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Key issues in the NPA

Accountability of the NPA

Issue Paper 5

by

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Contents

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1. Introduction

Public accountability is crucial to demonstrating and achieving independence. Accountability through public transparency can achieve the level of prosecutorial independence and accountability required to ensure that the public has confidence in the decisions being made, thus ensuring the trust of the public. Various kinds of accountability apply to the National Prosecuting Authority (NPA): internal accountability, accountability to Parliament, and public accountability.

As an organ of state[1] the NPA is accountable to the public.[2] Prosecutors in democracies accept that they are accountable to the public for the decisions they take, particularly in criminal justice systems which do not have compulsory or mandatory prosecution. Public accountability comprises two linked notions in relation to the exercise of prosecutorial discretion. First, it involves informing and explaining, that is, rendering an account of the manner in which prosecutorial responsibilities are being met.[3] Secondly, it involves taking corrective actions where appropriate, and giving an account of these corrective actions.[4]

Clarity and transparency are key to public accountability. Precisely because the exercise of any discretion cannot be capricious or arbitrary, it must be principled, that is, based on sound and reasonable known criteria and rules.

Individual prosecutors are accountable internally through the internal management structure of the NPA to their Directors of Public Prosecutions (DPPs) who must supervise and direct[5] and who in turn are accountable to the National Director of Public Prosecutions (NDPP), who has authority over the exercise of all powers and functions in the NPA.[6] Finally, the Minister exerts "final authority" over the NPA.[7]

In the democratic era, the centralised National Prosecuting Authority (NPA) replaced the individual Attorneys-General of the provinces, and became a programme of the Department of Justice. The NPA Act provides that the NPA is accountable to Parliament.[8] Because they perform a public function,

[1] *Section 239 Constitution of the Republic of South Africa Act 108 of 1996*.
[2] *Section 195(1)(f) Constitution of the Republic of South Africa Act 108 of 1996.*
[3] Bellemare 2.
[4] Bellemare 3.
[5] *Section 24(1) National Prosecuting Authority Act 32 of 1998*.
[6] *Section 22(1) National Prosecuting Authority Act 32 of 1998.*
[7] *Section 179(6) Constitution of the Republic of South Africa Act 108 of 1996.*
[8] *Section 35(1) National Prosecuting Authority Act.*

prosecutors are also accountable to the courts who exercise judicial authority[9] and to the public[10] for the way they discharge their responsibility.

The NPA has followed some of the requirements for its accountability to Parliament, but the content of that accountability has frequently stopped short of the accountability required by the NPA Act. Furthermore, the NPA's accountability to the public, required by the Constitution, has throughout its existence fallen short of democratic requirements. This paper seeks to explore how the NPA can improve its accountability, particularly broader, public accountability.

This Issue Paper argues that heightened public accountability, through clarity and transparency of policies and processes, are required to ensure an objective, independent, Constitutional prosecution service, which enjoys public trust.

2. Independence, accountability and the Minister

Independence is an essential feature of the proper exercise of prosecutorial discretion.[11] Yet, in South Africa the Minister also exerts "final responsibility" over the NPA. Is this "accountability" of and to the Minster inimical to independence? In democracies, political actors must determine prosecution priorities. However, it is usually seen as political interference to intervene directly in specific cases, before they are concluded.

Independence requires that justice be dispensed without "fear, favour or prejudice." [12] It further provides that no state entity shall *improperly* interfere with, hinder or obstruct the prosecuting authority in the exercise of its powers, duties and functions.[13] Thus, while it is impermissible for executive government to give instructions in individual cases to the chief prosecutor[14] (in South Africa, the NDPP) or to individual prosecutors, general instructions, for example to prosecute certain types of crimes more severely or speedily, are permissible.[15] Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.[16] Indeed, in some

[9] *Section 165(.....) Constitution of the Republic of South Africa Act 108 of 1996.*
[10] *Section 195(1)(f) and 195(2), Constitution of the Republic of South Africa Act 108 of 1996.*
[11] DA Bellemare, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', in *International Society for the Reform of Criminal Law 18th International Conference Montreal* (Quebec Canada, 2004), p. 2.
[12] *Section 179(4) Constitution of the Republic of South Africa Act 108 of 1996*.
[13] Section 32(1)(b) National Prosecuting Authority Act.
[14] Venice Commission Compilation, paragraph 3.2.4
[15] Venice Commission Report, paragraph 30.
[16] Venice Commission Report, paragraph 30.

democracies, the Minister of Justice in the executive cabinet is also the Attorney-General holding final responsibility for both prosecutions and prosecution policy.[17]

This is more common in established democracies but is considered less innocuous in transitional democracies with histories of abusive prosecutions, such as in Eastern Europe. However, where there is discretion to prosecute and there are insufficient resources to prosecute all matters with equal vigour, the prosecution should take guidance from the Minister on priorities: in South Africa, the *concurrence* of the Minister is required in setting prosecution policy.[18]

The particular history of South Africa with an overtly political use of the criminal justice system through detentions without trial and politically-motivated prosecutions, accompanied by torture and human rights abuses, has informed the design of the South African Constitution and the aversion to "political interference" in prosecution. In this the country is similar to former Eastern European systems, in overcoming a history of political prosecution. Accordingly, the role of the executive in policy-making should not result in the actual or perceived abuse of the prosecution process for political ends; to, for example, target political opponents of the government of the day, or to excuse or favour politicians or their connections within the government or ruling party.

However, independence does not imply that the prosecution is free to make any arbitrary or illegal decisions in the exercise of discretion, nor to make their own policy which seeks to override legislation, nor to keep secret the reasons for decisions on matters which are in the public domain.[19] "A country could not have multiple criminal law policies at the whim of prosecutors' opinions and beliefs; there must be only one such policy."[20]

Furthermore, while the NPA must act independently, it is accountable *after the fact* on its independent decision-making to the Minister,[21] Parliament,[22] as well as to the general public,[23] and must comply with the law and lawful orders of court, and prosecutorial policy. It is in accounting, that independence is demonstrated. Indeed, independence on its own is not enough – prosecutors must act within the law and the Constitution. Further, it also not enough that prosecutors act independently and within

[17] For example, Australia and Canada.
[18] Section 179(5)(a) Constitution of the Republic of South Africa Act 108 of 1996.
[19] Venice Commission Compilation, paragraph 2.1.2.1.
[20] Hamilton J (Substitute Member of the Venice Commission, Director of Public Prosecutions, Ireland) 'Prosecutorial Independence and Accountability' Campus Trieste Seminar 28 February – 3 March 2011 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2011)008-e accessed 23 July 2021.
[21] Section 33, National Prosecuting Authority Act 32 of 1998.
[22] Section 35, National Prosecuting Authority Act 32 of 1998.
[23] Section 41(1)(c) Constitution of the Republic of South Africa.

the law and the Constitution – they must also demonstrate their independence through accountability: being able to explain their independent and legal decision-making. This accountability is of course relatively simple when decisions have been taken through demonstrably unbiased and independent processes with clear and transparent processes which are within the bounds of the law.

2.1. Clarity and transparency in decision-making

Clarity and transparency are key to both public and internal accountability. Clarity involves the need for clear rules. Precisely because the exercise of any discretion cannot be capricious or arbitrary, it must be principled, that is, based on sound and reasonable known criteria and rules. Accountability originates in the basing of decisions in sound and reasonable criteria. Explanations are easy to provide when decisions are made in terms of applicable criteria which are clear and publicly available. By contrast, unprincipled decisions are difficult to explain.

The NDPP must therefore provide prosecutors with guidance as to how their discretion must be exercised, and this guidance, in the form of NPA Policy and Directives, should be publicly available in order for there to be meaningful public accountability. This guidance is to be distinguished from Confidential Memoranda providing legal advice to prosecutors. NPA Policy and Directives guiding the exercise of discretion should be publicly available as is the case in many democracies. For example, the Public Prosecution Service of Canada Deskbook is a public document[24] and in Australia, such criteria must be published in the Government Gazette.[25]

In South Africa, an overbroad "Prosecution Policy" document is in the public domain, but the more detailed Directives are currently treated confidentially. Arguably, the current Directives not only provide insufficient guidance to ensure proper accountability on a range of issues (e.g., Informal Mediation), but their confidential nature inhibits accountability.

The Directives should be expanded in focus and updated annually / biennially in order to more thoroughly guide the exercise of discretion, and they should be made publicly available. This is because not only must the rules be clear: they must also be known and understood: in other words, there needs to be transparency.[26]

The secrecy of a process encourages public speculation that improper decisions are being taken in secret. Transparency, by contrast, supports effective and meaningful public accountability. The more

[24] 'Public Prosecution Service of Canada Deskbook' <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> [accessed 31 May 2021].
[25] *Section 8 Director of Public Prosecutions Act 1983, Australia*.
[26] Bugg D 'Accountability, Independence and Ethics in the Prosecution Practice' 13.

that the exercise of discretion is a matter of public record, the more likely the decision-making process will be seen as responsible and accountable, therefore enhancing public confidence, credibility, and ultimately legitimacy.

3. Types of Accountability

3.1. Internal accountability of prosecutors

The power to prosecute is invested in the prosecuting authority as an institution.[27] The NDPP is the head[28] and has authority over all powers exercised within the prosecuting authority.[29] DPPs are vested with the power of prosecution (instituting, conducting, and discontinuing criminal proceedings) in their jurisdictions.[30] Prosecutors' decisions relating to prosecutions must be made on the basis of evidence, the law and the public interest.[31]

Prosecutors are accountable to their seniors and their respective DPPs for their actions, because their powers are assigned to them by the DPPs.[32] They must be able to explain to their seniors, the DPP, and ultimately the NDPP, the basis for the exercise of their discretion. This is internal accountability, which requires full transparency for accountability.

Because DPPs are required to "supervise, direct and co-ordinate" the work of Deputy Directors and prosecutors, they are obliged to put in place systems and processes in order to enable prosecutorial accountability to them, of those under their authority.

Because the NDPP has "final authority," she must ensure appropriate disciplinary processes exist to address failures to comply with policies and directives, and failure to be independent and accountable.

3.2. Accountability to Parliament

The NPA Act provides that the prosecuting authority is accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of

[27] *Section 179(2) Constitution of the Republic of South Africa Act 108 of 1996*.
[28] *Section 179(1)(a) Constitution of the Republic of South Africa Act 108 of 1996*.
[29] *Section 22(1) National Prosecuting Authority Act 32 of 1998.*

[30] *Section 20(3) National Prosecuting Authority Act 32 of 1998.*
[31] See inter alia Van Deventer v National Director of Public Prosecutions NO (64268/2013) ZAGPPHC 550 (7 August 2015).
[32] *Section 25(1)(c) National Prosecuting Authority Act 32 of 1998*.

prosecutions.[33] In accounting to Parliament, the NDPP must prepare a report *inter alia* on the activities of "the National Director, Deputy National Directors, Directors and the prosecuting authority as a whole,"[34] which must be submitted to the Minister by the 1st of June, and which the Minister must then table in Parliament.[35]

Although the NPA submits annual reports yearly, the detail and quality of these reports is variable. In particular, there appears to have been an attempt over the last decade to hide the extent to which the NPA chooses not to prosecute or withdraws matters, and the long-term trend toward a reduction in overall number of serious crime convictions.

The NPA also does not report in a sufficiently disaggregated fashion. In particular the NPA does not reported on the activities of each of the DPPs, who lead the office of the NPA at each seat of the High Court, as required.[36] In other words, it does not report separately on each Division of the High Court. Information in the Annual Report is not provided per Division of the High Court. The legislation seems to require such reporting, through which it would be possible to identify problems and issues by comparison amongst the divisions, and to better hold the relevant DPPs to account for the prosecutions occurring or not occurring in their divisions.

The submission of a national report with summary data only serves to reduce transparency in relation to the operation of the NPA and reduces the extent to which DPPs are held to account externally, and not just internally within the NPA. The DPPs are required to furnish their reports to the NDPP[37] on their activities, personnel and finances;[38] accordingly such information is available per division and should also be included as such in the annual reports to Parliament, should the NPA wish to meet the requirements of transparency, accountability and credibility.

Also note that s 342A(7)(a) of the Criminal Procedure Act (CPA) requires the NDPP to submit a report to Parliament on people awaiting trial and their duration in custody. This has not always been submitted as and when required.

[33] *Section 35(1) National Prosecuting Authority Act.*
[34] *Section 22(4)(g) National Prosecuting Authority Act.*
[35] *Section 35(2)(a) National Prosecuting Authority Act.*
[36] *Section 6 read with Section 13 National Prosecuting Authority Act.*
[37] *Section 24(3)(b) National Prosecuting Authority Act.*
[38] *Section 22(4)(g) read with Section 24(3)(b) National Prosecuting Authority Act.*

3.3. Public Accountability

As an organ of state[39] the NPA is accountable to the public.[40] Prosecutors in democracies must be accountable to the public for the decisions they take, particularly in systems which do not have compulsory prosecution. The type of decision determines the degree of accountability, as will be explored in the following sections.

This public accountability is different from the constitutional requirement that the NPA be accountable to Parliament "in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions." [41]

Public accountability comprises two linked notions in relation to the exercise of prosecutorial discretion. First, it involves informing and explaining, that is, rendering an account of the manner in which prosecutorial responsibilities are being met.[42] Secondly, it involves taking corrective actions where appropriate, and giving an account of these corrective actions.[43] The NPA has tended toward a limited degree of public accountability.

4. Accountability for decisions

4.1. Accountability in relation to the decision to prosecute or not

The notion of public accountability in relation to the decision to prosecute or not to prosecute is particularly important. This is probably the most difficult and important decision made in the exercise of prosecutorial discretion and cannot be taken lightly in any case. Internal accountability requires that such decisions are in line with policy and directives and are explainable as principled through the internal accountability chain.

When the decision is made to prosecute someone, prosecutors will not normally be expected to justify out of court or to the media, the reasons why someone has been charged, as these reasons will become clear when the evidence is presented in court.

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[39] As defined in *Section 239 Constitution of the Republic of South Africa Act 108 of 1996*.
[40] *Section 195(1)(f) Constitution of the Republic of South Africa Act 108 of 1996*.
[41] *Section 35 National Prosecuting Authority Act.*
[42] DA Bellemare, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', in *International Society for the Reform of Criminal Law 18th International Conference Montreal* (Quebec Canada, 2004), p. 2.
[43] DA Bellemare, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', in *International Society for the Reform of Criminal Law 18th International Conference Montreal* (Quebec Canada, 2004), p. 3.

However, the decision to *stop* a prosecution or *not to prosecute* someone is different, and whether a public explanation is required depends on the facts of the case. As an absolute minimum in all cases, accountability requires that a record must be kept of the reason for the decision.

Where there is a strong public interest in explaining a decision not to prosecute or a decision to stay a charge, public statements providing reason for the stay or decision not to prosecute must be made in court or to the media. In addition, there are two categories of person to whom explanations may also be owed in the ordinary course to enhance accountability.

4.1.1. Specific accountability to investigators and victims

Prosecutors must be accountable to certain categories of person who have an interest in the matter. The first category is the police or other investigative agency. Prosecutors must explain the reasons not to prosecute or to stay a case to the investigator of the case. In fact, prosecutors should ideally consult with the investigators *before* making that decision.[44]

Prosecutors must *explain* the reasons why the charges that had been recommended were not pursued; it is insufficient to simply say "no prima facie case" – the prosecutor should explain clearly which element of the offence is lacking. The investigator may not agree with the prosecutor's conclusion, but the investigator should feel that the conclusion reached was principled and not arbitrary – in other words, in line with policy and directives. To improve future investigations and increase the likelihood of convictions, the investigating agency must understand the nature of the evidentiary shortcomings. Too often, investigative agencies fail to receive any detailed feedback at all from the prosecutor.

The second category comprises the victims of crimes (including families) and witnesses. Increasingly, a duty to inform the victim about the status of investigations and prosecutions has been recognized in democracies. Specialized training in dealing with victims and witnesses may need to be provided to ensure this duty is discharged with the required degree of sensitivity. The NPA's Policy Directives require prosecutors to keep witnesses informed at all times of postponements and delays, [45]and of withdrawals, but only when the witnesses are at court.[46] Witnesses who may be expecting to appear should be informed whether or not they are at court.

[44] Bellemare, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', p. 8–9.
[45] Part 20 NPA Prosecution Directives.
[46] Part 5 NPA Prosecution Directives.

A particularly category of "victim" which has been neglected for accountability are state institutions which must use the SAPS to pursue cases in court. For example, Metro Police Officers frequently make arrests, but must process these arrests through SAPS. When a case is not pursued by the NPA, the Metro Police officers are not informed of the reason for the decision.

4.1.2. Accountability to the broader public

Broader, public accountability beyond these categories on the decision to stay or not prosecute, turns on the facts. The media are the only the means available to ensure accountability to the broader public. Public accountability in noteworthy cases via the media serves to minimize the risk that prosecution decisions are made without adequate regard to principles.

However, NPA Directives currently require permission to be obtained from the relevant DPP if a statement is to be made to the media.[47] If this is the case, the DPP should ensure that processes are in place to facilitate and expedite such permission: ideally, the DPP should anticipate the need for a statement in matters attracting public attention.

If a prosecutor foresees having to publicly justify a decision, it is likely that that the reasons for that decision will be carefully articulated; the accountability consists of informing and explaining a principled decision to the public via the media. Criminal trials frequently attract significant local interest from the media and civil society groups, and then the NPA has a duty to keep the public informed.

This does not mean that investigators and prosecutors are accountable to the media in the sense that they must bow to their concerns in taking decisions; on the contrary. Accountability to the public does not mean that the actions of the prosecutor are governed by public opinion, but that decisions must be explained to the extent that they are made free from fear, favour or prejudice.

The right of the public to know the reasons why charges were not laid or why a case was stopped is not an absolute right. It may be limited by law, legal privileges, operational requirements or privacy issues. The amount of information that can be disclosed publicly will therefore vary; however, the prosecution must not claim legal privilege or operational requirements where none exist, and must seek to be as transparent as possible in the circumstances.

For example, if the fact that someone was under investigation was secret and it was decided not to prosecute that person, it would not be in the public interest to make this information public.

[47] Part 47A NPA Prosecution Directives.

Conversely, however, if the issue is already in the public domain, (for example when an investigative agency has already announced recommendations for prosecution) the prosecutor usually must explain publicly the reasons why a decision was made not to prosecute. Some investigations have such a strong public profile that there will be demands that the prosecution service account to the public for the decision not to proceed.

It will be important to involve the investigative agency at the outset as legitimate operational issues may restrict the ability publicly to comment extensively and provide information. This is because public confidence in the administration of criminal justice would be severely undermined by a public disagreement between the police and prosecutors about the appropriateness of staying a case or not proceeding with a charge.

Accountability to the public consists not only of informing and explaining, but also by embarking on corrective action. The duty to inform and explain is necessary but not necessarily sufficient. If mistakes were made, accountability also requires that corrective measures are adopted to minimize the chances of similar mistakes or shortcomings. Corrective measures of an administrative nature may comprise "lessons learned" or the adoption of "best practices" to avoid the repetition of errors or mistakes and to upgrade internal processes and approaches.

There is also *de facto* accountability to the courts, which requires that prosecutors explain and motivate requests made of the court, particularly in relation to postponements or other indulgences of the court; they must also take corrective action where delay is involved. The court has real power to hold a prosecutor to account, often with adverse rulings affecting the state's case. This, in turn, should trigger internal accountability within the NPA.

5. The limits of public accountability

In respect of current cases, demands for *public* transparency and accountability may sometimes conflict with the obligation to protect the privacy of suspects and to ensure the accused's constitutional right to a fair trial without excess publicity. This is explored in more detail in Issue Paper 4, in respect of matters in the public domain.

Accountability does not imply the need to explain in detail the decision made in every case: if the directives are public and sufficiently detailed, those questioning a decision may simply be referred to the relevant part of the directives. In more complex or delicate situations, more explanation may be required.

Prosecutors can, however, provide factual information to the media, for example, by explaining applicable prosecution policies, the meaning of a court decision or more generally, seek to educate the public on the criminal justice system.

Prosecutors must not, however, argue a particular case outside the courtroom and must not make public comments about privileged information, or about advice given to or discussions held with particular individuals, or any information the disclosure of which is prohibited by law, or about the decisions or processes of outside investigative agencies.

This does not detract from the duty of the prosecution to explain their decisions as transparently as possible in the circumstances – particularly decisions not to prosecute or to discontinue proceedings.

6. Conclusion

Independence cannot exist alone: it must co-exist with accountability. If no-one is seen to be held accountable for the exercise of prosecutorial discretion, how can the public ever have any assurance that decisions are not tainted or improper? [48] Public accountability is crucial to demonstrating and achieving independence. Accountability through public transparency can achieve the level of prosecutorial independence and accountability required to ensure that the public has confidence in the decisions being made, [49] thus ensuring the trust of the public in the institution. Without trust, the criminal justice system cannot function adequately.

[48] DA Bellemare, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', in *International Society for the Reform of Criminal Law 18th International Conference Montreal* (Quebec Canada, 2004), p. 3.
[49] BA Macfarlane, 'Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency', *Criminal Law Quarterly*, 45.272 (2001), p. 2.
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