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UNSHACKLING THE CRIME FIGHTERS
Increasing private sector
involvement in South Africa's
criminal justice system

by
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EXECUTIVE SUMMARY

The traditional approach to fighting crime, where the criminal justice system is a state monopoly, is obsolete. Many developed states in the world today have a vibrant private sector actively engaged in the operation and management of their criminal justice system.

Over the past decade spending on the South African criminal justice system as a proportion of the national budget has more than doubled from less than 5% to almost 10%. Over the same period the number of reported crimes has increased by between 50% and 100%. South Africans are not getting value for their tax money from the state-run criminal justice system.

Greater private sector involvement in South Africa's criminal justice system will make the country a safer place to live in. It will also be cost-effective for both the consumer (who can exploit competitive market forces) and the state (which can contract out many of its criminal justice functions to the competitive private sector).

The South African private security industry is one of the country's largest private employers. There are more than three private security guards for every uniformed police officer. The industry has access to 80 000 vehicles to the 37 000 of the South African Police Service (SAPS). The industry supplements the work of the SAPS, and provides services to its clients which the SAPS cannot, and should not, provide. This alleviates some of the burden on the SAPS and permits it to concentrate its resources on its core functions and the country's poorer areas.

Policy changes are necessary to enable the security industry to become more effective in combating crime. Moreover, some legislative changes are required if the security industry is to expand its scope of operations.

The SAPS has 130 000 employees. Of these 112 000 are uniformed police officers, of whom only 87 000 perform policing functions. There are numerous functions and services performed by the SAPS which could be outsourced to the private sector. Forensic and specialised criminal investigations, administrative functions, the transporting of prisoners, and the guarding of premises are only some examples of police services which could be outsourced. This would place many police officers back on the beat, and improve a number of police services in a cost-effective manner.

The state-run prosecutions system is performing poorly. While crime has gone up, the number of prosecutions and convictions has dropped consistently over a number of years. For serious offences

such as murder, rape, and car hijacking, fewer than a third of those prosecuted are convicted.

Technical and seasonal prosecutions could be outsourced to lawyers in the private sector. Moreover, companies should be able to institute private prosecutions. The present system places victims at the mercy of the state's low conviction and prosecution rates. Victims should have the choice to institute a private prosecution, and their rights to seek legal redress should not be unduly limited by the state.

Arbitration and mediation could be used on a large scale in certain criminal disputes as substitutes for court trials. This would reduce the caseloads in the criminal courts, bring about savings to the taxpayer, and address many of the needs of crime victims.

South Africa's prisons, with a capacity to accommodate 99 400 people, are holding more than 134 000. An extensive privatisation programme whereby the private sector takes over the construction, management, and operation of a large part of the prison system is necessary. Moreover, a number of prison services could be outsourced, and prison labour could be used on a profit basis to cut costs and generate income for both the prisons and a victims' compensation fund.

To alleviate the overcrowding caused by awaiting-trial prisoners (34% of all inmates), a private sector driven system of bail agents, bail enforcement agents, and bail accommodation facilities could be implemented.

The proposals contained in this study will, if implemented, substantially increase the effectiveness of the South African criminal justice system without placing additional burdens on the national budget. Moreover, South Africans should have the freedom to choose what kinds of goods and services — currently provided by the state's criminal justice system — they want to provide for themselves, purchase from the private sector, or rely on the state to provide.

Martin Schönteich wrote this study while working in the Institute's Parliamentary Affairs Office in Cape Town. The work of that office is supported by the Friedrich Naumann Foundation, the International Republican Institute, and the Westminster Foundation for Democracy.

KEY POINTS

- In South Africa the demand for an effective criminal justice system is increasing at a rate greater than the ability of the state to generate the revenue to meet this demand.
- As state spending on the criminal justice system has gone up, so has the level of crime.
- Private policing is re-emerging because of its flexibility and responsiveness to consumer demand, a loss of faith in the public police, the inadequate level and reactive nature of public policing, and widening of private property ownership.
- An internal SAPS discussion document has concluded that: 'It would be of use to everyone (private security industry, municipal authorities, businesses, the public and the police) to in some form or another make use of the resources offered by the private security industry in the fight against crime.'
- Outsourcing brings about improvements in costs, quality, and service flexibility. Moreover, perceived disadvantages of outsourcing such as security risks, accountability problems, and corruption are less likely to occur in the competitive private sector than in state-owned monopolies.
- A total of 3 580 police officers spend over 10m working hours a year guarding buildings and selected individuals.
- Between 1991 and 1996 the number of prosecutions and convictions dropped by 40%; the number of crimes reported increased by 20%. The conviction rate for serious violent crimes is low. In 1997 it was 31% for murder, 18% for car hijacking, and 16% for rape.
- Companies cannot institute private prosecutions. Individuals may do so only in a few limited circumstances. Victims of crime should not be inhibited from instituting private prosecutions. Crime victims should not be at the mercy of the state's low prosecution and conviction rates.
- Through arbitration and mediation programmes time-consuming and expense-incurring matters can be diverted from state-funded courts. Such programmes could also reduce the level of tension between the participants by helping them resolve their disputes.
- Advantages in the private sector's building, managing, and operating of prisons are, inter alia, lower costs and faster service delivery, improved quality control, and better rehabilitation of prisoners.

- Services such as the provision of meals, clothing, health care, perimeter security, the monitoring of parolees, and checking on persons sentenced to correctional supervision, could be outsourced to the private sector.
- The Department of Correctional Services' agricultural production facilities could be outsourced or sold to the private sector. Prisoners could receive greater incentives to participate in profitable prison labour programmes, thereby generating an income for the prison system and themselves.
- Approximately 20 000 prisoners (14.5% of the total prison population) have been granted bail. The Department of Correctional Services spends R1.4m a day on awaiting-trial prisoners who have been granted bail but are unable to pay it. Through a private sector driven system of bail agents, bail enforcement agents, and bail accommodation facilities, the number of awaiting-trial prisoners could be reduced to a minimum.

INTRODUCTION

One of the most serious problems in South Africa is that the demand for an effective criminal justice system is increasing at a rate greater than the ability of the state to provide the services required. The imbalance between this demand, and the available resources, is likely to increase. To address this imbalance policy makers must encourage greater private sector participation in the criminal justice system.

Greater private sector involvement will maximise security and choice — security, as consumers can purchase the kind of services their particular needs require, choice, as the market for security products and services is more diverse than the limited service offered by the state.

A criminal justice system with substantial private-sector involvement will be more effective at achieving its objective: fighting crime. It will also be more cost-effective for both the consumer, who can exploit the competitive forces of the market, and the state, which can contract out to the private sector many of the functions it currently fulfils at considerable expense to the taxpayer.

This study is not advocating a radical restructuring of the criminal justice system whereby the state relinquishes all control. Certain parts of the South African criminal justice system are already owned and run by the private sector. Private security officers outnumber the public police by three to one; and before the end of the century South Africa will have prisons operated and managed by private contractors.

This study:

- analyses each of the three core components of the criminal justice system: policing and crime control, the courts, and correctional services. Each component is examined separately to establish the extent to which it is run by the private sector already, and how the state-owned and the private sections of the criminal justice system can work together to improve the efficacy of the system as a whole;
- proposes how private-sector involvement can be fostered and implemented in each component of the criminal justice system; and
- identifies the criminal justice system's core functions which demand the state's full attention, areas where some measure of state control is required, and areas where the state should withdraw its involvement entirely.

GROWTH OF THE STATE

Government spending as a proportion of gross domestic product (GDP) for the world's most developed capitalist states has increased from under 10% in 1870, to 29% in 1960, to 45% in 1996.¹ Most public policy problems of the twentieth century have been addressed through increased state involvement and expenditure of taxpayers' money.

In the last few decades, however, the state has withdrawn from some of its traditional roles. Education, health services, roads, railways, airports, and postal and telephone services have been privatised or partly privatised in a number of countries. It has taken public policy makers a long time to accept that these traditional 'public services' can be delivered more effectively and fairly (on the principle that only the user, and not every taxpayer, pays) by the market than by the state.

More difficult for public policy makers to accept is substantial private sector involvement in the modern state's core function: the protection of its citizens from criminals, the administration of the criminal justice system, and the imprisonment of convicted criminals.

Yet history shows that the state has not always had a monopoly over all functions of the criminal justice system. Private arrangements for the security of people and property predate the organised policing function of the state.² The earliest security guards may have been the temple priests in the ziggurat at Ur, enlisted by wary Sumerian money-changers in the third millennium BC to protect their lucrative banking operations.³

A few centuries ago most societies had largely informal and private mechanisms to resolve what were in essence criminal disputes. There were 'no public prosecutors, and the police were public in name only, deriving most of their income from bounties and shares of revenues from fines'.⁴ In Britain, and in other parts of the world, the responsibility for law enforcement, 'how it was used, against whom and when it was enforced were not matters for state initiative but for the aggrieved private citizen'.⁵

With the advent of industrialisation and urbanisation the local, personal, and voluntary basis of law enforcement disappeared. It was replaced by a state-owned, organised, and disciplined police force, with responsibilities for public safety and the prevention of crime within the entire territory of the state. By the late nineteenth century the state had taken over virtually all aspects of the modern criminal justice system. This was the case in countries around the world irrespective of their level of development or economic system. In countries with a free market economy, and those with a centrally controlled

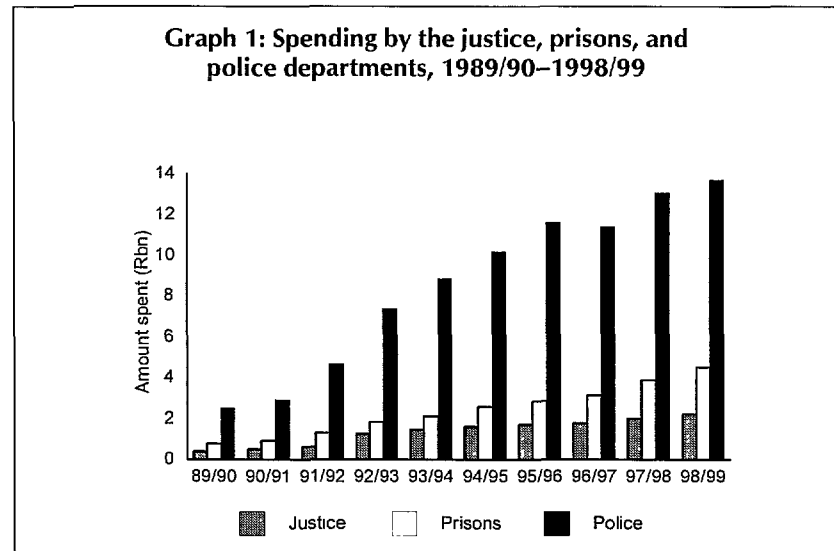
one, the criminal justice system was one of the most protected monopolies of the state.

Since the 1960s, however, the trend towards absolute state control of the criminal justice sphere has undergone a reversal in a number of developed capitalist states. Aspects of policing, prison construction and management, and even criminal detection and prosecution, are again being performed by the private sector. There are a number of reasons for this.

Firstly, even for wealthier states, maintaining and expanding all aspects of a criminal justice system became too costly. Secondly, private enterprise developed the expertise and capacity to provide specialised services more cost-effectively than the state. Thirdly, concern about high levels of crime induced many people to pay for private security in addition to the taxes they paid for state provided security.

CRIME: THE TAXPAYERS' BURDEN

The amount of money spent on the three core components of the criminal justice system (justice, prisons, and police) has, in real terms, increased considerably over the last ten years (graph 1). Spending increased from R3.6bn in 1989/90 to R20.04bn in 1998/99 — an increase of 456%. Over a similar period (1989–98), the consumer price index increased by 184%.

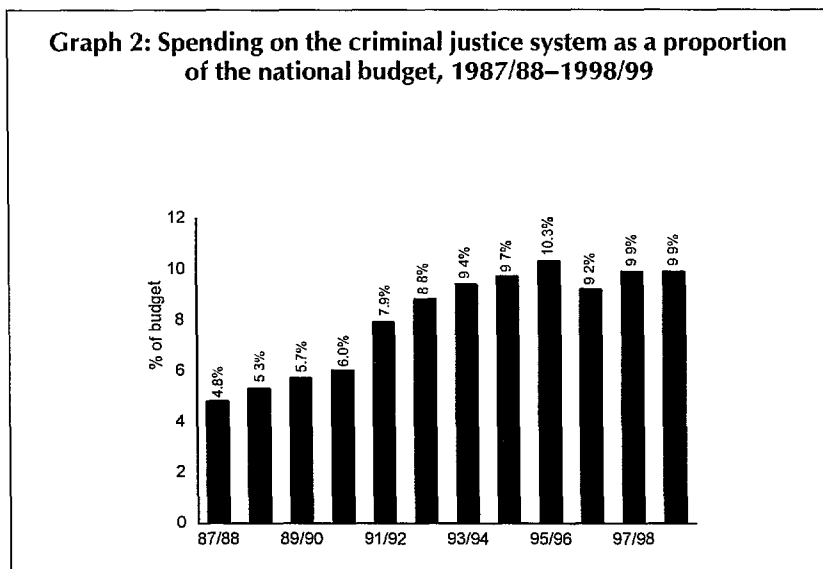


	<i>Justice Rbn</i>	<i>Prisons Rbn</i>	<i>Police Rbn</i>	<i>Total Rbn</i>	<i>Annual increase</i>	<i>Consumer price index increase</i>
1989/90	0.35	0.75	2.50	3.60	25.8%	14.8% (1989)
1990/91	0.46	0.88	2.93	4.27	18.6%	14.2% (1990)
1991/92	0.57	1.28	4.65	6.50	52.2%	15.4% (1991)
1992/93	1.21	1.80	7.36	10.37	59.5%	13.9% (1992)
1993/94	1.45	2.08	8.85	12.38	19.4%	9.7% (1993)
1994/95	1.60	2.58	10.17	14.35	15.9%	8.9% (1994)
1995/96	1.71	2.86	11.61	16.18	12.8%	8.7% (1995)
1996/97	1.75	3.13	11.42	16.30	0.7%	7.4% (1996)
1997/98	1.98	3.87	13.06	18.91	16.0%	8.6% (1997)
1998/99	2.20	4.49	13.71	20.04	5.9%	6.9% (1998)

Note: Up to and including the 1992/93 budget year the 'independent' homelands had their own budgets for expenditure related to their criminal justice systems. In 1992/93 this amounted to R0.75bn. The non-independent homelands budgeted for justice and police related expenses only. In 1992/93 this amounted to R0.55bn. Homeland expenditure is not included in the above figures.

Sources: Department of Finance; Central Statistical Service; 1993/94 *Survey*, pp415–417

The proportion of the national budget devoted to these three sectors of the criminal justice system has more than doubled over the last decade, from 4.8% in 1987/88 to 9.9% in 1998/99 (graph 2).

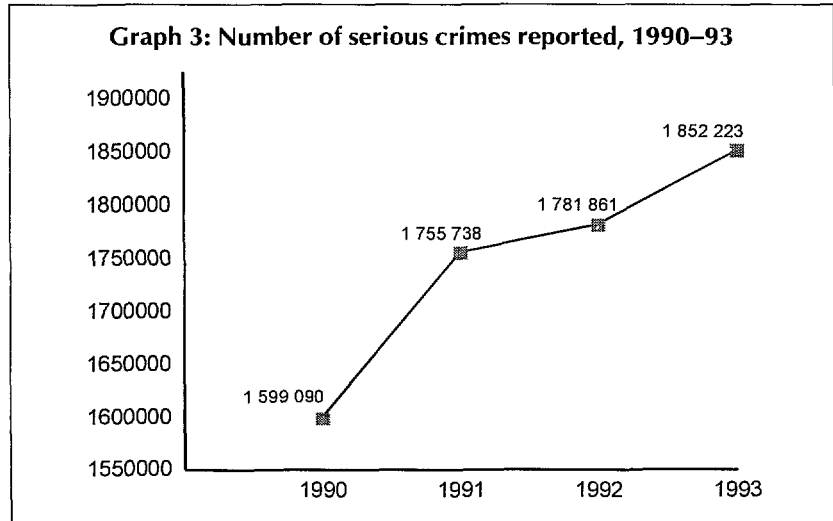


Note: Up to and including the 1992/93 budget year the 'independent' and non-independent homelands had their own budgets for expenditure related to their criminal justice systems. These figures are not reflected in this table

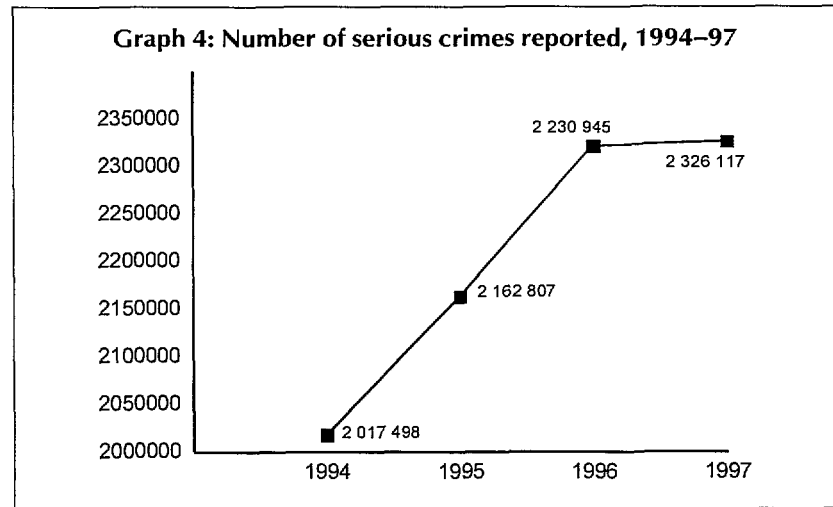
Source: Department of Finance

Over the last ten years state spending on the criminal justice system has gone up. So has the level of serious crime. Between 1990 and 1993, the number of serious crimes reported increased by 16% (graph 3). Between 1994 and 1997 the increase was 15% (graph 4).

A straight comparison of crime levels between the pre- and post-1994 periods should be avoided. According to the SAPS's Crime Information Management Centre, pre-1994 crime figures reflect crimes reported to the South African Police (SAP) only.⁶ In 1993 an estimated 44% of the South African population was living in the 'independent' and non-independent homelands.⁷ Most of these people would have reported crime to the homeland policing agencies. The reincorporation of the homelands into the Republic of South Africa could have contributed to the increase in crime between 1993 and 1994 as reflected in the SAPS's statistics.



Source: SAPS Crime Information Management Centre



Source: SAPS Crime Information Management Centre

Over a ten-year period, between 1988 and 1997, the number of reported murders and rapes increased two and a half times, reported robberies almost three times. Serious crimes against property also rose considerably over that period. The number of reported housebreak-

ings and theft of motor vehicles almost doubled between 1988 and 1997.⁸

South Africans are not getting value for money from the state-owned, managed, and financed criminal justice system. Resources spent on the criminal justice system are not having the desired effect of deterring and apprehending criminals so that people feel safe in their home, suburb, shopping area, or city.⁹ The state has largely failed to provide the service for which taxpayers have paid.

A state unable adequately to protect its citizens should not insist on monopolising all functions of the criminal justice system. Most people in South Africa, including the government, accept that the state's monopoly is weakening, however. Increasingly people are making use of private security, while the government has taken the important step of accepting extensive private-sector involvement in the building and management of a number of prisons.

THE RE-EMERGENCE OF PRIVATE POLICING

History of policing

The modern police force as a professional, permanent, state-controlled, and nationalised force is relatively new. Before the mid-eighteenth century, citizens in most countries were expected to protect themselves and each other. The first state police forces were established to augment citizen self-protection. There was no intention on the side of law makers that the state police should displace citizens' right of self-protection.¹⁰

In 1829 the first modern police force, the Metropolitan Police, was set up by Britain's home secretary, Robert Peel.¹¹ This was done in the face of considerable opposition. A parliamentary committee opposed the creation of a police force for the city of London on libertarian grounds. 'It is difficult to reconcile an effective police force with that perfect freedom of action and exemption of interference which are the great privileges and blessings of society in this country,' a member of the committee said at the time.¹²

In South African tribal society, public policing did not exist. Generally the whole community was responsible for the misdeeds and debts of any one of its members. Every man in the tribe was a policeman and was bound to report any act or wrong which he witnessed to his superior.¹³

After 1652 the creation of a police force by the white settler community at the Cape was slow. Jan van Riebeeck relied on soldiers for the preservation of law and order. In 1657 when free burghers were allowed to farm land, they were expected to guard their own property.¹⁴ It was only in the 1850s that Cape Town acquired a public police force modelled on the London Metropolitan Police. As in London, there were civil liberty concerns about the role and conduct of the police, and resistance to certain police powers. For a while the police in Cape Town were not allowed to handcuff people in public without special authority from the magistrate.¹⁵

In Natal no effective police force existed before the creation of the Natal Mounted Police in 1874.¹⁶ In the Orange Free State, ten policemen were employed for a trial period of three months in 1854. Subsequently the police service was placed on a permanent footing, while a detective service was instituted in 1894.¹⁷ The detective service kept a register of convicted persons, including their photographs — something which the South African Police Service (SAPS) cannot afford more than a century later.

In the Transvaal Republic the Transvaalsche Rijdende Politie was established in 1881 with 100 men. In 1894 the Transvaal government promulgated regulations with regard to uniforms. Police regulations were drawn up in 1897.¹⁸

South Africa's first centralised police force — the South African Police — was established in 1913 with 5 882 policemen. (Women were not permitted to enlist as full members until 1972.) However, because of South Africa's geographic size, most of the country's rural areas were hardly policed in the contemporary sense of the term. Farmers and other people living in rural areas were largely responsible for their own security. De facto private security of this informal kind was widespread at the turn of the century. Private security also existed on a more formal level: the British South Africa Company was empowered by its charter to raise and equip a force of private police to accompany its 1890 expedition into Mashonaland.¹⁹

With the growth of the influence of the state, and in the size of the South African Police,²⁰ the role of private security diminished in South Africa. A growing population, improved communications, and better roads also played a role in sidelining private security in the country's rural areas. In the 1980s and 1990s this trend was reversed with the rapid growth of a formal profit-driven private security sector.

Reasons for the re-emergence of private policing

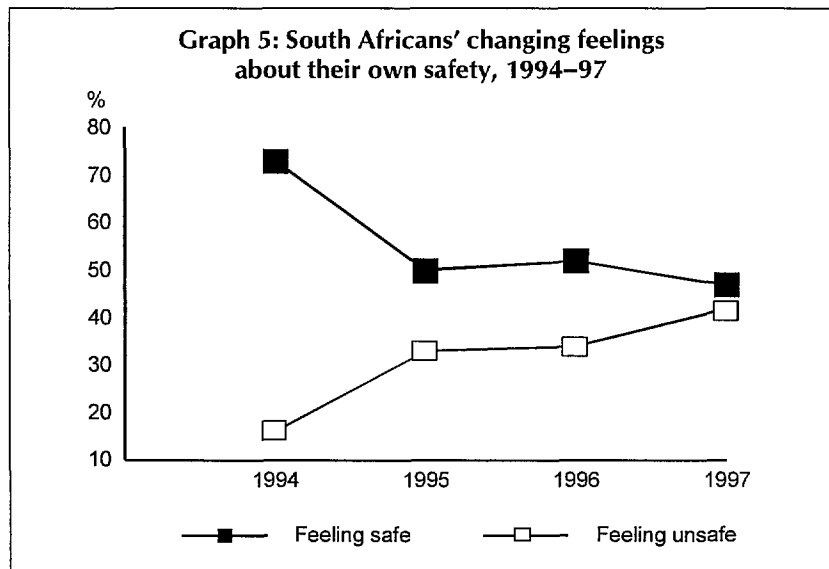
The past two decades have seen the creation of a host of private and community-based agencies that prevent crime, deter criminality, catch offenders, and investigate offences.²¹ There are a number of reasons for this:

- **Flexibility of private policing.** Private policing is far more 'flexible and efficient than public enforcement because it can be more readily adjusted to changing levels of consumer demand'.²² The ability of private security agencies to hire and dismiss personnel, or to employ people for temporary or part-time assignments, in response to varying demand is not possible in public police forces which have to operate under strict public service regulations.

The flexibility of private firms also results in a greater likelihood of innovation. The profit motive, reinforced by the threat of competition for contracts, leads private firms to seek cost savings and quality improving innovations. Often, companies specialising in a certain field of security are 'able to use much more sophisticated, scientifically advanced, technical equipment than most local law enforcement agencies can afford'.²³

- Loss of faith in public police.** In many countries, but especially in South Africa, the public questions the ability of the police to protect them from crime. Survey results released in 1996 show that of the people questioned, only 34% 'trust the police always or most times', while a minority of respondents (43%) thought that the 'police are interested in what happens to you'.²⁴ Another survey revealed that 30% of respondents thought that giving information to the police would make no difference to their ability to catch criminals, while 57% said they would feel unsafe giving evidence to the police. Some 28% of the people surveyed felt that most or almost all police officers are corrupt or in collusion with criminals.²⁵

Human Sciences Research Council (HSRC) survey results show that South Africans are feeling increasingly unsafe, while the number of people feeling safe is decreasing (graph 5).

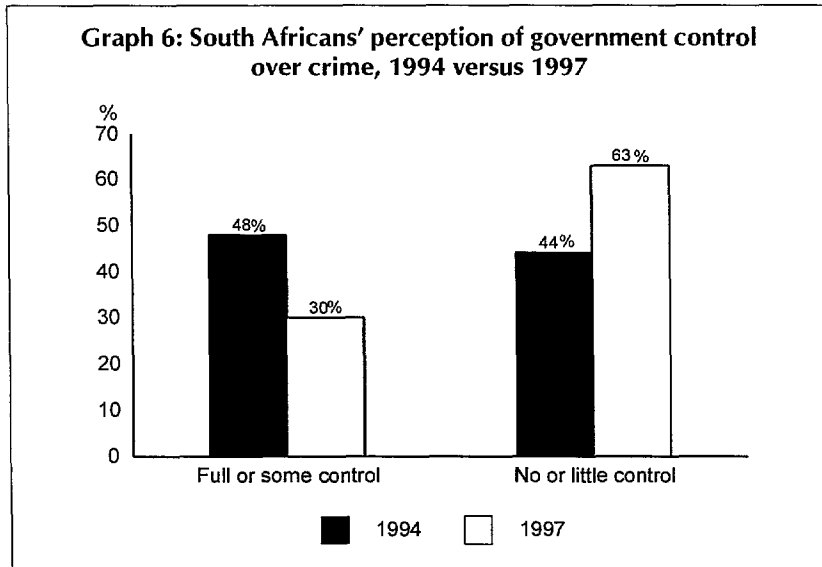


Year	Feeling safe	Feeling unsafe
1994	73%	16%
1995	50%	33%
1996	52%	34%
1997	47%	42%

Source: Human Sciences Research Council

The number of South Africans who believe the government has control over the crime situation dropped between 1994 and 1997

(graph 6). In 1994, fewer than half (44%) of the persons surveyed thought that the government had no or little control over crime. By 1997 almost two thirds (63%) of respondents thought so.



Source: Human Sciences Research Council

- **Inadequate public policing.** Only 23% of offenders are caught by the police.²⁶ Even fewer receive any sort of punishment from the criminal justice system. Crime pays, as a mere 5% to 8% of crimes committed in South Africa result in the conviction of the criminals involved.²⁷ Intuitively, the public is aware of this, and people with the necessary means look beyond the SAPS and the state run criminal justice system to safeguard their security.

The growth of the private security industry is related to the inability of the state to fulfil its policing functions adequately. If citizens believe the state is incapable of controlling the crime problem, they look elsewhere for protection.²⁸ Market forces 'fill the gap between rapidly expanding public demand and an unresponsive criminal justice system'.²⁹

- **Reactive nature of public policing.** At times of high levels of crime the police offer little protection to the individual victim of crime. Because of the high crime rate, and the use of police officers in ad-

ministrative functions, the visible presence of the police is stretched so thin that it fails to deter crime significantly. The role of the police shifts from preventing crime, to reacting to crime *after* it has occurred and been reported.

In the event of the police apprehending a criminal the beneficiary is the potential future victim or society at large. By being brought to justice, imprisoned, and rehabilitated, the criminal in question will not commit a crime again — or so it is hoped. The police's reactive type of intervention is of no assistance to the actual crime victim though, who will have suffered the loss by the time the police intervene.

The role of private policing is different. Its main purpose is to reduce the risk of crime through preventive action. Private policing is victim orientated, where the security needs of the potential victim (which may be an individual, business, or other institution) take precedence. Through prevention of the crime in the first place, the potential victim is protected to a much greater degree. Not being a victim at all is clearly better than the knowledge that one's assailant will be caught and brought to justice *after* one has been assaulted or robbed.

- **Maximising choice and satisfying demand.** In a modern society people have a wide variety of security related needs which an orthodox and centralised body such as a national police force cannot meet. The specialised security a bank needs to protect its electronic banking system from outside interference requires expertise too costly for a public police force to provide. The same applies to factories which require a 24-hour security presence. In terms of manpower, the provision of such a service would be extremely costly for the public police to provide. It would also be inequitable for taxpayers to have to subsidise the special security needs of private banks or factories.

South Africa's urban areas contain a sophisticated industrial, commercial, and residential market for security. The needs of this diverse market are so wide that the public police are unable to meet its demands within the scope of their limited human and financial resources. Many security companies not only make it their business to be on the scene of an emergency within minutes, they also provide services not offered by the police, such as premises control, escorting clients into their homes late at night, paramedic assistance, and holiday checks.³⁰ This demonstrates that the private security industry is not simply filling the vacuum left

by an increasingly ineffectual public police. It is also meeting security needs which the police cannot or will not fulfil.

- **Increase in private property.** In the last few decades there has been a worldwide increase in 'mass private property': privately owned property to which the public has right of access and use.³¹ This includes shopping centres, university campuses, blocks of flats, large office complexes, industrial parks, airports, train stations, and private recreational areas. The distinction between private and public property is being blurred. Such mass private property has security needs which the public police often cannot provide, and indeed should not provide.

International examples of private policing

Over the past few decades private policing and the contracting out of state policing functions to private companies have grown in many parts of the world.³² The United States has been at the forefront of this trend. Because of the politically decentralised nature of the US, many local councils use private companies to conduct policing operations.

- In the 1960s the state of Florida contracted a private firm to supplement its police force's investigative services. The state commissioned Wackenhut Incorporated to assist the police force in its war against organised crime. The \$500 000 contract lasted one year, and led to more than 80 criminal prosecutions. Many of those arrested were local politicians and government employees.³³
- In the 1970s Multi-State Incorporated provided skilled narcotics agents to public police forces on contract. Established by a former police chief, the firm employed ex-police officers with experience in drug-related crime and undercover operations. During its first few months of operation Multi-State was responsible for 150 arrests, and the seizure of illegal drugs with a street value of \$200 000.³⁴ Many small-town police forces without the financial resources to retain a full-time pool of specialised narcotics detectives, with comparable skills and experience, made use of these services.
- San Francisco has a number of private police beats which are owned by 'private patrol specialists'. All of these 'specialists' have gone through a police training course, and have the right to carry a firearm and make arrests. They are paid exclusively by the businesses, homeowners, and landlords on their 'beat' or patrol area. Each patrolman purchases the right to a patrol area. He then nego-

tiates contracts with property owners, who purchase his services. The level of attention a customer requires determines the fee. This system 'provides a vast diversity of police services, tailored to the needs of the individual customers, who pay for what they want'.³⁵ On the more lucrative beats patrolmen hire assistants, and in some cases even security guards and administrative staff, in effect 'becoming mini-police departments'.³⁶ Patrolmen are legally members of the San Francisco Police Department (like reservists), and are required to respond to police calls in their area.

- The management company of Starrett City, a low-cost housing development in Brooklyn, New York City, employs 60 security guards, 40 of whom are armed. Every guard has the status of 'special police' with full powers of arrest. The guards, who receive 70% of an average police officer's salary, handle about 10 000 service calls a year. In 1994, twenty years after the advent of the scheme, there were only 67 robberies in Starrett City, compared to 2 548 reported in the neighbourhood just outside the development. (Starrett City receives only part-time coverage from two public police officers.) In a survey of Starrett City residents, almost 90% felt 'somewhat or very safe' living in the complex, whereas only 40% felt similarly secure outside its boundaries. The survey further disclosed that 90% of the residents believed the complex would not be safe without private security.³⁷
- In 1981 the village of Reminderville, an Ohio municipality, contracted with a private firm for a comprehensive police service after the county withdrew its patrol from the village for budgetary reasons. Corporate Security policed the village for \$90 000 a year, about half the amount required by the county. Moreover, Corporate Security provided two patrol cars rather than the one provided by the county, and reduced the emergency response time from 45 to six minutes.³⁸
- In 1985 a group of New York City property owners formed a 'business-improvement district' charged with keeping streets safe and clean in the area surrounding Grand Central Station. The owners of the 220 commercial properties within the district voted on the plan, and a majority agreed to join. To raise money, property owners taxed themselves. By 1988 the partnership had 18 uniformed security guards on the streets around Grand Central each day. Their brief was to attend to even the pettiest of offences. No public violation of law, or exhibition of disorder, was ignored by the guards. The strategy paid off. According to the New York Police Department,

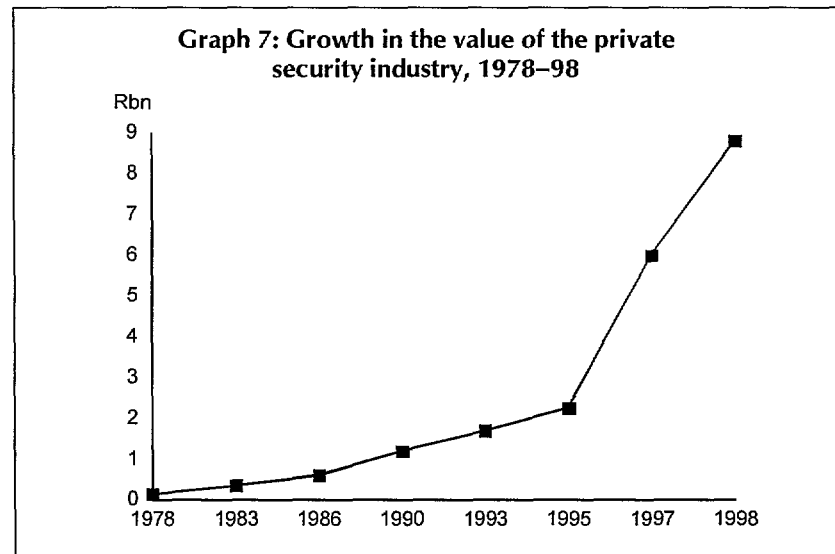
crime reported within the Grand Central Partnership dropped by 20% by 1990. By 1994 it had dropped 53%.³⁹

- In 1989 there were more than 500 residential patrols manned by private security officers in the United Kingdom. These are funded by local authorities, businesses, or residents. Private patrols also exist in Australia. In Melbourne a private security company offers a 'Home Watch' service. For a fee groups of home owners can have their streets patrolled during the day, or if they require it, their individual homes routinely checked.⁴⁰
- Virtually all police services on Paradise Island in the Bahamas are privately financed and provided by Security Services. The firm employs about 70 guards, plus a small number of administrative personnel. Security Services is responsible for protecting 30 firms, the island's hotels and resorts, and indeed the island territory as a whole.⁴¹

PRIVATE SECURITY IN SOUTH AFRICA

The growth of private security

Little statistical information is available on the private security industry in South Africa. What is clear, however, is that the industry has grown consistently since the mid-1970s. It is estimated that the industry's value increased from R141m in 1978,⁴² to R5.9bn in 1997, and an estimated R8.8bn in 1998 (graph 7).⁴³ This does not include the vehicle security industry, or in-house security, worth in the region of R2bn and R1bn respectively. The combined worth of the security industry in South Africa is therefore more than R9bn.⁴⁴



<i>Year</i>	<i>Rbn</i>	<i>Increase</i>
1978	0.14	–
1983	0.35	150.0%
1986	0.60	71.4%
1990	1.19	98.3%
1993	1.69	42.0%
1995	2.24	32.5%
1997	5.98	167.0%
1998	8.80 ^a	47.2%

a estimate

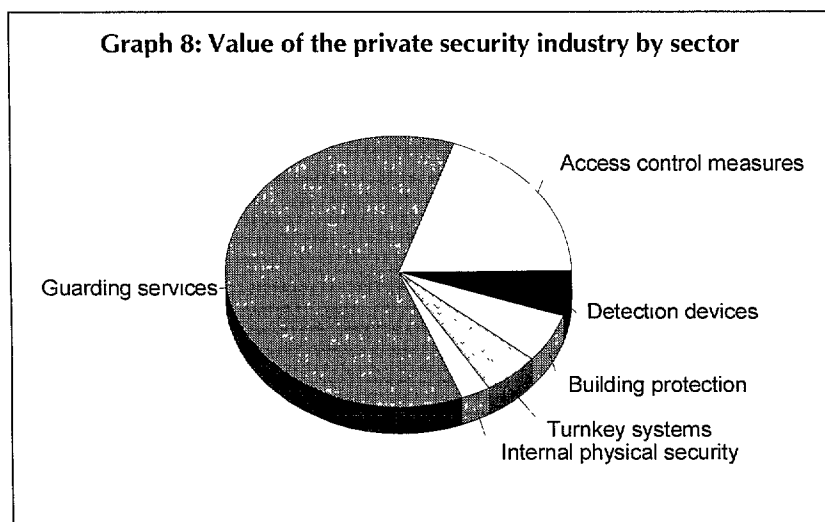
Source: Security Focus

Another indicator of the growth of the industry has been the increase in the number of training institutions accredited with the Security Officers' Board (SOB). The board is a statutory body with responsibility for exercising control over the occupation of security officer. In 1993, a year after the SOB became operational, the board recognised 17 training centres in South Africa, and by 1995 this had risen to 160.⁴⁵ In 1998 the figure stood at 492.⁴⁶

The armed response and monitoring sectors will grow an estimated 25% a year in the medium term.⁴⁷ The private security industry as a whole is growing at a rate of about 13% a year.⁴⁸

The scope of private security

The value of the various sectors of the private security industry connected to policing and crime prevention is indicated in graph 8.⁴⁹

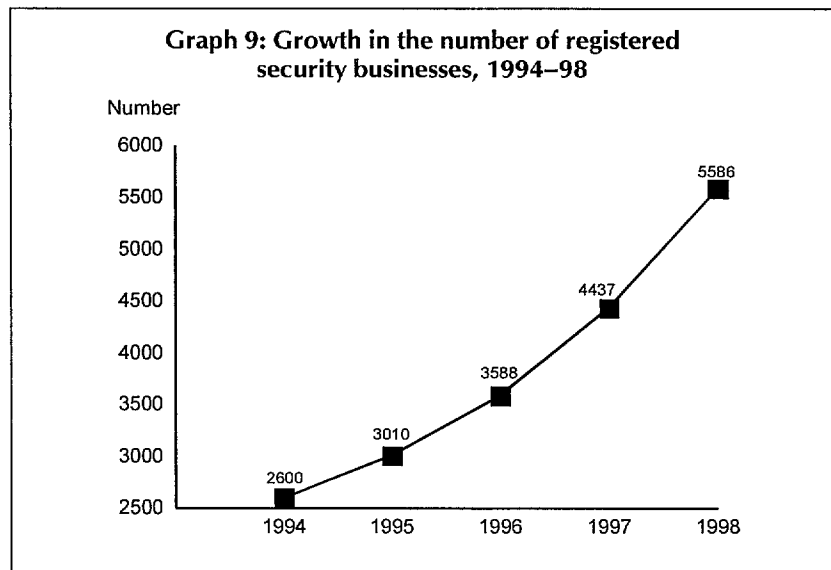


Sector	Rm	Proportion
Access control measures	1 140	19.4%
Detection devices	340	5.8%
Building protection	350	5.9%
Turnkey systems	300	5.1%
Internal physical security	160	2.7%
Guarding services	3 600	61.1%
Total	5 890	100.0%

Source: Security Focus

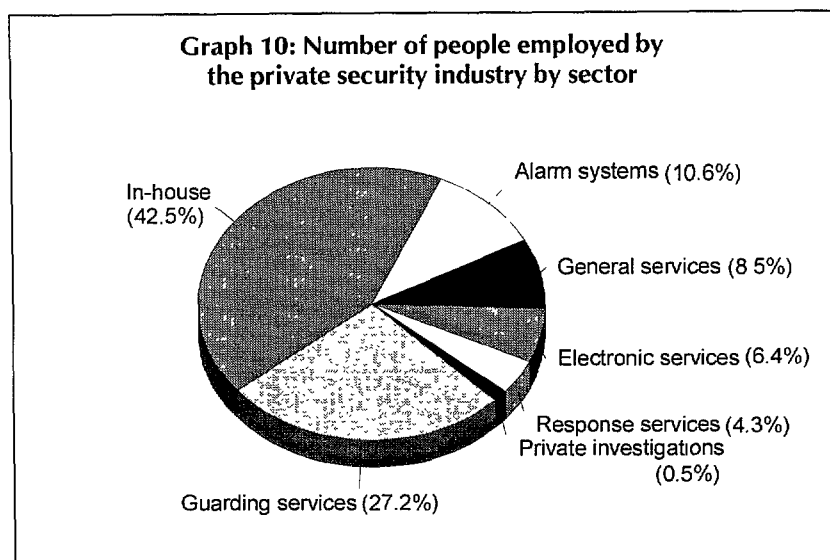
The largest part of the private security industry is the guarding sector, which is worth an estimated R3.6bn (up from R200m in 1990).⁵⁰

According to the Security Officers' Board, in 1998 there were 128 000 active security officers in the South African guarding industry, employed by some 5 600 security businesses, of which 2 960 were guarding, 690 armed response, and 530 cash-in-transit businesses.⁵¹ Between 1994 and 1998 the number of active registered security businesses more than doubled (graph 9). There are an additional 188 000 inactive security officers.⁵² The high number of inactive security officers is due, in part, to the fluctuations in market demand for private guarding services.



Source: Security Officers' Board

In addition there are an estimated 200 000 in-house security officers.⁵³ These are security personnel who exclusively guard the premises or property of their employer. A further 50 000 persons are employed in the alarm systems sector of the industry, 40 000 in general services, 30 000 in electronic services, and 20 000 in response services.⁵⁴ Moreover an estimated 2 500 private investigators or detectives operate in South Africa.⁵⁵ In total the broad private security industry employs in the region of 470 000 persons (see graph 10 for a breakdown by sector).



	<i>Number employed</i>	<i>Proportion</i>
Alarm systems	50 000	10.6%
General services	40 000	8.5%
Electronic services	30 000	6.4%
Response services	20 000	4.3%
Private investigations	2 500	0.5%
Guarding services	128 000	27.2%
In-house	200 000	42.5%
Total	470 500	100.0%

The private security industry is one of the largest private employers in South Africa. The ratio of private security personnel (across all categories) to uniformed police officers is approximately 4.1 to one. Taking only security guards (both contract and in-house) the ratio is 3.1 to one. While this ratio is high, private security officers outnumber police officers in a number of countries. In the United States the ratio is three to one. In the United Kingdom and Australia it is about two to one.⁵⁶

It is not only in terms of staffing that the security industry is larger than the public police. In 1997 the guarding sector of the security industry had access to 35 000 vehicles. The alarm and response sectors

had just under 25 000 vehicles.⁵⁷ The industry as a whole has access to 80 000 vehicles.⁵⁸ In comparison, the SAPS has a total vehicle fleet of 37 000, of which, on average, 3 000 vehicles are out of commission on any particular day because of breakdowns.⁵⁹

The South African security industry has a popular image of being run by ex-military and former South African Police officers. This is, however, too generalised a view to be accurate. Many security companies are run by professionals with managerial and commercial backgrounds. Black businessmen are also moving into the lucrative private security market. The South African Black Security Employers' Association (SABSEA) was founded in 1995. It represents some 135 black-owned security companies.⁶⁰ In 1998 SABSEA merged with the Security Association of South Africa (SASA).

There is also a vibrant private security industry presence in a number of sub-Saharan countries. It is estimated that there are 150 security companies in the Angolan capital of Luanda, of which the largest, Alpha 5, employs more than 1 500 security guards.⁶¹ In Kenya, Securicor employs 9 300 people using more than 290 vehicles and 200 motorbikes in its operations.⁶² In countries such as Zimbabwe, Malawi, Nigeria, and Uganda, the private security industry has grown rapidly over the last two to three decades. In these countries the industry is, however, underdeveloped in the alarm systems and electronic security sector, and is almost exclusively based on guards and guarding functions.⁶³

Police-private security co-operation

No national formal co-operation agreement exists between the SAPS and the private security industry. The fact that the SAPS has observer status on the board of the South African Security Federation is, however, indicative of the SAPS's recognition of the private security industry's role in combating crime.⁶⁴

Moreover, an internal SAPS discussion document concludes that 'security companies play a significant and important role in the provision of crime intelligence and information'.⁶⁵ The document predicts that increasingly SAPS resources will be channelled into combating priority crimes such as drug trafficking, car hijacking, violent crimes committed with illegal firearms, and the activities of criminal organisations. This will decrease the SAPS's resources for visible policing and crime prevention functions in residential areas. 'Accordingly it would be of use to everyone (private security industry, municipal authorities, businesses, the public and the police) to in some form or

another make use of the resources offered by the private security industry in the fight against crime,' the report says.⁶⁶

Partnerships between the SAPS and the private sector are provided for in the National Crime Prevention Strategy's programme on environmental design and maintenance.⁶⁷ Such partnerships are also in line with various crime-fighting initiatives put forward by Business Against Crime.

In certain areas around the country the SAPS and security companies have launched Community Police Forum subforums to coordinate, and co-operate in, crime-fighting initiatives and crime prevention exercises. Some of these subforums have adopted formal constitutions outlining their mission, goals, and functions, and setting out the duties and responsibilities of the various participants.⁶⁸

The private security industry is in favour of closer co-operation with the SAPS. Speaking at a conference presented by the Institute for Strategic Studies in May 1997, the president of the Security Association of South Africa (SASA), Mr Alan Hadfield, stated: 'Our police force should take notice that the private security industry is far larger than they are, and it is a well known fact that there are literally thousands of eyes, ears and vehicles out there, that are willing and able to assist in the combating of crime. The utilisation of such a force, who do not want to take over the role of the police, could radically reduce the crime rate overnight.'⁶⁹

This sentiment is echoed by certain segments within the government. Speaking at the annual SASA conference in June 1997, the Kwa-Zulu-Natal safety and security MEC, Mr Nyanga Ngubane, said the private security industry had an important role to play in combating crime: 'We need to see greater co-operation between private security companies and the South African Police Service. We need to tap into the resources of this industry, estimated to be worth R9bn a year, and find ways and means of utilising the eyes and ears of the thousands of security officers and vehicle patrol units who daily are involved in crime prevention.'⁷⁰

Mr Linda Mti, co-ordinator for intelligence: National Intelligence Coordinating Committee,⁷¹ spelled out the need for an SAPS-private security partnership: 'South Africa will be able to develop a crucial civil-society-state partnership aimed at the prevention and combating of crime. The state does not at this stage have the resources and capacity that will ensure there is adequate policing in light of the shrinking and limited resources available. Our call is not for the privatisation of police activities as some members of the industry are demanding. Rather, it is for a well regulated partnership to provide physical

security needs, personal protection services to the vulnerable of our citizens, and assisting in crime prevention by giving advice to those who are designing new neighbourhoods to build crime out of those areas. In this, private security companies will complement the state structures.⁷²

Speaking at a security conference in May 1998 the deputy national commissioner of the SAPS, Commissioner Zolisa Lavisa, called for greater co-operation between the industry and the police: 'Both the private security industry and the police have one common enemy, crime. The question is not whether the police and the private security industry should co-operate. The question is how this co-operation should manifest itself with due regard to our respective mandates and within the confines of the law.'⁷³

The minister of justice, Mr Dullah Omar, is more cautious: 'No formal understanding exists between the SAPS and private security companies. This does not, however, preclude the SAPS and private security companies from working together on an ad hoc basis in partnerships to combat specific crime problems.'⁷⁴

The relationship between the SAPS and the industry is generally a good one. There is, however, some opposition from middle management ranks within the SAPS against co-operating too closely with the industry.⁷⁵ Such opposition is based primarily on fears that the police could lose control over certain of their functions. Such fears are misplaced. In practice, the police service no longer has a monopoly on all its daily tasks and functions anyway. The market has filled the void left in the crime prevention field by an increasingly ineffective police service.

There is a realisation on the side of the SAPS that it makes practical sense to co-operate more closely with the private security industry. The industry has access to 80 000 motor vehicles (primarily for patrolling and rapid response purposes), and during 1997 responded to an estimated 370 000 armed response callouts, and 1.2m alarms.⁷⁶ These figures indicate the extent to which the policing functions of the private security industry take pressure off the police.

Every patrol car of a private security firm doing crime prevention duties has a deterrent effect on crime, allowing the SAPS to concentrate its resources elsewhere. Every response to an alarm by a private security company allows the police to deal with some other pressing matter. Mr Omar identified the large number of false alarms reported and attended to by the SAPS as a blockage in the criminal justice system, 'which results in a relatively large proportion of scarce resources being diverted away from high priority crime areas'.⁷⁷

In 1996 the SAPS was approached by a number of individual security firms with requests for the formation of partnerships on an ad hoc basis. The police responded positively. A task team was set up within the National Standards and Management Services division. A report published in June 1997 by the task team takes a positive approach towards closer co-operation between the SAPS and the private security industry.⁷⁸

The report lists areas in which the security industry could assist the SAPS:⁷⁹

- **Releasing SAPS members for policing duties.** If security personnel are used to guard government buildings, transport prisoners to court, guard banks and shopping malls, and monitor sporting events, more police officers are released for police and crime prevention duties.
- **Force multiplier.** Services of security companies which complement SAPS activities, such as responding to alarms and patrolling suburbs, act as a force multiplier for combating and preventing crime.
- **Information sharing.** In pursuit of their daily activities security companies are in a position to obtain information on crime patterns. This can be passed on and shared with the police.
- **Investigation of alarms.** Security vehicles in the vicinity of an alarm (the majority of which are false) can be requested by the police to investigate and verify whether the alarm is genuine or not.⁸⁰
- **Technological expertise.** Security firms can provide the police with expert advice and technological assistance with regard to closed-circuit television (CCTV), silent alarms, surveillance techniques, and detection equipment.

Private policing in action

Examples abound of the private security industry successfully engaging in activities such as patrolling, guarding, order maintenance, surveillance and inspection, all of which used to be the sole domain of the police:

- As part of a 'strategic plan for partnership policing through the mobilisation of communities to fight crime', Business Against Crime (KwaZulu-Natal) facilitated the formation of a series of Strategic Command Centres (SCCs) in communities throughout the province. SCCs are a joint venture between the SAPS, local authority protection services, the public, and private security companies.⁸¹

On a practical level this means an area is patrolled by private residents in their own vehicles. They monitor the area and call the SCC to report any suspicious or illegal activity. The SAPS assists in planning routes for the volunteers and gives advice on priority areas. A police captain is assigned to run the SCC. Any suspicious activity reported to the SCC is immediately rechannelled to both the SAPS and the private security companies which operate in the area. As part of the scheme, participating private security companies have access to certain police radio frequencies. This assists private security guards to respond to complaints in support of the SAPS.⁸²

- In Kloof (near Durban), residents have hired a security company to patrol their suburb on a 24-hour basis. A privately funded security office has been opened in the suburb. Residents are able to report any suspicious activities in the area to the office, which relays the information to patrolling security guards. Mr Brad Nathanson, the manager hired for the job, says patrols will go beyond surveillance to 'pro-actively investigate cases as much as we can to ensure the criminals are caught'.⁸³ The scheme has been endorsed by the SAPS.
- In Observatory (Cape Town) residents have formed a non-profit company, Obswatch. The company controls the operation and funding of a security control room for the suburb. The funding is derived from almost 1 000 residences and businesses who pay R50 and R100 a month respectively. The company employs 17 guards who patrol the area. At any one time four guards — who are in radio contact with the control room — patrol the suburb on bicycles. The guards chosen are police reservists and carry handcuffs and concealed firearms. While the guards do not have full powers of arrest, they can make citizen's arrests.⁸⁴ Obswatch started its operations in September 1997. Compared to February 1997, crime figures had dropped 60% by February 1998. Housebreaking had dropped by 88%, robbery by 67%, theft by 57%, and burglaries from businesses by 58%.⁸⁵ By comparison, crime in neighbouring Mowbray had risen by 20% over the same period.⁸⁶
- In the Johannesburg suburbs of Bakersfield and Fourway Gardens, residents formed a section 21 company which purchased sections of the roads leading into their suburbs.⁸⁷ (Both suburbs have only one access road.) The company erected an access control point across the purchased section of road. This consists of a guard house with booms controlling vehicle and pedestrian access into and out of the suburb. Any person or vehicle belonging to a non-resident

has to register with the security company controlling the access point before entering the suburb. Moreover, persons or vehicles leaving the suburb under suspicious circumstances (such as a person with a video machine under his arm at midnight) are checked. The suburb itself is surrounded by a perimeter fence, thereby restricting access to the control point. According to a police spokesman, such road closures have had a positive effect on violent crime levels.⁸⁸ The security company which controls access to the suburb also has vehicles patrolling the suburb itself. Suspicious persons and vehicles which enter the suburb are monitored by the company.

- In 1996 and 1997 Cape Town's business community, Metrorail, and the city council funded a 'rent-a-cop' scheme. The scheme, which employed 140 police reservists to patrol parts of the city, was credited with reducing crime in the city centre by 40% over the 1996 Christmas period, and by 30% on commuter trains.⁸⁹
- The Victoria and Alfred Waterfront shopping and entertainment complex in Cape Town is policed almost exclusively by private security guards. The complex, which had 20m visitors in 1997, spends just under R7m a year employing almost 200 security staff. This excludes security guards employed by the individual stores themselves.⁹⁰ Some 50 security guards are on patrol at any time, covering an area of about four square kilometres. This compares favourably to the 60 police officers who patrol the Cape Town city centre, comprising an area of six square kilometres.⁹¹ The Waterfront has about 12 reported shoplifts a month. Two people have been murdered at the Waterfront since its opening in 1990, while the last reported rape occurred in 1994.⁹² Crime levels at the Waterfront are low compared to crimes committed at the three parliamentary villages where many members of Parliament stay while they are in Cape Town during the parliamentary session. Each village is surrounded by a high security wall and is under 24-hour guard by members of the SAPS's National Protection Service, who have full control over who enters and leaves the villages. The total number of visitors is not more than a few thousand a year. During 1997, some 11 incidents of theft, 29 cases of housebreaking, and three assaults were reported at the villages. During the first quarter of 1998: 16 housebreakings and a rape.⁹³
- The Airports Company is in charge of the security systems at South Africa's three international airports as well as the other six previously state-owned airports.⁹⁴ The company uses its own security personnel for internal security such as the screening of pas-

sengers and baggage, and access control to airport buildings. The company has contracted out the provision of 'outside' security such as the patrolling of parking lots and perimeter fences.⁹⁵ The SAPS is responsible for the investigation of crime, the prevention of the importation of illegal substances and objects, and border control at these airports. At Johannesburg International Airport the security personnel are constituted as follows: 95 full-time and 21 part-time SAPS members, 449 Airports Company personnel and personnel contracted by the company through private security firms, and 530 security officers contracted by airlines and other stakeholders — in total, 1 095 security personnel, of whom 90% are employed by the private sector.⁹⁶

- In Centurion (near Pretoria) residents and businessmen, with the assistance of the local council, formed a section 21 company, the Centurion Community Protection Company, to combat crime through visible policing. The activities of the company are co-ordinated with those of the local community policing forum, the city council of Centurion, and the police station commanders in the area. Between November 1996 and July 1998, security personnel employed by the company did some 50 000 hours of service, and made 2 738 arrests. During this period the theft and hijacking of motor vehicles declined.⁹⁷
- At the end of 1996 farmers and forestry companies teamed up and hired two private security companies to combat crime in rural KwaZulu-Natal. The security companies protect forestry operations, sugar cane, and livestock farms, as well as farmers and their employees in the Natal midlands. A member of the provincial legislature, Mr Rudi Redinger, said the private security firms were offering 24-hour security, which police were unable to do.⁹⁸
- A venture started in mid-1996 in Senderwood (Johannesburg) is indicative of how security firms are moving into areas formerly reserved for the public police: sending their men out on the beat to patrol the streets and public areas. Working at the behest of the communities of two different streets in Senderwood, a private security firm set up a street surveillance team. The team consists of a manned vehicle unit combined with a foot patrol, who provide round-the-clock surveillance to deter criminals from operating in the area.⁹⁹

Regulation of the private security industry

While the private security industry is subject to a measure of regulatory legislation in many countries throughout the world, there are notable exceptions.¹⁰⁰ In the United Kingdom the private security industry is exempt from any form of regulatory legislation.¹⁰¹ In that country self-regulation is carried out through trade associations.¹⁰²

There is also no regulatory code for the private security industry in Australia. In the state of Victoria, a code existed until 1989, when the state government implemented a policy of deregulation. In terms of this policy, the licensing of guards is compulsory. The licensing of armed watchmen employed by (licensed) guard agents is not — a policy of self-regulation applies. Moreover, character references for security officers are no longer required by law, and a security officer's licence may be refused or suspended only if the applicant has been found guilty of a 'relevant offence'. Guilt by association (such as mixing with known criminals) no longer applies as a basis for rejecting applicants.¹⁰³

In the United States three quarters of states regulate some aspect of their private security industries, but on the whole the regulations are not onerous.¹⁰⁴ Ohio, for instance, has relatively comprehensive policies on the regulation of security officers, laying down mandatory conditions for training. In many other states there is virtually no regulation, and it is rare that any minimum level of education, training or prior experience is required by a licensing authority.¹⁰⁵

Most countries require some form of registration or licensing, and minimum training standards. The situation is similar in South Africa, where legislation, regulations, and training specifications exercise control over the industry and its employees.

Security Officers Act of 1987

The main purpose of the Security Officers Act of 1987¹⁰⁶ is the creation of a statutory body, the Security Officers' Board, which exercises control over the occupation of security officer. The act provides for compulsory registration with the board of all contract security officers.¹⁰⁷ Exempt are security officers providing in-house security — that is, security services rendered by an employee on behalf of his employer.

The act empowers the board to 'take such steps as are necessary to maintain standards and regulate practices' for security officers, and to 'take such steps as it may deem expedient or necessary in connection with the training of security officers, the determination of the standards of such training, and the promotion of the maintenance of those standards'.¹⁰⁸

The act lays down grounds for disqualification from registration.¹⁰⁹ These include:

- that the applicant is of ‘unsound mind’;¹¹⁰
- that the applicant has been found guilty of improper conduct. The board may draw up a code of conduct which becomes binding on security officers if the minister for safety and security declares it to be so by way of a notice in the *Government Gazette*;¹¹¹ and
- that the applicant has committed one of a number of offences specified by the act. These include most common law offences involving violence and dishonesty.¹¹²

The board has the power to withdraw registration if any of the grounds of disqualification come into existence after registration, or to petition a court for an order withdrawing registration on grounds not specified in the act.¹¹³ The board is obliged to maintain a register of licensed security officers, including their names, sets of fingerprints, and such additional particulars as the board may determine.¹¹⁴

The board may, with the concurrence of the minister for safety and security, regulate such matters as the training of security officers, the prescribing of uniforms, and any matter necessary for the attainment of the objects of the act.¹¹⁵

In 1992 regulations were promulgated regarding the training of security officers.¹¹⁶ The training regulations give the board the power to determine different training levels for different categories or grades of security officers. The board also determines the contents of training courses.¹¹⁷ Courses are presented by training establishments accredited with, and subject to, inspection by the board.

Training courses vary in intensity. Upon successful completion, a security officer attains a grade. A grade ‘E’ officer (the lowest grade) must attend a seven to ten-day training course.¹¹⁸ Such an officer may perform only guarding and patrolling duties.¹¹⁹ A grade ‘D’ officer (two to four-week training course) may search people with their consent and, if necessary, restrain persons.¹²⁰ The highest grade is ‘A’, a managerial position. Such an officer may, for example, supervise staff and assist in the screening of candidates for employment.¹²¹

The board issues training certificates to security officers after evaluating reports received from accredited training establishments. A security officer must have achieved a standard of at least 60% in every theoretical and practical subject forming part of a course before the board will issue a certificate.¹²² No private security firm may require of an employee who is a security officer to render a security service, unless the employee is in possession of a training certificate issued by the board.¹²³

Security Officers Amendment Act of 1997

The amendment act¹²⁴ replaces the Security Officers' Board with the Security Officers' Interim Board. The interim board continues with the work and duties of its predecessor. It also has the function of advising the minister for safety and security on the constitution of a new permanent board, and the enhancement of its representative character regarding the security services industry and the community.

The interim board advises the minister for safety and security on a new vision for the industry and the board, in particular, 'the promotion of democracy, transparency, equality, accessibility, and the satisfying of the needs of the community'.¹²⁵

The duties of the interim board are specifically to protect the public interest. 'The objects of the board shall be to exercise control over the occupation of security officer, to maintain, promote and protect the status of the occupation, and to ensure that the industry acts in the public interest.'¹²⁶

Criminal Procedure Act of 1977

Security officers enjoy the same powers as ordinary citizens. The Criminal Procedure Act of 1977¹²⁷ permits any security officer — or any private person — to arrest a person who commits, attempts to commit, or whom he suspects of having committed, a serious offence such as theft, robbery, rape or murder.¹²⁸ Anyone seen 'engaged in an affray' may also be arrested.¹²⁹ The arresting person may pursue the suspect to secure an arrest.¹³⁰

The act empowers the owner of property, or a person authorised by the owner, to arrest anyone found committing any offence on the property.¹³¹ This permits the security industry to guard, and combat crime on, private property more effectively. The courts recognise security personnel as 'lawful occupiers' in charge of the property they control.¹³²

Many security agencies include as part of the contract with their clients an authorisation notice indicating that the security guards guarding property are lawfully in charge of the property they protect.¹³³ This grants them full powers of arrest for any offence committed on the property they are assigned to guard.

The act also permits the use of 'necessary force' during the course of an arrest. The use of deadly force is permitted to prevent the escape of any person suspected of having committed a serious offence.¹³⁴

EXPANDING THE ROLE OF PRIVATE SECURITY

Introduction

The commercial provision of security is a reality. To exploit the opportunities offered by private security services, policy changes should be considered which grant the private security industry additional powers, and provide safeguards to ensure that it operates within the law and protects peoples' rights. Moreover, policy changes are necessary to allow the industry to expand its scope of operation.

The police service is unable to meet the public's demand for effective policing and security. The SAPS is hamstrung by personnel who are badly trained and educated. Roughly a quarter of the police service's members are 'functionally illiterate' and have difficulty filling in a form, or taking a written statement from a crime victim.¹³⁵ There are 4 800 police officers who have only a standard 6 qualification.¹³⁶ A third of the police officers (43 000 members) have a standard 8 qualification or lower.¹³⁷ More than 45 000 members of the SAPS do not have a driver's licence.¹³⁸ As a result, one out of three police officers cannot drive to a crime scene, or patrol a street in a vehicle, without breaking the law and endangering other road users. Of the police's 37 000 vehicles, some 11 700 or 31% were involved in accidents in 1997.¹³⁹ There are police stations without a telephone,¹⁴⁰ while others suffer from a lack of functioning vehicles.¹⁴¹

Poor employment screening procedures in the past have resulted in many members of the SAPS contributing towards the crime problem. For example, between April 1994 and December 1997, members of the police service lost 4 874 state-issued firearms. Of these, 103 were 'lost in a bathroom or toilet', and a further 259 were 'lost from the members' possession whilst visiting discos, shebeens or whilst being intoxicated'.¹⁴²

Citizens' anger with the situation is shown by a threatened court action by residents of Empangeni (on the KwaZulu-Natal north coast). Residents, including the town's mayor, plan to sue the state for failing to protect them from crime. Professor Christof Heyns, deputy director of the Centre for Human Rights at the University of Pretoria, contends that such a lawsuit is possible in principle. The constitution holds that everyone has the right to freedom and security of the person.¹⁴³ According to Professor Heyns, 'this clearly binds the government'.¹⁴⁴

People who use the services of private security companies pay tax

and contribute to the budget of the state's police service. Such people are prepared to make use of private protection and security at their own expense. This takes pressure off the police, and has a positive impact on crime levels. Obstacles, which constrain the private security industry in assisting private citizens to lawfully protect themselves and their property, need to be removed.

Peace officer status

In the United Kingdom — where the private security industry is relatively deregulated — some private security officers have had extended powers for some time. In 1989, Sealink, a ferrying firm, ended its contract with the British Transport Police. In their place it recruited a private security firm, Protective Security Systems, to police docks in the Harwich harbour. The security guards were sworn in as special constables allowing them to arrest illegal immigrants.¹⁴⁵ Another British statute grants private security officers working in ports the power to search harbour areas, ships, persons and property.¹⁴⁶

In the United States the granting of additional powers to private security officers is commonplace. The process whereby this occurs is deputisation: 'the formal method by which federal, state, and city governments grant to specific, named individuals the powers or status of public police or peace officers — usually for a limited time and in a limited geographical area'.¹⁴⁷ In a 1984 US survey 29% of in-house security managers, and 14% of contract security managers indicated that their personnel had special police powers.¹⁴⁸

The New York City Police Department authorised in-house security officers in some establishments to provide surveillance, make arrests, transport suspects to police holding cells, complete record checks, and enter criminal history information. Private security personnel exercising these powers must, however, be trained in the apprehension of suspects, and various other legal issues.¹⁴⁹

In South Africa security officers have the same legal powers as members of the public. However, unlike the man in the street, security guards receive relevant theoretical and practical training, are checked for previous convictions, must register with the Security Officers' Board, and are bound by a stringent code of conduct.

The South African private security industry has requested that suitably qualified and experienced security officers be granted 'peace officer' status.¹⁵⁰ So far the government has disregarded this request. A peace officer may arrest a person who commits or attempts to com-

mit *any* offence in his presence.¹⁵¹ That is, a peace officer's powers of arrest are not restricted to the more serious offences, or to the property which he is authorised to guard, as is the case with security guards at present.¹⁵²

A peace officer has the authority to arrest any person:

- who has in his possession housebreaking or car-breaking implements without being able to offer a satisfactory explanation for this;¹⁵³
- who is found in possession of anything which the peace officer reasonably suspects to be stolen property;¹⁵⁴ or
- who is at night time found in circumstances which afford reasonable grounds for believing that such a person has committed or is about to commit an offence.¹⁵⁵

A peace officer also has powers of search and seizure.¹⁵⁶ He may search any person he has arrested, and seize certain items in that person's possession, for example, an item used in the commission of an offence, such as a housebreaking implement or firearm.

The minister for safety and security may, by notice in the *Government Gazette*, declare a person to be a peace officer.¹⁵⁷ The minister may, however, limit the powers of any peace officer. For example, the minister may restrict the kind of offences for which a peace officer has powers of arrest, search and seizure, and he can limit the geographic area within which a peace officer may operate.¹⁵⁸ The minister could, therefore, selectively limit the powers of security officers who are granted peace officer status.

The powers of peace officers could be restricted to the power of arrest for a limited number of offences only, namely those which are relevant to their work, such as theft, robbery, housebreaking, assault, rape, murder, malicious damage to property, and trespassing. Moreover, the minister could specify the jurisdiction within which members of a security company function as peace officers. For example, a security firm operating in the Johannesburg area could receive peace officer status for its security officers for Gauteng only. The industry has also suggested that peace officer status be granted to security officers only after they have successfully completed a training course administered by the police.¹⁵⁹

It might not be prudent to leave the decision as to who should get peace officer status, solely to the discretion of the minister. Companies with security officers who have peace officer status will have a definite advantage over their competitors who do not. Leaving the

decision of who should receive peace officer status up to one person carries the risks of favouritism, abuse of power, and corruption. A better alternative is a body, independent of the industry, and of government interests — possibly headed by a retired judge — which would be responsible for allocating peace officer status to security officers.

Sirens and radio frequencies

The rapid response sector of the security industry is responsible for reacting to crimes which, in the majority of cases, have already occurred or are in the process of being executed. Security firms selling rapid response services guarantee their clients that they will respond to an emergency with a minimum of delay. A rapid response team is mobile, using fast vehicles, and is linked by radio to a central control centre.

Security industry representatives argue that the ability of rapid response services to arrive at a crime scene quickly to protect their clients, and increase the likelihood of apprehending any criminals, is impeded by two state-imposed restrictions.¹⁶⁰

Firstly, even in emergency situations, rapid response vehicles are not permitted to use a siren or a police-type blue (or red) warning light. Such a fixture would allow a vehicle to move faster through heavy traffic, reducing its arrival time at a crime scene. Moreover, it would warn other vehicles of the approach of a fast car, enhancing traffic safety.

Secondly, vehicles of private security companies may not be fitted with radios which have access to an SAPS radio frequency. If they could be so fitted, it would assist security officers in rapid response vehicles and the police in emergency situations. Private security officers responding to an emergency, and arriving at the scene of a crime, should be able to liaise directly with the SAPS. This can be illustrated by way of some practical examples.

Private security guards are called to respond to a silent alarm which has been activated at a residential address. Once they arrive at the scene they ascertain that the house is in the process of being ransacked with its owner inside. Instead of relaying this information to their control room who would then notify the SAPS, it would be more effective if the security guards could communicate directly with the closest police vehicles in their area, and apprise them of the situation.

Another scenario is where a private security patrol spots a vehicle suspected to be stolen from one of its clients. If the security officers

were in direct radio contact with the police, they could follow the vehicle and instantly relay its movements to the nearest police patrol vehicle. The police could then track the vehicle, stop it, arrest its occupants and search the vehicle, without the private security guards becoming directly involved. Alternatively, if the police are looking for a vehicle which has been hijacked or was involved in a bank robbery, they could relay its description to security company patrols on the road at the time. This would substantially increase the number of potential 'eyes' looking for the vehicle.

The SAPS would benefit from a shared radio frequency, as it has fewer vehicles at its disposal than security companies. In December 1997 a police officer at the Lenasia South police station (near Vereeniging) wrote an open letter to the public in his precinct asking for donations for the repair of police vehicles. It was revealed that vehicles of the Johannesburg crime prevention unit of the SAPS were restricted to travelling 60km a day (150km for the public order unit) as the fuel budget was almost depleted.¹⁶¹

The use of a police-type warning light, sirens, and the police radio frequency could be limited to carefully circumscribed situations, such as in the case of responding to an alarm, or to call for police assistance in an emergency. The industry has proposed that warning lights and sirens be permitted on vehicles only if driven by persons who successfully complete a police approved advanced driving course on an annual or bi-annual basis.¹⁶²

Armoured vehicles

Incidents of heavily armed gangs of criminals attacking cash-transit vehicles, often in broad daylight, have become commonplace. In 1997 there were more than 400 incidents of armed hold-ups of security vans, which resulted in the deaths of 60 security guards and the loss of R150m in cash.¹⁶³

The cash-transit industry has called on the government to allow it to use military type armoured personnel vehicles to transport large amounts of cash. Cash-transit vehicles currently used by security companies are merely 'reinforced' vehicles, and differ from military vehicles in construction and design. Vehicles used by security companies are no match for AK-47 rifles with armour-piercing bullets.¹⁶⁴ The National Conventional Arms Control Committee,¹⁶⁵ a committee of ministers appointed by the cabinet, currently places restrictions on the kind of armoured personnel vehicles private companies may acquire.¹⁶⁶

Industry self-regulation

The government can accede to the above proposals without having to draft new legislation. Granting peace officer status to selected security officers; allowing certain security vehicles the use of sirens and flashing lights, and a connection to the police radio frequency; and permitting the security industry to use armoured vehicles could be done by way of regulation and other administrative measures.

While there is no need for new legislation to expand the powers of security officers, it is important that some of the legislation which exists to regulate the private security industry is strictly enforced and implemented. It is also crucial, however, that the industry is not over-regulated.

The state and the statutory Security Officers' Board should ideally not be involved in regulating training in the industry. As with any industry, it should be left to employers to decide how much training they want to give to their employees. An employer who neglects to train his staff will soon go out of business as his service will be unprofessional and ineffective.

State regulation should apply only where private security companies perform policing functions on public property or in the public domain, and where security officers have additional powers to those of private citizens. Where security officers have the same powers as ordinary citizens, state regulation should be kept to a minimum.

Thus, security officers should be granted peace officer status only if they have completed a minimum standard of training, have a security officer's identification document approved by the Security Officers' Board, and comply with the registration requirements of the board (for example, not having a criminal record).

There are concerns that people's civil liberties could be infringed by security officers abusing additional powers granted to them.¹⁶⁷ Private security officers can, however, act unlawfully irrespective of whether they possess particular legal powers or not. There is no necessary link between awarding more legal powers to security officers and the abuse of their powers.¹⁶⁸

Proper training and background checks on prospective security officers by the Security Officers' Board and employers should minimise the abuse of power. Moreover, private security firms are liable to pay damages in respect of the unlawful conduct of their employees. It will be in their interests to request the granting of peace officer status only for their most competent and trustworthy employees. Market forces and the common law will tend to ensure that security com-

panies who abuse their powers will go out of business.

Members of the public police frequently abuse their powers. The difference between private security companies and the police is that people often have no choice but to deal with the latter. Every year members of the SAPS are convicted for assaulting and even murdering people during the course of their duties. In the period 1st April 1997 to 30th April 1998, some 232 people died in police custody. Of these 29 died of natural causes, and 72 committed suicide. The rest died as a result of injuries sustained while in custody or prior to custody, or from unknown causes where police negligence cannot be ruled out.¹⁶⁹ Moreover, between April and September 1997, there were 55 complaints of police torture.¹⁷⁰

In 1996 alone, 15 325 members of the SAPS were charged with crimes ranging from murder and armed robbery to reckless driving.¹⁷¹ In 1997 there were 17 526 complaints against the police and 9 035 criminal charges.¹⁷² Members of the police are more likely to be charged with murder (122 for every 100 000 police officers) than members of the public (61 per 100 000).¹⁷³ The number of police officers convicted of committing crimes ranges from 1 686 in 1994, to 1 839 in 1996, and 1 355 in 1997.¹⁷⁴ In 1997 some 38 police officers were convicted for murder, 41 for attempted murder, and 16 for armed robbery.¹⁷⁵

The minister for safety and security is frequently sued by individuals who claim to have been assaulted, wrongfully arrested or otherwise abused by police officers. In 1996 there were 6 437 civil claims against the minister with a total value of R409m, up from 6 382 claims with a value of R248m in 1995.¹⁷⁶

When members of the police service infringe people's rights they enjoy the protection of the state, which pays court ordered damages. As the state has considerable financial resources, it is in a position to pay out large sums of money.

By contrast, security companies work in a competitive environment. Any large court-imposed payment by a security company to an aggrieved member of the public will seriously affect that company's profitability. Companies which break the law and infringe people's rights will tend to go out of business. A report by the US based National Center for Policy Analysis points out: 'Private security firms are constrained by self-interest; those committing abuses are subject to market disciplines and civil litigation. In fact, legislation and custom effectively give public police an immunity from punishment for violation of citizens' rights that private security personnel do not have.'¹⁷⁷

An internal SAPS report on the security industry concedes that market forces impose self-regulation on the industry: 'Due to the

competitive nature of the industry and to undercut the opposition, [security] companies have shown themselves to be keen to report the transgressions of other companies.¹⁷⁸ Security companies which show a disregard for the law and civil liberties will incur severe financial costs.

Many people who occupy positions of authority would abuse their position — by, for example, cutting costs, doing poor quality work, and bullying — if they could.¹⁷⁹ However, the institutional arrangements within which people perform their tasks determine whether such abuses can be carried out. ‘Competitive markets are one of the best (if not the best) institutional arrangements designed to discourage abusive, inefficient behaviour.’¹⁸⁰

A police officer might be abusive to his ‘customers’, the public, and victims of crime. A private security officer who is unhelpful or arrogant towards his customers will lose them to his competitors. Before long security firms employing arrogant and incompetent security officers go out of business. A police officer can be unhelpful to every member of the public that seeks his help, without much fear of losing his job. A private security officer, working for a private firm, is not in such a secure position. The competitive nature of the private security market obliges security officers to be helpful towards their customers, and treat them professionally and with respect.

THE CRIMINAL JUSTICE SYSTEM AND THE PRIVATE SECTOR

Public and private goods

In recent years the South African government has committed itself to privatise state assets. Large chunks of state-owned enterprises, such as the Airports Company and Telkom, have been sold to private investors. This trend is likely to continue, albeit at a slow and erratic rate.¹⁸¹

Many of the services provided by the criminal justice system could also be considered for privatisation, or at least greater private sector participation through public-private partnerships or outsourcing schemes.

To determine the kind of services that are amenable to greater private sector participation, a distinction must be made between public and private goods. A public good is one which is provided collectively and from the benefits of which non-payers cannot be excluded. An example is national defence, from which everyone within a territory benefits, whether or not they pay the costs. As a result, public goods are generally produced in the public sector and paid for via taxation.¹⁸²

A private good is provided to a specific user or consumer, to the exclusion of everyone else. A service which is consumed privately and available only to those who pay for it is thus a private good. For example, people who buy oranges get the enjoyment and nourishment which oranges provide. People who do not buy oranges are excluded from these benefits.

Moreover, there are hybrid goods which are consumed collectively, but can be charged for individually in proportion to use, for example electricity provided by a power station to a city, cable television, or toll roads.

While the provision or production of pure public goods or services is not easily privatised, private goods, and hybrid goods, are.

The criminal justice system does not provide one service, but various kinds of service, many of which fall outside the strict public good definition.

One example is the public police. Some of its functions are the provision of services which fall within the ambit of a private good. The inspection of a house when its owner is away on holiday, responding to an alarm at a bank, or providing security at a private sporting event, are all services which fall within the definition of a private good.

These services could be — and are — provided by private firms. (In some countries police charge the users of such services.)

Other police services, such as the patrolling of a shopping centre or a particular residential area, allow those who live and work there to feel safer than they would otherwise do. In such cases everyone consumes and benefits from the service. The fact that private security companies provide such services, even though non-paying users also benefit from them, shows that this kind of service can be provided by the private sector.

Outsourcing versus privatising

Philip Fixler and Robert Poole of the Reason Foundation — an American research and educational organisation that explores and promotes public policies based on classical liberal values — point out that an ‘essential ingredient in a privatisation analysis is an understanding of the possible forms of privatisation’.¹⁸³

Two questions need to be asked about any service which is delivered by the state: Who pays for the service, and who delivers it? The classic form of public service (and the common assumption for all criminal justice functions) has the state providing the funding via taxes, and producing the services directly, through state employees. Fixler and Poole hold that private mechanisms may be used in either or both of these areas.

If the state retains responsibility for funding a service, but hires the provider of the service in the open marketplace, one has a form of private sector involvement known as outsourcing or contracting out.

Alternatively, if the state and its employees produce a service, but charge individual users in proportion to their use, the funding (but not the delivery) of the service becomes a hybrid private–public good, as in the case of toll roads, for example.

Finally, if both the funding mechanism and the service delivery are shifted to the private sector, the service is essentially privatised. The state may, however, retain some degree of control over the terms and conditions of the service, as will be the case with private sector construction and management of South African prisons.

Outsourcing: benefits and perceived disadvantages

There are numerous benefits to the state in outsourcing some of its functions and services to the private sector.

- **Cost.** The state has to follow rigid and bureaucratic procurement procedures to purchase goods or services. A private contractor can avoid these, and is in a position to purchase more quickly, maintain lower inventories, and negotiate better prices than a government department can. Private contractors can also avoid public service restrictions that interfere with efficient personnel management. They are in a more flexible position to hire, fire, promote, reassign, and delegate authority to an employee than the public service.

In *Justice without the state*, Bruce Benson, an economist from Florida State University, says the following about the public service in the United States (which applies equally to South Africa):

The organizational inflexibility inherent in the civil service system prevents management from disciplining inefficient employees unless their behaviour is extreme. Lateral movements to adjust manpower needs in the face of changing demands are virtually impossible, as is hiring at any but the lowest grades. Such dysfunctional qualities of civil service systems commonly reflect employee pressure which tends to emphasize continuity and seniority over competence as qualifications for higher-level positions, and by employee unions which emphasize the traditional union goals of more pay, less work, and job security.¹⁸⁴

Moreover, a private contractor's need to remain competitive and generate a profit, is an incentive to limit waste and maximise productivity — pressures that do not exist in the public service.¹⁸⁵

- **Quality.** In outsourcing contracts with private contractors, the state can set down and specify minimum standards. Without outsourcing, where the state has a monopoly over the provision of all services, this rarely happens. The public police is expected to uphold certain standards. If this does not occur, the state is not in a position to go to a different service provider. At best, the president can fire the responsible minister, and hope that his successor will provide a better performance. In practice, this hardly ever occurs, and the public has to wait for the next election to demonstrate its dissatisfaction.
- **Flexibility.** Private contractors have greater management flexibility than state departments. They can respond faster to changing circumstances, and tend to be more innovative. The state can terminate or decline to renew a contract if a private contractor is too expensive or delivers an unsatisfactory service. By contrast, it would be almost impossible to halt the activities of government departments which are staffed by tenured public servants. Ex-

perience in the United States has shown that it is extremely difficult to terminate a government department.¹⁸⁶

Critics of outsourcing argue that it can lead to security risks, accountability problems, and corruption. Analysis reveals it is the state-run criminal justice system which encounters such problems and disadvantages. Moreover, private contractors have a greater incentive to avoid such problems than do public service managers.

- **Security risks.** It is argued that private security or prison guards could place the safety of the public at risk by going on strike or being absent from work. This is a fallacious argument. 'Unemployment as the result of a strike is a more credible threat to private than to public guards, because a strike or other disruption would allow the government to terminate its contract.'¹⁸⁷ Moreover, the absence of a right to a protected strike has not prevented public police officers, prison guards or prosecutors from striking.

Between August 1996 and August 1997, there were 21 strikes by employees of the Department of Correctional Services, one as long as 29 days, another for 17 days.¹⁸⁸ During a 12-month period in 1996/97, there were 62 work stoppages in the SAPS.¹⁸⁹ In 1996 alone, some 1.3m mandays were lost because of absenteeism in the SAPS (in addition to vacation and special leave taken during that year).¹⁹⁰ Between January and July 1997 the absenteeism rate at the SAPS's crime prevention unit in the Cape Peninsula varied between 47% and 77%.¹⁹¹

Outsourcing contracts can make provision for emergencies such as strikes and labour unrest. For example, legislation permitting private contractors to build and manage South African prisons, grants the state the right to take over the management and control of any private prison facility if the contractor risks losing control thereof.

- **Accountability.** Professor Charles Logan of the University of Connecticut, a specialist in crime and justice matters, argues that contracting out increases accountability as governments are more willing to monitor and control contractors than themselves: 'Contractors — just as their governmental counterparts — are accountable to the law, to governmental supervisors, and ultimately, to the voting public through the political system. In addition, they are accountable, through a competitive market, to certain forces not faced by government agencies. They are answerable to insurers, investors, stockholders, and competitors. As a mechanism of accountability and control, the force of market competition is unmatched.'¹⁹²

Moreover, most governments are inept at holding themselves accountable, especially when it comes to financial matters. For example, in August 1998 the Heath special investigating unit was investigating government corruption involving R7bn. Some 90 000 cases of fraud, corruption and maladministration at different levels of government had been reported to the commission.¹⁹³

- **Corruption.** Corruption is engendered by monopolies, especially state monopolies. It is easier for a state official to be corrupt if he is the only one who has the authority to investigate a crime, stamp a passport or provide a document. If one firm in a competitive market is corrupt, the users of its services can go elsewhere.

There is strong evidence to suggest that corruption is fairly widespread in South Africa's state-controlled criminal justice system.¹⁹⁴ The number of police officers under investigation for alleged corruption has risen from 32 in 1993 to 56 in 1994 to 89 in 1995 and to 1 067 in 1996.¹⁹⁵ In December 1997 and January 1998, the SAPS's internal anti-corruption unit brought 490 cases of police corruption to court, and was investigating another 2 000 cases.¹⁹⁶

South Africa's onerous labour legislation, and a strong and politically powerful trade union movement, have pushed up labour costs to the point where outsourcing has been adopted by many private employers. According to a survey of more than 1 000 organisations across the economic spectrum by human resources consultants FSA-Contact, 68% are outsourcing a variety of activities such as security and cleaning, 61% catering, 42% printing, 36% information technology, and 33% recruitment.¹⁹⁷

A benefit of outsourcing is its cost-effectiveness. This often means that the same amount or more work is performed than before the outsourcing exercise with less labour. The organisation outsourcing its work invariably sheds jobs. If this were not the case, there would be no cost savings to the outsourcing organisation. As a result unions view outsourcing with suspicion and tend to resist it.¹⁹⁸

The SAPS's chief executive, Mr Meyer Kahn, found that personnel restructuring exercises (such as redeploying police officers from police headquarters in Pretoria to the provinces and out on to the streets) proceeded slowly because of the need to consult with each affected employee.¹⁹⁹

The two unions representing police employees are the Police and Civil Rights Union (Popcru) and the South African Police Union (SAPU). In principle both unions support the outsourcing and civilisation (replacing uniformed members with civilians) of certain

SAPS functions, with the proviso that none of their members lose their jobs or are otherwise adversely affected by the process.²⁰⁰ The conditions of service in the police — as in the departments of justice and correctional services — are so bad that a substantial number of staff leave each year through natural attrition. Over the past two years the police service lost some 12 000 members through this process.

It is likely that the resignation and retirement of staff employed by the departments which make up the criminal justice system will allow the government to relocate most of the staff who would need to be retrenched in the execution of an effective outsourcing programme. Nevertheless senior management in the criminal justice system and the government will have to be resolute in its commitment to an effective outsourcing policy if the impact of trade union opposition is to be minimised.

THE SOUTH AFRICAN POLICE SERVICE: EXPANDING PRIVATE SECTOR PARTICIPATION

Introduction

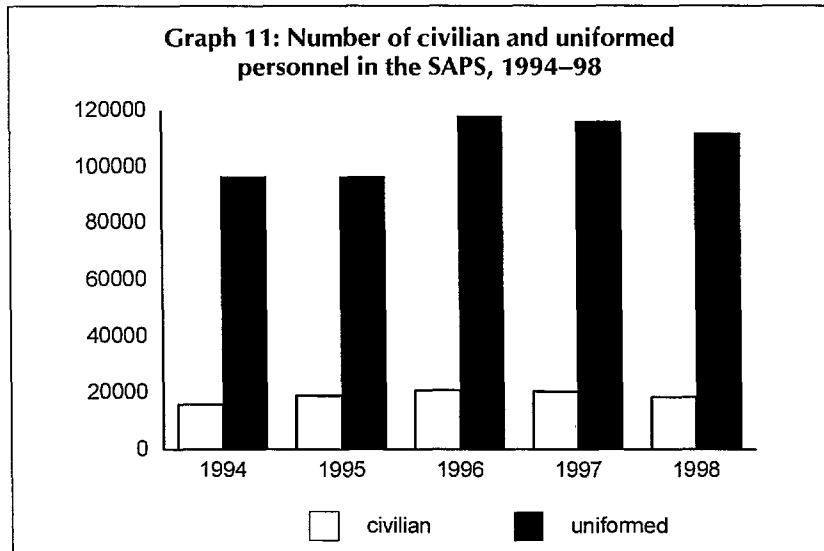
An increasing number of responsibilities traditionally the preserve of the police are being taken over or supplemented by private security. This is a worldwide trend. In South Africa this is of particular relevance as policing and crime prevention have been the state's most visible failures. The growth of the private security industry has a dual benefit for the state. Firstly, people who can purchase their private security feel more secure than they would otherwise. This creates a more content citizenry which is less inclined to protest, emigrate, or participate in vigilantism. Secondly, private security takes pressure off the public police. Every private security guard patrolling in a privately funded vehicle permits the police to channel their limited resources to areas where they are needed more.

Aspects of the work done by the SAPS are suited for greater private sector participation. By this is meant primarily the outsourcing of certain SAPS services to private contractors. The SAPS could put out to tender the provision of a variety of services it currently performs, and set standards for the provision of these services with which private contractors would have to comply.

SAPS policy: civilianisation or outsourcing?

A 1997 study by an American firm, McKinsey management consultants, revealed that South African police officers spend up to 70% of their time on administration, and only 30% on policing duties.²⁰¹

For some time the SAPS leadership has spoken of the need to civilianise its administrative functions. This would replace uniformed members with civilians, allowing the former to concentrate on policing duties. Over the last few years little has happened in this regard. Between 1994 and 1998 the ratio of civilian to police officer in the SAPS has more or less remained constant at 1:6 (graph 11).²⁰² In 1994 some 13.9% of the SAPS's personnel were civilians; by 1998 this had increased marginally to 14.1%.



	<i>Civilian</i>	<i>Proportion of total</i>	<i>Uniformed</i>	<i>Proportion of total</i>	<i>Total</i>
1994	15 575	13.9%	96 502	86.1%	112 077
1995	18 737	16.3%	96 514	83.7%	115 251
1996	20 429	14.8%	118 030	85.2%	138 459
1997	20 093	14.8%	116 147	85.2%	136 240
1998	18 299	14.1%	111 848	85.9%	130 147

Source: South African Police Service

In early 1998 the chief executive of the SAPS, Mr Meyer Kahn, announced that a thousand police officers working as petrol-pump attendants at police garages would be shifted to policing work. Petrol cards would be provided to permit police officers to purchase petrol directly from commercial sale points.²⁰³ Mr Kahn further announced that approximately 1 000 police officers a year (over three years) would be released from administrative duties at national and provincial police head offices, to allow them to perform policing functions.²⁰⁴ This, however, is not sufficient. Some 25 000 police officers (almost one in four) are deployed in an administrative capacity.²⁰⁵ These proposals will not replace police officers with civilians quickly enough. In fairness to Mr Kahn it must be said that stringent labour legislation and police unions limit his ability to relocate personnel rapidly.²⁰⁶

Moreover, civilianisation is not the ideal solution. By civilianising,

the state is merely replacing one kind of employee (uniformed police officer) with another (civilian). Civilianisation will bring about productivity gains provided appropriately skilled civilians replace relatively unskilled police officers. However, civilianisation will not bring about the substantial benefits outsourcing would.

Instead of replacing police officers with new civilian SAPS personnel, administrative positions could be outsourced to the private sector. Some of the policing functions could be outsourced as well, to allow police officers to concentrate on, and improve, their performance in a few core policing and crime prevention functions.

SAPS policy is lacking in the field of outsourcing. In fact, there does not seem to be any comprehensive SAPS policy on outsourcing.²⁰⁷ This is curious given that a 1996 internal SAPS report concluded that the guarding of the police headquarter buildings in Pretoria should be outsourced to a private security company.²⁰⁸

The report disclosed that police headquarters were being guarded by normal SAPS personnel who work in the buildings. Such personnel are assigned guarding duties in addition to their normal functions, at the expense of their non-guarding work. A person who performs a night shift during weekdays as part of his guarding duties is given days of rest on the day preceding and the day following the night shift. Such a member is thus away from his normal work for two full days.²⁰⁹

The report disclosed that a private security company could provide a guarding service which would be cheaper per guard provided, as compared to members of the SAPS performing such services. The report concluded that the contracting out of guard duties to a private security company would have, *inter alia*, the following advantages:²¹⁰

- more police officials would be available for functional policing for which they have been trained;
- the SAPS would save the expense of having to train its members to perform guarding duties;
- the SAPS would not incur any loss of productivity when outsourced guards go on vacation, study or sick leave (as would be the case with SAPS personnel). The private security company would be contractually bound to replace its guards who are absent, and to ensure that members who render an unsatisfactory service are removed and replaced;
- the time consuming burden of organising and administering guarding functions would no longer be the responsibility of the SAPS; and

- the SAPS would not be responsible for issuing private security guards with uniforms, and for transporting such guards to and from their workplaces.

The recommendation of the report, that the guarding of the police headquarter be outsourced to a private security firm, was not adopted by the SAPS leadership.²¹¹ Almost two years after publication of the report, the buildings are still being guarded by SAPS employees. The guarding is no longer performed by the police personnel who work in the buildings, however. These have been replaced by guards who are trained and employed by the SAPS.

Another internal SAPS document revealed that the SAPS's provincial logistical services in Bloemfontein has been outsourcing the guarding of its premises since the beginning of 1996.²¹²

The police's Free State logistical services moved into new premises in 1993. At the time the premises were guarded by assistant police constables. The police did not have sufficient personnel to guard the premises adequately, and a number of break-ins and thefts took place while the premises were under police guard. Moreover a number of the assistant constables were sleeping on the job, and acted in an unprofessional manner.

In 1996, the guarding of the premises was outsourced to a private security company. Subsequently thefts and break-ins dropped by 97%. According to the SAPS's Free State head of logistical services, the private security guards are professional in their duties, and are courteous in their dealings with the public and police. Moreover, because they have been trained as security guards, they show a genuine interest and pride in what they do.²¹³

The private security company undertakes any disciplinary steps which are necessary against the guards, relieving the police of this administrative and legal burden. The document concludes that the outsourcing of guarding duties was the most cost-effective option available to the police.²¹⁴

It is unfortunate that the SAPS has no consistent policy in favour of outsourcing certain of its functions and services. As shown below, there are many services performed by uniformed members of the police service which could be outsourced.

SAPS services suitable for outsourcing

Forensic investigation

Forensic investigation — the lifting and comparing of fingerprints, taking photographs at crime scenes, and conducting chemical analyses and ballistic tests — is a specialised field of police work which could be outsourced to companies which have the staff and equipment to do forensic work, or to individual specialists who do freelance work in this field.²¹⁵

For example, the analysis of alcohol levels from blood samples of people suspected of driving while under the influence of alcohol, is currently performed at only three places in the country: the Department of Health's forensic chemical laboratories in Cape Town, Johannesburg, and Pretoria. Insufficient staff and outdated equipment hamper the work of these laboratories. It takes six to ten weeks for an analysis report to be finalised for use as evidence in a trial.

Such a delay costs the state money. A person accused of driving while under the influence will appear in court within days of being charged. On his first court appearance the accused person's case will be postponed pending receipt of the blood-alcohol analysis report. Presiding officers are reluctant to postpone a court hearing for long periods as the constitution grants accused persons the right to a speedy trial.²¹⁶

A court hearing is usually postponed for about six weeks for the completion of the blood-alcohol analysis report. If personnel at the forensic laboratories take leave, or the police conduct drunk-driving 'blitzes' which result in numerous arrests, then the laboratories are unable to cope with the additional work. Over the Christmas/New Year period, a shortage of staff at the laboratories coincides with an increase in the number of persons arrested for drunk driving, exacerbating the situation.

As a result, blood-alcohol analyses are delayed. Court cases originally postponed for six weeks have to be postponed once more. The accused person must take time off work again to attend the postponement of his case (usually with his attorney). Valuable court time, as well as the time of the prosecutor, magistrate, and investigating officer of the case, is taken up merely to postpone the matter for another few weeks for the blood-alcohol report.

If the police were prepared to outsource such work to the private sector everybody would benefit. The financial costs to the state would be reduced as private sector laboratories would operate in a competitive environment. As the workload increases over Christmas

time, the SAPS could outsource additional work to private laboratories on a contract basis. This would reduce court delays, saving the state further expense. The economy in general would also benefit, as employed accused would not have to take time off work to attend the postponement of their cases.

The police could outsource this work to laboratories in their region to avoid transport costs. This would also save time, and reduce the risk of evidence transported over long distances being lost or contaminated. Blood samples collected at a road block in Durban or Bloemfontein would no longer have to be transported to Johannesburg for analysis.

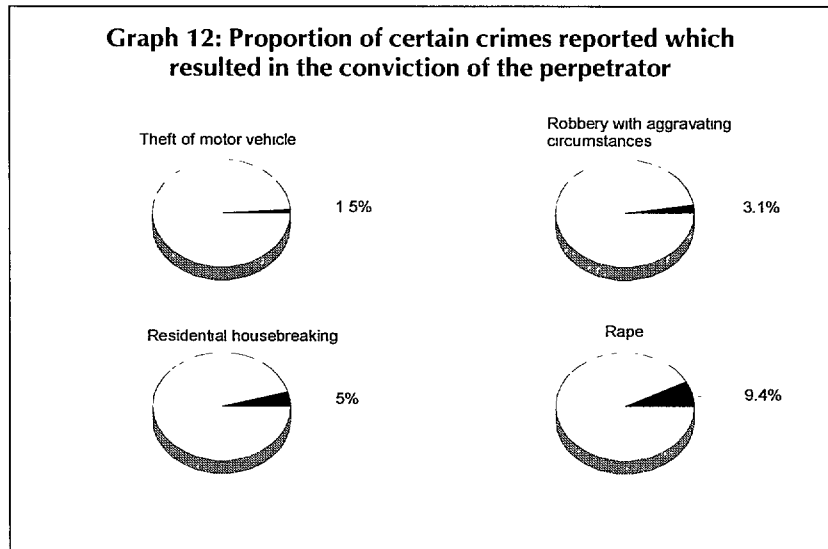
Criminal investigation

In many parts of the world private security agencies engage in specialised investigative activity. According to Les Johnston, author of *The Rebirth of Private Policing*, this is partly because of the 'inability of police organizations (and the law itself) to keep up with the sophisticated techniques of those engaged in large-scale fraud'.²¹⁷

In recent years the SAPS has neglected its detective functions, because of its emphasis on crime prevention and more visible policing. Detectives working in the crime ridden urban centres often work seven days a week, under poor and dangerous conditions. Out of a total of some 20 000 detectives in the SAPS, only 13 000 (65%) had undergone specialist detective training by October 1997.²¹⁸

The investigation of crimes by the SAPS is inadequate. The average workload of a detective is the investigation of 140 separate cases simultaneously, making any proper and thorough investigation impossible.²¹⁹ On average, of every ten crimes which are reported to the police, only two are investigated sufficiently for the prosecution to take on the case.²²⁰

Moreover, most cases are investigated so badly that even if they do go to court, they end in the acquittal of the accused. (A badly trained and inexperienced prosecution service is partly to blame for this, as is shown below.) Of all the cases of theft of motor vehicle reported to the SAPS in the first half of 1997, only 1.5% ended in the conviction of the perpetrators. For rape the corresponding figure was 9.4%, robbery with aggravating circumstances 3.1%, and residential housebreaking 5% (graph 12).²²¹



Source: Press release, minister for safety and security

A number of specialised crime units investigating serious crimes are particularly understaffed. For example, in 1998 the 933 detectives at the SAPS commercial branch were investigating 34 600 cases of commercial crime involving some R10.3bn.²²² It is estimated that it would take each detective an average of 19 years to complete his case load, assuming that no new cases were reported during that time.²²³ Unsurprisingly, of the 58 700 reported cases of commercial crime in South Africa in 1997, there were only 4 370 convictions.²²⁴ In 1997 the Office for Serious Economic Offences announced a moratorium on accepting new investigations because of a lack of experienced and well-trained staff.²²⁵

The investigation of commercial crime by private investigators and forensic accountants has taken place for some time in South Africa. Many private forensic accounting firms have become 'privatised commercial branches of the police comprised largely of ex-SAPS detectives'.²²⁶ Attracted by better salaries and working conditions, many experienced commercial branch detectives leave the police to work for the private sector.

The number of private investigators and accountants investigating economic crimes is increasing. A single large accounting firm in South Africa employs 30 to 40 accountants specialising exclusively in

forensic accounting and the investigation of commercial criminal activities.²²⁷ By contrast, the Office for Serious Economic Offences has only about 30 specialists on its staff.

The SAPS commercial branch and the Office for Serious Economic Offences have on occasion outsourced investigative work to accountants in the private sector.²²⁸ Such accountants, in conjunction with police detectives, investigate crimes and collect the evidence required by the prosecution service.

A new development is the investigation of violent crimes such as murder and rape by private security firms staffed by law graduates and experienced ex-SAPS detectives. A number of firms have the staff and technical know-how to collect and analyse forensic material such as fingerprints, and blood and hair samples, and collate all the evidence necessary for a successful criminal prosecution.²²⁹

The SAPS could expand what is already happening on an ad hoc basis. Especially for crimes where specialised skills are required for their detection — such as in the fields of commercial and environmental crime — the police could make greater use of outside skills on a regular basis.

Administrative functions

Police officers perform a variety of administrative functions. There is a dual benefit in outsourcing such work to the private sector. Firstly, police officers doing such work become available to fight crime and apprehend criminals. This is why they joined the police in the first place, and what they have been trained for. Secondly, the state could employ people who, in contrast to police officers, are actually trained to do administrative work.

Many people have had the experience of going to a police charge office to register a complaint, report an accident, or lay a charge. Often they have to wait as the police officer on duty is busy with other matters such as answering the telephone, or liaising with his colleagues over the police radio. Once the police officer is ready to take the statement he writes it down, word for word, on a piece of paper. Often the home language of the police officer and the member of the public do not correspond, contributing to the delay and the possible inaccuracy of the statement.

If this function is outsourced to the private sector the following scenario would be possible: Part of a charge office in every larger police station would be made available to a private company. This would leave the remainder of the charge office for the police to use for

police emergencies, such as when a person phones in to report a robbery in progress. All incoming calls to the police station would first go to the 'private' section of the charge office, which would transfer all emergency calls or serious complaints to a trained police officer who would have the time to deal with them adequately.

All other matters would be dealt with in the 'private' section of the charge office. The compiling of traffic accident reports, dealing with admission of guilt payments, taking statements and affidavits, certifying documents, taking fingerprints, and a variety of other administrative duties could be performed by the staff of such an office.

The office would be staffed by a trained and bi- or tri-lingual telephonist. A second person with good typing and interpersonal skills, and competent in two or three South African languages, who is also a commissioner of oaths, would use a computer to take down statements made by members of the public.

Outsourcing such work would grant the police greater flexibility, improving their performance. In tourist cities such as Durban and Cape Town, where complaints filed with the police increase dramatically over the summer holiday season, the police could hire additional administrative staff (in terms of an outsourcing contract) to deal with the additional workload. Presently this is impossible as police officers are employed on a full-time basis — and such officers go on leave themselves over these busy periods.

Other functions

There are many other functions suitable for outsourcing which are performed by police officers trained in police work (see below). It is a waste of their training, and of state resources, to use police officers for duties other than fulfilling their core function of combating crime.

- **Court orderlies.** Every court room in the country has at least one or two court orderlies, the majority of whom are police officers. It is their function to channel prisoners from their holding cells at a court building to the various court rooms, provide prisoners with lunch, and do other simple administrative functions in the court room itself. Such tasks could be outsourced to a private security firm.

There are no figures available on the number of police officers who are court orderlies. Usually, the police stations closest to a court allocate their members for court orderly duty on an ad hoc basis. As a result SAPS human resources planners are incapable of determining how many police officers work as court orderlies.²³⁰

An investigation on the Johannesburg magistrate's court and the Witwatersrand Local Division of the High Court found that 72 members of the SAPS work there as court orderlies.²³¹

There are 432 district and 11 regional courts in South Africa.²³² They vary in size. A small rural district court might have only one court room, one in a large urban centre could have fifteen or more. The number of uniformed police officers who could be placed back on the streets would be a few thousand if the functions of court orderlies were outsourced to the private sector.

- **Transporting prisoners.** Use is made of SAPS personnel to transport prisoners between police stations, courts, and prisons throughout the country. At the Johannesburg magistrate's court and the Witwatersrand Local Division of the High Court alone, 30 members of the SAPS use 16 vehicles to perform this task. A further 19 police officers are used for prisoner reception duties at these courts: receiving prisoners at the court cells, allocating them to the various courts, and dealing with general enquiries.²³³
- **Guards for premises and persons.** A total of 2 437 police officers are deployed to guard state-owned premises. They are no more than glorified versions of the bottom grade of security officer with seven to ten days of training. These police officers guard government buildings by, for example, keeping a register of persons entering and leaving a building, opening and closing gates for vehicles which enter the grounds to the building, or simply standing guard at the entrance to a building.

Members of the police's National Protection Service, who are required to do static guard duty for at least one year, have complained to the minister for safety and security about the tedious nature of their work.²³⁴ During the 1996/97 financial year, police officers devoted 8.5m working hours to this function.²³⁵ A further 1 144 police officers were deployed for a total of 2.4m working hours for the purpose of guarding individuals.

The total of 3 581 police officers used for guarding premises and individuals is only 60 less than the size of the police service for the entire Northern Cape province.²³⁶

- **Radio control rooms.** At a new police radio control centre in Pinenlands (a suburb of Cape Town) 62 uniformed police officers work as telephone operators and dispatchers, answering 1.8m calls a year. The Cape Peninsula flying squad had to sacrifice 12 of its 29 members to the centre to perform administrative and telephone duties.²³⁷

- **Providing guards for government departments.** Police officers regularly assist the Department of Welfare by guarding pension payout points, or the Department of Home Affairs by guarding entry and exit points at the country's border. The departments concerned could outsource this service to private security firms instead of burdening the SAPS with such tasks.
- **Guarding crime scenes.** Police officers are used to guard crime scenes. In the case of a motor accident this might only require the presence of one or two officers for an hour or so. However, in a multiple shooting incident with numerous bodies, and a lot of forensic evidence spread over a large area, a number of police officers might be used to guard the crime scene for a lengthy period.
- **Criminal Record Centre (CRC).** Police officers are involved in the collecting, sorting and comparing of fingerprints stored at the CRC of the SAPS. The fingerprints of every person who has been convicted of a crime are stored at the CRC. Over four million sets of fingerprints are on file at the CRC.
- **Serving summonses.** Police officers are often used to serve summonses on crime suspects or court witnesses.
- **Policing trains.** The Cape Town Metrorail train network is policed by 276 members of the SAPS, 61 members of Metrorail's own security service, and 347 private security guards. The majority of police officers who patrol Metrorail property could be replaced by private security personnel.

An intra-city rail service such as Metrorail has busy periods when the security of commuters is at greatest risk. These peak times are in the mornings and afternoons, and during particular events which take place along certain lines, such as sporting events. If Metrorail were to contract out its security, the contracting firm could be required to provide security guards if and when they are required — and Metrorail would have to pay only for the service it receives. With the current system, salaries and other benefits of the 276 police officers have to be paid by the state, even when their policing functions are superfluous at off-peak times.

- **Crowd control and security at private functions.** Taxpayers should not have to pay for security at private functions whatever their size. People who are willing to pay to watch a soccer or rugby match, or attend a rock concert, and thereby keep out the public at large, cannot expect the taxpayer to subsidise their security at

what is in essence a private function. At the International Amateur Athletic Federation's eighth world cup athletics event at the Johannesburg stadium in September 1998, some 1 000 police officers were deployed for the duration of the three-day event, primarily to oversee the safety of the athletes and officials.²³⁸

- **Training.** Some 15% of the training for police officers is done externally.²³⁹ The rest is done by the SAPS itself. While some 46 000 members of the SAPS do not have a driver's licence, the SAPS's driving school in Benoni and other police training centres provided driver training to only 1 740 police officers between 1995 and 1997.²⁴⁰
- **Other services.** Other SAPS services which could be outsourced include: the SAPS's psychological services, which employ 76 qualified personnel;²⁴¹ the chaplain service; the legal services division; SAPS mortuary services; support services such as logistics, finances, and human resources; and the police's forensic science laboratory.

SAPS infrastructure suitable for privatisation

A more radical proposition to reduce state involvement in the criminal justice system is the privatisation of its infrastructure. Privatisation, in contrast to outsourcing, means that the state sells the property being privatised to a private sector buyer. The buyer then uses the property on a profitable basis.

One such plan, which has been proposed by a South African company, is the purchase of police stations and court buildings.²⁴² Selling existing infrastructure would generate revenue for the state. This could be used to purchase resources for the criminal justice system, such as new vehicles, firearms, and information technology equipment, or it could be invested to generate a continuous income for the state.

The private company purchasing the infrastructure, would rent it to the state for the latter's use. Moreover, police stations — especially those in black areas — could be given a multi-purpose function. For example, attached to a police station could be a bank's automatic teller machine (ATM), pension payout points, and water and electricity pay points. This provides a benefit to both the provider of the services and the consumer. An ATM connected to a police station is less likely to be stolen or vandalised, while the user of the service will be better protected outside, or even inside a police station, as the SAPS is a 24-hour service.

The idea is not limited to financial services. Newspapers, groceries and other goods required on a daily basis, could be sold at a venue connected to a police station. Other services such as doctors' rooms, and attorneys' offices could be attached as well. Eventually police stations could form the centre of a retail node for the area in which they are situated.

The providers of the services, such as banks, newspaper sellers, Eskom and the post office, would pay a fee or rent to be able to operate in, or on the property of, a police station. The income generated from these ancillary non-policing services could be used to subsidise the police station. This private sector subsidisation would allow the private operator to rent the police station to the state at a low cost.

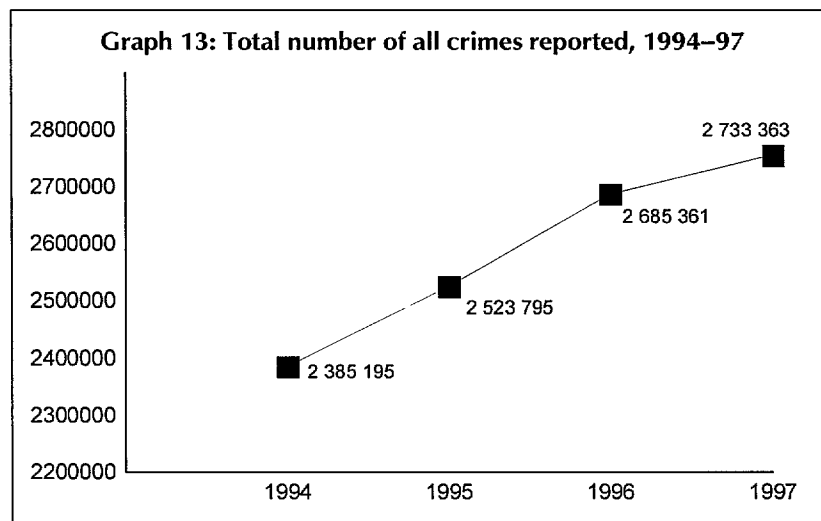
Such a scheme would also assist the SAPS in improving its relationship with the public. People would no longer go to the police station only to report a crime, lay a charge or visit an arrested relative. They will also go there to bank, shop, and receive their pension money in the relative safety of the police station. In this way members of the public will get to know their local police officers.

THE ADMINISTRATION OF JUSTICE

Introduction

The state-run justice department lacks the capacity and effectiveness to deal with the crime situation in South Africa. During the first half of 1997 (the latest period for which figures were available at the time of writing), over 180 000 cases were taken on by the country's prosecutors. During the same period only 153 700 cases were actually finalised.²⁴³

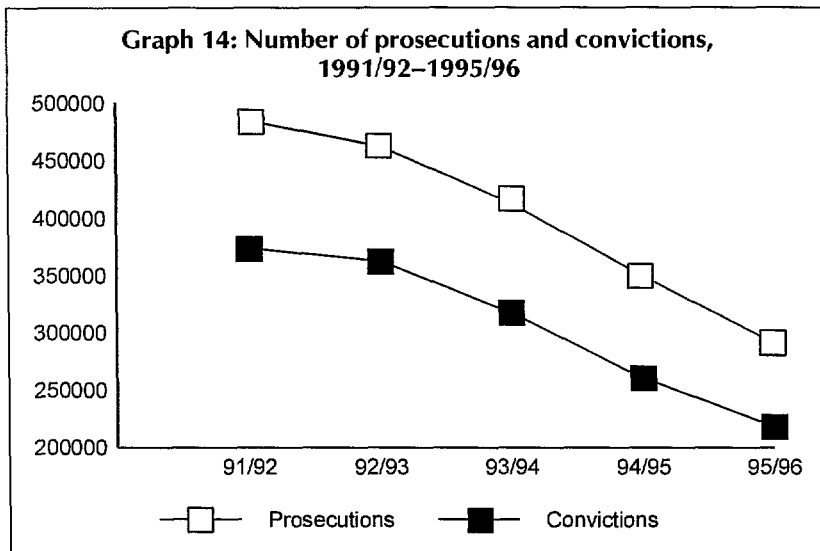
While the total number of reported crimes has increased over the last few years (graph 13), the number of prosecutions and convictions (table below and graph 14), has steadily declined over a four-year period.²⁴⁴



Source: SAPS Crime Information Management Centre

Prosecutions and convictions

Year	Prosecutions	(Decrease)	Convictions	(Decrease)
1991/92	485 099	–	373 600	–
1992/93	462 416	(4.7%)	362 500	(3.0%)
1993/94	413 500	(10.6%)	318 000	(12.3%)
1994/95	350 200	(15.3%)	261 000	(17.9%)
1995/96	291 774	(16.7%)	218 400	(16.3%)
Change 1991/92– 1995/96		(39.9%)		(41.5%)

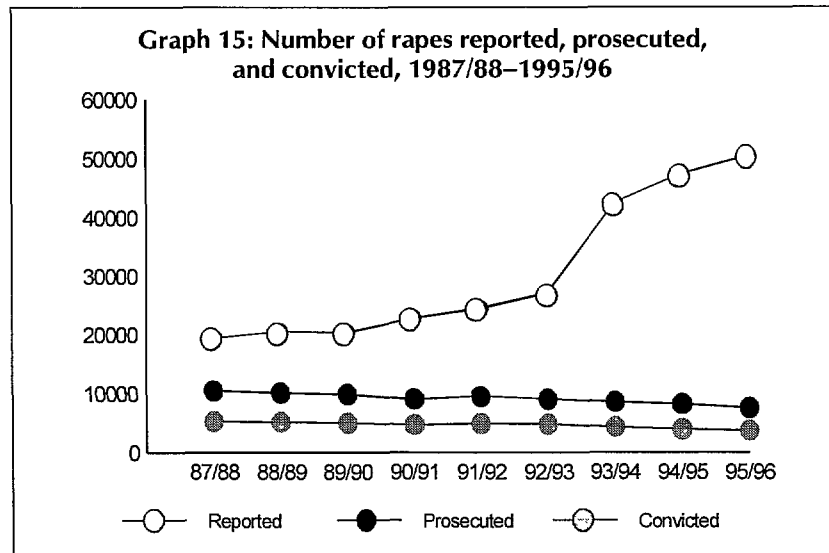


Source: Central Statistical Service

In 1995/96 (the latest period for which figures were available at the time of writing) the overall conviction rate was 75%. Thus of every four cases taken on by the prosecution service, one ended in an acquittal. This figure is deceiving, however, as persons charged with shoplifting, common assault, and other relatively minor offences often plead guilty, which is statistically recorded as a conviction. The conviction rate for more serious offences is considerably below the average. The 1997 figures are as follows: murder 32%, car hijacking 19%, and rape 16%.²⁴⁵ It must be remembered, moreover, that cases are usually prosecuted only where there is a reasonable prospect of obtaining a conviction — that is, cases where the evidence is substantially in favour of the prosecution's case.

Rape is particularly revealing. Technically, it can be a difficult crime to prove. The police use forensic evidence and district surgeons' reports to build up their case. The prosecution usually relies on the evidence of a single witness who is also the complainant. The forensic evidence available to the prosecution to support its case has to be acquired in a procedurally correct manner, be uncontaminated, and be presented to the court according to arduous laws of evidence. A successful rape prosecution therefore requires the co-operation of at least three government departments: health (the district surgeon), safety and security, and jus-

tice. Police officers and prosecutors require a certain level of skill and experience to be able to secure a conviction in a rape trial. Figures show the state has failed the country's rape victims dismally (graph 15).



Year	Reported	Prosecuted	<i>Prosecuted as a proportion of reported</i>	Convicted	<i>Convicted as a proportion of reported</i>
1987/88	19 368	10 424	53.8%	5 243	27.1%
1988/89	20 458	10 103	49.4%	5 159	25.2%
1989/90	20 321	9 873	48.6%	4 991	24.6%
1990/91	22 761	9 057	39.8%	4 661	20.5%
1991/92	24 360	9 450	38.8%	4 841	19.9%
1992/93	27 037	8 998	33.3%	4 753	17.6%
1993/94	42 429	8 553	20.2%	4 311	10.2%
1994/95	47 506	8 207	17.3%	3 893	8.2%
1995/96	50 481	7 544	14.9%	3 697	7.3%

Note: Crimes reported in the 'independent' and non-independent homelands prior to their reincorporation into the Republic of South Africa in 1994 were not recorded by the South African Police. Rapes reported in these territories prior to 1994 are therefore not reflected in the 'reported' category above. This might be a reason for the substantial increase in the number of rapes reported between 1992/93 and 1993/94.

Sources: Central Statistical Service; SAPS Crime Information Management Service

Between 1988 and 1996 the number of reported rapes increased by more than 160%. Over a similar period, the number of rape cases which went to court decreased by 28% and the number of successful prosecutions by 30%. The reasons for this are twofold.

Firstly, the police service is understaffed and badly trained. Moreover, because of its emphasis on crime prevention and more visible policing, the police service has neglected its detective functions. As a result most cases are so badly investigated that the prosecution is not prepared to take them on. Secondly, the national experience level of prosecutors is, on average, only three and a half years. In KwaZulu-Natal it is fewer than three years, in the Western Cape a mere six months.²⁴⁶

In a society based on the rule of law and the constitutionally enshrined principle of equality before the law, recourse to the courts must be available to all. Every person, however indigent, should have access to the administration of justice. This is often not the case. Frequently the poorer, uneducated victims of crime are neglected by the state-run criminal justice system. While the system theoretically assists every victim of crime equally, in practice the poor are at a disadvantage.

Poorer people are more likely to be victims of crime.²⁴⁷ Reliant on public transport, resident in areas with inadequate street lighting and neglected and overgrown public spaces, poorer people are easy targets for criminals. Poor people are also likely to suffer greater personal loss from criminal attack. Under-insured and with a low savings base, poor people face financial hardship should, for example, their weekly wages be stolen. A poor person who is unable to work for a period of time because of an assault or criminal attack, stands to lose more than a wealthier person who is insured, and has sufficient financial reserves to see him through his convalescence.

Often court cases do not begin on time. Once started, they are often not completed on the same day, requiring one or more postponement. Victims of crime who are day labourers frequently forgo their wages on the day they have to appear in court to testify. Reliant on public transport, they experience an additional burden in getting to court.

Greater private sector involvement in, and the outsourcing of certain aspects of, the administration of criminal justice should not be rejected out of concern that the poor could be discriminated against. Outsourcing and public-private partnerships are beneficial to everyone. Users of the justice system are likely to have a wider choice of services as private sector involvement will create new services. Moreover, the private sector will provide services more effectively, with less delay and at a lower cost to the state and the taxpayer. Another benefit to the state is that it will no longer be expected to exclusively pro-

vide an increasing range of specialised services. Rather, the state will be able to concentrate on one of its core functions: the prosecution of serious crimes such as murder, robbery and rape, which are posing a threat to the social order in South Africa.

What follows below are measures which, if implemented, will take the burden off the state to staff, operate and manage the criminal justice system in its totality.

Arbitration and mediation

Arbitration and mediation precede the creation of organised judicial systems. More than 2 500 years ago, societies developed informal mechanisms, much like arbitration and mediation, to resolve disputes.²⁴⁸

Most of the criminal cases heard in the lower courts today focus on factual rather than legal disputes. Such cases require a minimal application of the law. These cases are, however, filling the court rolls beyond capacity.

Arbitration is a substitute for a court trial. It involves a hearing and an enforceable decision, but the process takes place outside the court system, thus avoiding many of the delays, expenses, and stresses associated with litigation. Arbitration is usually quicker than litigation. It is also more convenient as hearings are set up at a mutually acceptable time and place. The arbitrator selected can be an expert on the offence in question, for instance domestic violence or reckless driving, which aids in shortening the presentations of the parties and in producing a sensible result.²⁴⁹

In the United States arbitration and mediation are used to reduce caseloads in the criminal courts. Such alternatives have the advantage over the formal court system in that the needs of victims are adequately addressed. The following analysis which looks at the position of victims of crime in the formal state run US legal system, is equally applicable to South Africa:

Victims [of crime] feel abused and betrayed by the system when the conviction does not reflect the nature of the acts committed, and the penalty is disproportionately small in relation to the suffering and hardships that have resulted. In addition, victims and other witnesses are expected to attend repeated court hearings where they are taken for granted or ignored entirely. They are rarely informed of continuances or informal dispositions that make their presence unnecessary. They must endure the anxiety of waiting for hours upon end, often in the same room with, or even seated beside the person against whom they have been called to testify. They are expected to assume the financial hardship that

the loss of their time entails, a hardship that can sometimes exceed the punishment that results for the defendant if he is convicted. In a very real sense, the victim and witnesses of crime become the victims of the criminal justice system itself.²⁵⁰

In Rochester, New York, a programme has been in operation since 1973 whereby less serious criminal charges are referred to arbitration. 'This is a program whereby minor criminal charges are converted into civil actions which are then submitted by the parties to arbitration. The rationale for the project is that not only are the courts relieved of a host of private minor complaints, but the disputes themselves are resolved in a more effective and positive way.'²⁵¹

In the Rochester programme, the first inquiry is about the nature of the offence and the relationship between the parties. The programme is available only to parties who know each other, such as husband and wife, landlord and tenant, neighbours, or employer and employee. The complaint must be over conduct which is of a minor criminal nature. Once this has been established by the court complaint clerk, the complainant is advised of the arbitration option. Only if the complainant, the local senior prosecutor, and the accused person agree to opt for arbitration does the process proceed. If the accused person does not wish to proceed, the charge is prosecuted in the normal manner.

The arbitrator's primary aim is to mediate the dispute and work out a consent agreement. 'Lacking successful mediation, the arbitrator has the authority to render his decision. The award can include civil damages and injunctive relief but not assessment of criminal penalties.'²⁵² A part of the consent agreement concentrates on the needs of the victim and compensation by the accused person.

As explained above, criminal courts often ignore the needs of individual victims. Fines go to the state, and punishment is determined, inter alia, by the need to protect society as a whole. The arbitration programme recognises the importance of the interests of the victim in the criminal justice process.

Arbitration and mediation could be used more widely in the South African justice system. This would assist the victims of crime, the courts and even accused persons who often have to wait months and even years for the finalisation of their trials. The high cost of criminal litigation, and the lack of capacity of the state-run criminal justice system, also speak for an arbitration programme for criminal offences in South Africa. Mr Lukas Muntingh, chief researcher with the National Institute for Crime Prevention and the Rehabilitation of Of-

fenders (Nicro), points out: 'It would be in the best interests of justice and those affected by crime that a situation of judicial pluralism evolves, giving individuals more than one recourse to justice in order that their specific needs are addressed.'²⁵³

Time-consuming and expense-incurring matters are diverted from state-funded courts through arbitration and mediation programmes.²⁵⁴ While court-imposed punishments lead to a high re-offender rate, the solutions provided through arbitration and mediation tend to prevent a recurrence of the criminal act. Such programmes reduce the level of tension between the participants by helping them resolve their disputes, and by 'creating a sense of satisfaction through the provision of meaningful and expeditious relief for the injuries suffered'.²⁵⁵

The state's goal need not always be to determine and allocate fault to any single person. Arbitration and mediation programmes approach antisocial behaviour with this in mind. They emphasise the personal responsibility of each party, rather than the narrow assessment of legal fault. As a result, 'mediation produces more durable results more economically and expeditiously than the current criminal justice system'.²⁵⁶

If an arbitration–mediation programme is implemented in South Africa cost savings to the state should result. 'Although the establishment of a mediator's office obviously has cost implications, these costs should be outweighed by cost-savings from staff reductions and smaller prison populations.'²⁵⁷ A 1992 pilot 'victim–offender mediation programme', undertaken by the Cape Town branch of Nicro, found that cases handled by such a programme are less expensive to the state than when they are processed through the normal criminal courts.²⁵⁸

Arbitration and mediation centres should not be staffed by prosecutors or presiding officers. The staff should come from the ranks of attorneys (as is the case with the successful Small Claims Court system), community organisations, and even senior law students. There should be no need for the state to employ additional personnel on a permanent basis.

Prosecutions

Technical cases

Most prosecutors enter their profession directly from law school. The typical academic qualification of a prosecutor is a bachelor degree in the social sciences, followed by a law degree. Prosecutors have little or no training in subjects such as forensic accounting or computer

science. As a result, computer-related fraud and intricate commercial crimes are often not prosecuted, or prosecuted unsuccessfully, because of the lack of technical knowledge on the part of prosecutors.

Such specialised prosecutions should be outsourced to the private sector.²⁵⁹ Bruce Benson, an economist from Florida State University, argues that there are advantages in specialisation, and the use of specialised personnel:

One reason that the private sector might be expected to do well what the government criminal justice system does badly is that consumers generally have narrowly focused concerns. Thus, when they pay a private firm to alleviate those concerns, they can hire someone with expertise. When resources *specialize* in their area of comparative advantage, economic efficiency is enhanced. More is produced with the same resources, or fewer resources are needed to produce the same level of output.²⁶⁰

There are many law firms in South Africa which specialise in commercial crime. They have qualified and experienced personnel to handle intricate fraud cases. While outsourcing such prosecutions to the private sector might be an additional expense to the state in the short-term, the long-term benefits of an increase in the number of successful convictions would be considerable. White-collar crime has reached alarming proportions.²⁶¹ Through the effective combating of such crime, the economy as a whole would benefit. Moreover, diverting selected cases to the private sector will permit state prosecutors to concentrate their efforts on other priority crimes.

Companies are loth to wait long periods for the finalisation of fraud cases involving their employees. Numerous, drawn-out court appearances are bad publicity, and costly as staff members have to spend time at court to testify. The loss for such companies is especially harsh if the prosecution is unsuccessful. Firms which are prepared to spend large sums of money on private investigators to track down a fraud suspect among their employees, might be willing to pay for an experienced and competent commercial lawyer to conduct the criminal prosecution of their cases as well — in particular if they were assured of a speedier finalisation of the trial, and a greater chance of obtaining a conviction.²⁶² (See *Private prosecutions* below.) Commercial insurance policies could even be adapted to cover the additional costs of a private prosecutor.

Seasonal cases

Certain crimes have a seasonal prevalence. Over the Christmas/New Year period there is an upsurge of drunken driving, shoplifting, as-

sault, and domestic violence cases. These are normally not complex cases to prosecute. Because of their sheer number, however, and the fact that many prosecutors go on leave over the Christmas period, a congestion of cases builds up at the beginning of each year. In the busier urban courts it can take up to six months to process these.

The solution is not to employ more prosecutors on a full-time basis as there would be a surplus of prosecutors for the remainder of the year. Rather, the prosecution of such cases should be outsourced to articulated clerks and junior attorneys in the private sector.²⁶³ This would assist the state to deal cost effectively with the annual bottleneck of cases.

'Special' prosecutions

Larger magistrate's courts assign one or more prosecutors to deal with maintenance cases, inquest proceedings, and traffic contraventions. The state is wasting a scarce and costly human resource by using qualified prosecutors to perform what are in essence non-legal functions.

- **Maintenance.** A maintenance prosecutor spends little time in court. The bulk of his time is spent mediating between estranged parents, in an attempt to come to an out-of-court settlement on the amount of maintenance the non-custodial parent is to pay to the custodial parent for the support of his children. This requires a factual assessment of the expenses the custodial parent incurs looking after the children, and of the incomes of the two parents. Thereafter each parent's contribution is calculated using a standard formula. A prosecutor's legal training and courtroom skills are wasted in such a function, which could be outsourced to a person with good interpersonal and mediation skills, and some knowledge of accounting and psychology. Only in instances where mediation fails should the matter be referred to a prosecutor for courtroom settlement.
- **Inquests.** As with maintenance, inquest prosecutors spend little time inside a courtroom. Their main function is to obtain a plethora of certified statements, reports, and forensic documents which together form a chain of evidence, from the deceased's time of death to the time his body is given to an undertaker for burial. On the basis of these documents a presiding officer makes a finding in chambers. It is only on rare occasions that a formal inquest is held in court. The compilation of inquest dockets could be outsourced to persons skilled in forensic medicine and record keep-

ing. Only if a formal inquest has to be held, should the matter be referred to a prosecutor.

- **Traffic contraventions.**²⁶⁴ A traffic prosecutor spends a large portion of his time dealing with written and oral representations from members of the public who admit to contravening a traffic regulation, but request a fine reduction. Traffic matters that go to court usually revolve around one or two factual disputes, such as whether a traffic light was red or green, or whether a vehicle came to a complete stop at a stop street. Prosecutors' knowledge is wasted in the processing and prosecution of such trivial cases. Such matters should be handled by senior officials from the various traffic departments. As traffic departments receive the income from traffic fines, it is fair that they finance the cost of such prosecutions.

Private prosecutions

Legislation makes provision for private prosecutions.²⁶⁵ They may occur only if an attorney general certifies that he declines to prosecute a case at the instance of the state.²⁶⁶ Moreover, private prosecutions are possible only in a limited number of circumstances, specified by statute. In essence, only a private person who proves some 'substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered' can institute a private prosecution.²⁶⁷ Companies and legal persons cannot do so.

There are a number of statutory safeguards to prevent persons misusing the limited right to institute a private prosecution. A private prosecutor must deposit with the court a fixed sum of money, and an amount the court may determine, as security for the costs which the accused person may incur in respect of his defence on a charge brought by a private prosecutor.²⁶⁸ Where a private prosecutor fails to prosecute a charge against an accused person without undue delay these sums of money are forfeited to the state.²⁶⁹

In a private prosecution the accused person cannot be arrested, and may be brought to court only by way of a summons.²⁷⁰ A court may set aside a private prosecution which is irregular or vexatious or constitutes an abuse of process of court. Moreover, where the court is of the opinion that a private prosecution was unfounded and vexatious, it must award to the accused person, at his request, such costs and expenses as the court deems fit.²⁷¹ Where an accused person is acquitted the court may order the private prosecutor to pay to the accused person the whole or part of his costs and expenses incurred in connection with the prosecution.²⁷²

There is much to be said for private prosecution.²⁷³ Victims of crime have a right to a fair hearing of their grievance. In certain situations this right can best be upheld through the use of private prosecution. Mr Tim Valentine, an American legal practitioner, says:

The employment of private prosecution is in some cases and in some jurisdictions the only way for victims of crime to get justice. If you hire an attorney and he allows your case to be continued into oblivion (or into the trash can) without putting up a spirited fight in open court, or if he otherwise fails to perform adequately, he can be subject to disciplinary action by the grievance committee of the bar association.²⁷⁴

Public prosecutors' offices often do not have the personnel, time and resources to adequately peruse the police dockets presented to them. Prosecutors also do not always have the time to confer with the state's witnesses or crime victims prior to a trial.

The argument that private prosecution favours the wealthy, who can afford the costs of a private prosecutor, is misconstrued. Private prosecutions do not damage the rights of poorer victims of crime who have to rely on the public prosecution system. Private prosecutions reduce the workload of public prosecutors, allowing them to concentrate their limited resources on cases where, *inter alia*, poor people have been victimised by crime. Moreover, concerned citizens, victims' rights groups (such as rape crisis centres), and non-governmental organisations can assist indigent crime victims to obtain the services of a private prosecutor.

Many large companies would be prepared to use private prosecutors to prosecute people who defraud them. Many such fraud cases are intricate and exact a lot of time and effort from prosecutors. Using private prosecutors to deal with them would allow public prosecutors to get on with prosecuting other serious crimes, such as murder and rape. The law would need to be amended to permit companies and legal persons to institute private prosecutions.

The law could also be amended to make it easier for private persons to institute private prosecutions. In terms of the present system, victims of crime may proceed with a private prosecution only after an attorney general declines to prosecute the case in question.

Crime victims are therefore left with no real choice. Should an attorney general decline to prosecute, it is likely that there is insufficient evidence to warrant a prosecution. A private prosecution under such circumstances is likely to be rejected by the courts. If a victim should have a strong case, and there is substantial evidence against an accused person, an attorney general will not decline to prosecute.

The victim then has to rely on the slow moving state-run justice system for redress.

The law should be changed to permit private prosecutions which are not conditional upon an attorney's general decision not to prosecute in a matter. The decision whether to institute a private prosecution should be left to the victim of a crime — the person who has the most to lose from a bungled prosecution.

There would be a number of benefits from such a change in the law. By instituting private prosecutions crime victims improve their chances of obtaining a speedy conviction against an accused person. The accused person benefits as his trial is finalised more rapidly than would otherwise be the case. Frequent delays in criminal trials place considerable financial and emotional strains on accused persons and their families, even if the trials end in their acquittal. Finally, private prosecutions alleviate some of the pressures on the state-run prosecution system, as state prosecutors will be able to devote more time to other cases.

Interns for prosecutors

Prosecutors spend a lot of their time performing routine administrative and clerical tasks because of a lack of support staff. This includes: filling in exhibit request forms, drawing up charge sheets, photocopying statements, finding relevant case law, and telephoning witnesses to arrange court appearance times. For example, during 1997, prosecutors at the Cape Town magistrate's court spent almost 3 000 hours preparing copies of dockets for defence counsel.²⁷⁵

Many senior law students would welcome the opportunity to do an internship at a magistrate's court during vacation time. Law students would be prepared to do a voluntary internship free of charge if the system were well structured, and the interns were afforded the opportunity to learn. Apart from gaining valuable practical experience about the operation of a criminal court, it would also enhance their CV, and assist them in making valuable personal contacts in the legal profession.

Prosecutors with families tend to go on leave during the summer and winter school holidays. During these times most prosecutors' offices are particularly understaffed. As school holidays overlap with university vacations, student interns would be available at times when their services would be needed most.

The criminal courts and their administration

All larger criminal court centres have non-legal personnel. These are clerks of the court (often one per court room in the larger centres), typists, secretaries, and other staff who perform a variety of administrative and clerical functions.

Typists are a good example of how slow the public service is at adapting to a changing technological environment despite the productivity and financial gains that it offers. Typists also epitomise the inertia that exists in the public service to dismiss or retrain people engaged in unproductive work. They also demonstrate that efficiency and cost-effectiveness are not high on the list of priorities in the public service.

At a typical magistrate's court two or three typists are responsible for the typing needs of the professional staff, namely presiding officers, prosecutors, and senior administrative personnel. Professional staff generally do not have access to computers, so that they must write everything by hand. Their handwritten documents are then given to the typists for typing. Typed work is returned to the professional staff and checked. If typographical mistakes are found, or the document needs to be altered in any way, it is returned to the typists, who manually correct the document or type it afresh, as they generally do not have access to computers themselves.²⁷⁶

Such a procedure is inefficient. With word processing equipment, the professional staff could perform the bulk of their typing needs with greater speed and less effort. Most, if not all, of the typists' posts could be done away with entirely. The cost savings by scrapping these posts could be invested in information technology equipment. In the long run costs would be reduced and the professional court staff could work more efficiently.

The tasks listed below, which are performed by non-professional personnel at criminal courts, could be outsourced to the private sector.

- **Clerical and junior administrative positions.** Each court centre could outsource clerical and administrative positions, taking into account local requirements and budgetary constraints. Part of every outsourcing contract would specify that the contracting firm is responsible for the information technology equipment necessary for the efficient provision of the service outsourced. It would not be up to the state to determine the optimal level of computerisation for each court centre. Moreover, the state would not be burdened with training its own staff to use the technology. Nor would it have to purchase expensive information technology equipment that would be outdated within a short period of time.

- **Security guards.** Magistrate's courts are allocated guards who control access to court buildings and are responsible for general security. Most guards are employed on a full-time basis by the Department of Justice with complete public service benefits, such as generous paid leave provisions, medical aid, pensions, and housing loan assistance. Such guards are busiest in the morning when witnesses, accused persons, and members of the public enter court buildings. As cases are adjourned and finalised during the course of a day, the amount of human traffic entering and leaving court buildings drops considerably.

Outsourcing such guarding functions would be cost-effective for the state. Guarding contracts with private security companies could specify that a greater number of guards would be on duty during the busier morning periods than in the afternoons. This should improve safety at the courts. The state would pay only for the number of 'guarding hours' it procures.

High profile court cases often attract large numbers of spectators and protestors. An outsourcing contract could specify that court management would be supplied with additional guards at short notice for a day. This is impossible under the current system, where court guards are employed on a full-time basis, and any additional security services are provided by the over-extended SAPS, which is called upon to assist courts on busy days.

Smaller courts experience a problem when one out of a staff complement of two guards goes on annual leave. This poses a security risk to that particular court as its guarding levels are reduced by 50%. An outsourced guarding service would obviate such a problem. The contract would commit the guarding company to provide a complete guarding service throughout the year.

- **Cleaning services.** A similar argument to outsourcing the provision of security at courts can be made for court cleaning staff. Cleaning staff employed by the state often work with outdated and inadequate equipment. A private profit-orientated company providing cleaning services would operate with modern equipment, as this would permit it to do more work with less labour.

THE PENAL SYSTEM

History of the private imprisonment industry

Privately operated prisons constitute a small minority of the world's prisons. This has not always been the case, however. Before the twentieth century, privately operated prison facilities were commonplace in, for example, Britain and the United States.²⁷⁷

In medieval England jails were not publicly financed. Sheriffs obtained the right to run a jail by paying a fee to the crown.²⁷⁸ In the eighteenth century, English prisons were administered by local justices. Gaolers made their living by charging for board and lodging. No distinction was made between prisoners who were awaiting trial, debtors, and convicts awaiting transportation to the penal colonies. It was only in 1823, with the passing of the Gaol Act, that legislation sought, for the first time, to impose some standard and uniformity on the running of local prisons.²⁷⁹ By the twentieth century, governments the world over had assumed responsibility for nearly all aspects of imprisonment.

The proponents of absolute state control over all aspects of imprisonment argue that only the state should have the power to deprive people of their freedom. However, this is a flawed argument with respect to privately run prisons.

Prison guards, or their managers, do not deprive prisoners of their freedom. This is the role of the police, prosecutors, and judges who sentence people to be imprisoned. Duly authorised imprisonment by a fair and impartial court of law is legitimate, whether the court-imposed punishment is administered by a government employee or an employee of a private prison company.

Growth of the private imprisonment industry

Beginning in the mid-1980s, governments in the US, Britain, Australia, and some western European countries began contracting with private firms to operate and even own a variety of prisons.²⁸⁰ By the 1990s a vibrant private imprisonment industry had re-emerged in these countries.

United States

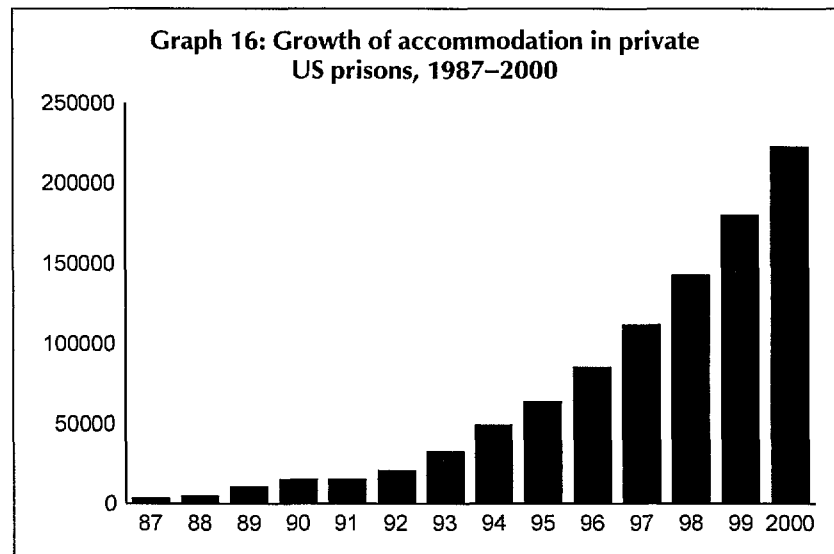
Since the late 1960s the US federal government's Bureau of Prisons has been contracting with private firms to operate community treatment centres and halfway houses where federal prisoners are trans-

ferred prior to being paroled. In the late 1970s the US Immigration and Nationalization Service (INS) contracted with private firms to detain illegal immigrants pending hearings or deportations. The INS began using private firms primarily because contractors were able to create new detention facilities more quickly than the federal government, whose procurement procedures require long lead times.²⁸¹

In the mid-1980s private firms began taking over the management and building of prison facilities intended for long-term adult inmates. Around this time another form of private sector involvement emerged in the US: the construction of privately owned facilities that were leased to the state for direct government operation. In terms of this scheme, an investment banking firm puts together a lease-purchase deal for a county or state government that wants to build a new prison. A private corporation is formed to build the new prison. Investors buy 'certificates of participation' or shares. The prison is then leased to the government, and the lease payments are used to repay investors.²⁸²

Another American development has been 'speculative prison building'. Money is raised from investors, and a prison is built prior to the signing of a contract. Only once the prison is built and set up is the government approached to enter into a contract with the private firm.²⁸³

Over the last ten years the number of privately operated and owned prisons in the US has increased substantially. In 1987 private secure adult correction facilities accommodated slightly more than 3 000 inmates; by 1997 this had increased to more than 111 000.²⁸⁴ According to projections, it will increase to 223 000 by the year 2000 (graph 16).²⁸⁵ In 1997 private prison companies controlled about 5% of prison beds nationwide. The number of such beds is growing at four times the rate of those administered by state-run prisons.²⁸⁶



<i>Year</i>	<i>Number of prisoners accommodated</i>	<i>Increase</i>
1987	3 122	–
1988	4 630	48.3%
1989	10 973	137.0%
1990	15 300	39.4%
1991	15 476	1.2%
1992	20 687	33.7%
1993	32 555	57.4%
1994	49 154	51.0%
1995	63 595	29.4%
1996	85 201	34.0%
1997	111 588	31.0%
1998^a	142 799	28.0%
1999 ^a	179 884	26.0%
2000^a	223 002	24.0%

a Forecast

Source: Thomas, C W, Private Corrections Project, University of Florida

In 1997 there were 17 different private firms that built and managed prisons under government contract in the US. The firms vary in size. Some manage only a single prison, while others, such as the Cor-

rections Corporation of America, run 52 prisons containing 42 000 prisoners. The larger firms offer a variety of services. For example, the Correctional Services Corporation, which manages 24 facilities, provides 'comprehensive offender risk management services' through three corporate divisions.²⁸⁷ These services include:

Adult corrections:

- detention for awaiting-trial accused, and illegal immigrants awaiting deportation; and
- secure detention for convicted accused, and shock incarceration ('intensely structured and regimented residential correctional services that emphasise disciplined activities — generally limited to youthful offenders').²⁸⁸

Correctional supervision:

- non-secure, residential correctional services for offenders in need of supervision and monitoring. This service entails visiting the offender at his place of work or home on a frequent basis, and requiring him to participate in a variety of community programmes.

Youthful offender/juvenile programmes:

- secure detention for awaiting trial and convicted youth;
- educational, vocational, and life skills training; and
- traditional treatment programmes for substance abuse, anger management, and aggression control.

Another private firm, Wackenhut Corrections, provides prisoner and court services including transporting prisoners between prisons and courts and providing secure custody of prisoners at courts, both in the holding cells and in courtrooms.²⁸⁹

Privately run prisons in the US are at the forefront of providing profitable employment for their inmates. This is not a new development. US prisons were originally intended to be self-supporting, and during the nineteenth century many state prisons ran surpluses, returning excess funds to their state governments. In 1885 three quarters of US prison inmates were involved in productive labour, the majority of them working under contract for private employers.²⁹⁰

A survey commissioned by the National Institute of Justice identified more than 70 companies that employ prison inmates in manufacturing, service, and light assembly operations. The National Center for Policy Analysis supports prisoners' works programmes: 'Such work benefits everyone. It enables prisoners to earn wages and acquire marketable skills while learning individual responsibility and the value of

productive labour. It also ensures that they are able to contribute to victim compensation and to their own and their families' support while they are in prison.²⁹¹

United Kingdom

In 1970 the British Home Office began using private security firms to administer immigrant detention centres at principal airports and escort services associated with them.²⁹²

Advanced by the Adam Smith Institute, the idea of privately operated prisons gained popularity in government circles in the mid-1980s. A 1987 British home affairs committee report recommended that private firms be permitted to tender for the construction and management of prisons and that priority be given to contracting out remand centres (for awaiting-trial prisoners), 'because it is here that the most overcrowding in the prison system is concentrated'.²⁹³

In 1990 the British government adopted most of the recommendations of private management consultants to issue contracts to private firms to design, construct, and operate remand centres, and to turn existing remand centres over to the private sector. The consultants further recommended that the government issue separate contracts for court and escort duties, such as escorting prisoners to and from court, guarding prisoners at court, and providing court security. This separation between remand centre and escort duties was recommended, as an increase in the efficiency of staff and managers would result from concentrating specially trained employees on their principal missions, rather than requiring them to do both.²⁹⁴

In 1993 the British government announced that it would create a private prisons sector 'large enough to provide sustained competition'. This entailed the private management of about 10% of the prisons in England and Wales.²⁹⁵ The Labour Party took over the government in 1997 and agreed to continue with the previous government's prison privatisation programme, largely because of worsening prison population pressures.²⁹⁶

Non-custodial forms of punishment such as parole and correctional supervision, while funded by the central government, are run like a business, with six regions under well-paid business managers. Private companies, not-for-profit organisations, and the scaled-down state-run probation service bid for market shares to provide electronic tagging apparatuses, day centres, drug and alcohol rehabilitation centres, and other supervisory functions.²⁹⁷ The tender process introduces market forces into the operation and management of non-custodial forms of correction.

Advantages of greater private sector participation

According to Professor Charles Logan of the University of Connecticut, there is 'no potential problem with private prisons that is not matched by an identical or closely related problem among prisons that are run by the government. It is primarily because they are prisons, not because they are contractual, that private operations face challenges... While privatization raises no truly new problems for prisons, it does offer some new solutions'.²⁹⁸

Lower costs and faster delivery

A study by the US-based National Institute of Justice found that a realistic expectation of savings through contracting is in the range of 5% to 15%.²⁹⁹ The British National Audit Office, which investigated two privately constructed prisons, found a cost saving of approximately 10% for these prisons when compared to the cost of building them with public finance.³⁰⁰ The need to show a profit in a competitive market is a powerful incentive for private contractors to reduce waste and raise productivity. 'The costs are lower and efficiency greater because managers in private facilities have more freedom to manage effectively.'³⁰¹

Contracting allows the state to avoid rigid procurement procedures. Private contractors can purchase material more quickly, maintain lower levels of stock, and negotiate better prices. As a result, private contractors can create new prison facilities faster than the state. It takes the state an average of five years to construct a prison in South Africa. It is estimated that a private sector developer could do the same work in 18 months.³⁰²

According to the International Finance Corporation, private financing and management of prison infrastructure can deliver faster and better service performance than is possible under public management, particularly during the design and construction phase.³⁰³ This is of particular importance in South Africa, where the backlog in the construction of new prisons is very large.

Improved quality control

Studies of facilities operated by private firms have reported good conditions and services, relative to public facilities.³⁰⁴ The then South African minister of correctional services, Dr Sipo Mzimela, visited a number of countries to investigate their prison systems. 'Wherever the private sector got involved, they have delivered a better service, and have done it at less cost to the taxpayer,' Dr Mzimela said.³⁰⁵

In a competitive market it is in the self-interest of private firms to deliver the best service possible. Should they fail to do so, it is likely that their contracts will not be renewed.

The state can contractually specify that certain conditions and minimum standards have to be met in private facilities. 'Contracting forces government agencies to establish specific and written performance standards and goals, something that is done less frequently in the direct public provision of services.'³⁰⁶ In South Africa the government currently has no choice but to accept the standards set by the Department of Correctional Services, as there is no alternative provider of prison services to whom it can turn.

Better rehabilitation

Private prisons have a greater incentive to provide training and employment opportunities for prisoners. Active prisoners generate wealth which can be used to offset the running costs of prisons. Work for prisoners also lowers boredom levels and reduces the mundaneness of prison life. Research conducted by the Florida Correctional Privatization Commission — a statutory body — found that prisoners released from privately operated prisons had a lower incidence of recidivism than prisoners released from public prisons.³⁰⁷

The private sector has also been innovative in devising and providing alternatives to incarceration. In the US, the private sector is a major participant in providing treatment centres for persons convicted of alcohol and drug-related crimes, non-secure institutions for juveniles and adults, and correctional supervision schemes.³⁰⁸

The South African situation

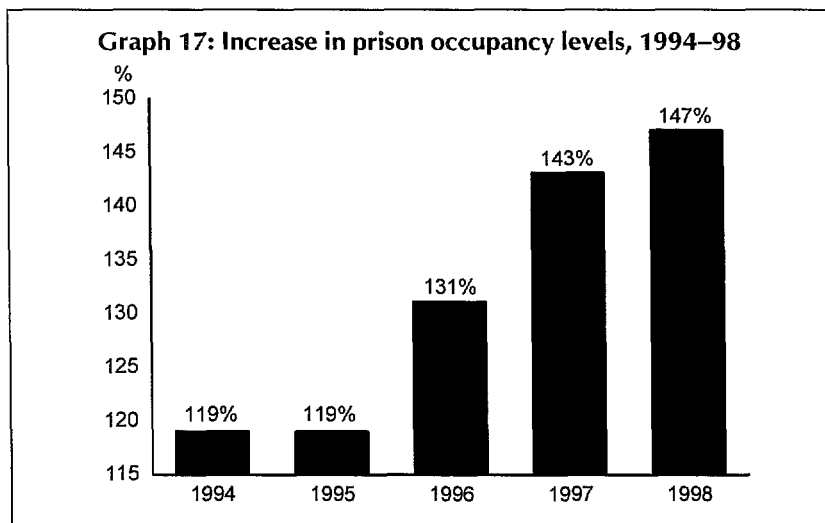
The breakdown of the state-run prison system

The Department of Correctional Services has been investigating private sector participation in the construction and management of prisons since 1994. The department's commitment to utilising the private sector is a result of both a shift in its thinking and necessity. The South African prison system is unable to cope because of its lack of resources and crumbling infrastructure.

- **Overcrowding.** The prison system is facing collapse because of overcrowding. Far from rehabilitating criminals, prisons are becoming centres of crime.

South Africa's prisons have a capacity to house 99 400 prisoners, yet the country's 231 prisons are holding more than 134 000

inmates. Within a four-year period, between 1994 and 1998, prison occupancy levels increased from 119% of capacity to 147% (graph 17).³⁰⁹ Some prisons are overcrowded to a much greater extent than the national average. For example, Pretoria Central Prison has an occupancy level of 220%.³¹⁰ Occupancy levels are determined by an ideal level of occupancy. Prisons are designed to accommodate a set number of prisoners so that prisoners may live in hygienic and humane conditions. The number of prisoners in excess of the ideal determines the level of overcrowding.



Source: Department of Correctional Services

- Lack of resources.** While there are more than 134 000 prisoners, the Department of Correctional Services' budget provides for only 118 000.³¹¹ A budget that ignores 16 000 inmates is under strain to provide prisoners with sufficient food and other necessities. For example, prisoners at Pollsmoor prison (near Cape Town) receive only two proper meals a day: breakfast at 9h00, and lunch at 12h00. According to a report released by a board of inquiry appointed by Dr Mzimela, prisoners in Pollsmoor go 'without a meal for approximately 19 hours'.³¹²

Many prisoners rely on family and friends to provide them with provisions to supplement their prison meals. This places an unfair strain on prisoners' families, and encourages corruption among prison staff, who are supposed to search everything that enters the

prison. Unsurprisingly, drug trafficking in Pollsmoor is out of control, with drug-related money 'exchanging hands at approximately R300 000 per week'.³¹³

Owing to a lack of resources, South Africa's inmate to warder ratio is a high 5 to 1.³¹⁴ In Botswana it is 3 to 1, in Germany and Australia only 1.5 to 1.³¹⁵ The Department of Correctional Services is short of 4 495 personnel nationally.³¹⁶ This is aggravated by the fact that the department has never had a day with full staff attendance. Between May 1996 and April 1997, an average of 2 424 employees, out of a total workforce of 29 000, were absent on each working day for unknown reasons or ill health.³¹⁷

Cost cutting has even forced the department to stop photographing prisoners. In the words of a department spokesman: 'Taking photos of every prisoner is too expensive, time consuming and a great administrative problem.'³¹⁸

- **Human rights abuses.**³¹⁹ Three quarters of South Africa's prisons are more than 20 years old. Some 92 prisons are in need of repair and budget cuts have suspended repairs at 18.³²⁰ Two Eastern Cape prisons are so old they have no electricity. In 1997 they housed a total of 228 prisoners, but had only 21 beds between them. As a result most inmates slept on mats on the floor.³²¹

Owing to overcrowding, hardened criminals are often mixed with people imprisoned for relatively minor crimes. Young people in prison for the first time are frequently abused and assaulted by their fellow prisoners. During 1997, some 3 050 (2 252 in 1996) incidents of assault among prisoners were reported, resulting in the death of 25 prisoners.³²²

During a search of prisoners' cells at Pollsmoor in May 1997, prisoners were assaulted by the search teams (including SAPS reaction unit members). Prison authorities subsequently revealed that 155 prisoners sustained injuries which necessitated medical attention.³²³

Speaking to the portfolio committee on correctional services, Dr Mzimela related the story of an inmate who had swallowed a valuable item for safekeeping. While he was still alive, this inmate's stomach was cut open with a razor blade by his cell mates, who wanted the item. After retrieving it from the man's stomach, they proceeded to cut his heart out, sliced it up and ate it. The overburdened warders were unaware of what was happening.³²⁴

The situation is so serious at some prisons that the commissioner of correctional services, Dr Khulekani Sithole, is concerned

that his department would lose a court challenge if prisoners sue the department for imprisoning them inhumanely. 'The department could be forced by the courts to release prisoners on this basis,' Dr Sithole said.³²⁵

Escapes. Overcrowding, badly designed and run prisons, and insufficient staff, lead to a number of prisoner escapes each year. While escapes are on the decrease, it is too early to say whether this is a long-term trend. Seen over the past ten years, the level of escapes is still high (graph 18). According to Dr Mzimela, a primary contributing factor to prison escapes is the 'negligence of personnel'.³²⁶



Note: The four 'independent' homelands had their own prisons. These prisons were transferred to the Department of Correctional Services with the reincorporation of the homelands into the Republic of South Africa in 1994.

Source: Department of Correctional Services

Year	Escapes	Increase/ (decrease)
1988/89	575	-
1989/90	663	15.3%
1990/91	746	12.5%
1991/92	1 126	50.9%
1993	1 171	4.0%
1994	1 233	5.3%
1995	1 247	1.1%
1996	1 345	7.9%
1997	1 050	(21.9%)

- **Recidivism.** The recidivism rate is extremely high. Between 87.5% and 95% of all convicted accused are not rehabilitated and commit further crimes. More than half of all sentenced prisoners have been to prison before.³²⁷ The purpose of imprisonment is to punish the accused, to protect society, and to rehabilitate the prisoner. The latter point is important as virtually all convicted prisoners are released back into society upon full or partial completion of their sentence. It is therefore important that such prisoners are rehabilitated and weaned from their criminal habits.

Private sector participation through APOPS and POPS

If current trends continue, it is only a matter of time before many of the country's prisons break down completely. The government is aware that it does not have the financial resources or the expertise to salvage the prison system.³²⁸

In late 1996 the cabinet approved APOPS (Asset Procurement and Operating Partnership System), a sub-programme of the government's broader public-private partnership initiative. APOPS, co-ordinated by the Department of Public Works, facilitates public-private sector partnerships to provide specialised infrastructure, together with the procurement of associated operations and services for a long-term period of up to 25 years.³²⁹

There is pressure on the government to reduce the budget deficit. One way of doing this is to reduce government capital expenditure by contracting out essential services, and utilising private sector funds for these services. The APOPS programme strives to relieve the deficit by utilising private sector finance, while allowing the government to retain a certain measure of control over the services it contracts out.

In terms of APOPS, the Department of Correctional Services will enter into partnerships with the private sector, which will finance the building, design, operation and maintenance of certain prisons. With APOPS the prison buildings which the private sector finances become state property after a period of 25 years.³³⁰ If an APOPS contract has to be cancelled because of a breach of contract based on a lack of service delivery, the department can take over the prison in question. In such a case the government will have to refund the outstanding capital balance to the private contractor.

The Department of Correctional Services has put the construction of an initial four correctional facilities out for tender.³³¹ Tenders will be granted in terms of certain criteria based on experience, financial capability, previous performance, records of management of such infrastruc-

ture, rendering the best possible value for money, and socio-economic benefits.³³²

Performance-related payment is the key to prison contracting. Private sector managers will be paid for providing such things as clean cells, edible food, hygienic ablution facilities, and adequate clothing. For the super maximum prisons, 'any single escape from the facility will constitute a breach of contract' between the private contractor and the Department of Correctional Services.³³³ In the case of an escape, it is likely that the department will be able to 'fine' the contractor concerned.³³⁴

The private contractor will provide the capital funds for the construction of the facilities. The department will pay only a certain amount per prisoner per day to the successful tenderer. It is unlikely that this amount will be higher than the present expenses per prisoner per day.³³⁵

Another joint venture with the private sector proposed by the Department of Correctional Services is POPS (Procurement and Operating Partnership).³³⁶ With POPS, there is no building procurement. The private sector will either build a new prison building or convert an existing building into a prison — the residential Ponte Tower in Johannesburg, for example — which will meet the requirements of the department.

The private contractor lets the building to the department, and may even manage and operate the prison. However, on completion of the contract, the state is under no obligation to take over the building. Ownership remains with the private operator, who can seek to extend his contract with the department or use the building for a different purpose altogether.

POPS is more cost-effective for the state than APOPS. The state never owns the building and does not have to pay for it, save the rental costs for the duration of its use as a prison. Moreover, in the case of a breach of contract that results in the cancellation of the contract, the department is not subjected to additional payments on the building itself.³³⁷

The legislative framework

Legislation promulgated in 1997 empowers the minister of correctional services to appoint private contractors to design, construct, finance, manage and operate prisons.³³⁸ The legislation is broad in terms of what functions and services the Department of Correctional Services may contract out to the private sector. It does, however, contain a number of safeguards to ensure the state can regulate the disciplining of prisoners and the granting of parole. The legislation also ensures the state retains control of the services and facilities it contracts out.

A contract between the state and a private contractor is limited to 25 years. A private contractor may not conduct disciplinary hearings against a prisoner, apply and administer correctional supervision, or place any prisoner on parole.³³⁹ To avoid contracted personnel striking, private contractors must apply to the essential services committee — in terms of the Labour Relations Act³⁴⁰ — to have the whole of the service provided under the contract declared an essential service.³⁴¹

The commissioner of correctional services must appoint a controller for every contracted-out prison. It is the duty of the controller to monitor and review the daily management and operation of the prison for which he is responsible. The controller is empowered to order the director of a prison to detain certain prisoners separately, and to detain a prisoner in a single cell.³⁴²

The director of a prison, responsible for daily management and operation, may be appointed by the private contractor only with the written approval of the commissioner.³⁴³ In an emergency — when a prison director has lost effective control of a contracted-out prison, and there is a threat to persons or property — the minister of correctional services may appoint a temporary manager to act as head of that prison.³⁴⁴

An inspectorate, under the control of an inspecting judge, facilitates the inspection of prisons in order to report on the treatment of prisoners, and conditions in prisons.³⁴⁵ The inspecting judge appoints independent prison visitors for every prison. They visit prisons regularly and deal with the complaints of individual prisoners. By law they have access to any part of a prison, and to any relevant document or record, and may interview prisoners in private.³⁴⁶

Greater scope for private sector involvement

Dr Mzimela's commitment to greater private sector participation in the construction and management of prisons was commendable. He was superseded by Mr Ben Skosana in July 1998. Government bureaucracy has, however, hampered progress. Prolonged negotiations with the departments of public works, and finance, the Treasury, and tender boards have, in the words of Dr Mzimela, 'cost endless time and money' without producing substantial results.³⁴⁷

If all goes well, construction of the first of four private sector prisons should begin in the first half of 1999, to be operational at the end of 2000.³⁴⁸ The situation is so critical, however, that the Department of Correctional Services should explore ways of outsourcing specific aspects of the prison system in the interim. For example:

- **Outsourcing services at existing facilities.** The board of inquiry on Pollsmoor prison recommended that ‘a private security firm should be employed to man all points of entry’ into the prison.³⁴⁹ This would allow warders to concentrate on their core functions: to guard and rehabilitate the prisoners in their charge. Private guards would also replace corrupt warders who allow drugs and weapons to be smuggled into the prison. A solution to the meal situation at Pollsmoor would be to hire a private catering firm to provide inmates with three proper meals a day.

The Department of Correctional Services should analyse all services performed by department staff to ascertain whether they could be outsourced to the private sector. The provision of food, clothing, health care, perimeter security, laundry services, and the transporting of prisoners could be contracted out to the private sector. Moreover, the provision of various training and development programmes such as metal, building and woodwork, could be outsourced to private sector educationists and vocational trainers. This will be more cost-effective for the state, and allow the department to release warders from such tasks.

Of the department’s 29 000 staff, only 18 000 (or 62%) are warders. They perform the department’s core function of guarding and rehabilitating prisoners.³⁵⁰ The bulk of the remaining personnel are administrative staff. Most of the functions performed by non-warders could be outsourced to the private sector.

- **Checking on persons sentenced to correctional supervision.** Convicted persons can be sentenced to a period of correctional supervision in lieu of a sentence of straight imprisonment. This is a form of house arrest outside of working hours. Correctional services staff are often utilised to check on such persons to confirm that they are complying with their correctional supervision conditions. Some 1 100 members of the department work as correctional supervision officers to monitor 46 000 persons.³⁵¹ According to a work study investigation by the department, this is to be increased to 2 012 posts.³⁵² Such a service could be outsourced to the private sector.
- **Monitoring parolees.**³⁵³ During 1997, over 50 000 prisoners were released on parole.³⁵⁴ Prisoners eligible for parole could be required to deposit a sum of money as a guarantee that they will not violate the terms of their parole — for example, submit to drug tests, not commit further crimes, and report regularly to a correctional services official or a private parole agent. This should be waived only in instances where the prospective parolee genuinely

has no money available to him. The amount of money to be deposited should be set by the courts or parole boards based on the parolee's financial means, criminal history, and risk of abscondment. An important source of funds for parolees could be wages earned doing work while in prison.

Private sector parole agents could assist parolees in obtaining the money they require for parole by assisting them with loans. Parolees violating the terms of their parole would forfeit their money to the state, thereby generating money for the Department of Correctional Services, or the private parole agent. Parole agents would reduce the need for taxpayer financed public parole officers. Moreover, with their own money at risk, parole agents would monitor their parolees closely, reducing the abscondment rate. Over 7 000 persons who were released on parole supervision absconded in 1997.³⁵⁵

- **Specialist facilities.** There is a need for specialist correctional facilities in South Africa. Detention centres for illegal immigrants, youth development centres for juveniles convicted of relatively minor crimes, and prisons for awaiting-trial accused are needed. The Department of Correctional Services does not have the resources or specialist staff to provide the infrastructure and services these facilities require. The department could look to the private sector for the provision and management of such specialist facilities.

Prison labour: cutting costs and generating profits

It is the Department of Correctional Services's aim to 'become more self sufficient and therefore less dependent on government and the taxpayer through the establishment of prison industries'.³⁵⁶ Referring to the agricultural production and the manufacture of other goods within the prison system, Dr Mzimela stated there was a need to 'run both ventures along business lines'.³⁵⁷

According to the department it is important that a healthy work ethic is cultivated among prisoners in order to facilitate their reintegration into the community. 'By performing productive labour, sentenced prisoners are given the opportunity to extend their skills and knowledge, increasing their chances of obtaining employment after their release.'³⁵⁸

In 1997 prisoners and prison staff produced agricultural products with a value of R57m, generating a net profit of R7m. The department was, however, unable to attain complete self-sufficiency in any of the categories of agricultural produce. For example, with vegetables the self-sufficiency was 66%, with fruit 43%, and with milk only 27%.³⁵⁹

The department owns large tracts of land (20 prison farms comprising 40 000 hectares), and has a workforce that wants to work, and does not require many of the expensive benefits available to employees outside of prison such as medical aid, maternity leave, and housing allowances.³⁶⁰ Prison labour can work for less remuneration as it has fewer expenses than workers in the outside world. Despite this the department is incapable of attaining self-sufficiency in the agricultural production field. Moreover, the department under-utilises the labour at its disposal. A daily average of 3 680 prisoners were utilised on prison farms in 1993/94; by 1997/98 this had dropped to 2 777.³⁶¹

The department's agricultural production facilities could be outsourced to private contractors. Such contractors would have an incentive to increase productivity and output. They would seek to provide not only the needs of the department, but also produce for the general market. Some of the profits thus generated could be ploughed back into the department's coffers.

The department also runs steel, wood and textile workshops throughout the country. These workshops produce a variety of items for the department's own use, as well as for the use of other government departments. The workshops generated a net profit of R9.3m during the 1996/97 financial year.³⁶² The workshops and additional production lines could also be outsourced to the private sector to run them on a profitable basis.

The department supplies prison labour to private companies and individuals who need extra workers on a temporary or ongoing basis. This is not done very effectively, however. In 1997/98, an average of 3 914 prisoners were hired out per weekday for a nominal fee of R5 each.³⁶³ By outsourcing this operation, prison labour could be run on a profit basis. Thereby income could be earned in terms of the quantity and type of labour supplied, instead of the present fixed and ludicrously low rate. With a higher profit ratio, prisoners can be paid for the work they perform, which will serve as an incentive for other prisoners to work.

Prison labour is beneficial to prisoners, the employers of such labour, the taxpayer, and even victims of crime. Prisoners benefit through the wages they earn, which they can use to purchase goods, or invest for the day of their release. Employers benefit through the availability of relatively inexpensive labour with minor overhead costs.³⁶⁴ Taxpayers benefit, as part of prisoners' wages could go to the department for the general upkeep of prisons.

Finally, prisoners can use some of the money they earn to pay into a victims' compensation fund, which would seek to assist victims of

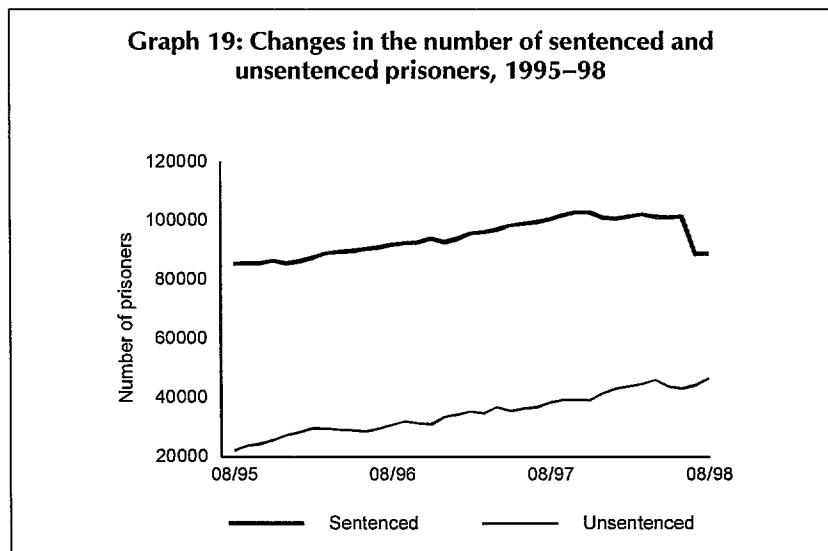
crime. Prisoners could be encouraged to do this by a scheme which would bring forward their parole date if they contribute to the fund.

The bail system and the private sector³⁶⁵

Introduction

South Africa's prisons, with a capacity to accommodate 99 400 people, are holding more than 134 000. At current trends, with the prison population increasing at 1% per month, the number of inmates will be over 200 000 by the end of 2001.³⁶⁶ Based on current building and expansion plans by the Department of Correctional Services, a mere 14 400 extra prison beds will be available by 2001.³⁶⁷ The shortfall will then be some 86 000 beds.

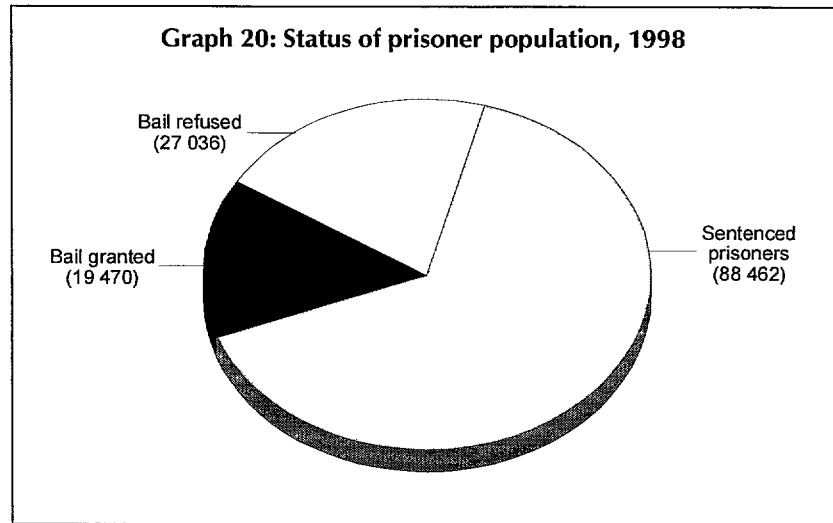
The increase in the prison population over the last year few years is primarily the result of an increase in the number of awaiting-trial prisoners. Some 34% of all prisoners fall into this category.³⁶⁸ In the three years between August 1995 and August 1998, the number of sentenced prisoners increased from 85 127 to 88 462 — by 4%. Over the same period, the number of awaiting-trial prisoners increased from 22 051 to 46 506 — by 111% (graph 19).³⁶⁹



	<i>Sentenced</i>	<i>Unsentenced</i>	<i>Total</i>	<i>Unsentenced as a proportion of the total</i>
August 1995	85 127	22 051	107 178	20.6%
September 1995	85 404	23 750	109 154	21.8%
October 1995	85 273	24 360	109 633	22.2%
November 1995	86 160	25 648	111 808	22.9%
December 1995	85 252	27 320	112 572	24.3%
January 1996	85 869	28 364	114 233	24.8%
February 1996	87 048	29 708	116 756	25.4%
March 1996	88 491	29 589	118 080	25.1%
April 1996	89 061	29 153	118 214	24.7%
May 1996	89 348	29 015	118 363	24.5%
June 1996	90 144	28 453	118 597	24.0%
July 1996	90 613	29 528	120 141	24.6%
August 1996	91 601	30 729	122 330	25.1%
September 1996	92 091	32 008	124 099	25.8%
October 1996	92 369	31 211	123 580	25.3%
November 1996	93 736	30 842	124 578	24.8%
December 1996	92 326	33 424	125 750	26.6%
January 1997	93 547	34 303	127 850	26.8%
February 1997	95 340	35 377	130 717	27.1%
March 1997	95 880	34 755	130 635	26.6%
April 1997	96 748	36 696	133 444	27.5%
May 1997	98 147	35 545	133 692	26.6%
June 1997	98 800	36 230	135 030	26.8%
July 1997	99 212	36 669	135 881	27.0%
August 1997	100 304	38 330	138 634	27.6%
September 1997	101 648	39 331	140 979	27.9%
October 1997	102 579	39 255	141 834	27.7%
November 1997	102 648	39 032	141 680	27.5%
December 1997	100 975	41 435	142 410	29.0%
January 1998	100 491	43 103	143 594	30.0%
February 1998	101 318	43 917	145 235	30.2%
March 1998	101 851	44 584	146 435	30.4%
April 1998	101 148	45 769	146 917	31.2%
May 1998	100 885	43 728	144 613	30.2%
June 1998	101 336	43 140	144 476	29.9%
July 1998	88 301	44 138	132 439	33.3%
August 1998	88 462	46 506	134 968	34.5%

Source: Department of Correctional Services

Approximately 19 500 prisoners (14.5% of the total prison population) have been granted bail (graph 20). Of these, 6 460 have been granted bail of less than R500.³⁷⁰ A prisoner costs the state R71 per day.³⁷¹ The Department of Correctional Services thus spends R1.4m a day on awaiting-trial prisoners who have been granted bail, but are unable to pay.



Source: Department of Correctional Services

In some areas the situation is worse than the national average. A June 1997 study by the Bureau for Justice Assistance — a joint project between the South African Ministry of Justice and the US-based Vera Institute of Justice — found that 75% of accused persons from Mitchells Plain magistrate's court (near Cape Town), who were awaiting trial at Pollsmoor prison, had been granted bail.³⁷²

To alleviate the overcrowding problem, the number of awaiting-trial prisoners who have been granted bail must be reduced to a minimum. This would have the following benefits:

- more room will be created for sentenced prisoners, improving their chances of rehabilitation. This will have a positive long-term effect on the crime rate;
- the Department of Correctional Services will save money, as fewer awaiting-trial prisoners will have to be accommodated by the prison system at the state's expense; and

- more awaiting-trial accused will be able to work and earn an income to support themselves and their families, without being a burden to the state.

Bail agents

In the United States many jurisdictions have privately employed bail bondsmen or agents who assist accused persons granted bail to obtain the money they require to be released from custody. Bail agents make their profits by lending money to accused persons at a fee.

Bail agents have a pecuniary interest in preventing their clients from absconding once released on bail. Thus, in the US, bail agents mail reminders of future court dates to accused persons, 'phone them the day before court, or require accused persons to telephone their office periodically'.³⁷³

In South Africa, many accused persons experience difficulties obtaining bail money on the day of their first court appearance. Few anticipate their arrest, and do not have the required money on them when they appear in court for their bail hearing. In such cases, the accused person is transferred to the awaiting-trial section of the local prison. Bail payments are only accepted in cash or by bank guaranteed cheque. Courts close at 4pm, banks even earlier. While prisons accept bail money at any time, under-staffing and bureaucracy often make it difficult for an accused person's family to pay bail outside of normal working hours and on weekends.

The poor, who have to rely on public transport to get to a court, bank or prison (frequently outside of town), have difficulties paying bail for their incarcerated friends or family members. Relying on public transport or walking increases the risk of being robbed of this money.

A bail agent would assist an accused person in obtaining money for bail in a variety of ways:

- the agent (and his staff at the larger centres) would liaise with an accused person's family and friends. The agent would, for example, contact an accused person's family the moment the accused appears in court for a bail hearing. The agent would inform them of the accused's predicament, and assist them in a variety of ways, such as arranging transport, or procuring a bank loan;
- the agent would assist an accused person in obtaining a bank guaranteed cheque. The agent would also obtain financial statements on behalf of an accused, to assist the court in coming to a fair decision on bail;

- at an accused person's request, a bail agent would assist him in mortgaging his fixed assets, or pawning property to raise money for bail. The agent would liaise with banks, auctioneers, and pawn shops on behalf of the accused;
- bail agents would seek the permission of banks to act on their behalf in certain limited instances. Bail agents would verify an accused person's identity, bank account details, and creditworthiness. This would enable them (with the banks' consent) to make out bank guaranteed cheques at court or the prison, or provide bank loans to an accused; and
- bail agents would verify an accused's assets, family and community ties, and the accused's ability to repay loans upon his release. Having done so, bail agents would be in a position to lend money to an accused, at a fee or interest rate which reflects the flight risk of the accused. Such verified information would also assist presiding officers. The constitution holds that every accused person is entitled to be released on bail 'if the interests of justice' permit it.³⁷⁴ Moreover, it is accepted law that bail should be set at an amount the accused can afford. Setting bail beyond an accused's means is tantamount to a refusal of bail.³⁷⁵ This happens, however, because presiding officers have insufficient information on an accused's financial position. Bail agents, who have a financial interest in the accuracy of their information on an accused, can assist presiding officers in setting bail at an appropriate amount. The Bureau of Justice Assistance has initiated a pre-trial services project whereby presiding officers are provided with verified information on accused in bail applications.³⁷⁶ According to the bureau, such information assists presiding officers to use conditions — such as reporting to a police station once a week — rather than exclusively setting money bail in circumstances where the offence is not of a very serious nature.³⁷⁷

Bail agents would operate on a profit basis, obtaining their income from the people they assist. Upon completion of the court case, they could, for example, take a percentage of the bail money which they facilitated for an accused. Alternatively, they could charge according to the services they offer, for example transporting relatives of an accused to prison, negotiating a loan with a bank, or auctioning some of an accused's assets. Or, they could charge interest on the money they lend to an accused.

Indigent accused might not be able to afford to pay for the service of a bail agent. It might, however, be in the state's interest that such

accused are also assisted by bail agents. Even the poorest awaiting-trial accused costs the state R71 a day.

In such instances, part of the agents' income would have to be subsidised by the state. The state could finance this from interest accrued on bail monies deposited with the courts, and any bail monies which are forfeited to the state because of the non-appearance of accused persons on their trial dates.

Bail enforcement agents

In the US bail enforcement agents work with bail agents to trace and apprehend accused persons who have reneged on their bail conditions. Bail enforcement agents trace and apprehend accused persons who have been released on bail through the efforts of bail agents, but who have absconded. The success of such agents in ensuring the attendance at court of an accused person released on bail is ten times greater than when such an accused is released on public bail.³⁷⁸

If an accused should not stand trial — and thereby break his bail conditions — the bail enforcement agent would have a financial interest in tracing the absconded accused. The National Center for Policy Analysis points out: 'The private bail agent can only stay in business if at least 95% of his clients show up in court. Agents have gone broke for failure to run their business as a business. That is why surviving private bail agents are so efficient at ensuring the appearance of their clients — at no cost to the taxpayer.'³⁷⁹

The US Fugitive Service (USFS), a private company, is part of a nationwide network of bail enforcement agents who exchange information on persons who have skipped bail.³⁸⁰ Through this network, fugitives are easily apprehended even if they move from one state to another. If an agent of the USFS apprehends a fugitive he has the power to arrest such a person. The USFS also transports fugitives to correctional services facilities.

The USFS monitors the compliance with bail conditions by accused persons. Thus, if an accused person has to remain within a certain area or not come into contact with certain persons, it is the USFS which monitors his compliance with such conditions, taking the burden off the police.

No new legislation is required for the legal operation of private bail enforcement agents in South Africa. A minor amendment to the Criminal Procedure Act would be sufficient to furnish enforcement agents with peace officer status. This would enable them to arrest persons who have broken their bail conditions.³⁸¹ Suitably trained and qualified persons working within the regulated ambit of the pri-

vate security industry, could be imbued with such powers to enable them to arrest bail absconders.

Bail accommodation facilities

Bail accommodation facilities (or bail hostels, as they are called in England and Wales) seek to accommodate certain kinds of awaiting-trial accused.

Bail is sometimes refused because the accused person poses a danger to himself, or to his alleged victim if they should come into contact. These are primarily cases involving assault where the parties are known to each other, such as spouses or neighbours, or cases where the accused person is addicted to alcohol or drugs, and a relapse might cause him to commit further crime. If such accused persons are employed, the denial of bail has harmful consequences for families who rely on their income. A solution is to provide accommodation for such accused where they would be obliged to stay outside of working hours, curtailing their movements.

Careful monitoring of their comings and goings, their alcohol or drug intake, or their attendance at counselling sessions for drug or alcohol abuse, domestic violence, or anger management, would reveal any non-compliance on the part of the accused, at which stage bail could be revoked by the court.

Trained staff at bail hostels in England assist awaiting-trial accused who intend to plead guilty. They encourage accused persons to face up to their guilt and to tackle the reasons for it. They also assist accused persons to salvage damaged family relationships.³⁸² By contrast, a remand in custody limits such opportunities, and provides no facilities to address the reasons for offending in order to reduce the risk of re-offending.

Bail accommodation facilities could be constructed and managed by the private sector, and operated on a profit basis. An accused person who is granted bail, on condition that he stay in these facilities, would have to pay accommodation and other related fees.

The benefits of such facilities are obvious. The taxpayer will not have to fund the incarceration of awaiting-trial prisoners using such facilities. Awaiting-trial accused using bail accommodation facilities will remain in their jobs which would be beneficial to society as a whole. The accused themselves would benefit as their reintegration into society would be easier in the event that they are acquitted at the end of their trial or given a non-custodial sentence.

Implementation

The above proposals are practical and easy to implement. The benefits of the proposals are numerous. Awaiting-trial accused who have been granted bail would make room in prison for convicted accused. This would result in considerable cost savings to the Department of Correctional Services, and improve its ability to manage and rehabilitate the convicted prisoners under its control. Moreover, fewer awaiting-trial accused would be incarcerated. They would be able to continue to work, support themselves and their families, and not rely on the state for support.

The departments of correctional services and justice would need to implement the following practical measures to assist aspirant bail agents, and bail enforcement agents:

- every court and prison should make available a room or rooms to prospective bail agents in which they can set up an office and conduct their business. This should not, however, be free of charge. Such rooms should be rented out. For an initial start-up period the rental could be below market values to encourage participation by as many prospective bail agents as possible;
- the state could enter into a partnership with private entrepreneurs interested in implementing these proposals. It might be in the interests of the state to assist bail agents in some of their activities. If the state has an interest in releasing indigent accused persons on bail it could assist bail agents in raising money for such accused persons; and
- the Criminal Procedure Act should be amended in the manner suggested to allow bail enforcement agents to operate effectively.

CONCLUSION

This study has proposed a variety of ways in which private sector involvement in the criminal justice system can be increased.

The private sector can take over and manage state assets, as has been proposed for police stations and prisons. The private sector can supplement and expand services already delivered by the state, as is the case with private security. The state can increase its effectiveness and cut costs by outsourcing many of its functions to the private sector, as has been proposed for all sectors of the criminal justice system. And the state can relax its controls over some of its functions, thereby encouraging greater private sector participation, as has been proposed for criminal investigations and private prosecutions.

To implement these proposals, and to improve its ability to combat crime, the state could deregulate the private security sector and not unduly restrict the industry's ability to deliver an effective service. The state should also desist from unnecessarily restricting people's ability to protect themselves and seek legal redress. In essence, the state should cut back its level of involvement in the non-core functions of the criminal justice system.

By performing fewer non-core functions itself the state will be able to do more in the fight against crime. More, because it can concentrate on its core duty of apprehending, prosecuting, and convicting criminals, rather than expending its limited resources on peripheral criminal justice functions. More because private individuals, the private sector, and civil society will play a greater part in the fight against crime. More, because private crime-fighting initiatives will reduce the financial and personnel burden on the state's criminal justice system, allowing it to concentrate its resources where they are needed most.

Few proposals contained in this study are really radical. The majority of them require only minor — if any — legislative changes to be implemented. What is required most is a change in the attitudes and mind-set of criminal justice policy makers and administrators, trade unions, and private sector entrepreneurs. What seemed unthinkable only a decade ago — a criminal justice system which is not a state monopoly — has become necessary and even desirable because of the state's inability to get to grips with crime.

Additional research is needed to investigate more radical ways to further reduce the state's influence on the criminal justice system. There are, for example, townships and informal settlements throughout the country where no formal policing services exist. The state

only has limited resources to build new police stations in such areas. Once a decision is taken to do so, it takes years to design and build one. Moreover, once built, police stations are often filled with badly trained and unmotivated police officers.

Residents of these areas might gain more from a system of state issued security vouchers. Such vouchers would be redeemable for policing and security services, or goods. Would a resident of a badly policed township want an ineffective police station with one badly maintained vehicle to protect him? Or, would he prefer an annual security voucher valued at, say R340, for every member of his family, which he could use as he thought fit on security related products and services?³⁸³ With their life and property — and that of their families — at stake, individual citizens, and not policy makers in far away Pretoria or Cape Town, should know what products and services best ensure their safety.

A family of five could use their annual quota of security vouchers valued at R1 700 to build a fence, instal an alarm system in their house, or hire the services of a private security firm. (Residents of the middle-class suburb of Observatory in Cape Town are paying R600 per household per year for a private security service which employs police reservists to patrol their suburb on a 24-hour basis.) They could select from a wide variety of services and goods to purchase whatever serves their security needs the most.

This might be a radical proposal, because it presupposes that it is not the state but individual citizens who know what is best for themselves. Moreover, it seeks to empower citizens to decide for themselves how they want to go about protecting themselves and their property within the ambit of the law.

This study does not make such a radical proposal. It should, however, serve to stimulate debate and further research on such proposals. Individuals need to be empowered to a point where they, and not the state, have the freedom to choose what kinds of goods and services, currently provided by the criminal justice system, they want to provide themselves, purchase from the private sector, or rely on the state to provide for them.

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- 112 Section 20, Act 92 of 1987, as amended
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- 120 *Ibid*
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- 323 Board of inquiry into the events of violence at Pollsmoor prison, op cit, p30. The SAPS opened 92 assault dockets and 52 theft dockets against prison warders at Pollsmoor prison. Prisoners also laid charges of malicious damage to property and the illegal pointing of a firearm (*Cape Argus* 4 December 1997).
- 324 Statement by Dr Sipo Mzimela, portfolio committee on correctional services, 14 October 1997
- 325 Statement by Dr Khulekani Sithole, portfolio committee on correctional services, 29 October 1997. Correctional services minister, Dr Sipo Mzimela, conceded that some prisoners' human rights may be infringed by bad conditions and overcrowding in jails. (*Cape Argus* 13 May 1998, 'Crammed jails "may hit inmates' rights".)
- 326 *Hansard* (S:Q) 9 col 871, 10 October 1996
- 327 *Hansard* (NA:Q) 12 cols 2471–2472, 16 October 1996
- 328 Speaking at a press conference in Cape Town on 22 April 1997, Dr Mzimela conceded that, 'the government has not got enough money for the prisons we need'.
- 329 Press release by Dr Sipo Mzimela, Cape Town, 15 April 1997
- 330 Ramafoko, H, 'DCS and private sector in a joint venture', *Nexus*, March 1998, p7
- 331 An awaiting-trial facility in Boksburg (Gauteng) for 1 500 inmates, a maximum security prison in Grootvlei (Free State) for 1 500 inmates, a further maximum security prison in Louis Trichardt (Northern Province) for 1 500 inmates, and a prison for juveniles in Barberton (Mpumalanga) for 800 inmates.
- 332 *Hansard* (NA:Q) 5 col 977, 19 May 1997
- 333 *Ibid*
- 334 *Business Day* 8 April 1998, 'Lock-ups with a difference — owners pay for every escape'
- 335 *Hansard* (NA:Q) 2 col 978, 19 March 1997
- 336 By the year 2001, three new prisons are to be operational in terms of the POPS programme: Johannesburg city centre (2 500 inmates), Pretoria city centre (1 200 inmates), and greater Johannesburg metropolitan centre (800 inmates). [Briefing by the chief deputy commissioner, Department of Correctional Services, to the portfolio committee on correctional services, 13 May 1998]
- 337 Ramafoko, op cit, p7
- 338 Section 20A(1), Correctional Services Act no 8 of 1959, as amended by Act 102 of 1997
- 339 Section 20A(2) of Act 8 of 1959, as amended by Act 102 of 1997
- 340 Section 70(2) of the Labour Relations Act no 66 of 1995, as amended
- 341 Section 20A(3)(e) of Act 8 of 1959, as amended by Act 102 of 1997
- 342 Section 20C(1) of Act 8 of 1959, as amended by Act 102 of 1997
- 343 Section 20D of Act 8 of 1959, as amended by Act 102 of 1997
- 344 Section 20J(1)(a) of Act 8 of 1959, as amended by Act 102 of 1997
- 345 Section 25 of Act 8 of 1959, as amended by Act 102 of 1997
- 346 Section 25H of Act 8 of 1959, as amended by Act 102 of 1997
- 347 Dr Sipo Mzimela, briefing to the portfolio committee on correc-

- tional services, 14 October 1997
- 348 Telephonic interview with Mr Bert Slabbert, ministerial liaison officer, Department of Correctional Services, 25 November 1998
- 349 Board of inquiry into the events of violence at Pollsmoor prison, op cit, p48
- 350 *Hansard* (NCOP:Q) 6 col 656, 20 October 1997
- 351 Dr Khulekani Sithole, commissioner of correctional services, briefing to the portfolio committee on correctional services, 29 October 1997
- 352 Department of Correctional Services, annual report, 1996, p9
- 353 Many of the ideas on parole come from, Reynolds, 'Privatizing the probation and parole systems' in *Using the Private Sector to Deter Crime*, op cit, <<http://www.ncpa.org/studies/s181/s181m.html>>
- 354 Department of Correctional Services, annual report, 1997, p10
- 355 Ibid, p10
- 356 Department of Correctional Services document (untitled), released during parliamentary briefing week, Cape Town, 12 February 1998, p2
- 357 *Hansard* (NCOP) 3 col 387, 5 May 1998
- 358 See, 'Building for freedom', *Triple Trust Newsletter*, October 1997, p4
- 359 Department of Correctional Services, annual report, 1997, p36
- 360 Mr Frik Bell, Director: Industries, Department of Correctional Services, submission to the portfolio committee of correctional services, 6 May 1998
- 361 Ibid
- 362 Department of Correctional Services, annual report, 1997, p36
- 363 Mr N Ntolo, deputy director: labour and operations, Department of Correctional Services, fax to the author, 26 May 1998
- 364 For a discussion of the effect of labour legislation on prison labour see van Zyl Smit, D, 'Prison labour in South Africa', Institute of Criminology, University of Cape Town, Cape Town, May 1996, pp24-27
- 365 This section is based on a paper submitted by the author, on behalf of the South African Institute of Race Relations, to the Department of Correctional Services entitled, 'Proposals to decrease prison overcrowding through the use of bail agents, bail enforcement agents, and bail accommodation facilities', 24 April 1998
- 366 Mr Gideon Morris, parliamentary services, Department of Correctional Services, fax to the author, 26 January 1998
- 367 *Business Day* 14 May 1998, 'No more room for prisoners in jail'
- 368 Mr Vusi Shabalala, Department of Correctional Services media liaison services, fax to the author, 9 October 1998
- 369 Ibid
- 370 Ibid, 15 May 1998
- 371 Department of Correctional Services, annual report, 1997, p3
- 372 Paschke, R, 'Pollsmoor awaiting trial population profile and a study of first appearance decisions in Mitchells Plain Magistrates Court: Preliminary results and the role of the Pre-trial Service demonstration', Bureau for Justice Assistance, November 1997, p6
- 373 Toborg, M A, 'Bail bondsmen and criminal courts', *The Justice System Journal*, vol 8, no 2, 1983, p142
- 374 Section 35(1)(f) of Act no 108 of 1996
- 375 In *R v Conradie* 1907 TS 455, the court held that bail should not be set at an amount so high that the

- accused cannot pay it, as that would be tantamount to a refusal of bail.
- 376 Memorandum of understanding between the South African Ministry of Justice and the Vera Institute of Justice regarding the establishment of the Bureau for Justice Assistance, Cape Town, 9 May 1997
- 377 Telephonic interview with Mr Ron Paschke, Director of Research and Technology, Bureau for Justice Assistance, 28 January 1998
- 378 Alexander Grant study: 'Private bail agents have a 0.8% fugitive rate versus 8.0% percent for public bail'. See <[http://www. public-policy.org/studies/s181/s181g.html](http://www.public-policy.org/studies/s181/s181g.html)>
- 379 Reynolds, 'Bounty hunting: making the bail system work' in *Using the Private Sector to Deter Crime*, op cit, <<http://www.ncpa.org/studies/s181/s181g.html>>
- 380 That is, the 'National Association of Bail Enforcement Agents'
- 381 Granting peace officers the power to arrest a person who has reneged on his bail condition can be done in two ways. Firstly, the offence of failing to comply with a bail condition, (section 67A of the Criminal Procedure Act 51 of 1977, as amended by Act 75 of 1995), could be made a Schedule 1 offence. Secondly, the offence of failing to comply with a bail condition, could be added to section 40 of Act 51 of 1977, as amended. This would authorise peace officers to arrest, without a warrant, a person who has failed to comply with his bail conditions.
- 382 Bail — some current issues, Penal Affairs Consortium, <[http://www. penlex.org.uk/pacbail2.html](http://www.penlex.org.uk/pacbail2.html)>
- 383 R340 is approximately the amount the 1998/99 budget for the Department for Safety and Security allocates for each person living in South Africa (R13.7bn for 40.6m people resident in South Africa, according to the 1996 census results).

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