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FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

An Assessment of the National Prosecuting Authority

A Controversial Past and Recommendations for the Future

by

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Executive summary

The Constitution of South Africa provides for a single, independent national prosecution authority. The office of the National Prosecuting Authority (NPA) was formally established through the National Prosecuting Authority Act on 1 August 1998, replacing the former provincial Attorneys-General. The Constitution provides that the NPA has the power to institute and conduct criminal proceedings on behalf of the state; carry out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinue criminal proceedings.

Twenty years into democracy, the independence of the NPA, in particular the National Director of Public Prosecutions (NDPP), has become a highly contested and politicised issue. The Constitutional Court has noted that '[t]he constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework'.

This report focuses on the substantive problems and dilemmas facing the NPA. In the discussion that follows the major challenges that the NPA is facing and have faced are set out. The report unpacks these and presents possible solutions and recommendations.

The first issue dealt with is the independence of the NPA and NDPP as it relates to the dismissal and appointment of the NDPP and it is argues that the process lacks transparency. Moreover, the lack of a transparent selection and appointment process has raised concerns about the 'fit and proper' requirement for the position of NDPP and other senior positions in the NPA. Interference by the executive in the work of the NPA has also emerged as a concern.

The second issue dealt with is the accountability of the NPA and NDPP with reference to general proceedings and decisions to prosecute or not. Accountability is also examined in the light of the Prosecution Policy and Prosecution Directives.

Thirdly, the question is raised whether the NPA is effective in holding offenders accountable. Data is presented that the institution's performance is on a steady decline in pursuit of a high conviction rate, raising question about efficiency and effectiveness.

Recommendations are presented in relation to independence, accountability and performance.

Independence

- Amend the NPA Act to require judicial review of controversial decisions
- The Constitution should be amended to remove ministerial control and to diffuse the power of the NDPP on a geographic basis.
- Reform the selection and appointment process of the NDPP and other senior officials to set higher requirements for incumbents and ensure that the process is transparent.

Accountability

- Prosecution policy and directives should be reviewed to ensure that all persons are equally subject to prosecution. Requirements for authorisation to prosecute should be counterbalanced by authorisations to withdraw or not charge, whenever there is a prima facie case.
- Alternative Disputes resolution, which is used widely, should be regulated and practised in a transparent manner.
- Accountability to Parliament in respect of record-keeping systems and expenditure should be strengthened.

Performance

- Parliament should require detailed reporting, particularly in relation to offences involving violence, and on the extent to which prosecution has successfully targeted repeat offenders or offenders posing a risk to society.
- The internal performance management system of the NPA requires review as there is currently little in place to encourage or reward performance within the NPA, and similarly few consequences for failure to perform.

1 Introduction

Independent, accountable and effective – these are the three key characteristics required of a prosecution service for a criminal justice system to operate justly and successfully. The pivotal role of the prosecution in any criminal justice system demands the prosecution service to provide neutral, non-political, non-arbitrary decision-making about the application of criminal law and policy to real cases.[1] In South Africa, the National Director of Public Prosecutions (NDPP) has high political status[2] and wields considerable power, but is subject to limited oversight. This creates a number of risks, which are the focus of this report.

Finding the right balance between independence and accountability is the central challenge in ensuring just and effective operations.[3] Failures in independence and accountability in turn negatively influence effectiveness. The need for prosecutors in nation states to be both independent and accountable in carrying out their role is increasingly recognised in international instruments such as the United Nations (UN) Guidelines on the Role of Prosecutors,[4] but these tend to stop short of imposing binding commitments on nation states.

The Constitution of South Africa provides for a single, independent national prosecution authority.[5] The office of the National Prosecuting Authority (NPA) was formally established through the National Prosecuting Authority Act on 1 August 1998, replacing the former provincial Attorneys-General. The Constitution provides that the NPA has the power to institute and conduct criminal proceedings on behalf of the state; carry out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinue criminal proceedings.[6]

Both the Constitution and the legislation appear to entrust the NPA with considerable discretion to prosecute or not. Furthermore, the NDPP, after consultation with the Minister of Justice, writes the Prosecution Policy, and the NDPP alone writes the detailed Prosecution Directives with which all prosecutors must comply.[7]

In the past ten years the NPA has come under increasing criticism for a number of reasons, including its poor performance, as evidenced by the low percentage, and declining number, of cases being prosecuted;[8] its lack of

[1] Waters, T. (2008) 'Design and reform of public prosecution services' in *Promoting Prosecutorial Independence, Accountability and Effectiveness: Comparative research*, Sofia: Open Society Institute, p. 25.
[2] Du Plessis, A., Redpath, J. and Schönteich, M. (2008) 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness*, Sofia: Open Society Institute, p. 353.
[3] Schönteich, M. (2014) *Strengthening Prosecutorial Accountability in South Africa*, ISS Paper 255, p. 3.
[4] Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.
[5] Section 179 Constitution of the Republic of South Africa Act 108 of 1996.
[6] S 179(2) Constitution.
[7] S 179(5)(a) and (b), respectively.
[8] Redpath J. (2012) *Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa,* Pretoria: Institute for Security Studies, ISS Monograph 186.

accountability and the difficulty in reviewing its decisions not to investigate or prosecute;[9] and the politicisation of the institution and its perceived or real lack of independence.[10]

Twenty years into democracy, the independence of the NPA, in particular the NDPP, has become a highly contested and politicised issue. Whereas initially there may have been concerns that the NDPP might target political opponents of the ruling party, in recent times the concern is perhaps more so that prosecutions are not being undertaken against *allies* of the ruling party, and that, furthermore, the review of such decisions is being resisted in a methodical and litigious manner. The Constitutional Court has noted that '[t]he constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework'.[11]

Given this tension between constitutional imperatives and the NDPP's considerable discretion, the accountability of the NDPP and NPA needs to be enhanced, while at the same time maintaining their necessary independence of office. The core issue can thus be described as centring on the question of balancing independence with oversight and accountability; imbalances in this regard have led to the various problems that afflict the NPA. These were concisely identified in research done in 2007:

[S]everal serious challenges still remain, including: poor court performance, a growing backlog of cases, low prosecution rates, growing numbers of sentenced prisoners and prisoners awaiting trial, the need to maintain positive public perceptions, clarifying the role and positioning of its elite crime fighting unit, the Directorate of Special Operations, allegations of criminality among its own members, high staff turnover, and the need to deal with the consequences of complex and politically sensitive investigations into high-profile political figures.[12]

This report will not describe the structure and distribution of functions in the NPA, as it has been done already more than adequately in the extant literature.[13] The aim instead is to focus on the substantive problems and dilemmas facing the NPA. In the discussion that follows the major challenges that the NPA is facing and have faced are set out. The aim is to unpack these with a view to develop possible solutions and recommendations. Detailed recommendations follow the review of the situation.

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[9] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* (288/11) [2012] ZASCA 15; 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA) (20 March 2012) and subsequent decisions following from this matter; *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61; 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP) (8 May 2012).

[10] See, for example, 'NPA probe should assess whether Zuma is to blame for the mess' *Mail & Guardian*, 25 July 2014, http://mg.co.za/article/2014-07-24-npa-probe-should-assess-whether-zuma-is-to-blame-for-the-mess.

[11] *S v Basson* [2004] (6) BCLR 620 (CC), 32.

[12] Du Plessis, A., Redpath, J. and Schönteich, M. (2008) 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness*, Sofia: Open Society Institute, p. 346.

[13] Redpath J. (2012) *Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa,* Pretoria: Institute for Security Studies, ISS Monograph 186. Du Plessis, A., Redpath, J. and Schönteich, M. (2008) 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness*, Sofia: Open Society Institute. Govender, K. (2013) 'Power and constraints in the Constitution of the Republic of South Africa', *African Human Rights Law Journal*, No. 13, pp. 82-102. De Villiers, W.P. (2011) 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, No. 74, pp. 247-263. Mokoena, T. (2012) 'Taming the prosecutorial beast: Of independence, discretion and accountability', *Stellenbosch Law Review*, No. 2. Schönteich, M. (2014) *Strengthening prosecutorial accountability in South Africa*, ISS paper 255.

2 The role of the prosecution

It is a truism that the prosecutor's 'primary function is to assist the court in arriving at a just verdict'.[14] In criminal trials, the role of the prosecutor involves the exercise of a great deal of discretion, including decisions about instituting criminal proceedings; withdrawing charges or stopping prosecutions; whether or not to oppose bail; which crimes to charge an accused with and in what court; whether a case should be diverted; whether or not to accept a guilty plea; which evidence to present at trial; which evidence to present during sentencing proceedings; and whether or not to appeal a question of law, a sentence, the granting of bail, or to seek a review of proceedings.[15]

Although South Africa's prosecution policy holds that prosecutors represent the community in criminal trials[16] – and hence in taking the decisions above – prosecutors are neither elected by the public, nor can they be removed by it, given that they are public servants. The public holds little sway, if any, over prosecutors as they account to the hierarchy of the NPA and have to comply with general conditions of employment and performance requirements.[17] They are bound only by law and by prosecution policy and directives, making their independence and impartiality in exercising their discretion crucial to the just operation of the criminal justice system.

3 Independence

Succinctly put, '[a]n accused has a constitutional right to a prosecution that is independent from political influence'.[18] Prosecutorial independence in South Africa is usually assumed to relate to independence from the executive arm of government, even though this is not an international norm; in many Anglo-Saxon countries the head of the prosecution service was or is also a minister in the cabinet.[19] As the executive government is the most powerful force in South African society, and given the country's history surrounding political prosecutions under apartheid, concerns about prosecutorial independence usually relate to inappropriate influence by the executive. However, prosecutorial independence should be understood more broadly than only independence from political influence by the executive; it entails independence from inappropriate influence of *any kind*, including that by the government, a political party, the media or public opinion.

Independence refers to both internal and external independence; it refers, that is to say, to the independence of individual prosecutors and the independence of the institution *vis-à-vis* other arms of the state, in particular to the

[14] *S v Jija and Others* 1991 (2) SA 52 (E).
[15] NPA (2013) Prosecution Policy, p. 4.
[16] NPA (2014) Prosecution Policy, p. 4.
[17] For examples from other jurisdictions, see UNODC (2014) *The Status and Role of Prosecutors – A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, New York: United Nations, pp. 14-15.
[18] De Villiers, W.P. (2011) 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, No. 74, pp. 248. See also s 35(3) Constitution.
[19] *National Director of Public Prosecutions v Zuma* (573/08) [2009], Supreme Court of Appeal, para. 28.

impermissibility of the executive instructing the prosecution in individual cases.[20] In post-1994 South Africa, what has been cause for concern is independence from the executive and from political factions within the ruling party of the executive. This is largely because of the unusual situation, though not an unprecedented one,[21] in which a presidential presumptive, and now sitting President, faces potential prosecution for serious crimes, prosecution he has strenuously resisted for almost a decade.

3.1 Independence from the executive: Legislative history

The legislative independence of the prosecuting authority from the executive government has changed significantly over the past one hundred years. Until 1926, the four provincial Attorneys-General, as they were known, were free from legislated political control and had absolute autonomy. However, the government of J.B.M. Hertzog, successor to Smuts, brought an end to this and placed the Attorneys-General under the direct control of the Minister of Justice.[22] This was entrenched in a 1935 amendment that gave the Minister the authority to reverse any decision of an Attorney-General or Solicitor-General.[23] During this period there was fundamentally no separation of powers between the national executive and the Attorneys-General.[24]

The situation prevailed until 1992, when an amendment introduced by the De Klerk government removed the Minister's power to interfere in the decision-making of the Attorneys-General.[25] The African National Congress (ANC) regarded the amendment with some suspicion, viewing it as an attempt by the 'old order prosecutors to protect their entrenched positions'.[26] As a result, the provisions introduced by the Constitutional Assembly in the Final Constitution may be seen to some extent as a reaction to the 1992 amendments. They (the provisions in the Final Constitution) provided for a *national* Director of Public Prosecutions – to be appointed by the national executive – who has final say over decisions to prosecute or not, and over prosecution policy and prosecution directives.

There was, however, an objection to the introduction of a single national prosecuting authority, one that was raised during the certification process of the Constitution. The objection averred that a single national prosecution authority breached Constitutional Principle VI, which requires 'separation of powers between the legislature, executive and

[20] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para. 30.
[21] Silvio Berlusconi and Park Geun-hye spring to mind.
[22] Redpath J. (2012) *Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa,* Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.
[23] Redpath, J. (2012) *Failing to prosecute? Assessing the State of the National Prosecuting Authority in South Africa*, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.
[24] Du Plessis, A., Redpath, J. and Schönteich, M. (2008) 'Report on the South African National Prosecuting Authority' in *Promoting Prosecutorial Accountability, Independence and Effectiveness*, Sofia: Open Society Institute, p. 344.
[25] Redpath J. (2012) *Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa,* Pretoria: Institute for Security Studies, ISS Monograph 186, p. 10.
[26] Redpath J. (2012) *Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa,* Pretoria: Institute for Security Studies, ISS Monograph 186, p. 10.

judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.[27] It was argued that the breach arose because the NDPP is appointed by the President as head of the national executive.

The Constitutional Court dealt swiftly with the objection, stating that

> [t]here is no substance in this contention. The prosecuting authority is not part of the judiciary and CP [Constitutional Principle] VI has no application to it. In any event, even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.[28]

The Court added that the Constitution requires national legislation to be in place to ensure that the NPA exercises its functions without fear, favour or prejudice. The Court thus concluded that there is a constitutional guarantee of independence and that 'any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'.[29] The Constitution guarantees the institutional and functional independence of the NPA to enable it to 'exercise its functions without fear, favour or prejudice' – the usual formulation for prosecutorial independence. [30] This is echoed in the NPA Act, in particular by section 32(1)(b) which prohibits any functionary in government from interfering in the work of the NPA.

The history of the prosecuting authority shows that the issue of independence versus political control of the prosecution by the executive has shifted between extreme points. At the one extreme was the situation prior to 1926, where there was absolute autonomy, and at the other, the situation between 1935 and 1992, during which the decisions of the Attorney General could be reversed by the national Minister. Each of these extremes reflected the prevailing paradigm of the ruling government rather than any considerations of effectiveness.

In the post-1998 situation, the constitutional framework results in an NPA that falls somewhere in between these historical extremes. Thus there is now a single NDPP, which overrules provincial DPPs; there is national legislation that guarantees independence, yet at the same time it is the case that the President appoints the NDPP, who in turn determines prosecution policy after consulting the Minister. Furthermore, the NDPP determines the prosecution directives, on the basis of which he or she may intervene in prosecutions; the NDPP may also review decisions not to prosecute or decisions to prosecute, this after consulting the provincial DPPs; and finally, the Minister 'exercises final responsibility *over* the prosecution authority'.[31] The way in which this complex formulation of independence versus political control has played out in practice is the subject of the next section.

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[27] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), paras. 140-141.
[28] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para. 141.
[29] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para. 146.
[30] S 179(4) Constitution.
[31] S 179(6) Constitution.

3.2 Independence from the executive: The democratic era in practice

In South Africa the President has the power both to appoint and remove the NDPP, although in the case of removal this must be done on limited specified grounds and the President must seek and obtain the concurrence of Parliament for dismissal on those grounds (see below). These appointment and removal provisions create the risk that the President will appoint a person who is unwilling, where necessary, to prosecute members of the executive or the ruling party, or persons politically connected to them; similarly, they create the risk that the President, with the concurrence of a Parliament dominated by the ruling party, will seek to remove an NDPP who is indeed willing to do so.

Such risks have come to pass in South Africa. Not one NDPP has served his full term of ten years: during the past 18 years, there have been five permanently appointed NDPPs and four acting NDPPs. In recent years, the lack of oversight over the decision not to prosecute has raised a great deal of controversy about the NPA's motives and integrity, with these concerns arising from the fact that key appointments are made by the President.

A potted history of the concerns regarding the independence of the NPA begins with the decision by NDPP Bulelani Ngcuka not to prosecute then Deputy President Jacob Zuma. Ngcuka resigned after then Public Protector Lawrence Mushwana, acting on a complaint from Zuma, said Ngcuka had undermined the dignity of Zuma when he told the media that, while there was 'a prima facie case' against the Deputy President, he would not be charged as the case could not be won.[32]

During Ngcuka's tenure, the struggle icon Alan Boesak and two senior ANC politicians, Winnie Madikizela-Mandela and party chief whip Tony Yengeni, were prosecuted. Some argued that these cases were not evidence of Ngcuka's independence but a function of his close association with the Mbeki-oriented (anti-Zuma) faction of the ANC. Within a year of Ngcuka's departure, Zuma was relieved of his duties as Deputy President in 2005 by President Mbeki after Zuma's business associate Schabir Shaik was found guilty of corruption on the basis largely of his dealings with Zuma. Ngcuka's wife, Phumzile Mlambo-Ngcuka, was subsequently appointed Deputy President in Zuma's stead.

Silas Ramaite was appointed Acting National Director in September 2004, a caretaker position he held for less than a year. Vusi Pikoli was then appointed in February 2005 by President Mbeki. In May 2006 Zuma was prosecuted and acquitted on a charge of rape. Pikoli charged Zuma on charges associated with the conviction of Shaik, charges that were dismissed in 2006 because the prosecution was not ready.

In 2007 Pikoli also authorised a warrant of arrest for the then Commissioner of Police, Jackie Selebi, who was perceived as an Mbeki ally. Soon after the existence of the warrant became known, President Mbeki suspended Pikoli on 24 September 2007 on the basis of an 'irretrievable breakdown' in the relationship between Pikoli and the Justice Minister, Bridget Mabandla. Frene Ginwala, a former Speaker of the National Assembly, was appointed on 28 September 2007 to head a Commission of Inquiry into Pikoli's fitness to hold office.

[32] 'Ngcuka hands in resignation' *News24* 24 July 2004, http://www.news24.com/SouthAfrica/News/Ngcuka-hands-in-resignation-20040724.

Mokotedi Mpshe became Acting NDPP in 2007. On 27 December 2007 Zuma was recharged, via an 87-page indictment, shortly after he had been elected as president of the ANC at the party's 2007 Polokwane conference. At this conference, Zuma defeated Mbeki for the leadership position of the ruling party.[33] In May 2008, Leonard McCarthy, the head of the Scorpions, the investigative unit of the NPA responsible for the Zuma prosecution, resigned and left the country.

In September 2008 Judge Chris Nicholson in the High Court granted Zuma's application to have the corruption charges against him dismissed, agreeing there were signs of a conspiracy. In September 2008 President Mbeki was 'recalled' by the ANC; he resigned, and Kgalema Motlanthe served as President from 25 September 2008 to 9 May 2009.

In December 2008 Ginwala found that most of the allegations against Pikoli were unfounded, but that Pikoli should have agreed to Mbeki's request that, on the basis of national security, he be given two weeks before proceeding against Selebi. On this basis, Mbeki's caretaker successor, Motlanthe, refused to reinstate Pikoli as head of the NPA; meanwhile, Pikoli's decision to prosecute Selebi had been justified by Selebi's ultimate conviction and sentencing. In her findings, Ginwala had made negative findings around the then-Director-General of Justice, Menzi Simelane.[34]

Acting NDPP Mpshe announced on 6 April 2009 that he had decided not to prosecute Jacob Zuma. This was in the light of allegations of abuse of process in the Zuma case, allegations arising out of leaked intelligence recordings of telephone conversations between former NPA head Bulelani Ngcuka and Leonard McCarthy, then head of the Scorpions and the person responsible for the proceedings against Zuma.

The timing of Mpshe's announcement not to prosecute Zuma removed the last obstacle to the Zuma presidency. On 22 April 2009 the national election was held, with the ANC winning a majority at the polls. Zuma, as leader of the ANC, was elected by the National Assembly and inaugurated as President in May 2009. Zuma was never asked to plead and thus prosecution may still be instituted.

At the end of November 2009, President Zuma appointed Menzi Simelane as NDPP a few days after Vusi Pikoli, on receipt of a settlement, withdrew his application for a nullification of his dismissal as NDPP. The opposition Democratic Alliance (DA) brought a case in which they claimed that Simelane was not a 'fit and proper person' to lead the NPA, making the claim on the basis of the evidence in the Ginwala Commission. Although it was unsuccessful at first, in October 2012 the case eventually succeeded in the Supreme Court of Appeal as well as the Constitutional Court.

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[33] 'A quick guide to the Jacob Zuma matter' IDASA 2009, http://idasa.wordpress.com/2009/04/15/a-quick-guide-to-the-jacob-zuma-matter/.

[34] Ginwala Commission, paras. 320-321: '[320] I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv. Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA. [321] All these complaints against Adv. Pikoli were spurious, and are rejected without substance, and may have been motivated by personal issues.'

Advocate Nomgcobo Jiba, a deputy NDPP said to be central to in-fighting at the NPA, served as acting NDPP from December 2011 until August 2013, when Mxolisi Nxasana was appointed by President Zuma as NDPP, effective from 1 October 2013. Nxasana, having received a large settlement, agreed to step down from his position as NDPP on 31 May 2015, effective from 1 June 2015, and an inquiry into his fitness to hold office was suspended. While there was some cloud over his criminal record, it was also suggested that Nxasana's short tenure as NDPP were connected to his attempts to reinstate charges of murder, kidnapping and defeating the ends of justice against Crime Intelligence Head, Richard Mdluli.

On 16 June 2015, Shaun Abrahams was appointed as NDPP. In October 2016 he apparently brought spurious charges against Finance Minister Pravin Gordhan and SA Revenue Service officials Ivan Pillay and Oupa Magushula. The charges were subsequently withdrawn.

In 2016, a full bench of the North Gauteng High Court held that the decision of then acting NDPP Mokotedi Mpshe to drop corruption charges against Zuma was irrational – hence the charges against Zuma had to be reinstated. The judges refused to grant leave to appeal. The Supreme Court of Appeal granted Zuma the right to argue why leave should be granted and, if he were successful, why the order of the High Court should be set aside. This is to be heard on a date not yet set down in 2017.

This brief history highlights only the most prominent issues relating to the NDPP's independence and vulnerability to executive influence and perceived or actual partisan decision-making. Crucial to his or her vulnerability in this regard is the fact that the NDPP is appointed and dismissed by the President, in the latter instance with the concurrence of Parliament. This is considered in detail below.

3.2.1 Executive appointment of the NDPP

The Constitution and the NPA Act provide that the NDPP is appointed by the President,[35] who may also, after consultation with the NDPP and Minster of Justice, appoint up to four Deputy National Directors of Public Prosecution (DNDPP).[36] The President similarly appoints the Provincial Directors of Public Prosecutions (PDPP).[37] The Minister, after consultation with the NDDP, appoints the deputy PDPP.[38] In addition, the Minster may 'in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director'.[39]

[35] S 10 NPA Act.
[36] S 11(1) NPA Act.
[37] S 13(1) NPA Act.
[38] S 15(1)(a) NPA Act.
[39] S 15 (1)(c) NPA Act.

It is evident, then, that the entire top echelon of the NPA (at least 14 positions) is appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general. This poses significant risks for the NPA's independence.

In *DA v President of SA*[40] the Constitutional Court found that the appointment of Menzi Simelane as NDPP was irrational in that the President failed to take into consideration relevant information emanating from the Ginwala Enquiry, in which negative findings were made about Simelane.[41] The Court found that the President must take all information into consideration, that the appointment process has to be rational, and that the President cannot cherry-pick the information on which he or she bases the decision to make an appointment.

The parliamentary ad hoc committee that dealt with the suspension and dismissal of Advocate Pikoli as NDPP observes that 'it may be an anomaly that Parliament plays no role in appointing the NDPP, but has the final say in his or her removal. The review of the legislation should also consider whether Parliament should play any role in the appointment of the NDPP.'[42]

3.2.2 Dismissal of the NDPP

Section 12(6)(a) of the NPA Act provides that the President can provisionally suspend the NDPP or a Deputy Director of Public Prosecutions (DDPP) pending an enquiry into his or her fitness told office. The President may remove him or her from office for (1) misconduct, (2) on account of ill health, (3) on account of incapacity to carry our his or her duties, and (4) on account that he or she is no longer a fit and proper person. The reason for the suspension as well as the representations thereto must be communicated to Parliament within 14 days of the suspension. Within 30 days (or as soon as possible after the communique), Parliament must pass a resolution to endorse or dismiss the decision of the President. The President must dismiss the NDPP or DDPP from office if an address of each of the Houses of Parliament in the same session praying for such dismissal is received on the grounds set out in section 12(6)(a) of the NPA Act.

3.2.3 The 'fit and proper person' requirement

Given the power held by prosecutors and the discretion with which they are entrusted, it follows that they need to possess certain qualities of character to prevent the misuse of such power and discretion. The European Commission for Democracy through Law (Venice Commission), which provides guidance on this issue from an international perspective, states that because of the seriousness of a criminal conviction, the prosecutor 'must act to a higher

[40] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011).
[41] *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008.
[42] *Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*, Annexure 1 para. 7.

standard than a litigant in a civil matter'.[43] The Venice Commission also notes that the qualities required of a prosecutor are similar to those of a judge, and thus require a suitable procedure for appointment and promotion.[44]

The requirement in South African law that the NDPP be a 'fit and proper person' is relevant in both the appointment and dismissal of the NDPP. The NPA Act requires that the NDPP must possess the necessary legal qualifications and must 'be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned'.[45] Similarly, the President may remove an NDPP from office on the basis that he or she is no longer a fit and proper person.[46]

The parliamentary ad hoc committee that dealt with the Pikoli case noted that the definition of 'fit and proper' contained in the NPA Act may need to be expanded to take account of other relevant criteria in ensuring that the NDPP discharges his or her responsibilities adequately and effectively.[47] The Ginwala Commission also paid some attention to the notion of 'fit and proper':

> The element of fitness for the office of the NDPP that requires the person to be fit and proper to be "entrusted with the responsibilities of the office concerned" is not defined in the Act nor has it been judicially defined. I do not propose to define the concept except to say that, amongst others, the person must possess an understanding of the responsibilities of such an office. There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority. To that must be added an appreciation for and sensitivity to matters of national security.[48]

The issue of 'sensitivity to matters of national security' emanated from the facts of the Ginwala Commission itself and originated in the dispute that developed between President Mbeki and Adv. Pikoli regarding the timing of the arrest of former National Police Commissioner Jackie Selebi. It is doubtful if there is precedent for this requirement, and 'national security' appears to have come in handy at the time as a cover-all term for getting rid of a too independently-minded NDPP.

With the NPA Act being rather vague about the meaning and application of the requirement that an NDPP must be a 'fit and proper person', the SCA placed the issue under scrutiny in 2011 when it considered the appointment of Menzi Simelane as NDPP.[49] In *Democratic Alliance v President of the Republic of South Africa and others*, the DA argued that

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[43] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para. 14.
[44] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para. 18.
[45] S 9(1)(b) NPA Act.
[46] S12(6)(a) NPA Act.
[47] *Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*, Annexure 1 para. 4.
[48] *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008, para. 72.
[49] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011)

each of the qualities are stated in objective terms and that, furthermore, 'the absence of the words "in the President's opinion" is indicative that the fitness for office of a candidate is to be determined objectively. Put differently, these are jurisdictional requirements, so it was contended, that have to exist as an objective fact.'[50] The Court went on to agree with the DA's contention:

> [116] I disagree with the view that in applying s 9(1)(b) of the Act the President is entitled to bring his subjective view to bear. First, the section does not use the expression "in the President's view" or some other similar expression. Second, it is couched in imperative terms. The appointee "must" be a fit and proper person. Third, I fail to see how qualities like "integrity" are not to be objectively assessed. An objective assessment of one's personal and professional life ought to reveal whether one has integrity.[51]

The term 'integrity' is therefore an objective requirement existing in law guiding the determination of 'fit and proper'. The Court further drew upon the *Oxford Dictionary* to clarify 'integrity': 'unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity'. Further clarification was sought in the *Collins Thesaurus*: 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, and reputability'. The following were noted as antonyms: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity'.[52]

The SCA went on to state, 'Consistent honesty is either present in one's history or not, as are conscientiousness and experience.' When the Constitutional Court heard the matter, it made a notable observation regarding the fact that information about Simelane's dishonesty came from the Ginwala Commission, which is not a court of law:

> The last reason given is that the Ginwala Commission is not a court. This is an irrelevant consideration. It does not matter for the purposes of evaluation of credibility whether a person is dishonest and devious to a court, to a commission of enquiry, to an employer or to anyone else for that matter. Dishonesty is dishonesty wherever it occurs. And it is much worse when the person who had been dishonest is a senior government employee who gave evidence under oath. Although not a court, the Ginwala Commission was about as important a non-judicial fact-finding forum as can be imagined.[53]

The Court added that 'conscientious' is defined as 'wishing to do what is right and relating to a person's conscience'.[54] On this point the Court concluded that there is no doubt that the appointment of the NDPP is not to be left to the

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[50] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 102

[51] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

[52] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

[53] *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para. 84.

[54] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.

subjective judgment of the President but needs to be 'objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law'.[55]

When the matter of Simelane's appointment reached the Constitutional Court, the latter agreed with the SCA's reasoning as to what is 'fit and proper', and confirmed that the objective assessment against jurisdictional facts as exist in the NPA Act. The Court acknowledged that while the 'fit and proper' requirement does involve a value judgment, 'it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President' and is therefore immune from objective scrutiny.[56]

The tenure of NDPP Nxolisi Mxasana also ended in a cloud of suspicion after concerns were raised once more about his being a 'fit and proper person', this when it came to light that he had been charged with murder in the 1980s but later acquitted. Nevertheless, he did not disclose this prior to his appointment as NDPP, and as a result did not obtain the necessary security clearance.[57] Two previous convictions of his for assault were indeed disclosed, but not so the complaints of professional misconduct laid against him by the KwaZulu-Natal Law Society.[58] One cannot but speculate that Mxasana's departure, facilitated by a R17-million pay-out,[59] was linked to his insistence on suspending Advocates Jiba, Mrwebi and Mzinyathi of the NPA, a matter which is discussed below.

The two *DA* decisions brought much clarity to the 'fit and proper' requirement after the Ginwala Commission demonstrated the uncertainty by accepting President Mbeki's argument that the NDPP must be sensitive to national security concerns and the parliamentary ad hoc committee acknowledged that greater clarity is sought on this requirement. Identifying a 'fit and proper' NDPP is thus not a simple task and it would be appropriate that it not be done by one person behind closed doors.

3.2.4 Other senior positions in the NPA

The 'fit and proper person' requirement is relevant not only to the NDPP but other senior positions in the NPA. Two former DDPPs (Advocates Nomgcobo Jiba and Lawrence Mrwebi) were struck off the roll of advocates in mid-September 2016. The General Council of the Bar brought the case, which related to their conduct in a number of matters. These included their decision to drop charges against the suspended police crime intelligence head Richard Mdluli; the 'spy tapes' matter relating to the dropping of corruption charges against President Jacob Zuma; and the case of suspended KwaZulu-Natal Directorate for Priority Crime Investigation (the Hawks) head Johan Booysen in the

[55] *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.
[56] *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para. 23.
[57] 'Nxasana drinks from poisoned chalice' *IOL* 6 July 2014, http://www.iol.co.za/news/crime-courts/nxasana-drinks-from-poisoned-chalice-1714977.
[58] Nxasana out as prosecutions boss' *News24.com* 31 May 2015, http://www.news24.com/SouthAfrica/News/Nxasana-out-as-prosecutions-boss-20150531.
[59] 'Former National Director of Public Prosecutions (NDPP) Mxolisi Nxasana may have to pay back the R17-million golden handshake he was paid by the state' *Sowetan* 29 August 2015, http://www.sowetanlive.co.za/news/2015/08/29/nxasana-may-have-to-pay-back-r17m-payout.

alleged Cato Manor 'death squad' matter.[60] The judgment, in which they were disbarred, is scathing of Jiba and Mrwebi as well as their relationship with Richard Mdluli:

> [167] I cannot believe that two officers of the court (advocates) who hold such high positions in the prosecuting authority will stoop so low for the protection and defence of one individual who had been implicated in serious offences.
>
> [168] In fact, taking into account the kind of personality (referring to Mdluli), Mrwebi and Jiba had to deal with, they should have stood firm and vigorous on the ground by persisting to prosecute Mdluli on fraud and corruption charges. By their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him.[61]

Despite the five judgments[62] in which Jiba and Mrwebi were criticised for their conduct dating back to 2013 and 2014, they were not summarily booted out of the NPA, nor did they resign. Following the *Freedom Under Law* cases,[63] the NDPP (at the time Mxolisi Nxasana) sought legal opinion on an appropriate course of action. The opinion was delivered on 7 July 2014 and recommended disciplinary action against Jiba and Mrwebi (as well as Mzinyathi, another senior prosecutor).

On 18 July 2014, the NPA informed the Minister of Justice and Correctional Services in detail of the NPA's motivation and arguments in support of a request that the President provisionally suspend Advocates Jiba, Mrwebi and Mzinyathi from their offices. The Minister was also asked to forward the memo to the President and request that he provisionally suspend the three senior NPA members pending an enquiry into their fitness to hold office as well as the finalisation of the envisaged criminal investigations and complaint lodged with the General Council of the Bar.[64] A committee was established under Judge Zak Yacoob and delivered its report on 27 February 2015; the NDPP informed the Minister of the adverse findings made in respect of Advocates Jiba, Mrwebi and Mzinyathi.

It should also be noted that the Minister of Justice had known about the unfavourable findings against the three NPA officials since at least July 2014 but did not inform the President. On 12 September 2014, a letter from the NDPP was hand-delivered to the President regarding these findings. Whatever the reasons may have been, it is evident that the

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[60] 'NPA's Nomgcobo Jiba and Lawrence Mrwebi struck off the roll of advocates' *Mail & Guardian* 15 September 2016, http://mg.co.za/article/2016-09-15-npas-nomgcobo-jiba-and-lawrence-mrwebi-struck-from-the-roll-for-advocates.

[61] *General Council of the Bar of South Africa v Nomcgobo Jiba, Lawrence Sithembiso Mrwebi and Sibongile Mziyathi*, Gauteng Division (Pretoria), Case no. 23576/2015, paras. 167-168.

[62] *Democratic Alliance v Acting National Director of Public Prosecutions*, [2013] 4 All SA 610 (GNP), *Zuma v Democratic Alliance and Others* [2014] 4 SA 35 (SCA), *Booysen v Acting National Director of Public Prosecutions and Others* [2013] 3 All SA 391 KZD, *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 254 (GNP), and *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

[63] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 254 (GNP), and *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

[64] NPA (20125) *Annual Report 2014/15*, p. 32.

Minister was stalling a decision to suspend the NPA officials. The NDPP did not mince his words when he wrote in the 2014/15 annual report:

> In spite of the above-mentioned urgent requests [to suspend the three officials] directed to the Minister and the President, and the outstanding criminal proceedings against Advocates Jiba, Mrwebi and Mzinyathi, no feedback has been received from the Minister or the President. As emphasised by the High Court, "the respondents are unbecoming of persons of such high rank in the public service, and especially worrying in the case of the (acting) NDPP, a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold." Therefore, it is important for the Minister and the President to fulfil their constitutional mandate and to act as a matter of urgency.[65]

On 16 September 2016, a year and seven months after the request for their suspension, Jiba and Mrwebi were placed on special leave.[66] On 25 September 2016 President Zuma requested representations from both of them regarding his intention to suspend them pending an inquiry into their fitness to hold office.[67] The motivation for not suspending the three officials is not clear, but there is little doubt that it was deliberate and that it raised further controversy and speculation about the already beleaguered NPA.

A more rigorous, transparent and inclusive appointment process may have prevented the appointment of the officials discussed above. Leaving the selection and appointment of senior NPA staff to the President and his allies has evidently been costly in reputational damage to the NPA.

3.2.4 Ministerial control over the prosecution service

Both the Constitution and the NPA Act provide that the Minister of Justice shall 'exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act', while at the same guaranteeing the independence of the NPA. However, the phrasing could imply a great deal of ministerial control of the prosecuting authority and hence a restriction of its independence.

The SCA in *NDPP v Zuma* found there was no conflict in these provisions, quoting from Namibian jurisprudence with approval and clarifying that the provisions mean that, 'although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority'.[68]

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[65] NPA (20125) *Annual Report 2014/15*, p. 33.
[66] 'Jiba and Mrwebi placed on special leave, but are expected to appeal judgment' *Mail & Guardian* 16 September 2016, http://mg.co.za/article/2016-09-16-jiba-and-mrwebi-placed-on-special-leave-but-are-expected-to-appeal-judgment.
[67] 'NPA's Nomgcobo Jiba instructs lawyer to make representations to President Zuma' *Mail & Guardian* 26 October 2016, http://mg.co.za/article/2016-10-26-npas-nomgcobo-jiba-instructs-lawyer-to-make-representations-to-president-zuma.
[68] NDPP v Zuma SCA 573/08 (2009).

While the Ginwala Commission likewise found that the ambit of ministerial control did not include decisions around prosecution, it did find, in addition, that the Minister has a veto over prosecution policy,[69] that the Minister tables the Annual Report of the NPA in Parliament[70] and that the NDPP has the responsibility to inform the Minister in respect of any material case, matter or subject that is dealt with by the NPA in the exercise of its powers, duties or functions.[71]

The NPA Act seems to locate much of the Ministerial responsibility to the accounting function: the Director-General (DG) of Justice and Constitutional Development, the functionary of the Minister, is legislatively responsible for accounting for state monies paid out for the NPA. Yet the NPA assumed separate responsibility from 1 April 2001 for all support services previously rendered by the Department of Justice, and from this date it was responsible for its own accounting systems and the preparation of separate financial statements. The accounting authority is nevertheless still responsible for ensuring this is done properly.

The ambit of the DG's accounting function was the subject of some dispute between then NDPP Vusi Pikoli and then DG: Justice and Constitutional Development, Menzi Simelane, a dispute also forming part of the Ginwala Commission. Pikoli restricted the interpretation to 'bean-counting', whereas Simelane's interpretation was in favour of wider control of the NPA by the Director-General.

4 Accountability

Corder, Jagwanth, and Soltau describe accountability in the general sense as follows:

> Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.[72]

In relation to prosecutors, independence without accountability 'poses an obvious danger to the public interest, which requires the fair and just administration of the criminal justice system'.[73] While prosecutorial independence is an essential element in the proper administration of justice, it must be recognised that inherent in independence without accountability is the potential for making 'arbitrary, capricious, and unjust decisions'.[74]

[69] Ginwala Commission para. 63.
[70] Ginwala Commission para. 64.
[71] Ginwala Commission para. 65.
[72] Corder, H., Jagwanth, S. and Soltau, F. (1999) *Report on Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town, http://www.pmg.org.za/bills/oversight&account.htm.
[73] Flatman, G. (1996) The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996 http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf.
[74] Flatman, G. (1996) The Independence of the Prosecutor, Prosecuting Justice Conference, Melbourne 18 and 19 April 1996 http://www.aic.gov.au/media_library/conferences/prosecuting/flatman.pdf.

The NPA sits between the executive and the judiciary, but is more associated with the executive than the judiciary.[75] The NDPP is explicitly accountable to the Minister of Justice[76] and ultimately Parliament, while the reviewability in the courts of its decisions to prosecute or not has been the subject of some controversy.

4.1 Accountability to the Judiciary

The duty of a prosecutor is not to secure a conviction but to assist the court in arriving at a just verdict. In *S v Jija* the court noted: 'A prosecutor … stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth.'[77] The power of the prosecution is thus tempered primarily by its relationship with the courts.

4.1.1 Accountability for general conduct of proceedings

The prosecution is accountable to the courts for delays in prosecution and for the general conduct of the case during proceedings. A court can strike a case from the roll if the prosecution is tardy, and may find the prosecution in contempt of court if it fails to follow judicial directions. Thus, accountability to the judiciary relates largely to the accountability of *individual* prosecutors in relation to particular cases, rather than to the accountability of the organisation as a whole. However, the NPA's prosecution policy and directives are subject to judicial review, and the Pretoria High Court struck down as unlawful and invalid the NPA's 2005 amendments to its policy and directives regarding prosecutions arising from the Truth and Reconciliation Commission (TRC), because the policy and directives had the effect of granting 'amnesty' to those denied it by the TRC (see below).

4.1.2 Accountability for decisions to prosecute

Historically, courts interfere with decisions *to* prosecute only in limited circumstances, for example, where the discretion to prosecute is improperly exercised (illegal and irrational)[78] or there exist *mala fides.*[79] This is because ultimately it is the courts which decide on guilt and the prosecution must prove a criminal case 'beyond reasonable doubt'. Thus a case brought by the prosecution which is not supported by the facts or by the law will ultimately fail once it is tested in court. Nevertheless, a great deal of reputational damage can be wrought against an accused simply by the bringing of a case, and the prosecution can be abused in this manner to political ends. An aggrieved accused may bring a case of malicious prosecution and pursue civil damages.

[75] De Villiers, W.P. (2011) 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, No. 74, p. 248. See also Guideline 10 in *UN Guidelines on the Role of Prosecutors* (Adopted by 8th UN Crime Congress 1990): 'The office of prosecutors shall be strictly separated from judicial functions.'
[76] Constitution s 179(6).
[77] *S v Jija and Others* 1991 (2) SA 52 (E) cited in *Chauke v S* (70/12) [2012] ZASCA 143 para. 26.
[78] *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and others* 1994 (1) SA 387 (C).
[79] *Mitchell v Attorney-General Natal* 1992 (2) SACR 68 (N).

4.1.3 Accountability for decisions not to prosecute

There is a duty on the prosecution to prosecute where a prima facie case has been demonstrated, save for exceptional circumstance. Decisions not to prosecute where no prima facie case has been demonstrated are relatively uncontroversial. Decisions not to prosecute where a prima face case has been demonstrated are controversial as they hinge on the exercise of discretion by the prosecution. The NPA has strongly resisted any judicial review of its prosecutorial decisions, whether to prosecute or not to prosecute. The SCA in *Democratic Alliance v The Acting National Director of Public Prosecutions* held that the decision by the office of the NDPP to discontinue prosecution is subject to constitutional review and that in the case at hand a political party (i.e. the DA) has *locus standi* to bring an application to review a decision.[80]

4.1.4 Accountability for Prosecution Policy and Directives

The NPA Prosecution Policy is subject to judicial review. The TRC gave the NPA a list of 300 names of people who had been denied amnesty or who did not apply for amnesty. In December 2008 Judge Legodi of the North Gauteng High Court overturned a 2005 amendment to NPA Prosecution Policy that purported to permit negotiating 'amnesty' with such persons. The court application was brought by the widows of the 'Cradock Four'[81] and the sister of Nokuthula Simelane, supported by three civil society organisations. It took until February 2016 for the NPA to bring a prosecution in relation to Simelane after her family launched further applications. At the time of writing the case had not yet been resolved.

The existing Prosecution Policy does have an overall tenor of discouraging prosecution. The Prosecution Directives, which are determined by the NDPP alone and contain detailed guidelines to prosecutors, are treated as 'confidential' by the NPA. Current Prosecution Policy provides that the consent of the NDPP is sought whenever specified public officials are to be prosecuted and that this requirement is necessary to avoid prosecutions in 'inappropriate circumstances'.[82] The UN Guidelines on the Role of Prosecutors are alive to this problem inasmuch it pertains specifically to public officials suspected of corruption, abuse of power and serious human rights violations, with the Guidelines requiring that special attention should be given to such cases.[83] The Venice Commission acknowledges that not bringing prosecution which ought to be brought is probably a more common problem than incorrectly

[80] *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 (20 March 2012).
[81] In 1985, four Eastern Cape activists were intercepted by security police at a roadblock near Port Elizabeth. They were unaware that two members of their group – Matthew Goniwe and Fort Calata – had been targeted for assassination. The Cradock Four – Goniwe, Calata, Sparrow Mkonto and Sicelo Mhlauli – were never seen alive again. ('Unveiling the mystery of the Cradock Four: 25 years later' South African History Archive, http://www.saha.org.za/news/2010/June/commemorating_the_cradock_four_25_years_later.htm).
[82] NPA (2014) Prosecution Policy, p. 9.
[83] 'Guideline 15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.' *Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990.

brought prosecutions and, furthermore, that it is more difficult to counter due to lack of judicial control.[84] The SCA has held that equal weight and scrutiny must be accorded to the decision *not* to prosecute in apparent 'inappropriate circumstances' as to the decision to prosecute.[85]

4.2 Accountability to Parliament

The Constitution requires that the executive must account to Parliament for its actions, policies, expenditure and so forth, and states that this also applies to the NPA.[86] The NPA Act provides that the NPA shall be accountable to Parliament 'in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions'.[87] Despite these provisions, the legislation is vague on how Parliament should exercise its mandate. Oversight has a broader meaning than accountability, and includes a wide range of activities and initiatives aimed at monitoring the executive.[88] Yet while accountability and oversight may differ in scope and focus, it is also clear that they are closely linked and mutually reinforcing.

A key means of holding the executive to account to Parliament is through the latter's various oversight committees, which in the case of the NPA is the Portfolio Committee on Justice and Correctional Services (formerly the Portfolio Committee on Justice and Constitutional Development). According to the website of the Parliamentary Monitoring Group, between 2012-2016 the Portfolio Committee called on the NPA to report to it on nine occasions, as indicated in the table below which also notes the topics of the meetings.

Table 1: Portfolio Committee oversight meetings with the NPA (2012-2016)

Date	**Topic**
16 April 2012	Strategic plan
15 October 2012	Performance plan
22 April 2013	Strategic and annual performance plan
7 October 2013	Annual report
3 July 2014	Strategic plan
24 April 2015	Strategic plan

[84] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para. 21.
[85] See also *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).
[86] S 55(2)
[87] S 35 National Prosecuting Authority Act 32 of 1998.
[88] Corder, H., Jagwanth, S. and Soltau, F. (1999) *Report On Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town, http://www.pmg.org.za/bills/oversight&account.htm.

Date	Topic
15 October 2015	Annual report
12 October 2016	Annual report
4 November 2016	Withdrawal of charges against Minister Gordhan

Nine engagements over a five-year period is insufficient to deal with matters in-depth and engage in penetrating and robust debate. However, it is also the case that the Portfolio Committee on Justice and Correctional Services has one of the largest portfolios in Parliament,[89] with matters having been made worse when Correctional Services was added to the portfolio after the 2014 general elections.

The Venice Commission recommends that while the prosecuting authority should be accountable to Parliament, the scope of such accountability should be limited, in the sense that it should exclude decisions in individual cases and instead address issues such as the prosecution policy.[90] The NPA Act does require, however, that the NPA must also account to Parliament 'in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions'.[91]

It was with reference to 'decisions regarding the institution of prosecutions' that the NDPP (Shaun Abrahams) was summoned to appear before the Portfolio Committee on Justice and Correctional Services in late 2016 to explain why the Minister of Finance, Pravin Gordhan, and two others were charged with fraud, only for these charges to be withdrawn a few days later.[92] The controversy over the laying of charges against Minister Gordhan simply deepened suspicions about the motives and independence of the NPA; however, having Parliament summon Abrahams to appear before it to explain his decision sets a dangerous precedent.

At the Committee meeting Abrahams was at pains to explain that the decision to prosecute Gordhan et al. was not made by him but the Director of the Priority Crimes Litigation Unit (PCLU) in the NPA (Adv. Pretorius) and the North Gauteng Director of Public Prosecutions (Adv. Mzinyathi). He supported the decision, and this is what he announced at a media briefing. He was quick, nonetheless, to point out to the Portfolio Committee that the fact that he announced the decision to prosecute did not mean he owned the decision.[93] Following the media briefing in question, Abrahams invited and received submissions from two of the accused and two civil society organisations.[94]

With new information available, as per the representations, Abrahams decided to review the decision to prosecute and withdrew the charges against Gordhan et al. When he appeared before Parliament, he was not accompanied by

[89] See Appendix 1.
[90] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, paras. 42-43.
[91] S 35(1) NPA Act.
[92] *PMG Report on the meeting of the Portfolio Committee on Justice and Correctional Services of 4 November 2016*, https://pmg.org.za/committee-meeting/23596/.
[93] *PMG Audio recording of the meeting of the Portfolio Committee on Justice and Correctional Services of 4 November 2016,* Time lapse at 1:17:00, https://pmg.org.za/committee-meeting/23596/.
[94] Freedom under Law and the Helen Suzman Foundation.

Pretorius and Mzinyathi – the officials who purportedly 'own' the decision. Despite protests from MPs about the absence of these officials, Abrahams was able to navigate direct questioning without disclosing the facts, or admitting the absence thereof, that resulted in the initial charging of Gordhan et al. and the subsequent withdrawal of charges. When asked by an opposition MP whether he would submit to Parliament documents indicating Advocate Mzinyathi's support for the prosecutions, he replied that he would consider it via a 'written request'.[95]

This response, and the general content of the 'briefing', as Abrahams referred to it, indicated that Parliament was not being taken seriously as it holds little real power over the NDPP. In effect, his position was that he would decide what information Parliament receives or not from the NPA; by implication, it meant that Parliament could not compel him to submit it. The NDPP was mistaken, however, because the Rules of the National Assembly are clear about the powers of the committees to compel any person to produce such documents as it requests.[96] Nonetheless, if MPs (especially opposition ones) laboured under the expectation that they would lay eyes on the 'facts' that informed the two decisions, they were mistaken.

The NDPP's claim is that it was not he who made the decision to prosecute the Minister of Finance and hence he could not be held accountable for it. However, the claim holds no water, since the NDPP bears ultimate responsibility for decisions to prosecute or not.

The question in relation to the NDPP and NPA's accountability to Parliament is whether such accountability for individual cases (as described above in relation to the Gordhan case) could on another occasion lead to inappropriate influencing of the actions of the NDPP by Parliament. Thus it is recommended that, as per the Venice Commission, Parliament's role be limited to reviewing performance and influencing policy and policy directives.

4.3 Accountability to the Minister

As discussed above, accountability to the executive in the form of the Minister holds within it the threat to independence, but only if it extends to interference in the decision to prosecute or not to prosecute. In law, the accountability to the Minister does not extend to influencing these decisions, although the Minister is entitled to be informed of them, particularly with regard to high-profile cases. Thus, the accountability to the Minister is general rather than specific to particular cases, and relates to the formulation of policy, reporting to Parliament, and financial probity.

[95] *PMG Audio recording of the meeting of the Portfolio Committee on Justice and Correctional Services of 4 November 2016,* Time lapse at 1:19:17, https://pmg.org.za/committee-meeting/23596/.

[96] 'Rule 167: For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly - (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents. Parliament of South Africa (2016) *Rules of the National Assembly*, 9th Edition, Rule 167 http://www.parliament.gov.za/content/RULES_OF_THE_NATIONAL_ASSEMBLY_(SNGL-Web)_FINAL_1.pdf.

5 Effectiveness

What does it mean for the prosecution to be effective? Teasing out standards for the effectiveness of the prosecution is not a trivial exercise. It is suggested that, in the South African context, an effective prosecution is one that achieves the following:

- Offenders are held accountable for their crimes; in other words, prosecutions occur when appropriate.
- Crime is reduced through the conviction of serious, serial and prolific offenders who are responsible for a disproportionate number of crimes.
- Cases are disposed of appropriately according to the offender and the offence.
- Cases are disposed of in a timely, efficient and cost-effective manner.[97]

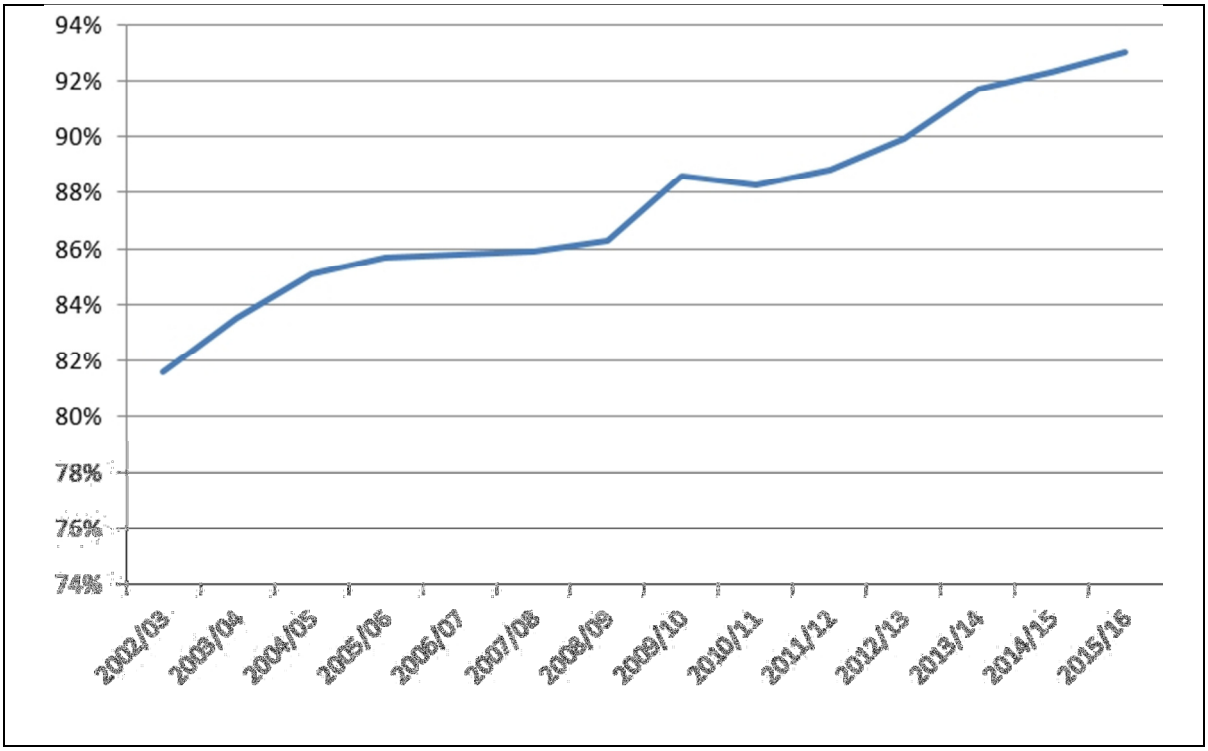
This section, working on the basis of available data, assesses the extent to which these standards are adhered to in practice.

5.1 Are offenders being held accountable?

The primary mechanism through which offenders are held accountable is prosecution in court. As discussed above, in its prosecution policy the NPA provides that it should prosecute when there is evidence on the face of it and if the prospects of success are reasonable. Conviction rates provide an easy measure of what the prospects of success actually have been for the prosecution.

[97] Adapted from National District Attorneys Association American Prosecutors Research Institute *Performance Measures for Prosecutors* April 2007.

Figure 1: Conviction rates, 2002/3 to 2015/16



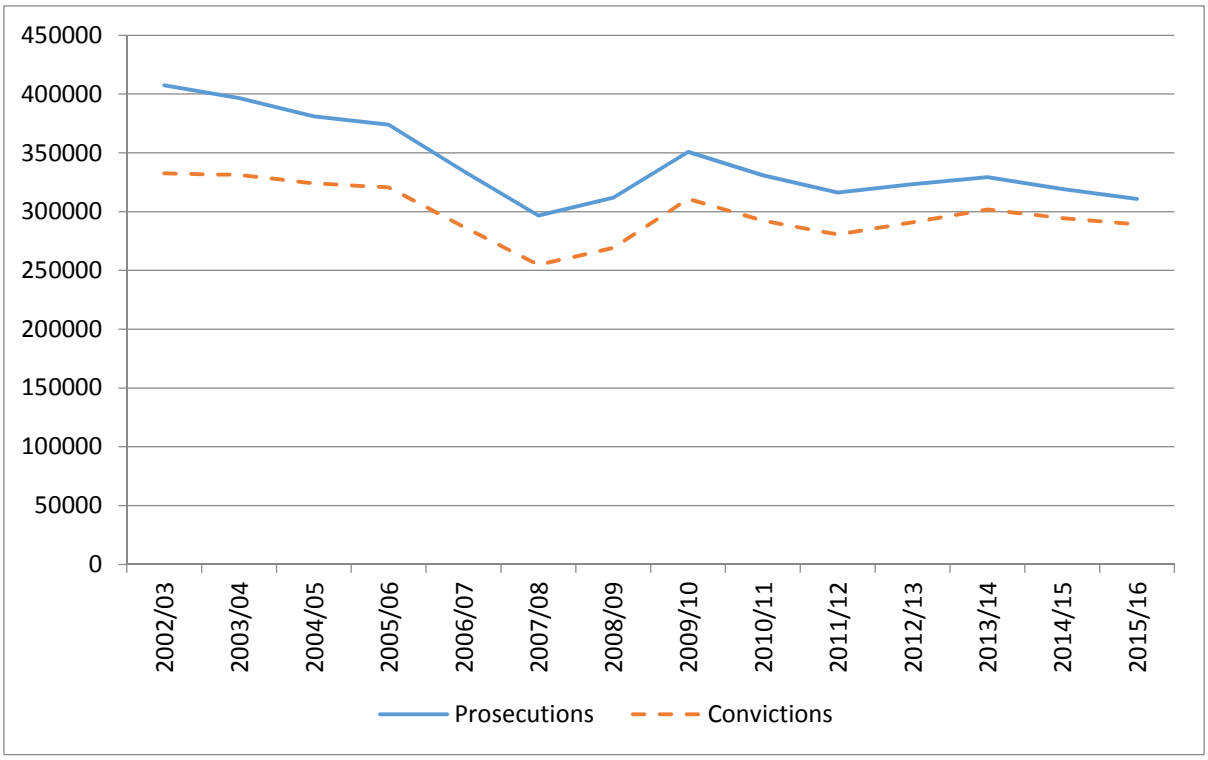
The evidence suggests that the NPA is setting the bar very high on 'reasonable prospects of success'. Of cases the NPA decides to prosecute, the rate of conviction has increased slowly but steadily from 82% in 2002/2003 to 93% in 2015/16 – an overall increase of 11 percentage points and an increase of almost a percentage point each year.

South Africa has now reached a rate of conviction which is inching closer to the 99% conviction rate enjoyed in China and other states with repressive justice systems.[98] This means the NPA has only a 7% chance of failure in the cases it decides to prosecute, which is far more than a 'reasonable' prospect of success. This change might not have affected the extent to which offenders are held accountable in court if the number of people being prosecuted had remained the same or increased, or if the proportion of arrests resulting in prosecution had remained the same or increased.

Unfortunately, the reality is that far fewer people are being prosecuted, in absolute numbers and when expressed as a percentage of arrests.

[98] 'China's criminal conviction rate fell to just 99.92% in 2015' *The Shanghaiist* 16 March 2016, http://shanghaiist.com/2016/03/16/china_conviction_rate_near_100_percent.php.

Figure 2: NPA prosecutions and convictions, 2002/3 to 2015/16



The number of cases actually prosecuted has dropped from 407,530 cases finalised in the courts in 2002/3 to 319,149 in 2015/16 – a decrease of almost two percentage points per year, or an overall decrease of 22% in the number of cases prosecuted.[99] The decrease is not a result of a drop in referrals by the South African Police Service (SAPS); indeed, the number of arrests has steadily increased over time. The number of priority crime arrests exceeded 1,023 million in 2015/16, compared to just under 445,000 in 2002/3.[100] Furthermore, from 2010/11 the SAPS' Detective Service began reporting on the number of 'detections' for the 20 most serious crimes it records, as well as on the number of 'trial-ready' dockets prepared in this regard. It is apparent that during these six years the figures have gone up rather than down (see Figure 3), which suggests that these trends too cannot explain the drop in prosecutions.

The conclusion to be drawn from this data is that offenders are not being held accountable *in the courts* to the same degree as they were more than a decade ago. (The question of alternative resolutions is dealt with below.)

5.2 Are serious, serial and prolific offenders being convicted?

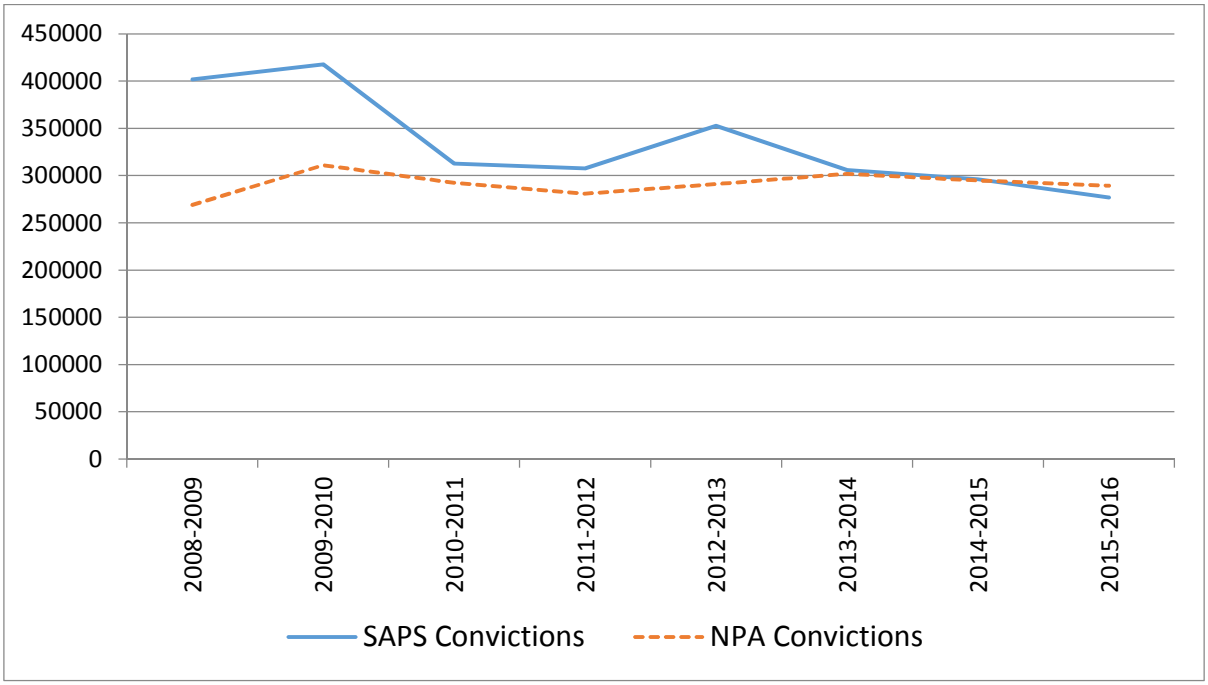
Unlike the NPA, the SAPS reports (since 2008/9) on convictions for each crime category and sums the 20 most serious crimes to provide totals on convictions. Comparing the SAPS serious crime total and the NPA total convictions usually results in the SAPS recording slightly more total convictions for the 20 most serious crimes than the total reported by the NPA, given that the NPA counts cases whereas, allowing that a case may involve more than one charge, the SAPS counts charges convicted.

[99] NPA (2016) *Annual report 2015/16*, p. 30.
[100] SAPS (2016) *Annual Report 2015/16*, p. 108.

However, since 2013/14 NPA convictions have *exceeded* SAPS convictions, while the latter have decreased by more than 100,000 since 2008/9. This suggests two things:

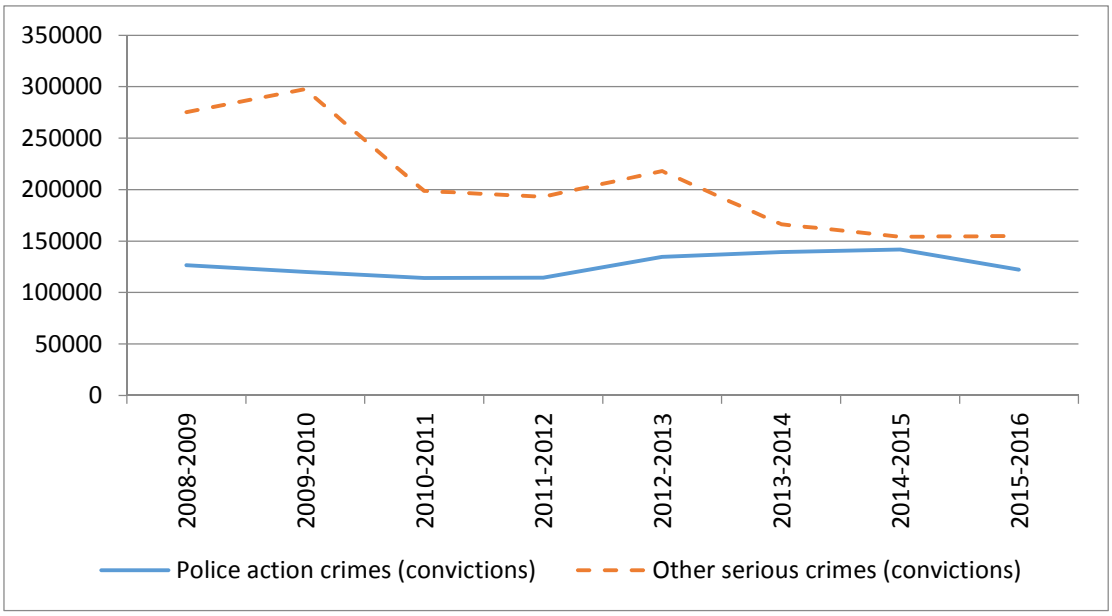
- An increasing proportion of NPA convictions do not relate to the 20 most serious crimes reported on by the SAPS, which suggests in turn that such crimes are assuming less prominence among prosecutions
- The NPA convictions do not comprise as many charges as previously, suggesting that those being convicted are increasingly being convicted on only one charge. This could indicate that serial and prolific offenders are less prominent among NPA convictions.

Figure 3: Number of SAPS and NPA convictions per year, 2008/9 to 2015/16



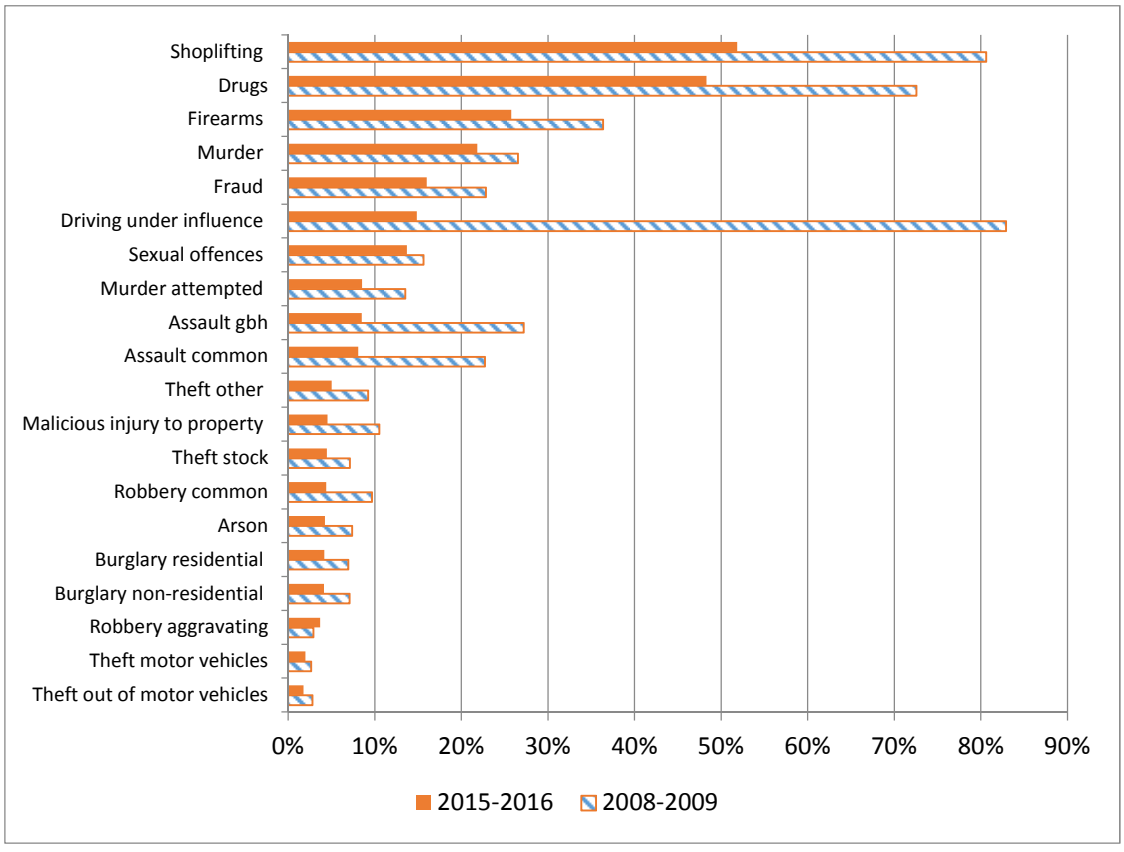
These suggestions are given further weight by a trend in SAPS data showing that an increasing number of convictions relate to 'crimes dependants on police action', with an almost flat trend in the case of other serious crimes (see Figure 4). 'Police action' crimes (drugs, firearms, driving under the influence, and so on) are generally 'victimless' in nature and easier to prosecute, as they do not require the cooperation of a complainant. The number of these convictions has increased, albeit slightly, whereas the number of convictions relating to other serious crimes has almost halved. Again, this cannot be entirely accounted for by reductions in SAPS detections.

Figure 4: Number of convictions per year for police action crimes, compared to other serious crimes



Indeed, comparing 2008/9 to 2015/16, by crime category, and expressed as a percentage of reported crime, all categories have recorded a reduced percentage of convictions in relation to reported crime (see in Figure 5).

Figure 5: Convictions expressed as a percentage of reported crime, 2008/9 and 2015/16



Consider together, these data trends suggest it is increasingly unlikely that serious and serial prolific offenders are being convicted by the NPA to any greater degree than previously.

5.3 Are cases disposed of appropriately by offence and offender?

The data above provide some indication of the extent to which crimes, particularly serious ones, are disposed of in court. However, convictions are not the only method of disposing of cases. Both the CEO of the NPA and the former NDPP have argued that part of the reason for the drop in the number of cases finalised in court lies in the increase in resolutions outside court in the form of 'alternative dispute resolution mechanisms' (ADRM).[101]

ADRM increased exponentially, from 14,808 per year in 2002/3 to 184,314 per year in 2014/2015, but declined to 166,952 in 2015/16.[102] Theoretically, ADRM should occur only where there is in fact a *prima facie* case – if no such case exists, there should be no mediation, but instead a simple *nolle prosequi*. Yet the SAPS seem to indicate that mediation sometimes occurs in the absence of a finalised case, as their definition of what counts as a 'trial-ready docket' includes cases mediated but not fully investigated.

There are many reasons to prefer ADRM to prosecution and imprisonment, not the least being overcrowded prisons. But not all ADRMs are created equal. The bulk of ADRM as it is currently occurring (as much as 75%) takes the form 'informal mediation'. [103] What is 'informal mediation'? The NPA Policy Directives provide that '[i]nformal mediation is a process of resolving disputes between parties with the assistance of a mediator. The mediator facilitates the resolution of conflict between the parties with the objective of reconciling the parties, through reaching a mutually agreeable solution.'[104]

The Directives further provide that the mediator may be the prosecutor; that informal mediation should 'mainly' be considered for 'less serious' offences; that it should not be considered for murder, rape, robbery aggravating, domestic violence, offences involving children as victims, racially motivated offences, offences likely to garner a prison sentence, and offences involving repeat offenders; that written authorisation must be obtained from an authorised representative of the DPP; and that the prosecutor may not be rewarded for the mediation.

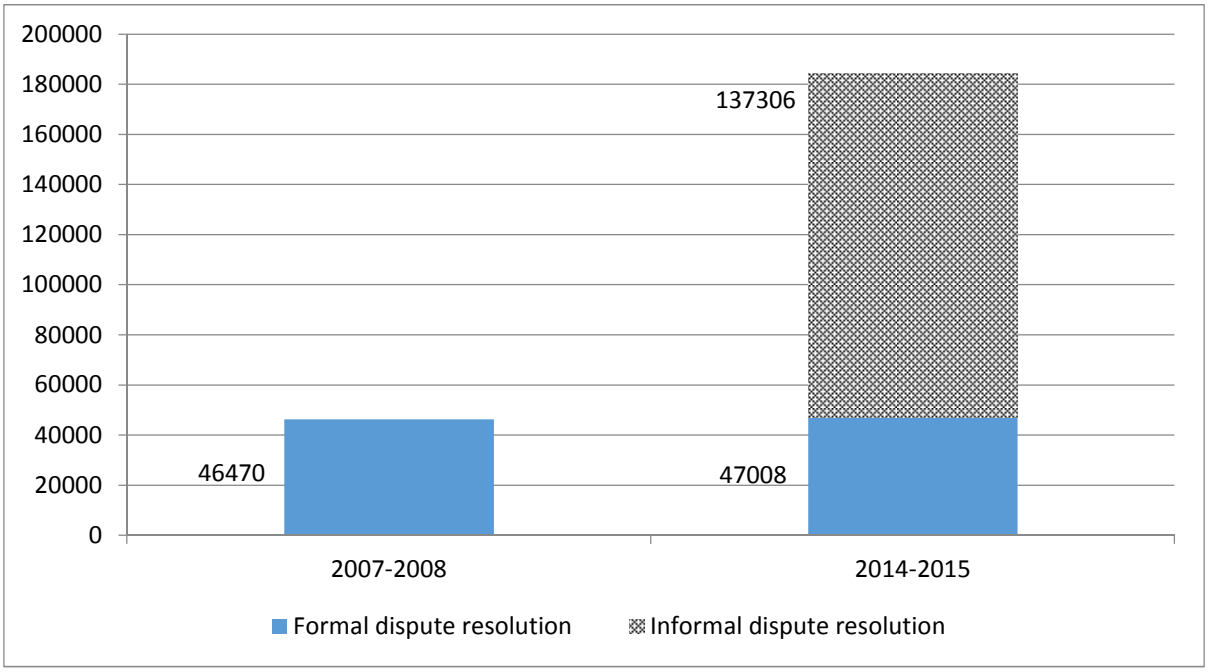
'Informal mediation' appears to be the ultimate in the exercise of prosecutorial discretion, with the prosecution simply agreeing not to prosecute a case to the benefit of the accused. There is anecdotal evidence to suggest that this sometimes occurs with agreement by the alleged accused to pay compensation to the alleged victim. This kind of scenario may hold considerable potential for abuse. With more than 160,000 such cases per year – slightly more than half of prosecutions – this is a particularly worrying situation as it implies that a very substantial proportion of prosecutorial decision-making is exercised with little if any oversight in largely unregulated environment.

In his budget vote speech in April 2016, the Minister of Justice, Michael Masutha, said in relation to the continued growth in ADRM that '[w]e are currently working with the NPA to refine the system to ensure that it is fair and just,

[101] Adv. Nomgcobo Jiba, ISS presentation, Pretoria, 20 November 2012.
[102] NPA (2016) *Annual Report 2015/16*, p. 35.
[103] According to the NPA annual report, in 2014/2015 'a total of 41 126 cases were diverted after enrolment, 5 882 cases were diverted before enrolment in terms of the Child Justice Act (CJA) and 137 306 cases were successfully mediated on an informal basis'.
[104] *Prosecution Policy Directives – Policy Directives issued by the National Director of Public Prosecutions* (2014) Section F(2), p. 23.

not only to the accused but equally to the victim as well'.[105] This suggests that in its current 'unrefined' form it may not be fair and just. Indeed, no information exists to indicate whether it is or not, which raises concerns about the due process rights of the accused and undue pressure on victims.

Figure 6: Formal and informal dispute resolution, 2007/8 and 2014/15 (NPA data)



The data from the SAPS discussed in the previous section shows large decreases for serious crimes involving complainants (i.e. for crimes which are not police-action crimes). If this is accounted for by informal mediation, it is cause for concern. Indeed, if mediation *does* account for the drop, the massive growth in ADRM disappears if 'informal mediations' are removed from the ADRM total. For the period 2014/2015, only 47,008 'formally' mediated cases remain – which is a similar figure to the 46,470 diversions recorded in 2007/8, when 'informal' mediations began to be counted. By contrast, formal ADRM, such as diversion in terms of the Child Justice Act, involves the courts and other institutional role-players like Legal Aid, with the agreements reached being confirmed by the courts. The procedure requires acknowledgement of responsibility and actions of atonement or reform from the child being diverted. The withdrawal of the case is contingent on these actions being carried out.

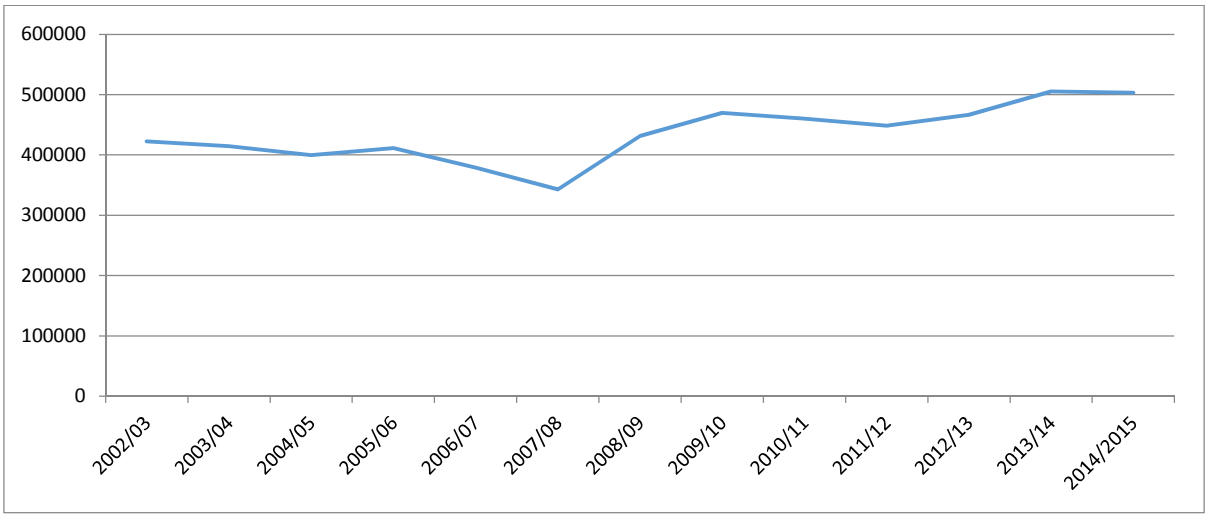
In relation to informal mediation, no central register is maintained, and each prosecutor is directed only to maintain 'a file' of informal mediations. What is unclear, then, is the extent to which any prosecutor can be sure a particular accused has not been previously 'informally mediated'. Thus, to answer the question whether cases are being disposed of appropriately by offence and offender, a great deal more information would need to be made available. On the face of it, such information as is available raises concern that prosecutions are increasingly of less serious offences and are being replaced by informal mediations. It is certainly not clear that cases are being disposed of appropriately. Better information from the NPA may clarify matters.

[105] 'South Africa: Minister Michael Masutha - Justice Dept Budget Vote NCOP 2016/17' *AllAfrica.com*, 19 April 2016, http://allafrica.com/stories/201604191260.html.

5.4 Are cases disposed of in a timely, efficient and cost-effective manner?

In its statistical reporting, the NPA adds formal and informal mediation to cases prosecuted (convicted and acquitted) to come to a total number of cases dealt with by the NPA argue that its productivity has increased. Indeed, a trend toward an increase in this total number is observed after 2007/8, the period when informal mediations began to take off. Does this mean the NPA is dealing with cases in a more timely, efficient and cost-effective manner?

Figure 7: Number of cases resolved in court plus alternative dispute resolutions (including informal mediations)



5.4.1 Cost-effectiveness

For the sake of argument, assume that all 'informal mediations' are indeed appropriate resolutions of cases. Does this 20% increase in 'resolutions' then match the increase in funding since 2002/3? The marginal increase in total 'appropriate resolutions' does not keep pace with the increase in funding in real terms – which is of the order of a doubling over the last decade.

In 2002/3, the general prosecutions arm of the NPA received just over R621 million and the NPA as a whole, almost R924 million. Taking only inflation into account, these amounts would be equivalent in June 2016 to R1.4 billion to the general prosecutions arm and a little more than R2 billion to the NPA as a whole. Instead, by 2014/2015 the budget allocation was R2.7 billion – almost double the inflation-adjusted 2002/3 amount. For the NPA as a whole it was almost R3.7 billion, about 185% of what it was in 2002/3.

Massive increases in funding should predict a massive increase in productivity. But the number of cases (even if one includes informal mediation) per millions of rand spent has fallen. In 2002/3, each 'constructively resolved' case – if calculated on the budget for general prosecutions only and prosecutions plus ADRM – cost R3,254 in todays' money. By 2014/15 the amount was R5,385 per case, an increase of 65% in cost in real terms. If ADRM is excluded from the analysis, each prosecution (convicted and acquitted) cost R3,372 per case in 2002/3 and R8,495 in 2014/15 – an increase of 152%. Thus, the NPA has not become more cost-effective.

5.4.2 Efficiency

Have prosecutors become more efficient and productive? In 2005/6, there were 1,982 prosecutors[106] and 373,995 actual prosecutions. This meant each prosecutor dealt with 189 prosecutions per year, or almost four per week. In 2011/12, the NPA had 2,745 prosecutors;[107] there were 319,149 actual prosecutions. This means each prosecutor dealt with only 116 prosecutions per year – just more than two per week. Even if ADRM is included, then in 2005/6 there were 207 per prosecutor, whereas in 2011/12 there were only 163 per prosecutor. Thus, the NPA has not become more efficient, measured by cases per prosecutor, including finalisations by ADRM.

5.4.3 Timeliness

Average court hours have dropped, along with the number of cases finalised in court. But have cases speeded up or slowed down? The data show average court hours decreased from 4h09 minutes per court day in 2002/3 to 3h16 minutes in 2015/16 – a total drop of 53 minutes and a 21% reduction in court minutes per day.[108] Assuming that total court days stayed the same, if cases in 2015/16 were finalised at the same average speed as in 2002/3, an average court day of 3h16 should have resulted in 320,787 cases being finalised in 2015/16 – which is about 10,000 more than actually were.

Put differently, if speed had remained the same, the 310,840 cases actually finalised should have resulted in average court hours of only 3h09 minutes, not the 3h16 minutes recorded in actuality. If the number of courts, and therefore the total number of court days, have increased (which is highly likely), then the calculations would be even more unfavourable.

Prosecutors are doing less prosecuting in court *and* taking more time about it. Indeed, this can be measured by the increase in the duration of time accused persons spent awaiting trial.

5.5 Summary of issues on performance

Fewer offenders than previously are being held accountable in relation to reported crime. The data suggest that fewer serious and prolific offenders are being convicted than previously. There are insufficient data to determine whether cases are being disposed of appropriately according to offender and offence; the available data suggest there is cause for concern. Cases cost more, fewer cases are resolved per prosecutor, and cases are taking longer than before. In conclusion, the available data strongly suggest that the overall performance of the NPA has declined.

[106] NPA (2006) *Annual Report 2005/6*, Table 7.3, p. 80.
[107] The number is as at 1 April 2011. NPA (2012) *Annual Report 2011/12,* Table 5.4, p. 141.
[108] NPA (2016) *Annual Report 2015/16*, p. 31.

6 Recommendations

6.1 Independence

6.1.1 Preventing politically controlled decisions

Amend the NPA Act to require judicial review of controversial decisions.

The NPA Act is clear on what the Minister can expect from the NDPP with reference to information requests.[109] The Constitutional Court found that the Minister had violated section 32(1)(b) of the NPA Act when then Minister Mabandla instructed then NDPP Pikoli to hold off with the arrest of the Commissioner of Police until she had given approval.[110] Inasmuch as the NDPP is protected in law from interference, the reality is different and political heads appear to have seen little wrong in attempting to influence how the office of the NDPP performs its functions, as evidenced by the Shaun Abraham decisions in relation to the Minister of Finance and other SARS officials.

The solution possibly lies not in the NPA Act but in amending the Criminal Procedure Act to require that, on request, the NPA demonstrate before the courts, perhaps in camera, the evidence at hand influencing its decisions whenever prosecutions, or failures to prosecute, appear to be politically motivated.

6.1.2 Removing the centrality of the NDPP in decision-making

It can be argued that the drafters of the Constitution erred in locating so much power in the position of the NDPP and, furthermore, in subjecting the NDPP to some degree of control by the Minister. Ultimately, the Constitution should be amended to remove ministerial control and to diffuse the power of the NDPP on a geographic basis. This would reduce the political pressure on a single individual.

6.1.3 Amending the appointment process of the NDPP

Assuming that the Constitution cannot easily be amended and continues to locate final power in the NDPP, the question therefore arises as to how the appointment process can be made more inclusive, transparent and, frankly,

[109] Section 33(2) of the NPA Act states: 'To enable the Minister to exercise his or her final responsibility over the prosecuting authority , as contemplated in section 179 of the Constitution , the National Director shall, at the request of the Minister – (a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions; (b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions; (c) furnish the Minister with information with regard to the prosecution policy referred to in section 21 (1) (a) ; (d) furnish the Minister with information with regard to the policy directives referred to in section 21 (1) (b) ; (e) submit the reports contemplated in section 34 to the Minister ; and (f) arrange meetings between the Minister and members of the prosecuting authority.'

[110] s 32(1)(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.' (*Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), para. 56.)

more rigorous to ensure an independent and accountable NDPP. The Venice Commission places significant emphasis on the process whereby a Prosecutor General, or in this case the NDPP, is appointed:

> It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.[111]

If it is accepted that the appointment will ultimately still be made by the President, as head of the executive, then there are two immediate possibilities. First, Parliament plays a more direct role in identifying the suitable candidate for the President to appoint. Secondly, the Judicial Service Commission (JSC) identifies the suitable candidate and the President appoints on its recommendation.[112] Both structures already perform similar functions in this regard, for example, in the appointment of judges, in the case of the JSC, and the appointment of the Public Protector and other heads of Chapter 9 institutions, in the case of Parliament.[113]

The Constitution, in section 193, sets out the procedure for identifying suitable appointees for the position of Public Protector and other heads of Chapter 9 institutions. Given that the NDPP is an individual appointed to that position, it is argued that an improved appointment process of the NDPP should be more akin to the process with regard to the positions of the Public Protector and Auditor General of South Africa (AGSA) than to the five Commissions established by Chapter 9 of the Constitution.

In contemplating reform of the current process for appointing the NDPP, a number of guidelines can be extrapolated from the appointment process of the Public Protector and the Auditor-General of South Africa (AGSA). First, candidates should reflect the race and gender composition of the population.[114] Second, in addition to a candidate's being a fit and proper person, it is a requirement that he or she have specialist knowledge, as is the case with the AGSA: 'Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.'[115]

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[111] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para 34. Citing from CDL(1995) 073 rev. Chapter 11.

[112] De Villiers, W.P. (2011) 'Is the Prosecuting Authority under South African law politically independent? An investigation into the South African and analogous models', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, No. 74, p. 263; *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para. 36.

[113] S 193(5) Constitution.

[114] S 193(2) Constitution.

[115] S 193(3) Constitution.

A certain minimum number of years of experience in a particular field may also be set as a requirement, as is the case with the Public Protector, who must be any of the following:

- a judge;
- an admitted and practising advocate or attorney with ten years' experience;
- a qualified and admitted advocate or attorney and have lectured law at a university with ten years' experience;
- a person with specialist knowledge of – or for a period of at least ten years, experience in, the administration of justice, public administration or public finance;
- a member of Parliament for at least ten years; or
- a person who has acquired any combination of experience listed in the above for a cumulative period of ten years.[116]

It should be noted that the requirements for the Deputy Public Protector are the same, save that this position cannot be occupied by a judge. It is evident that the drafters of the Constitution wanted to weed out wholly unsuitable applicants for the position of Public Protector and his or her Deputy by requiring at least ten years' experience in law, the administration of justice, public administration and/or public finance.

On the other hand, the requirements for the NDPP are rather slim when compared to those of the Public Protector and AGSA; here, it is required merely that the person be fit and proper and 'possess legal qualifications that would entitle him or her to practice in all courts in the Republic'.[117] In terms of the Legal Practice Act, any person who has been admitted and enrolled to practise as a legal practitioner in terms of the Act is entitled to practise throughout South Africa, unless his or her name has been ordered to be struck off the Roll, or is subject to an order suspending him or her from practising.[118] There is no requirement of specialist knowledge or numbers of years of experience. Whilst it may not be possible or even desirable to set specific criteria in respect of qualifications, the structure identifying the suitable candidate would benefit from the advice of experts from the legal community and civil society.[119] The current relatively low threshold is particularly worrisome given the powerful position of the NDPP.

[116] Modified from s 1A(3) Public Protector Act 23 of 1994.
[117] S 9(1) National Prosecuting Authority Act 32 of 1998.
[118] S 25(1) Legal Practice Act of 28 of 2014: 'In the case of an attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney – (a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules; (ii) is in possession of an LLB degree; and has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or (b) has gained appropriate relevant experience, as may be prescribed by the Minister in consultation' (s 25(3)).This means that if the nominated head of the NPA is an attorney, the latter threshold in terms of qualification and experience applies to him or her because section 25 requires him or her to be entitled to practise 'in all courts in the Republic'.
[119] *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para. 35.

Furthermore, the composition of the Parliamentary Committee (or, regarding the appointment of judges, the JSC) making the selection is important, as the aim is to bring a broad range of skills, knowledge and stakeholders into the selection process. Identifying a suitable person as Public Protector or AGSA requires that the National Assembly must recommend persons nominated by a committee of the National Assembly proportionally composed of members of all parties represented in the Assembly. Moreover, the nomination must be approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members if the recommendation concerns the appointment of the Public Protector or the AGSA.[120]

The JSC, for the purpose of appointing judges, consists of the following 23, and in some cases 25, persons:

- the Chief Justice, who presides at meetings of the Commission;
- the President of the Supreme Court of Appeal;
- one Judge President designated by the Judges President;
- the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
- two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
- one teacher of law designated by teachers of law at South African universities;
- six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
- four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
- when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.[121]

The appointment of certain persons to the JSC is also not at the exclusive discretion of the President, a factor that provides a further safety measure. Certain members are there *ex officio* (for example, the Judge President), and persons nominated by the legal profession, as well as persons from the National Assembly and National Council of Provinces nominated by those structures. The diversity of membership of the JSC ensures that candidates are thoroughly questioned as well as that different perspectives are aired during interviews; the latter are open to the public, as it has a vested interest in which persons are appointed to Chapter 9 institutions and as judges.

[120] S 193(5) Constitution.
[121] S 178(1) Constitution.

Much can be learnt from the appointment of the Public Protector and the AGSA and used to improve the appointment of the NDPP, particularly the emphases on experience, expertise and the nature of the process by which the candidate is identified. The central points are that these appointments are not the President's sole prerogative and that the process followed is an open one.

6.2 Accountability

6.2.1 Judicial review of prosecution directives

Prosecution policy and directives should be reviewed to ensure that all persons are equally subject to prosecution. Requirements for authorisation to prosecute should be counterbalanced by authorisations to withdraw or not charge, whenever there is a prima facie case.

The Constitution provides that the NDPP sets prosecution policy and directives. The NPA Act says this must be set after consultation with the Minister. The Prosecution Policy Directives of 1 June 2014, which the NPA treats as confidential, contain a number of provisions that have the effect of discouraging prosecution.

In particular, the chapter entitled 'Prosecution of certain categories of persons' is highly problematic. It requires that written authorisation or instruction be obtained from the NDPP or DPP whenever prosecution is to be instituted in respect of certain serious offences by senior members of the SAPS, SANDF, DCS, and municipal law enforcement as well as by diplomats and Department of Justice and Constitutional Development (DOJCD) officials, prosecutors, magistrates and judges. It is clear that this serves to discourage the prosecution of these individuals.

Furthermore, the chapter requires notice to be given only to the head of the employer organisation concerned (for example, the DOJCD) of the decision *against* prosecuting such individuals, when the offence involves an element of violence or dishonesty. The decision not to prosecute such individuals should surely be reviewed at a more senior level within the prosecution authority itself, given the importance of ensuring the integrity of officials in the criminal justice system.

More broadly speaking, read as a whole the Directives discourage, rather than encourage, prosecution. Only in cases of domestic violence (violation of a protection order), sexual offences, and trafficking in persons is there a specific directive not to withdraw without authorisation.

In relation to diversion, authorised prosecutors may divert cases of murder, aggravated robbery and rape, although the Directives provide that there should be no diversion for an accused with a criminal record or a previous diversion. On a practical level, while the diversion must be recorded in a diversion register, there appears to be no searchable central diversion register which would ensure that previously diverted individuals, who may have been diverted previously in another geographical location, are not diverted again.

6.2.3 Consultation on informal mediation provisions

Informal mediation is possibly of even more concern, as no searchable central record appears to be kept of previous informal mediations, and there is no requirement for such a register, only a requirement for an 'informal mediations file'. While the policy directives indicate that murder, rape and aggravated robbery may not be subject to informal mediation, it is possible, according to these directives, for prosecutors to obtain authorisation for informal mediation in such cases.

Policy directives determine the trends in relation to prosecution and should be more widely consulted upon. The legislation should be amended to ensure input by a broader range of stakeholders into prosecution policy and directives. The directives should be amended to take closer account of the role prosecution plays in crime prevention by removing serious prolific offenders from society. In particular, guidelines on informal mediation should be finalised as a matter of urgency.

6.2.4 Accountability to Parliament on expenditure on record-keeping systems

Despite billions of rand and years of investment since 1998, the 'Integrated Justice System' in the form of integrated records amongst the criminal justice agencies still does not exist, making it difficult for the courts and prosecution to arrive at a real assessment of the risk posed by a particular person arrested or accused. Widespread withdrawals compound the problem. Prosecution directives should take into account the practicalities of record-keeping systems to ensure that repeat offenders and offenders who pose a risk are prosecuted.

It is mystifying that something which could probably be achieved by a relatively simple database still has not been developed, despite the massive budgets spent on this. The focuses of these budgets for 'Integrated Justice' seem to be on measuring performance rather than accurately identifying who poses a risk. The system should be able to record and track all interactions with the criminal justice system of any person, and link any person to any existing case in which she or he is already linked. Parliament needs to interrogate why this is not yet in place, and hold those to account who have failed to deliver.

6.3 Performance

6.3.1 Accountability on performance to Parliament

Parliament should require detailed reporting, particularly in relation to offences involving violence, and on the extent to which prosecution has successfully targeted repeat offenders or offenders posing a risk to society.

The NPA, unlike the SAPS, fails to report in detail to Parliament in their Annual Report, thus obscuring the fact that almost half of its prosecutions are now in relation to so-called 'victimless offences' in particular drug offences. SAPS data suggest that the number of convictions for other serious crimes has almost halved since 2009.

By comparison, the Crown Prosecution Service (CPS) in England and Wales provides, inter alia, the following reports:

- A monthly analysis of the outcome of CPS proceedings in magistrates' courts and in the Crown Court by principal offence category.
- Joint enterprise data which focuses on all murder related cases involving multiple defendants in the 'Homicide' category of cases recorded by the CPS, the most recent being for the years 2012 and 2013.
- Reports on several key performance measures across a range of business areas, including conviction rates, cases dropped, hate crime and sickness absence.[122]

6.3.2 Internal performance management

The internal performance management system of the NPA requires review. There is currently little in place to encourage or reward performance within the NPA. Furthermore, there appear to be few consequences for failure to perform. Such a system might involve collecting feedback from a variety of sources, including peer prosecutors, supervisors, judges, defence counsel, victims, defendants, and the public.[123] Incentives can then be devised to encourage success in these measures, to attract and retain good prosecutors, and to motivate them to succeed, through variable salaries, raises, and promotions. A great deal of consultation and thought would be required, however.

[122] Crown Prosecution Service, Performance Management Information, available at http://www.cps.gov.uk/publications/performance/.
[123] Bibas, S. (2009) 'Rewarding prosecutors for performance', *Ohio State Journal of Criminal Law*, Vol. 6, p. 441, http://moritzlaw.osu.edu/osjcl/Articles/Volume6_2/Bibas-FinalPDF.pdf.

Appendix 1: Portfolio of the Portfolio Committee on Justice and Correctional Services

Department of Correctional Services

- Department of Correctional Services
- Judicial inspectorate for Correctional Services
- National Council for Correctional Services

Department of Justice

- Department of Justice and Constitutional Development includes: Courts and officials, Office of the State Law Advisor, Office of the Family Advocate, Solicitor General/State Attorney, Masters of the High court, Magistrates' Commission
- Special Investigating Unit
- Legal Aid South Africa
- South African Human Rights Commission
- Public Protector
- Office of the Chief Justice and Judicial Administration (the South African Judicial Service Commission and the South African Judicial Education Institute falls under this office)
- National Prosecuting Authority of South Africa (comprising: National Prosecuting Service, Office for Witness Protection, Asset Forfeiture Unit (AFU), Specialised Commercial Crime Unit, Priority Crimes Litigation Unit, Sexual Offences and Community Affairs Unit, the Family Violence, Child Protection and Sexual Offences (FCS) units)

Other

- South African Board for Sheriffs
- South African Law Reform Commission