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EXECUTIVE SUMMARY

Spending on the South African criminal justice system has been increasing in real terms for a number of years. One-tenth of annual government expenditure is devoted to policing, prosecuting and incarcerating the country's criminals. Notwithstanding the increase in public expenditure on the criminal justice system, criminal justice departments are overwhelmed by the number of cases, trials and prisoners they are expected to handle.

Increasingly, demands are placed on the criminal justice system to do more with less. This is not an impossible task, provided policy makers adopt new and innovative ways of providing public services by outsourcing selected criminal justice functions to private service providers.

There is much scope for greater private sector participation in the provision of criminal justice services through outsourcing schemes. (Public Private Partnership is the official term the South African government uses to refer to outsourcing the delivery of public services by private parties.) The criminal justice system provides a wide array of services. Many of these services are not related to the core functions the criminal justice departments have the responsibility to perform. These non-core functions are particularly amenable to outsourcing to private or non-state service providers.

The state can benefit in a number of ways by outsourcing some of its functions and services to the private sector. To be effective, however, outsourcing contracts must contain detailed service level agreements between the contracting parties. Thus, provided outsourcing contracts are properly conceptualised, and the implementation thereof effectively monitored, benefits of outsourcing can include providing services at lower cost and higher quality, greater flexibility in the provision of services, and a more rapid response to changing service and customer needs.

The South African Treasury has developed comprehensive outsourcing norms and standards for government departments that elect to outsource the provision of some of their services. Treasury regulations have been published to

govern the implementation of public private partnership agreements. A Treasury manual on public private partnerships seeks to assist government departments to structure successful deals with private partners for improved public service delivery.

The South African Police Service (SAPS) has outsourced a number of its functions and services to private-sector service providers. These include the guarding of government buildings, the maintenance of police buildings, the management of the police's vehicle fleet and vehicle pounds, and the provision of information technology services for the SAPS.

A multitude of non-core policing functions are, however, still being performed by an overworked police service. These include transporting and guarding prisoners, court orderly duties, running state mortuaries, managing the Firearms Register and the Criminal Record Centre, and providing VIP protection services to parliamentarians and politicians. The provision of these non-core policing functions could, with the proper controls and police oversight, be outsourced to the private sector. Outsourcing the multiplicity of peripheral tasks the police service presently performs, will permit the SAPS to meet its constitutional obligations, to prevent, combat and investigate crime.

South Africa's judiciary, courts and prosecution service do not have the capacity to adequately deal with the case load swamping the country's criminal courts. While the state can employ more prosecutors, it is expensive to train new recruits and pay them high enough salaries to keep experienced and skilled prosecutors in its employ. Moreover, the effective prosecution of certain intricate crimes requires specialised skills, which the prosecution service does not have.

A cost-effective way of dealing with the large backlog of cases, and the prosecution of intricate cases, is to outsource their prosecution. Another way to lighten the burden on the state's prosecutors is to make it easier for crime victims to institute private prosecutions. Other outsourcing options to relieve the pressure on the criminal courts include private arbitration and mediation schemes to deal with minor criminal offences, and outsourcing the management and administration of criminal courts.

The private sector has a role to play to finance, design, construct and manage prisons in South Africa. However, over the long run massive prisons construction programmes are not sustainable, and alternatives need to be developed. The private sector—in the form of business, non-governmental organisations, and civil society in general—must play a greater role in this regard.

Outsourcing selected criminal justice services to the private sector will allow the country's criminal justice departments to focus on their core responsibilities. It remains the responsibility of the state, however, to ensure that all outsourcing agreements involving the criminal justice system – and, by implication, the rights of suspected offenders, victims and the public – are prudently negotiated to leave no ambiguity about the rights, duties and responsibilities of both the state as outsourcer and the private contracting parties. Any outsourcing contract can, and must, contain enough built-in safeguards to guarantee the preservation of rights and the observance of the rule of law.

CHAPTER 1

INTRODUCTION

Martin Schönteich

In a seminal paper published in 2001, two internationally renowned experts on policing, David Bayley and Clifford Shearing, argue that policing is undergoing a historic restructuring. Further, that this restructuring has two distinguishing features: the separation of those who authorise policing from those who do it; and the transference of both functions away from government.¹

Policing is being transformed and restructured in the modern world... The key to the transformation is that policing, meaning the activity of making societies safe, is no longer carried out exclusively by governments... Gradually, almost imperceptibly policing has been ‘multilateralized’: a host of nongovernmental groups have assumed responsibility for their own protection, and a host of nongovernmental agencies have undertaken to provide security services. Policing has entered a new era, an era characterized by a transformation in the governance of security.

Back to the future?

The restructuring of policing as described by Bayley and Shearing is not without historical precedent. The state has not always had a monopoly over all functions of the police or other services provided by the modern 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 moneychangers in the third millennium BC to protect their lucrative banking operations.³

Only 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 remaining 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 the state monopolising the provision of criminal justice-related services has undergone a reversal in many capitalist states. Aspects of policing, prison construction and management, and even prosecution, are again being performed by the private sector. There are a number of reasons for this.

First, even for wealthier states, maintaining and expanding all aspects of a criminal justice system has become too costly. Second, private enterprise has developed the expertise and capacity to provide specialised services more cost-effectively than the state. Third, rising crime levels, and public concerns about high levels of crime, has forced policy makers to look for new and alternative providers of criminal justice services.

Finally, as services, facilities and industries hitherto monopolised by the state were successfully outsourced to private contractors, and even completely privatised, innovative reformers could develop an outsourcing agenda for criminal justice systems. If airports, harbours and railways can be privatised, and the provision of electricity, water and healthcare outsourced, why not the provision of criminal justice services?

The cost of crime

South Africa is a good example of a country where the cost to the state of combating crime is becoming prohibitive. Spending on the criminal justice system has been increasing in real terms for a number of years, and should continue to do so for some years to come.⁶ One-tenth of annual government expenditure is devoted to policing, prosecuting and incarcerating the country's criminals.

South Africa – a country with the largest HIV-positive population in the world – allocates the same amount of public money to fighting crime as it does to health-related expenditure.

Or, in respect of policing only, the safety and security department's budget allocation for 2003/04 is almost R22 billion, or approximately 6% of national expenditure. In a country with a variety of important socio-economic needs, and a huge backlog in the provision of housing, schools and transportation infrastructure, South Africans can ill afford spending more on policing than what is absolutely necessary.

Notwithstanding increased spending on the criminal justice system, public feelings of insecurity have worsened since 1994.⁷ Moreover, a range of legislative and operational initiatives to combat crime, and improve the effectiveness of the criminal justice system, have had only a limited positive impact so far. Many criminal justice performance indicators reveal that large segments of the justice system are performing sluggishly.⁸

In essence, 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.

For every 100 crimes recorded by the South African Police Service (SAPS) just after South Africa's first democratic election in 1994/95, there were 125 in 2001/02. Over the same period police numbers have decreased. The recorded crime figures serve as an index of the demands made on the police by the public with regard to crime.¹⁰ A clearer way of grasping the increase in workload of the police is to consider the number of crimes recorded per police officer. Thus, in 1994/95 there were some 17 recorded crimes per officer. In 2001/02 the ratio was 23 recorded crimes per police officer.

A significant number of new police officers are to be recruited over the coming years. Yet, should the number of recorded crimes increase by another half a million over the next seven years (as was the case in the seven years between 1994/95 and 2001/02), the expected increase in police numbers will do little to reduce the workload on the average police officer. Moreover, while an increase in police numbers should boost the police service's ability to meet its objectives, there is a limit to the number of police officers the national fiscus

can afford.¹¹ Already over three-quarters of the Department of Safety and Security's expenditure is devoted to personnel related costs. Any increase in personnel numbers is not only costly, but also restricts capital expenditure on items crucial to effective policing, such as vehicles, communication equipment and computers.

Doing more with less

Increasingly, demands are placed on the criminal justice system to do more with less. Surprisingly, given the limited financial resources of the state, this is not an impossible task, provided policy makers are willing to explore new and innovative ways of providing public services – notably by outsourcing selected criminal justice functions to private service providers.

The police's primary role is to prevent crime through visible patrols, searches and raids; react to crime through calls for assistance; and investigate crime. A study of a large metropolitan police station in South Africa revealed that the bulk of police time is not devoted to fulfilling the police's primary role.¹² The study revealed that a fifth (20%) of the station's staff was assigned to full time guard duty, as the station was responsible for security at the local court houses (which is common practice throughout the country) as well as its own holding cells. Almost a quarter (23%) of police officers' time was taken up by administrative work, while another 8% of was devoted to public administration such as acting as commissioners of oath and otherwise maintaining the charge desk. In contrast, visible patrols took up 15% of police officers' time, followed by investigations (10%) and responding to calls for assistance (8%).¹³

The above figures illustrate that even with the immense pressure the SAPS is under to respond to rising levels of recorded crime and public insecurity, the bulk of its human resources is devoted to performing functions peripheral to its mandate. Most of these functions, such as the guarding of court rooms and holding cells, and administrative and clerical work, could be outsourced to the private sector.

A similar case can be made for the prosecution service. As a result of rising crime levels and investigated cases, the backlog of the number of outstanding cases in the country's courts stood at 200,000 at the end of 2002.¹⁴ Notwithstanding this massive backlog, courts generally sit for only four hours a day. An important reason for this is that prosecutors are unduly occupied with performing a range of non- or quasi-prosecutorial functions such as pho-

tocopying documents, making phone calls of an administrative nature and negotiating with traffic offenders about the amount of their fine. Such peripheral functions could also be outsourced.

Finally, South Africa's prisons are overcrowded – many by 100% and more. Unsurprisingly, wardens working in prisons designed to accommodate a much lower inmate population cannot provide the meals, medical services, and correctional and vocational programmes necessary to care for and rehabilitate the prisoners under their control. In addition to outsourcing the design, construction and management of prisons (which is being done already), the provision of meals, and medical and rehabilitative services for prisoners could be outsourced to private service providers.

Outsourcing criminal justice

Somewhat sarcastically, Kim Nossal describes the trend of greater private sector engagement in traditional state functions as follows:¹⁵

In the past 20 years, privatization and outsourcing have been the watchwords in much of the developed world. Inspired by the preaching of neo-liberal economists who rail against the 'invisible hand' of the State, governments in numerous Western jurisdictions have increasingly passed ownership of a range of public enterprises to the private sector in order to allow the 'invisible hand' of the market to work its putative magic. The handmaiden of privatization has been outsourcing – contracting private actors to perform numerous other functions that used to be performed by State agencies.

Many in South Africa, including the government, accept that the state's monopoly over the provision of criminal justice services is weakening. Increasingly criminal justice departments – the departments of Safety and Security, Justice and Constitutional Development, Correctional Services, and the National Prosecuting Authority – are outsourcing their peripheral function and services to the private sector.

In some cases, departments have even begun to experiment with outsourcing certain aspects of their core functions:

- In Pretoria selected, serious commercial crimes are being prosecuted by private counsel.

- The largest privately designed, built and managed prison in the world is Kutama Maximum Security Prison, near Louis Trichardt, with 3,024 prisoner spaces.
- On the outskirts of Cape Town, police stations in gang-ridden areas have elected to use private armed response companies in the event that they come under attack or fall victim to armed robbers.¹⁶

South Africa is not alone in outsourcing the provision of criminal justice services and products to the private sector. For example, several municipalities in Montreal (Canada) have hired private security officers to augment the patrols of the public police. By 1998, within the jurisdiction of 18 of the 43 police authorities in England and Wales, local governments had hired private security patrols to police public spaces and areas.¹⁷ The following is a (slightly tongue-in-cheek) list of products provided by the private sector for prison administrators in the United States:¹⁸

Inside prisons the corporate world includes Aerko International's Mister Clear Out ('The state of the art in tear gas hand grenades especially designed for indoor use'); the Peerless Handcuff ('A major breakthrough in cuff design'); Disposable Waste Systems Muffin Monster ('It will grind up into small pieces all the things that inmates put down toilets'); Servomation, a food distribution company ('Justice is served') and Coca Cola ('Time goes better with Coke').

In 2002 the total value of signed and planned Public Finance Initiative (PFI) or Public Private Partnership (PPP) projects in the criminal justice system in the United Kingdom was £13 billion, including capital and operational costs.¹⁹ The Sussex Police Authority (in the United Kingdom) has awarded a 30-year contract to a consortium to provide police custody facilities and services across the whole county. As a result a number of police holding cells have been closed, and detainees are held in centralised facilities operated and managed by a private operator.²⁰ Among the 43 police authorities in England and Wales, outsourcing schemes range from facilities for firearms training, to riding stables, offices, custody suites and entire police complexes.²¹ A Metropolitan Police Authority outsourcing project provides not only new police stations, but also a wide range of police support staff such as custody processing and suspect processing staff, station reception offices, and selected support services including typists, prisoners property store and the storage of uniforms and special equipment.²² It is estimated that by 2010, private sector consortia will operate and manage most court complexes in England and

Wales.²³ In fact, in the United Kingdom, there already are privatised prisoner escort services; contractually managed prisons; outsourced ancillary services within publicly run prisons; privately run immigration detention centres and electronic monitoring services.²⁴

This monograph explores the potential of outsourcing the provision of functions and services, traditionally provided by the South African criminal justice system, to both the for-profit and the not-for-profit sector.

What follows is an analysis of the concept of outsourcing, its risks and benefits, and a discussion of the South African government's outsourcing policy. Thereafter, the outsourcing policies (to the extent that they exist) and outsourcing opportunities for each core criminal justice department – policing, justice and prosecutions, and corrections – is explored.

CHAPTER 2

OUTSOURCING: RISKS AND BENEFITS

Martin Schönteich

A number of services provided by the state in the field of criminal justice could be delivered by private and non-state institutions. Contrary to what may immediately spring to mind, not all forms of non-state service delivery need to involve profit-making activities. The alternatives to state provision range from “community action, to private non-profit making organizations, to voluntary organizations, as well as various combinations of these options”.²⁵

Most of the services provided by the criminal justice system are not amenable to complete privatisation. There is, however, much scope for greater private sector participation in the provision of criminal justice services through outsourcing schemes (also referred to as contracting out, or public-private partnership arrangements).²⁶ Indeed, the state can benefit in a number of ways by outsourcing some of its functions and services to the private sector. Provided outsourcing contracts are properly conceptualised, and the implementation thereof effectively monitored, benefits of outsourcing can include providing services at lower cost and higher quality, greater flexibility in the provision of services, and a more rapid response to changing service and customer needs.

Some argue that the outsourcing of state services can undermine the reliable provision of essential state services, diminish the accountability of those responsible for the delivery of services, labour disputes and the provision of unequal services.²⁷ These are real concerns that need to be addressed, especially in developing economies where private competition is limited and government contracts are not always awarded in a competitive and optimally transparent manner. However, while these concerns are valid, on balance, private contractors have a greater incentive to avoid such concerns or problems than public service managers.

What can be Outsourced?

To determine what kind of state services are amenable to greater private sector participation – especially of the profit-making kind – a distinction must be made between public, private, and hybrid goods and services.

A *public* good or service 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 and services are generally produced in the public sector and paid for via taxation.²⁸

A *private* good or service 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 and services 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 and hybrid goods and services are.

The criminal justice system does not provide one service, but various kinds of services, 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. In many cases such services can be categorised as hybrid services. 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.

Fixler and 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”.²⁹ 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 serv-

ice (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 a state-owned and managed museum or game reserve, 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 is the case with toll roads in South Africa.

Matthews distinguished between the *provision* and *administration* of services.³⁰ Traditionally the state both supplied and took responsibility for the implementation of criminal justice services. In the case of an outsourcing contract, the state subcontracts the provision of a service to a private sector service provider. However, through the outsourcing contract the state retains control over the level and standard of service supplied. While Matthews is critical of excessive private sector participation in the provision of criminal justice services, he concedes that the final responsibility of providing outsourced services remains with the state agency which draws up the outsourcing contract and pays for its implementation: "As long as the State exercises ultimate responsibility, it can effectively disengage from the immediate provision of certain services within the criminal justice system without necessarily incurring any significant disadvantages."³¹

Provinces taking the lead on PPPs³²

According to the South African treasury, formal Public Private Partnerships (PPPs), through which the private sector provides the initial finance for public infrastructure and takes on operational responsibility and risks associated with service provision, are growing in importance. At the time of writing, pioneering PPP transactions had been concluded for the N3 and N4 toll roads, two high security prisons and a number of tourism concessions.

Several provincial departments engage in, or are exploring, the use of Public Private Partnership arrangements in the delivery of services. In fact, all but one of the six PPPs concluded in 2002 in accordance with Treasury Regulations were provincial projects. Of these, two were hospital projects, based at the Albert Luthuli Central Hospital in KwaZulu-Natal, and the Universitas and Pelonomi Hospitals in Bloemfontein. The Albert Luthuli Hospital project was cited as “Best Health Sector PPP of the Year” by *Euromoney* magazine.³³

The Albert Luthuli Hospital PPP covers facilities management, medical equipment, and IT systems and maintenance, as well as equipment and IT refurbishment. According to the treasury’s 2003 Budget Review, the project is a milestone in South Africa’s PPP experience. Shouldn’t it be: As the first provincial PPP in the country, it demonstrated a high degree of cooperation between the different spheres of government, highlighting the state’s ability to design and procure through PPP-type arrangements.³⁴

In the Bloemfontein project, the private sector will invest some R206 million (in nominal terms over 15 years) in Universitas and Pelonomi hospitals, in return for concession rights to operate hospital facilities within the public hospitals over the period. The project presents an example of alternatives to competition for revenue between private and public health services. Both projects have strong black economic empowerment components.

Benefits of Outsourcing

The state can benefit in a number of ways by outsourcing some of its functions and services to the private sector. Benefits include the provision of public services at lower cost and higher quality. Outsourcing can also bring about greater flexibility in the provision of services, and a faster response to changing public needs. These potential benefits of outsourcing are discussed in greater detail below.

Reduced costs

The state has to follow rigid costly, strict 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. Moreover, private contractors' 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.³⁵

In *The Enterprise of Law: 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):³⁶

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.

Other commentators are less certain that outsourcing automatically reduces costs. This is primarily because comparisons between the costs of public and private institutions are difficult to make: "The differences in roles, level of training and range of functions, make direct comparisons difficult. Also, there may be critical functions which are not amenable to quantification (for example, the rehabilitation of convicted offenders, or crime prevention)."³⁷

Popular outsourcing

South Africa's labour legislation, and a strong and political 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, conducted in the late 1990s, of more than 1,000 organisations across the economic spectrum by human resources consultants FSA-Contact, 68% were outsourcing a variety of activities such as security and cleaning, 61% catering, 42% printing, 36% information technology, and 33% recruitment.³⁸

Better quality

Outsourcing contracts with private entities allow the state to determine and specify minimum performance and service delivery standards. Without outsourcing, where the state has a monopoly over the provision of all services, this rarely happens. For example, the public police is expected to uphold certain standards. If this does not occur, the state (i.e. the cabinet or parliament) is not in a position to go to a different service provider. At best, the president can fire the responsible minister, or the minister can fire the national police commissioner, and hope that a successor will perform better. In practice, this hardly ever occurs, and the public has to wait for an election to demonstrate its dissatisfaction.

Benson argues that “private entrepreneurs are residual claimants”.³⁹ That is, they accrue the profits and bear the losses of their business endeavour. It is this profit motive which provides an incentive for entrepreneurs to produce goods, or provide services, at good quality and low cost. As consumers (in the case of this outsourcing discussion, the state) are free to choose how they spend their money, the best way an entrepreneur can legally obtain customers and profits is by persuading potential customers that a quality service is being offered at a reasonable price. Private producers or providers of services are consequently unable to lower costs by sacrificing quality if they want to stay in business. Should they do so, consumers will invariably turn to substitutes that provide a service of a higher quality for the same price, or of the same quality with an even lower price. “Thus, competition forces private firms to offer relatively high-quality services at relatively low prices.”⁴⁰

Flexibility and innovation

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. Experience in the United States has shown that it is extremely difficult to terminate a government department, or an established unit within a government department.⁴¹

Where the aim is to overcome the inertia that characterises many existing criminal justice departments, or to move away from entrenched principles,

outsourcing the provision of services can provide a catalyst for change by introducing new personnel and methods:⁴²

The greatest promise of the private sector may... lie in its capacity to satisfy objectives that might be difficult if not impossible to achieve in the public sector – introducing public sector managers to the principles of competitive business, quickly mobilising facilities and manpower to meet immediate needs, rapidly adapting services to changing market circumstances, experimenting with new practices, in satisfying special needs with an economy of scale not possible in a single public sector jurisdiction.

Concerns about Outsourcing

Critics of outsourcing argue that the outsourcing of state services can lead to security risks, accountability problems, labour-related disputes and the provision of unequal services. These are reasonable concerns, especially in developing economies where private competition is limited and government contracts are not always awarded in a competitive and transparent manner. While these concerns need to be taken seriously, on balance, private contractors have a greater incentive to avoid such problems compared to public service managers.

Security risk

Outsourcing critics fear that private security or prison guards can place the safety of the public at risk by going on strike or being absent from work. Professor Charles Logan of the University of Connecticut, a specialist in crime and justice matters, is critical of this 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 [outsourcing] contract.”⁴³ Moreover, the absence of a right to a protected strike has not prevented South African public police officers, prison guards or prosecutors from striking. For example, in 1996/97 there were 21 strikes by employees of the Department of Correctional Services, one as long as 29 days, another for 17 days.⁴⁴ Also in 1996/97, there were 62 work stoppages in the SAPS.⁴⁵ In 1996 alone, some 1.3 million person-days were lost because of absenteeism in the SAPS (in addition to vacation and special leave taken during that year).⁴⁶

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 privately managed prison facility if the contractor risks losing control thereof.

Accountability issues

The perceived lack of accountability of private service providers is central to the potential negative impact the private provision of criminal justice services may have on human rights.⁴⁷ Logan, however, argues that outsourcing increases accountability as governments are more willing to monitor and control contractors than themselves:⁴⁸

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.

Nevertheless, states with limited human and capital resources may find it difficult to monitor and administer its outsourcing contracts. State departments which elect to outsource some of their services can face problems developing adequate criteria for the monitoring and implementation of outsourcing contracts. Competitive tendering does not necessarily guarantee the most effective or desired result. Matthews in *Privatizing Criminal Justice* points out: “There are problems [with outsourcing] concerning measurement, the establishment of clear comparative criteria between the performance of competing agencies, the development of procedures for monitoring contract compliance, and in enforcing sanctions for non-compliance.”⁴⁹ For outsourcing to work it is crucial that both contracting parties enter into detailed service level agreements to, among other things, establish two-way accountability of service, document service levels in writing, clearly define criteria for service evaluation, and standardise methods for communicating service expectations.⁵⁰

Unfortunately some individuals, whether publicly or privately employed, abuse their positions by cutting costs, doing poor-quality work, and generally abusing the rights of people over whom they have control. According to

Benson, institutional arrangements within which people perform their tasks determine whether such abuses can be carried out, and that competitive markets are one of the best institutional arrangements to discourage abusive, inefficient behaviour:⁵¹

Individuals not fully responsible for the consequences of their actions are likely to be *relatively* unconcerned about those consequences. But private firms must satisfy customers to stay in business. Therefore, a security officer who abuses shopping-mall patrons will not remain an officer for long. Furthermore, even if a firm fails to respond to market incentives, a civil suit brought against an abusive private security firm can be costly, perhaps even destroying the business. In contrast, public police departments rarely go out of business, no matter how corrupt and abusive their members may be.

Employee opposition

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, or little, cost savings to the outsourcing organisation. As a result unions view outsourcing with suspicion and tend to resist it.⁵² Senior management in the criminal justice system and governmental policy makers will consequently have to be resolute in their commitment to an effective outsourcing policy if the impact of trade union opposition is to be minimised.

For example, the SAPS' then chief executive, 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.⁵³

The work environment and conditions of service in the police (as in some other state departments) are often such that a substantial number of staff leave each year through natural attrition. For example, the SAPS loses some 5,000 members per year through this process. Consequently, 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. 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 civilianisation (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.⁵⁴

Unequal service

In a society based on the rule of law and the constitutionally enshrined principle of equality before the law, access to police services and recourse to the courts must be available to all. Every person, however indigent, should have access to police protection and the administration of justice.

Outsourcing criminal justice functions to the private sector may lead to inequality and injustice as criminal justice services could be made disproportionately available to those in power or those who can pay for it. It should be borne in mind, however, that even when the state provides security, all people do not receive equal protection. In most countries, especially in South Africa, the density of police personnel – and their willingness to intervene in violent situations – is lower in economically poor areas, or in areas inhabited by ethnic and racial groups with little economic power, than in more affluent areas.⁵⁵

Moreover, in South Africa poorer people are more likely to be victims of violent crime.⁵⁶ 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.

Inefficiencies in the state-run criminal justice system may also disproportionately inconvenience the poor. For example, in South Africa, many court cases do not begin on time. Once started, they are often not completed on the same day, requiring one or more postponements. 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 criminal justice system should not be rejected out of concern that the poor could be discriminated against. The outsourcing of state services and functions can be beneficial to everyone. With outsourcing, 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 should be able to provide services more effectively, with less delay and at a lower cost to the state and the taxpayer. By outsourcing the provision of some of its services, the state will no longer be expected to exclusively provide an increasing range of specialised services. Rather, the state will be able to concentrate on delivering its core functions: preventing serious crime, and investigating, prosecuting and rehabilitating serious offenders who pose a threat to the social order in South Africa.

Conclusion

The criminal justice system provides a wide array of services. Many of these services are not related to the core functions the criminal justice departments have the responsibility to perform. These non-core functions are particularly amenable to outsourcing to private or non-state service providers.

The traditional form of criminal justice service provision in South Africa has the state providing the funding via taxes and producing the services directly through state employees. That is, the state both pays for the services and delivers them. Yet, there are many criminal justice services, the provision of which the state could outsource to private sector service providers or appropriate not-for-profit civil society-based organisations, while retaining responsibility for funding such services. That is, making use of an outsourcing arrangement whereby a service is provided by a private sector company or civil society organisation. In such a case the private sector company or civil society organisation enters into a contractual obligation with the state, to provide the service traditionally provided by a government department. Moreover, the state can outsource the provision of a service or good which it is unable to provide. This could be a highly specialised service or product, the provision of which requires expertise or production techniques which the state does not have.

For a state-sponsored outsourcing arrangement to work, and deliver the benefits discussed in this chapter, it is crucial that the state is absolutely clear about what services – and the quality of those services – it wants to outsource.

Unlike the case of a privatised service, the state remains accountable for ensuring that outsourced services are, in fact, delivered. The final responsibility for the provision of an outsourced service remains with the state. To be effective, outsourcing contracts must contain detailed service level agreements between the contracting parties. These should include penalty clauses setting out the punitive consequences for the party providing the outsourced service, in instances where minimum service levels are not met. Beginning in the late 1990s, the South African Treasury began to develop comprehensive outsourcing norms and standards for government departments that elect to outsource the provision of some of their services. These norms and standards are discussed in the next chapter.

CHAPTER 3

GOVERNMENT OUTSOURCING POLICY: PUBLIC PRIVATE PARTNERSHIPS

Martin Schönteich

In May 1996, the then South African president, Nelson Mandela, announced that privatisation was a “fundamental policy” of the African National Congress (ANC) which would be implemented as “government policy”.⁵⁷ Indeed, since the mid 1990s the South African government has committed itself to privatise state assets. Large chunks of state owned enterprises, such as the iron and steel producer Iscor, the arms manufacturer Denel, several South African Broadcasting Corporation (SABC) radio stations, the Airport Company South Africa (ACSA), state commercial forests and local services have been sold to private investors.⁵⁸ This trend is likely to continue, albeit at a slow and erratic pace.

This monograph explores the role a limited form of ‘privatisation’ can play in increasing private sector (including the not-for-profit sector) participation in the delivery of criminal justice services. Public Private Partnership (PPP) is the term the South African government uses to refer to outsourcing the delivery of public services by private parties. PPPs are relatively new in South Africa, and support for service delivery through PPPs varies across government departments. Indeed, the “role of the state in the provision of public services in South Africa continues to be an ongoing and healthy source of debate”.⁵⁹ Even pro-PPP advocates concede that the outsourcing of state services needs to be supported by sound regulatory practices which promote key public policy objectives, such as curbing monopolistic practices and promoting universal service access.

In April 1997 the South African cabinet approved the establishment of an Inter-Departmental Task Team (IDTT), chaired by the Department of Finance, to initiate the development of a regulatory framework for PPPs, and explore how PPPs could improve infrastructure and service delivery efficiency. The IDTT was mandated to develop a national Public Private Partnership programme, the key objectives of which were to identify the major constraints to the successful implementation of PPPs, and to develop a package of cross-sectoral and inter-governmental policy, and legislative and regulatory reform.⁶⁰ In December 1999, cabinet endorsed the resulting strategic framework for PPPs. In April

2000, Treasury regulations were published in terms of the Public Finance Management Act to govern their implementation.⁶¹ Shortly thereafter, in early 2001, the *Treasury Manual on Public Private Partnerships* was published.⁶²

Describing PPPs

A PPP is a contractual arrangement whereby a private party performs part of a government department's service delivery or administrative functions and assumes the associated risks. In return, the private party receives a fee according to predefined performance criteria, which may be from service tariffs or user charges (as is the case with toll roads), and/or from a departmental or other state budget.⁶³

The essential aspects of a PPP arrangement, as distinct from the direct delivery of a public service by a government department, are a focus on the services to be provided, and a shift of the risks and responsibilities to a private provider for the activities associated with the provision of services.

A simple form of PPP is a service contract. In a service contract a department typically awards a private party the right to perform a specific service, within well-defined specifications for a relatively short period of time (usually one to three years). In a service contract the government retains ownership and control of all facilities and capital assets and properties.

A more complex form of PPP is a concession, where the concessionaire's responsibilities usually include maintenance, rehabilitation, upgrading and enhancement of the facility in question. A concession may involve a substantial capital investment by the concessionaire. Another complex PPP arrangement are Build-Operate-Transfer (BOT) schemes. In a BOT the private party undertakes the financing and construction of a given infrastructure facility, as well as its operation and maintenance, for a specified time period. Given the often substantial capital investment by the private sector under such arrangements, the contracts tend to be of long duration (usually 25 years).

According to the *Treasury Manual on Public Private Partnerships*, service delivery through a PPP changes the means of delivering services but does not change a government department's accountability for ensuring that the services are delivered. The department's focus shifts from managing the inputs to managing the outputs – the department becomes a contract manager rather than a resource manager.⁶⁴ In terms of draft *Standardised PPP Provisions*, pub-

lished for public sector input at the time of writing, a government department has contractual remedies if the private PPP partner defaults. These remedies include financial claims covered by some security, penalties and, in certain instances, an ability for the government department to step into the PPP project. In some circumstances, defaults may entitle the government department to terminate the PPP agreement.⁶⁵

PPP Manual

The *Treasury Manual on Public Private Partnerships* contains guiding tools designed to assist national and provincial government departments to structure successful deals with private partners for improved public service delivery. Writing the preface to the manual, finance minister, Trevor Manuel, argues that PPPs can play a crucial role to satisfy public demand for effective government services. Moreover, to be successful, government departments need to skilfully negotiate and effectively implement PPPs that promise to add value to public service delivery.⁶⁶

Our [the government's] overwhelming priority is to meet the socio-economic needs of all South Africans, and in particular, to alleviate poverty. But we would be wrong to assume that government can meet this challenge alone. The state must complement its budgetary capacity with the wealth of innovative and specialist skills available in the private sector. Furthermore, the availability of state resources for these purposes must be used to leverage much-needed private sector investment in public infrastructure and services...

Governments across the world are notoriously shoddy at calculating the risks associated with service delivery. PPPs force us to think differently, and in so doing, calculate the real costs... In a PPP the department is no longer the hands and legs of delivery, but rather its strategist, its monitor, its driver and its public accountant. We need new skills to play these roles, and to ensure that we engage confidently and effectively with business partners in negotiating the terms and conditions of long-term contractual commitments. This manual [the *Treasury Manual on Public Private Partnerships*] should go a long way to building such essential abilities.

According to the *Treasury Manual*, PPPs are an integral component of the state's overall strategy for the provision of public services and public infra-

structure. This does not imply that PPPs are the preferred option for improving the efficiency of services delivered, but rather that they enjoy “equal status among a range of possible service delivery options available to departments in all spheres of government”.⁶⁷

The manual concedes that complex PPP arrangements – especially long-term contracts involving private finance – have produced mixed results in South Africa. The manual goes on to say, however, that correctly structured PPPs are a useful service delivery option from both an operational and strategic perspective. Operationally, the benefits of PPPs “can result in some combination of better and more services for the same price, and savings, which can be used for other services or more investment elsewhere”.⁶⁸ Strategically, PPPs can boost a department’s managerial efficiency as “existing departmental financial, human and management resources can be refocused on strategic functions”.⁶⁹

Treasury Regulations

PPPs that entail payments to private parties from departmental or other state budgets are generally likely to impose more serious risks to the fiscus than those that derive their revenues from service tariff or user charges. The National Treasury’s strategic framework for delivering public services through PPPs notes that “all PPPs involve a commitment of public resources, and to this extent, public revenues are almost always involved in PPP arrangements”.⁷⁰ Long-duration contracts that entail financing arrangements are likely to impose more serious risks on the fiscus than simple service contracts. According to the treasury’s strategic framework, “the degree of regulation is likely to increase from one end of the PPP continuum to the other”.⁷¹

In 2002 the finance ministry issued regulations in terms of the Public Finance Management Act of 1999, to regulate the state’s use of PPPs.⁷² The regulations seek to ensure that the financial consequences of PPP arrangements do not adversely affect the state’s coffers. The regulations control all aspects of a PPP life cycle, from project identification through to post-contract management and monitoring. Under certain terms and conditions the National Treasury may exempt a government department from the application of the regulations.⁷³

In terms of the Treasury Regulations, the National Treasury maintains firm control over national and provincial government departments wishing to enter into PPP agreements. According to the regulations, a government department

may not proceed with a PPP without the prior written approval of the National Treasury, or the relevant provincial treasury, if the department is a provincial institution and the National Treasury has delegated this function to the provincial treasury.⁷⁴ Moreover, the relevant treasury may approve of a PPP agreement only if it is satisfied that the proposed PPP will meet three requirements. Namely, that the PPP will provide value for money; be affordable for the government department; and transfer appropriate technical, operational and financial risks to the private party.⁷⁵

Standardised PPP process

The Treasury Regulations lay down a standardised and specific set of processes which need to be followed before a government department can obtain the necessary treasury approval to enter into a PPP agreement with a private party. These processes are discussed briefly below.

Feasibility study (Treasury approval I)

To determine whether a proposed PPP is in the best interest of a government department, the department must undertake a feasibility study that:⁷⁶

- Explains the strategic and operational benefits of the PPP agreement for the government department in terms of its strategic objectives and government policy.
- Describes in specific terms the nature of the departmental function that is to be subject to the proposed PPP agreement; the extent to which this departmental function, or the use of state property, can be performed by a private party in terms of a PPP agreement; and what other forms of PPP agreement were considered, and how the proposed form was selected.
- Assesses whether the agreement will provide value for money, is affordable for the government department, and transfers appropriate technical, operational and financial risk to the private party. (Operational risk is the risk that operating costs vary from budget, that performance standards slips or that the service cannot be provided.)
- Includes any relevant information and the economic criteria used to justify these assessments.

- Explains the capacity of the government department to effectively enforce the PPP agreement, including to monitor and regulate implementation and performance in terms of the agreement.

Affordability versus value-for-money

Affordability relates to whether the cost of a PPP project, over the whole project life, can be accommodated in the budget of the sponsoring government department, given the department's existing commitments. This is different from 'value-for-money', which simply means that private provision of a government service or function results in a net benefit to government, defined in terms of cost, price, quality, quantity, or risk transfer, or a combination thereof.

A particular PPP may thus be unaffordable, even though it provides value for money. According to the Treasury Manual, if a project is unaffordable, it undermines the government's ability to deliver other services and should not be pursued, even if there is a possibility that it may meet value-for-money criteria.⁷⁷

Finance minister, Trevor Manuel, argues that "affordability is both about budgetary considerations and about wider human, social or environmental considerations... and affordability is also about avoiding the unnecessary exclusion from public goods or services of those who could be accommodated without cost or inconvenience to others, but who lack the means to pay".⁷⁸

A government department may not proceed with the procurement phase of a PPP without written treasury approval for the feasibility study on aspects relating to affordability, value for money and appropriate technical, operational and financial risk transfer.

Procurement (Treasury approval II)

Prior to the issuing of procurement documentation to any prospective bidders, the government department must obtain approval from the relevant treasury for the procurement documents. The approval must include at least the main terms of the proposed PPP agreement, the aspects of affordability,

value for money and risk transfer.⁷⁹ The procurement procedure must include an open and transparent pre-qualification process; a competitive bidding process; and criteria for the evaluation of bids to identify the bid that represents the best value for money.⁸⁰

After the evaluation of the bids, but prior to entering into negotiations with any of the bidders, the government department must submit a report for approval by the relevant treasury, demonstrating the means by which affordability, quantification of value for money, appropriate technical, operational and financial risk transfer can be established.⁸¹

According to the regulations, the procurement procedure “may include” a preference for categories of bidders, such as previously disadvantaged persons, provided that this “does not compromise the value for money requirements”.⁸² The procurement procedure may also include incentives for recognising and rewarding innovators in the case of unsolicited proposals.

Contracting PPP agreements (Treasury approval III)

After the procurement procedure has been concluded, but before the government department enters into a PPP agreement, the department must obtain approval from the relevant treasury.⁸³

- that the PPP agreement contains the affordability, value for money and appropriate risk transfer; and
- a management plan that explains the capacity of the government department to effectively enforce the agreement including, to monitor and regulate implementation of, and performance in, terms of the agreement.

Management of PPP agreements

Once a PPP agreement has been approved by the treasury and entered into by a government department, the Treasury Regulations place certain responsibilities on the contracting government department to ensure that the PPP agreement is properly enforced. The regulations hold that a PPP agreement does not divest a government department “of the responsibility for ensuring that the relevant institutional function is effectively and efficiently performed in the public interest”.⁸⁴ Specifically, to meet its responsibilities in terms of a

PPP agreement, a government department must establish mechanisms and procedures for:⁸⁵

- monitoring and regulating the implementation and performance in terms of the PPP agreement;
- liaising with the private party;
- resolving disputes and differences with the private party;
- generally overseeing the day-to-day management of the PPP agreement; and
- reporting on the management of the agreement in the government department's annual report.

Government Commitment

In May 2003, the National Treasury released the draft *Standardised PPP Provisions*. The 340-page document describes the key issues that are likely to arise in PPP projects regulated by the Treasury Regulations discussed above. The objectives of the Standardised Provisions include the promotion of a common understanding of the technical, operational and financial risks that are typically encountered in PPP projects, and a common understanding of how such risks must be transferred or shared among the parties involved in the delivery of PPP projects. Moreover, the Standardised Provisions seek to promote a consistent approach to risk transfer and sharing value for money across PPP projects falling within the same sector, and a reduction of the time and cost of negotiation of the parties involved in a PPP project.⁸⁶

Government commitment to developing high and predictable standards in respect of PPPs was underlined by finance minister, Trevor Manuel's comments at the occasion of the launch of the Standardised Provisions:⁸⁷

Too often, in too many countries, in too many projects, weakly specified contracts have led promising partnerships into conflict, contestation, failed services, unmet targets, unpaid bills and court proceedings... We will not go down that route. Those who think that service delivery contracts can be signed off on the basis of casual disregard for procurement procedures... do not belong on our government side

negotiating teams. And those businesses who think that government contracts are a licence to overcharge for shoddy services or to offer system designs that meander from one mediocre consultant's report to the next incontinent permutation, should know that they also do not belong in this partnership.

To support government departments wishing to enter into PPP agreements, the National Treasury established a dedicated PPP Unit in 2001. A key objective of the Unit is to spearhead innovative infrastructure and service delivery through PPPs, and to implement successful projects and develop best practice templates in key infrastructure and service delivery sectors. Moreover, the Unit seeks to address constraints and facilitate successful implementation of affordable PPPs. The core functions of the Unit include:⁸⁸

- communicating the government's PPP strategy to departments and potential private investors;
- assisting departments in preparing cost-effective and affordable PPP projects, with support through the project implementation cycle, from project inception through to financial closure;
- supporting capacity enhancement activities by initiating, managing and, where appropriate, offering technical assistance and training activities;
- serving as a resource centre for South African best practice in PPPs;
- ensuring that all PPPs are implemented in conformity with the Treasury regulations; and
- reviewing existing policies and legislation to identify potential constraints to successful implementation of PPP arrangements, and recommending additional reforms as required.

The Unit does not eliminate the need for government departments to develop their own capacity and use their own expert advisers. Rather, the Unit is tasked with assisting in building such capacities and developing a wider pool of expertise, within and outside of government, to bolster the implementation of PPPs in the long run. In order to attract appropriately skilled personnel – with the necessary experience in project finance, contract law and economics – the Unit contracts in private sector specialists in an advisory capacity.

In the municipal sphere, the Municipal Infrastructure Investment Unit (MIIU) was established in 1998 to provide technical assistance and support to municipal councils involved in PPPs or Municipal Service Partnerships (MSPs). It promotes PPPs and fosters capacity enhancement through its work with municipalities.

The MIIU was conceived as a five-year intervention to develop a market for technical assistance for project preparation in the sphere of municipal infrastructure and services. However, in August 2002, the MIIU's lifespan was extended to 2006. The MIIU's scope of activities include:⁸⁹

- provide grant funding to local authorities on a cost sharing basis, to hire private sector expertise for assistance with PPP project preparation;
- assist local authorities in the process of hiring private sector consultants; and
- assist local authorities with the management of PPP contracts.

The MIIU undertakes its activities with local authorities that are developing project proposals involving private sector investment. The investments can take a broad range of forms, including:

- private sector financing of municipal debt;
- contracting out, or outsourcing, the management of ongoing services;
- concessions to operate the local authority's assets over a defined period;
- contracts requiring the private sector to Design, Build, Finance and Operate assets to deliver services for the local authority; and
- privatisation of assets and services.

The Department of Provincial and Local Government has also coordinated several technical assistance projects to provide appropriate training and related capacity enhancement activities for local government officials. The department has also issued various best practice guidelines on key aspects of the PPP project life cycle, and has assisted municipalities in promoting the PPP concept among municipal residents.⁹⁰

Conclusion

At the private sector launch of the *Standardised PPP Provisions*, finance minister Manuel stressed that, properly conceptualised and negotiated, PPPs should enhance the standards and quality of public service delivery. Minister Manuel listed some of the benefits or strengths of PPPs, over traditional public service delivery mechanisms, provided the PPP process is adequately regulated and managed:⁹¹

- public private partnerships require outputs and service level standards to be specified clearly and transparently, together with identification of costs and risks;
- efficiencies arise from the integration of the design, building, financing and operation of assets that is intrinsic to a well-structured PPP;
- the private sector tends to bring [a] higher level of innovation to planning and project delivery, and has a sharper and more timely engagement with technology, with significant spin-offs for skill transfer in the public sector;
- the introduction of enhanced management skill into public service delivery through the PPP process is of considerable benefit in service quality and effectiveness; and
- the contractual assurances of specified service standards and affordability of PPP agreements bring about a stricter and more effective management of risk.

PPPs are a relatively new concept in South Africa. It consequently does not come as a surprise that the number of completed PPP agreements number only a few dozen at the time of writing. With the publication of the Treasury Regulations, and the refinement of the Treasury's *Manual on Public Private Partnerships*, a significant increase in the number and value of PPPs can be expected in the years to come.

The government – the National Treasury in particular – has adopted a regulated and top-down approach in the implementation of PPPs throughout the country. As a result of limited government capacity – especially at provincial and municipal level – and some poorly negotiated (from the government's point of view) PPP contracts in the mid-1990s, the Treasury appears committed to

retaining strong control over the PPP process. This may change as both government departments and private sector investors become more comfortable with the partnership approach, and PPPs become an established fixture in the country's investment and business environment. Indeed, both the Treasury's PPP Unit and the Municipal Infrastructure Investment Unit are temporary institutions, designed to assist in the initial development of rules and operating procedures around PPPs.

In the interim, during the initial 'teething' period of the PPP concept, the government appears to have embraced the PPP concept as a vehicle for expanding the delivery and provision of public services to a needy populace. Government commitment to making PPPs work appears to be sincere and strong. Too strong, some would argue, given government's persistent temptation to err on the side of over-regulation, as the detailed and verbose policy documents, regulations and statutes on PPPs tend to indicate.

CHAPTER 4

OUTSOURCING AND THE SOUTH AFRICAN POLICE SERVICE

Anthony Minnaar and Duxita Mistry

After South Africa's first democratic election in 1994, levels of recorded crime increased substantially. Public fear of crime soared, as did the perception that criminals were breaking the law with impunity. Public perception was driven by the belief that the country was facing a 'crime explosion'. Crimes such as vehicle hijacking, rape and murder received prominent media coverage. South Africans felt helpless and the police, lacking the capacity and resources to deal with the upsurge in violent crime, appeared to be incapable of dealing effectively with criminality. There was a lack of faith in the ability of the criminal justice agencies to reduce crime and punish offenders.

In South Africa, members of the public are more likely to come into contact with a private security officer than a member of the South African Police Service (SAPS). In their areas of operation, private security companies are generally able to respond faster than the SAPS to calls for assistance from the public. In poorer, mainly black, communities the infrastructure of the SAPS remains inadequate. Traditionally, until 1994, police resources were concentrated in the country's white suburbs and business areas. While this has been changing, police resources remain disproportionately located in traditionally white areas and the country's city centres.⁹² With the demise of apartheid, informal networks of social control which inhibited certain forms of crime in many black South African townships before 1994, disappeared. As crime increased throughout the country, private security providers have begun to provide selected services to township residents able to afford them.

Transformational issues in the SAPS – such as organisational restructuring, lack of resources, and a reduction in personnel numbers – have detrimentally affected the quality and level of service the police can provide. This has added to the perception that the SAPS is unable to adequately deal with crime in the country, and that the police service needs to look at the private security industry for assistance. The sheer size of the private security industry, and the resources available to it, support this argument.⁹³

Consequently, many people who can afford to do so, engage the services offered by the private security industry – particularly armed response services. Beginning in the late 1980s, the private security industry has grown substantially to cater to the security needs of both individuals and the corporate sector. The industry has grown not only in size, but also in the scope of services it provides. According to Jenny Irish, a long-time analyst of the South African private security industry, the industry is increasingly “performing functions which used to be the sole preserve of the police”.⁹⁴

The Outsourcing Debate

Within the context of the growth of private security, and the potential for filling the so-called ‘policing gap’ with private security resources, proposals were developed which saw the private security sector either assist the SAPS in its policing functions, or advocate for outsourcing certain policing functions to the private security industry.⁹⁵

In an analysis of outsourcing options for the South African criminal justice system, Martin Schönteich argues that “greater private sector involvement in South Africa’s criminal justice system will make the country a safer place to live in”.⁹⁶ Schönteich further postulates that such private sector participation would be “cost-effective” for both the consumer, who could shop around for the best price and security product in the market, and the state which could save money by contracting out many of its criminal justice functions to the competitive private sector.⁹⁷

Schönteich is of the opinion that “there are numerous functions and services performed by the SAPS which could be outsourced to the private sector”.⁹⁸ Examples identified included forensic and specialised criminal investigations, administrative functions, the transporting of prisoners, and the guarding of premises. According to Schönteich, outsourcing these and other police functions would allow police officers, performing administrative and other peripheral policing duties, to focus on core policing work such as conducting visible patrols and investigating crime. This would improve the performance of the police service in a cost-effective manner.⁹⁹

The private security industry appears to be in favour of assisting the SAPS with crime prevention.¹⁰⁰ However, at the time of writing no national formal co-operation agreement exists between the SAPS and the private security industry.¹⁰¹ The erstwhile president of the Security Association of South Africa

(SASA), Alan Hadfield, speculates that opposition to closer cooperation between the SAPS and the private security industry emanates from the middle management level of the police.¹⁰² According to the literature, this opposition is based on fears that the police service could lose control over certain of its functions.¹⁰³ However, such fears are misplaced according to Schönsteich. This is because in practice the police service has not had a monopoly on all its daily tasks and functions for some time.¹⁰⁴ Moreover, an internal SAPS discussion document, written in the late 1990s, concludes:¹⁰⁵

...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 debate, whether to outsource certain SAPS functions and services to the private sector, primarily concerns the following issues:

- The extent to which private security should fill the 'gap' where the police has failed, or is failing, to provide adequate services.
- The need, extent and desirability for the further privatisation of policing, and what policing services could and should be outsourced.
- The security industry's primary role of protecting its clients and their assets, versus the public police's role of crime prevention and combating throughout the country. In other words, the question of the effectiveness of loss prevention versus offender prosecution as a crime deterrent.
- Different standards and criteria for performance measurement of service delivery and client satisfaction. The private security industry measures its success by general business principles and market accountability, while the police measures success taking into account its ability to fight crime and its success rate with reference to arrests.
- Perceptions concerning a general lack of quality, professionalism and specialisation in the training of private security officers. There are relatively few mandatory standards for private security practitioners, as opposed to statutory standards and levels of training provided by the state for SAPS recruits.
- The lack of an effective external oversight body for the private security industry. That is, an adequately funded institution saddled with the

responsibility for excluding certain convicted offenders from working in the industry, applying sanctions against transgressors of industry regulations, and enforcing compliance with such regulations.¹⁰⁶

Much of the controversy surrounding this debate arose because private security had penetrated traditional areas of public policing. The debate is fiercest around such issues as the real motivations behind the private security sector's desire to engage in tasks traditionally reserved for the public police. That is, whether it is purely for generating profits or a genuine concern to combat crime and arrest suspected offenders? The debate also concentrated on the lack of accountability by, and controls over, private security companies that provide policing services outsourced to them. The issue of public and legal liability is a central issue in this regard.

Today, the debate is no longer about whether the private security industry should perform functions traditionally within the preserve of the public police, but where the authority of the private security industry ends and responsibility of the public police begins. That is, exactly which services can be safely outsourced to private security providers without compromising the traditional role of the public police and other law enforcement agencies in fighting crime and upholding the law?

The SAPS and Outsourcing¹⁰⁷

After 1994, in the context of transforming the newly amalgamated South African Police Service, the demands for improved police service delivery increased substantially. This led the SAPS to investigate the possibility of outsourcing or contracting out some of its specialist services.

The possibility of outsourcing some SAPS services was abetted by a number of other factors which led to acute shortages of experienced and specialised personnel within the police service. Shortly after the creation of the new SAPS (an amalgamation of the erstwhile South African Police and a number of homeland police forces), generous retrenchment packages were offered to senior, and mainly white, police officers. This resulted in a shortage of experience and expertise within the newly established SAPS. Over the same time a poorly managed affirmative action policy within the SAPS, and high levels of public insecurity, resulted in an exodus of experienced police officers to the burgeoning private security industry. The personnel shortage was further exacerbated by a hiring moratorium of new police personnel between 1995 and

2002 – over this period the number of police employees decreased from over 140,000 to 121,000.

The shortage of skills within the SAPS has been particularly severe. With the opening of the country's borders after 1994, and South Africa's developed banking and transport infrastructure, various forms of organised crime (e.g. money laundering, cyber crime, vehicle hijacking and narcotics syndicates) experienced rampant growth. By the late 1990s it had become clear to senior management in the SAPS that the organisation faced a shortage of specialised expertise to meet the demands new forms of organised crime were placing on it.

It was the significant decline in overall numbers of both uniformed officers and detectives, however, which provided the biggest impetus for senior police managers to seriously consider outsourcing options for the SAPS. That is, the need to make optimal use of existing trained police personnel largely overcame the reluctance of police management to consider outsourcing as a means of reducing the work pressure on its operational personnel. Accordingly, outsourcing was seen as a means by which uniformed personnel could be released from their desk- and office-bound jobs and placed back on to the streets. By outsourcing non-core policing functions, it was hoped to make a larger proportion of uniformed officers available for 'taking back the streets' instead of performing administrative and clerical jobs. In other words, outsourcing would allow the SAPS to concentrate on its core business of combating and investigating crime, upholding the law and maintaining order.

The discussion in the SAPS around outsourcing, and which services to outsource, was part of a wider debate on 'civilianising' certain police functions. Civilianisation is the appointment of qualified civilians to certain appropriate posts within the SAPS previously filled by police officers. Where necessary, highly qualified civilians can be recruited to the SAPS through a process known as 'lateral entry'. That is, suitably qualified and experienced civilians can be appointed directly to senior posts within the SAPS. Such senior civilians are appointed under the South African Police Service Act and not the Public Service Act. Public Service Act appointees usually involve lower level support staff such as administration and provisioning clerks, messengers, telephonists and secretaries.

Another element of the outsourcing debate in the SAPS was about privatising certain functions or services traditionally delivered by the public police. That is, selling selected police services to the private sector which would continue

providing them to a paying clientele only. An evaluation of the possible role of the private security industry, in providing privatised policing services, was undertaken for the SAPS in 1997.¹⁰⁸ It was concluded that the SAPS could not abrogate its constitutional responsibilities. The country's constitution is very specific about the objectives of the SAPS:¹⁰⁹

[t]he objectives of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Given the aforementioned constitutional provision, the SAPS made a principled decision in the mid-1990s that no core policing functions (as determined by the SAPS) would be outsourced. That is, only non-core functions capable of being outsourced without affecting the ability of the police to prevent, combat and investigate crime would be outsourced. This decision led to an internal debate on what could be regarded as non-core SAPS functions. Questions were raised about a number of functions, some of which remain unanswered to this day. For example, is the guarding of awaiting trial prisoners at court houses a core policing function, or does it merely serve to provide security which can be provided by private armed guards?

A further guiding principle on outsourcing non-core policing functions is centred around cost. That is, if it costs more to outsource a specific service or function than what it would cost the SAPS to perform the job itself, then outsourcing is deemed to be not feasible. In other words, the SAPS has to benefit financially from outsourcing any service to the private sector.

Finally, the SAPS approached outsourcing from a policy perspective. Namely, to advance the government's Reconstruction and Development Programme (RDP) through the economic empowerment of small emerging black-owned companies. In line with the RDP, black-owned companies, and individuals from previously disadvantaged communities, are encouraged to tender for local SAPS outsourcing contracts to provide selected services such as building maintenance, cleaning, catering and gardening services.

By the late 1990s the outsourcing debate in the SAPS had largely disappeared. A wide range of functions performed by police members, such as guarding, and logistical, financial and personnel services had been considered for outsourcing. However, in most cases the outsourcing option was rejected, often because the outsourcing debate had led to speculation about the continued

existence of certain units and posts within the SAPS. This created rumours about job security in the SAPS resulting in low staff morale.

What has been Outsourced?

After much internal debate and discussion only a limited number of carefully selected functions and services, historically performed by the SAPS, have been outsourced to the private sector. Some of these are discussed in greater detail below.

Guarding of government buildings

At the time the SAPS was established in 1995, Municipal Police officers (also disparagingly known as '*kits konstabels*' or '*instant constables*' because of their short training period of six weeks) were used for guarding police stations and other government buildings. After 1995 many Municipal Police officers with the necessary qualifications, became full members of the SAPS. Guarding functions previously performed by Municipal Police personnel were outsourced to local security companies. Outsourcing contracts were later extended to include access control to SAPS buildings and the guarding of police garages.

Building maintenance

The day-to-day maintenance of police buildings has been outsourced. Individual station managers can send out local tenders for maintenance services. Once a tender has been approved by the provincial office, the local station manager is accountable for ensuring that the outsourced service provider performs the agreed upon work. While the Department of Public Works continues to undertake major repairs and the construction of new police buildings, the department itself also outsources much of its work to private contractors.

Vehicle fleet management

Certain functions around the maintenance and management of the SAPS vehicle fleet have been outsourced. For example, towing services as well as the servicing, repairing and the maintenance of the police vehicle fleet has been outsourced. The use of private motor mechanics differs between areas. Either pri-

vate mechanics (with their tools and an assistant) are hired on a job-by-job basis to work on police vehicles at a police garage, or servicing and maintenance is contracted out to specific garages for the work to be done there.

Vehicle pounds

The provision of guarding services at police vehicle pounds has been outsourced to private security companies. Other outsourced services include vehicle pound related towing services, the moving of vehicles within pounds (e.g. from 'unidentified' to 'identified' vehicle sections), cleaning and maintenance of pound premises and vehicles, and access control to vehicle pounds. These services were specifically outsourced to deter theft from vehicle pounds by corrupt police members.

Consultants and experts

The SAPS commissions outside consultants and experts to assist it on a variety of issues. For example, outside consultants have been used to assist the police in developing new policy, such as the White Paper on Safety and Security. Outside consultants have also been used to develop standards and procedures for specific police activities such as developing performance indicators or establishing hiring criteria for certain positions. Such services are usually outsourced in cases where persons with the requisite skills cannot be found within the SAPS.

IT services

In 1998 the State Information Technology Agency (SITA) was established to serve the information technology needs of government departments. Shortly thereafter the SAPS outsourced the provision of its IT needs to SITA. The outsourcing arrangement includes maintenance of, and support for, software applications.

Other

Other services and functions that have been outsourced by the SAPS include:

- cleaning services at police offices and buildings;

- gardening services at all police facilities;
- catering services;
- laundry services and the provision of meals at police training colleges and single quarters;
- providing meals for prisoners detained at police holding cells; and
- the crew and maintenance personnel for the police's aircraft.

What has not been Outsourced

While the SAPS has outsourced a number of its non-core functions, many are still performed by police staff themselves. What follows is a discussion of many of these non-core services and functions, and an analysis of the reasons why they have not been outsourced.

Transporting prisoners

The SAPS is responsible for transporting all arrestees to court. These are suspects arrested off the street or at a crime scene who, by law, have to appear in front of a judicial officer within 48 hours of their arrest. Suspects who have been arrested and kept in police holding cells at a police station before their first court appearance are consequently transported by the police from the place of arrest to the police station, and from the police station to the local court. For example, if the police arrest a suspect on a Saturday, such a suspect is usually detained in police holding cells until the following Monday morning, when the police transport the detainee to the local court for the purposes of a bail application.

When accused persons are detained awaiting trial (i.e. they are not released on bail) after their first court appearance, they are transported to the local prison either by members of the Department of Correctional Services, or the police. The transporting of awaiting trial prisoners from prison to court for purposes of trial or a bail application is also done by either the Department of Correctional Services or the SAPS, depending on the area, the seriousness of the offence with which the accused has been charged, and the perceived dangerousness of the accused.

Generally, awaiting trial prisoners are transported from prison to court by police members in SAPS vehicles. Awaiting trial accused who are perceived to pose a flight risk or to be particularly violent, are additionally escorted and guarded by members of the Public Order Police (which is part of the SAPS). However, in smaller centres and for low-risk prisoners members of the Department of Correctional Services often transport and escort prisoners to the local court.

The SAPS has investigated outsourcing the transporting of prisoners to and from court. However, this outsourcing option was rejected, partly because no uniform national policy on the transporting of prisoners by the SAPS and the corrections department exists. The outsourcing discussion is complicated by the fact that high-risk prisoners are presently escorted and guarded by armed police guards. This raises questions about the extent to which an outsourced prisoner transportation service would be responsible for transporting and guarding high-risk prisoners. If a high-risk prisoner escaped, who is held accountable in such a situation? Should private security guards be permitted to track down and re-arrest such escapees? Or, should the outsourcing contract extend only to the transporting of prisoners, with the SAPS retaining responsibility for escort and guarding functions? These are questions which must be resolved before outsourcing the transportation of prisoners can be seriously contemplated.

Guarding prisoners and court orderly duties

The police are responsible for guarding all persons detained in holding cells situated at court houses throughout the country. Moreover, virtually every courtroom in the country is staffed by two or more uniformed police officers who serve as 'court orderlies' for the courtroom in which they are located. Court orderlies are responsible for escorting prisoners to and from the court holding cells to the courtroom, maintaining order and security in court, and a variety of other administrative functions. The SAPS has investigated – and rejected – the possibility of outsourcing the guarding of court-based prisoners and the court orderly function to private security guards.

The Department of Justice and Constitutional Development is responsible for court administration. Based on this, the SAPS has argued, the justice department should pay for outsourced guarding services to secure prisoners at court and court orderly functions. The justice department, however, argues that the SAPS has always been responsible for providing these services and should

consequently also be responsible for financing any replacement service outsourced to the private sector.

The dispute was resolved after a number of high-profile escapes of dangerous prisoners from courtrooms, and the assassination of judges and magistrates. This resulted in a number of judicial officers refusing to hear cases unless uniformed police officers were guarding them and their courtrooms. After a re-evaluation of court security subsequent to the aforementioned escapes and attacks on magistrates and judges, it was decided that the maintenance of security within a court, and the guarding and control of prisoners in court-based holding cells, would remain the responsibility of the SAPS.

State mortuaries

In South Africa, state mortuaries are administered and controlled by the SAPS. This includes functions such as transporting bodies to the mortuary (in SAPS vehicles), providing storage facilities, preparing inquest documents and assisting in post-mortems. The actual post-mortem examinations are, however, conducted by pathologists attached to the Department of Health.

After a lengthy investigation it was decided to transfer the administration of mortuaries (with the exception of the transporting of bodies) to the Department of Health. This decision has, however, not been implemented because of a dispute about the issue of funding. The SAPS budget is a national one while each (provincial) Department of Health, which is a provincial competency according to the constitution, receives its funding from provincial government. Provincial health departments are reluctant to take over these funding responsibilities for mortuaries, arguing that they are a national responsibility. Moreover, the national Department of Health has not budgeted for running the country's mortuary service in its entirety. As a result, the SAPS continues to administer and run state mortuaries until such time when the health department allocates the necessary funds for this purpose. This has been stalled by the provincial health departments which refuse to accept financial responsibility for the state mortuaries in their provinces.

While the SAPS would like to cede responsibility for the transporting of bodies, this is opposed by the health department. The Department of Health wants the SAPS to continue providing this service as the latter already has mortuary vans, and the police are usually the first on the scene of an unnatural death. As part of any criminal investigation it is the police who can

quickly arrange for a body to be transported to the nearest mortuary. Moreover, the health department argues, as the body of an unnatural death forms part of the chain of evidence required for the purposes of a trial or an inquest, the police should retain ownership of a body from the scene of death to the point where it is handed over to a mortuary worker.

SAPS Video Unit

Many of the functions performed by the SAPS Video Unit do not relate to the core services provided by the police service. Non-core services performed by the Video Unit include developing public relations and other promotional material for the SAPS. The Unit also creates material for POL-TV, an internal SAPS TV channel broadcasting a few hours a week. Many of the training videos made for the police's Training Division are also developed by the Unit.

In addition to the above, the Unit assists the police's detective service by filming crime scenes for investigative purposes, or for the prosecution service to use in a subsequent trial. The Unit also assists the SAPS by filming demonstrations, marches and other public events that potentially may lead to violence. Although a large proportion of the Unit's personnel are specialist camerapersons and video technicians, the SAPS has decided not to outsource any of the Unit's operations.

Firearms Register and Criminal Record Centre

The functions of the Central Firearms Register (CFR) were expanded with the promulgation of the Firearms Control Act of 2000.¹¹⁰ With the implementation of new firearm registration structures a number of positions in the CFR have been transferred from uniformed police officers to civilian SAPS employees. Such 'civilianised' positions include firearm registration clerks at specific police stations, and firearm application and data capture clerks at the CFR.

The Criminal Record Centre (CRC) is responsible for checking the fingerprints of persons charged with having committed a crime against their fingerprints database of convicted persons. Many CRC functions are performed by civilian administrative and data capture clerks employed by the SAPS. Management positions in both the CFR and the CRC are occupied by police officers. Given this, it is unlikely that the functions of either the CFR or the CRC will be outsourced to the private sector in the foreseeable future.

VIP protection and guarding of parliament

The specialised function of VIP protection for cabinet ministers, Members of Parliament (MPs) and other South African and foreign political dignitaries could be outsourced to private security specialists. This has, however, not been done because of political considerations. So far the government has always felt strongly that such a sensitive security function should remain under firm state control and be provided by a government department. The VIP Protection Unit will remain the responsibility of the SAPS until a political decision is made to either outsource it to another government department (e.g. South African Secret Service or National Intelligence Agency) or to specialist private security companies.

Uniformed SAPS officers guard parliament and perform access control functions at parliament, even though the guarding of other government buildings has largely been outsourced to private security personnel. The perceived sensitive security needs of parliament and MPs has meant that the SAPS remains responsible for this function. Somewhat surprisingly, however, the provision of guarding and security services at some provincial legislatures (including Gauteng) has been outsourced to private security companies.

Outsourcing by Default

Certain policing functions, while not formally outsourced by the SAPS, are nevertheless performed by private security practitioners. In these cases private security companies have 'by default' successfully filled a demand for security services, the supply of which the SAPS is unable or unwilling to monopolise. Some of the more notable traditional police services outsourced 'by default' are discussed below.

Responding to alarms

Responding to burglar or intruder alarms situated in private homes, business premises and factories is, strictly speaking, part of the police's crime combating and prevention functions. However, because of resource constraints this function is decreasingly being performed by the SAPS. In response, private security operators have exploited the gap in the provision of alarm-response services and built up an impressive 'armed response' capability in most urban areas in South Africa. The police's previous alarm-response service has been

outsourced to the extent that both the provision and the payment for this service is provided by, respectively, private security operators and fee-paying customers. In effect the previously state-provided alarm-response service has been privatised, with the private sector selling an alarm-response service to customers who have the means to pay for it.

Many Africa private security companies have established their own armed reaction units – a rapid reaction ability whereby armed guards respond to activated alarms. As this sector of the security industry developed in the early 1990s, many private alarm systems were linked not only to the radio-control centre of a security company, but also directly to the local police station. In practice, the SAPS found that a large proportion of alarms were activated in error and were ‘false alarms’.¹¹¹ As a result many police stations have stopped monitoring alarms installed in private homes and businesses, or insist that the private security company screen every activated alarm and only forward positive calls to the police. This has decreased the burden on the police to respond to every activated alarm by transferring the onus of first response to a private security company.

CCTV in CBDs

Outsourcing ‘by default’ has been taking place in the field of electronic surveillance, notably the installation of closed-circuit television (CCTV) cameras in public places, and the monitoring thereof in high-tech control rooms operated by private security companies in a number of Central Business Districts (CBDs) in South Africa.¹¹² The funding, installation, operation and maintenance of these CCTV networks has been a boon to the SAPS. South Africa’s urban CCTV networks provide a significant support service to the police, without requiring any financial outlay or expensive infrastructure expenditure by the SAPS.

Sport and other public events

In the past, the provision of security at large public events, such as sport tournaments and music concerts, was provided by the police. With the growth in the size of sport events, and the professionalisation of many sports, sporting associations began to accept greater responsibility for providing physical security at their events.

Today, the organisers of sporting events are generally responsible for providing access control and internal security at events. Such security services are usually

provided by the security companies specifically hired for the job by the event organiser. The SAPS has retained responsibility for providing private security for external or perimeter security. Moreover, the SAPS co-ordinates and maintains overall control of all security arrangements at large public events.

Future Outsourcing Possibilities

The SAPS continues to perform a range of peripheral policing functions, the provision of which should be considered for outsourcing. For example, support services such as human resources management, financial services, trauma counselling services and logistics could be outsourced without impinging on the police's core function of preventing, detecting and investigating crime. While such services have not been outsourced, they have undergone a substantial civilianisation process whereby police officers have been replaced by civilian SAPS personnel. Other functions, presently performed by the SAPS, which could be fully or partially outsourced to the private sector are discussed below.

Training

Presently SAPS personnel supply the bulk of the organisation's training needs. The SAPS could, however, share a greater part of its training burden through innovative partnerships with tertiary educational institutions and relevant non-governmental organisations (NGOs), many of which already offer some training to the police. By outsourcing its training needs to carefully selected and evaluated educational institutions, the SAPS can ensure that its members receive the latest and most relevant training programmes available. Moreover, many tertiary educational institutions have state-of-the-art facilities and equipment, enhancing the level of training they can provide.

The staff shortages in the SAPS Training Division, coupled with burgeoning training needs as the SAPS is anticipated to employ an additional 36,000 new recruits between 2002 and 2006, are likely to compel the organisation to out-source a significant portion of its training requirements.

Crime information analysis

The SAPS is responsible for collecting, collating, interpreting and disseminating all crime data it collects throughout the country. With some 2.5 million

recorded crimes annually, the police's Crime Intelligence Management Centre (CIMC) and Crime Information Analysis Centre (CIAC) lack the personnel to deal with all crime statistics-related enquiries from other criminal justice agencies and the public. Moreover, both the CIMC and CIAC are primarily staffed by police officers, so that both Centres lack professional statisticians, database operators, criminologists and sociologists to adequately analyse the raw information at its disposal. It would be prudent of the SAPS to outsource some of the more specialised statistical and analysis functions in the CIAC, and to a lesser extent the CIMC, to experts in the private and academic sectors.

Forensic Science Laboratory

With the increase in recorded crime in the late 1990s, and the post-1994 emphasis on evidence-driven (instead of confession-based) investigations, the police's forensic science laboratories have been unable to cope with the amount of forensic material they are requested to analyse and convert into evidence useful in court. To make matters worse, the SAPS has found it difficult to attract skilled forensic scientists at the salaries the public service can offer. To reduce the backlog in forensic analysis, and effectively analyse unusually complex pieces of forensic evidence, selected services presently performed by the police's forensic science laboratories could be outsourced to private forensic practitioners and technical laboratories.

Conclusion

The SAPS has outsourced a number of its functions and services to private-sector service providers. Nevertheless, a multitude of non-core policing functions are being performed by an overworked police service. The provision of many such non-core policing functions could, with the proper controls and police oversight, be outsourced to the private sector.

In South Africa the public police is responsible for an incredibly wide array of services. Commissioner-of-Oaths duties, court orderly or bailiff functions, laboratory-based forensic analysis, the operation and administration of mortuaries and the transportation of prisoners, are all services which are generally not performed by sworn police personnel in modern police services in other parts of the world. Young men and women do not join the police service to sign piles of affidavits, look after bodies in a mortuary, or act as court-based security guards. Making the police responsible for these tasks is not only

demoralising to the police officers involved, but wasteful of the expensive training police recruits get to investigate and combat crime. Such wastefulness is especially inexcusable in a country like South Africa, where violent crime rates are extraordinarily high.

The SAPS' principled decision not to outsource core policing functions is sound. However, as has been elaborated upon above, the implementation of this decision has been ambiguous and fraught with uncertainty. There is, for example, no logical reason why the transporting of prisoners or the guarding of court rooms should not be outsourced to private security service providers. South Africa has a well developed private security industry regulated by a statutory body, the Security Industry Regulatory Authority, which is accountable to the Minister for Safety and Security. Properly managed and supervised, the SAPS need not fear that, by outsourcing selected services, it is relinquishing control over such services to chaotic market forces. Outsourcing the multiplicity of peripheral tasks the police service presently performs, will permit the SAPS to meet its constitutional obligations, to prevent, combat and investigate crime, to maintain public order, and to uphold and enforce the law.

CHAPTER 5

PROSECUTIONS AND THE ADMINISTRATION OF JUSTICE

Martin Schönteich

South Africa's judiciary, courts and prosecution service do not have the capacity to adequately deal with the case load swamping the country's criminal courts. Between 2001 and 2002 the number of investigated cases referred to court increased by 47%. Between 1996 (the first year for which accurate figures are available) and 2002 the number of criminal cases referred to court increased by a massive 110%.¹¹³ Over the same period the number of prosecutions and convictions increased by, respectively, only 51% and 58%.

Since the late 1990s the National Prosecuting Authority (NPA) has employed more prosecutors, and the annual number of finalised cases has increased. However, because of high levels of crime, and police operations which result in a large number of arrests, the number of outstanding or uncompleted cases in the country's courts has also increased. While the state can employ more prosecutors, it is expensive to train new recruits and pay them high enough salaries to keep experienced and skilled prosecutors in its employ. Moreover, the effective prosecution of certain intricate crimes require specialised skills which the NPA does not have.

A cost-effective way of dealing with the large backlog of cases, and the prosecution of intricate cases, is to outsource their prosecution. Some tentative steps towards outsourcing particularly difficult-to-prosecute commercial crimes have been taken by the NPA's Specialised Commercial Crime Unit. At the Pretoria Specialised Commercial Crimes Court, the NPA has outsourced the prosecution of selected cases to experienced private counsel.

Another way to lighten the burden on the state's prosecutors is to make it easier for crime victims to institute private prosecutions. It is, for example, likely that, given the choice, some financial institutions would happily forego relying on overworked public prosecutors and prefer to pay competent private counsel to prosecute persons suspected of defrauding them of large sums of money. Other outsourcing options to relieve the pressure on the criminal courts include private arbitration and mediation schemes to deal with minor criminal offences, and outsourcing the management, administra-

tion of criminal courts. These and other outsourcing options are discussed in greater detail below.

Insufficient Capacity

Cases are 'referred to court' when the South African Police Service (SAPS) hands over investigated cases to the prosecution service. This is done when the police believe there is a *prima facie* case against a suspect. In essence, cases are sent to court only if there is fairly substantial evidence for a suspect to be charged with an offence. Only about a quarter of all crimes recorded by the police result in referrals to court. Yet, the courts are unable to deal with the load of cases the prosecution service has elected to prosecute. The number of cases referred to court since 1996 – and especially since 2000 – has been increasing at a far greater rate than the courts are able to finalise (Figure 1).

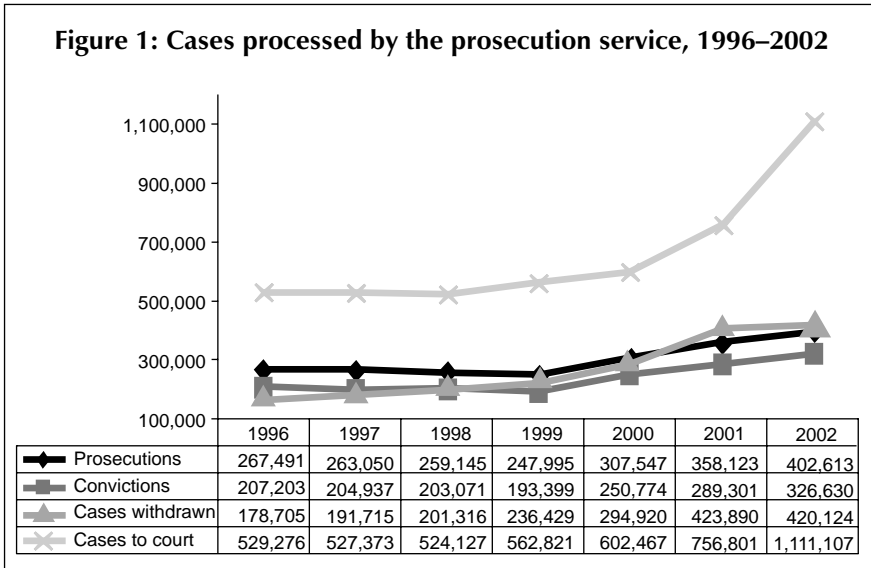
For example, during 2002 some 1.1 million cases were referred to court. During the same year only 403,000 cases were finalised with a verdict, of which 81% resulted in a conviction and 19% in an acquittal or not guilty finding.¹¹⁴ A further 420,000 cases were withdrawn by the prosecution service.¹¹⁵ Thus, of all the cases dealt with by the prosecution service during 2002, just over half (51%) were withdrawn. A further 40% resulted in a conviction and 9% in an acquittal.¹¹⁶

What follows below is a brief discussion, demonstrating that a lack of a sufficient number of skilled and experienced prosecutors and police investigators is leading to inefficiencies in the court process; specifically to high case withdrawal rates and a growing backlog of outstanding cases.

Withdrawn cases

Between 1996 and 2002 almost two million cases referred to court were withdrawn by prosecutors across the country. With almost every second case referred to court being withdrawn, it would appear that police resources are being wasted in the investigation of cases which do not make it to the trial stage of criminal proceedings.

There are a number of reasons for the high withdrawal rate. A common reason for the withdrawal of charges against an accused is a court's refusal to grant the prosecution any further postponements in respect of a case on the



Sources: SAPS CIAC, NPA Court Management Unit

court roll. The South African constitution grants every accused the right to have their trial begin without any unreasonable delay.¹¹⁷ Often suspects are charged before the investigation pertaining to their case is completed by the police. This can produce lengthy delays as the police’s investigations need to be finalised before the prosecution can compile a detailed charge sheet against an accused and commence with a formal prosecution.

Courts will grant postponements to the prosecution, so as to allow the police to finalise its investigations, for a reasonable time only. In less serious cases, lengthy and frequent postponements are rarely granted. For example, prosecutors require a blood-alcohol analysis report from the Department of Health’s forensic chemical laboratories to successfully prosecute persons charged with driving while under the influence of alcohol (i.e. drunken driving). It takes about six weeks for such a report to be finalised, and the courts are generally prepared to postpone drunken driving cases for such a length of time. Over busier periods, such as Christmas time, when there are many police roadblocks and the number of people charged with drunken driving increases, the finalisation of such reports can take up to three months. Most courts are unlikely to postpone drunken driving cases for such a long time. Consequently, in cases where a trial might be unreasonably delayed due

to outstanding forensic investigations, (such as a blood-alcohol or district surgeon's report), withdrawal rates are high.

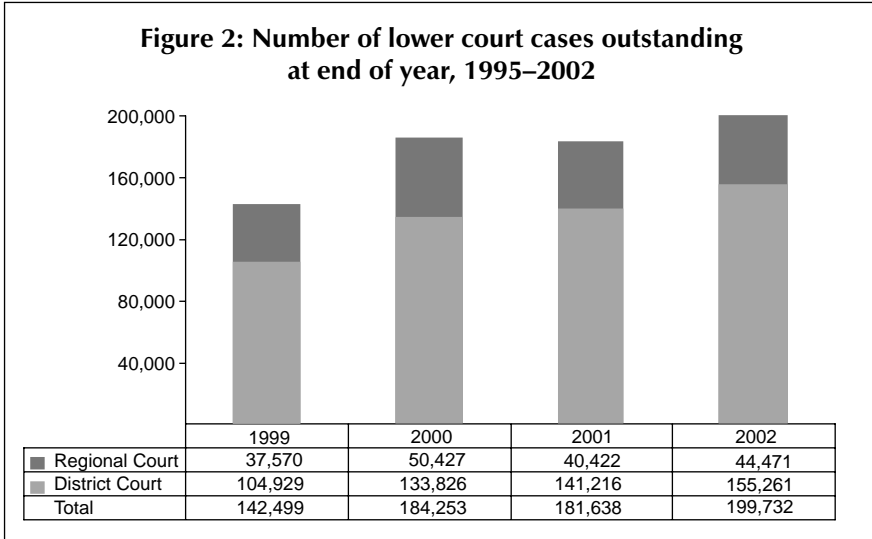
Generally about half of all residential housebreaking, robbery, and car theft cases referred to court are also withdrawn by the prosecution service. For these crimes it is unlikely that ambivalent victims are the reason for the high number of withdrawals. The more likely reason is the often inordinate delay in the investigation of these crimes, and the consequent failure of witnesses to testify in court.¹¹⁸ The latter might be because many witnesses tire of going to court with the expectation to testify, only to be told that the case will be postponed because of outstanding investigations or because the court is too busy to accommodate their case. Some witnesses are also intimidated from attending court by the accused they are supposed to testify against. The more often and the longer witnesses have to wait outside busy court rooms, the greater the opportunity for their intimidation. In parts of the country, many burglaries, robberies and car thefts are committed by crime syndicates whose members do not hesitate to intimidate those who might testify against them. Moreover, some witnesses might have no faith in the criminal justice system, and elect not to testify for this reason.¹¹⁹

Outstanding cases

The backlog of outstanding cases is high. At the end of 2001, about 182,000 lower court cases were 'outstanding' or had not been finalised. This represents the backlog of cases the courts had to contend with at the beginning of 2002. At the end of 2002, some 200,000 lower court cases were outstanding or had not been finalised (Figure 2). At the end of 2002, the number of outstanding cases was equal to almost half of all cases prosecuted during that year. Already in October 2000, the National Director of Public Prosecutions, Bulelani Ngcuka, pointed out that the 180,000 criminal cases outstanding in the country's courts at the time, would take prosecutors two years to deal with, excluding any new cases.¹²⁰

Court productivity

During 2002 the average district court secured 273 convictions; the average regional court 64 convictions. Given that district courts mainly deal with minor offences, 273 convictions per average court per year – or a conviction about every working day – is low. While some regional court trials take a long time to finalise, an average of one conviction per court every fourth working day is also low.¹²¹



Source: NPA Court Management Unit

During 2002 the average district court sat for 4 hours and 10 minutes, and the average regional court for 4 hours (excluding periodical courts). The courts are working far below their potential capacity. In theory, courts are open six hours per day. While courts sitting six hours a day are probably impossible to achieve in practice, there is considerable room for improvement for the many courts that sit for even shorter periods than the present average of around four hours.

Policy Dilemma

No empirical research has been done to show why many cases are being withdrawn by the prosecution service, a high number of outstanding cases are overwhelming the courts' rolls, and the courts are unable to sit for longer periods of time given the large backlog of cases that need to be finalised. It is likely that the core problem facing the courts is one of too few experienced investigators and prosecutors who can expeditiously finalise the investigations, and prosecute the cases referred to court.

Experienced prosecutors can assist inexperienced police investigators by giving the latter guidance and advice during the investigation process. A sufficient number of experienced prosecutors should thus be able to reduce the number

of cases going to court that end up being withdrawn because of a lack of sufficient evidence against the accused, or because of inordinate delays in the investigation process. Investigations conducted under the guidance of experienced prosecutors avoid unnecessary enquiries, and instead focus on the core issues that need to be proved to convict the accused. A shorter period between arrest and prosecution, reduces the risk that victims change their minds to testify because of the inconvenience of repeatedly attending court or intimidation. Moreover, the shorter the period between the commission of a crime and the prosecution thereof, the greater the likelihood that witnesses can recall what they saw, thereby increasing the chances of a successful prosecution.

Shorter investigation times and faster prosecutions reduce the average period accused persons remain incarcerated awaiting trial, thereby relieving pressure on the overcrowded prison system. With fewer accused persons awaiting trial, the proportion of time prosecutors spend postponing cases and conducting bail applications should decrease. This, and the fact that experienced prosecutors are able to finalise trials more rapidly than their inexperienced colleagues, should decrease the number of outstanding cases within the system.

Since the creation of the National Prosecuting Authority in 1998, a number of recruitment drives have increased the number of prosecutors. Moreover, new career paths for prosecutors have been developed to retain the services of experienced prosecutors. Provided the National Treasury allocates the necessary resources, it is relatively easy for the NPA to recruit new prosecutors. However, the disadvantage to recruiting large numbers of new prosecutors is that they are a considerable and recurring expense in the long run. As is the case with the public service generally, prosecutors are paid more the longer they stay within the service. A prosecutor with ten years experience, for example, generally receives a relatively high salary irrespective of how good or productive that particular individual is.

As the public service tends to be inflexible in terms of its hiring and firing policy, with very little individualised performance review, badly performing prosecutors are rarely dismissed. The prosecution service is able to react only slowly and inflexibly to changes in the demand for prosecutors. Once the senior management of the NPA realise there is an increased demand for prosecutorial capacity, it needs to persuade the National Treasury to allocate more money for the recruitment of prosecutors, go through a lengthy recruitment process and train the new recruits. Such a process can take a few years. By the time newly recruited prosecutors are able to take on their positions in court rooms throughout the country, the increased demand for additional

prosecutorial capacity may have subsided. For example, with the launch of the police's Operation Crackdown in 2000 the number of cases referred to court increased dramatically.¹²² It is likely, however, that as the Operation begins to wind down during 2003, and as recorded crime begins to stabilise and even decrease, the need for additional prosecutors will decrease too. The new prosecutors hired in response to the increased case load brought about by Operation Crackdown will, however, continue to be an expensive drain on the NPA's coffers after the need for their services subsides.

A surplus in the number of prosecutors can, of course, be managed through the natural attrition of staff the NPA experiences all the time. On balance, however, the most qualified and skilled prosecutors are the first to leave the NPA to seek work in the lucrative private sector. These are usually prosecutors with skills in demand by both the NPA and private law firms or financial institutions, such as prosecutors with experience in prosecuting serious commercial crimes and the activities of organised crime syndicates. As the public service allocates rewards for prosecutors primarily for being loyal employees (i.e. by length of service), rather than by the scarcity of their skills, commercial crime prosecutors generally receive the same remuneration as, for example, violent crime prosecutors of the same rank and years of service.

In summary, the dilemma policy makers face is that hiring new prosecutors is expensive, and there is no guarantee they will remain in the prosecution service once they have gained work-related experience and practical litigation skills. Moreover, should a large number of new prosecutors be hired to get rid of the backlog of cases, the state may end up with a surplus of prosecutors if there is a significant decrease in recorded crime.

Outsourcing solutions

An effective way of addressing the state's dilemma of meeting the changing demand for prosecutorial services, and for the state to be in a position to provide rare and expensive prosecutorial skills only when there is a justified demand for such services, is through outsourcing some of the services presently provided by the NPA.¹²³ As is discussed in greater detail below, by outsourcing certain types of prosecutions, and making use of outsourced prosecutorial services when there is a spike in the demand for prosecutors, the state could at all times guarantee a complete and effective prosecutorial service in a cost-effective manner. The categories of cases suitable for outsourcing, and the concept of private prosecutions, are discussed below.

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

Such specialised prosecutions could be outsourced to legal specialists in the private sector.¹²⁴ Bruce Benson, an economist from Florida State University, argues that there are advantages in specialisation, and the use of specialised personnel.¹²⁵

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.

There are many law firms in South Africa which specialise in commercial crime and, to a lesser extent, environmental issues of a legal nature. 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. 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 which strongly undermine public safety, such as murder, rape and robbery.

Outsourcing selected commercial crime prosecutions

Outsourcing selected prosecutions in South Africa would not be new. For some time the Specialised Commercial Crime Unit (SCCU) of the NPA has been outsourcing the prosecution of selected cases falling within the juris-

diction of the Specialised Commercial Crime Court in Pretoria (which has been operating since 1999).

The NPA has, on a number of occasions, made use of private legal counsel to prosecute particularly difficult and complicated commercial crimes tried at the Specialised Commercial Crime Court. The specific objectives of this outsourcing initiative include:

- the successful prosecution of high profile, complex cases, where the guilty are appropriately sentenced; and
- the transfer of skills from private counsel to state advocates.

The Specialised Commercial Crime Court is supported by Business Against Crime (BAC). Through BAC-facilitated negotiations between the NPA and the business sector, a trust fund has been set up so that money donated by the private sector – primarily banks and other financial institutions – is available to the NPA to finance outsourced prosecutions.

Consequently, in cases where the prosecution service lacks the skills or the confidence to prosecute a particularly intricate commercial crime, the NPA may use the money in the trust fund to hire senior counsel in private practice to assist the state in the prosecution of such cases. Usually a senior private advocate is teamed up with one or two state advocates. In this way a mentoring relationship can develop through which the private sector specialist can transfer some of his skills to the state prosecutors allocated to him. When similar cases come up in the future, the state (through its mentored prosecutors) should have gained the necessary skills to prosecute the matter without outside assistance.¹²⁶

By all accounts the Specialised Commercial Crime Court has performed well.¹²⁷ During 2001, the two magistrates of the court handed down judgments in 171 cases, with 88% resulting in a conviction.¹²⁸ Each case was finalised in an average of two days of court time. Nationally the average regional court takes about four days to complete a trial, and this includes simpler-to-prosecute and adjudicate violent crimes. While it is not possible to determine the extent to which outsourced prosecutions have assisted the NPA to boost its performance in respect of prosecutions at the Specialised Commercial Crime Court, there is general agreement that outsourcing the prosecution of selected cases has been a success.

Seasonal cases

Certain crimes have a seasonal prevalence. Over the December holiday period there is an upsurge of drunken driving, shoplifting, assault, and domestic violence cases. These are normally not complicated cases to prosecute. Because of their sheer numbers, however, and the fact that many prosecutors go on leave over the December period, a congestion of cases usually builds up at the beginning of every year.

The solution to effectively deal with the seasonally-determined changes in case-load is not to employ more prosecutors on a full-time basis as this would bring about a surplus of prosecutors for the remainder of the year. Rather, the prosecution of such cases should be outsourced to articled clerks and junior attorneys in the private sector.¹²⁹ This would assist the state to deal cost effectively with the annual increase in cases referred to court at the end of every year.

Similarly, in the aftermath of extended SAPS crime combating operations – such as Operation Crackdown – an increase in the number of cases referred to court can be expected. In such situations it may not be cost effective, or even possible within a short period of time, to employ a large number of new prosecutors on a full-time basis. New prosecutors would need to be trained first to have the necessary level of skill to deal with many of the serious cases investigated by the police. Rather, it may be more appropriate to outsource the prosecution of such a short-term influx of cases to private lawyers who are appointed as prosecutors for a limited period of time only.

Private Prosecutions

A number of countries permit private prosecutions under certain circumstances. In 1985 the Council of Europe's Committee of Ministers adopted a recommendation that crime victims should have "the right to ask for a review by a competent authority of a [prosecutor's] decision not to prosecute, or the right to institute private proceedings".¹³⁰ In England, victims perform about 3% of criminal prosecutions.¹³¹ In Germany, private prosecutions are permitted in two circumstances. First, a class of minor offences, including violations such as domestic trespass, can be prosecuted by victims. Second, a crime victim can demand that the public prosecutor pursue a case, and if the demand is refused, the victim can appeal to the court. If the court orders a prosecution, the victim can act as a 'supplementary prosecutor' to ensure that the public prosecutor adequately presents the case.¹³² In Mexico, an amendment

to the constitution in 2000, provides for the right of victims to appoint a lawyer to assist the public prosecutor's office with the investigation and trial, and to adduce evidence.¹³³

In a report on private prosecutions, produced by the Law Reform Commission of Canada, a case is made for expanding the use of private prosecutions.¹³⁴ While the report focuses on the Canadian criminal justice system, the arguments presented by the Commission are appropriate to South Africa as well. The Commission argues that a criminal justice system that makes full provision for the private prosecution of criminal offences has advantages over one that does not:

In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.¹³⁵

The Commission felt that certain kinds of offences are more likely to motivate individuals or public interest groups to launch a private prosecution. For example, offences relating to the protection of consumers, the environment or animals are likely to bring forth citizens who are committed to the enforcement of the values contained in this type of legislation. At the same time these types of offences – usually of the regulatory kind – are most likely to be given a lower priority by the state prosecution service.

In another comment applicable to South Africa, the Commission concludes that society benefits where formal, positive citizen interaction with the justice system results in some additional control over official discretion:

The form of retribution which is exacted by the citizen's resort to legal processes is clearly preferable to other unregulated forms of citizen self-help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, this form of citizen/victim participation enhances basic democratic values while at the same time it promotes the general image of an effective system of administering justice.¹³⁶

As in many other common law jurisdictions, South African legislation provides for private prosecutions but it is very rarely used in practice.¹³⁷ In South Africa

a private prosecution may occur only if a Director of Public Prosecutions declines to prosecute a case at the instance of the state. 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.¹³⁸ 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. 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.¹³⁹
- In a private prosecution the accused person cannot be arrested, and may be brought to court only by way of a summons.¹⁴⁰
- A court may set aside a private prosecution which is irregular or vexatious or constitutes an abuse of the process of court. If a court is of the opinion that a private prosecution is unfounded and vexatious, it must award to the accused person, at his request, such costs and expenses as the court deems fit.¹⁴¹
- Where an accused person is acquitted a court may order the private prosecutor to pay to the accused person the whole or part of the latter’s costs and expenses incurred in connection with the prosecution.¹⁴²

There is much to be said for private prosecutions.¹⁴³ 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 state witnesses or crime victims prior to a trial. 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. Tim Valentine, an American legal practitioner in favour of expanding the use of private prosecutions, says:¹⁴⁴

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 [to conduct a private prosecution] 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.

The argument that the concept of private prosecutions is flawed, because such prosecutions are accessible only to those with the means to pay for them, 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 the latter 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 (NGOs) can assist indigent crime victims obtain the services of a private prosecutor.

Paying for private prosecutions

Bruce Benson, a proponent of expanding private prosecutions, concedes that an important question in the debate around private prosecutions is: How would a private citizen finance the prosecution of an accused? Benson comments as follows:¹⁴⁵

One possibility is a voucher system as has been suggested for privatizing indigent defense and eliminating the public-defender bureaucracy.¹⁴⁶ A superior way to pay for private prosecution (and one that simultaneously creates incentives to pursue prosecution) is the refocusing of the criminal justice system on restitution... including repayment of the costs of collection (e.g., prosecution and supervision of payment). Effectively, this procedure turns crimes with victims into torts, creating strong incentives to pursue prosecution in order to collect damages. This is not a far-fetched idea. For instance, in France, a crime victim can file a civil claim against the accused, and it can be filed in the criminal proceedings. Furthermore, if a judge in France finds a claim to be groundless, the accuser pays the court expenses and damages to the accused, and if the accusation is believed intentionally false, charges can be brought against the accuser.

Companies are loath 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.¹⁴⁷ Commercial insurance policies could even be adapted to cover the additional costs of a private prosecutor.

The law would need to be amended to permit companies and legal persons to institute private prosecutions. The law would also have to be amended to make it easier for individuals to institute private prosecutions. In terms of the present system, victims of crime may proceed with a private prosecution only after a Director of Public Prosecutions declines to prosecute the case in question. It may be prudent to explore the benefits of amending the law to permit private prosecutions which are not conditional upon a Director of Public Prosecution's decision not to prosecute in a matter. The decision whether to institute a private prosecution could be left to the victim of a crime – the person who arguably has the most to lose from a bungled prosecution.

There could be a number of benefits to such a change to the law. By instituting private prosecutions, crime victims improve their chances of obtaining a speedy conviction against an accused person. Accused persons benefit as their trials are 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 would alleviate some of the pressures on the state-run prosecution system, as state prosecutors should be able to devote more time to other cases they have to deal with.

Arbitration and Mediation

Most of the criminal cases heard in the lower or magistrate's courts, which are filling the court rolls beyond capacity, focus on factual rather than legal disputes. Such cases require a minimal application of the law. If used appropriately, private arbitration and mediation schemes could go some way towards

dealing with many of such minor criminal offences outside of the formal criminal justice process.

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.¹⁴⁸

In the United States arbitration and mediation are used to reduce criminal court caseloads. 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 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.¹⁴⁹

In Rochester, New York, a programme has been in operation since 1973 whereby less serious criminal charges are referred to arbitration. This is a programme 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."¹⁵⁰

In the Rochester programme, the first enquiry 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 is 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."¹⁵¹ Part of the consent agreement concentrates on the needs of the victim and compensation by the accused person.

It would be fruitful to explore the role arbitration and mediation could play, to reduce the pressure on the formal criminal justice system in South Africa. Appropriate and effective arbitration and mediation schemes can 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, adds to the appeal of an arbitration programme to deal with minor criminal offences in South Africa. The National Institute for Crime Prevention and the Rehabilitation of Offenders (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."¹⁵²

A South African arbitration or mediation programme should bring about cost savings to the state. "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."¹⁵³ 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 for the state compared to those processed through the normal criminal courts.¹⁵⁴ Arbitration and mediation centres do not need to be staffed by prosecutors, magistrates or judges. Centre staff could come from the ranks of attorneys (as is the case with the successful Small Claims Court system), community organisations, and even senior law students.

Administrative Support 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, in the only study of its kind it was calculated that prosecutors at the Cape Town magistrates' court spent almost 3,000 hours preparing copies of dockets for defence counsel.¹⁵⁵

Many senior law students would welcome the opportunity to do an internship at a magistrates' court during their holidays. Law students are likely to do a voluntary internship free of charge if the system is well structured, and the interns are afforded the opportunity to learn. Apart from gaining practical experience about the operation of a criminal court, it would also enhance their CVs, and assist them in making valuable personal contacts in the legal profession. Some law schools allow their students to earn course credits for participating in a 'street law' programme where they teach high school students about their legal rights. In a similar manner law schools could allow their senior students to earn credits for spending a certain number of hours assisting prosecutors with their work.

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.

Court Management and Administration

All larger criminal court centres employ non-legal personnel. These are court managers, clerks of the court, typists, secretaries, and other staff who perform a variety of administrative and clerical functions to ensure the smooth running of the courts. The tasks listed below, which are performed by non-legal court personnel, could be outsourced to the private sector.

Clerical and administrative positions

Court centres could outsource clerical and administrative positions, taking into account local requirements and budgetary constraints. For example,

outsourcing contracts could 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 the state have to purchase expensive information technology equipment that becomes outdated within a short period of time.

Professional court managers

Traditionally, senior magistrates have been responsible for managing the overall operation of court centres. In terms of the Integrated Justice System (IJS) programme, court managers are replacing these 'managing magistrates' in the busiest court centres. This is a sensible development as magistrates should adjudicate trials and not be distracted by day-to-day management issues.

In South Africa the state lacks an adequate supply of capable and experienced middle-level managers.¹⁵⁶ To overcome this, it would make sense to outsource court management functions to private sector managers. The private sector has a ready supply of capable managers. Moreover, management contracts could take into account the needs of individual courts (which would be almost impossible in the unionised and bureaucratic public service, where job descriptions for middle management positions are usually uniform throughout the country). For example, as part of the IJS programme many court centres will have their case management systems upgraded from a manual to an electronic system. Such court centres should employ managers with project and change management skills and a good understanding of information technology systems.

Court centres need to accommodate the needs of a number of government departments. While prosecutors and judicial officers spend most of their time at a court centre, many police officers, correctional officials and social workers also perform some of their functions within a court environment. The implementation of an electronic case management system, as well as other large departmental projects, involves changing the mind-sets and attitudes of public servants; of persuading public servants to not only think in terms of narrow departmental interests. In such situations it is helpful to have outsider managers who do not appear to be partisan and who can objectively implement projects in the interest of the criminal justice system as a whole, without favouring a particular programme or interest in the public service.

Finally, private sector court managers can be employed on the understanding that they improve the service courts, and the officials who work in them, deliver to the court-going public. This can be facilitated through regular court-user surveys. Such surveys can measure the opinions of court users on a variety of issues such as their feelings of safety while at court, the length of time they had to wait before being assisted by a public official, the cleanliness of public rest rooms, and the readability and usefulness of public signage at court buildings.

Court-based income-generating services

In addition to improving services courts traditionally deliver to the public, private sector court managers can be encouraged to offset some of the costs of operating a court centre by generating an income for the centre they are responsible for. This could be done through an incentive scheme whereby managers receive a bonus calculated on the income they are able to generate (which would be difficult to do in terms of the strict rules governing public sector managers).

Examples of income-generating initiatives, for which a present need exists at most court centres in the country, include:

- Leasing out space of a court centre to catering companies (to open canteens and refreshment stations), banks (to install Automatic Teller Machines) and other small traders (to sell snacks, reading materials and phone cards, and provide photocopying, Internet-access and other basic office facilities for lawyers and witnesses who need to do some work while waiting for their court cases to begin).
- Renting out court rooms after hours to night schools and other training organisations in need of lecture rooms during evenings or over weekends.
- Renting out wall space outside of court rooms for advertisers. Restrictions could be placed on the type of advertisements that would be allowed excluding, for example, political and other controversial advertising. Non-governmental organisations and foreign donor organisations could be approached to rent space for public-interest advertisement to publicise, for example, public health, anti-crime or road safety campaigns.

Security personnel

Magistrates' courts are allocated guards who control access to court buildings and are responsible for general security. Many guards are employed on a full time basis by the Department of Justice and Constitutional Development. Such guards enjoy all public service benefits, such as generous paid leave provisions, medical aid, pensions, and housing loan assistance. Court-based security personnel 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 the 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 be on duty during the busier morning periods than in the afternoons. This should improve safety at the courts, and the state would pay only for the number of 'guarding hours' it procures.

High profile court cases often attract a large number of spectators and protestors. An outsourcing contract with a security company could specify that courts 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 half. An outsourced guarding service would obviate such a problem. The contract could commit the guarding company to provide a complete guarding service throughout the year.

PPP for justice department cash halls

Every year public funds, between three and six billion rand, are channelled through 450 courts and state attorneys offices throughout South Africa. Much of this money involves bail payments, maintenance payments and disbursements, fines, administrative payments to the justice department, estate monies and witness fees. These monies are largely administered manually and distributed in cash to members of the public who do not have access to bank accounts. The present system is labour intensive,

burdensome to justice department personnel, and has led to widespread 'leakage' or corruption within the system.

At the time of writing, the Department of Justice and Constitutional Development had begun exploring a potential public private partnership (PPP) to overhaul its financial administration system for these funds. The department aims "to attract a private party which can take responsibility for financing, developing and operating a complete, integrated, appropriate and secure cash hall service". If successful, the project promises "not only to clean up the handling of these large sums [of money], but to go a long way in freeing up the courts and state attorneys offices to deal with their core functions".¹⁵⁷

Conclusion

As a result of its central position in the criminal justice process, the performance of the prosecution service is crucial to the smooth running of the whole system. A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to accused persons' request for bail, the number of unsentenced prisoners goes up. This causes overcrowding in the country's prisons and makes it difficult for prison wardens to adequately look after and rehabilitate sentenced prisoners. Moreover, if the prosecution service does not operate optimally, witnesses are discouraged from testifying and many guilty accused are acquitted of the charges against them. This lowers police morale, and fosters public perceptions that crime pays, creating public disillusionment in the ability of the criminal justice system to effectively fight crime.

The expeditious prosecution of accused is consequently a crucial component of a functioning criminal justice system. However, a country such as South Africa lacks the financial resources to employ enough prosecutors to consistently deal with the number of investigated cases that require attention. The country also lacks the resources to retain enough skilled prosecutors to competently prosecute intricate or difficult-to-prosecute offences.

Some readers may have ideological misgivings about outsourcing the prosecution of suspected offenders – a key responsibility of the modern state. The present South African reality, however, demands cost-effective alternatives to

prosecuting cases solely by state-employed prosecutors. Outsourcing the prosecution of both mundane offences with a seasonally determined prevalence and relatively rare, but difficult-to-prosecute, offences has a lot of merit as this chapter has sought to demonstrate. In fact, a small number of commercial crime prosecutions involving millions of rands have already been successfully outsourced to private counsel at the Specialised Commercial Crime Court in Pretoria.

It is the state's responsibility to ensure that all outsourcing agreements involving the criminal justice system – and, by implication, the rights of suspected offenders, victims and the public – are prudently negotiated to leave no ambiguity about the rights, duties and responsibilities of both the state as outsourcer and the private contracting parties. Any outsourcing contract can, and must, contain enough built-in safeguards to guarantee the preservation of rights and the observance of the rule of law.

CHAPTER 6

INCARCERATING AND REHABILITATING OFFENDERS

KC Goyer

In most countries, public punitiveness and the politicisation of crime policy results in the use of imprisonment for an increasing variety of crimes, as well as longer prison terms and a reduction in the use of parole. Combined with bottlenecks in many criminal justice systems, this has led to a global incarceration boom. South Africa has joined the United States, Russia, and most of the former Soviet Republics in the top 20 of the most highly incarcerated countries in the world. With an incarceration rate of 406 prisoners per 100,000 people, South Africa is the most highly incarcerated country in Africa (Table 1).¹⁵⁸

While both the number of prisoners and prison sentences continue to increase, experience in rich and poor countries alike has shown that prisons

Table 1: Prison populations per capita, selected countries, 2002

Global rank	Country	No. of prisoners per 100,000 of the general population
1	United States of America	690
2	Russian Federation	670
4	Belarus	554
6	Kazakhstan	522
7	Turkmenistan	489
12	Ukraine	436
13	Kyrgyzstan	426
16	South Africa	406
18	Botswana	396
20	Latvia	367

Source: International Centre for Prison Studies, Kings College of Law, 2002

are not sustainable. They are expensive and ineffective. In many countries at the top end of the incarceration scale, most inmates incarcerated today have been to prison before, only to be released and re-offend. While prisons are supposed to rehabilitate they often do the opposite, perpetuating the same destructive and unhealthy behaviour that led to the offender's incarceration in the first place.

Historical Developments

Most of South Africa's prisons were built during the apartheid era, and are similar in design to mining dormitories – communal cells, with beds and a single toilet for 12 to 18 men. The intention was to provide sleeping space only, as it was assumed that during the day the inmates would be out working in the mines, on farms, or on large public works projects. As rehabilitation and reintegration was not considered an important part of the mandate of South African prisons, the idea of putting chairs, desks and classrooms into prisons was lost on prison designers at the time.

By the 1960s, the use of prisoners for unpaid labour had fallen out of favour internationally, and the South African government gave the appearance of falling into step with international norms. In 1959, legislation was passed to abolish forced prison labour and introduce the concept of parole. At that time, parole was just developing in Western prison systems, and referred to a system of correctional supervision to replace short prison terms, or to reward good behaviour for sentenced prisoners. In South Africa, however, parole meant that a prisoner could shorten his sentence by working on a mine, a farm, or a public works project. Essentially, the prison labour system was maintained under a different name and remained in effect throughout the apartheid era.

The Correctional Services Act of 1959 entrenched the prison system as a quasi-military institution, with a military-style chain of command, uniforms complete with rank insignia, and a disciplinary code with many aspects usually associated with the armed forces.¹⁵⁹ With this hierarchical management style, wardens were not expected to interact with prisoners, nor were prison employees trained to rehabilitate or assist with the development of prisoners.

In 1991, major amendments to the Correctional Services Act marked the beginning of a new era for the South African prison system. During the early 1990s political prisoners were released and apartheid policies were dismantled

within the prison system. Other legislative amendments introduced correctional supervision as a sentencing option as an alternative to incarceration.¹⁶⁰ The demilitarisation of the Department of Correctional Services was, however, implemented only in April 1996.

The apartheid-era 1959 Correctional Services Act was replaced in its entirety by the Correctional Services Act of 1998, which states in its opening paragraph:¹⁶¹

The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by detaining prisoners in safe custody while ensuring their human dignity.

The 1998 Act is a significant step forward to prevent a return to previous abuses of authority and power in the country's corrections system. The 1998 Act set up a policy advisory board, the National Council for Correctional Services, comprised of academics, members of non-governmental organisations (NGOs), judicial officers and senior Department of Correctional Services officials. The 1998 Act also set up an independent prison inspectorate, the Judicial Inspectorate of Prisons, to monitor prison conditions and abuses against prisoners. The Judicial Inspectorate appoints independent prison visitors to receive and investigate prisoner complaints. The effect of this monitoring function on prison conditions is already apparent, as issues of prison conditions are now consistently raised in parliamentary debates.

Overcrowding and its Remedies

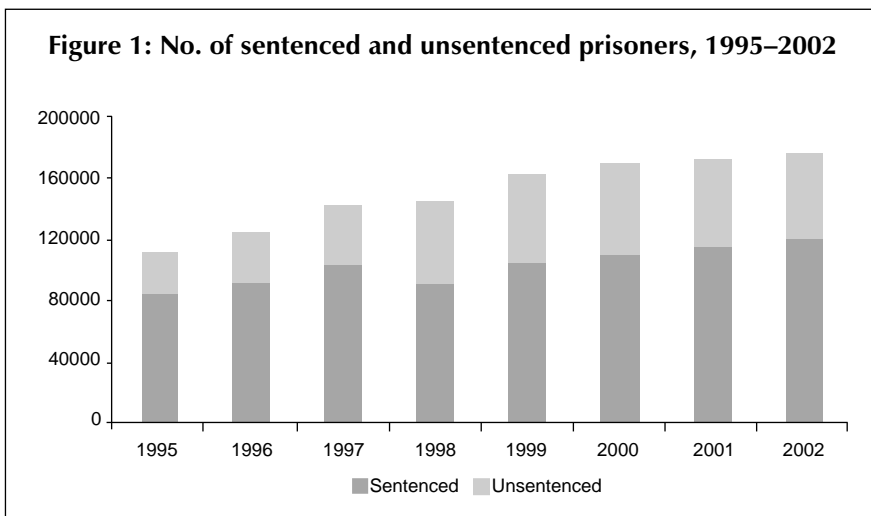
The growth of South Africa's prison population has outpaced capacity, resulting in crisis levels of overcrowding in many facilities. In mid-2003, the prisons in operation had been built to accommodate 113,000 inmates, but were holding 186,000.¹⁶² In many of the larger prisons, such as Johannesburg and Pollsmoor (outside of Cape Town), cells intended for 18 were holding an average of 50 prisoners. The most overcrowded prisons were struggling with occupancy rates approaching, and even exceeding, 300%.

Overcrowding is the primary issue affecting South African prison conditions today. Indeed, writing the introductory section of the 2002/03 annual report of the Judicial Inspectorate of Prisons, the Inspecting Judge of Prisons, JJ Fagan, states:¹⁶³

The problem we have in our prisons can virtually all be attributed to overcrowding. We now have the highest number of prisoners we ever had in our country and it is placing an unbearable burden on the Department of Correctional Services.

The overcrowding can be attributed in large part to the increase in unsentenced prisoners since the country's transition to democracy in 1994. Unsentenced prisoners are those who have been arrested and charged, and either are denied, or cannot afford to pay, bail. Many end up being detained awaiting trial simply because they are poor. For example, in July 2003, almost 4,000 awaiting trial prisoners had been granted bail of R500 or less.¹⁶⁴ Presumably most of them remained incarcerated because they could not afford to pay bail.

In December 1995, the country's prisons held 27,320 unsentenced prisoners, about a quarter of the total prison population. In December 2002, some 56,500 prisoners were unsentenced – almost one-third of the total prison population. Efforts by the Department of Justice and Constitutional Development to expedite the trial process, and prisoner release programmes initiated by the Judicial Inspectorate of Prisons, are stabilising the proportion of unsentenced prisoners. The total number of prisoners is, however, on the increase (Figure 1).



Source: Department of Correctional Services

The immediate effects of overcrowding are decreased security, as the same number of guards are responsible for an increasing number of inmates.¹⁶⁵ Decreased security, cramped conditions and lack of personal space leads to increased violence and assaults between prisoners. The strain overcrowding places on scarce resources negatively affects access to basic medical care, and other essentials such as bedding, clean laundry and nutritious food.

For example, the number of assaults by prisoners on prisoners increased marginally by 10% between 1999 and 2002. The number of assaults by prison wardens on prisoners increased by 9.5% over the same period, but decreased by 9% in 2002 (Table 2).¹⁶⁶ According to the Judicial Inspectorate of Prisons, statistics on assault are not always reliable as some inmates fear reprisals if they report an assault on them by a fellow prisoner or a warden. During 2002 the Inspectorate’s independent prison visitors received 6,284 complaints of assault from prisoners.¹⁶⁷

The shortage of guards means that prisoners are locked up for long portions of the day. It is not uncommon for lock-down to take place by mid-afternoon, whereafter prisoners are not permitted out of their communal cells until the next morning. Crowding 55 men into a single, dirty, dark, and unsupervised cell for upwards of 18 hours a day creates an environment of violence and disease. Pulmonary Tuberculosis, a lung disease which can be spread by breathing in the same air as an infected person, quickly spreads in crowded conditions with poor ventilation. Irritating afflictions, such as scabies and lice, are rampant and often not considered severe enough to warrant a trip to the prison health services.

Even with the emphasis on rehabilitation and human dignity embraced by some political leaders, and entrenched in legislation and policies, prison conditions in South Africa continue to deteriorate. Overcrowding, and the resulting problems

	1999	2000	2001	2002
Prisoner on prisoner	2,204	2,354	2,380	2,429
Warden on prisoner	545	609	633	582
Total	2,749	2,963	3,013	3,011

Source: Department of Correctional Services

frustrate any attempt at rehabilitation. An addition to the apartheid-era warehouse-style prison at Westville (outside of Durban), was intended to be used for classrooms and job training programmes. Instead, it is being used to house prisoners as the entire facility has a 150% occupancy level.

Building more prisons

The Department of Correctional Services faces many challenges, all of which are compounded by a lack of resources available to keep up with the increasing demand for prison space. Moreover, the prison infrastructure is ageing and was primarily designed during the pre-1994 era. Most existing communal cells are not conducive to human dignity, even when utilised at their intended capacity. Entirely new facilities are needed, both to replace the old ones, as well as to provide additional capacity, but this requires substantial capital investment. Prisons designed to function as more than just warehouses are more expensive to build than hospitals or schools (or hotels). Facilities to securely house and feed thousands of people, with space for learning and working, are extremely costly to build, maintain, and manage.

In 2002, the estimated cost of building a new prison was approximately R250,000 per prisoner place, and the average length of time to build a prison was three years.¹⁶⁸ As a large prison can accommodate about 2,500 inmates, South Africa requires some 30 new, large prisons to have a correctional system which is not overcrowded. In 2002 South Africa would have needed to spend more than R7 billion to meet the demand for prisoner space, not taking into account maintenance and running costs.

By the mid-1990s the Department of Correctional Services began to explore the possibility of involving the private sector in a new prisons building programme, primarily to address overcrowding through the more rapid construction of new facilities.¹⁶⁹

In effect, South Africa followed the lead of other highly incarcerated countries, and looked to the private sector for assistance in providing space for its expanding prison population.¹⁷⁰ That is, the South African government has engaged the private sector to design, build and manage a number of prisons. These are not 'privatised' prisons but 'contract managed' prisons, as the government has not sold any of its existing prisons to the private sector. Rather, the government has entered into contracts with private sector consortia to finance, design, build, operate and maintain a number of prisons for a 25-year

period.¹⁷¹ In this way, the Department of Correctional Services does not have to provide the capital outlay for the construction of such prisons at the outset, but pays a predetermined fee per prisoner space to the private consortium over the 25-year contract period.

So far the Department of Correctional Services has contracted with private consortia to manage and run prisons on the department's behalf. A private prison consortium combines all the companies which the department needs to design, construct, finance, and manage a prison so that the state need only contract with one entity. The consortium forms an umbrella company to oversee each component, and the state is saved from having to engage in a procurement process with each individual contractor. These contract-managed prisons are often referred to as DCFM contracts: 'Design, Construct, Finance and Manage' contracts.

DCFm contracts save the state time and capital in the construction of prison facilities. Such contracts are also attractive to the private sector, as the contracts extend over an extended time period (usually 25 years), involve substantial amounts of money and a low risk creditor in the form of the state, thereby virtually guaranteeing cash flow. The involvement of the state permits the private sector consortia to borrow money at a reduced rate as the interest income received by the banks is usually tax-free. The potential for high returns on a low-risk investment is attractive for banks which can handle the large sums of money involved.

Many prison reform advocates fear that the involvement of the profit motive, particularly with large and powerful corporations, has a harmful effect on criminal justice policy decisions. Those in favour of DCFM contracts, however, point to the profit-making motives of the companies involved as a guarantee of efficiency and cost-effective management.

At the time of writing South Africa had two DCFM prisons: Mangaung Maximum Security Prison in Bloemfontein, managed by a consortium led by UK-based Group 4, and Kutama Maximum Security Prison in Louis Trichardt, managed by South African Custodial Services (a division of Wackenhut, a publicly traded US corporation). Group 4 has pioneered the field of providing correctional services by contract to HM Prison Service in the United Kingdom, and a similar model was adapted for its South African operations. The Mangaung Prison, with a capacity for 2,928 prisoners, opened in July 2001 and is the first 'private prison' in Africa. The Kutama prison, with a capacity of 3,024, opened in February 2002 and is the largest 'private prison' in the world.

Both prison contracts run over 25 years, at which point the facilities will become the property of the South African state. During the 25-year contract period, the consortia are paid a set fee per prisoner-place, not per prisoner, in order to eliminate any incentive for overcrowding. The management companies are bound by extremely detailed performance guidelines in their contracts. These range from the minimum education and training opportunities, to the provision of haircuts for every prisoner. Both prisons have a Department of Correctional Services monitor on site, who is responsible for ensuring contract compliance. The consortia are contract-bound to pay fines for even the slightest infraction of their contracts such as, for example, not meeting the minimum required temperature for a hot meal. Penalties attach to far more serious infractions as well, such as the escape of a prisoner from the facility.

The effectiveness of the contracts, as instruments, and the contract-monitors, as the agents of implementing these instruments, remains to be seen. However, given that state correctional facilities often fail to provide basic necessities such as beds, clean linen, and adequate nutrition to prisoners, it is doubtful that the privately managed prisons can perform any worse. Simply fulfilling one requirement in their contracts – that the prison will not accept more prisoners than its contracted occupancy – prevents overcrowding and is an enormous improvement over state-run facilities.

Wackenhut is a US-based firm, which is second in its domestic market only to the world's largest private prison company, Corrections Corporation of America. Both these companies and Group 4 are the main players in the booming private prison industry and are publicly traded entities. Some argue that pressure from shareholders could result in cost-cutting and deficient service delivery from such companies. The counter-argument is that shareholders are more responsive to scandals and ineffective management than state-owned and operated facilities, as it is easier to sell shares than change government policy.

At the time of writing, the DCFM-contract prisons had not been operational long enough to allow a careful evaluation of their performance. Most academic studies have found that prisons in general are brutal, fearsome places and that privately-run facilities are no better or worse than their state-run counterparts. Similarly, cost comparisons have not found conclusively whether private prisons are more or less expensive than state prisons.

Is private cheaper?

In early 2002, the national commissioner of the Department of Correctional Services, Linda Mti, complained to parliament that the largest item in his department's R6.8 billion budget – R435 million – was for prison privatisation.

In response a joint task-team from the Department of Correctional Services, the National Treasury and the Department of Public Works investigated the cost of building and running South Africa's two privately run prisons. The three-month investigation was conducted during the last quarter of 2002.¹⁷² According to the task-team report, the two privately run prisons apply world-class practices to rehabilitate prisoners, while government's "lock up and punish" prisons have few rehabilitation facilities:¹⁷³

The public-private partnership (PPP) prisons should be acknowledged as providing value in relation to construction and operation costs, empowerment benefits, as well as delivery of secure facilities, quality services and rehabilitation... The contracts optimally transfer financial, technical and operational risk to the private parties.

At the two privately run prisons, each day has structured programmes for prisoners, including comprehensive health, education, self-development and social programmes, against unstructured day programmes at most Department of Correctional Services prisons.¹⁷⁴

The report says the two 'private' prisons cost about R100,000 per prisoner to build. The cheapest equivalent Department of Correctional Services prison, Malmesbury, cost R153,000 per prisoner.

On the face of it, Department of Correctional Services prisons (R94 per prisoner, per day) cost less to run than Mangaung prison run by Group 4 (R132/day), but more than the privately run Kutama prison in Louis Trichardt (R87/day). But, says the report, "if the public prisons were not overcrowded... the cost per prisoner would be... considerably higher than the PPP prisons' costs per day".¹⁷⁵

The task-team report did, however, point out that the private prison operators are making too much money, but argued that this is because the concept of privately designed, built and managed prisons was untried in

South Africa, and was negotiated in 1999 when interest rates were at record highs. The Bloemfontein consortium will make a nominal 30% a year return on equity over 25 years, and the Louis Trichardt consortium will get 25%.

Outsourcing in the corrections field

As is discussed below, alternatives to imprisonment are an overlooked and underutilised component of correctional services. Nevertheless, prisons are necessary to protect the public from dangerous criminals. While the majority of the current prison population does not fall into this category, there are thousands of prisoners who do. What role can the private sector play to provide correctional services for this section of the prison population?

Without exploring structural changes to prison design, location, and size, there are several aspects of the operations and maintenance of existing prisons in South Africa which could be viably outsourced to the private sector. This outsourcing could be to private companies, NGOs, or even other government departments. The opportunity also exists for partnerships between various organisations, as well as with consortia of NGOs, business, and government entities.

Existing South African prisons could outsource all the services which are ancillary to prison management, such as janitorial, general maintenance, laundry, ground keeping, and catering services. Such services could be provided on a contract basis by private companies, with considerable benefit and cost-savings to the state. The benefits of outsourcing such services could include improved nutrition for prisoners, and reduced corruption as smuggling and theft of food contributes substantially to the black market inside the prison environment. If, for example, the provision of prison food is outsourced to a few large private catering companies, significant economies of scale could result in cost savings to the state. Moreover, private sector companies can provide capital investments which could serve to improve prison equipment and facilities. For example, leasing kitchen space to a nation-wide catering company, under contract to provide food services for the entire prison system, could result in much needed upgrades of the outdated kitchen equipment in many prisons.

The buying and selling of contraband is a persistent problem in South Africa's prisons and gives rise to various forms of corruption. The country's two privately managed prisons have overcome this problem by prohibiting the use of cash within the prison walls. In these prisons transactions occur in an entirely

computerised cash-less system. Prisoners who work can earn small amounts of money, which are deposited directly into their accounts. Family members and friends of prisoners may also deposit money into prisoners' accounts. Prisoners who wish to purchase something can do so by logging into computer terminals located in each cell wing, and transferring money electronically to, for example, their phone account or to order items from the prison store. Actual money never changes hands, and cash discovered inside the prison is automatically incriminating proof that some sort of smuggling or illegal transaction has taken place.

This cashless system requires substantial investment in technology and training. It is also difficult to implement in state-run prisons where overcrowding prevents access to basic necessities, let alone space for computer terminals and the freedom of movement to access them. However, it may be possible that innovative private sector companies can implement such a system without the need for expensive computer terminals.

In addition to the opportunities for outsourcing ancillary services, functional services in prisons could also be provided on a contract basis by NGOs, academic institutions and for-profit private companies. Thus, HIV/AIDS counselling and education could be coordinated and designed for the prison environment by a network of relevant NGOs throughout the country.

Already, the most successful reintegration and rehabilitation initiatives are provided by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO). NICRO has a long standing in the community, and many years of experience which could be used more constructively by the Department of Correctional Services. For example, in the same way that the department enters into a contract with Bloemfontein Corrections Corporation to manage the Mangaung prison, the department could enter into an agreement with NICRO for the latter to provide rehabilitation services in juvenile facilities in return for office space on site, unrestricted access to prisoners, and a guaranteed level of support in the form of security.

Many organisations are interested in working with prisons in a cooperative relationship, and numerous such partnerships are already in place. However, many NGOs encounter unnecessary, costly, and sometimes project-defeating difficulties in navigating the Department of Correctional Services' fluid and complicated procedures for obtaining access to prisons. In order to encourage NGOs and academic institutions to assist the department, such procedures must be streamlined.

Non-state alternatives to imprisonment

The United States spends US\$ 54 billion annually on imprisonment, yet struggles to house its record-breaking prison population.¹⁷⁶ Recidivism rates for state-run and privately-contracted prisons do not seem to vary conclusively, but rather show that in either case prisons are ineffective at reducing the incidence of crime. Not even the wealthiest country on earth can build its way out of prison overcrowding.¹⁷⁷ If South Africa is to address its prison overcrowding crisis, the solution lies not in seeking private sector assistance to build more prisons, but to obtain private sector assistance to provide viable and cost-effective alternatives to imprisonment and thereby help reduce the number of prisoners.

The mandate of the Department of Correctional Services is not simply to incarcerate convicted offenders, but to provide correctional services. Depending on the offender, and the crime of which the offender has been convicted, correctional services includes providing rehabilitative services, and reintegrating offenders back into the community. An employed petty offender who is incarcerated for even three months is likely to lose his job because of his imprisonment, while his chances of securing new employment upon release are reduced. Offenders with informal employment, who supported their families or other dependents before their incarceration, may battle to resume their income generating activities, and will experience a loss of income over the period of their incarceration. For indigent offenders who turned to crime to survive, the impact of the disruption of their lives by imprisonment could lead to increased criminal activity, and lower chances of gaining lawful, let alone formal, employment.

The decision to send an offender to prison does not lie with the Department of Correctional Services, but with the courts. For alternatives to imprisonment to become viable, such alternatives need to be trusted by the judicial officers making daily sentencing decisions in criminal courts throughout the country. Much like building prisons, alternatives to imprisonment require a significant investment. However, the investment for such alternatives is of a different kind and requires primarily human capital to build community support and involvement, rather than financial capital to build prisons of brick and steel.

For a developing country such as South Africa, viable alternatives to imprisonment need to be based on community structures and involvement, rather than requiring expansive bureaucracies and more state expenditure.¹⁷⁸ The broad private sector can provide a valuable service in this regard. Civil society can become actively involved in the appropriate treatment and rehabilita-

tion of offenders who act against the interest of their community. A successful scheme of this sort is the community service programme in Zimbabwe. Set up in 1992, with funding from the British Department for International Development (DFID) and the European Union (EU), through Penal Reform International, the scheme assigns offenders who would otherwise be incarcerated for one year or less, to work without pay for a set number of hours for a not-for-profit organisation. The success of this programme has been attributed to the high-level political leadership which initiated and supports the scheme, and the strength and resilience of civil society in Zimbabwe.

One of South Africa's many strengths as a nation is its civil society. The country's large NGO sector employs more people than the mining industry. The Department of Correctional Services should tap into this pool of resources to design and implement effective alternatives to imprisonment. The exact description of such alternatives is an area that requires more and careful research. Crucially, to be useful, such research requires the support and encouragement of policy-makers in the criminal justice system.

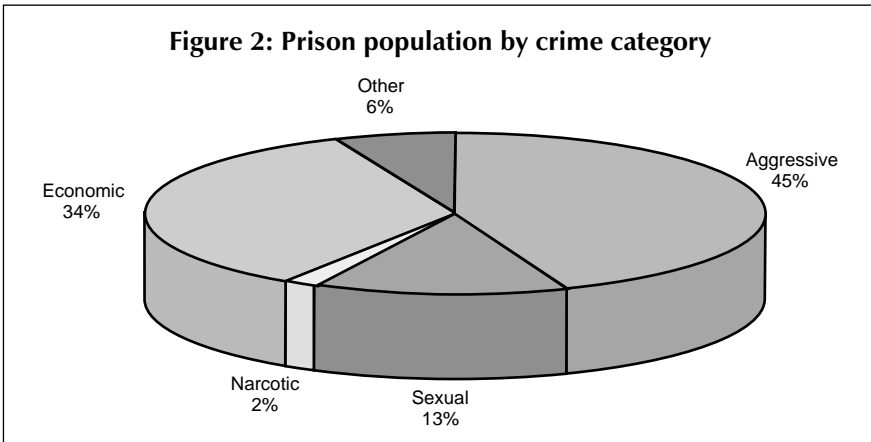
With the exception of those who are unfit, unwilling or unable to be part of society, most prisoners fall into three categories for whom alternatives to imprisonment should be explored. These are crime suspects awaiting trial, convicted non-violent offenders, and convicted unemployed and indigent offenders. These three categories of prisoners comprise between two-thirds to three-quarters of South Africa's prison population.

To better understand how many prisoners could be considered for correctional supervision, which is less expensive and more constructive than imprisonment, it is necessary to analyse the prison population in terms of prisoners sentenced for economic (thus, assumed to be non-violent) crimes, and all those sentenced to prison terms of less than one year (Figures 2 and 3).

From the data presented, more than 100,000 prisoners, or almost two-thirds of the prison population, could be considered for a sentencing option which does not entail imprisonment (Figure 4). The future of private sector involvement in the provision of correctional services should therefore be targeted at alternatives to imprisonment. From a financial and public security (i.e. through better prospects of rehabilitation) point of view, reducing the size of the prison population is far more appealing than the ability to double prison capacity.

The statistics used for this analysis, represented in Figures 2 to 4, date from February 2001, shortly after the Department of Correctional Services released

approximately 11,000 awaiting trial prisoners who were incarcerated for non-violent offences with bail amounts at less than R1,000. The cost to the state of detaining these prisoners, in respect of whom the courts had already determined that they were not a flight risk or a risk to society, and would not interfere with witnesses and evidence, far exceeded their bail amounts. They were in prison simply because they could not afford to pay their bail. The release of these prisoners temporarily reduced the number of prisoners awaiting trial. This should be kept in mind when viewing Figures 2 and 3.



Source: Department of Correctional Services



* Includes unsentenced prisoners

Source: Department of Correctional Services

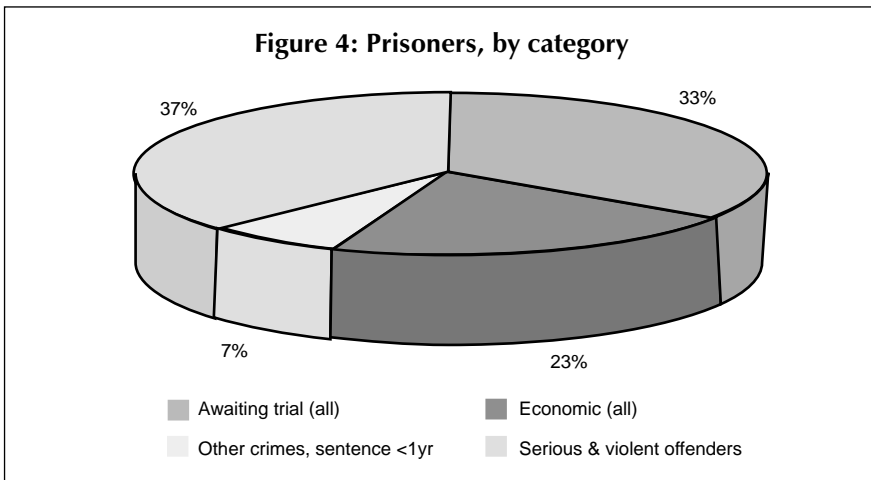
Conclusion

The private sector has a role to play to finance, design, construct and manage prisons in South Africa. The country's two privately managed prisons offer relatively good facilities and rehabilitative programmes at a reasonable cost. More research is needed, however, to conclusively compare the costs of privately managed prisons to state-run institutions.

South Africa's prison system, like similar prison systems around the world, is a largely outdated institution. The contemporary prison structure has not undergone any fundamental changes over the last two hundred years. As Marc Mauer explains in his book, *Race to Incarcerate*:¹⁷⁹

Looking back on two centuries of prison in America, what is particularly remarkable is how little the institutional model has changed since the 19th century. While the philosophical orientation and stated goals of the prison have fluctuated, the basic concept of imprisoning people in cages remains the central feature of the system.

South Africa has one of the highest incarceration rates in the world. This does not seem to have had an impact on levels of recorded crime or the public's fear of crime. The country's overcrowded prisons have become public health hazards where inmates are infected with tuberculosis and HIV/AIDS, and are



Source: Department of Correctional Services

then released with an increased likelihood of infecting others in their communities. Overcrowding and squalid conditions make it close to impossible to rehabilitate prison inmates. As a result many prisoners who are released, re-offend and again become a burden to the criminal justice system. Moreover, prisons are expensive and reduce the ability of the treasury to finance the building of roads, schools and hospitals.

Over the long run massive prisons construction programmes are not sustainable, and alternatives need to be developed. The private sector – in the form of business, NGOs, and civil society in general – must play a greater role in this regard. Private sector ingenuity and support is needed to develop successful alternatives to prison. For example, by assisting with the expansion of community service programmes the for-profit and not-for-profit private sector could make a real contribution to the development of a humane criminal justice system in South Africa. Given time this should contribute to the rehabilitation of offenders and their reintegration back into their communities, resulting in lower rates of recidivism, less crime and a safer society for all.

CHAPTER 7 CONCLUSION

Martin Schönteich

The South African government has been outsourcing some of its functions and services for some time. Highway construction and financing (through toll fees) by private companies, and the protection of strategic state assets or ‘national key points’, such as oil depots and radio stations, with private security personnel has been going on since the 1980s. A more recent, post-1994, development is the adoption, even embrace, of outsourcing – or Public Private Partnerships (PPPs) – as official government policy to boost the delivery of public services and infrastructure.

Beginning in the late 1990s, the South African government has been developing a regulatory framework to promote the use of PPPs by state departments and private investors. Speaking in May 2003, the Minister of Finance, Trevor Manuel, was unambiguous about the government’s commitment to PPPs:

We are serious about making private public partnerships work in South Africa. Deeply, profoundly, serious. The challenges we face – building and maintaining roads, rehabilitating our hospitals, streamlining the justice system, banking the unbanked, delivering water, preserving our biodiversity heritage, bringing computers and connectedness into schools and clinics – are deeply serious undertakings. And so when we seek to harness the resources, the project management capacity, the technology and knowledge that resides in the business sector in pursuit of these public purposes, we do so on the strength of legally secure, financially sound, forward-looking, affordable, cost-effective, transparent contracts.¹⁸⁰

(Over)Regulated Outsourcing?

According to the head of the Treasury’s PPP Unit, Michael Schur, PPPs in themselves are not necessarily beneficial. A great deal of work needs to go into each venture to ensure an optimal outcome, Schur argues. This work relates to set-

ting in place stringent performance agreements, appropriate pricing rules and accounting standards, competitive tendering processes, strong management of contracts, and an appropriate assignment of risks and rewards.¹⁸¹

There is much to be said for adequately regulating the PPP framework in South Africa – a country where civil servants often lack the experience and skills to negotiate complicated PPP agreements and, given their novelty, PPPs are viewed with some caution (some would say suspicion) by the broader business community. Regulations create minimum standards, establish safeguards for state agencies and private investors alike and, ultimately, fashion an environment where partnerships between the public and private sectors are seen as a sound and tested means of delivering quality services to both the state and the general public.

There is a danger of over-regulating the PPP environment, however. According to Ketso Gordhan, Executive Director of Rand Merchant Bank and ex-CEO of the Greater Johannesburg Metro, the issue of market capacity is important when assessing the future success of PPPs. There exists a constraint on capacity within the PPP market, and more emphasis needs to be on “deal making” versus “regulating”, argues Gordhan.¹⁸² This is echoed by Tutu Mnganga, chairman of the empowerment company Vulindela Holdings, who warns that regulations place an onerous obligation on government departments to get PPPs off the ground.¹⁸³

No Criminal Justice Sector Outsourcing Policy

Once PPPs are firmly entrenched within government and private sector thinking, it may be necessary to revisit some of the more onerous regulations which hamper the development of innovative and flexible PPPs. In the context of this monograph, on outsourcing criminal justice services, the dearth of outsourcing activity does not appear to be a result of an over-regulated environment. Rather, the main impediment to outsourcing is the lack of a coherent outsourcing policy in the three core criminal justice departments (Safety and Security, Justice and Constitutional Development, and Correctional Services) and the National Prosecuting Authority. The South African Police Service (SAPS) has attempted to develop an outsourcing policy, but the policy not only lacks a broad strategic vision of what it would like to achieve, but is incoherent.

For example, uniformed SAPS officers guard, and perform access control functions at, the country’s national parliament in Cape Town, even though the

guarding of other government buildings has largely been outsourced to private security personnel. The SAPS' argument, that Members of Parliament require police protection, is unconvincing given that the provision of guarding and security services at some provincial legislatures (including the Gauteng Legislature situated in central Johannesburg) has been outsourced to private security companies.

The lack of a coherent outsourcing policy for the different criminal justice departments is aggravated by inter-departmental squabbling about which department is responsible for outsourcing services traditionally performed by its personnel. As has been discussed in chapter four of this monograph, the SAPS has investigated outsourcing the transporting of prisoners to and from court. However, this has been rejected partly because there is no uniform national policy on the transporting of prisoners by the SAPS and the Department of Correctional Services. Outsourcing the guarding of court rooms and holding cells at courthouses has been prevented because the justice department and the SAPS (which presently performs these functions) cannot agree about which department should be responsible for providing these services and, consequently, should foot the bill for any replacement service outsourced to the private sector. Similarly, outsourcing the administration of mortuaries has been delayed over a dispute between the SAPS and the Department of Health over which department should pay for outsourcing such a service.

In a country such as South Africa, where crime levels are high and criminal justice departments strain to meet their responsibilities because of a lack of personnel, inter-departmental outsourcing disputes are especially worrisome. Literally thousands of uniformed police officers spend their time transporting and guarding prisoners. Yet, public feelings of security could be significantly enhanced if these officers were used to patrol the country's streets and other public spaces.

Innovation

The lack of a coherent outsourcing policy in the criminal justice sector is aggravated by a dearth of innovative thinking by policy makers on what could be outsourced. It may be a fairly radical proposition to outsource not only the prosecution of crimes which require rare and specialised prosecution skills, but also the prosecution of the many run-of-the-mill cases clogging the court rolls at the beginning of every year.

Yet, outsourcing the prosecution of a large volume of cases could promote the rights of accused and incarcerated persons, and save money. For example, some accused are incarcerated while they await the outcome of their trial. This is because the courts refuse to grant them bail, or because bail is set at an amount which is unaffordable to the accused. There are a number of factors which determine the length of time an accused spends in prison awaiting the finalisation of his trial. However, in many cases there are delays in the finalisation of trials for the simple reason that the courts' rolls contain too many cases for the limited number of prosecutors to deal with.

Unsurprisingly, as the number of recorded crimes has increased, so has the detention cycle time, or the average length of time unsentenced prisoners remain incarcerated until the finalisation of their trials. The detention cycle time has increased from 136 custody days in December 2000, to 143 custody days in September 2002 (the latest period for which figures were available at the time of writing).

This means that, on average, in September 2002 accused persons were imprisoned for almost five months awaiting the finalisation of their trial. This is a significant infringement on the liberties of accused persons, many of whom are at real risk of being attacked and sexually assaulted while incarcerated. Such delays in the processing of cases also place a considerable financial burden on the state. In 2002, a prisoner cost the state some R95 a day. Multiplied over an average of 143 custody days this comes to almost R13,600 per average unsentenced prisoner. Outsourcing the prosecution of a large volume of seasonal cases (as is proposed in chapter five of this monograph) could significantly reduce the human and financial cost resulting from the present backlog of cases in courts throughout the country.

Another innovative proposition worthy of further investigation is outsourcing the management of police stations and facilities. A radical version of this idea (as it involves a form of outsourcing bordering on privatisation of state infrastructure), which has been proposed by a South African company, is the purchase of police stations and court buildings by private sector investors.¹⁸⁴ Selling existing infrastructure would generate revenue for the state. This could be used to purchase much needed equipment for the criminal justice system, such as new vehicles and information technology equipment, or it could be invested to generate an 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 high crime areas – could be given a multi-purpose function. For example, attached to a police station

could be banks' Automatic Teller Machines (ATMs), pension payout points, and water and electricity pay points. This would provide 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. Newspapers, groceries and other goods required on a daily basis, could also 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.

In the United States, many local governments routinely contract with private firms for a wide array of traditional police functions, particularly in the area of 'police support' services, including accounting, maintenance, communications, data processing, towing illegally parked cars, fingerprinting prisoners and directing traffic. Security firms also provide guards for public buildings and other public facilities. For example, the state of Florida contracted with Wackenhut Services Incorporated for security guards at all its highway rest stops after a 1993 rest-stop murder of a tourist.¹⁸⁵

Outsourcing, or public private partnership arrangements, is official government policy in South Africa. Increasingly, traditional government functions and services are being provided by the private sector. Outsourcing criminal justice related services remains controversial, however. The prevention and combating of crime, and the prosecution and incarceration of offenders, is frequently seen as the state's core function. Yet, the provision of criminal justice services has also been one of the South African state's most visible failures.

This monograph has sought to demonstrate that there is much scope for outsourcing a wide variety of criminal justice services to both the for-profit and not-for-profit private sector, without impinging on the state's prerogative to arrest and charge suspected offenders, and determine their guilt and eventual punishment.

Outsourcing criminal justice services entails some risk. As a policy, outsourcing is still under development in South Africa, competition for many outsourcing contracts is limited, and some government departments lack the expertise to properly design and monitor outsourcing contracts. These risks – all of which can be minimised through sound planning and the intelligent use of outsourcing contracts – are small compared to inaction, however. By not outsourcing many of the peripheral functions presently performed by the country's criminal justice agencies (and some core functions as well), the criminal justice system risks collapse under the increasing strain of more recorded crime, investigations, prosecutions and prisoners.

Criminal justice policy makers would be well advised to develop comprehensive and innovative outsourcing policies for the country's core criminal justice departments. This monograph has served its purpose if it has managed to encourage thinking and discussion in this respect.

NOTES

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111. Analyses of time spent by SAPS reaction units attending to false alarms revealed that the police was wasting its resources doing so. In certain areas, a large proportion (as high as 90%) of alarms proved to be false. See A Minnaar, *Partnership policing between the South African Police Service and the South African private security industry*, op cit.
112. In some cities a SAPS officer is deployed in the local CCTV control room to assist with the observation work, and to alert the SAPS of specific crimes observed. In other areas (e.g. Cape Town), CCTV control room operators have a direct phone line to the local police station. CCTV cameras, funded by Business Against Crime (BAC), have been installed in the Central Business Districts of Cape Town, Johannesburg and Pretoria, with plans to extend this service to Port Elizabeth. See J Penberthy, *Surveillance technology: International best practice and securing a standard – a national priority*. Paper presented to the 2nd World Conference: Modern Criminal Investigation, Organised Crime and Human Rights, Durban, 3–7 December 2001.
113. The data for these calculations comes from two different sources. The data for the years 1996–1999 is from the police’s Crime Information Analysis Centre, while the 2000–2002 data is from the NPA’s Court Management Unit. The NPA has been collecting court-related performance statistics since mid-1999.
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116. During 2002 a very small proportion of cases (0.01% or 9,990 cases) dealt with by the NPA were diverted.
117. Section 35(3)(d), *Constitution of the Republic of South Africa Act no. 108 of 1996*.

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127. See A Altbeker, *Justice through specialisation? The case of the Specialised Commercial Crime Court*, *ISS Monograph Series* 76, January 2003.
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140. *Ibid*, section 12.
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