

NOTES

- 1 Here we have said “almost any other part of the criminal justice system” because, for obvious reasons the integration of investigation and prosecution in many of the offices of the Directorate of Special Operations is more complete because both investigator and prosecutor work for the same unit.
- 2 BAC is currently assisting with the roll-out of a replica of this court and its systems in Johannesburg and has secured corporate sponsorship (mainly from Nedcor and The Banking Council) to assist with the setting up of the required infrastructure.
- 3 Thurman Arnold quoted in GF Cole, Performance measures for the trial courts, prosecution and public defence, in *Performance Measures for the Criminal Justice System*, Bureau of Justice Statistics, Princeton University Study Group on Criminal Justice Performance Measures, NCJ-143505, 1993, p 87.
- 4 In this regard, the argument of D Gambetta, *The Sicilian Mafia: The business of private protection*, Harvard University Press, Cambridge, 1996 reflects the long-term consequences of a failure to provide a legitimate and effective impartial system of courts. He argues that the origin of the mafia in Sicily can be traced to the failure of the Italian state, unified in 1860, to extend such a system to Sicily. This created a market opportunity for the privatised enforcement of contracts—protection—which is, he insists, the essence of mafia activity. The fact that the mafia remains an organised crime problem in Italy and, until recently at least, dominated organised crime elsewhere in the world reflects the impact the failure to provide courts in rural Sicily had on world crime problems!
- 5 South African Law Commission, Discussion Paper 96: The Simplification of Criminal Procedure, 2001, p 7.
- 6 This ‘adversarial’ system—based on the English legal system—is often contrasted to systems in continental Europe which are more ‘inquisitorial’. Here the magistrate controls the pre-trial phases of cases—the investigation and gathering of evidence. At trial the magistrate calls witnesses and leads the questioning of them. Clearly, this system places much more faith in the capacity of the magistrate (and, therefore, the state) to conduct investigations professionally and to protect the interests and rights of suspects and accused persons. Nonetheless, the South Africa Law Commission is investigating ways in which South African trial courts could be made more efficient through the adoption of measures originating in more inquisitorial

systems. Such measures include giving the presiding officer a greater role in case management, providing her with access to the police docket, and requiring the defence to disclose the basis of its case prior to the start of the trial.

- 7 M Feeley, Two models of the criminal justice system: an organisational perspective, in S Stojkovic, J Klofas and M Kalinich, *The Administration and Management of Criminal Justice Organisations: A Book of Readings*, Waveland Press, Prospect Heights, 1999.
- 8 This is not to say, of course, that all accused persons and their counsel always and everywhere share an interest in the *speedy* finalisation of cases. On the contrary, it is often in the defendant's interests to delay the completion of cases for as long of possible in the hope that with the passage of time the quality of the prosecution's case will deteriorate. Similarly, a cynic might point out that, on some level, defence counsel have a financial interest in longer cases rather than shorter ones. Defence counsel interviewed in the course of this research, however, suggested that only foolish attorneys (or ones who could not fill their diaries with new cases) would adopt delaying tactic merely to beef up their billable hours because such an approach would soon become obvious to the prosecution who would then be much less inclined to assist that attorney (and her clients) in subsequent cases.
- 9 Characterising a court in this fashion has important practical and policy implications, not the least of which is that changes to workflow, organisational structure and/or organisational rules in courts need to be considered not merely in relation to the effect they will have on the actors to which they apply, but also on the rest of the 'group'. It is quite conceivable, therefore, that some changes aimed at improving efficiency may fail to do so either because of their impact on the behaviour of other role-players or because, informally, the group has already devised solutions to the problems which such changes purport to deal with. This partly explains the argument that there is good reason to doubt that many organisational and policy reforms aimed at increasing the efficiency of courts fail—they simply cannot negotiate the complexities of the formal and informal work rules governing the practical exercise of administering justice. For more on this see E Doleschal, The dangers of criminal justice reform, in Stojkovic, et al, op cit.
- 10 EJ Clynych and DW Neubauer, Trial courts as organisations: A critique and synthesis, in Stojkovic, et al, op cit, p 71.
- 11 The United States Department of Justice has set out a series of 22 performance standards divided into five distinct performance areas comprising for the team of autonomous and semi-autonomous actors that constitute the court:
 - *access to justice* standards relate to the accessibility of the machinery of courts to the people they serve;
 - *expedition and timeliness* relates to the completion of cases and the performance of all other court functions;
 - *equality, fairness and integrity* standards relate to the extent to which the courts uphold due process rights, provide case-specific, individualised justice, treat

- actors consistently and fairly, and ensure that their actions are consistent with established law;
- *independence and accountability* performance measures look at the extent to which the courts retain their independence from the other branches of government; and
 - *public trust and confidence* standards relate to public perception of the court.

The 22 performance standards linked to these five performance areas seek to refine further these performance areas, with a total of 68 distinct quantifiable performance measures developed on the basis of these standards. Perhaps the elements most obvious by their absence from the above list are any mention of the role of the court—understood as the informal workgroup of presiding officer, prosecutor, investigator and defence team—in the prevention of crime and the enforcement of the law. Thus there is no mention of conviction numbers or rates, or anything vaguely related to the nature of sentences imposed. These standards do, however, set out a clear and realistic set of criteria against which the performance of courts, as well as the impact of innovations in the management or institutional character of courts, can be measured.

Given the federal nature of America's structure of government, the Departments of Justice cannot impose these measures on courts, nor are local or state courts accountable to the department for their performance. In the US, therefore, the documents setting out these measures are merely advisory, offered in the hope that courts will use them to monitor and, therefore, improve their performance.

These performance areas, standards and measures are, for the most part, also reflected in the policy goals of South Africa's Department of Justice and Constitutional Development as reflected in the Department of Justice's Justice Vision 2000. However, that document's purpose is not confined to setting out a set of performance areas for South Africa's courts, dealing, as it does, with a much wider range of responsibilities which the Department has. It does not, therefore, set out its assessment of the key objectives, goals and performance areas for courts in a manner similar to that of the Bureau of Justice Assistance, which, for our present purposes, is more helpful. See the Bureau of Justice Statistics, *Trial Court Performance Standards with Commentary*, BJA, Washington DC, 1997.

- 12 Schönsteich reports data on the causes of delays in South African courts, finding that most hours were lost in district courts because rolls were finalised before the scheduled close of court-business. Problems with the prosecution in District Courts caused the second lowest number of hours to be lost, with defence, magistrates, interpreters and witnesses all being more wasteful of court hours. In regional courts, 'consultation' which, presumably, involved the prosecution resulted in the third largest number of lost hours, with prosecution and investigation causes not even being ranked. See M Schönsteich, *Lawyers for the People: The South African Prosecution Service*, ISS Monograph Series No. 53, Institute for Security Studies, Pretoria, 2001, pp 109–10.

These data do not detract from the point made in the text that most time is lost in completing investigations/prosecutions in the investigation phases since Schönteich's data refer only to cases that have already begun.

- 13 A British study of the reasons for adjournments in courts in that country found that about 54 per cent of adjournments resulted from the inability of the prosecution or defence to proceed on the intended date. A further 17% resulted from the fact that requested information such as previous convictions or psychiatric reports were not available. Fourteen percent resulted from first hearings where the accused pleaded non guilty, with a further 14% resulting from the non-attendance of the defendant, while 11% were to allow the case to go to a higher court. Other reasons for delays included the need for an interpreter or the awaiting of the finalisation of cases in other courts. See C Wittaker, A Mackie, R Lewis and N Ponikiewski, *Managing Courts Effectively: The reasons for court adjournments*, Home Office, UK, 1997.
- 14 BJ Olstrom and RA Hanson, *Efficiency, Timeliness and Quality: A new perspective from nine state criminal courts*, National Institute of Justice, Washington DC, 2000.
- 15 Ibid.
- 16 Ibid, p 89.
- 17 Ibid, pp 103–4. Schönteich's contention that each awaiting trial prisoner costs the state R80 per day is, it is submitted, misleading. The figure of R80 per day reflects the average cost per prisoner per day. The relevant figure for working out the costs to the state of the time spent by these prisoners is the marginal costs of their stays—covering the food, health care and other costs of incarceration. These are closer to R10 per day per prisoner.
- 18 Ibid, pp 107–9.
- 19 Ibid, p 193.
- 20 Ibid, p 153.
- 21 The following section is a brief summary of the main points contained in chapter seven of Schönteich, op cit.
- 22 Before 1994, a number of laws were on the statute books which sought to assist the state in the prosecution of certain offences. These laws created presumptions in the state's favour. The presumptions placed an onus on persons accused of certain offences, which they had to rebut by proof on a balance of probabilities to be acquitted of the charges against them. After 1994 the constitutional court declared a number of such presumptions invalid and unconstitutional.
- 23 Department of Justice, *Justice Vision 2000*, Department of Justice, Pretoria, 1997, pp 26–32.

- 24 South Africa's courts structure is currently being reviewed by a commission chaired by Chief Justice Chaskalson with a view to rationalising the structure and ensuring that it is both coherent and constitutional.
- 25 This reluctance became a matter of public record in the first half of 2002 when Parliament debated the draft Immigration Bill and members of the Justice Portfolio Committee rejected the establishment of specialised immigration courts, a proposal made in the draft Bill presented to Parliament.
- 26 Equally, some matters arising out of a single set of facts could conceivably create causes of action falling within the remit of the specialised courts as well as actions falling outside of those remits. Under those circumstances, the narrowness of the definition of the mandate of specialised courts could mean that the cases may have to be divided between different courts.
- 27 This section relies heavily on E Cazalet, *Specialised courts: Are they a quick fix or a long-term improvement in the quality of judges?* Paper presented to a World Bank conference in 2001 and P Du Rand, *The phenomenon of specialised courts*, paper presented to a departmental seminar on the Immigration Bill in 2001.
- 28 This argument is not, of course, new. So important is the resulting increase in productivity associated with specialisation that Adam Smith accorded the division and specialisation of labour pride of place in his theory of economics setting out its importance in the first chapter of *The Wealth of Nations*. The progressive and continuous division of labour, he argued, meant that the same number of people would be able to produce a "great increase in the quantity of work" largely because of the "increase of dexterity of every particular workman". See A Smith, *The Wealth of Nations*, Penguin Books, England, 1983, p 112.
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 There is, however, another species of crime which some might characterise as commercial crime: the violation of laws regulating the conducting of business activity in ways that harm the environment or undermine the health and safety of workers and/or consumers. The violation of these laws—whether they govern the nature of services offered by banks, worker safety or environmental standards—may well occur in the dishonest pursuit of a quick buck. In some cases, statutory offences linked to these regulatory endeavours will be added to the charge sheet in an investigation/prosecution run through the SCCU if a conviction on these counts may be possible in addition, or as an alternative, to a conviction for fraud/theft. However, for the most part, 'pure' violations of these laws are not handled by the Commercial Branch and the SCCU, being within the remit of agencies in other government departments.

- 33 This operational approach to defining commercial crime is markedly different from the theoretical approach developed by criminologists and sociologists, the gist of which is to identify as criminal various acts by the wealthy and powerful in order to refute the notion, common to many discourses on crime, that it is the poor who commit crimes.
- 34 CR Snyman, *Criminal Law*, Butterworths, Durban, 2002, p 520.
- 35 Adams & Adams, *Trade Mark Handbook*, Adams & Adams, SA, 1999, pp 33–4.
- 36 KPMG, *Southern Africa Fraud Survey*, KPMG, Johannesburg, 2002, p 12.
- 37 It is for this reason that it is hard to credit the claim of Business Against Crime that the appropriate comparison of the 170+ cases finalised per year in the Specialised Commercial Crimes Court is the claim that in 1997 in the whole of Johannesburg, only 15 convictions for commercial crime were obtained. It seems extremely unlikely that like is being compared with like.
- 38 These average values, it should be pointed out, reflect the *potential* losses associated with the cases. Since many cases are brought before any loss is incurred, this obviously overstates the real cost of fraud to South African businesses.
- 39 These data have been gleaned from various documents on the SAPS website and can be accessed at <http://www.saps.org.za/crimeinfo/bulletin/index.htm>.
- 40 This list is taken from the National Prosecuting Authority, *Policy Manual*, NPA, Pretoria, 1999, p A2.
- 41 For more detail on this point, see A Altbeker, *Solving Crime: The state of the SAPS detective service*, ISS Monograph Series No. 31, Institute for Security Studies, Midrand, 1998.
- 42 For more on this, see A Altbeker, Internet frauds: A basic typology, *Nedbank ISS Crime Index* 5(1) 2001, and A Altbeker, Intangible evidence? Policing in the information age, *Nedbank ISS Crime Index* 5(4) 2001.
- 43 Ibid.
- 44 Perhaps the most celebrated of these failures to get adequate inter-agency cooperation in the recent past have been those brought to light by the singular failure of the various law enforcement agencies in the United States to share information that might have helped to prevent the terrorist attacks of September 11 2001.
- 45 B Widlake, *Serious Fraud Office*, Warner Books, Great Britain, p 46.
- 46 This argument is pieced together from similar points made in J Redpath, *Leaner and meaner: The restructuring of the Detective Service*, ISS Monograph Series No. 73, Institute for Security Studies, Pretoria, 2002, Chapter 4.