



African Policing Civilian Oversight Forum

## Submission

# South African Law Reform Commission's Discussion Paper 167: Review of South Africa's Bail System

27 March 2025

## INTRODUCTION

1. APCOF welcomes the opportunity to provide input on Discussion Paper 167, recognizing the vital importance of bail reform in advancing justice, proportionate use of remand detention, and compliance with constitutional and international human rights standards. Our submission is informed by our [Study on the Use of Bail in South Africa](#) (Research Paper 23, May 2018), which examined the effectiveness, accessibility, and human rights implications of South Africa's bail system. The study, which is attached as **annexure 1**, identified systemic weaknesses in South Africa's bail system, particularly its disproportionate impact on marginalised communities and its contribution to unnecessary remand detention.
2. We welcome the Commission's work to propose reform to the bail system, and Discussion Paper 167 makes a number of important proposals. However, we submit that it does not adequately address a number of key human rights concerns identified in our research. Accordingly, our submission outlines additional recommendations that seek to enhance the Commission's recommendations by:
  - a. Reinforcing the presumption of bail to limit excessive remand detention.
  - b. Ensuring socioeconomic equality in bail decisions.
  - c. Strengthening protections for vulnerable populations.
  - d. Expanding alternatives to custodial remand detention.
  - e. Enhancing transparency and oversight in bail decision-making.

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## **STRENGTHENING THE PRESUMPTION OF BAIL TO REDUCE UNNECESSARY REMAND DETENTION**

3. APCOF's study found that South Africa's correctional services population is disproportionately composed of remand detainees, many of whom are accused of minor, non-violent offences. Delays in processing bail applications and arbitrary judicial discretion were identified as contributing to prolonged and arbitrary remand detention. Furthermore, we highlighted that many accused persons lack legal representation at bail hearings, making it difficult to argue for release or negotiate the use of non-custodial measures.
4. The Discussion Paper acknowledges concerns about prolonged and arbitrary remand detention, but does not propose sufficient structural safeguards to reduce its occurrence. While it notes that bail should not be unreasonably refused, it does not go far enough in reinforcing the constitutional presumption of release.
5. We **recommend** that the Commission consider including, or emphasising, the following issues relating to the presumption of bail:
  - a. Explicitly codify the presumption of bail for all non-violent offences. Courts should be required to justify, in writing, any decision to deny bail.
  - b. Expand access to legal representation at bail hearings, ensuring that accused persons have effective support to argue for release.
  - c. Mandate judicial review of remand detention at regular intervals to assess whether continued detention is justified.
  - d. Establish fast-tracking mechanisms for bail applications, especially for those accused of minor offences.

## **ADDRESSING SOCIOECONOMIC INEQUALITY IN BAIL ACCESS**

6. APCOF'S research paper highlighted that the monetary bail system disproportionately disadvantages accused persons who experience economic marginalisation, leading to prolonged detention for those who cannot afford bail, even when their offences are minor. It further underscored that many detainees lack legal representation at the bail stage, which significantly reduces their ability to challenge unfair decisions or conditions. As the study underscored, failure to pay even low bail amounts can result in prolonged remand detention.
7. The Discussion Paper recognises financial inequality in bail access, but does not propose alternatives to the monetary bail system. There is also no detailed discussion on how courts should assess an accused person's ability to pay the prescribed bail amount.
8. We **recommend** that the Commission consider including, or emphasizing, the following issues related to addressing socioeconomic inequality in bail access:

- a. Reduce reliance on financial bail, with emphasis given to prioritizing release on warning, community-based supervision, or reporting conditions.
- b. Require courts to assess an accused's financial circumstances before setting bail conditions.
- c. Develop a standardized framework for bail affordability, preventing excessive financial conditions from being imposed arbitrarily.
- d. Expand legal aid coverage for economically marginalised persons to challenge unfair bail conditions.

## **ENHANCING BAIL FOR VULNERABLE GROUPS**

9. APCOF's research paper emphasized that vulnerable populations – including women, persons with disabilities, and foreign nationals – face heightened difficulties in securing bail. Foreign nationals, for example, are often denied bail due to their perceived flight risk, even in cases where they have strong community ties. Furthermore, the bail system does not adequately consider the gendered impacts of remand detention, particularly for women who are disproportionately the primary caregivers of children and elderly persons.
10. The Discussion Paper acknowledges gender-based vulnerabilities, but does not propose concrete protections for women and caregivers. Furthermore, it reinforces the assumption that foreign nationals are flight risks, without considering alternatives.
11. We **recommend** that the Commission consider including, or emphasizing, the following issues related to enhancing bail for vulnerable groups:
  - a. Implement gender-sensitive and child-friendly bail procedures to prevent unnecessary detention of women (especially caregivers) and juveniles.
  - b. Establish guidelines for assessing flight risk of foreign nationals, ensuring that detention is not imposed solely due to immigration status.
  - c. Provide reasonable accommodation for accused persons with disabilities to ensure that they are not unfairly or arbitrarily subject to remand detention.

## **EXPANDING THE USE OF NON-CUSTODIAL ALTERNATIVES TO BAIL**

12. APCOF's research paper found that the overuse of remand detention exacerbates overcrowding in correctional institutions, and increases the risk of human rights violations in these settings. Non-custodial measures, such as electronic monitoring, community-based supervision, or mandatory check-ins) remain underutilized in South Africa. We recommended that expanding the use of community-based measures be prioritized to prevent overcrowding, and reduce commensurate human rights abuses in detention settings, in particular those which stem directly from overcrowding.

13. While the Discussion Paper acknowledges the need for alternatives, it does not mandate their prioritisation over custodial measures.
14. We **recommend** that the Commission consider including, or emphasizing, the following issues related to the expansion of non-custodial alternatives to bail:
  - a. Development of statutory provisions that require courts to prioritize non-custodial measures, particularly for minor and non-violent offences.
  - b. Expand community-based supervision programs, with clear guidelines on eligibility, implementation, and oversight.
  - c. Ensure that electronic monitoring, where used, adheres to human rights safeguards, including protections against excessive surveillance.

### **STRENGTHENING MONITORING AND OVERSIGHT OF BAIL DECISIONS**

15. APCOF's research paper raised concerns regarding the limited data and oversight on how bail decisions are made, particularly regarding patterns of remand detention, which limit the extent to which assessments into the fairness and consistency of South Africa's bail system can be made. Judicial discretion varies widely, leading to inequalities in the remand system.
16. The Discussion Paper does address the need for judicial consistency. However, it does not propose the establishment of systematic oversight mechanisms.
17. We **recommend** that the Commission consider including, or emphasizing, the following issues related to strengthening monitoring and oversight of bail decisions:
  - a. Establish a national database on bail decisions to monitor trends and ensure consistency in bail applications across jurisdictions.
  - b. Require regular judicial review of remand detention cases, ensuring accountability in bail decisions.
  - c. Expand the mandate of the Judicial Inspectorate for Correctional Services to include monitoring compliance with fair bail procedures and identifying systemic challenges. JICS already monitors conditions in correctional facilities, and reports on prison overcrowding, both of which are key issues linked to excessive remand detention. As an independent oversight body, JICS can provide an impartial assessment of bail-related detention practices. It also has a mandate to collect data on remand detainees, which could be used to assess the impact of bail decisions on rates of detention. The expansion of JICS' mandate could include
    - i. Systematic review of bail decisions to determine whether remand detention is proportionate and fair;

- ii. Assessment of reasons for the denial of bail, and whether judicial discretion aligns with principles of fairness, equity and human rights.
- iii. Identify systemic delays in bail hearings, contributing to prolonged remand detention.
- iv. Monitor compliance with alternative bail measures, such as release on warning or community-based supervision.

## **CONCLUSION**

18. APCOF commends the Law Reform Commission's consideration of bail reform, but urges that additional measures be considered to ensure that the bail system aligns with South Africa's constitutional and international human rights obligations. We strongly recommend that the Commission strengthen the presumption of bail to prevent arbitrary remand detention; reduce socioeconomic barriers to bail, including excessive financial decisions; enhance protections for vulnerable groups; expand non-custodial alternatives, including community-based supervision; and improve transparency and oversight of bail decisions, including an enhanced oversight role for JICS.

19. We appreciate the opportunity to contribute to this important reform process, and welcome further engagement on these issues.

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