# Unsustainable and unjust

## Criminal justice policy and remand detention since 1994

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*The 'tough on crime' approach embodied in bail and sentencing law has had a profound impact on the trends around remand detention, including prison overcrowding of such an extent that it is estimated to have contributed to an additional 8 500 natural deaths in custody. Ultimately the policies have led, in practice, to an 'Alice in Wonderland' effect: fewer people are being tried and sentenced, while more than ever are denied their freedom without ever being tried in a court of law.*

Over the period 1995–1998 South Africa embarked upon an unprecedented legislative programme. In 1998 alone, more than 120 laws were passed by the new democratic parliament. In the arena of criminal procedure and criminal law these laws were not in the direction of the reforms suggested by South Africa's Constitution and Bill of Rights, enacted in 1996; instead, they were intended to convey a 'tough on crime' approach. In a short space of time a number of protections for accused persons, many of which had been developed by the courts during apartheid to ameliorate the effects of unjust security detention laws, were simply swept away by legislative fiat, encompassed in amendments to the Criminal Procedure Act (CPA).[1] This article seeks to describe and analyse the 'tough on crime' policy approach, and to assess its impact.

## The 'tough on crime' policy approach

During the apartheid years it was accepted that a bail application was a matter of urgency: after all, a person's freedom was at stake.[2] But in 1997 the CPA was amended so that it explicitly provides in s50(6)(b) that an arrested person is not entitled to be brought to court after hours.[3] Bringing bail applications after hours was a common practice in magistrate's courts before 1998, and prior to 1994 the courts on a number of occasions confirmed the right of an accused to bring a bail application within the 48 hours envisaged by the then section 50; some went so far as to say there was a duty on the part of the state to co-operate and make it possible for a bail application to take place.[4] Commentators at the time voiced their dissatisfaction at the change, noting: 'The irony inherent in this reactionary measure is, of course, striking: a procedural human right deemed under the old order through creative and enlightened judicial interpretation has been summarily taken away by decree of the new order.'[5]

Protective limits on the length of time for which bail applications may be postponed for further investigation were undone in 1995.[6] Section 50(7), which contained a time limit of a day on delaying bail applications for the purpose of further investigations, was deleted and replaced,[7] and subsequently tweaked by the Amendment Act 62 of 2000, which

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provides for the postponement of a bail application for seven days *at a time* if the court, *inter alia*, thinks it has insufficient information to make a decision on bail, if the accused is going to be charged with a serious offence, or the court simply thinks it is in the interests of justice to do so.[8]

In addition to these procedural changes relating to when bail applications may be heard, a greater onus has been placed on the accused. The court hearing the bail application must be satisfied that the interests of justice are served by release, whereas previously the court had to be satisfied that the interests of justice are served by continued detention.[9] In relation to accused persons charged with serious offences listed in Schedule 6,[10] such as premeditated murder and gang rape, bail has all but been ruled out. Section 60(11) places the onus on an accused charged with such an offence to adduce evidence to satisfy the court that *exceptional circumstances* exist, which, in the interests of justice, permit release.[11] This is called a 'reverse onus' and implies that if an accused charged with a Schedule 6 offence at the bail application provides no evidence, or provides unexceptional evidence in support of the contention that the interests of justice will be served by his release, he will not be released on bail.

In relation to Schedule 5[12] offences, which are serious offences such as murder and rape that have not been aggravated by additional factors (such as premeditation in the case of murder), the amendments require that 'the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, *adduces evidence* which satisfies the court that the interests of justice permit his or her release'. This formulation is slightly less onerous than that applicable to Schedule 6 offences.

The Constitutional Court found that the limitation inherent in s60(11) (exceptional circumstances for Schedule 6 offences) on section 35(1)(f) of the Constitution, which provides that 'everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions', was reasonable and justifiable in our current circumstances of widespread violent crime.[13] The Court noted that 'the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated ... an accused ... could establish the requirement by proving there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case'.[14]

It was also noted that 'the amendment was intended to make the obtaining of bail of accused persons who are charged with serious offences more difficult. It was not meant to make the obtaining of bail by these persons impossible'.[15] Unfortunately, the provisions seem to have ensured that the possibility of bail in relation to Schedule 6 offences is likelier among those with expensive legal representation;[16] for the vast majority accused of serious crimes, release is highly unlikely.[17]

A 2008 study predicted that the combined impact of these changes is 'likely to be a significant delay in the hearing of bail applications, an increase in postponements for further investigation, and a reduction in the number who are granted bail at first appearance'.[18] The study did in fact find evidence of these trends in three courts investigated.[19] However, many crime-weary South Africans appeared to welcome these amendments to bail law, as many believed at the time that 'criminals have too many rights'.[20]

In response to public perceptions of leniency in sentencing,[21] tough sentences were also introduced in 1997.[22] Counter-intuitively termed 'minimum sentencing', the legislation prescribing tough sentences for serious crime was a response to an earlier Constitutional Court judgement that had found the death penalty to be unconstitutional.[23] At the time of this judgement, the public believed crime in South Africa had escalated[24] and public sympathy was against the abolition of the death penalty.[25] Consequently there was a need to demonstrate that government was 'tough on crime', and thus 'minimum' sentences of life imprisonment were legislated for crimes that previously might have

incurred the death penalty. Other 'minimums' were also provided for. Minimums are applicable even in relation to first offenders, unlike the 'three strikes' law applicable in some US and Australian states. The minimum sentencing provisions commenced on 1 May 1998,[26] and the initial period of their validity was only two years.[27] After two years the provisions were explicitly renewed by the President with the agreement of the legislature.[28] These minimum sentencing provisions were renewed on a number of occasions, and almost ten years later the renewal requirements were deleted, making minimum sentencing permanent.[29] A summary of the minimum sentencing provisions and their applicable sentences appears in the tables below. Their introduction occasioned further amendments to the sentencing jurisdiction of the lower courts.

**Table 1.1:** Summary of minimum sentencing offences (Schedule 2)[30]

| Part I | Part II | Part III | Part IV |
|---|---|---|---|
| **Life** | **Fifteen years** | **Ten years** | **Five years** |
| Some aggravated murders, such as pre-meditated murder | Murders not covered in Part I | Rapes not covered in Part I | All offences in Schedule 1 of the Criminal Procedure Act, where committed with firearm |
| Some aggravated rapes, such as gang rape | Some aggravated robbery (including hijacking) | Some indecent assault | |
| Some aggravated terrorism offences | Some drug dealing | Some assault GBH | |
| | | Some firearms offences | |
| | | Some white collar crime (including corruption) | |
| | | Terrorism offences not in Part I | |

**Table 1.2:** Prescribed sentences (section 51)[31]

| Penalty on: | PART I | PART II | PART III | PART IV |
|---|---|---|---|---|
| 1st offence | life | 15 years | 10 years | 5 years |
| 2nd offence | life | 20 years | 15 years | 7 years |
| 3rd or subsequent offence | life | 25 years | 20 years | 10 years |

At the time of the introduction of minimum sentences, only the high courts, which generally hear fewer than 1% of criminal cases, had the sentencing jurisdiction to impose many of these sentences. Consequently, soon after the minimum sentencing provisions came into effect, the sentencing jurisdiction of the regional courts was extended to 15 years' (from 10 years') imprisonment, and the district courts' jurisdiction was extended to three years' (from 12 months') imprisonment.[32]

A messy period of almost a decade (1998–2007) followed, during which regional courts were empowered to hear life imprisonment matters, but had to refer them to the high courts for sentencing. Incidentally, a parliamentary study found that in one in ten such cases the high court ended up acquitting the accused, who had been found guilty in the regional court.[33] Ultimately the regional courts were empowered in December 2007 to hand down sentences of life imprisonment in these matters.[34] The automatic right of appeal that went with these sentences was legislatively removed – possibly unintentionally – in April 2010.[35]

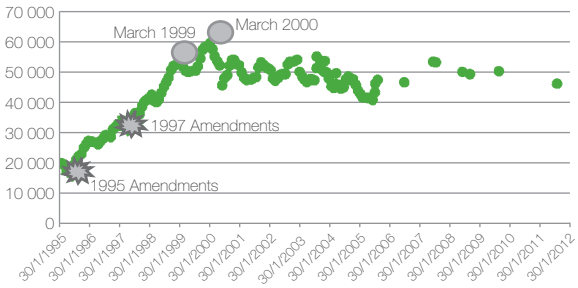
Some analysts predicted that this jurisdictional change would sharply increase the number of people convicted and sentenced to prison, simply because the regional courts have the capacity to hear many more cases than the high courts. The next section reveals that the number of people handed down long sentences has indeed increased – but not the total number convicted and sentenced year-on-year.

## The impact of 'tough on crime' policy changes

The practical impact of the changed bail and sentencing framework was borne most obviously by the Department of Correctional Services (DCS).

This is immediately apparent in the figures for the total remand population by month. Between 1995 and 1996, after the first amendments, the number of people held pre-trial at month end increased by 50%, from around 20 000 to 30 000 people. By the end of April 1998 almost 43 000 people were held, compared to the almost 18 000 held in May 1995 – a staggering 138% increase in only three years. After the 1998 amendments came into effect, there was a further steep increase until April 2000, when a peak of almost 60 000 people held pre-trial was reached. In only five years the pre-trial population in prisons had tripled.

**Figure 1:** Remand population in prisons as at month end, 1995–2012[36]




Since that peak, the pre-trial population has hovered around the 50 000 mark, with some seasonal dips to the 40 000 mark.

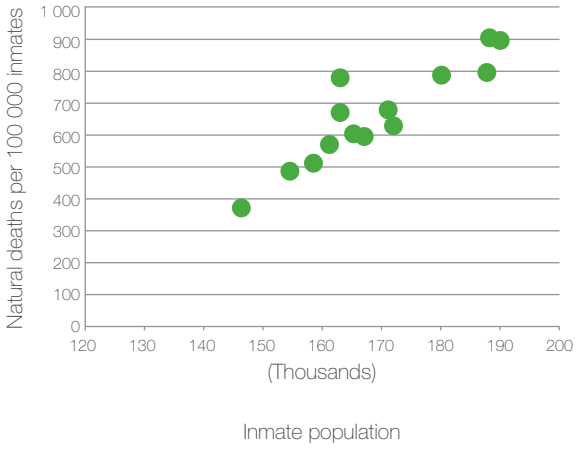
During the remand peak from 2000 to 2004, prisons were bursting at the seams, holding 170 000 to 190 000 people, a large proportion of whom were untried, in facilities designed for just over 100 000 people.[37] Overcrowding leads to less than ideal conditions of detention, including the spread of communicable diseases. Unsurprisingly, these conditions of overcrowding led to a steep increase in the number of deaths from natural (i.e. not violent or accidental) causes.

Plotting the inmate population since 1995 in prisons against the rate of natural deaths per 100 000 inmates shows that not only does the number of deaths increase as the inmate population grows, but also the rate of death. At around a total population of 140 000, there is on average one death a year for every 250 inmates. Where total inmate populations

**Figure 2:** Number of deaths due to natural causes in prisons, 1998–2011[38]

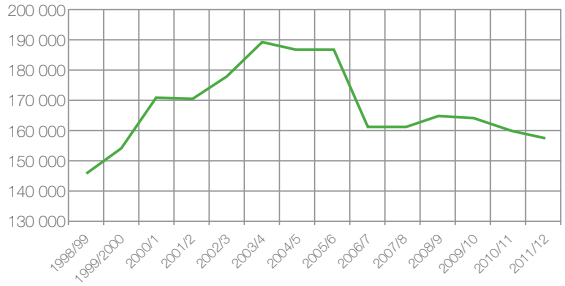

are closer to 190 000 (largely because of the massive increase in remand inmates) there is closer to one death for every 110 inmates. In other words, a 35% increase in total population has more than doubled the rate of natural death. Using this relationship, it can be calculated that, had inmate populations remained at around 140 000, some 8 500 natural deaths would probably not have occurred in the period 1998 to 2011.[39]

**Figure 3:** Relationship between rate of natural deaths per year and inmate population from 31 March 1998–2011[40]



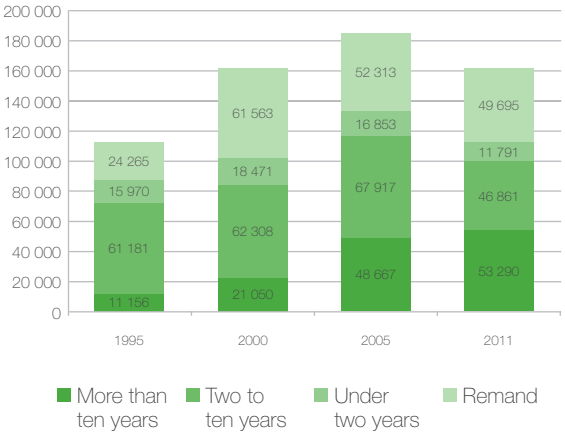

The trend in natural deaths is likely to have been influenced by a high prevalence of HIV and tuberculosis. Anti-retroviral roll-out in prisons only began in 2006 at three sites,[41] just after the peak in inmate population numbers over the 2003–2005 period. Official prison capacity by the end of February 2011 was only 118 154 – yet at one point during this period the number incarcerated tipped 190 000.

**Figure 4:** Total inmate population, 1998–2010[42]




In response to excessive inmate numbers – see the graph above – the DCS motivated for presidential 'special remissions of sentences', leading to the early release of 33 972 sentenced prisoners during 2005.[43] In addition, consideration of parole[44] at the earliest possible parole date[45] has now become the norm.[46] This is increasingly essential as prisoners with longer sentences (in excess of ten years) continue to replace those with shorter sentences. By 2011 the number of prisoners with sentences of more than ten years had almost quadrupled, to more than 50 000.

**Figure 5:** Composition of the total prison population by sentence status, 1995, 2000, 2005 and 2011[47]



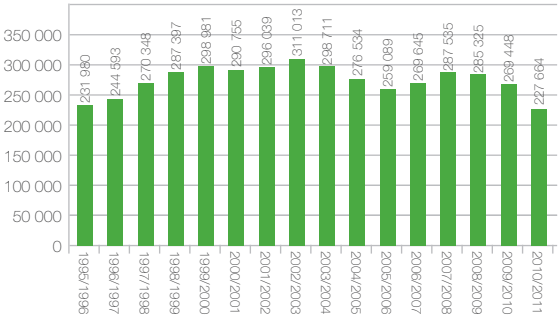

Since 1994, imprisonment capacity has increased by approximately 20 000, which is still not nearly enough.[48] However, the DCS has limited control[49] over one of the key drivers of the size of the total inmate population – a high remand population, which is around twice the size it was in 1995.

## The drivers of the remand population

What causes high remand populations? The number of remand detainees on any particular day is influenced by two trends – how many people are admitted to remand, and how long each of them remains in detention. What do the data say about how many people were admitted to remand detention?

The legislative changes discussed above were likely to have increased the number of people denied bail and admitted to remand. If arrests had remained constant or had increased, then the number admitted to remand should have increased, and analysis of the data shows that admissions rose considerably during the initial period of the new laws. In 1995/1996 just over 230 000 people were admitted on remand. This increased to almost 299 000 by the year 1999/2000 – in other words, four years later, 67 000 or 29% more people were admitted on remand than in 1995/1996. Another two years later 311 013 were admitted on remand. Subsequently, however, remand admissions dropped to the point where in 2010/11 there were fewer such admissions than there had been in 1995/6. What accounts for this trend?

**Figure 6:** Number of people admitted on remand (un-sentenced admissions) to prisons, 1995/6–2010/11[50]



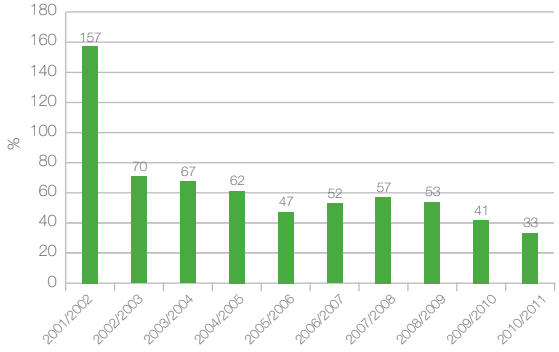

The question arises whether the drop in remand admissions down to 1995/6 levels is due to a drop in the number of arrests, particularly priority crime arrests, which are more likely to result in a denial of bail. This is not the case. Comparing 2002/3 – the peak of remand admissions – to 2010/11 shows a 55% increase in priority crime arrests (which are more likely to result in denial of bail), from 444 738

to 688 937.[51] Consequently the drop in remand admissions cannot be attributed to a drop in arrests.

**Figure 7:** Number of priority crime arrests, 2001/2–2012/13[52]


What has reduced is the extent to which such arrests translate into remand admission into prisons. In 2002/3 the remand admissions figure was 70% of the priority crime arrests figure (in the previous year there were more remand admissions than priority crime arrests). By 2008/9 the ratio of remand arrests had dropped to 53%; in 2010/11 it was only 33%. How can this be explained, given that the legislative framework in relation to bail remains strict?

**Figure 8:** Remand admissions expressed as percentage of priority crime arrests




A possible explanation is that an increasing proportion of people are being held for extended periods in police cells, rather than in prisons – often because prisons refuse to take any more: a number of oversight visits by national and provincial Members of Parliament over the last decade mention police cells being used for prolonged remand detention because 'prisons are full'.[53] Indeed, some prisons are holding more than double their approved capacity.[54] The 2013 White Paper on Corrections and the White Paper on Remand Detention, however, seek to affirm that after 5 March 2012 the holding of remand detainees in police cells after first appearance is not legal.[55]

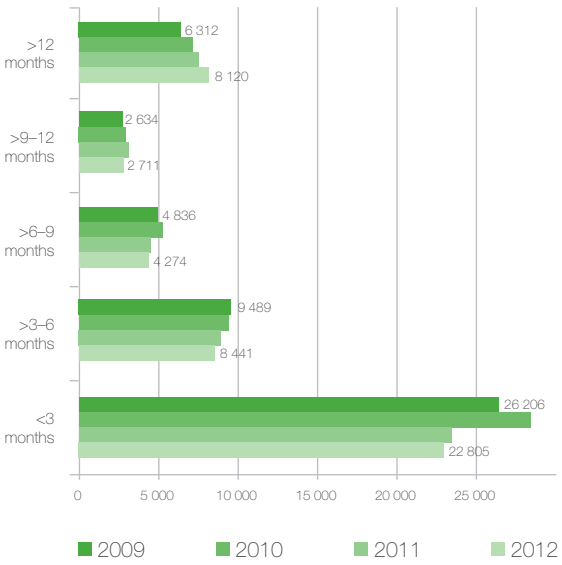
Using the 70% figure for 2002/3 (of priority arrests converted to remand admission) as a benchmark would suggest that a potential 250 000 people were probably admitted to police cells rather than to prison remand after first appearance in 2010/11. This is of great concern, given that police cells do not have facilities for the adequate care of detainees held for prolonged periods. Arrests continue to rise: in 2012/13 the SAPS reported 806 298 priority crime arrests and a further 876 476 'other' arrests.

The fact that the remand population in prisons remains high, despite the drop in admissions to prison on remand, must then relate to the duration of remand detention. One of the theorised effects of minimum sentencing for the pre-trial phase was that persons accused of such offences would be loath to plead guilty, given that the bar is now set so high on their potential punishment. This could lead to backlogs and general slowing of the system. Given that such persons would highly likely be denied bail under the bail amendments, they would also highly likely be incarcerated awaiting trial for an extended length of time. Their continued incarceration before the commencement of trial could, it was theorised, lull the state into taking its time in preparing a case against the accused.

In 1995, there were remand admissions of 230 000 and a remand population of around 20 000, suggesting that the average duration of detention in 1995 must have been around one month. By 2000, admissions of almost 300 000 and a remand population of 60 000 suggests that the average duration of detention must have doubled to around 2,4 months. In 2010/2011 there were 227 664 admissions but a population of around 46 500 – suggesting the average duration of detention has remained at around 2,4 months.

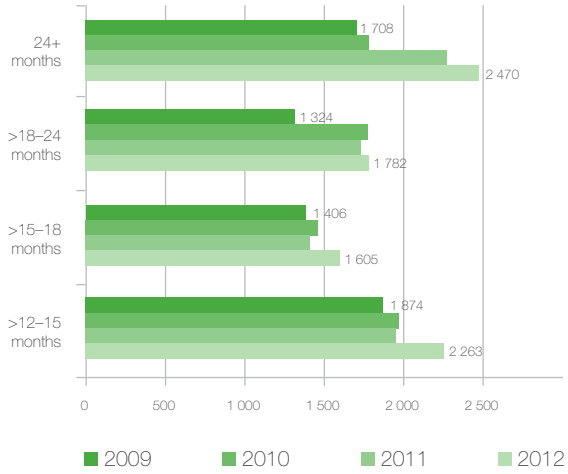
The back-of-the-envelope 'average duration' calculations above provide a putative average of the duration of detention. Averages are not the best measures of the 'central tendency' of a population that is asymmetrically distributed – in other words, populations where there is a fixed minimum for the measure at hand (in this case duration of detention cannot be less than zero) and a maximum that can increase in size indefinitely. The department has therefore provided 'snapshot' figures of the time spent in remand at a particular date over the period 2009–2012.

**Figure 9:** Number of people held for various durations on remand, 2009–2012[56]




The number of people in custody on remand for more than three months comprised more than half of remand detainees as at March 2012. (Recall that the putative average in 1995 was one month.) The number in custody for more than a year comprised almost 18% in 2012 (or one in six remand inmates), whereas in 2009 this percentage was only 13% (one in eight). Indeed, by March 2012 some 5% (or one in 20) had spent more than two years in custody. In other words, all the longer time categories have experienced growth over the period 2009 to 2012, while all the shorter time categories have reduced in size, suggesting a general and continued lengthening of the duration of remand detention over this time period.

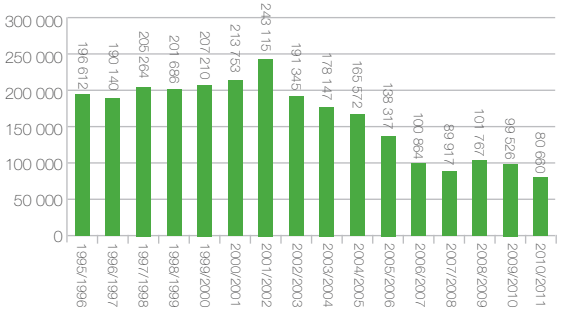
**Figure 10:** Number of people held for more than one year on remand, 2009–2012[57]




## Is the remand trend justified by court outcomes?

In short then, the data show that fewer people are being admitted on remand to prisons, but for much longer time periods. Can it be assumed that such long pre-trial incarcerations on remand are ultimately justified by eventual convictions? Over the initial time period after the legislative changes the number of people sentenced to imprisonment and admitted to prisons did indeed rise 24% from 1995/6 to 2001/2 (see Figure 7). This coincided with the peak in the size of the total prison population over the period thereafter until the special remissions that occurred in 2005.

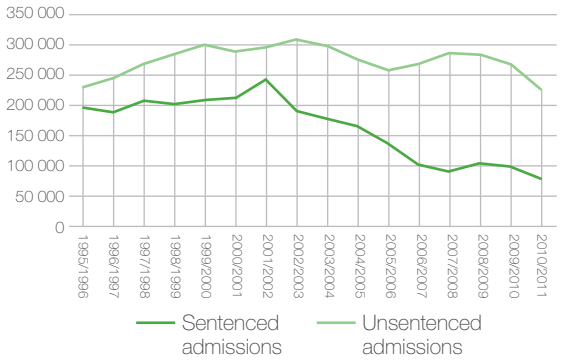
**Figure 11:** Number of sentenced people admitted to Correctional Centres, 1995–2010




After the peak in 2001/2 there was a steady decrease in the number of sentenced admissions. Yearly

remand admissions, by contrast, dropped below their 1995/6 levels only in 2010/11, while sentenced admissions did so in 2002/3 and decreased further thereafter. Yet, despite the drop in remand admissions, the remand population remains more than double the size it was in 1995.

**Figure 12:** Number of sentenced and remand admissions, 1995–2011




In 1995/6 the 230 000 remand admissions were matched by 200 000 sentenced admissions; in other words, there was an approximately 85% conversion of remand to sentenced imprisonment in 1995/6. Put differently, just over one person was sent to remand for every person convicted and imprisoned in the same year. By 2007/8 this had worsened to 31%; in 2010 the ratio was 35%. Almost three times as many people were sent to remand as were convicted in the last years for which data are available. In 2010/11, some 150 000 people were sent to prison on remand who were not subsequently imprisoned as a result of a conviction in the same year. The 'conversion rate' is likely to be far worse if remand detention in police cells is taken into account.

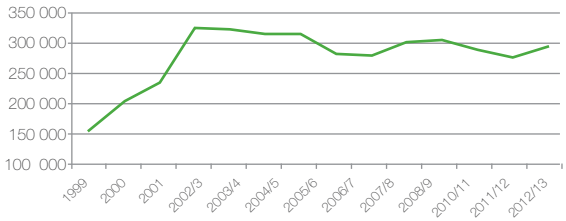
**Figure 13:** Percentage of remand admissions matched by sentenced admission


What has been driving the drop in sentenced admissions? Sentenced admissions are admissions of people who are convicted, and then sentenced to a term of imprisonment, rather than with a non-custodial sentence. Has the number of convictions dropped, or is it the extent to which sentences that include a term of imprisonment have dropped?

The National Prosecuting Authority Act, which created the National Prosecuting Authority (NPA), was promulgated in October 1998. Initially the newly formed NPA reported data on the finalisation of cases in the reporting period January to December; prior to that the individual provincial Attorneys-General did not report on their work in a uniform manner. The 2001/2 NPA Annual Report included data for 1999, 2000 and 2001 on the number of finalisations and the conviction rate.[58]

According to these data, convictions increased sharply over this time period, by 55%. From 2002/3 the reporting period changed to run from March to February each year.[59] The further jump in convictions, comparing January to December 2001 with March 2002 to February 2003, of another 41% in a single year suggests there may have been a further change in reporting practices that occurred at the same time, that influenced the number of convictions recorded. Assuming there was no such change in reporting practices, the increase in convictions, comparing the year January to December 1999 to the year March 2002 to February 2003, was a staggering 117%.

**Figure 14:** Number of convictions, 1999–2001,[60] 2002/3 to 2012/13[61]



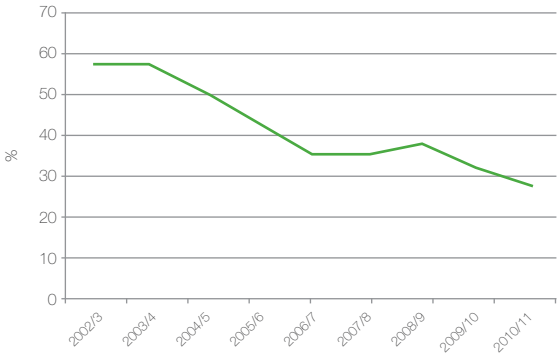

From 2002/3, however, the trend changes dramatically towards an overall decrease in the number of convictions. Consequently it appears that

the reduction in the number of sentenced admissions is partly a result of the trend towards a reduction in the number of convictions apparent from 2002/3.

**Figure 15:** Number of convictions, 2002/3–2012/13


At the same time, however, there has been a commensurate reduction in the extent to which sentences of imprisonment accompany a guilty conviction. Over the period 1999 to 2001 there appear to have been more sentenced admissions than there were convictions. This may, as indicated above, also be the result of how convictions are recorded. Looking at data from 2002/3 onward, there is a steady downward trend in the extent to which convictions are matched by sentenced admissions, from almost 60% to less than 30%.

**Figure 16:** Sentenced admissions as percentage of total convictions




This suggests that convictions are increasingly accompanied by non-custodial sentences – or alternatively that convicted people are being sentenced to time already served on remand – the 'Alice in Wonderland' scenario: 'sentence first, verdict after'.[62] What is clear is that the number of people held on remand in prisons is decreasing, the time for which they are held on remand in prisons is increasing, and the likelihood that they will ever be sentenced to a term of imprisonment is decreasing.

## Conclusion

The 'tough on crime' policy approach embodied in the tightening of bail laws and lengthy minimum sentences has had, over the long term, an unanticipated impact. After an initial period in which the DCS bore the brunt of predicted and massive increases in the total prison population, there was a subsequent stabilisation.

Prior to stabilisation, the twin unsustainable bail and sentencing policies led to conditions of detention resulting in more deaths from natural causes due to overcrowding in just over a decade, than the number of death penalty deaths during the apartheid era.[63]

As a result the criminal justice system developed methods to ameliorate the impact of these unsustainable policies. Some prisons refused to accept any more remand detainees, and detainees were then held at police stations. The full extent to which this occurred and continues to occur, is unclear.

The criminal justice trends suggest that, in addition, the system has generally slowed down and cut back on the number of people it chooses to prosecute,[64] the number it convicts, and the speed with which it does so, leading to a reduction in the number of people sentenced year-on-year.

The sentenced prison population is increasingly composed of those with longer sentences, but most will be released on parole at the earliest possible parole date.

In short, durations of remand detention have increased, convictions have decreased, an increasingly greater proportion of people are held on remand than will ever be convicted, and sentences are less likely than ever to contain a custodial component.

The 'tough on crime' approach has in practice turned into 'justice delayed and freedom denied'.

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## Notes

1 Criminal Procedure Second Amendment Act 1995 (Act 75 of 1995); Criminal Procedure Second Amendment Act 1996 (Act 85 of 1996); Criminal Procedure Amendment Act 1996 (Act 86 of 1996); Abolition of Restrictions on the Jurisdiction of Courts Act 1996 (Act 88 of 1996); Criminal Procedure Amendment Act 1997 (Act 76 of 1997); Criminal Procedure Second Amendment Act 1997 (Act 85 of 1997); Criminal Law Amendment Act 1997 (Act 105 of 1997); Criminal Matters Amendment Act 1998 (Act 68 of 1998); Criminal Procedure Amendment Act 2001 (Act 17 of 2001); Criminal Procedure Second Amendment Act 2001 (Act 62 of 2001).

2 See cases cited in note 4 below.

3 Criminal Procedure Act, as amended by the Criminal Procedure Second Amendment Act 1997, Section 50(6)(b).

4 See *Twayie v Minster van Justisie* 1986 (2) SA 101 (O); *S v Du Preez* 1991 (2) SACR 372 (Ck); *Novick v Minister of Law and Order* 1993 (1) SACR 194 (W) 197.

5 J van der Berg, *Bail: A practitioners' guide*, 2nd ed, Cape Town: Juta 2001, 11.

6 Criminal Procedure Second Amendment Act 1995 (Act 75 of 1995).

7 Section 50(7) (now deleted): 'If a person is arrested on suspicion of having committed an offence but a charge has not been brought against him or her because further investigation is needed to determine whether a charge may be brought against him or her, the investigation in question shall be completed as soon as it is reasonably possible and the person in question shall as soon as it is reasonably possible thereafter, and in any event not later than the day after his or her arrest contemplated in subsections (1) and (2), be brought before an ordinary court of law to be charged and enabled to institute bail proceedings in accordance with subsection (6) or be informed of the reason for his or her further detention, failing which he or she shall be released.'

8 The full text of Section 50(6)(d): 'The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if— (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A); (iii) the prosecutor informs the court that the person is going to be charged with an offence referred to in Schedule 6 and that the bail application is to be heard by a regional court: (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to (aa) procure material evidence that may be lost if bail is granted; or (bb) perform the functions referred to in section 37; or (v) it appears to the court that it is necessary in the interests of justice to do so.'

9 Prior to amendment, Section 60(1) (a) read as follows: 'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6) *and* (7), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, *unless the court finds that it is in the interests of justice that he or she be detained in custody*. After amendment, section 60(1) (a) reads: An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, *if the court is satisfied that the interests of justice so permit.'* [Own emphasis]

10 The offences listed in Schedule 6 are: 'Murder, when—(a) it was planned or premeditated; (b) the victim was—(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) Rape; or (ii) robbery with aggravating circumstances; or (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. Rape—(a) when committed—(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim— (i) is a girl under the age of 16 years; (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 1973 (Act 18 of 1973); (c) involving the infliction of grievous bodily harm. Robbery, involving— (a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle. Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm. An offence referred to in Schedule 5—(a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.'

11 E du Toit, F J de Jager, A Paizes et al., *Commentary on the Criminal Procedure Act*, 2007, 9–42.

12 Treason. Murder. Attempted murder involving the infliction of grievous bodily harm. Rape. Any offence referred to in Section 13 (f) of the Drugs and Drug Trafficking Act 1992 (Act 140 of 1992), if it is alleged that—(a) the value of the dependence-producing substance in question is more than R50 000,00; or (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) the offence was committed by any law enforcement officer. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of

an automatic or semi-automatic firearm, explosives or armament. Any offence in contravention of Section 36 of the Arms and Ammunition Act 1969 (Act 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in Section 39 (2) (a) (i) of that Act. Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or Section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004—(a) involving amounts of more than R500 000,00; or (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) if it is alleged that the offence was committed by any law enforcement officer—(i) involving amounts of more than R10 000,00; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. Indecent assault on a child under the age of 16 years. An offence referred to in Schedule 1— (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

13 *Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat* [1999] JOL 4944 (CC), para. 67–77: '[67] There can be no quibble with Mr D'Oliveira's submission that over the last few years our society has experienced a deplorable level of violent crime, particularly murder, armed robbery, assault and rape, including sexual assault on children. Nor can there be any doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society and that accordingly all steps that can reasonably be taken to curb violent crime must be taken. Mr D'Oliveira was correct when he argued that it is against this background that we should assess the provisions of s 60(11)(a). [68] Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. Parliament enacted s 60(11)(a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit. The question we need to answer is whether the extent of that limitation is justifiable. [69] In order to determine whether the limitation is permissible in terms of s 36, it is necessary to consider whether the limitation would be considered reasonable and justifiable in democratic societies based on freedom equality and dignity. … [77] In conclusion, therefore, I am of the view that although the inclusion of the requirement of "exceptional circumstances" in s 60(11)(a) limits the right enshrined in s 35(1)(f), it is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances.'

14 *Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat* [1999] JOL 4944 (CC) para. 75–76.

15 *S v Jonas* 1998 (2) SACR 677 (SEC) para. 679d–680e.

16 Such as the bail application of Oscar Pistorious, in which a lengthy affidavit spoke to exceptional circumstances.

17 A 2008 study in three large urban courts found that in excess of 80% of murder accused and 90% of rape accused were denied bail. See V Karth et al., *Between a rock and a hard place: bail decisions in three South African courts*, Open Society Foundation for South Africa, 2008.

18 Ibid.

19 Ibid.

20 In a national representative survey conducted face to face with 3 000 South Africans in November and December 1998, about 70% of South African respondents either agreed or strongly agreed with the statement that 'criminals have too many rights'. Reality Check, *South Africans' views of the new South Africa: a report on a national survey of the South African people*, 1999, 1999.

21 See M Shönteich, Sentencing in South Africa: public perception and judicial process Paper 43, ISS, November 1999. The ISS and the Institute for Human Rights and Criminal Justice Studies at Technikon South Africa (TSA) conducted a survey among Eastern Cape residents in 1999 to ascertain their attitudes to sentencing in South Africa. The survey found almost 60% said that the courts are 'much too lenient'.

22 Criminal Law Amendment Act 1997 (Act 105 of 1997).

23 *S v Makwanyana & another* 1995 (3) SA 391 (CC).

24 Although serious crime had been increasing since the 1980s, the public perception of a 'crime wave' over the period 1994–1997 is not supported by SAPS data: See M Schönteich & A Louw, *Crime trends in South Africa 1985–1998,* Centre for the Study of Violence and Reconciliation (CSVR), June 1999.

25 A survey conducted by the Human Sciences Research Council (HSRC) in July 1996 found that 71% of the public were in favour of retention of the death penalty, while 69% felt that criminals were treated too leniently by the courts. See HSRC media release, *The death penalty debate*, 4 September 1996, http://www.hsrc.ac.za/media/1996/9/19960904.html (accessed 3 June 2005).

26 Act assented to on 27 November 1997, commencing 13 November 1998; s51 operable from 1 May 1998.

27 Section 53(1) of the Act.

28 Section 53(2) of the Act.

29 The Criminal Law (Sentencing) Amendment Act 2007 (Act 38 of 2007), Section 3; Criminal Law Amendment Act 1997 (Act 105 of 1997), deleted sections 53(1) and 53(2).

30 Criminal Law Amendment Act 1997 (Act 105 of 1997), Schedule 2.

31 Ibid., Section 51.

32 Magistrates' Courts Act 1944 (Act 32 of 1944) as amended by the Magistrates Amendment Act 1998 (Act 66 of 1998), commencing 7 October 1998, Section 92(1)(a).

33 Over the period April 2005 to March 2007 some 2 418 minimum sentencing matters were referred to the High Court for sentencing. The High Court acquitted 234 of these accused who had already been convicted in the

Regional Court. Parliament of South Africa Research Unit document, 31 July 2007, http://www.pmg.org.za/docs/2007/071030research.pdf (accessed 2 March 2014).

34 Criminal Law (Sentencing) Amendment Act 2007 (Act 38 of 2007).

35 See *Chake v State* (824/2012) [2013] ZASCA 141 (30 September 2013).

36 This chart was compiled by combining a spreadsheet covering the period 1995 to 2005 that incorporated monthly data, originally made available to the author by the Office of the Inspecting Judge for the preparation of a report on a minimum sentencing in 1997, with various MIS (Management Information System) reports provided to the Civil Society Prison Reform Initiative (CSPRI) by the Department of Correctional Services (DCS) since 2003. The last such report was dated 28 February 2011. A data point for 2012 was obtained from the DCS Annual Report.

37 ISS, *Crime Index* 4(4) (2000); Office of the Inspecting Judge, *Annual report 2011–2012*.

38 Office of the Inspecting Judge, *Annual report 2011–2012*.

39 Some 7 280 deaths in 13 years would have been likely over 1998–2011, if the prison population had remained at 140 000. Instead 15 778 deaths occurred.

40 This chart was compiled using data from the Judicial Inspectorate of Correction Services, *Annual report 2011–2012*, figure 22, on the number of natural deaths over the period 1998–2011, as well as total inmate population data, usually reported at the end of February or March of the year concerned.

41 Grootvlei, Pietermaritzburg and Qalakabusha. Presentation to the Select Committee on Security and Constitutional Affairs, 13 September 2006, www.pmg.org.za/docs/2006/060913parole.ppt (accessed 5 March 2014).

42 See note to Figure 2 above.

43 Department of Correctional Services, *Report on Special Remission 2005*, 23 August 2005, www.pmg.org.za/docs/2005/050823sishuba.ppt (accessed 5 March 2014).

44 Parole is a manner of placement whereby an offender, subject to completion of a minimum period of sentence inside the correctional centre, and subject to certain criteria being met, may be allowed to serve a part of his/her sentence in the community. A person placed out on parole will be placed under strict conditions and under the supervision of a parole/ probation officer and will remain under supervision in the community until the sentence is completed in full. If he/she transgresses any of these conditions, he/she may be arrested and returned to a correctional centre to serve the remainder of the sentence.

45 For most sentenced offenders (those serving between two years and life imprisonment), the earliest parole date occurs when half the sentence has been served, in terms of Section 73(6)(a) of the Correctional Services Act 1998 (Act 111 of 1998). For a life sentence, 25 years must be served, and sentences in terms of minimum sentencing require four-fifths.

46 The percentage of eligible cases considered by parole boards from April 2011 to end of December 2011 is 76,30%. See Department of Correctional Services, *Status report on case management committees, parole boards and correctional supervision*, 13 March 2012, http://www.pmg.org.za/report/20120313-correctional-supervision-parole-status-report-department-correctional (accessed 5 March 2014).

47 The data for 1995–2005 was drawn from Chris Giffard and Lukas Muntingh, *The effect of sentencing on the size of the South African prison population*, OSF-SA, 2006. The 2011 data was obtained from the Department of Correctional Services Management Information System report, 2011.

48 Department of Performance Monitoring and Evaluation, The Presidency, *Twenty-year review South Africa 1994–2014*, 114.

49 Section 49G of the Correctional Services Act and 63A of the Criminal Procedure Act are relevant. Section 63A does grant the head of a correctional centre, under certain circumstances and with regard to certain crimes, the discretion to either seek the release of a remand detainee or to request amendment of the conditions of such a person's bail. The head of the correctional centre may approach the relevant court if he/she is satisfied that the population is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused where an accused has been granted bail but remains in custody. The extent to which the provision has been used in practice is unclear. It only applies to detainees who have been granted bail but remain in custody (presumably because bail cannot be paid). Section 49G of the Correctional Services Act provides that that a remand detainee may not be detained for a period exceeding two years without such matter having been brought to the attention of the court concerned. In April 2014, DCS announced that 380 detainees 'were no longer in remand detention' as a result of this provision being put to use.

50 See note 22 above.

51 South African Police Service, *Annual report 2002–2003 (Visible policing);* and South African Police Service, *Annual report 2010–2011 (Visible policing).*

52 Source: ISS Crime Hub, http://www.issafrica.org/crimehub/ (accessed 10 April 2014).

53 See KwaZulu-Natal Legislature Community Safety and Liaison Committee, *Report on targeted visits to police stations in the Umzimkhulu area*, 20, 23–25 May 2005, 19, http://www.kznlegislature.gov.za/LinkClick.aspx?link=committees%2F23-25+May+2005+visit+to+police+stations+20.pdf&tabid=96&mid=717 (accessed 5 March 2014): 'Concerns: The refusal of the relevant prisons to accept any more awaiting trial prisoners. These prisons are already as much as 200% overcrowded and cannot cope with any extras. The consequence is that the holding cells in the Police Station are overcrowded, putting extra pressure on the personnel.' And at 22: 'This is an issue which arose at many of the Police Stations, but was particularly noticeable during the visit to the Mehlomnyama Police Station. Police have to grapple with the problem of awaiting trial prisoners who cannot be accommodated at the Port Shepstone Prison. This raises issues such as the responsibility of Police Stations having to keep awaiting trial prisoners, which is not their responsibility, but that of Correctional Services.' See also *Report of the Portfolio Committee on Police on its oversight visit from 26–30 March 2012 to the following police stations in the North West Province*, http://www.pmg.org.za/files/doc/2013/comreports/130515pcpolicereport.htm (accessed 5 March 2014); *Report of the Portfolio Committee on Police on its oversight visit from 23–27 January and 02*

*February 2012 to the following police stations in Limpopo Province*, http://www.pmg.org.za/files/doc/2013/com reports/130515pcpolicereport2.htm (accessed 5 March 2014): 'All the detainees were supposed to be in Polokwane prison and not in the station cells. The one who had been there the longest, had been there from January 2010. The reason given was that the prison was full.'

54 For example, Johannesburg Medium B on 28 February 2011 held 249% of approved capacity; Mount Frere 245%; King William's Town 254%.

55 Correctional Services Act 1998 (Act 111 of 1998), Section 5(2)(b) prohibits the detention after first appearance of detainees in police cells. According to the White Paper on Remand Detention, para. 4.3.2.5, 'Prior to the implementation of section 5(2) (b) of the CSA, the SAPS kept a number of RDs in their police cells in terms of a bilateral agreement between the SAPS and the DCS regional offices. The above-mentioned section makes provision for the detention of inmates in a police cell for a period not exceeding seven (7) days if there is no correctional centre or RDF nearby. All the bilateral agreements for detention of RDs in police cells for longer than seven (7) days ceased to operate on 01 March 2012 as this was the official date set for the implementation of section 5(2)(b). The purpose of 5(2) (b) was to ensure that RDs are not kept for longer periods than necessary by the entity responsible for investigating their alleged offences which may lead to torture or inhumane treatment in the pursuit of an investigation.'

56 Source: Department of Correctional Services.

57 Source: Department of Correctional Services.

58 National Prosecuting Authority of South Africa (NPA), *Annual report 2001–2002*.

59 Data for 2002–2003, 2003–2004, 2004–2005 and 2005–2006 is reported on in the relevant annual reports of the NPA; NPA, *Annual report 2005–2006* is available at http://www.npa.gov.za/UploadedFiles/NPA%20Annual%20Report%20 2005_2006.pdf (accessed 5 March 2014).

60 NPA, *Annual report 2001–2002*, annexures B and D, 15, 17. The number for 1999 and 2000 excludes High Court convictions. The number for 2001 includes High Court convictions. The convictions are derived by multiplying the percentage guilty by the total finalised.

61 The red line shows data reported by the Department of Performance Monitoring and Evaluation, *Twenty-year review*, 143. The blue shows data sourced from individual annual reports of the NPA.

62 Lewis Carroll, *Alice's Adventures in Wonderland,* London: Macmillan,1865, Chapter 12: '"Let the jury consider their verdict," the King said, for about the twentieth time that day. "No, no!" said the Queen. "Sentence first – verdict afterwards."'

63 The number executed during the apartheid era is estimated at approximately 4 000. Approximately 8 500 *additional* deaths (i.e. 8 500 more than would have been the case had usual occupancy levels prevailed) are calculated to have occurred during the worst period of overcrowding.

64 This author has written extensively in an ISS monograph on the NPA's tendency not to prosecute and wide interpretation of its discretion not to prosecute. See J Redpath, *Failing to prosecute?,* Monograph 186, Institute for Security Studies, 2012,http://www.issafrica.org/pgcontent.php?UID=31594 (accessed 5 March 2014).