, which has been cited as a major factor in the weak administration, and delays in justice, in South Africa.<sup>87</sup>

The Khayelitsha Commission of Inquiry found that detainees are often kept for longer than 48 hours, and that the 48-hour rule is commonly 'subject to abuse' by SAPS officials.<sup>88</sup> The Commission found that no evidence was brought forward to demonstrate that members of the SAPS were unaware of the legal principles relating to the 48-hour rule, which suggests that this practice is intentional.<sup>89</sup> During consultations on this draft review, stakeholders raised concerns about the targeted use of arrest on Thursdays and Fridays as a crime prevention measure (i.e. the operation of the 48-hour rule means that persons arrested on these days will spend the weekend in police cells). In some of the examples

given, the use of arrest in this context was either a punitive measure, which raises concerns about the implementation of South Africa's existing framework for the protection of rights during arrest, or alternatively as a criminal justice response to what are essentially social problems, such as drug and alcohol abuse. Further research on this issue is recommended, with a view to identifying the command and control and training issues within the SAPS, and how other stakeholders, including community social services and state services, can be engaged (and supported) to reduce the number of unnecessary arrests and deliberate detention over weekends.

### *Police custody*

Section 12 of the Constitution provides for the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. Section 35(2) of the Constitution provides an extensive list of the rights of detained persons, which align with the provisions of the Luanda Guidelines.<sup>90</sup>

As with arrest, there is an element of legal uncertainty regarding whether all persons in police custody constitute a detained person, and therefore, whether they are entitled to the rights provided in section 35(2) of the Constitution. The reason this is significant is that an arrested person will always be a detained person and therefore entitled to the rights under sections 35(1) and (2), whereas a person held in police custody will not always be an arrested person. The question therefore becomes: at what point does a person held in police custody become a detained person, and therefore entitled to the protections under section 35(2)?

SAPS Standing Order 361(G) defines a 'person in custody' as 'a person who has been arrested and who is in the custody of the Service [SAPS] and who has not yet been handed over or handed back to the Department of Correctional Services or any other institution for detention'. Detention facilities are defined as 'a police cell, lock-up or temporary detention facilities (*'stormseel'*) which are under the control of the Service [SAPS]'.<sup>91</sup> According to this Standing Order, a person being held in police custody is an arrested person who is waiting to be transferred to the DCS, or another institution of detention. However, this does not account for persons who are held in police custody but not arrested, to whom the protections of section 35(2) should also be extended.

South African courts have diverged in their approach to this issue. In *S vs. Sebejan*,<sup>92</sup> Satchwell J motivated for an understanding that the right to a fair trial begins at the inception of the criminal justice process, not at the commencement of the criminal trial, in order to preserve the right to presumption of innocence and to protect the accused persons' right against self-incrimination. However, the High Courts have diverged on this point, as in *S vs. Langa*<sup>93</sup> and *S vs. Mthethwa*,<sup>94</sup> both courts ruled that the rights under sections 35(1), (2) and (3) do not apply to suspects. In the absence of a Constitutional Court ruling, there is much scope for argument.

There are no statistics available on the number of people held in police custody over a period of 12 months. As noted in relation to arrest, the SAPS acknowledges that both unlawful arrest and detention are a challenge, and reported a 21% increase in the number of civil claims lodged against the organisation, attributed mainly to 'a high rate of unlawful arrest and detention'.<sup>95</sup>

In terms of the use of police custody facilities for persons already subject to remand orders, the Correctional Services Act (CSA)<sup>96</sup> allows for detention of a person in police custody for not more than one month (unless otherwise authorised by a commissioner) if there is no prison in the district. However, reports of oversight visits by members of the National Parliamentary Portfolio Committee on Police have raised the issue of detainees being held in remand detention in police custody for the reason that 'prisons are full'.<sup>97</sup>

As discussed in Part II, a first step to addressing some of the key challenges in the police custody context is strengthening police cell monitoring and the availability of custody statistics from the SAPS. Recommendations to this effect are contained in Part V of this review.

## Remand detention

### Remand orders

The framework for making a remand order in South Africa<sup>98</sup> is not entirely consistent with the approach taken in the Luanda Guidelines. The normative standard provided in the Guidelines is that detention be a measure of last resort. However, the South African framework provides only that the release of persons awaiting trial depends on a relatively narrowly constructed notion of the 'interests of justice'.<sup>99</sup> In making a decision, the court is therefore concerned with determining whether or not there is a 'rational connection' between the deprivation of liberty (in this case, remand detention) and 'some objectively determinable purpose'. If so, the court can find that there is 'just cause' for the deprivation of liberty.<sup>100</sup> A rights-based approach, as proposed with the Luanda Guidelines, that accords with the framework for permissible limitations of rights in the South African Constitution,<sup>101</sup> requires a broader analysis by judicial officers, taking into account not only issues of proportionality, justice and reasonableness, but the availability and appropriateness of alternative measures, and whether the use of remand detention is a measure of last resort.

Nonetheless, there have been marked improvements in remand detention numbers in South Africa over the past few years. In response to the White Paper on Remand Detention Management in South Africa, and amendments to the CSA, the overall number of male remand detainees have dropped, from 47 398 in 2009/2010 to 41 717 in 2014/2015.<sup>102</sup> In other terms, the remand detention population rate, per 100 000 of national population has reduced significantly from 93 in 2010 to 79 in 2015.<sup>103</sup>

The DCS has attributed the decline to the use of non-custodial placements as a result of bail review applications to the court in terms of section 63 of the CPA, in addition to specific remand interventions by the sub-structures of the JCPS cluster.<sup>104</sup>

These interventions are welcome; however more information on the terms and conditions of non-custodial placements, and the extent to which they are met, is required in order to assess whether they conform to a rights-based approach, and are being effectively and fairly applied.

### Bail

Section 59 of the CPA authorises release on bail of certain suspects by the police. During consultations on this review, stakeholders noted both unwillingness by the police to exercise this power, and practical barriers to the granting of bail in respect of this section. Further research is required to understand these challenges, and to identify how the police can be supported to properly exercise this function.

During 2014/2015, South African courts heard 56 340 formal bail applications.<sup>105</sup> The number of informal applications or instances where accused persons are released on warning is not available. In terms of judicial decisions on bail, there are a number of identifiable challenges. First, the law relating to bail proceedings does not stipulate a maximum time period, which, once expired, entitles the accused to be released pending trial. Further, the current system does not provide for a process of continuous or intermittent review of bail decisions.<sup>106</sup> These issues are discussed in detail in terms of duration of remand detention, below.

Regarding the application of bail, the law places an obligation on the court to raise the question of the possible release of the accused person on bail should the prosecutor or the accused person not raise the issue.<sup>107</sup> Except in the case of certain offences specified in *Schedule 5* and *6*, the onus rests on the prosecution to persuade the court that the interests of justice do not permit the release of the accused person on bail. The reverse onus of proof in relation to bail for schedule 5 and 6 offences<sup>108</sup> has been criticised on the basis that it fails to adequately protect the right to innocence until proven guilty, and places a significant burden on the accused person to prove 'exceptional circumstances' in situations where the defendant may not have access to adequate legal representation.<sup>109</sup>

As at March 2015, 17% of remand detainees were held in detention despite having been granted bail.<sup>110</sup> What constitutes an unaffordable amount was given by the JCS as a threshold of R1 000, at which



5 673 detainees remain in custody as a result of not being able to pay.<sup>111</sup> This indicates that the amount of monetary bail set by the courts is not always appropriate to the circumstances of the accused, raising issues in relation to the right to equality for indigent persons,<sup>112</sup> and the extent to which the courts are making sufficient inquiries into the reasonable amount of bail that the accused person can afford.<sup>113</sup> The NPA also reports that there are instances where the accused person declines to pay bail because of services (medical) and subsistence (accommodation and food) they are provided.

There have been recent developments in relation to bail, including a new bail protocol (to approach the court for the release of an accused person on warning in lieu of bail, or to amend bail conditions), and the institution of electronic monitoring of remand detainees, which will be utilised by the court system.<sup>114</sup> The impact of these new developments will need to be measured against their impact on remand detainee numbers.

## Duration of remand detention

### *Justification for the category of measurement*

A category of indicators that measures the duration of remand detention provides an evidence base of the effectiveness and efficiency of the criminal justice system in processing cases through the court system, and can reveal where blockages and challenges arise within that chain.

The proposed indicators to measure the duration of remand detention take into account not only the average duration of remand detention, but the number and proportion of remand detainees who are held in excess of norms and standards established at international and national levels.

The period of incarceration that may not be exceeded without a court giving specific consideration to the continued detention of such a person is (and every year thereafter) two years, with the number held for more than two years reduced to 1 660 by 30 November 2015,<sup>115</sup> compared to 1 971 on 3 June 2013.<sup>116</sup> The reduction in both the number of remand detainees, as well as the number who remain in remand detention beyond two years is encouraging, although further research is required to understand whether this is a result of seasonal fluctuations or of interventions by the relevant institutions. In any case, there remain a number of challenges inherent in the current remand system that have a negative impact on further and sustained reductions of remand duration.

### *Duration of remand detention in South Africa*

As of 30 November 2015, the statistics on the length of detention for persons held in remand detention in South Africa are as follows:<sup>117</sup>

Remand detainees on 30 November 2015		
Period in Custody	Total	Percentages
<3 months	23312	57.00
>3 to 12 months	12282	30.03
>12 to 24 months	3635	8.89
>2–3 years	1036	2.53
>3–4 years	360	0.88
>4–5 years	137	0.34
>5 years	133	0.33
<b>Total</b>	<b>40895</b>	<b>100.00</b>
Longest period spent as at 30 November 2015: 8 years 8 months		
The longest period spent by an RD in DCS facilities is more than 14 years according to the profile report of RDs based on a snapshot for 31 December 2007.		

Source: DCS Length of Detention report

Since the implementation of section 49G, the number of remand detainees held for more than two years reduced to 1 660 by 30 November 2015,<sup>118</sup> compared to 1 971 on 3 June 2013.<sup>119</sup>

There are myriad factors that contribute to the length of remand detention, including the performance of the police in terms of timeous investigations, and delays within the court system. A few of the identified challenges are set out below.

#### *Postponement of bail hearings*

Courts can, informally or by order, adduce evidence needed to make a decision or order regarding bail, or postpone proceedings for the purpose of obtaining the further evidence required.<sup>120</sup>

There are reports that the postponement of bail hearings, which are permitted for up to seven days at a time, frequently occur on the basis that the presiding officer does not have enough information before him or her to make a decision on bail.<sup>121</sup> The current identity verification system does not utilise biometric data, and the SAPS should work with the Department of Home Affairs to modernise and update its system to reduce backlogs and delays as a result of identity verification.<sup>122</sup> The CPA does provide presiding officers with alternatives if postponements are repeatedly made, such as striking the case from the roll and requiring that investigators complete the investigation, at which time, if appropriate, the accused can be re-arrested.<sup>123</sup>

#### *Custody time limits*

Once a remand order has been made, South African law does not provide custody time limits or a mechanism by which remand decisions are routinely or automatically brought to the courts for review, except when a detainee has been held for more than two years, when the 'matter' must be 'brought to the attention of the court' pursuant to section 49G of the CSA. The CPA does allow an accused person to bring an application for release on bail at any time during the criminal justice process, but as noted by Ballard (2012), the onus is on the accused person to make an application for review and, given that the information required is not always available to the accused (including whether the prosecution and the SAPS are diligently investigating and prosecuting the case), the current system is 'unfair'.<sup>124</sup>

There were welcome developments in 2014/2015. In its most recent annual report, the DCS notes that together with the Criminal Justice System Review Committee, the National Operations Committee and the Provincial Efficiency Enhancement Committees, it has established a process to track remand detainees who have been 'detained the longest in correctional facilities', which includes a review of the factors contributing to the finalisation of the accused persons' trial, and steps to address those factors.<sup>125</sup> As a result, the number of remand detainees held for more than two years reduced to 1 660 by 30 November 2015,<sup>126</sup> compared to 1 971 on 3 June 2013.<sup>127</sup> The long-term impact of these interventions should be tracked.

However, in its latest annual report, the JICS has noted that during its inspections, it found that 'important and substantive additional information' in relation to the detainee being referred to court pursuant to section 49G was missing, which can have a negative impact on the extent to which the court can make decisions on bail that are in the interests of justice.<sup>128</sup>

#### *Court utilisation and backlog*

Despite efforts to improve coordination and integration across the criminal justice system, through the NDP, 7-Point Plan<sup>129</sup> and the OCJ Norms and Standards for the Performance of Judicial Functions,<sup>130</sup> case flow management challenges remain apparent.

In terms of court utilisation time, in 2014/2015, the number of criminal cases finalised with a verdict was 319 149, which is 1.6% lower than the target set by the NPA, and owing in part to the reduction in court utilisation time over the same period.<sup>131</sup> Average court day utilisation decreased 2.6% in 2014/2015; however courts are reported to be achieving 78.1% (three hours and 31 minutes) of the four hours and 30 minutes provided by the Chief Justice Norms and Standards.

The current backlog of criminal cases, which is being addressed through the Case Backlog Reduction Project,<sup>132</sup> affects the efficiency of the justice system at every court level, and contributes to the duration of remand detention. However, addressing court backlog is a complex project. Factors contributing to backlogs include human resource and infrastructure constraints, failure by courts to utilise court hours, poor quality of police investigations, and the lack of an integrated ICT system for the criminal justice system,<sup>133</sup> and challenges transporting remand detainees between DCS facilities and the courts.<sup>134</sup> The role of the Case Backlog Reduction Project in addressing these issues is critical, and in Part V of this review, improved data collection and dissemination is recommended to allow for the analysis of these challenges, to identify further areas of intervention, and to measure the impact of those interventions.

#### *Incomplete dockets and investigations*

Incomplete trial dockets, or investigations that are not complete, are a major contributing factor to backlogs and delays in the criminal justice system, adding to the duration of remand detention.

In terms of the percentage of trial-ready<sup>135</sup> case dockets for serious crimes, the 2014/2015 target by the SAPS was not met, with only 63.63% being trial-ready (237 362 from a total of 373 037).<sup>136</sup> This was attributed to 'inadequate command and control in the investigative value chain', with secondary contributions as a result of resignations and subsequent skill shortages in investigative services, and outstanding deliverables from external service providers, such as forensic reports from the Department of Health.<sup>137</sup> There is also evidence to suggest that the SAPS are not effectively responding to priority crimes, as indicated by increases in the murder rate over the past few years.<sup>138</sup>

In 2012 the Portfolio Committee on Police held a Detective Dialogue to discuss the challenges and how to address them, to ensure an effective and efficient detective service within the SAPS.<sup>139</sup> Amongst the challenges identified during the Dialogue were training, personnel strength and resources, career-pathing, detection and conviction rates, spending patterns, implementation of legislation, lack of response to complaints, capacity constraints at the Criminal Record Centre and Forensic Science Laboratories, and the functioning of Family Violence, Child Protection and Sexual Offences Units.<sup>140</sup> These challenges reflected those identified by a Public Service Commission report into detective services in 2011.<sup>141</sup>

As discussed above on page 9, amendments to the Police Act to align the role and function of the police to South Africa's constitutional framework, and to the new policy framework provided by the White Paper, is a critical and urgent next step, and will provide an opportunity to incorporate recommendations from previous reviews of detective services into SAPS legislation, regulations, standing orders and training. Furthermore, the Back to Basics and Transformation Agenda should be implemented and monitored by the CSP to determine the impact on identified challenges, such as arrest and police custody, as part of this review.

#### *Trial postponements*

Postponements can occur when one or more key role-players fail to appear in court. These include prosecutors, legal representatives, court interpreters as well as presiding officers.

The failure of remand detainees to present themselves for court appearances is of significant concern.<sup>142</sup> The warrant of detention (J7) for each remand detainee should include the validity of the warrant and the next court appearance date. The detention of a remand detainee except in strict compliance with the J7 is unlawful, and the DCS must have a tracking system in place to ensure that all remand detainees are notified of their next court appearance, and are made available to the SAPS for transportation on the day.

#### *Use of pre-trial hearings*

Pre-trial hearings have been identified by Legal Aid South Africa, the NPA and the OCJ as one solution to prevent remand in trial-ready cases. However, the NPA reports that pre-trial hearings have been slow to gain traction in the lower courts, which has been compounded by courts placing too few trial cases on court rolls, wasting court hours and reducing court utilisation times.<sup>143</sup>

Pre-Trial Services<sup>144</sup> were trialed by the DoJ&CD in 1997, but were not integrated into the criminal justice system for reasons owing to the failure of the project to align with the department's broader strategy and lack of planning for its integration.<sup>145</sup> These services sought to improve bail decision-making through a bail recommendation report containing information needed by the court to make a bail decision on an accused person's first appearance. Karth (2008) observed:<sup>146</sup>

The information enabled the court to make more appropriate bail decisions. It meant that high risk, dangerous and repeat offenders were more likely to be detained while awaiting trial, but also that low-risk, petty, first-time offenders could be released from custody. In order to facilitate this release, [Pre-Trial Services] attempted to strengthen supervision of bail conditions as a viable alternative to money-based bail. [Pre-Trial Services] offered an alternative to the money-based bail system by encouraging judicial officers to make greater use of alternative bail conditions and the supervision of accused persons who were released from custody.

Based on observations of the Pre-Trial Services trial, a similar programme has the potential to promote affordable bail and the use of non-monetary conditions, and reduce the average length of remand detention by improving the efficiency and effectiveness of bail decision-making.<sup>147</sup>

Efforts should therefore be made across the criminal justice system to promote the use of pre-trial hearings, in line with the current recommendations of Legal Aid, the NPA and the OCJ.

#### *Access to legal services*

Access to legal services is particularly important given the profile of remand detainees as being, on the whole, amongst the most vulnerable and marginalised, who may be unaware of their legal rights, and wholly dependent on legal aid lawyers with large caseloads.<sup>148</sup> Legal Aid has acknowledged the constraints on its ability to provide adequate service delivery in criminal matters. Primarily, the challenge is defined as one of insufficient funding.<sup>149</sup> In 2014/2015, Legal Aid reported that it was below target for the delivery of legal assistance services in regional courts as well as High Court matters, owing to delays in investigations and repeated postponements on the request of prosecutors.<sup>150</sup>

Legal Aid has also reported that access to clients over the weekends, and the inability of officials to locate their clients within some correctional facilities, have an impact on the quality and continuity of services that its practitioners can provide.<sup>151</sup> However, the DCS reports that a protocol on the procedures to be followed by Legal Aid practitioners to obtain access to remand detainees for consultation purposes has been developed to address the challenges related to access raised by Legal Aid.<sup>152</sup>

Improving accused persons' access to legal services is an important component of a remand detention reform agenda. Consideration should be given to reviewing the current budget cuts to Legal Aid South Africa, and to addressing challenges in the access to clients through instructions or other means between the relevant departments.

## **Conditions of detention**

### ***Category of measurement***

The measurement of conditions of detention can provide information on the criminal justice system's treatment of persons who are deprived of their liberty in line with the constitutional and legislative protections so afforded remand detainees. The gaps identified by such a measurement can assist with prioritising service delivery and budget allocations based on need.

### ***Framework in South Africa***

#### *Police custody*

Although the CSP is responsible for monitoring conditions in police custody and the treatment of detainees, the number and location of SAPS stations has created challenges in conducting widespread inspections.<sup>153</sup> According to a report conducted on conditions in police holding cells,

persons in police custody are typically detained in communal cells which usually have shower and toilet facilities that are shared amongst detainees with limited privacy.<sup>154</sup> The report found that most cells are overcrowded, poorly lit and have bad ventilation, with temperatures becoming hot during the day and extremely cold at night.<sup>155</sup>

In 2014/2015, 244 people died and 34 people were raped while being held in police custody.<sup>156</sup> Causes of death in police custody range from suicides to natural causes and from assaults prior to detention to injuries sustained during detention.<sup>157</sup>

To address these issues, this review recommends a strengthening of the current police cell inspection regime, including consideration of the establishment of a Lay Visitor's Scheme as part of the Civilian Secretariat's mandate to inspect police cells (see page 10, 'Police cell monitoring').

### *Remand detention*

In 2014/2015, the majority of remand detainees were held across 119 facilities, of which 15 were dedicated remand detention facilities.<sup>158</sup> In 2014/2015, DCS facilities were, on average, at 32% over capacity.<sup>159</sup> Conditions of detention in DCS facilities do not meet the minimum standards set out in the Luanda Guidelines. Factors contributing to poor conditions of detention are numerous and include inadequate infrastructure maintenance, overcrowding, and staffing levels and conditions.<sup>160</sup>

Overcrowding has led directly to the spread of TB and bacterial infections among detainees.<sup>161</sup> The DCS has acknowledged that facilities and management have a negative impact on the ability of the DCS to safely and securely house and care for detainees, and on the ability of detainee's to exercise their rights, such as access to legal counsel and healthcare, and to make contact with persons outside the correctional facility.<sup>162</sup>

The National Commissioner has noted that, in relation to healthcare, the DCS still requires more psychologists, social workers, medical practitioners and pharmacists to meet the demand for health services.<sup>163</sup> Despite the challenges, some improvements were reported in 2014/2015, with the cure rate for TB increasing from 75% in 2013/2014 to 83% in 2014/2015, and 100% of all inmates being tested for HIV during the same period.<sup>164</sup>

Remand detainees are exposed to violence (from both inmates and officials),<sup>165</sup> death as a result of violent assaults (which constituted 25% of all unnatural deaths in DCS facilities in 2014/2015)<sup>166</sup> and communicable diseases such as HIV/AIDS, tuberculosis and hepatitis.<sup>167</sup> Overcrowding – which occurs across the DCS system, with occupancy at 150% in some facilities – has been identified as the single most pressing concern by the National Commissioner.<sup>168</sup> Indeed, the NDP requires that the issue of overcrowding be addressed as a matter of urgency.<sup>169</sup> The DCS is seeking to reduce overcrowding through a range of initiatives, including a number relevant to remand detainees, such as the introduction of electronic monitoring and a new bail protocol (to approach the court for the release of an accused person on warning in lieu of bail, or to amend bail conditions).<sup>170</sup>

In reports on violence at the Johannesburg Management Area, Just Detention International–South Africa identified the need for policy and training, improving the facility environment, and addressing the sources of violence, such as contraband and gangs, as critical to addressing violence in correctional services facilities.<sup>171</sup>

Section 63A of the CPA provides for the release of certain detainees on bail where overcrowding has resulted in conditions of detention that pose a threat to human dignity, physical health or safety. However, in the course of its inspections, the JICS has reported that its inspectors have found 'little evidence of the heads of correctional services ... [using] 63A to apply to a court for it to consider the release of an accused on warning in lieu of bail or the amendment of the bail conditions'.<sup>172</sup>

The DCS also promotes the use of section 63(1), which allows for either the accused or the prosecutor to approach the court for an amendment of bail.<sup>173</sup> The DCS conducted a retraining programme on

DCS-led protocols, including the protocol on bail from July to October 2014.<sup>174</sup> Between April and December 2015, 19 268 applications were submitted for bail review and of these submissions, 10 703 were successful.<sup>175</sup> Court outcomes that constitute successful applications are:<sup>176</sup>

- Reduction of bail;
- Placement under correctional supervision;
- Release on warning; and
- Withdrawal of case.

In terms of the separation of categories of detainees, lack of proper risk assessments, which allow the DCS to identify high risk detainees, coupled with insufficient information on the J7 form to facilitate a risk assessment, means that remand detainees are all held together, without consideration of their risks and needs.<sup>177</sup> This places an additional security burden on correctional facilities, and does not take into account the individual security profiles of remand detainees when assigning accommodation. In a positive development the DCS commenced the 2015/2016 financial year with the three-year rollout of the Continuous Risk Assessment (CRA) tool for facilities that detain remand detainees. It is envisaged that by 2017/2018, all accused sent for detention without an option for bail will be assessed within 24 hours of admission. Remand detainees with an option for bail are considered to be in the CRA's low-risk category on the basis that the DCS will release them when the bail amount set out in the warrant of detention is paid.

## **Accused persons' compliance with conditions of release**

### ***Compliance with conditions of release as a category of measurement***

Measuring the extent to which accused persons comply with conditions of release provides an insight into the extent to which the pre-trial practices of the court protect the administration of justice and the criminal justice process, and can provide an important counter-narrative to the effectiveness of the bail system in reducing overcrowding without prejudicing the interests of justice or disregarding community perceptions about safety. The measurement can also provide useful information for a monitoring and evaluation framework on the risk factors associated with non-compliance of release orders, and to identify factors that contribute to wilful compliance.

The indicator proposed for this category of measurement is the number of warrants of arrest issued for the failure to appear in court, and the number of bail forfeitures (which provides a more direct correlation with bail paid). Statistical information on these indicators was not available.

### ***South African framework***

Although courts have the discretion to apply non-monetary bail conditions, there are concerns that this option is under-utilised. According to the NPA, the most significant barrier to the application of non-monetary bail conditions is the presumption that the accused person will abscond before their trial.<sup>178</sup> This is particularly so for persons with no monitorable address. Alternatives to the requirement for a monitorable address should be considered, and more use made of the placement of accused persons under supervision of a probation officer or correctional official in accordance with section 62(f) of the CPA.

Since 2012, the DCS has implemented an electronic monitoring pilot project (EMPP), which has been more recently extended to include remand detainees, and a protocol on the electronic tagging of remand detainees was approved in December 2015 and will come into commencement once it is signed.<sup>179</sup> The effectiveness of that project should be monitored with a view to including it in the range of non-monetary options available to the court in making decisions on bail conditions. As of March 2015, 604 persons had been tagged electronically, including a 50 year-old who was previously a remand detainee, who is paraplegic, and had been held at the Grootvlei Correctional Centre since 2011.<sup>180</sup> As of 1 February 2016, there were three awaiting-trial persons placed under the electronic monitoring system, with two additional high-profile cases placed under the system through an application made by their legal representatives.<sup>181</sup>

Fewer remand detainees in DCS facilities represents a significant cost saving to the government. The opportunity cost of high rates of remand detention has an immediate impact on other resource spending. The Open Society Justice Initiative (2014) estimated that half of the DCS's total budget (R16.7 billion) could increase the national budget for basic education by approximately 60%, or represent a three-fold increase in the budget for the NPA.<sup>182</sup> A cost-benefit analysis of alternatives to remand detention are therefore recommended.

## **Efficiency and effectiveness of the criminal justice system**

### ***Measuring efficiency and effectiveness in the criminal justice system***

Measuring the effectiveness and efficiency of the criminal justice system aims to provide an understanding of the extent to which remand detainees enjoy procedural and substantive fairness, expressed in terms of whether their remand detention was justified. The indicators proposed for this category of measurement are:

- Number and proportion of remand detainees acquitted, and reasons for acquittal;
- Number and proportion of remand detainees who had their cases withdrawn, and the reasons for the withdrawal;
- Number and proportion of remand detainees who received non-custodial sentences; and
- Number and proportion of remand detainees who are released as a result of cases being struck off the roll, and reasons for the case being struck off.

This category of measurement will provide an understanding of the extent to which remand detainees are held with insufficient evidence to sustain the charge/s or an acquittal, and can provide insight into the weakness of police investigations and prosecutions. Disaggregated data is not available in terms of remand detainees for all categories of measurement, nor are the reasons for decisions to strike or withdraw matters from the court roll. However, some observations in terms of overall statistics in South Africa are given below.

### ***Framework in South Africa***

In 2014/2015, conviction rates for serious crime stood at 79.66%, down by 0.05% on the previous year.<sup>183</sup> So too was the reduction in cases finalised with a verdict (3% fewer than 2013/2014 at 319 149), which was attributed in part to prosecutor efficiency, whose tasks are impacted by challenges in the screening processes to ensure quality prosecutions, and the need to assist the SAPS by guiding investigations.<sup>184</sup> These challenges highlight the need for more effective coordination across the criminal justice chain, particularly in terms of police investigations and court utilisation time.

At first glance, the conviction rates are impressive, however research on the relationship between conviction rates, and the number of dockets considered for prosecution by the NPA each year has raised concerns that as the NPA is not required to provide reasons for declining to prosecute, 'the door is thus opened to only pursue cases where there is a high probability of success with the least amount of effort involved', including in relation to prosecutions against DCS and SAPS officials.<sup>185</sup> The impression from the research by Muntingh (2013) is that 'the NPA in general declines to prosecute in a very large proportion of ordinary criminal cases'.<sup>186</sup> Other research suggests that decisions to decline to prosecute are not linked to lack of resources or heavy workloads, but rather as a result of a permissive legislative and policy framework that does not provide for effective accountability over the NPA.<sup>187</sup>

In a welcome development, fewer cases were withdrawn from the court roll in 2014/2015 than in the previous year, which continues a decline of 42.1% of case withdrawals over a five-year period. However, it noted with concern that cases struck off the court roll had increased by 5.3% (to 5 934 cases) over the same time period, and the NPA has called for further explanation for this.<sup>188</sup>

A positive development is the increased use of alternative dispute resolution mechanisms (ADRM). In 2014/2015, the NPA finalised 503 463 criminal court cases, including through ADRMs,<sup>189</sup> 1 879 cases

fewer than the previous year, but still 6.3% above the target set for 2014/2015.<sup>190</sup> The NPA attributed the success in meeting the target as the increase in accused persons successfully completing diversion programmes, and an increase in the number of suitable cases identified for informal mediations.<sup>191</sup> The use of ADRMs, particularly in relation to less serious crimes, is welcome, and consistent with the aims of the Luanda Guidelines to promote greater access to justice.

In terms of plea and sentence agreements, the NPA reports that there were 1 760 plea and sentence agreements concluded under section 105A of the CPA during 2014/2015, which was an increase of 33% from the previous year.<sup>192</sup> Plea and sentence agreements are reportedly used most frequently in relation to serious and complex cases, saving the court time otherwise spent on potentially lengthy trials.<sup>193</sup> However, without data on the type of matters for which plea agreements are offered by the NPA, an analysis on the fairness of the current system, when considered against the backdrop of challenges to accessing legal representation for remand detainees, is not possible. This type of data should be included in any review and reform of the current data collection and dissemination across the criminal justice chain.

## **Community perceptions of the effectiveness and efficiency of the criminal justice system**

### ***Measuring community perceptions***

Measuring community perceptions of the effectiveness and the efficiency of the criminal justice system represents an important data source for policy- and law-makers in terms of the extent to which reform of the criminal justice system is received by the community, can influence resource allocation and priority setting, as well as assist in tailoring interventions (whether reform or awareness initiatives) that respond to community safety concerns.

### ***Framework in South Africa***

#### *Perceptions*

The 2015 Victims of Crime Survey by Statistics South Africa (Stats SA) provides an overview of community perceptions of the effectiveness of the criminal justice system as a whole, and in terms of key departments and institutions.

Overall, more than 60% of households surveyed were generally satisfied with the work of the police and courts, and factors that influence responses were identified as the responsiveness of police to reports of crime, visible policing, conviction and sentencing rates.<sup>194</sup> However, respondents expressed dissatisfaction with police responses to crime, with perceptions of police corruption and laziness cited as reasons for dissatisfaction.<sup>195</sup>

Incidents of police crime and use of force is also a strong indicator of a broader challenge in policing systems, and of the SAPS's capacity to execute its functions within the rule of law.<sup>196</sup> During 2014/2015, there were 244 deaths in police custody and 396 deaths as a result of police action reported and investigated by the Independent Police Investigative Directorate (IPID).<sup>197</sup> Further, there were 145 incidents of torture reported to the IPID, which was an 88% increase on the number of incidents reported to them in the previous year.<sup>198</sup> The increase in complaints to the IPID can, on the one hand, be reflective of increased community awareness about rights and the means to enforce them,<sup>199</sup> particularly since the enactment of the Prevention of Combatting and Torture of Persons Act of 2013. However, the impact on community confidence and trust in the police as a result of a broad range of misconduct and criminality should not be underestimated,<sup>200</sup> nor the challenges faced by the IPID and other oversight mechanisms charged with investigating incidents and complaints.

In terms of the court system, 64% of respondents were satisfied that the courts were generally achieving their mandates; with challenge areas identified as lenient sentencing, postponements and unconditional release of suspects rating as reasons for dissatisfaction.<sup>201</sup> This final point reflects the



concerns raised on the role and perception of the bail system in a country that experiences relatively high rates of crime and as discussed in this paper. Data on the number of accused persons who comply with release orders, coupled with a review of comparative bail systems and non-monetary bail options, should be considered in order to understand and implement a bail system that is not only effective, but can be demonstrated as effective and safe to the community.

Evaluating the DCS, 86.1% of respondents indicated that they believed that 'many people who are guilty do not go to prison', and 28.1% agreed with the statement that 'prisons violate prisoner rights'.<sup>202</sup> On this point, the Victims of Crime Survey provides an interesting picture of community perceptions, which accord with feedback from stakeholders that the community wants a 'tough on crime' approach to managing violence and crime in South Africa. As discussed in Part II of this review, the law and order response favoured is not entirely consistent with the new policy framework for policing and safety in South Africa, and community consultation and education may be required to ensure support and understanding of the new policy direction.

#### *Impact of resource allocation on community perceptions of the justice system*

The inequitable distribution of police services between previously disadvantaged and advantaged areas remains an ongoing cause for concern, despite numerous requests for the urgent reallocation of resources to areas with high levels of crime and violence. Amongst the various recommendations included in the Khayelitsha Commission of Inquiry's report was 'revision of SAPS' system for determining the theoretical human resource requirement of police stations', a practice described by the former provincial commissioner, Arno Lamoer, as 'fundamentally irrational'.<sup>203</sup>

Despite calls to revise a deeply problematic and illogical approach to resource allocation, no substantial changes seem to have been made. For example, during the 2013/2014 reporting period, 164 murders were reported to Harare police station in Khayelitsha, compared to six murders reported during that same period to stations located in suburbs from Camps Bay to Rondebosch.<sup>204</sup> Notwithstanding the disproportionate level of violence in Khayelitsha, Harare police station is staffed with one third the number of police officers as these suburbs, with many of its detectives being student constables.<sup>205</sup> Consequently, many of the officers who work at this station are 'overburdened, burnt out, uncaring, and probably unqualified' to deal with the volume of contact crimes reported to the station.<sup>206</sup> Further, the failure to appoint an adequate number of qualified, competent, and experienced officers to respond to incidents of crime and violence in these areas not only violates community members' rights to equality and freedom and security of the person, but also compromises the safety and security of the individual police officers.

Community organisations in Khayelitsha, including Social Justice Coalition, Ndifuna Ukwazi and Equal Education, have called for immediate implementation of the report's recommendations as well as the development of a plan to deliver equitable and adequate police resources across all nine provinces.<sup>207</sup> These requests, however, appear to have gone unnoticed by the SAPS at national level, despite receiving widespread support from the SAPS at a local level.<sup>208</sup> As a consequence of the non-response from the SAPS, incidents of vigilante violence are on the rise, with community members taking criminal matters into their own hands, which has resulted in increased levels of crime and violence in these areas.<sup>209</sup>

## **PART IV VULNERABLE GROUPS**

### **Children in conflict with the law**

The Department of Social Development plays a critical role in the provision of efficient, responsive and professional criminal justice services, specifically for children subject to remand detention. In terms of the Child Justice Act [No. 75 of 2008] (CJA) and the National Policy Framework for Implementation of the CJA, the DSD is responsible for ensuring that all children who are charged with a criminal offence are assessed by a probation officer and either referred to the Children's Court, recommended for counselling, or placed in a secure care facility.<sup>210</sup> Additionally, the DSD is responsible for the provision of

educational programmes to children awaiting trial, and for the delivery of all accredited diversion programmes.<sup>211</sup> Further, the DSD is also responsible for the provision and management of child and youth care centres (CYCCs) for children awaiting trial as per the Children's Act of 2005, and work with the SAPS and DoJ&CD to ensure adequate levels of security at every CYCC.<sup>212</sup>

What follows is a review of the framework for child justice in South Africa relevant to the remand environment, and the management of CYCCs.<sup>213</sup>

### ***Constitutional framework***

The framework for child justice in South Africa is subject to a specific constitutional and legal regime. The Constitution contains a number of substantive provisions aimed at protecting the rights of arrested, detained and accused persons.<sup>214</sup> Importantly, for present purposes, are the rights specifically afforded to children in conflict with the law.<sup>215</sup> In this regard section 28(1)(g) provides that, in addition to the rights enjoyed by children under sections 12 and 35 of the Constitution, a child in conflict with the law also has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time;<sup>216</sup> the right to be kept separately from detained persons over the age of 18 years;<sup>217</sup> and the right to be treated in a manner and kept in conditions that consider the child's age.<sup>218</sup> In addition section 28(2) of the Constitution provides that the best interests of the child are to be considered of paramount importance in all matter concerning that child, including those who are subject to arrest, police custody and remand detention.<sup>219</sup>

### ***Legal framework***

On 1 April 2010 the CJA was promulgated into law. The CJA aims to establish a criminal justice system that has as its central feature the possibility of diverting matters away from the criminal justice system, and expands and entrenches the principles of restorative justice, while ensuring that children are held responsible and accountable for offences they commit.<sup>220</sup> It further recognises the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending, and balances the interests of children and those of society with due regard to the rights of victim.<sup>221</sup> The CJA also creates special mechanisms, processes, or procedures for children in conflict with the law by:

- Amending the common law pertaining to criminal capacity by raising the minimum age of criminal capacity for children from 7 to 10 years of age;
- Ensuring that the individual needs and circumstances of all children in conflict with the law are assessed by a probation officer shortly after apprehension;
- Providing for special processes or procedures for securing attendance at court, the release or detention, and placement of children;
- Providing for appearance in a preliminary inquiry, which is an informal, inquisitorial, pre-trial procedure, designed to facilitate the best interests of children by allowing diversion of matters involving children away from criminal proceedings in appropriate cases;
- Providing for the adjudication of matters involving children, which are not diverted, in child justice courts; and
- Providing for a wide range of appropriate sentencing options specifically suited to the needs of children.<sup>222</sup>

The CJA also provides a set of 'guiding principles' which frame the paradigm of child justice in a manner that accords with – and takes cognisance of – the obligations placed upon it by the international and regional law instruments, and the Constitution.<sup>223</sup> The CJA has ushered into the South African context a comprehensive system of dealing with children in conflict with the law that represents a decisive break with the 'traditional' criminal justice system.<sup>224</sup> The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain an understanding of a child caught up in behaviour that results in the transgression of the law. This is achieved by assessing his or her personality; determining whether the child is in need of care and protection; and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative justice processes and the reintegration of the child into the community.<sup>225</sup>

## *Arrest*

One of the main aims of the CJA is to prevent children from being exposed to the adverse effects of the formal criminal justice system.<sup>226</sup> This is achieved by tightly regulating instances where arrest may be considered, and by providing alternatives to arrest. The following serves as a snapshot of that envisaged by the CJA:

**The use of a written notice.**<sup>227</sup> A written notice may only be handed to a child who has committed a *Schedule 1* offence.<sup>228</sup> The notice should be handed to the child in the presence of his or her parent, guardian or an appropriate adult.<sup>229</sup> Where this is not possible, the police officer must hand the written notice to the child and a copy must, as soon as circumstances permit, be handed to the parent, guardian or an appropriate adult.<sup>230</sup> The police official must, when handing the notice to a child, inform him/her of her rights.<sup>231</sup> Immediately hereafter, but no later than 24 hours, the police official must notify the probation officer concerned that a written notice has been served on a particular child.<sup>232</sup>

**The use of a summons.**<sup>233</sup> A summons is usually used when a period of time has elapsed since the offence was committed. This is usually the case when a charge was previously withdrawn and the prosecutor elects to reinstate it.<sup>234</sup> A summons may be used to secure the attendance of a child regardless of what *Schedule* the offence may be included in. The summons must be served on the child in the presence of an appropriate adult.<sup>235</sup> Where this is not possible, the police official must serve the summons on the child and a copy must, as soon as circumstances permit, be handed to the parent, guardian or an appropriate adult.<sup>236</sup> The police official must notify the probation officer concerned within 24 hours that a summons has been served on a particular child.<sup>237</sup>

**The arrest of a child.**<sup>238</sup> A child who is suspected of committing an offence listed in *Schedule 1* of the CJA may not be arrested unless there are compelling reasons justifying the arrest.<sup>239</sup> In all other instances, that is where a child is suspected of committing an offence listed in either *Schedule 2* or *Schedule 3*, he/she may be arrested.<sup>240</sup> In instances where a child is arrested, the CJA requires the police official to (i) inform the child of the nature of the allegation against him/her;<sup>241</sup> (ii) inform the child of his or her rights, including the right to remain silent and the right not to be forced into making a confession;<sup>242</sup> (iii) explain to the child the procedures to be followed in terms of the CJA;<sup>243</sup> and (iv) notify the child's parent, guardian, caregiver or another appropriate adult that he/she has been arrested.<sup>244</sup> Immediately following the arrest, but no later than 24 hours after making the arrest, the police official must contact the probation officer responsible for the jurisdiction in which the arrest took place to conduct an assessment of the child.<sup>245</sup> If the police officer is unable to contact the child's parents or arrange an assessment with the probation officer, the officer must submit a written report to the magistrate during the preliminary inquiry which demonstrates that a good faith effort was made to comply with the provisions of the CJA.<sup>246</sup> The CJA further provides that a child must be brought before a magistrate court having jurisdiction 'as soon as possible but not later than 48 hours after arrest'.<sup>247</sup>

It is evidently clear that the CJA, insofar as its mechanisms for securing a child's attendance are concerned, both resonate with and promote the Luanda Guidelines as well as the other international and regional law instruments on child justice.

## *Pre-trial assessments*

The CJA makes it compulsory for all children who are alleged to have committed an offence, including those under the age of 10 years, to be assessed by a probation officer prior to their appearance before a preliminary inquiry.<sup>248</sup> The purpose of the assessment is, among other things, to do the following:

- Establish whether the child is in need of care and protection;
- Estimate the age of the child if this is uncertain;
- Gather information relating to any previous convictions or diversion, or pending charges in respect of the child;
- Formulate recommendations regarding the release or detention and placement of the child;
- Establish whether the child is a suitable candidate for diversion;
- Determine whether any measures should be taken against a child who is 10 years or younger;

- Express a view on whether expert evidence is needed in relation to the criminal capacity of a child 10 years or older but under the age of 14;
- Consider whether the child was used by an adult to commit the offence; and
- Provide any other information regarding the child which the probation officer may regard to be in the best interests of the child or which may further any objective the CJA seeks to achieve.<sup>249</sup>

In addition, probation officers are required to monitor diversion orders;<sup>250</sup> convene family group conferences;<sup>251</sup> conduct victim-offender mediation;<sup>252</sup> submit pre-sentence reports in cases that are not diverted;<sup>253</sup> and monitor alternative sentences, especially community-based sentences.<sup>254</sup>

### *Police custody*

A police official must, in respect of an offence referred to in *Schedule 1*, where appropriate, release a child on written notice into the care of a parent, an appropriate adult or a guardian.<sup>255</sup> If a police official does not release a child who has committed a *Schedule 1* offence, he or she must set out the reasons in a written report, which must be submitted to the inquiry magistrate.<sup>256</sup> In instances where the police official cannot release a child, a prosecutor may authorise the release of the child on bail. The prosecutor is entitled to do so both in relation to offences listed in *Schedule 1* as well as offences listed in *Schedule 2*.<sup>257</sup> It bears emphasis that '[w]hen considering the release or detention of a child who has been arrested, preference must be given to releasing the child'.<sup>258</sup>

It is important to note that where a child is not released before his or her first appearance, a police official must, where appropriate and applicable, consider the placement of a child in a suitable child and youth care centre.<sup>259</sup> Whether it is appropriate and applicable to consider placement of a child, section 27 of the CJA, distinguishes between three categories of children, namely, a child who is:

- 10 years or older but under the age of 14 years and who is charged with any offence;
- 14 years or older and who is charged with a *Schedule 1* or *2* offence; and
- 14 years or older and who is charged with a *Schedule 3* offence.

In respect of the first two identified categories, a police official must give due consideration to the detention of a child in an appropriate CYCC. If no such facility is available, or where the child is 14 years and older and who has committed a *Schedule 3* offence, the child must be detained in a police cell or lock-up.

In instances where a child is detained in police custody he/she must be: (i) detained separately from adults, and boys must be held separately from girls; (ii) detained in conditions that consider their vulnerability and which reduce the risk of harm to the child and the risk of harm caused by other children; and (iii) permitted visits by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors, and any other person who is entitled to visit in terms of any law.<sup>260</sup> Moreover, the child must at all times be 'cared for in a manner that is consistent with the special needs of children', which includes the provision of immediate and appropriate health and medical care, as well as adequate food, water, blankets and bedding.<sup>261</sup>

### *Diversion*

Diversion is the channelling of children away from the formal court system into reintegrative programmes. If a child acknowledges responsibility for a wrongdoing, in certain circumstances he/she can be diverted to such a programme, thereby avoiding the often stigmatising and even brutalising effects of the mainstream criminal justice system. Diversion gives children a chance to avoid a criminal record while at the same time teaching them accountability and responsibility for their actions.<sup>262</sup>

It is important to note that a child may be diverted regardless of the offence he/she is alleged to have committed.<sup>263</sup> The legal consequences of a diversion is that, if successfully completed, the child cannot be prosecuted for the same crime.<sup>264</sup> Moreover, a diversion order does not constitute a criminal conviction and therefore the participation therein cannot be used against the child later.<sup>265</sup>

### *Remand detention*

A child may be released at a preliminary inquiry or any subsequent appearance in one of three ways:

- The child may be released, in respect of any offence, into the care of a parent, an appropriate adult or guardian;<sup>266</sup>
- The child may be released, in respect of a *Schedule 1 or 2* offence, on his or her own recognisance;<sup>267</sup> or
- The child may be released on bail.<sup>268</sup>

The presiding officer must, as mentioned earlier, favour the release of the child unless the circumstances are such that the child cannot be released.<sup>269</sup> If this is the case a presiding officer may order that the child be either detained in a CYCC or a prison.<sup>270</sup> When making such a decision, the presiding officer must give preference to the least restrictive option possible in the circumstances.<sup>271</sup> In practice this would mean that a child should be detained at a CYCC rather than in a prison.<sup>272</sup> This is reinforced by the fact that the CJA provides that a presiding officer may only order detention in a prison if an application for bail has been postponed or refused; the child is 14 years or older; the child is accused of committing a *Schedule 3* offence; the detention is necessary in the interests of justice; and there is a likelihood that the child, if convicted, could be sentenced to prison.<sup>273</sup>

Lastly, where a child has been ordered to remain in any form of pre-trial detention, the CJA mandates that such detention must be re-evaluated on each and every subsequent appearance.<sup>274</sup>

### ***Success and challenges of the CJA***

The successful implementation and administration of the CJA is largely dependent on two important conditions: first, that each department fulfills its mandate; and second, that there is close cooperation and collaboration between implementing departments.<sup>275</sup> In the five years since the CJA has been in operation a number successes and challenges have emerged. In what follows we address these challenges insofar as they relate particularly to South Africa's obligations under the Luanda Guidelines.

### *A need for training*

The National Policy Framework for Child Justice provides that training of all personnel involved in the child justice process is essential, and in fact is a key priority area, for the effective implementation of the CJA.

This is no truer than for members of the SAPS. The SAPS are the gatekeepers to the child justice system as they are often the first port of call in circumstances when children are accused of committing criminal offences. They also have the task of securing a child's attendance at his/her preliminary inquiry in compliance with the CJA. It is therefore imperative that they receive specialised training in dealing with children in conflict with the law.<sup>276</sup> Unfortunately this need for training has not been heeded to by the SAPS.

In the first year of implementation (2010/2011), the SAPS provided training on the CJA to approximately 15 891 members.<sup>277</sup> In the second year of implementation (2011/2012), the SAPS provided training to approximately 14 060 members.<sup>278</sup> In the third year of implementation (2012/2013), the SAPS provided training to approximately 5 888 members.<sup>279</sup> In the fourth year of implementation (2013/2014), the SAPS provided training to approximately 6 927 members.<sup>280</sup> In the fifth year of implementation (2014/2015), the SAPS provided training to approximately 4 422 members.<sup>281</sup>

In total the SAPS have trained approximately 50 000 members on the CJA. This, when viewed against the number of members of the SAPS (157 518),<sup>282</sup> is but a fraction of the members of the SAPS. This represents a serious gap in the successful implementation of the CJA and may have a bearing on the decrease in numbers of children entering the system.

### *Dwindling numbers*

The number of children entering the system has decreased significantly since the CJA came into operation in 2010. In the first year of implementation (2010/2011), a total of 75 435 children were 'charged'<sup>283</sup> by the police.<sup>284</sup> This translates to about 6 286 children per month, which is substantially lower than the approximately 10 000 children arrested per month that was reported to Parliament in 2008.<sup>285</sup> In the second year of implementation (2011/2012), a total of 68 078 children were charged by the police.<sup>286</sup> This in turn translates to about 5 673 children per month. In the third year of implementation (2012/13), a total of 57 721 charges were made against children.<sup>287</sup> This represents approximately 4 810 children per month. Lastly, in the fourth year of implementation (2013/14), 47 274 children were charged. This in turn translates to 3 939 children per month; a decrease of almost 60% from the initial statistics mooted in 2008.

The decrease in number of children entering the system has had a profound impact on the successful implementation of the CJA. The decrease in the number of children entering the system, which anecdotal evidence suggests is due to lack of police training, has resulted in a number of diversion service providers having to close their doors due to lack of funding. This may not seem to be a major setback at present for the child justice sector, but if (or rather when) the numbers begin to increase and normalise, the system will be without the necessary services to promote a proper functioning child justice system. In addition hereto, the decrease in numbers, also has a negative effect on children who may have benefitted from the programmes on offer. These children are, most probably, being turned away from the system at vital moments in their lives and this may result in the laudable objectives of the CJA, namely the 'breaking of the cycle of crime', not being met.

### *Changes in remand detention*

One of the most fundamental changes brought about by the various strategies employed by the South African government within the context of child justice is the significant decrease of its child population awaiting trial in prisons.

In 2001, the Intersectoral Committee on Child Justice (ISCCJ) developed and implemented the Interim National Protocol for the Management of Children Awaiting Trial, which aimed to establish an integrated system of management to accurately assess and place children who were charged with serious crimes in residential facilities. The effect of these interventions were palpable and resulted in a steady decrease in the number of children in remand detention. This trend has continued under the auspices of the CJA. The decrease (and stabilisation) is encouraging and lends testament to South Africa's commitment to utilise detention in prison environments as a measure of last resort. Statistics provided by the DCS on the number of children held in remand detention prior and post-CJA are given below.

Average number of children held in remand detention (14 to 17 years) <sup>288</sup>			
Calendar Year	RD	Sentenced	Total
Average for 2000	2229	1681	<b>3910</b>
Average for 2001	2042	1711	<b>3753</b>
Average for 2002	2255	1796	<b>4051</b>
Average for 2003	2324	1802	<b>4126</b>
Average for 2004	1912	1698	<b>3610</b>
Average for 2005	1332	1233	<b>2564</b>
Average for 2006	1144	1095	<b>2239</b>
Average for 2007	1196	892	<b>2087</b>
Average for 2008	928	870	<b>1799</b>
Average for 2009	696	854	<b>1550</b>
Child Justice Act (14 to below 18 years)			
Average for 2010	346	658	<b>1004</b>
Average for 2011	366	552	<b>918</b>
Average for 2012	367	417	<b>784</b>
Average for 2013	241	296	<b>537</b>
Average for 2014	167	235	<b>402</b>

In terms of the period of detention for children in remand detention, of which there are a total of 107, as of 30 November 2015 were reported by the DCS as:<sup>289</sup>

- <1 to 3 months: 74 children (69.16% of child remand detainees);
- >3 to 6 months: 24 children (22.43% of child remand detainees);
- >6 to 12 months: 5 children (4.67% of child remand detainees);
- >12 to 18 months: 4 children (3.74% of child remand detainees).

### ***Child and youth care centres***

Children in remand may be placed in CYCCs, which are designed to provide alternative care to children in conflict with the law. Although the intent to separate children in remand from adult detainees is progressive and in accordance with children's rights discourse, recent reports indicate that in certain CYCCs across the country, children in need of protection are kept in the same facilities as children in remand, which raises serious concerns about the adequacy of alternative care being provided to children.<sup>290</sup>

Unlike other remand detention facilities (which fall under control of the DCS), CYCCs fall within the mandate of the DSD, which is obligated to conduct regular oversight of all registered CYCCs;<sup>291</sup> however, many functioning CYCCs are not registered, and many registered CYCCs do not receive regular visits from the DSD.<sup>292</sup> Further, when it comes to abuse, employees of the CYCC (including managers and youth care workers) are mandated to report the incident to the provincial Head of Social Development, who is then required to assign a designated social worker to investigate the allegation and report incidents of serious injury, abuse and death to the police.<sup>293</sup> There is, however, no mechanism to follow-up on the investigations to inquire about their status or whether they are even being conducted.<sup>294</sup> Even though section 211 of the Children's Act provides a process for ensuring quality assurance, the practice occurs once every three years which has been argued as insufficient for ensuring adequate protection.<sup>295</sup> Perhaps most concerning is the lack of an independent oversight mechanism similar to the JICS,<sup>296</sup> which makes it difficult to make accurate assessments about the conditions in which children are being kept, and the extent to which their rights as remand detainees are being protected.<sup>297</sup> Accordingly, further research is required in order to make evidence-based assessments and interventions of this issue.

### **Other vulnerable groups**

Although discourse surrounding the needs of 'vulnerable groups' has been criticised for its use of protectionist language, certain categories of persons in South Africa undoubtedly face a distinct set of challenges in the context of remand detention, which consequently requires immediate and targeted interventions. The Draft White Paper on Policing calls for the police to make 'special efforts [...] towards supporting women, children, persons living with disabilities, older persons and the lesbian, gay, bisexual, transgender and intersex communities', including the assurance that 'all serving officers acquir[e] the necessary skills, insights and sensitivities to response to crimes against vulnerable and marginalised communities' and the 'implementation of community education and outreach programmes to enhance community safety'.<sup>298</sup> Prioritising efforts to address challenges faced by 'vulnerable groups' is a critical step towards integrating principles of the Luanda Guidelines on a domestic level.

The following section attempts to provide a brief overview of the challenges faced by categories of persons classified as 'vulnerable'. It is imperative to note here, however, that the list below is not exhaustive, and that the issues described is not all-inclusive.

#### ***Women***

##### ***Arrest and police custody***

The extent and prevalence of abuse against women in police custody is largely unknown due to extremely low levels of reporting by victims. In recent years, reports have emerged about numerous

women (sex workers, in particular) being raped by officers while detained in holding cells and released only after submitting to acts of sexual coercion.<sup>299</sup> In addition, according to the IPID's Annual Report for 2014/2015, the number of reported rapes committed by members of the SAPS increased from 121 in 2013/2014 to 124 in 2014/2015, with 42 of those incidents occurring while the officer was on-duty, while the remaining 82 incidents occurring while the officer was off-duty.<sup>300</sup> One of the major incidents highlighted in the report involved the rape of a minor by six members of the SAPS at the Atemalang police station in the North West.<sup>301</sup> Further, the report indicated that 34 rapes were committed in police custody, 14 of which were perpetrated by police officers, which amounts to 41% of the total number of rapes reported that year.<sup>302</sup> The IPID's Annual Report also noted there were 3 856 cases of torture and assault by police officers, which is not disaggregated by gender, but invariably includes incidents of torture and assault against women.<sup>303</sup> As with most reports concerning violence against women, the statistics presented above likely provide a mere glimpse into the actual number of assaults that occur in remand.

### *Remand detention*

Challenges faced by women detainees are often overlooked in government policies and practices given that women comprise only 2.5% of the entire inmate population in South Africa.<sup>304</sup> In response to the lack of information available on the experiences of women in detention, the JICS undertook a study involving site visits to the female sections of Worcester, Pollsmoor, Kgosi Mampuru II and Johannesburg Central correctional centres in order to develop stronger and more effective evidence-based programmes and interventions.<sup>305</sup>

According to the DCS, there were 1 028 women remand detainees as of 30 November 2015.<sup>306</sup> The conditions in which female remand detainees are kept were described by the JICS as 'much less clean' than those of the sentenced inmates, the cause being attributed to high levels of overcrowding in remand facilities which inevitably impacts the hygiene, and general health and well-being of inmates.<sup>307</sup> The study also found that toiletries were only provided to women once a month, which posed significant challenges for women, depending on their specific needs and health concerns.<sup>308</sup>

Although healthcare is provided to women detainees, services seem to be centred around reproductive health, particularly in relation to mothers and children. Specific concerns, however, were raised about the lack of responsiveness some correctional officers displayed towards women who were pregnant, breast-feeding or accompanied by small children, with formal requests being made to install panic buttons in mother and baby units.<sup>309</sup> In addition, questions around the ability of the DCS to provide for the needs of infants and small children were also raised, specifically in relation to compliance with the DSD's norms and standards.<sup>310</sup> The plight of foreign national mothers with small children was also raised as a pertinent issue in the JICS's report, with mothers finding it difficult to register the births of their children and tending to health-related issues, as 'DCS officials are more careless when it comes to healthcare of foreigners'.<sup>311</sup>

While these initiatives are critical, concerns were raised about the lack of social workers and general lack of access to counselling and therapeutic services. For example, the study found that in the female section of Johannesburg Central, there was only one social worker for 956 inmates, who saw an average of 32–34 women per month,<sup>312</sup> and roughly 400 inmates per year. In addition to having an overwhelming workload, a social worker's interventions may not be very effective given that he/she only meets with inmates once every couple of years.

Perhaps the most disturbing finding of the report, however, was the invasive and degrading manner in which several women detainees described being searched by correctional officers. For example, at the Kgosi Mampuru facility, some inmates reported they had been subject to invasive and degrading searches in front of groups of officials, who often mocked them while referring to specific body parts.<sup>313</sup> Inmates stated that they felt some searches were arbitrary and invasive, and that the manner in which certain searches were conducted violated their right to privacy and human dignity.<sup>314</sup> The JICS identified these practices as a major concern in its report and made various recommendations to the DCS to rectify the behaviour, calling on all officials to be 'sensitised' on searches and search practices,



requiring all searches to be conducted in private, and to obtain prior approval from the head of the correctional centre before conducting searches of orifices.<sup>315</sup>

### ***LGBTI persons and communities***

Prejudicial attitudes and stereotypes of LGBTI persons influence the way in which police 'police' crime and violence against members of this community, as evidenced by the lack of diligence some officers take when investigating cases of sexual violence against LGBTI persons.<sup>316</sup>

Similarly, the same prejudicial attitudes and beliefs also influence the way in which police respond to perpetrators of crimes who identify themselves as an LGBTI person or who nonetheless 'appear' to be, which often elicits harassment and other incidents of violence and abuse from members of law enforcement. Further, remand detainees who identify as or who appear to be LGBTI are more vulnerable to experiencing violence and other forms of abuse in detention given the misconception of weakness and fragility, which makes them more vulnerable to abuse from other detainees, police officers and correctional services officials, and more likely not to receive adequate protections from actors in the criminal justice system.<sup>317</sup>

### ***Migrants and refugees***

The African Charter, Luanda Guidelines, as well as South Africa's other international obligations stemming from the Universal Declaration of Human Rights, require South Africa to respect and promote the human rights of all persons within its borders, regardless of their national or social origin. South Africa has a legal and moral obligation to take action to protect and promote the rights of all non-nationals within its territory, and this includes in relation to the role of the police in not only responding to violence against foreigners, but to safeguarding and protecting rights in the context of arrest, police custody and remand detention.

The presence of up to 10 000 foreign nationals in South Africa's criminal justice system has reportedly placed a resource strain on the correctional services sector because of additional services required such as translation and the provision of adequate legal services.<sup>318</sup> However, the Luanda Guidelines, and other international normative standards, reaffirm that translation services should be provided as part of a rights-based approach to access to justice, and Treasury should provide sufficient budget to the DCS and criminal justice system to ensure translation and legal services are provided.

Xenophobia is enflamed by responses of the criminal justice system, most notably the police, who have 'expressed ambivalence towards the rights and welfare of "outsiders" or have been actively hostile or complicit with the violence against them'.<sup>319</sup> Researchers have found that 'antiforeigner sentiments and support, or at least passive condoning, of the violence' drives the police officers' lackadaisical approach to violence prevention against foreigners,<sup>320</sup> and the police's failure to make serious effort to protect foreign nationals from violence, and only moving into action *after* the incidents of violence had already occurred.<sup>321</sup>

Additionally, migrants in South Africa are often accused of a variety of societal problems, including draining public resources, taking economic opportunities away from local South Africans, and engaging in illicit criminal activity,<sup>322</sup> which has arguably justified the 'selective and discriminatory enforcement' of laws by the police.<sup>323</sup> For example, police in northern Limpopo have been accused of 'selectively targeting foreign-owned businesses, shutting them down for bylaw infringements while similar South Africa shops remain unscathed'.<sup>324</sup> A UN report also mentioned incidents of 'assault and harassment by state agents, particularly the police and immigration officials', as well as public threats and community violence.<sup>325</sup>

The UN has recommended that South Africa strengthen its human rights curriculum and training for immigration officials, border police, police officials and staff of detention centres, and other civil servants charged with enforcing the laws, in order to prevent and reduce incidents of violence against migrants.<sup>326</sup>

### ***Economically and geographically marginalised persons***

People who live in economically disadvantaged and geographically isolated areas suffer a disproportionate number of challenges during the remand detention process.<sup>327</sup> In addition to financial difficulties that arise when trying to pay bail, access to adequate legal representation is often limited given the high volume of cases taken on by Legal Aid, and the fact that most attorneys work in urban settings.<sup>328</sup>

### ***Persons with mental health disorders***

Research conducted in Durban revealed a high prevalence of serious mental disorders amongst the prison population as compared to the general population, with the majority not diagnosed or receiving treatment within the correctional facility.<sup>329</sup>

The White Paper on Remand Detention Management in South Africa 2013 states that the provision of health-related services for all remand detainees should be done in close collaboration with the Department of Health (DOH) and its provincial offices.<sup>330</sup> The DCS has a legal mandate to provide mental health services to their inmates, except those referred to the DOH for mental observations or declared state patients who are held in a DCS facility until a hospital bed is available. Other detainees who become mentally ill while in detention are the responsibility of the DCS, but can be referred to the DOH if the needs of the patient exceed the capacity of the DCS.<sup>331</sup> In this regard, the DOH is required to work with the DCS and the DoJ&CD to ensure the delivery of adequate healthcare (including mental healthcare) to every remand detainee.<sup>332</sup> Further, the DCS has an important role to play in the conducting of risk assessments and classifications, and must consider the impact of incarceration on the mental and medical condition of the remand detainee, which must be featured in ongoing case management.<sup>333</sup>

During consultations on this review of South Africa's remand system, both the DCS and the DOH noted that there are not enough beds available to ensure that remand detainees needing mental health assessments can be accommodated, with the DCS noting that the presence of mentally ill remand detainees places a significant resource and security burden on the department. Further complicating the system is the legal mandate of the SAPS to transport detainees from the remand facilities to DOH facilities for assessment and treatment, and the need for the SAPS to provide additional security to the DOH facility. A draft protocol on mental observations for state patients, which outlines the responsibilities of all stakeholders in this regard, including the DoJ&CD, NPA, SAPS, DOH and the DCS, is in development.<sup>334</sup>

## **PART V RECOMMENDATIONS**

This review of South Africa's remand detention system against the requirements of the AChHPR, as expressed through the Luanda Guidelines, has focused on the legislative, policy and implementation gaps and challenges. As noted in Part I of this review, the South African framework generally aligns to the Luanda Guidelines, with a few notable exceptions, particularly in how that framework is implemented. These challenges are generally known to the key stakeholders within the criminal justice system, and in the course of making this review, APCOF has noted that significant efforts are already being made at national level to address the challenges through, in particular, the Office for the Criminal Justice System Review, the Intersectoral Committee for Child Justice, and implementation of the White Paper on Remand Detention Management in South Africa by the DCS and other stakeholders.<sup>335</sup> This review and its recommendations has taken these priorities and efforts into account, and what follows are a number of key recommendations to address evidence-based challenge areas that will either supplement or complement existing efforts, or are linked to upcoming reform discussions.

## Measuring and tracking remand justice in South Africa

In the course of making this review, and during stakeholder discussions in 2015, the issue of data collection and dissemination was apparent. To address these issues, the following recommendations are made:

### ***To the Office for the Criminal Justice System Review:***

Consultation and development of a comprehensive set of indicators to guide data collection, dissemination and analysis across the criminal justice chain in terms of arrest, police custody and remand detention, with a view to identifying challenge areas, potential interventions, and tracking progress made. The high-level indicators used to inform the review of process issues in Part II of this review could form the basis of further work to develop second and third tier indicators for measurement:

- Risk to freedom of movement;
- Duration of remand detention;
- Compliance with conditions of release;
- Effectiveness and efficiency of the CJS;
- Conditions of detention; and
- Community perceptions of the effectiveness and efficiency of the CJS.

For all criminal justice sector institutions, the release of data should include data that is disaggregated by age, gender, race, nationality, location (national and provincial), and where relevant, level of court and type of offence.

### ***To the SAPS:***

Facilitate the regular release of police custody statistics, disaggregated by age, gender, race, nationality, location (national and provincial), including average length of time spent in police custody.

### ***To the DCS:***

Regular release of statistics in terms of the number of persons held in remand detention, disaggregated by age, gender, race, nationality, location (national and provincial), and duration in three-month intervals, up to 24 months.

## Police law reform

On page 9 of this review, it was noted that the White Paper on Policing and subsequent Police Act Amendment is an opportunity to provide a clearer policy framework for policing that is consistent with the role of the police in terms of the Constitution, and the recommendations of the NDP. The challenges identified in terms of policing in this review, such as those within detective services, and the use of arbitrary arrest, could be addressed by a new legal framework that is consistent with the emerging policy priorities.

### ***To the SAPS:***

Align the role and function of the police with the constitutional framework, the White Paper on Policing, the Luanda Guidelines, and evidence-based findings and recommendations contained in the SAPS Policy Advisory Council Reports (2006/7 and 2007/8), Parliament's Detective Dialogue (2012), the NDP (2012), the Khayelitsha Commission of Inquiry (2014) and the SAPS National Inspectorate Report (2015).

In conjunction with legislative amendments, give consideration to a review of police distribution models and allocations of policing resources in terms of the challenges identified in section 13 of this review.

## Oversight and monitoring

South Africa's oversight architecture for the criminal justice system is, on paper, consistent with the requirements of the Luanda Guidelines, and represents one of the strongest accountability frameworks in Africa. However, to address the gaps and challenges in terms of implementation of that framework, the following recommendations are made:

### ***To the Office for the Criminal Justice System Review:***

Establish a mechanism to promote cohesion between all accountability and oversight actors, including a *shared framework for inspections and reporting*. The establishment of a shared framework will also support the systematic monitoring of the remand detention system, as proposed in the recommendation above.

### ***To the SAPS and the Civilian Secretariat for Police:***

One of the key gaps in the current monitoring system is the lack of sustained and systemic oversight of police cells. Since responsibility for cell monitoring was moved from the former Independent Complaints Directorate to the CSP, there has been limited cell inspections. Consideration should therefore be given to the establishment of a Lay Visitor's Scheme as part of the CSP's mandate to inspect police cells.

### ***To the NPA:***

Some commentators have argued that the current internal accountability systems within the NPA, including reporting to Parliament and the Auditor-General, do not have the necessary independence or sufficiently broad mandate, to provide the type of oversight that will enhance public confidence, and improve the efficiency and effectiveness of the NPA.<sup>336</sup> This review recommends research and consultations into the need, and scope, of an independent oversight mechanism for the NPA.

### ***To the DSD and the South African Human Rights Commission:***

Scoping study on the establishment of an independent oversight mechanism for CYCCs, whether as part of a New Public Management (NPM) agreement or as a separate institutional arrangement.

## Use of force during arrest

To promote alignment between section 49 of the CPA and the Luanda Guidelines (as well as other international standards on the use of force by law enforcement personnel), this review recommends that section 49 be amended to limit the use of force during arrest to the imminent threat requirement, rather than permitting use of force on the basis of the accused person's offence.

## Bail

The challenges inherent in the current bail system in South Africa have been set out in detail on pages 16 and 18 of this review. To address these challenges, this review recommends:

- Review of section 60(4) of the CPA to require a broader analysis that takes into account not only issues of proportionality and justice, but the availability and appropriateness of alternative measures (such as ADRM), and whether the use of remand detention is a measure of last resort;
- Research to understand and address the barriers to the use of police bail as per section 59 of the CPA;
- Review of the use of electronic monitoring of remand detainees at regional magistrates court level after 12 months of operation to understand the profile of detainees, number of persons complying with conditions, reasons for the failure to comply, and the impact on the remand detainee numbers;

- Review of the new bail protocol after 12 months of operation to understand the extent to which it is used, trends in terms of release and amendment to conditions, the profile of detainees to whom the protocol applies, the number of persons complying with conditions, and the impact on remand detainee numbers;
- A scoping study that identifies global trends in alternatives to remand detention, with a view to identifying additional measures that could be put in place in South Africa to reduce remand detention numbers.

## **Court utilisation and backlog**

This review has noted the operation of the Case Backlog Reduction Project, and this review therefore makes recommendations to supplement or complement the current efforts to reduce backlog and delays.

### ***To the OCJ:***

Review the current use of ADRMs with a view to promoting their increased use, including a cost benefit analysis of ADRMs versus trial.

Promote the comprehensive and systematic use of pre-trial hearings, identified by the OCJ, Legal Aid and the NPA as a key to increasing the number of trial-ready cases.

### ***To the SAPS:***

Implementation of recommendations to improve SAPS investigation and preparation of trial-ready dockets, including those set out in Parliament's Detective Dialogue (2012).

### ***To the OCJ and NPA:***

Research to understand and address the reasons for withdrawal of cases from the court roll.

## **Conditions of detention**

Noting that there have been improvements to conditions of detention since efforts to promote the implementation of the White Paper on Remand Detention Management, this review makes the following recommendations:

### ***To the DCS:***

Research, policy and training about the causes of violence within DCS facilities, and the appropriate care and management of vulnerable detainees.

### ***To the DoJ&CD:***

If adopted, review the implementation of the protocol to deal with backlog in terms of state mental health patients and state observation patients after 12 months of operation.

If approved for use, explore the use of tele-psychiatry in general psychiatric services, and roll it over to forensic medical health once approved.

### ***Community perceptions of the criminal justice system***

This review, drawing on stakeholder consultations, recommends community education and awareness raising regarding the use of bail and ADRMs as part of an effective and cost efficient criminal justice system.

## Endnotes

- 1 Preamble, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. See also, Louise Edwards, *Pre-Trial Justice in Africa: An Overview of the Use of Arrest and Detention, and Conditions of Detention*, APCOF Policy Paper No. 7, February 2013, available at [http://www.apcof.org/files/8412\\_Pre-trial\\_TrialJustice\\_Overview\\_in\\_Africa.pdf](http://www.apcof.org/files/8412_Pre-trial_TrialJustice_Overview_in_Africa.pdf) (accessed on 1 October 2015); Martin Schönteich, *Presumption of Guilt: The Global Overuse of Pre-trial Detention*, Open Society Justice Initiative, 2014, available at <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf> (accessed on 1 October 2015); L. Muntingh and K. Petersen, *Punished for Being Poor: Evidence and Arguments for the Decriminalisation of Petty Offences*, Civil Society Prison Reform Initiative, 2015; and L Muntingh and J Redpath, *The Socio-Economic Impact of Pre-Trial Detention* (forthcoming), Johannesburg, Open Society Institute.
- 2 The African Commission on Human and Peoples' Rights is an organ of the African Union, established by the African Charter on Human and Peoples' Rights, to ensure the promotion and protection of human and peoples' rights throughout the African continent. For more information, see <http://www.achpr.org/> (accessed on 1 October 2015).
- 3 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.
- 4 African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereafter AChHPR), article 45(1)(b).
- 5 Ibid, at sections 2, 3, 5, 6, 7 and 26.
- 6 The Luanda Guidelines received extensive consultation during the drafting phase in 2012–2013, including two reviews by Commissioners of the ACHPR, expert reviews on the margins of the 53rd and 54th Ordinary Sessions of the ACHPR, and four regional consultations, held in Nairobi (Kenya), Johannesburg (South Africa), Dakar (Senegal) and Tunis (Tunisia), which were attended by national ministries, police agencies, prosecuting authorities, prison services, legal aid providers, national human rights institutions and civil society.
- 7 APCOF is also providing technical assistance to the ACHPR for implementation projects, which follow a similar methodology to the South African project (review and consultation), in the following countries: Malawi, Tanzania, Ghana, Tunisia, Côte d'Ivoire, Sierra Leone and Uganda.
- 8 ISCCJ: Intersectoral Committee for Child Justice was established in terms of section 94 of the Child Justice Act (Act 75 of 2008) to oversee the implementation of the Act and the national policy framework. Information received by APCOF from the Department of Correctional Services on 16 February 2016.
- 9 Republic of South Africa, Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, at 10.
- 10 Representatives from the following organisations and government departments attended the workshop: South African Police Service, Department of Correctional Services, Department of Justice and Constitutional Development, Legal Aid South Africa, South African Human Rights Commission, Judicial Inspectorate of Correctional Services, Civil Society Prison Reform Initiative, Centre for the Study of Violence and Reconciliation, University of the Witwatersrand's African Centre for Migration and Society, Social Justice Coalition, University of Witwatersrand's School of Governance, Western Cape Department of Community Safety, Southern Africa Litigation Centre, Integrated Justice System Development Committee, and the Civilian Secretariat of Police.
- 11 The categories of indicators for measuring remand detention were based on the work of APCOF's partners at the Latin America Network for Pre-trial Justice, who developed a basket of indicators through country studies and a series of regional expert meetings. In the Latin American context, a 2014 report of the Inter-American Commission on Human Rights on the Use of Pre-trial Detention in the Americas (OEA/Ser.LV/II. Doc 46/13, 30 December 2013) recommended, amongst other actions, that states: establish indicators that fix measurable benchmarks related to the reasonable use of pre-trial detention; and ensure that this information is used to implement public policies aimed at guaranteeing the application of international standards pertaining to the use of pre-trial detention, as well as reducing the financial and human costs related to its use. That report is available at <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf> (accessed on 17 October 2015).
- 12 The revised UN Standard Minimum Rules for the Treatment of Prisoners were adopted unanimously in December 2015 by the UN General Assembly and set out the minimum standards for good prison management, including to ensure that the rights of prisoners are respected.
- 13 Preamble, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.
- 14 See, for example, *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) and Benade H (2014) 'Different arresting worldviews', *The Advocate*, August 2014.
- 15 See, for example, Judicial Inspectorate for Correctional Services, *Annual Report for the Period 1 April 2014 to 31 March 2015*, p 43.
- 16 See Part I of this Preliminary Review for a detailed description of each Part of the Luanda Guidelines.
- 17 The categories of measurement are based on work done by APCOF's partners within the Global Campaign for Pre-Trial Justice, specifically the Open Society Foundations and the Latin America Network for Pre-Trial Justice. The methodology for the indicator development by these partners included country studies, analysis from past experiences and a series of regional expert meetings in the Latin America region. A full guide on the use of the Latin American indicators was published by the Open Society Justice Initiative in 2015: Martin Schönteich, *Strengthening Pre-trial Justice: A Guide to the Effective Use of Indicators*, Open Society Foundations, New York, 2015, available at <https://www.opensocietyfoundations.org/sites/default/files/strengthening-pre-trial-justice-guide-indicators-20151119.pdf> (accessed on 20 December 2015).
- 18 Republic of South Africa, National Planning Commission, 'National Development Plan 2030: Our future – make it work', 15 August 2012, at 393.

- 19 National Planning Commission (2012) *National Development Plan 2030: Our Future – Make it Work*, at 388-389. Pretoria: National Planning Commission.
- 20 Ibid.
- 21 Ibid, at 388–389.
- 22 Office of the Presidency: Department of Planning, Monitoring and Evaluation (2014) *Medium-Term Strategic Framework 2014–2019*, p 15.
- 23 Ibid.
- 24 National Planning Commission (2012). 'National Development Plan 2030: Our Future – Make it Work', at 387-388. Office of the Presidency: Pretoria. [Herein referred to as 'National Development Plan']
- 25 Civilian Secretariat of Police (2015) *Draft White Paper on Police*. Government Gazette Notice 179 of 2015. [Herein referred to as '2015 Draft White Paper on Police'].
- 26 Ibid.
- 27 2015 Draft White Paper on Police, p 6–7.
- 28 Ibid, p 7.
- 29 2015 Draft White Paper on Safety and Security, p 11.
- 30 2015 Draft White Paper on Police, p 16.
- 31 Constitution of the Republic of South Africa, [No. 108 of 1996], at section 35.
- 32 The role of the police in a democratic South Africa, the benefits of which include: (a) promotes safety in the community; (b) promotes trust between the police and the community, (c) improves accountability, which increases respect for the police; and (d) indicates a willingness to support police reviews and reform. See, African Policing Civilian Oversight Forum, *Submission on the White Paper on Policing*, 30 March 2015, at 2.
- 33 The key components of democratic policing: (a) adherence to the rule of law; (b) compliance with human rights standards and obligations; (c) accountability – internal and external; (d) equality in resource provision and service; (e) transparency; (f) responsiveness – including imperatives for community participation; (g) effectiveness in performance; (h) efficiency – improved coordination with other state actors, particularly in the JCPS cluster; and (i) partnerships – collaborations, including the role of non-state actors such as private security, business and civil society. See, African Policing Civilian Oversight Forum, *Submission on the White Paper on Policing*, 30 March 2015, at 2–3.
- 34 See, African Policing Civilian Oversight Forum, *Submission on the White Paper on Policing*, 30 March 2015, at Part 4; and Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015.
- 35 Republic of South Africa, Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, at 10.
- 36 Republic of South Africa, Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014.
- 37 Department of Correctional Services, *Annual Report 2014–2015*, pp 8–9 and 51.
- 38 Judicial Inspectorate for Correctional Services, *Annual Report for the Period 1 April 2014 to 31 March 2015*, p 118.
- 39 Final Report of the Judicial Commission on Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services, 2006, at 590 and 614.
- 40 Lukas Muntingh and Gwenaëlle Dereymaeker, *Understanding impunity in the South African law enforcement agencies*, Civil Society Prison Reform Initiative, University of the Western Cape, 2013, at 40.
- 41 Section 179(4) of the Constitution.
- 42 Section 179(5)(a) and (b) of the Constitution.
- 43 See part 4(a) of the Policy Directives.
- 44 See, Martin Schönteich, 'Strengthening prosecutorial accountability in South Africa', *ISS Paper 255*, Institute for Security Studies, Pretoria, April 2014.
- 45 Stop and search statistics available in South Africa are for police operations and not for specific individuals or groups of individuals. Thus, for example, a festive season crime combatting operation may involve stop and search of all vehicles travelling along a particular road. The vast majority of these persons will not be persons 'who are in conflict with the law'.
- 46 South African Police Service, *Annual Report 2014/2015*, at 140.
- 47 South African Police Service, *Annual Report 2014/2015*, at 16: 'Most of the arrests were made in Gauteng, with 453 982 (26.6%) followed by the Western Cape with 396 929 (23.2%) and KwaZulu-Natal with 257 500 (15%).'
- 48 South African Police Service, *Annual Report 2014/2015*, at 150.
- 49 Department of Correctional Services, *Annual Report 2014–2015*, pp 8–9 and 28.
- 50 Ibid, p 15.
- 51 *Ferreira v Levin* NO 1996(1) SA 984(CC)[54].
- 52 Constitution, section 12.
- 53 Ibid, section 14.
- 54 Ibid, section 21.
- 55 South African Police Service, *Annual Report 2014/2015*, at 140.
- 56 Ibid, at 16: 'Most of the arrests were made in Gauteng, with 453 982 (26.6%) followed by the Western Cape with 396 929 (23.2%) and KwaZulu-Natal with 257 500 (15%).'
- 57 2015 Draft White Paper on Police, p 6.
- 58 National Development Plan, p 393.

- 59 2015 Draft White Paper on Police, p 14–15.
- 60 CPA, section 27.
- 61 Constitution, section 35(1)(a).
- 62 Ibid, section 35(1)(b)
- 63 Ibid, section 35(1)(c)
- 64 Ibid, section 35(1)(d).
- 65 South African Police Service, Standing Order 341(G).
- 66 Ibid.
- 67 South African Police Service, Standing Order 341(G), section 5(a).
- 68 CPA, section 6(2).
- 69 See, *Louw and Another v Minister of Safety and Security and Others* [2004] ZAGPHC 9 (6 December 2004).
- 70 Katherine Wilkinson, 'Knysna police ordered to meet arrest quotas', *West Cape News*, 17 May 2010, available at <http://westcapenews.com?p=1454> (accessed on 5 October 2015).
- 71 See, for example, Lukas Muntingh, *Race, gender and socio-economic status in law enforcement in South Africa – are there worrying signs?*, Civil Society Prison Reform Initiative, 2013; Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 24 – 25; National Prosecuting Authority, *Awaiting Trial Detainee Guidelines*, undated, at 66; Vanja Karth, *Between a Rock and a Hard Place: Bail Decisions in Three South Africa Courts*, Open Society Foundation for South Africa, Cape Town, 2008, at 17–18; Campaign for Safer Communities, *Police Custody & Pre-Trial Detention – Discussion Report*, Cape Town, 16 April 2013; and US State Department, *South Africa 2014 Human Rights Report*, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236406> (accessed on 9 October 2015).
- 72 Currie I and De Waal J, *The Bill of Rights Handbook*, 5th ed., Juta, Cape Town, 2005, at 279.
- 73 South African Police Service, *Annual Report 2014/2015*, at 122. See also, Parliament of the Republic of South Africa, Portfolio Committee on Police, *Report of Meeting between the Portfolio Committee on Police, the Minister, Deputy Minister, Acting National Commissioner and senior management of SAPS*, 18 November 2015, available at <https://pmg.org.za/committee-meeting/21851> (accessed on 27 November 2015).
- 74 South African Police Service, *Briefing to Portfolio Committee on Police Legal Expenditure*, 18 November 2015, at 4.
- 75 Section 49 of the CPA permits the use of force when making a lawful arrest, but limits its use to situations where physical force is 'reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing'. The use of deadly force is allowed only in situations where: '(a) the suspect poses a serious threat of violence to the arrestor or another individual; or (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at this time or later'.
- 76 Luanda Guidelines, Guideline 3(c)(ii).
- 77 Constitution, section 35(1)(e).
- 78 Ibid, section 35(3)(a).
- 79 Ibid, section 35(3)(b).
- 80 The rights of the accused to include: the right to examine the charge at any stage of the proceedings (section 80); the right to be provided with the essentials of the charge (section 84); and the right to object to the charge on grounds which include failure to set out an essential element of the offence, failure to disclose an offence, lack of sufficient detail relating to the charge, or lack of sufficient information relating to the accused (section 85).
- 81 CPA, section 84: The charge must contain the following – (a) the time of the offence; (b) the place of the offence; (c) the person against whom the offence was committed (if appropriate); and (d) the property in respect of which the offence was committed (if appropriate).
- 82 CPA, section 76: the charge sheet must include the name, and where known and applicable, the address and a description of the accused in terms of their gender, nationality and age. If any of these details are unknown to the prosecutor, it will be sufficient to state that fact in the charge sheet in terms of section 84(2) of the CPA.
- 83 CPA, section 91: Certain omissions or imperfections in the charge sheet do not invalidate the charge, however, including (1) lack of a formal statement or allegation regarding a matter/issue which is not material to the charge; (2) referring to a person mentioned in the charge by his/her office or other designation instead of by his/her proper name; (3) omission of the time of an offence where the time is not material to the charge; (4) inaccuracies relating to the day on which the alleged offence occurred; (5) errors relating to the addition of an accused or another person; (6) lack of a formal statement about the value or price of a matter or subject, or the monetary value of 'damage, injury or spoil' in a case where such information is not 'of the essence' to the alleged offence.
- 84 CPA, sections 83 and 88.
- 85 South African Police Service, *Annual Report 2014/2015*, at 150.
- 86 National Director of Public Prosecutions, *Annual Report 2014/2015*, National Prosecuting Authority, at 8.
- 87 See, African Policing Civilian Oversight Forum, *Submission on the White Paper on Policing*, 30 March 2015, at Part 4; and Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015.
- 88 *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha*, August 2014, at para 108.
- 89 Ibid, at para 110.
- 90 The rights provided by section 35(2) of the Constitution including the right to: (1) be informed of the reason for being detained; (2) to choose or to consult with a legal practitioner and to be informed of this right promptly; (3) to have a legal practitioner assigned to the detained person by the state and at the state expense; (4) to challenge the lawfulness of detention in person before a court and, if the detention is unlawful, to be released; (5) to conditions of



- detention that are consistent with human dignity; and (6) to community with, and be visited by, that person's spouse of partner, next of kin, chosen religious counselor, and chosen medical practitioner.
- 91 South African Police Service, Standing Order 361(G), at 2.
- 92 *S v Sebejan and Others* 1997 (1) SACR 626.
- 93 *S v Langa* 1998 (1) SACR 21 (T).
- 94 *S v Mthethwa* 2004 (1) (SACR 449 (E).
- 95 South African Police Service, *Annual Report 2014/2015*, at 122.
- 96 Section 5(2)(b) of the CPA.
- 97 See, Parliament of the Republic of South Africa, *Report of the Portfolio Committee on Police on its oversight visits from 26 – 30 March 2012 to the following police stations in North West Province, 2012*.
- 98 Criminal Procedure Act of 1977 (hereafter CPA), section 60(4).
- 99 In considering whether it is 'in the interests of justice' to deprive the accused of his or her personal freedom, the court must consider the prejudice the accused is likely to suffer if detained in custody, by considering the following: (1) the period for which the accused has already been in custody since his or her arrest; (2) the probable period of detention until the disposal or conclusion of the trial; (3) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (4) any financial loss the accused may suffer as a result of his/her detention; (5) any impairment to the preparation of the accused's defence or any delay in accessing legal representation resulting from the detention of the accused; (6) the state of health of the accused; (7) or any other factor that should be considered by the court. Criminal Procedure Act, section 60(9). See also, section 62 of the CPA.
- 100 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at 23. See also, Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, at 9.
- 101 Article 36(1), Constitution of the Republic of South Africa.
- 102 Department of Correctional Services, *Annual Report 2014–2015*, p. 9.
- 103 Institute for Criminal Policy Research, *World Prison Brief 2015: South Africa*, available at <http://www.prisonstudies.org/country/south-africa> (accessed on 11 January 2016).
- 104 Department of Correctional Services, *Annual Report 2014–2015*, p 9.
- 105 National Director of Public Prosecutions, *Annual Report 2014/2015*, at 45.
- 106 Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 6.
- 107 Section 60(1)(c) of the CPA.
- 108 CPA, section 60(1)(b). See also, *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC); 1999 (4) SA 623 (CC).
- 109 Jean Redpath, 'Unsustainable and unjust: Criminal justice policy and remand detention since 1994', *SA Crime Quarterly No. 48*, June 2014, at 26.
- 110 Judicial Inspectorate for Correctional Services, *Annual Report for the Period 1 April 2014 to 31 March 2015*, p 43.
- 111 *Ibid*, p 46.
- 112 Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 22.
- 113 *Ibid* at 22.
- 114 Department of Correctional Services, *Annual Report 2014–2015*, p 16.
- 115 Statistics provided to APCOF by the Department of Correctional Services on 16 February 2016.
- 116 Department of Correctional Services, *Annual Report 2014–2015*, p 15.
- 117 Information provided to APCOF by the Department of Correctional Services on 16 February 2016.
- 118 Statistics provided to APCOF by the Department of Correctional Services on 16 February 2016.
- 119 Department of Correctional Services, *Annual Report 2014–2015*, p 15.
- 120 CPA, section 60(2) – In bail proceedings, the court – (a) may postpone any such proceedings as contemplated in section 50(6) of the CPA; (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail; (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require the prosecutor or the accused, as the case may be, that evidence be adduced; (d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection 11(a) and (b) require the prosecutor to place on record the reasons for not opposing the bail application.
- 121 Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 22. See also, Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, Cape Town, at 9.
- 122 Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, at 4.3.2.10.
- 123 See, for example, Wits Justice Project, *Innocent but Incarcerated: An Analysis of Remand Detention in South Africa*, Department of Journalism, University of Witwatersrand, at 15.
- 124 Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, Community Law Centre, 2011, at 21.
- 125 Department of Correctional Services, *Annual Report 2014–2015*, pp 8 and 39.
- 126 Information received by APCOF from the Department of Correctional Services on 16 February 2016.

- 127 Department of Correctional Services, *Annual Report 2014–2015*, p 15.
- 128 Judicial Inspectorate for Correctional Services, *Annual Report for the Period 1 April 2014 to 31 March 2015*, p 43.
- 129 Republic of South Africa, National Planning Commission, 'National Development Plan 2030: Our future – make it work', 15 August 2012, at 388–389. See also, National Planning Commission (2012) *National Development Plan 2030: Our Future – Make it Work*, at 386–390. Pretoria: National Planning Commission.
- 130 Republic of South Africa, Government Notices No. 147, *Office of the Chief Justice: Norms and Standards for the Performance of Judicial Functions*, No. 37390, 28 February 2014, at 5.1.
- 131 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 37.
- 132 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 8.
- 133 Public Service Commission, *Report on the Inspections of Regional Courts: Department of Justice and Constitutional Development*, November 2011, at 7–13. See also, Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 23.
- 134 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 39.
- 135 The SAPS Annual Report describes 'trial-ready' as a fully investigated and completed case docket that is ready for trial.
- 136 South African Police Service, *Annual Report 2014/2015*, at Table 41.
- 137 Ibid.
- 138 Institute for Security Studies, *ISS Submission: White Paper on the Police*, April 2015, at 13.
- 139 Parliament of the Republic of South Africa, Portfolio Committee on Police, *Detective Dialogue: Report on Proceedings*, 5 September 2012.
- 140 Ibid, at 4–5.
- 141 Republic of South Africa, Public Service Commission, *Consolidated Report on Inspections of Detective Services: Department of Police*, September 2011, at ix–xi, available at <http://www.psc.gov.za/documents/2012/Police%20Report%20Complete.pdf> (accessed on 9 October 2015).
- 142 Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, January 2014, at 24.
- 143 National Director of Public Prosecutions, *Annual Report 2014/2015*, National Prosecuting Authority, at 49.
- 144 Pre-Trial Services was a project that commenced in 1997 by the Bureau of Justice Assistance and the Department of Justice and Constitutional Development to assist judicial officers to make more informed decisions on bail. See, Vanja Karth, *Between A Rock and A Hard Place: Bail Decisions in three South African courts*, Open Society Foundations for South Africa, 2008, at 11.
- 145 Louise Ehlers, *Frustrated Potential: The Short- and Long-term Impact of Pre-trial Services in South Africa*, in *Justice Initiatives: Pre-trial Detention*, Open Society Justice Initiative, at 121.
- 146 Vanja Karth, *Between A Rock and A Hard Place: Bail Decisions in three South African courts*, Open Society Foundations for South Africa, 2008, at 11.
- 147 Martin Schönreich, Making Courts Work: A Review of the IJS Court Centre in Port Elizabeth, *ISS Monograph No. 75*, Institute for Security Studies, Pretoria, 2002. See also, Vanja Karth, *Between A Rock and A Hard Place: Bail Decisions in three South African courts*, Open Society Foundations for South Africa, 2008, at 12–13.
- 148 Jeremy Gordin and Ingrid Cloete, *Imprisoned Before Being Found Guilty: Remand Detention in South Africa*, 80 U. Cin. L. Rev. (2012), at 1168–1169.
- 149 Legal Aid South Africa, *Annual Report 2014/2015*, at 24.
- 150 Ibid, at 39.
- 151 Parliament of South Africa, *Report of the Portfolio Committee on Correctional Services on its Oversight Visit to the Johannesburg Correctional Centre to Assess Remand Detention Facilities and Services*, 21 November 2012, available at <http://pmg-assets.s3-websites-eu-west-1.amazonaws.com/doc/2013/comreports/130207pccorrectrepport2.htm>, accessed on 12 January 2016.
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- 153 Civilian Secretariat of Police, Annual Performance Plan 2014/2015, p 2.
- 154 Dissel, A. and Ngubeni, K. (2000) 'The Conditions of Custody: Police Holding Cells', at 32. Cape Town: Centre for the Study of Crime and Violence Prevention.
- 155 Ibid.
- 156 IPID Annual Report 2014/2015, p 43.
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- 158 Department of Correctional Services, *Annual Report 2014 - 2015*, p 9.
- 159 Ibid, p 15.
- 160 Judicial Inspectorate for Correctional Services, *Annual Report for the Period 1 April 2014 to 31 March 2015*.
- 161 *Lee v Minister of Correctional Services* 2013 (2) SA 144(CC).
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- 163 Department of Correctional Services, *Annual Report 2014 - 2015*, p 16.
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- 166 Department of Correctional Services, *Annual Report 2014–2015*, p 48.
- 167 Centre for Applied Legal Studies, *A measure of last resort: Research report on Remand Detention in South Africa*, January 2013, at 4.
- 168 Department of Correctional Services, *Annual Report 2014–2015*, p 15.
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- 170 Department of Correctional Services, *Annual Report 2014–2015*, p 16.
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- 177 Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, at 1.4.5.1.
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- 188 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 36.
- 189 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 39: ADRM is diversion and informal mediation methods to resolve disputes between parties.
- 190 National Director of Public Prosecutions, *Annual Report 2015/2015*, National Prosecuting Authority, at 8.
- 191 Ibid.
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- 193 Ibid.
- 194 Stats SA, *Victims of Crime Survey 2015*, at 2.
- 195 Ibid at 34.
- 196 See, Working Group on Arbitrary Detention, *report of a Mission to South Africa* (addendum), 2005, UN Doc E/CN.4/2006/7/Add.3. See also, Louise Edwards, 'Spike in claims of police torture is worrying', *Business Day*, 15 October 2014, available at <http://www.bdlive.co.za/opinion/columnists/2014/10/15/spike-in-claims-of-police-torture-is-worrying> (accessed on 4 October 2015).
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- 198 Ibid.
- 199 See, for example, South African Police Service, *Annual Report 2014/2015*, at 122, where SAPS have attributed an increase in the number of civil claims against it to an increase in community awareness of rights, and the means to enforce those rights.
- 200 Independent Police Investigative Directorate, *Annual Report 2014–2015*: IPID reports that incidents of rape in police custody were up 79% from the previous reporting year, with smaller increases in relation to rape by a police officer (2% and deaths in police custody (4%). Concurringly, complaints of the discharge of an official firearm were up 119% on the previous reporting period, to 940 incidents.
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- 202 Ibid at 40.
- 203 Social Justice Coalition, Equal Education and Ndifuna Ukwazi (25 August 2015). *Memorandum to the Minister of Police, Chairperson of the Portfolio Committee on Police, and Chairperson of the Portfolio Committee on Security and Justice: Khayelitsha demands a fair share of quality SAPS resources!*, at para 11. [Herein referred to as 2015 Memorandum].
- 204 2015 Memorandum, at para 6.
- 205 Ibid, at para 6.
- 206 Ibid.
- 207 Ibid, at para 23.
- 208 Ibid, at para 18–21.

- 209 Ibid, at para 16–17.
- 210 *National Policy Framework for Implementation of the Child Justice Act 2010*, pp 15–16.
- 211 Ibid. See also *National Crime Prevention Strategy of 1996*, p 9.
- 212 *National Policy Framework for Implementation of the Child Justice Act 2010*, p 16.
- 213 This section, insofar as it relates to the overview of the legal framework of the Child Justice Act 75 of 2008, has been adapted from Skelton A & Courtenay RM, 'The Child Justice Act: Practice and Procedure' in Bezuidenhout C (ed.) (2013) 'Child and youth misbehavior in South Africa: A Holistic Approach'. Pretoria: Van Schaik Publishers with the authors' permission.
- 214 See sec. 12 ('Freedom and security of the person'), sec. 35 ('Arrested, detained and accused persons') and sec. 28 ('Children') of the Constitution of the Republic of South Africa, 1996. [Herein referred to as the Constitution].
- 215 In terms of sec. 28(3) of the Constitution, a 'child' is defined as a person under the age of 18 years.
- 216 Ibid sec. 28(1)(g).
- 217 Ibid at sec. 28(1)(g)(i).
- 218 Ibid at sec. 28(1)(g)(ii).
- 219 Ibid at sec. 28(2).
- 220 Child Justice Act, [No. 75 of 2008], at Preamble. [Herein referred to as the CJA].
- 221 CJA at Preamble.
- 222 Badenhorst, C. (2011) 'Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, Questionable Outcomes'. Pinelands: Open Society Foundation for South Africa.
- 223 CJA at sec. 3.
- 224 Courtenay, R.M. & Hansungule, Z. 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act' in Proudlock, P. (ed.) (2014) 'South Africa's progress in realizing children's rights: A law review'. Cape Town: Children's Institute, University of Cape Town & Save the Children South Africa at 156.
- 225 Ibid.
- 226 CJA at sec. 2(c).
- 227 Ibid at sec. 18.
- 228 Ibid at sec. 18(1). A *Schedule 1* offence includes: theft, common assault, *crimen injuria*, and public indecency.
- 229 Ibid at sec. 18(3)(a).
- 230 Ibid at sec. 18(3)(b).
- 231 Ibid at sec. 18(4)(a).
- 232 Ibid at sec. 18(4)(b).
- 233 Ibid at sec. 19.
- 234 Gallinetti J (2009) 'Getting to know the Child Justice Act. Cape Town: University of the Western Cape at 23.
- 235 CJA, at sec. 19(2)(a).
- 236 Ibid at sec. 19(2)(b).
- 237 Ibid at sec. 19(3)(b).
- 238 Ibid at sec. 20.
- 239 Ibid at sec 20(1). The circumstances that may warrant arrest, include, a reasonable belief that the child will continue committing offences if not arrested (CJA, sec. 20(1)(b)), a reasonable belief that the child poses a danger to any person (CJA, sec. 20(1)(c)), and where the offence is in the process of being committed (CJA, sec. 20(1)(d)).
- 240 The offences listed in *Schedule 2* of the CJA include: robbery, assault with the intention to inflict serious bodily harm and arson. The offences listed in *Schedule 3* of the CJA include: murder, rape and armed robbery.
- 241 CJA, at sec. 20(3)(a).
- 242 Ibid at sec. 20(3)(b).
- 243 Ibid at sec. 20(3)(c).
- 244 Ibid at sec. 20(3) (d).
- 245 Ibid at sec. 20(4)(a).
- 246 Ibid at sec. 20(4)(b).
- 247 Ibid at sec. 20(5).
- 248 Ibid at sec. 34.
- 249 Ibid at sec. 35.
- 250 Ibid at sec. 57.
- 251 Ibid at sec. 61.
- 252 Ibid at sec. 62.
- 253 Ibid at sec. 71.
- 254 Ibid at sec. 72. See also Badenhorst, supra at 17.
- 255 Ibid at sec. 21(2)(a). See sec. 22(1) of the CJA for the basis of denying a child the right to be released in instances where he/she has committed a *Schedule 1* offence.
- 256 Ibid at sec. 22(2).
- 257 Ibid at sec. 21(2)(b).
- 258 Ibid at sec 21(1).

- 259 Ibid at sec. 26(2)(a).
- 260 Child Justice Act, sec. 28.
- 261 Ibid.
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- 275 Department of Justice and Constitutional Development (2010) 'National Policy Framework for Child Justice. Pretoria: DoJCD, at 8.
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- 286 Police Oversight Committee (2015). This number should be viewed against that detailed in Department of Justice and Constitutional Development (2013) supra at 41. It is evident that a serious need for accurate reporting is required since in the Department of Justice Report 57 592 children were reportedly charged rather than the figure provided by SAPS.
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## Appendix

### Proposed categories and indicators for measuring remand detention in South Africa

Category 1: Risk to Freedom of Movement		
KEY ISSUE: determination of arbitrariness/ validity of violation of right to freedom of movement (stop and search) and/or arbitrary arrest		
Indicator	Disaggregation	Data Sources
(1) Number of people stopped and searched	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Type of offence</li> </ul>	SAPS National Inspectorate, visible policing SAPS Dockets SAPS Charge Sheets SAPS Annual Reports to Parliament
(2) Number of people arrested	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Type of offence</li> </ul>	SAPS National Inspectorate, visible policing SAPS Dockets SAPS Charge Sheets SAPS Annual Reports to Parliament SAPS legal services: Civil claims against National Inspectorate: Disciplinary proceedings Parliamentary reports
(3) Number of people charged	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Type of offence</li> </ul>	SAPS Dockets Charge Sheets Annual Reports Reports to Parliament
(4) Number of people detained in police custody	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Type of offence</li> </ul>	SAPS Dockets Charge Sheets Annual Reports Reports to Parliament
(5) Number of people in remand detention	<p>Number of people held in custody on remand orders</p> <p>Number of matters heard in terms of s 63<sup>1</sup> of the Criminal Procedure Act</p> <p>Court outcomes for s63A of the Criminal Procedure Act<sup>2</sup> applications:</p> <ul style="list-style-type: none"> <li>Reduction of bail;</li> <li>Placement under Correctional Supervision;</li> <li>Release on warning; and</li> <li>Withdrawal of cases.</li> </ul> <p>Number of people with bail held in remand detention.</p> <p>Number of people placed in community corrections in terms of s 62(f)<sup>3</sup> of the Criminal Procedure Act.</p> <ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, DCS facility?</li> <li>Type of offence</li> </ul>	DCS (Remand Detention) DSD (Social Integration) DOJCD Office of the Chief Justice NPA Annual Reports Reports to Parliament Record of court proceedings in terms of s 62 <sup>4</sup> of the Criminal Procedure Act

1 'Section 63 – Amendment of bail conditions.'

2 'Section 63A – Release or amendment of bail conditions of accused on account of prison conditions'.

3 'Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail – ... (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional officer'.

<b>Category 2: Duration of Remand Detention</b>		
(1) Duration of remand detention	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Type of offence</li> </ul>	DOJCD – Court records DCS (Length of Detention Reports and other CJSR reports) JICS Annual Reports Reports to Parliaments
(2) Number and proportion of defendants in remand detention in excess of norms and standards/ legal requirements	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, DCS facility?</li> <li>Type of offence</li> <li>Court (district, regional etc.)</li> </ul> <p>Number of RDs held for following durations:</p> <ul style="list-style-type: none"> <li>0–3 months</li> <li>3–6 months</li> <li>6–12 months</li> <li>12–18 months</li> <li>18–24 months</li> <li>More than 24 months</li> </ul> <p>Number of remand cases reviewed in terms of section 49G of the Correctional Services Act</p>	DOJCD DCS and CJSR reports Office of the Chief Justice NPA JICS Annual Reports Reports to Parliament
<b>Category 3: Defendants' compliance with conditions of release</b> <b>Key Issue: alternatives to remand detention – frequency of use and effectiveness</b>		
(1) Number and proportion of defendants complying with bail/conditions of release from remand detention	<p>Number and proportion of defendants who have failed to comply with conditions imposed in terms of s 62 of the Criminal Procedure Act</p> <p>Social integration figures in terms of section 62(f) of the Criminal Procedure Act</p> <p>Number and proportion of defendants who fail to appear in court</p>	DOJCD DCS Office of the Chief Justice NPA DCS (section 62(f))  Annual Reports Reports to Parliament Record of court proceedings in terms of s 62 <sup>4</sup> of the Criminal Procedure Act
<b>Category 4: Effectiveness and Efficiency of the Criminal Justice System</b> <b>Key Issue: determination of effectiveness and efficiency of the criminal justice system in terms of procedural and substantive fairness – i.e. was detention justified in the first place – did it result in a conviction?</b>		
(1) Number and proportion of remand detainees acquitted, and reasons for acquittal	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province,</li> <li>Level of court</li> <li>Type of offence</li> </ul>	Office of the Chief Justice NPA DOJCD Annual Reports Reports to Parliament SAPS dockets
(2) Number and proportion of remand detainees matters withdrawn and reasons for withdrawal	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province</li> <li>Level of court</li> <li>Type of offence</li> </ul>	Office of the Chief Justice NPA DOJCD Annual Reports Reports to Parliament SAPS dockets
(3) Number and proportion of remand detainees who received a non-custodial sentence	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province</li> <li>Level of court</li> <li>Type of offence</li> </ul>	Office of the Chief Justice NPA DCS (Social Reintegration) DOJCD Annual Reports Reports to Parliament

4 'Section 64 – Proceedings with regard to bail and conditions to be recorded in full'.



(4) Number and proportion of remand detainees who received a custodial sentence shorter than the duration of remand detention	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province,</li> <li>Level of court</li> <li>Type of offence</li> </ul>	Office of the Chief Justice NPA Annual Reports Reports to Parliament
(5) Number and proportion of remand detainees who are released as a result of cases being struck off the court roll, and reasons for the case being struck off	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, police station</li> <li>Level of court</li> <li>Type of offence</li> </ul> <p>Number of matters struck off the court roll and reasons for the strike off</p>	Office of the Chief Justice NPA Annual Reports Reports to Parliament
<b>Category 5: Conditions of Detention</b>		
<b>Key Issue: determine the conditions of detention in remand facilities both in terms of the physical conditions of custody and the extent to which detainees are afforded their procedural rights (e.g. access to legal services, health services, risk assessments, etc.).</b>		
(1) Conditions of detention for remand detainees meet the requirements in terms of Chapter II of the Correctional Services Act	<p>Procedures and safeguards set out in relation to admissions to prison in terms of s 2 of the Correctional Services Act are met</p> <p>Accommodation, nutrition, clothing and bedding, exercise, health care, community contact, procedures for death in prisons, recreation, access to legal services, reading materials, discipline, safe custody, searches, identification requirements, and use of mechanical restraints requirements in terms of the Correctional Services Act are met</p>	DCS JICS DoJ&CD
<b>Category 6: Community perceptions of the effectiveness and efficiency of the criminal justice system</b>		
(1) Community perceptions of the effectiveness and efficiency of the criminal justice system  Experience of CJS – Inmates perceptions of criminal justice system?	<ul style="list-style-type: none"> <li>Demographic data: Age, gender, race and nationality</li> <li>Geographical: National, province, local level (police station, magisterial district/ police station)</li> </ul> <p>A reduction in the number of reported contact crimes</p> <p>An increased proportion of citizens feel safe walking alone, during the day or at night, as measured in official surveys</p> <p>An increase in the proportion of households that are satisfied with police services in their area, and with the way courts deal with the perpetrators of crime</p> <p>Improvements in citizens' perceptions of levels of crime and progress in reducing crime, as measured in official surveys An improvement in South Africa's ranking on the Transparency International Corruption Perception Index</p>	DoJ&CD IPID JICS Public perception surveys Office of the Chief Justice DCS NPA LASA SAHRC Public Protector Annual Reports Reports to Parliament Research reports





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## **ABOUT APCOF**

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

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