ENTRY POINTS INTO EVALUATING GAUTENG’S COURT STAKEHOLDERS
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Executive Summary

Detention while awaiting trial is not an internationally accepted default practice. In fact, international standards suggest that there are a variety of conditions that have to be met before someone can be legally detained before their trial. Alongside this outlook, international norms dictate that over-crowding is a crucial human rights issue that should not be ignored. Thus, South African society should be moving away from the premise that remand detention is inevitable, which brings the issue of bail to the forefront of court process.

Bail is an excellent diagnostic tool for assessing the health of the criminal justice system. Bail laws, when correctly applied, should result in those who pose a risk to society and are at risk of absconding from their trials being detained – and those who do not fit that description are released. Bail is thus inextricably linked to remand detention, a key focus of the Wits Justice Project (WJP).

This research project examined the application of bail in Gauteng’s courts, through qualitative interviews with court stakeholders and criminal justice experts. The findings examined both the practical application of bail, as well as other systemic challenges facing court stakeholders that could influence the bail regime. The research findings also highlighted how issues apparently unrelated to the administration of bail profoundly affect an accused’s chance of being granted or denied liberty – with knock-on effects on over-crowding figures in remand detention.

Solutions to some of these challenges were suggested, focusing on realigning government priorities; making a practical administrative changes at courts (including increased accountability and process streamlining); and a focus on community education about criminal justice processes. It is hoped that this research will be used as a starting point to engage criminal justice stakeholders in frank discussion on how to improve the administration of criminal justice in Gauteng.

Acknowledgements

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Why this research project?

The Wits Justice Project (WJP), established in 2008, investigates miscarriages of justice and the plight of remand detainees in South Africa’s correctional facilities. A part of the Journalism Department of the University of Witwatersrand, the WJP aims to have significant impact on the lives of people through stimulating positive changes in the criminal justice system. The WJP aims to be a leading authority on issues of the criminal justice system in South Africa, and to do so, creatively combines the use of journalism, advocacy, law and education.

As part of the WJP focus on contributing towards the improvement of the criminal justice system in South Africa, engaging with court stakeholders is a key focus area. The bail regime in South Africa has been under-researched, and considering the critical knock-on effects of bail on remand detention, the WJP highlighted this as a key research priority for 2012.

Framing the issue: bail and remand detention

As of March 2012, South Africa had a correctional facilities population of 158 853. Of these, 29% – or 46 481 – roughly a third of this correctional facilities population, are in remand detention. This means that they have been accused of a crime, and are awaiting the completion of their trials. As they are in custody, they have either not been granted bail, or have been granted a bail amount they cannot afford. 2 616 of these remand detainees have been detained for more than two years 1.

How does this affect correctional facilities? Statistics from the Judicial Inspectorate for Correctional Services (JICS) report 2011/2012 puts the average national over-crowding statistic at 133%, with Gauteng at 162% 2. The same report gave an average of 47% of all remand detainees being held for over three months – 33% being held for six months or more. 32% of all remand detainees are in Gauteng facilities 3. The JICS 2010/2011 Annual Report put the occupancy of Johannesburg Medium A, a remand detention facility, at 238.33% 4. Figures from the Department of Correctional Services (DCS) give a compound cost of R298.38 per person in detention, per day, for the 2012/2013 time period (it is important to note that this figure includes direct costs such as clothing and indirect costs such as employee compensation) 5. The direct cost per inmate is calculated as R13.86 per day. This means that DCS – and the tax payer – are paying R19 326 799.8 per month to house remand detainees in South Africa’s correctional centres.

Even more disturbing is the statistic quoted by Clare Ballard, in her research report on remand detention in South Africa:

‘Literally thousands of people in South Africa spend long stretches of their lives in conditions frequently described as “inhumane,” and without access to educational or rehabilitative programs. More than half of those in remand detention will be released due to acquittal or their charges being withdrawn or struck off the roll’ 6 [own emphasis]

This means that many people are being placed behind bars, and then acquitted at a later date. What were they doing in correctional facilities then, subjected to a range of ills including exposure to TB, HIV/AIDS, violence (including rape and assault) and disconnected from their communities – and costing South Africans billions of rands?

BAIL AS A ‘RED FLAG’

Bail is an excellent diagnostic tool for assessing the health of the criminal justice system. Bail laws, when correctly applied, should result in those who pose a risk to society and are at risk of absconding from their trials being detained – and those who do not fit that description being released. This results in an equilibrium between imposing on constitutional rights to liberty, and protecting society from potential crime and violence. However, when this system malfunctions or is mis-applied, the result is dangerous. An imbalance in a bail regime can result in many people being incorrectly detained, leading to over-crowding in correctional facilities and remand detention facilities – and those who should be under correctional supervision, potentially incorrectly released. This can lead to spiralling socio-political problems for the criminal justice sector, as one expert explains:

The effect of system dysfunction is huge: there is a loss of faith in the system, and anger towards the system. If it becomes overly punitive, there is trauma as well as anger, which leads to a desire to undermine the system and therefore the rule of law. So if we punish people unfairly, we create a population with anger against the rule of law, which undermines the entire democratic undertaking, as it causes state instability.’

Roughly a third of South Africa’s correctional facilities’ population is in remand, as the statistics above explain. This means that South Africa’s criminal justice system’s remand statistics keep company with Cote D’Ivoire (28.5%), Rwanda (28.9%), and Iran (25.7%) – and South Africa’s awaiting trial detention facilities are more over-crowded than Ethiopia (14%), Algeria (12.4%), Sudan (12.1%), Egypt (9.9%) and Myanmar (10.8%) 7. These statistics persist, even though both internationally and continentally, the practice of routine remand detention has been strongly criticised 8.

Detention while awaiting trial is not an internationally accepted default practice. In fact, international standards suggest that there is a variety of conditions that have to be met before someone can be legally detained before their trial. Alongside this outlook, international norms dictate that over-crowding is a crucial human rights issue that should not be ignored. As Jeremy Gordin states in the New South Africa Review, the International Convention on Civil and Political Rights (ICCPR) states that trials must be completed in ‘reasonable time’ or persons must be released on bail 9. Thus, South African society should be moving away from the premise that remand detention is inevitable, which brings the issue of bail to the forefront of court processes 10.

South Africa’s bail regime is regarded as comprehensive and well- legislated 11. Yet, many people wait in remand for more than three months, and are subsequently acquitted or have their cases withdrawn. What are the obstacles that prevent South Africa’s bail legislation from regulating remand detainee populations? As this judicial officer points out:

‘[The criminal justice sector] is like a complicated ball of wool. If you tug on one end, there will be movement somewhere else’

Using bail and the issues relating to remand detention as an entry point, this research project aims to better understand some of the critical workings of the criminal justice system, and thereby identify issues that are crucial to the correct functioning of the system. Viewing remand detention and the bail regime as a critical point of contention, stakeholders were asked to identify the reasons why they could not better apply the bail regime – and what challenges they experienced that, while not directly related to the administering of bail, could be seen to influence the system’s performance on the whole.

1 The Judicial Inspectorate for Correctional Services (JICS), Quarterly report covering April to June 2012
2 The Judicial Inspectorate for Correctional Services (JICS), Annual Report 2011/2012, p. 29
4 Email communication with the Department of Correctional Services, 15 October 2012
6 These statistics are from the World Prison Brief, an online tool updated monthly and compiled by the International Centre for Prison Studies, http://www.prisonstudies.org/cifs/worldbrief/egp_brief.php
7 Gordin (2010), p. 12
8 Ibid.
9 Ibid.
10 Gordin (2008), p. 93
11 Chakalos & De Jong (2009), p. 90
Introduction to bail in South Africa

South African law operates on the principle of innocent until proven guilty. In addition to this, the South African Constitution espouses strong principles on the right to liberty of person. Section 12(1)(a) of the Constitution states: ‘Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause’. However, criminal justice is by its nature, punitive. It seeks to bring order to society through condoning and sanctioning a variety of actions on the part of its citizens. So the criminal justice system in liberal democracies like South Africa must walk a fine line between respecting the rights of its citizens and controlling their activities.

This tension is most clearly evidenced when examining the legislation that governs bail. Indeed, bail is a good example of how resolution might theoretically be reached in the criminal justice system, in terms of respecting individual rights while maintaining order in society. The point of bail is to ‘minimise and avoid anticipatory punishment before conviction and sentence’.

Bail as a legal right

Bail legislation in South African law dictates that an accused person, at any stage before conviction, is entitled to be released if the interests of justice permit. In a legal sense, bail comprises of three key rights of the accused. These are the procedural right to approach the court for bail, the substantive right to have a bail application considered by the court, and a remedial right to be released if the interests of justice allow. In theory, the process of bail operates thus: an accused is brought before a court to decide if there is a case against them. If there is a case, then the question of bail becomes operative. This court must then begin to balance the interests of justice permit interference with an individual’s right to freedom, as guaranteed by the Constitution, not a judgement on someone’s guilt or innocence – or as a method of sentencing. As John Van der Berg puts it, bail should be seen as a procedural human right. What this boils down to, is that bail is a function of the criminal justice system – not a favour, a judgement or a means to manage crime.

Bail as a legal right

Bail decisions must be based on a variety of facts that are brought to the Court’s attention and due to the foundational nature of the rights being balanced, a court must have full information before such a decision can be made.

Bail conditions

The CPA makes it clear that both financial and non-financial bail is appropriate in South Africa. Non-financial bail conditions include options such as forbidding the accused from visiting certain geographical locations; forbidding the accused to communicate with certain individuals; reporting to police stations at stipulated times or remaining under the supervision of a correctional services official.

It is crucial to emphasise that in the light of an accused being unable to afford bail, judicial officers are compelled by law to consider other viable bail options. Section 60(2B)(a) of the CPA states that if a court suggests setting financial bail conditions, there must be an inquiry into whether the accused can afford such a condition. If the accused is unable to pay, the law dictates that judicial officers must consider non-financial bail options or consider setting bail at a price that is appropriate to the circumstances of the accused.

South African courts have a clear legal process to follow when considering bail. The law stipulates that bail should not be dealing with guilt or innocence, but rather with a balancing of rights: the right to freedom, and the interests of justice. South Africa’s laws indicate that where the interests of justice would be served by lesser means than incarceration, these means should be used.

So bail can be seen as a contract: between the state (that allows an accused freedom, pursuant to a range of conditions) and between the accused (who agrees to return to face the court at a stipulated time and place). Bail decisions must be based on a variety of facts that are brought to the Court’s attention and due to the foundational nature of the rights being balanced, a court must have full information before such a decision can be made.

It is important to note that this does not relate to all crimes. Schedule 5 crimes in South Africa carry a reverse-onus provision. Reverse-onus means that the burden of proving that the interests of justice are not damaged by release on bail falls onto the accused. For schedule 6 crimes, persons accused must prove ‘exceptional circumstances’ to allow their release on bail.

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So bail can be seen as a contract: between the state (that allows an accused freedom, pursuant to a range of conditions) and between the accused (who agrees to return to face the court at a stipulated time and place). Bail decisions must be based on a variety of facts that are brought to the Court’s attention and due to the foundational nature of the rights being balanced, a court must have full information before such a decision can be made.
However, legal theory does not always correlate with reality. Lars Buur, in his work on crime, calls the South African attitude to crime ‘polyvalent’. This means that crime becomes a catch-phrase for a range of social ills and disorders and the definition of a criminal depends on the zeitgeist of the time: the criminal class are embodied by illegal Zimbabwean immigrants; foreigners; gangs of unemployed youth. The attitude to bail in South Africa can also be called polyvalent: bail becomes the reason why criminals repeat offend, or constitute another perceived miscarriage of justice when bail is granted to those accused of crime. It has become a catch-all that overpowers the carefully crafted contract that allows a give-and-take of liberty and incarceration, based on an evaluation of the interests of justice.

Bail should be seen as a method to guarantee your reappearance in court when your trial comes up on the roll. But anecdotal evidence shows that the general public appears to equate bail with a trial, and links bail with a judgement on someone’s presumed guilt or innocence. It is common parlance to state that someone ‘got off’ on a certain amount of money posted as bail. But as this judicial officer explains:

There is always going to be a tension between liberty and justice. What is little understood is that the purpose of being arrested is to ensure you stand trial for the crime you have been accused of – that’s all. Arrest is to ensure that there is no risk of interference with the trial, and bail provides for where the risk can be managed

Bail thus determines, crucially, whether you wait for your matter to come to trial in your place of residence, or in prison. Given the district court rolls in Gauteng, where approximately 107 847 cases are dealt with each month – of which approximately 25% (or 26 482 cases) are postponed every month – a bail decision can influence your mental and physical well-being, as well as your preparedness for your trial.

What is important to note, which is often overlooked in public discourse, is that an error in bail judgement either way has serious consequences. An incorrect bail decision could keep an accused in remand detention when their case permits their freedom – keeping them under lock and key amongst hardened criminals. Alternatively, an incorrect bail decision that permits bail could release a criminal back into society, potentially to re-offend. Thus bail should not be viewed as a process that is partial to either the public or the accused.

The effect of bail on remand detention is clear: if people accused of crimes are not given bail – or cannot afford to pay the bail amount set – they will be detained in a remand facility until their trial date. If bail is ineffective or unable to be given, the numbers of people in remand will rise, resulting in over-crowding and the knock-on effects of poor living conditions, spread of communicable disease, and a violation of the right to dignity.

To situate the bail situation in Gauteng in a practical manner, the following pages illustrate the bail regime in Gauteng’s courts by analysing the court statistics for the months January through to March 2012.

The graphs on the following pages give some ideas of the situation of bail in Gauteng’s courts. For clarification, informal bail means that the state prosecutor has not opposed bail. Formal bail means that parties do not agree as to the suitability of bail, and a formal bail hearing must ensue. These graphs show that in the majority of courts, informal bail is more regular than formal bail. The implication of this is that if a formal bail hearing ensues, it is significantly less likely that bail will be given.
These graphs prove that statistically, bail is granted to a fraction of the cases on the roll at magistrates’ courts in Gauteng. However, statistics that show ‘release on warning’ are not available. Thus, it is very possible that some of the courts that show a very small percentage of bail records, could have a very large percentage of warnings issued. Thus, while anecdotally, it is clear that bail administration is a challenge for Gauteng courts, it is not possible to accurately tell whether bail is being under-utilised as many people are let off on warnings – or bail is being under-utilised as people are getting constantly remanded. This is a crucial issue to highlight, as it opens up the importance of record-keeping and updating electronic data management – an issue that will be discussed later in the paper.

Research methodology

A total of 24 respondents participated in in-depth interviews on the issues and challenges relating to bail, remand detention and the criminal justice system. A further two meetings were held with specific stakeholders. Some stakeholders were unable to participate in the first half of 2012, and have asked to be consulted in November. Respondents were from a range of courts and offices around Gauteng. There was an emphasis on the areas surrounding Johannesburg and Pretoria, for logistical reasons. For confidentiality reasons, none of the specific courts are identified in the research findings.

The research methodology used for this project was a mix of journalistic and academic tactics. The aim of this project was to examine the application of bail in Gauteng courts, thereby highlighting practical challenges with the application of bail; and flagging systemic challenges within the criminal justice system that prevent the optimal functioning of the system as a whole.

Time and resource constraints meant the stakeholder group had to be limited, and considering the priority of bail procedures in the research aim, interviewees were confined to those who were directly involved in court processes, namely, prosecutors, lawyers and judicial officers. What came out of these interviews, however, demanded engagement with the training and/or governing bodies of these three stakeholder groups. As such, the Justice College, the South African Judicial Education Institute, the Law Society and Legal Aid South Africa were also invited to participate.

The limitations described above resulted in the exclusion of one key stakeholder – the police. As the police have no direct role in the court room, they were excluded from this study. The research findings, however, highlight the importance of their role in the criminal justice process, including the bail process, and this stakeholder group has been highlighted as a key area for further research.

Much of the access to research subjects was determined by relationships established with the criminal justice sector by the Wits Justice Project, while other access was developed through repeat court visits and door-knocking sessions. In parallel, an official research route was followed, by contacting heads of department and statutory bodies governing elements of the judiciary and the legal profession.

This official research route required informing the Magistrates Commission and the Judicial Services Commission of the research, and requesting permission to make contact with and interview judges and magistrates. The Magistrates Commission gave consent and extensive support; the Judicial Services Commission consented verbally but did not respond to any further telephonic, email or SMS communications. As such, Mr Djadje, Gauteng Regional Court President; and Justice Ngoepe (then Judge President for North Gauteng High Court), were contacted, informed of my research and invited to participate.

The Law Society of South Africa, the Justice College and the South African Judicial Education Institute were also formally invited to participate in this research. The Law Society and the Justice College responded positively. The South African Judicial Education Institute acknowledged the invitation, but sadly did not find time in their schedules to arrange an interview.

The challenges of this approach included waiting on officially-sanctioned access, which resulted in severe delays and much diversion of responsibility within senior administration. Heavy workloads were the biggest reasons for turning down participation, amongst all those who were invited to participate.
Contacting the legal fraternity involved making contact with Legal Aid South Africa, and any private law firms who had a special focus on criminal defence. Due to the small number of top firms that have criminal law departments, ad hoc searches and referrals to independent criminal lawyers were also used to gain interviews. Other private lawyers were contacted through Pro-Bono.org, a legal aid NGO that links private lawyers with public interest cases.

Prosecutors were contacted through the National Prosecuting Authority (NPA). Invitations to participate were sent to a range of NPA personnel, and interviews were arranged accordingly.

The final group of stakeholders contacted is categorised as expert opinion. Based on research output, professional and academic status, experts proved willing and extremely helpful in responding to this research.

This research has operated in a field that is commonly known to be problematic, regarding stakeholder access. Termed ‘a black hole’, ‘chaotic and disorganised’, ‘extremely defensive and protective of information’, researching bail and Gauteng’s criminal justice system was never going to be an easy task.

While the short-comings of this research, as highlighted above, may have impacted its ability to make statements that are supported by a critical mass of participants, the value of the information gathered remains. This research, far from demonstrating a large-scale, systematic judgement on the functioning of Gauteng’s criminal justice system, does provide a key snapshot of stakeholder views.

The evidence and conclusions stemming from the evidence will hopefully contribute to a better understanding of the system of bail, how court processes affecting bail are managed, and how this influences remand detention.

Finally, it must be emphasised that this research investigated stakeholder opinions. The views and comments in this paper should not automatically be taken as fact. Many opinions serve to highlight complexities, or under-lying issues that are prejudicial to the functioning of bail and indeed the criminal justice system as a whole; and should not be interpreted as impartial data.

Research findings

The findings have been divided into two distinct parts. The first set of findings relate to the practical challenges with the application of South Africa’s bail regime. These findings reflect on the impact that bail has on over-crowding in remand detention, and highlight some key obstacles to implementing a high-functioning bail regime in our courts.

The second set of findings identifies systemic challenges within our criminal justice system. These challenges do not have a direct impact on the bail regime and remand detention – but contribute to how high or low functioning the system is, as a whole. It is crucial to highlight these broader, systems-wide challenges along with the practical considerations. If only practical issues are dealt with – such as introducing a mandatory bail review for remand detainees who have reached a certain custody limit – without addressing systemic problems such as complaisance and low career ceilings in some court professions – it is unlikely that any new practical measure will have the appropriate impact.

Research findings: challenges to the administration of bail

When discussing the right to bail, it is important to understand that the court must have adequate information before it to consider a bail decision. It is crucial, when weighing up the interests of justice against individual freedom, that judicial officers have adequate information at their disposal. Information such as the address of the accused, any past convictions and any other charges is important when building a picture of how the accused might behave if released on bail.

However, finding and producing this information in court is frequently a monumental task that requires the co-ordination of information from a range of government departments. If the court does not have adequate information to make a bail decision, the case is postponed until such information is available. Obtaining records from a range of government departments becomes cumbersome as there is no integrated departmental network that allows this information to be obtained from a single central source.

FRAUDULENT I&Ds AND FALSE ADDRESSES ARE also an issue in terms of verification, as one magistrate points out:

In terms of postponements, the biggest problem I have is when foreigners are in court. We then have to get a section 212 certificate from Home Affairs, especially if their documents are thought to be fraudulent, and this can take 6 weeks. Also, South Africans often give false addresses which causes big delays.

Judicial officers generally agree that the fixed address and ID verification is problematic in South Africa, a country that has many informal settlements and many people that have not had access to official ID mechanisms such as birth certificates and ID books. However, they cannot see an alternative in the near future.

The verification process and the fixed address issue are out-dated, we are awaiting modern biometrics like fingerprinting and consolidated IDs. Until then, the fixed address test is a ‘necessary evil’.

The CPA gives judicial officers a variety of alternatives, if cases are being repeatedly postponed. These include striking a case off the roll and asking the investigating officer to rather sort the investigation out and re-arrest, as opposed to keeping the accused in custody. Acknowledging that ID and address verification can result in multiple remands means that developing a system whereby ID and address verification can be streamlined via the Department of Home Affairs and other government agencies that keep address and ID records including the Department of Social Welfare should be a priority.

THE AFFORDABILITY ENQUIRY AND SECTION 63 BAIL PROTOCOL: MAKING BAIL FINANCIALLY APPROPRIATE

In principle, if you have fixed bail that someone cannot pay, you have failed the system. You are frustrating your own system. The seriousness of crime is one consideration, but it is illogical to consider that over other factors – judicial officer
As aforementioned, Section 60(2)(B) of the CPA states that if a court suggests setting financial bail conditions, there must be an inquiry into whether the accused can afford such a condition. If the accused is unable to pay, the law dictates that judicial officers must consider non-financial bail options or consider setting bail at a price that is appropriate to the circumstances of the accused. This two-stage process separates two decisions from each other: the decision of whether someone qualifies for bail; and what form that bail may take.

Considering the two-stage affordability enquiry and the issuing of non-financial bail conditions is a serious obstacle to the administration of bail in South Africa. The Office of the Inspecting Judge has this to say:

‘The detention of a remand detainee [who has been granted bail but remains in custody] makes nonsense of the fact that the court, in granting bail, signifies that the accused is not a danger to the community and may be released pending finalisation of his or her trial. It is also in conflict with one of the most fundamental constitutionally protected human rights, namely the right to freedom and security of the person as provided in section 12 of the Constitution, more particularly section 12(1)(a) which states that no one should be “deprived of freedom arbitrarily or without just cause”’. Imposing a bail amount which the accused will clearly not be able to pay must be regarded as ‘arbitrary or without just cause’.

Even though most judicial officers understand the bail enquiry process –

‘When considering a bail application, it is crucial to look at the severity of the crime, because that will give an indication of potential punishment and therefore whether someone will try and evade their trial. But we also look at personal circumstances: is someone bound to the area they live in? Are their children in school, do their parents live with them, are they fixed in a community? This will also affect the possibility of them returning for their trial.’

‘In a bail hearing, I first consider the seriousness of the charge, then I ask the state for a suggestion, and then do an affordability test. The big considerations are whether someone is a flight risk, a risk to somebody else or might be a repeat offender if released.’

– some judicial officers have a real problem with applying the two-stage affordability enquiry or granting non-financial bail conditions. Abansdoning from a trial – the main purpose of arrest being to ensure you stand trial – was deemed the biggest reason for not applying non-financial bail conditions, or reducing bail amounts:

‘If the crime is not a serious one, I would consider releasing on warning, but experience shows financial bail is what brings people back to court. Simply putting reporting requirements in place is too risky in terms of flight risk.’

‘I do not often do non-financial bail as they will not re-appear for their trial then.’

‘Of those released with only a warning, 30-40% abscond from their trial so it is difficult to apply non-financial bail conditions’.

The affordability enquiry, supposedly designed to prevent criminal justice being prejudicial to the poor, does not appear to be having the desired effect. As this judicial officer candidly explains:

‘If I see an average of 15 new cases a day, 10 will be unable to afford bail.’

The affordability enquiry’s practicality was also questioned by some judicial officers:

‘For financial bail, it is difficult to assess family circumstances. It is difficult to have a full assessment of ability to pay as it would take a very long time to go through tax returns, payslips, etc. A good judge of affordability is if bail is set and they remain in custody. If this is the case, bail should be adjusted.’

The problem comes when we do the affordability test, as we have no way of verifying the answers they give us.’

‘How do you expect judicial officers to adequately perform an affordability test? It is not possible with the current human and material resources to do this’.

In theory, this judicial officer understands the bail concept, but applies a crucial caveat:

‘The basics of a bail decision are as follows: if you are not a danger to society, you should not be incarcerated while awaiting trial. The traditional approach is financial bail, although I am not sure that is the most effective. It is easy and an “at hand” measure but the control you have with non-financial conditions is considerable, as long as you have a good investigating monitoring police officer.’

From interviews conducted, it is clear that judicial officers in Gauteng consider a range of other factors when deciding on bail, including the competence, efficiency and capability of outside actors, which the court is unable to continuously monitor for compliance.

In his book Bail: A Practitioner’s Guide, John Van der Berg states that in South Africa, bail unfortunately functions as ‘privilege prejudicial to the poor’. This relates to the prevalence of financial bail as opposed to non-financial bail conditions in South Africa. Financial bail conditions discriminate against the poor in many ways: without funds to access a private lawyer, it is very likely that poor people will be relying on state-sponsored legal assistance, which may not be available before that case goes to court – thus effectively denying the possibility of applying for bail before the court hearing. As one expert puts it:

‘[Once in remand detention] you are totally dependent on people on the outside who won’t help you unless you pay huge amounts...people with money and resources can force the system to work’.

The idea of a two-track bail system – one for the rich and one for the poor – resonates with one expert, who stated:

‘Our financial bail system is a capitalist notion of justice that has two systems – one for the rich, and one for the poor. Due to structural inequalities, bail becomes punitive to the poor. We have a system whereby an indigent shoplifter will be remanded for being unable to afford a minimal amount of bail money, whereas a businessman who stole millions can afford his huge bail, and will not be remanded. So there is an inconsistency in the way bail is applied. Bail serves as a mistress to those with money.’

This is despite the CPA providing for non-financial bail conditions and also obliging judicial officers and judges to consider them if the affordability test shows financial bail would be prejudicial. It is clear that judicial officers are unlikely to apply non-financial bail conditions if there is any chance that this would result in absconding; compounded with this, is the extreme likelihood that a judicial officer would consider reducing financial bail on affordability reasons alone. This may seem counter to the legislation outlined in the CPA, but societal issues and attitudes to crime must also be taken into account. Judicial officers come under huge pressure to appear tough on crime. South Africa saw fit to legislate on conservative bail laws for serious crimes, as well as introduce a minimum sentencing regime, in an attempt to provide a sense of security to the public – that the crime problem was being addressed. Considering the critical mass of legislation that empowers judicial officers to incarcerate – it is not so surprising that many judicial officers prefer continual custody as their modus operandi.

Along with the two-stage enquiry process, which compels judicial officers to consider the affordability of a bail amount, the CPA also provides a further section designed to reduce over-crowding and allow liberty to certain categories of remand detainees. This section of the CPA was vaunted by the then Minister of Correctional Services, Ms Nosiviwe Mapisa-Nqakula, when briefing the Portfolio Committee on Correctional Services in September 2011. The Minister suggested an improved implementation of the so-called ‘Bail Protocol’ as a solution to over-crowding in remand facilities, among other suggestions.

The ‘Bail Protocol’ that the Minister quotes as being a solution to over-crowding in remand facilities is in fact a complex, politically charged and difficult law to implement. It can be found in section 63A of the CPA, and states that Heads of Correctional Facilities may ask that those awaiting trial who have been granted bail but for some reason have not paid it, are released with a warning in lieu of bail, or have their bail conditions amended so as to allow release. The key issue here is the criteria that must be in place before the Head of a Correctional Facility may request such amendments. The CPA states that Heads of Correctional Facilities must be satisfied that ‘prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to human dignity, physical health or safety of an accused’.

30 The Judicial Inspectorate for Correctional Services (JICS), Annual Report 2010/2011, p. 15
31 Van der Berg (2001), p. 26
32 Schonteich (2008), p. 106
33 Portfolio Committee on Correctional Services, Minister and Deputy Minister of Correctional Services on Ministerial Task Team findings and recommendations (2011), http://www.pmg.org.za/report/20110831-introductory-meeting-national-council-correctional-services
34 Section 63A(11) of the Criminal Procedure Act

Serious crimes that fall into Schedule 5 & 6 include murder, gang rape and robbery

Judicial officers have a few reservations when it comes to the application of the ‘Bail Protocol’, and demonstrate regret with their previous dealings – as well as highlighting the disjuncture between law and practice:

‘With those who had R1000 or less bail being released on warning, many never came to their court appearances. From the interests of justice perspective, then, they should not have been released’

The use of Section 63 and mandatory bail reviews are excellent and should be used. But the problem with mandatory bail review is the manpower required – we can’t even review current bail! It is the same problem – the legislation is good but it cannot be applied due to human resource constraints.’

Section 63 has not been widely used, due to a range of issues as mentioned above. It is unlikely that Heads of Correctional Facilities will voluntarily expose themselves to the threat of civil lawsuits about conditions of detention, even if they have received training and communication about the use of Section 63 – and it is also unlikely that judicial officers will be happy to grant such provisions, when some are of the opinion that it is simply license for mass absconding. It is an excellent example of where a practical legislative provision cannot successfully address bail and remand detention issues, without consideration of other crucial systemic issues such as managerial support and some kind of feedback regarding implementation.

REVERSE-ONUS AND EXCEPTIONAL CIRCUMSTANCES PROVISIONS

As previously mentioned, the CPA provides separate bail considerations for different categories of crimes. For serious crimes that fall into Schedule 5 offences, the onus is on the accused to prove why they should be allowed bail – and for Schedule 6, the accused must show ‘exceptional circumstances’ to be allowed out on bail. These are controversial clauses in some circles, with experts commenting on the fact that these stringent provisions have not reduced crime, and can interfere with judicial discretion. As one expert explains:

‘In terms of exceptional circumstances and reverse-onus, the statistics state that violent crime has been dropping off since 2003, so I think those provisions should go. This is also pertinent because it is clear that even after the bail laws were tightened [in the late 1990s], violent crime continued to increase’

Due to these provisions, judicial officers feel they cannot reduce expensive bail based on the affordability enquiry, and sometimes cannot offer bail at all:

‘You need to balance the interests of justice with the right to freedom: we have to look at someone who is poor but whose crime deserves a high bail...I deal mainly with schedule 5 and 6 offences, so an application for a reduction in bail amounts set must depend on the person bringing me new facts to prove new circumstances. I can’t automatically reduce bail.’

But some feel differently – as this judicial officer put it:

‘In terms of reverse onus provisions – I am not happy with anything that puts restrictions on judicial decisions. The problem with these provisions is that they were put in place so that we seem tough on crime, when the crime rate is extremely high – but these emergency measures have become permanent and focus on this macho approach to fighting crime, which doesn’t work.’

ROLE OF POLICE AND THE NATIONAL PROSECUTING AUTHORITY (NPA)

The police and the NPA have a crucial role to play, regarding bail. When cases do arrive at court, it is up to the prosecutor to decide whether or not to oppose bail. If the prosecutor decides not to oppose bail, the lawyer for the defence will submit a bail request to the presiding officer, and it will fall to this officer to make the decision about bail. This is called informal bail. If, however, the prosecutor decides to oppose bail, a formal bail hearing will ensue. Interviewees explained that deciding on a bail amount relies on experience more than clear and extensive instructions given to prosecutors. They rely on assessing the same facts as the judicial officer, as laid out in the CPA. As one prosecutor says:

‘There are no real guidelines for deciding on bail. All courts differ in their decisions. In general, a prosecutor should know, through experience, how to set a financial bail amount – is the person a flight risk? Do they have employment? And so on.’

This, however, does not take into account that the NPA has published a document on how prosecutors should approach the issue of awaiting trial detainees, including a section on bail advice. Indeed, this document puts the onus on the prosecutor to ensure the magistrate is considering financial circumstances of the accused:

‘Prosecutors should not recommend that bail be fixed in an amount of less than R1000.00. Practically, where prosecutors are therefore of the opinion that the amount of bail should be less than R1000.00, they should ensure that the accused can indeed pay the amount or rather recommend to court that the accused be released on warning if it is appropriate.

If the magistrate fixes an amount less than R1000.00 or an amount that the accused cannot pay, the prosecutor should at the next appearance ask for a reduction of such an amount. If the accused can still not pay the amount of bail the prosecutor must ask the court to warn the accused and/or take the necessary steps to ensure that the matter is fast tracked.’

The absence of knowledge of – or the lack of compliance with – this document, is a cause for concern. Some prosecutors say they prefer to discuss and agree on a bail amount with the accused prior to a court appearance, which allows for a speedy hearing and avoids lengthy bail reviews which can cause delays. Others say the reason they often oppose bail is the issue of a financial guarantee:

‘Bail is not a problem when there are financial guarantees, like a bank. But what kind of guarantees are in place for the poor?’

The state of the docket can also influence the bail decisions of the prosecution:

‘There is a cover sheet for every docket that the police are supposed to fill out, in terms of bail. This cover sheet lets police say whether they recommend bail be given or denied, as well as reasons for this decision. It also provides tick-boxes for things we need to know to decide about bail, like whether they are employed, have a fixed address, and so on. However it is difficult to rely on this data because it is poorly filled out.’
Poorly filled out cover sheets have a direct impact on bail and therefore, the length in a remand facility. Another stakeholder highlighted this issue of police training in relation to crime scene investigation, stating that it’s not the police’s fault if they have had mediocre training.

The following two pages give insight into how these bail cover sheets might look:

<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>DETAILS (also specify where these details are presently unknown)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has fixed address?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has fixed employment?</td>
<td>Yes</td>
</tr>
<tr>
<td>Owns fixed property (house etc.)?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has Passport?</td>
<td>No</td>
</tr>
<tr>
<td>Outstanding warrants of arrest?</td>
<td>Yes</td>
</tr>
<tr>
<td>In custody on another case?</td>
<td>Yes</td>
</tr>
<tr>
<td>On bail on another case?</td>
<td>Yes</td>
</tr>
<tr>
<td>Committed offence while on bail</td>
<td>Yes</td>
</tr>
<tr>
<td>Broken bail conditions before?</td>
<td>Yes</td>
</tr>
<tr>
<td>Escaped or attempted to escape?</td>
<td>Yes</td>
</tr>
<tr>
<td>Provided false information to police?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has will interfere with witnesses?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has will interfere with investigation?</td>
<td>Yes</td>
</tr>
<tr>
<td>Resided arrest?</td>
<td>Yes</td>
</tr>
<tr>
<td>Is violent/Dangerous?</td>
<td>Yes</td>
</tr>
<tr>
<td>Is a danger to a person/Community?</td>
<td>Yes</td>
</tr>
<tr>
<td>Was will be difficult to trace?</td>
<td>Yes</td>
</tr>
<tr>
<td>Can easily evade arrest if released?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has links with foreign countries?</td>
<td>Yes</td>
</tr>
<tr>
<td>Is an illegal immigrant?</td>
<td>Yes</td>
</tr>
<tr>
<td>Has previous convictions?</td>
<td>Yes</td>
</tr>
<tr>
<td>Might commit further offences?</td>
<td>Yes</td>
</tr>
</tbody>
</table>

### ACCUSED DETAILS

| A | Has fixed address* | YES | NO | H | Involved in other cases* | YES | NO |
| B | Has fixed employment* | YES | NO | I | Exemplified arrested* | YES | NO |
| C | At school* | YES | NO | J | Easy to arrest* | YES | NO |
| D | Owns property* | YES | NO | K | Cooperated with police | YES | NO |
| E | Married* | YES | NO | L | No danger to person/Community | YES | NO |
| F | Has children* | YES | NO | M | Antipathies with witnesses | YES | |
| G | Previous convictions* | YES | NO | | | |
| | | | | | | |

| 3 | Investigation complete | YES | NO | A | Outstanding suspicious behaviour/foreign notebooks | YES | NO |
| 4 | Can be released on warning | YES | NO | 5 | Can be released on bail | YES | NO |
| 6 | Are conditions imposed regarding to specified police station | Yes | No | 7 | Should be placed under constant supervision | YES | NO |
| | | | | | | | | |

| 8 | Should be held in prison | YES | NO | Reason |
| 9 | Form completed by | Name | Signature | Date | Tel |

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* indicates evidence supported by documents.
Detectives courses are of a poor quality. This means at a crime scene, crucial evidence is not collected even if an arrest has been made. For instance, when a witness is available immediately after a crime, they are not interviewed there and then. So by the time the investigating officer gets the docket, there is often no prima facie evidence linking the accused to the crime. With no information, detectives cannot even decide whether a case goes on the roll or not, let alone decide whether bail is appropriate. Most likely the case cannot go on the roll, and thus the arrest of the accused is arbitrary. This happens often.

The lack of police training, particularly in the detectives unit, has also been raised in parliament. Experts explained, in a submission to parliament, a range of factors that influence the quality of detective work in South Africa:

- Dockets are often carried over (from previous year) for reasons outside the control of the detective (e.g. delays with forensic analysis; court delays because of long court roles; repeatedly remanded cases, etc)
- In some cases individual detectives add to their burden by their own sloppy work such as poor docket administration, poor quality of statements, and bad time management
- Pressures increase and quality of work deteriorate at stations or units where there is a lack of or poor detective and/or station management

Court stakeholders also agree that heavy workloads are a key issue for police performance and poorly investigated doockets:

- There are between 80 and 130 doockets to investigate; maybe 8 detectives and 1 police car. There is a minimum of 2 witnesses per case, which means a minimum of 160 witnesses to deal with. So it is clear that doockets will just close unless you are in a position to personally push the case forward.37

A recent presentation to Parliament on 5 September 2012 by the Institute for Security Studies explained that the average case load per investigator in South Africa is 100 doockets – when 50 to 60 doockets is considered a manageable workload.38 Under-capacity of probation officers and the inability of police to manage and monitor a large population of people who have been released with reporting or monitoring conditions, was also mentioned as a challenge to releasing on non-financial bail. This judicial officer explains:

The police are poor monitors of non-financial bail conditions and it is not their fault: there are no measurable standards to monitor the smooth running of a system that is not designed to electronically capture all cases, and provide an electronic platform to manage and update case information. It generates a unique reference number per case, and allows for the scanning and uploading of any other documentation relevant to a specific case. Case progress notifications via email and SMS are envisaged, and integration with other departments, including SAPS, are planned for.39 However, there seems to be a huge disjuncture between what the DOJJC believes is being implemented in courts, and what actually happens on the ground. Some judicial officers, when questioned about this system, were simply not clear about what this system was supposed to be. As this judicial officer explains:

We had a computer system with clerks entering information about the date and outcome of each appearance (but this was not a system that allowed scanning of dockets and evidence). But then, there was a shortage of court clerks, these guys got re-routed to work in court and the system fell apart as it wasn’t maintained. Electronic management is great and really helpful but it must be maintained and someone must pay for that maintenance.40

Another issue raised was police collusion with other stakeholders (attorneys and prosecutors) for after-hours bail, as this expert explains:

For coming out for after hours bail, ‘petrol money’ is requested or R4500: R2000 for police, R2000 for attorney and R500 for the actual bail. You can whistle for after hours bail but [without bribery] you won’t get it.

The statements above barely scratch the surface of the complex issues at play, regarding the role of police and the NPA in the criminal justice process. What these statements show, is that there are some key administrative issues that chronically affect the functioning of bail administration. A well-filled out cover sheet, adherence to guidelines for prosecutors when deciding on financial (or non-financial) bail conditions and stronger oversight when an accused is in police custody seem like preliminary fixes that could positively affect the administration of bail in Gauteng’s courts.

Research findings: systemic challenges in Gauteng’s criminal justice system

PHYSICAL INFRASTRUCTURE OF CORRECTIONAL FACILITIES AND COURTS

It does not matter how competent court officials are, or how delicately constructed the legislative framework is – if there is no physical infrastructure to support it, delays and postponements are inevitable. One stakeholder interviewed told a compelling story about the relationship between court performance and court infrastructure. This story revolved around the location of a photocopier. Court personnel were getting through roughly four court matters that required photocopying per day. The location of the photocopier was changed, and the number of matters per day that was doubled. Prosecutors have related how cases have been postponed during the Gauteng summer due to dysfunctional air-conditioners, with court temperatures rising to unworkable levels.

It is not only physical infrastructure that hampers court operations. Electronic court infrastructure is also an issue that plagues the effectiveness of our criminal justice system in Gauteng. The Department of Justice and Constitutional Development (DOJJC), in a 2011 conference on access to justice, stated that as of 2009, an electronic case management system called the Integrated Case Management System (ICMS) has been deployed at all courts.41 This system is designed to electronically capture all cases, and provide an electronic platform to manage and update case information. It generates a unique reference number per case, and allows for the scanning and uploading of any other documentation relevant to a specific case. Case progress notifications via email and SMS are envisaged, and integration with other departments, including SAPS, are planned for.42 However, there seems to be a huge disjuncture between what the DOJJC believes is being implemented in courts, and what actually happens on the ground. Some judicial officers, when questioned about this system, were simply not clear about what this system was supposed to be. As this judicial officer explains:

We had a computer system with clerks entering information about the date and outcome of each appearance but this was not a system that allowed scanning of dockets and evidence. But then, there was a shortage of court clerks, these guys got re-routed to work in court and the system fell apart as it wasn’t maintained. Electronic management is great and really helpful but it must be maintained and someone must pay for that maintenance.

After having the ICMS system explained, this judicial officer said, very politely:

[That would be nice] but we work with paper here.

Other judicial officers were aware something was happening with electronic case management, but had yet to see it come to fruition.

38 Ibid.
40 Court Services(including personnel), address by the Deputy-General: Court Services at the Access to Justice Conference, 9 July 2011 p. 3
41 Court Services(including personnel), address by the Deputy-General: Court Services at the Access to Justice Conference, 9 July 2011 p. 6
"Something was going to happen, and you can see in the court room we still have the wiring for some technology, but nothing happened. Also, an electronic system will not help us if you just come with two computers… this electronic system is also a bone of contention, I think there were some objections because how we deal with dockets and evidence electronically does not seem to be legislated on as yet."

ICMS has made it to some courts, but with limited effectiveness, as this judicial officer explains:

‘Electronic management systems are tricky because the system is unreliable, so people use their own manual systems too, in parallel. Electronic court management was meant to improve services and courts but the magnitude of the investment needed was underestimated. So some systems were rolled out but don’t work – there is a simple bandwidth capacity limit that makes them painfully slow. It is a hindrance not an enabler’

The issue of legislating on electronic case management was raised by a number of judicial officers, who were unsure about the operation of a system without ensuring that loopholes had been cleared legally:

‘you cannot implement [electronic court management] without legislating around that. For example, what if a firearm is evidence in court – how do you ‘scan’ that? What about confidentiality of dockets?’

It is clear that the physical infrastructure of courts needs to be addressed – as does the issue of introducing electronic case management into a system not yet infrastructurally or legislatively capable of coping with it.

CLOGGED COURT ROLL AND WHAT MATTERS ARE PLACED ON THE ROLL, AND WHY

An over-loaded court role is a key part of delayed proceedings, which can result in multiple remands and lengthy detention. The charts below explain court efficiency in Gauteng, based on the number of cases disposed of against the number of cases postponed.
Judicial officers affirm that the main reason for postponing matters for later dates on the court roll is due to a case not being ready to be heard, or information to decide on bail not being available. It is pertinent, at this point, to understand how matters arrive on the court roll.

Prosecutors play a key role in the criminal justice system. Prosecutors decide, based on information provided by the police, on whether to pursue a prosecution of an alleged offence or not. Once a crime has been reported, an investigation is conducted by the police. The results of this investigation – collated into a docket – is then sent to the prosecutor’s office that is linked with the police station the case originated from. If the prosecutor decides to prosecute the case, the case is then put on the court roll and the prosecutor will decide whether or not to oppose bail. If the prosecutor declines to prosecute, the docket is returned to the police. Declining to prosecute could mean the case has no merit (it has no prima facie evidence) or further investigation is necessary before the case can be placed on the roll.

In practice, however, this process can be fraught. Often, if a case is prosecuted, the prosecutor will have to go to court without having interviewed or spoken with the investigating officer. It is not standard practice that detectives accompany their dockets to court, which is understandable, as this would cut into their investigating time. In some courts, a solution to this systemic problem has been reached, as this prosecutor explains:

“We do have liaison officers, who can speak to the police if you need information from them. In some offices we also have a screening protocol, which is when a senior liaison officer, a member of the police and a prosecutor all examine a docket together. However, the issue is finding people to fill these positions, particularly as the police have no budget for this.”

So many prosecutors simply have to make a decision on whether to proceed with prosecution, based on the docket in front of them. The ideal situation is that the police and the prosecutor work together to build a case. However, in South Africa, they allocate prosecutors a court and not a caseload, so there is no continuity or investment of time in the same sets of cases.

There is also a need to clarify the role of the Director of Public Prosecutions and the control prosecutor in deciding what goes on the court roll. The control prosecutor seems to have different jobs depending on which court is in question:

“The role of a control prosecutor is different in every court. In some areas, they do that, the complainants complain about criminals being set free.’

A prosecutor must always take responsibility for their decisions to prosecute – we retain prosecutorial discretion, much like judicial discretion...we discourage prosecutors from leaving everything in the hands of the court...the DPP should, in terms of policy, give decisions in certain matters - but it is still up to the prosecutors involved to decide the details.”

The DPP is supposed to authorize some prosecutions, but it should not be hampering the way court functions.’

How cases get onto the roll is a very important issue that affects the efficiency and productivity of courts in Gauteng. There are some pressing information gaps here, that this research project was not able to fill in. For example, prosecutors are clear that they send back cases that do have merit to the police – and yet, judicial officers state they see cases without merit on the roll often. Further investigation into the process of a case being opened and making its way onto a court roll might be helpful in better understanding clogged court rolls, and addressing the consequences of such clogged rolls.

POOR TRAINING IN THE SECTOR, OR POOR IMPLEMENTATION OF KNOWLEDGE

Training was one of the biggest issues raised during this research. The quality of training offered, and the quality of candidates coming into the criminal justice system as employees were both flagged as a problem. A widespread response to this issue is that criminal justice personnel struggle, for various reasons, to understand or apply the law. A second common response was that criminal justice personnel do not understand the social contexts of crime in South Africa. A recognized training institute had the following to say:

“Social context training cannot be underestimated, even if judicial officers feel they don’t need it.”

Indeed, some judicial officers interviewed said that it was unlikely that a visit to a correctional facility would show them anything they didn’t already know, and some were not convinced that overcrowding or correctional facility conditions were issues they should be concerned with. As officers of the court, their duty is to establish whether the interests of justice permit release on bail – not the conditions in remand facilities:

“Remand detention is a difficult issue. In theory, conditions of detention are not an issue for judicial officers: our job is to assess the accused and make sure that conditions are in place for their return to court.”

It is not only the judiciary who were singled out as requiring further training and sensitisation. It was unanimously agreed that the police were chronically under-trained and, as a consequence, had less than optimal knowledge of the law. One prosecutor, who has observed detectives training, had this to say:

“Detectives courses are often of a poor quality. This means at a crime scene, crucial evidence is not always collected, because people are not trained for a crime scene.’

South Africa cannot expect a high-functioning police service if it does not empower them with high-quality training and education. The trickie-down effects of poor training can be seen through the criminal justice system, and it is simply not fair to expect police to do a decent job without applying a rigorous and high quality training programme.

Institutes that provide training to other officials in the criminal justice system, when questioned whether they provide similar training to police, had this to say:

“We will train SAPS if requested but we acknowledge we should proactively approach them’

In terms of training of judicial officers, this has been in a state of transition for the last two years. The Justice College is now responsible for training court officials, excluding magistrates and judges. The South African Judicial Education Institute (SAJEI) was officially established this year, and will be responsible for the training of judges and magistrates.

Judicial officers attend a two month training session on appointment (one month for criminal work, one month for civil) and are then sent to their station, where they participate in peer review and evaluation. For judges, there is a three day training course on the practicalities of being a judge [including judicial ethics and writing judgements].

This may be a system which works for some, but as one judicial officer explained:

“In terms of training – there are significant gaps. People come into the system with a four year LLB and no knowledge of anything else.”

The Justice College, now in charge of all court personnel training (apart from the judiciary), acknowledges gaps:

“We deal with already qualified legal professionals, so we make an assumption that knowledge of the law is not that important to train. So we focus on the functional part of the law – how to apply the law – to those in a workplace situation already. We know that our training is good, but we also know it is not ‘spot-on’. We have to make many assumptions, and we wonder whether our material caters for the pathologies of the system?”

Criminal justice personnel are now trained in three different institutes and colleges: the judicial personnel at SAJEI, the prosecutors internally at the NPA, and all other personnel at the Justice College. It could be argued that this splits expertise, and divides the criminal justice knowledge repository into three silos. As one stakeholder commented:
The research findings highlighted in the sections above give a snapshot of what court stakeholders experience in criminal courts. It also highlights how issues apparently unrelated to the administration of bail profoundly affect an accused’s chance of being granted or denied liberty – with knock-on effects on over-crowding figures in remand detention. Some of these issues will now be discussed.

A DISJUNCTURE BETWEEN THEORY AND PRACTICE

There were many stages during the interview process where stakeholders explained the theoretical operations of law and procedure in South Africa’s criminal justice system, but their own experiences highlighted the chasm between theory and practice. Many judicial officers explained how, in theory, the two stage bail inquiry functions, in terms of granting non-financial bail conditions. But in practice, it is clear that non-financial bail conditions are granted with reluctance. Another crucial issue is the fact that many stakeholders champion legislative approaches to improving the criminal justice system – but ignore the fact that these approaches are bound to fail unless they are operationalised in parallel with significant training, advocacy and internal, inter-departmental communication. A classic example of this is the implementation of the CPA’s section 63A protocol – in theory, a wonderful legislative tool that in practice, is not functioning as it should be.

A good procedural idea that also doesn’t seem to be functioning optimally is the case-flow management system. If this system worked effectively, there would not be clogged court rolls and crowded remand detention facilities. In theory, this is a place for all stakeholders with a stake in the functioning of the criminal justice system to sit and talk about the issues their courts are facing.

In practice, this is a widely disputed tool. It suffers from dissension amongst stakeholders on who is best placed to lead the administration of the court, and who should be present at these meetings – and how action should be taken. This leads to a further pressing issue this research highlighted – that of unpredictability and consequent instability in the system.

Taking the example of case-flow management: a group of stakeholders who attend these meetings around Gauteng explained their experiences – and all were different. Some said they had barely ever seen a police presence at the meetings, while some said station commanders themselves were present at every meeting.

When asking questions about the training of stakeholders, the disparities in monitoring and training evaluation – within the same sector, but different geographic locations – was stark. Courts themselves painted vastly differing infrastructural pictures. It seems that while minimum standards are a theoretical fact, they are sometimes not a reality. It is no stretch to say that one’s experience of criminal justice in Gauteng can be based on which police station one reports a crime to, and which court is fed by that police station.

A system with such unpredictability is a system one cannot trust. This is clearly evidenced by the significant and worrying lack of trust and faith that stakeholders themselves have, in both their colleagues and their professions. This influences the next issue this research highlighted – that of a poor relationship amongst court stakeholders.

POOR RELATIONSHIP AMONGST COURT-STAKERS

One of the most pressing issues this research revealed was the prevalence of the ‘blame game’. Almost all stakeholders interviewed had a range of explanations as to why the criminal justice sector was not functioning optimally. Most of the reasons had to do with other stakeholders, including complacency, negative attitudes, poor competence and laziness. Below is a selection of opinions from interviewees:

- ‘Police don’t care about quality, they only care about arrest figures. But this increases the acquittal rate, bail applications and civil claims against the police.’
- ‘Police don’t care about quality, they only care about arrest figures. But this increases the acquittal rate, bail applications and civil claims against the police.’
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What do these research findings say about our criminal justice system?

The research findings highlighted in the sections above give a snapshot of what court stakeholders experience in criminal courts. It also highlights how issues apparently unrelated to the administration of bail profoundly affect an accused’s chance of being granted or denied liberty – with knock-on effects on over-crowding figures in remand detention. Some of these issues will now be discussed.
This situation within the criminal justice system is problematic because it sits with a system that is severely flawed. There is not one entity that is particularly worse than the other."

Court decisions [such as bail] are therefore inextricably linked to the performance of all stakeholders. One interviewee used a comparison with the American court management system:

Why aren’t we following the US model? Every type of matter has a defined pathway, with expected timeframes and if there is any divergence, the stakeholder responsible for the delay is billed.

It appears that most stakeholders have limited faith in each other – a very concerning state of affairs. This causes demoralisation of the system as a whole, and a significant amount of defensive behaviour. Stakeholders feel the need to constantly defend themselves against criticism from others, and this leads to a silo’d system where stakeholders do not feel secure enough to admit fault or attempt change.

What doesn’t assist this state of affairs is that often, stakeholders are, in fact, working at cross-purposes. The issue of disparate targets is pressing and in need of urgent attention. As stakeholders explain:

Prosecutors account to quantitative figures but this is not designed to meet a certain standard of system-wide delivery.

The biggest issue is that we all [stakeholders in the CJS] do not have the same targets: NPA, SAPS and the judiciary. The targets don’t speak to each other.

The general opinions of different court stakeholders on criminal justice system targets are that the police target arrests, the NPA target convictions, and the judiciary are above performance targets and evaluation. Accurate or not, these attitudes highlight the fact that stakeholders, at best, are working to cross-purposes; and at worst, have little faith in each other.

Compounding mistrust amongst stakeholders is another worrying aspect of communication: how information gets passed from the top of a departmental hierarchy to the grassroots officials who implement policy directives. The disparity between a high-level statement on a unified judiciary policy, and a district judicial officer’s experience of it. Similarly, there is a chasm between a Correctional Services directive making remand targets, and the NPA and SAPS directives making arrest targets.

One respondent highlighted the fact that within DCS in particular, there was no Seal 4 system where stakeholders do not feel secure enough to admit fault or attempt change.

The reality was that there was a huge gap between top management and DCS officials at the grassroots level.

For example, some stakeholders have complained that remand detainees are not allowed access to social workers – that this is a ‘privilege’ reserved for sentenced offenders. An interviewee at DCS says, emphatically, that this is not the case. It is imperative that internal and interdepartmental communication is prioritised as a means to streamline effective service delivery in the criminal justice system.

Human resource issues

Like any organisation or system, the criminal justice sector is only as good or as effective as the employees that run it. Human resource issues are crucial to resolving issues within the criminal justice system, as without resolving these issues, the system becomes demoralised, complaisant and disinterested for change and high performance.

This first set of human resource issues relates to career trajectories. What is important to note is that very few respondents asked for higher salaries. What was deemed more important was career trajectories, accurately matching workload and pay-scale, and financial support. Below is a selection of the comments from stakeholders on this issue:

The problem with the government prosecutors is that there is a salary ceiling – and if you want to progress past that, there is a political element - real seniority is political. It is difficult to avoid the fact that some prosecutors will move into private practice due to lack of opportunities, which means losing some good resources.

There is the idea of a unified judiciary, but when you get regional and district judicial officers together, there is a clear hierarchy. The career trajectory is very rigid as there are not that many posts. We know attorneys get a few of those posts – we also know there is a huge repository of knowledge in the district courts that the system doesn’t recognise.

We are being treated like factory workers and it is disheartening. We are at the coalface of justice in this country, we are the people most citizens see and interact with, but the idea of a single judiciary is simply not getting there. Magistrates do about 10000/12000 cases a year; regional magistrates 2000/4000; a judge 200/300. There should be a single career path, but now attorneys are being pulled in to be judges, not magistrates.

Magistrates are bored and frustrated. There is no financial or promotional incentives to do work well, we stay in one place too long and stagnate.

Everyone says there is a unified judiciary, but it never happens, it is pie in the sky.

A big issue in the criminal justice system is the issue of payment and compensation. The standards of performance are pitifully low, and there is a complaisance and lack of motivation. And it is understandable: why should I, as a policewoman, go and put myself in harm’s way, when I know that if I die, there is no spousal pension for my husband?

Staffing issues also highlight the tensions that face government departments supplying resources to the criminal justice system:

‘If there were options, I would not employ candidate attorneys [at Legal Aid South Africa], because they leave after their 2 year articles and we cannot re-employ the good ones as most posts require 5 years post-qualification experience.’

Legal Aid South Africa (LASA) is the primary source of criminal defence lawyers in South Africa, and stated to parliament that it had served 382 000 accused persons in 2011. Funded through parliament, LASA has an obligation to provide legal assistance to those in trouble with the law who meet their ‘means test’ for free assistance. They take on candidate attorneys, as part of their mandate is to open up the legal profession to South Africans, and assist them to gain relevant experience.

‘Most of the country’s criminal work comes to Legal Aid South Africa. We operate under resource constraints. If we had more money for criminal justice delivery, it would go first to human resources.’

Legal Aid South Africa works on a ‘practitioner per court’ system where there is one lawyer for every court. Additionally, every practitioner must have one out of court day in order to consult with clients. So the court coverage is not based on statistics of court volumes, but rather guarantees every court has a practitioner. As a LASA representative explains:

We do have 100% court coverage. Stakeholders don’t like this system because the rotation means there is a different person in court once a week, to cover the one day out of court. But there is no back-up of relief staff here – there is no HR capacity on the budget.

So if a LASA attorney is sick or unable to make a court date, the matter must be postponed. LASA sees this as a challenge and is considering bringing in a demand ratio for court practitioners – thus courts with higher volumes could expect to have more practitioners in the near future.

In terms of the NPA, recruitment issues were also raised at a very practical level. One respondent cited continuity issues as being key for NPA performance:

‘At the NPA there is a high staff turnover and it takes 6-12 months to fill a vacancy. Internal promotion is tricky because of the issue of a repeat vacancy if you promote internally. It is also very difficult to find people with the right management skills.’

Some judicial officers pointed out that Correctional Facilities liaison officers – who could act as key communicators and information sharers between the court room and the detention centre - had simply had not been appointed.
‘Prison visiting was delegated to someone who retired last year, and we have not replaced him as yet.’ Other serious infractions result from understaffing at magistrate level:

Understaffing can compromise a magistrate’s objectivity, if they must sit as the trial magistrate as well as bail magistrate in rural areas.

Applying all these issues to the matter of bail, this judicial officer sums that matter up concisely:

‘Due to a lack of sufficient training, over-worked and under-staffed courts, judicial officers have to rely on the work done by the police and the prosecutor. They often grant the strongest bail as a ‘safety mechanism’ – financial bail is tangible and measurable while non-financial bail is difficult to police. So we have judicial officers who have neither the time, inclination or tools to help the system work effectively. They may want to know about the crime, the strength of the case – but there is no time.’

Solutions

Research participants were not without suggestions for improving the functioning of the bail regime and addressing some of the systemic issues raised. Solutions offered have been divided into five sections, namely: government priorities; legal solutions; practical solutions; community education; and accountability and process streamlining.

GOVERNMENT PRIORITIES

South Africa’s criminal justice stakeholders have already developed a format of working together and communicating with each other. This group is called the Justice, Crime Prevention and Security (JCPS) Cluster. Tasked with a variety of outputs, performance output two, as highlighted by Minister of Justice and Constitutional Affairs, Jackson Mthethwa, is of importance to this research: this output addresses transformation of the justice system – creating an effective criminal justice system50. On 25 June 2012, Minister Mthethwa highlighted improved case-flow management and a greater commitment from high-level stakeholders as victories for the cluster. This is a victory indeed, as political buy-in is crucial if positive changes are to be made. But as this research shows, one of the big issues is finding a way to communicate high-level policies to grassroots officials.

When stakeholders were questioned about this crucial issue of passing relevant information and training on to staff at implementation level, the response was unanimous: circulars, directives, pamphlets and training courses were highlighted as the means for doing this. However, these methods do not seem to be working optimally. The JCPS cluster seems to have all the right ideas, but communicating them downwards seems to be a difficult proposition. Addressing this issue should be a key priority for JCPS, going forward.

A solution to one of the biggest problems highlighted by court stakeholders – that of clogged court rolls – has also received attention from this cluster. A team has been established to look into the possibility of having a ‘prioritised cases’ court, where pressing matters will be heard quickly and efficiently. Particularly focusing on sexual offences and child protection matters, this is an excellent suggestion that one hopes would lead to increased capacity and a reduction of backlogs on the court roll.

However, while prioritising such serious offences as sexual violence and child protection issues is necessary and pressing – there is also an argument to prioritise bail hearings as a means of reducing not only the court roll, but over-crowding in detention centres. One expert suggested that courts hold ‘bail days’ where matters can be processed efficiently and effectively, reducing backlogs, clearing court rolls and reducing over-crowding. The fact that the justice cluster is considering priority courts bodes well for the possibility of advocating for prioritised bail hearings.

A further recommendation could be to review and increase the powers of the Inspecting Judge for Prisons. A first issue to tackle could be one raised by all stakeholders – including parliament52 – namely, the lack of budgetary independence of the Judicial Inspectorate53. The Inspecting Judge, Judge Tshabalala highlighted this key issue when briefing a Portfolio Committee meeting in August 2012: he explained that the Judicial Inspectorate of Correctional Services is similar in scope to a Chapter 9 institution. This implies independence, which is simply not possible without a separate budget. The more effective use of this appointment has been long suggested as a means to better understand Correctional Facilities conditions, and provide another method of feedback and communication amongst justice stakeholders in government.

LEGAL SOLUTIONS

Other suggested solutions have much to do with optimising the use of existing legislation. In terms of remand detention, bail and over-crowding, it is worth giving a short history of responsibility for this area, to better contextualise government response. In 2011, the then-Minister of Correctional Services, Ms Nosiviwe Mapisa-Nqakula stated:

‘Remand detention has for a long time been the step child of DCS. There was no clear policy in government as to where matters of remand should be situated and this has resulted in a situation where the needs of remand detainees were not on the forefront of developments within DCS. The White Paper on Corrections in South Africa of 2005 captures and reflects this policy uncertainty as follows. ‘The Department of Correctional Services has been saddled with the responsibility of keeping a range of detainees within its facilities, as a legacy from the time when the Department of Prisons was administered under the Ministry of Justice and was perceived to have a single “custodial mandate”. Following the legislative and policy developments over the last ten years it has since become apparent that this perception cannot be sustained’.’

In 2009, the Department of Correctional Services became, through order of Cabinet, the lead department when dealing with issues of remand detention. However, history makes it clear that remand detention is not a popular issue, and is sometimes perceived as a ‘hangover’ from another department’s mismanagement. As remand detention can be affected by so many government departments and decisions, it was made clear in 2009 that the issue remained a cross-cutting one, to be dealt with by the Justice Cluster as a whole, including departments such as the South African Police Service; the Department of Health; the Department of Social Services; and the Department of Correctional Services.

A new structure at DCS was announced in the May 2012 Budget Speech, and in June, a remand detention branch, at the level of a Branch, was established. This was a clear message that DCS was taking the issue of remand detention seriously. This Directorate has made clear that they will be prioritising the use of current legislation to improve the situation in remand, namely Section 63A and the new Amendment to the CPA which pegs the maximum length of detention without a mandatory court review at two years. This stipulation answers the call by many experts and commentators for mandatory pre-trial detention limits54. While an effective legal tool, mandatory pre-trial detention review should not be seen as a quick fix or a generalised solution. It is very possible that, given the two year limit before compulsory detention review takes place, an accused person could be detained past the time limit of the sentence that some categories of crime result in55.

So while mandatory custody review is a good and useful step forward, it must be seen as part of a wide range of interventions rather than a solution in itself.

47 The Judicial Inspectorate for Correctional Services (JICS), Quarterly report covering April to June 2012
48 Ibid
49 Wits Justice Project (2011), p. 37
53 Ibid, p. 23
55 The Judicial Inspectorate for Correctional Services (JICS), Quarterly report covering April to June 2012
56 Ibid
57 The Judicial Inspectorate for Correctional Services (JICS), Quarterly report covering April to June 2012
58 Ibid.
A controversial legal solution that has been suggested is the revamping or removing of the reverse-onus and exceptional circumstances provisions for bail, for certain schedules of serious crimes. These provisions were introduced through the Criminal Procedure Second Amendment Act of 199754. Many experts anecdotally refer to these provisions as ineffective, as the spate of violent crime did not drop in 1998, when the Act came into force. A report published by the Centre for Violence and Reconciliation states that 1998 saw levels of violent crime actually increase, as these statistics from the report show:

- Between 1997 and 1998 the number of reported attempted murders and robberies with aggravating circumstances increased.
- The consistent decrease in the number of reported murders that had been underway since 1994 was halted during 1998.55

As this expert explains:

To use bail laws to fight crime is absurd. They also encourage a decline in work ethic from those at court: if you don’t have to prove anything to keep someone incarcerated, your work is done for you. If we move away from state onus [to prove bail should be opposed], you don’t have to work as hard.’

Interviews with DCS, however, have made it clear that working with current legislation, as opposed to revamping existing legislation, will be a priority for the Department of Correctional Services. It remains to be seen whether other Justice Cluster stakeholders would consider amending, removing or drafting new legislation to contribute towards solving some of the challenges faced by the criminal justice system.

Looking beyond South Africa’s legislative framework, it is important to examine what regional and continental guidance has been issued, regarding bail and remand detention. A set of guidelines adopted by the African Commission for Human and People’s Rights (ACHPR) pertinent to remand detention and bail issues is the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (known as the Robben Island Guidelines, RIG). Adopted by the ACHPR in 2003, the RIG lays out ‘procedural safeguards’ for the treatment of those deprived of their liberty. Relevant to this research are the safeguards during pre-trial processes, which state, among other clauses, that:

- Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention56.
- Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention57.

These clauses enforce both speedy and efficient judicial processes, as well as allowing for the accused to challenge their current detention. For remand detainees, this can be done through bail – asking for the court to examine whether the interests of justice permit their release.

The ACHPR has also established a number of special rapporteurs to aid their work, one of which was the Special Rapporteur (SR) on Prisons and Conditions of Detention in Africa, established in 1996 as a result of the first Africa-wide conference in penal conditions held in Uganda in the same year37. The product of this conference – the Kampala Declaration on Prison Conditions in Africa – outlines the standards expected of African states, as well making recommendations on improving prison conditions58. This document includes a special section on those in remand detention, recognising that many people in Africa spend years in remand. The Kampala Declaration states:

1. That the police, the prosecuting authorities and the judiciary should be aware of the problems caused by correctional facilities overcrowding and should join the correctional facilities administration in seeking solutions to reduce this
2. That judicial investigations and proceedings should ensure that inmates are kept in remand detention for the shortest possible period, avoiding, for example, continual remands in custody by the court,
3. That there should be a system for regular review of the time detainees spend on remand59.

There is an implication here that people and departments involved in criminal justice should be working together – and that in particular, judicial proceedings should attempt to minimise repeated remands and lengthy custody (both issues bail has the potential to address).

The mandate of this SR established by the ACHPR after the Kampala Declaration covers state visits to examine conditions of detention and correctional facilities – and this includes liaising with individuals, NGOs and anyone else who has made a communication to the ACHPR regarding correctional facilities and conditions of detention; making recommendations on alterations to national law that would result in conformity to international standards of detention.

The ACHPR is clearly aware of some of the problems present in many African countries’ penal systems, although it is debateable how effective this mechanism has been, as the ACHPR suffers from the same maladies as other larger international bodies, including difficulties lodging communications, bureaucracy around protocol of communications and a long lead time for action to be taken. However, the establishment of this SR has resulted in five reports to the ACHPR and three country visits. The SR has visited Cameroon, Ethiopia and South Africa.

As the SR stated in her 2004 visit report:

- By keeping people in detention their social lives are disrupted - learners stop going to school and employees risk losing their jobs... it may be important for the correctional facilities authorities to approach the courts to seek the release... Conditions can be attached to their release – such as reporting to the nearest police station once a week, withholding of their passports, or not to leave the town until they have appeared in court60.

Considering how best to use these African guidelines in encouraging South Africa to conform to the standards laid out is an interesting entry point to further research and advocacy work.

PRACTICAL SOLUTIONS

Practical solutions refer to projects or actions that the criminal justice sector might feasibly develop to facilitate a better functioning bail system and reduce over-crowding in remand detention facilities. Electronic tagging as a replacement for incarceration while awaiting trial was a suggestion put forward by some research participants, and it is being piloted with sentenced offenders. It is, however, also a controversial measure, and there has been some opposition to using tagging with people who have not been found guilty. And, as this participant explains, tagging is expensive and more of a ‘band aid’ than an actual solution:

- ‘Tagging is a good idea, but it is very expensive. Also, it will not solve the issue of there being many more people in the system than should be. It follows a trend of throwing money after problems rather than engaging with the problem.’

However, most judicial officers agreed that a system of electronic tagging would be a huge asset for them. As one judicial officer explains, having a reliable electronic tagging process would help them decide on borderline bail cases:

- ‘If we had electronic tagging, I am sure that many cases that were on the borderline of being granted bail, would have been granted.’

Stringent and proactive oversight was also a solution suggested, for ensuring the criminal justice system is functioning as it should. Improved oversight included increasing the powers of the Inspecting Judge for Correctional Facilities, as well as encouraging judges and magistrates to use their right, as provided for in Section 99(1) and (2) of the Correctional Services Act, to visit all correctional facilities, at any time61.

Another practical measure to streamline criminal justice and the provision of bail was to return to the idea of detaining of suspects at police stations until their hearings. This was followed by another response which suggested the out-sourcing of bail and all other matters before the actual trial to the correctional facilities. However, participants explained that neither of these ideas were new, and had previously met with a range of political and constitutional objections:

56 Resolution On Guidelines And Measures For The Prohibition And Prevention Of Torture, Cruel, Inhuman Or Degrading Treatment Or Punishment In Africa (2003), p. 13 - 14
57 Diesiel (2005), p. 1
58 Kampala Declaration on Prison Conditions in Africa, September 1996
59 Kampala Declaration on Prison Conditions in Africa, September 1996
60 ACHPR (2004), p. 51
61 Section 99(1) and (2), Correctional Services Act of 1998
Many stakeholders agree that administrative training within the court management structure, including training on general management, financial management, peer learning and learnerships on court processes. The DOCJD explained, in an address at the Access to Justice conference in 2011, that the DOJCD is focusing on 'We acknowledge that the court manager competencies have not been reviewed and need review. It is a fundamental change that could positively affect the functioning of courts and therefore, bail and remand process. Facility has Court 72 within its bounds. An assessment of whether this arrangement assists with disposing of risk if court was held at a prison. But I am sure this could be worked around.'

The idea of community education is one supported by the new Minister for Correctional Services, Sbu Ndebele, albeit for the rehabilitation of offenders. It is very encouraging that the DCS is focusing on community participation and restorative justice perspectives; if this can be fed into pre-sentencing as well as post-sentencing initiatives, the positive impact from empowering communities could be significant.

ACCOUNTABILITY AND PROCESS STREAMLINING

In line with the ideas of a hotline and other mechanisms to promote community education around criminal justice, is the issue of how communities can give feedback on their experiences within the system. If stakeholders are not made aware of tensions, conflicts and other pressing issues that are delaying court processes, they are unable to fix them. There are some established feedback mechanisms for some stakeholders (such as the Independent Police Investigative Directorate, and the Law Society), but stakeholders raised this issue that there is no forum for the public to give feedback about the behaviour of prosecutors and judicial officers. The Magistrates Commission (MC) takes discipline quite seriously, and has recently been lauded in parliament for its internal review processes. But reporting a complaint, as a member of the public, is not a clear process, and there are no guidelines on the process that the MC would follow, or any guarantee of the MC following up on a complaint.

The development of a positive (and negative) feedback system being set up for all stakeholders in the criminal justice sector would be a crucial accountability and confidence-building tool. An ombudsman for the criminal justice sector as a whole would have a system-wide perspective, and could make decisions with a wider view than any single stakeholder body. Without demanding that court personnel be questioned and interrogated, a sensible filtering tool along with a feedback mechanism could assist all oversight bodies such as the MC, the Law Society and the management of the NPA with identifying courts that are harbouring ineffective personnel, and rewarding courts that receive praise for the way they handle their matters.

Accountability is always a complex and sensitive issue when dealing with the judicial sector, as their independence is crucial to the efficient functioning of South Africa's democracy. However, as judicial officers themselves are quick to point out, there are ways to keep judges and magistrates accountable without impinging on their independence. Suggestions from judicial officers on monitoring performance included showing evidence of preparedness for court, as well as showing evidence of hours spent in court.

COMMUNITY EDUCATION

The pressure on the criminal justice system is huge. Managing crime rates and criminals in the face of a high degree of public fear and demand for justice puts this sector under pressure to appear tough on crime. Community education on the process of criminal justice is one way to ease the pressure on stakeholders, and allow the public to better understand the system and how it is designed to keep communities safe, while respecting the rights of society and the accused.

A key element of this is community education on the purpose of bail. As explained in the introduction, bail is a fundamentally misunderstood concept in South Africa. If communities were reassured that bail is a mechanism to get people to return for their trials; if bail were better supported by a competent and comprehensive infrastructure relating to reporting and other non-financial bail conditions; and if communities felt empowered by the outcomes of criminal justice, to feel reassured that a trial will appropriately adjudicate guilt or innocence – pressure on officials might ease and those ‘borderline cases’ explained by a judicial officer might not crowd a remand detention facility.

A key factor that seems to make complainants nervous, along with seeing an accused out on bail, is the opaque nature of the process of investigation, charging and trial dates. This is a legally complex timeline, and helping the public follow the processes of criminal justice for themselves might empower them and reassure them that justice is taking its course.

A key element of community education is information dissemination. This could take many forms:

- Pamphlets available at courts and/or police stations
- A short orientation paragraph, explaining how charging and investigation proceeds, when opening a case at a police station. This could also be a cover page on documentation such as statements and/or affidavits
- A helpline, allowing complainants to call in for advice and assistance when trying to understand the stage their case is at. For instance, a complainant could call the hotline asking for clarification when a matter is transferred from a district court to a high court
- Outreach from criminal justice stakeholders: judicial officers, prosecutors and police could consider attending resident association meetings or community meetings in specific areas, to talk through justice processes in their particular district courts
- Developing and training community paralegal officers, who are able to provide practical advice on legal processes in communities that might not be able to afford private legal advice – and who need more support and information than Legal Aid South Africa are able to provide to individual cases


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Court Services(excluding personnel), address by the Deputy-General: Court Services at the Access to Justice Conference, 9 July 2011
Chakalisa & De Jong (2009), p. 92
Issues for further investigation

As mentioned in the introduction, this research project was designed to provide a snapshot of how court stakeholders are administering Gauteng’s bail regime – and flag issues that are preventing the optimal functioning of the criminal justice system. Thus, identifying issues for further research and engagement is an important outcome. The table below highlights these topics:

<table>
<thead>
<tr>
<th>Issue</th>
<th>Explanation</th>
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<tbody>
<tr>
<td>Court statistics</td>
<td>Thorough investigation of data capturing techniques as well as court statistics that have been captured. This will allow an accurate picture of court caseloads and court performance to be developed.</td>
</tr>
<tr>
<td>How cases arrive on the court roll</td>
<td>There is currently a mismatch of information: prosecutors say they reject many dockets as having no case to answer; judicial officers say they see many cases on the roll with no merit. If this process can be de-mystified, court efficiency could increase.</td>
</tr>
<tr>
<td>Collusion and corruption</td>
<td>There is a twin track justice system in Gauteng: one for the rich, who can afford to legally (through bail or legal representation) pay their way out of remand; and one for the poor, who are disenfranchised by a criminal justice system that relies on monies. Alongside these two approaches is the problem of irregular and illegal payments made to ‘work’ the criminal justice for a favourable outcome. How does this kind of corruption work – and where is it most prevalent? How does it impact on the functioning of the system as a whole?</td>
</tr>
<tr>
<td>The police station</td>
<td>There is a lack of information as to what actually occurs at a police station once arrest has taken place. Is police and/or prosecutor bail effectively used? Are people aware of their rights if they are arrested, and are police aware of their responsibilities once they have someone in custody? The police have a heavy workload and extremely challenging working conditions – an inquiry into the challenges and opportunities for the police to positively impact the criminal justice system is key.</td>
</tr>
<tr>
<td>Piloting and monitoring community education initiatives</td>
<td>A well-informed citizen can make good decisions and request appropriate assistance. They can also question procedure and query irregularities. Do public education initiatives make a difference in how efficiently bail is administered – and does a community education project, coupled with an anti-corruption reporting line, increase the legal levels of police and prosecutor bail?</td>
</tr>
<tr>
<td>Court administrators</td>
<td>Court administrators are a key stakeholder group when considering court efficiency. Record-keeping and correct, accurate processing of court information is crucial to streamlining court processes. What is the best kind of administrator for Gauteng’s courts? What should they be responsible for?</td>
</tr>
<tr>
<td>Case flow management meetings</td>
<td>If these meetings could be subject to review, and a generic agenda and attendance requirements circulated, could this assist with addressing the unpredictability and wide variance in these meetings’ positive outcomes for streamlining court processes?</td>
</tr>
<tr>
<td>Review of the offenses of ATD populations</td>
<td>What kind of offenses are awaiting trial detainees accused of? If a census was taken, would this not aid the design of specific interventions to reduce this population appropriately?</td>
</tr>
</tbody>
</table>

This list is by no means exhaustive, and it should not be seen as purely research-focused activities. Some of the suggestions relate to advocacy, networking and relationship building activities that could be undertaken by a range of institutes or bodies.

Conclusion

It is clear that issues relating to bail and remand detention in Gauteng highlight a range of challenges facing the criminal justice system. The administration of bail – a procedural human right – is fraught with other obstacles such as human and physical resources and capacities; disparate court targets, and a lack of cohesion amongst all stakeholders who take responsibility for bail decisions.

It needs to be emphasised that arresting someone is not a punishment in itself – it serves the purpose of ensuring someone will stand in a fair trial where a judicial officer can weigh the accusations against them. In the same manner, bail is not punishment or capitulation. The purpose of bail is to ensure that someone returns to stand in a fair trial, through the imposition of certain conditions. Bail (or in other words, liberty) should only be denied if it serves the interests of justice. Thus – if someone has been arrested, and qualifies for bail, the purpose of the conditions set should be geared towards ensuring someone is capable (or coerced through the conditions) of returning for their trial.

What this research project has attempted to expose is how all aspects of criminal justice management are inter-related. This project has not unearthed any new truths or unique insights. Rather, it has synthesised key stakeholder views to form a more complete picture of how bail is administered – and the consequent challenges all stakeholders in the courtroom are subject to.

By building a broader picture of bail administration, it is hoped that the challenges and solutions that this paper brings together are viewed by all stakeholders as opportunities to improve performance; advocate with all necessary powers for change, where appropriate; and dispel the sensation that they operate alone and without support or understanding from their compatriots.

As the court statistics earlier in this paper prove, many courts and their staff in Gauteng are doing an excellent job. It is hoped that targeted interventions, advocacy and the deployment of skilled and committed public servants will soon improve those courts that have yet to reach this standard of service delivery.
Bibliography


Court Services (including personnel), address by the Deputy-General: Court Services at the Access to Justice Conference, 9 July 2011


Karth, V., O'Donovan, M., and Redpath, J. (2008), Between A Rock And A Hard Place: Bail decisions in three South African courts, OSISA


National Prosecuting Authority (date unknown), Awaiting Trial Detainee Guidelines


van der Berg, J. (2001), Bail: A Practitioner’s Guide, Juta Law

Wits Justice Project Conference publication, Remand detention: Challenges and solutions, 10 August 2011