Submission to the Zondo Commission of Inquiry into State Capture

Recommendations concerning the National Prosecuting Authority of South Africa

June 2019

Contents

1. Introduction 2
2. State Capture and the NPA 3
3. Independent and accountable NPA 5
4. Transparent and just appointments 6
5. Transparent reporting 8
6. Improved prosecution policy 10
7. Improved morale and conditions 11
8. Zondo Commission and prosecutions 11

1. Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR seeks to carry out engaged research, teaching and advocacy on criminal justice reform and human rights in Africa.
2. ACJR's interest in the National Prosecuting Authority (NPA) originally arose due to our research which showed that South African **government officials implicated in serious human rights violations were routinely failing to be prosecuted**.[1] This failure frequently related to the NPA's apparent unwillingness to prosecute and that it is indeed a rare occurrence for police and prison officials to be prosecuted for human rights violations. This has fostered a culture of impunity in the South African Police Service (SAPS) and the Department of Correctional Services (DCS). The UN Commission on Human Rights defines impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."[2]
3. This in turn lead us to investigate the NPA more broadly. Our investigations suggest that the current legislation, structure, policies and operations of the NPA result in the outcome that few persons are convicted of serious crimes, and that state officials, in particular, are more likely to escape prosecution. That is, **state officials experience impunity** for rights violations and for offences related to state capture.
4. Problems in the criminal justice system are, however, not restricted to impunity for rights violations. All indications are that the criminal justice system is teetering on the brink of collapse. This requires a comprehensive investigation into the underlying problems plaguing the criminal justice system and we submit that it requires a **judicial commission of inquiry**.

---

[1] Muntingh, L. and Dereymaeker, G. (2016) 'South Africa' IN Carver, R. and Handley, L. (eds) *Does Torture Prevention Work?* Liverpool: Liverpool University Press, pp. 335-393.; Dereymaeker, G. and Muntingh, L. (2015) *Human Rights Violations and South Africa's Law Enforcement Agencies - Assessing Investigation Processes by the Judicial Inspectorate for Correctional Services*, ACJR Research Report; Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR; Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, ACJR Research Paper, Bellville: Community Law Centre.

[2] E/CN.4/2005/102/Add.1 Definitions. This definition differs slightly from the one adopted in 1996 (E/CN.4/Sub.2/1996/18) by adding the words "if found guilty, sentenced to appropriate penalties, and to making reparations to their victims"

5. It is imperative that there be reform of the NPA to ensure state officials are held to account for state capture and for rights violations, and for the NPA to be held to account for their decisions. It is appropriate that the Zondo Commission makes such recommendations. This is the subject of this submission.

2. State Capture and the NPA

6. State capture occurs when institutions of state have been repurposed to serve the interests of a narrow elite without a real and meaningful possibility of accountability. For the purposes of this submission, "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."[3] Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at monitoring the executive.[4] While accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing.
7. Accountability is understood to mean the relationship "between the bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right".[5] This means that a government must be able to and indeed explain how it executed its mandate.[6] The point has also been made that the normal features of a democracy (e.g. multi-party elections and universal suffrage) are necessary but not sufficient to ensure healthy accountability between citizens and the government.[7] Democratic elections therefore do not make for clean government and new democracies remain haunted by human rights violations, nepotism and corruption, which do not disappear with the advent of democratic elections.[8]
8. The construct of accountability can be split into two dimensions: horizontal accountability and vertical accountability. According to Schacter, the state must be willing "to restrain itself

[3] Corder, H., Jagwanth, S. and Soltau, F. (1999) *Report On Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town.
[4] *Ibid.*
[5] U4 Anti-Corruption Resource Centre *Corruption Glossary* http://www.u4.no/document/glossary.cfm Accessed 6 October 2011.
[6] Muntingh, L. (2007) *Prisons in the South African constitutional democracy*, Johannesburg: Centre for the Study of Violence and Reconciliation, p. 16.
[7] Schacter, M. (2001) When Accountability Fails – a framework for diagnosis and action, *Isuma* Vol. 2 No. 2, p. 1.
[8] Muntingh, L. (2007), p. 16.

by creating and sustaining independent public institutions to oversee its actions, demand explanations, and when circumstances warrant, impose penalties on the government for improper and illegal activity".[9] The accountability that the state imposes on itself and on governments is commonly referred to as horizontal accountability. Vertical accountability refers to the control external institutions exercise over a government, such as the electorate, the media and civil society.[10]

9. The fact that a relationship exists between the state and another internal or external body does not automatically result in an effective accountability relationship, and three principles need to be adhered to, namely transparency, answerability, and controllability. The answerability requirement states that decision-makers must be able to justify their decisions and actions publicly in order to substantiate that they are reasonable, rational and within their mandate.[11] Answerability (and transparency) will, however, be meaningless if there are not mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions must therefore be able to exercise control over the institutions that they are overseeing.[12] Failure to hold government and individuals accountable creates the conditions for impunity to exist.

10. In recent years the NPA was repurposed to protect the financial and power interests of a relatively small group of individuals. This has had the broader impact that **accountability as a constitutional value of the public administration has suffered immense damage**.[13] It has become the norm that public officials, even if not implicated in state capture, are simply not held accountable for serious criminal offences. For example, according to a Daily Maverick report, the ruling party has been implicated in 21 major scandals in 24 years and there have hardly been any prosecutions save for Tony Yengeni and Shabir Shaik.[14]

11. **The NPA is the primary custodian of the constitutional imperative of accountability**. No other institution holds as much power to hold private individuals, public officials (including the president) and companies to account. The NPA is therefore not an 'ordinary' institution of state – it has a special relationship with the Constitution, especially where it concerns

---

[9] Schacter, M. (2001), p. 2.
[10] Schacter, M. (2001), p. 2.
[11] U4 Anti-corruption Resource Centre, Glossary, http://www.u4.no/document/glossary.cfm Accessed 6 October 2011.
[12] U4 Anti-corruption Resource Centre, Glossary, http://www.u4.no/document/glossary.cfm Accessed 6 October 2011.
[13] S 195(1)(f) Constitution.
[14] Haffajee, F. "Corruption is eating the ANC's soul – can Ramaphosa save it?" *Daily Maverick*, 12 June 2019, https://www.dailymaverick.co.za/article/2019-06-12-corruption-is-eating-the-ancs-soul-can-ramaphosa-save-it/

public officials implicated in criminal conduct. The recommendations therefore focus on ensuring appropriate balance between the independence and accountability of the NPA.

3. Independent and accountable NPA

12. WE submit that independence and accountability in relation to the NPA are not conflicting, but mutually reinforcing values.
13. An **independent** prosecution service provides neutral, non-political, non-arbitrary decision-making regarding the prosecution of cases. Prosecutors should not be political actors; save in that they do play a role in the democratic process as they uphold the rule of law. That the prosecution service should perform its duties without "fear, favour or prejudice", as provided for in the Constitution, has, however, in the past decade become meaningless.
14. Functional independence involves prosecutorial decisions being made without partisan or other improper considerations.
15. Accountability in relation to functional independence relates primarily to **reporting transparently on decision-making** in relation to decisions to prosecute or not prosecute; providing adequate communication and explanation; and managing of expectations on a case by case basis.
16. 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. The 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'.[15]
17. The decision not to prosecute is thus the one creating more risk as it is not subject to judicial review. In order to promote transparency and accountability, the decision not to prosecute therefore **need to be supported by reasons** that are based in law and policy, and be made available upon request. Such reasons need to be detailed and not be a mere rout statement reflecting "there is not a *prima facie* case"; it needs to reflect, for example, what evidence is lacking.
18. Institutional independence involves structural mechanisms designed to enhance prosecutorial independence. These structural mechanisms include:
    a. A transparent and just appointment processes

[15] NPA (2014) Prosecution Policy, p. 9.

b. Security of tenure – balanced against appropriate discipline

c. Adequate working conditions

d. Culture of professionalism.

19. Such structural mechanisms are not a guarantee of functional independence i.e. of impartial decision-making, but they support it and reduce the risk of interference and manipulation.

20. Accountability in relation to institutional independence requires reporting and transparency on all of the relevant mechanisms and the responsible person being tasked with rectification in relation to perceived failings. **Consequently, the Zondo Commission should make recommendations to improve NPA accountability**.

4. Transparent and just appointments

21. Given the power and discretion of the NDPP and his or her immediate deputies, the current legal framework does not provide for a sufficiently rigorous and transparent appointment procedure of thee officials. It is common cause that this has had disastrous consequences for the NPA as an institution.

22. The Constitution and the NPA Act provide that the NDPP is appointed by the President,[16] who may also, after consultation with the NDPP and Minster of Justice, appoint up to four Deputy National Directors of Public Prosecution (DNDPP).[17] The President similarly appoints the Provincial Directors of Public Prosecutions (PDPP).[18] The Minister, after consultation with the NDDP, appoints the deputy PDPP.[19] In addition, the Minister 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'.[20]

23. It is evident, then, that the entire top echelon of the NPA (at least 14 positions) may be 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 and integrity. There is no requirement for a process calling for nominations and an assessment panel as is the case with the Judicial Services Commission in appointing judges, or Parliament in appointing the Public Protector.

[16] S 10 NPA Act.
[17] S 11(1) NPA Act.
[18] S 13(1) NPA Act.
[19] S 15(1)(a) NPA Act.
[20] S 15 (1)(c) NPA Act.

24. The requirements for the NDPP are rather slim when compared to those of the Public Protector and Auditor General of South Africa (AGSA). In the case of the NDPP 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'.[21] 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 practice 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.[22] 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, a structure identifying the suitable candidate would benefit from the advice of experts from the legal community and civil society.[23] The current relatively low threshold is particularly worrisome given the powerful position of the NDPP.
25. The process recently adopted in the appointment of Adv. Batohi as NDPP was not mandated in law, but discretionary. It was nonetheless a constructive step towards greater transparency of the appointment process. **The Zondo Commission should recommend that the legislation be amended to provide for improved eligibility requirements for senior staff in the NPA and a consultation process involving the Judicial Services Commission.**
26. The requirements to become a prosecutor appear to be limited to an LLB degree and a 12-month internship. Consequently, aspirant prosecutors may not have completed any course of professional ethics usually required for Attorneys' or Advocates' admission. **The Zondo Commission should recommend that an ethics test such as that required for Attorney's or Advocates' admission form a requirement** before an internship is embarked upon.

[21] S 9(1) National Prosecuting Authority Act 32 of 1998.

[22] 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 with the Council, if the attorney complies with paragraph (a)(iii).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'.

[23] *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.

5. Transparent reporting

27. Reliable and disaggregated data on the criminal justice system, especially covering the performance of the NPA, is by and large absent. This make it extremely difficult to pinpoint problems and make policy recommendations. Current reporting in the Annual Report, especially on performance, appears designed to obfuscate. The NPA no longer reports on the number of new cases enrolled, which is necessary for calculating a number of measures, such as the withdrawal rate. The NPA does not report on the outcomes of decision dockets received (prosecution instituted, prosecution declined, further investigation.) It also no longer reports on the number of outstanding cases nor on measures indicating case cycle times (percent of cases older than 6 months or 12 months in District, Regional and High Courts). It has never reported on duration of cases. The NPA's focus on conviction rate – expressed as a percent of cases finalised with a verdict, rather than as a percent of cases reported or cases enrolled – is highly misleading and is currently 96 per cent, which strongly suggests the NPA is only prosecuting cases that are easy to win. Indeed, the NPA has never reported on the number and percent of cases resolved by way of guilty plea (it only reports on the number of plea bargains). The reporting on informal mediations is limited to the number of cases and does not indicate the crime types. The NPA does not disaggregate any of its data geographically.
28. Part of the problem with criminal justice system performance is that different departments measure themselves by their own performance indicators as opposed to measuring the criminal justice system outcomes that would contribute to public safety. In this regard we propose the establishment of a **Criminal Justice System Review Board** that would assess overall system performance.
29. **The Zondo Commission should recommend that the NPA reporting requirements be set by an outside agency in consultation with NPA**, not by the NPA alone, as is currently the case. The proposed Criminal Justice System Review Board can fulfil this function.
30. The Constitution affords the provinces some limited powers in monitoring the performance of the police,[24] but a similar provision does not exist in respect of the NPA and 'justice' is not listed as a concurrent national and provincial legislative competence in Schedule 4 of the Constitution. The NPA Act is similarly void of any reference to the provinces or any specific

[24] S 206(3) Constitution.

duties that a Deputy Director may have towards the provincial government in the province to which he or she is appointed to.[25]

31. Not all provinces are the same and it would then be a logical expectation that the NPA at provincial level should be able to accommodate such differences through productive relations with the provincial governments and legislatures. The Commission should therefore recommend that the **NPA per province reports to the provincial legislature** on performance and other relevant matters.
32. From 2002/3 to date there has been a **steady decline in the number of convictions** and part of the reason for this is the increase in informal mediation. Informal mediation is a process by which a prosecutor negotiates with a complainant and the accused, leading to the withdrawal of the case. The court is not involved in the negotiations and the accused does not receive a criminal record, and nor is there a central database of informal mediations to establish if a person has previously benefitted from informal mediation.[26]
33. Informal mediation, as reported on in the NPA Annual Reports, has increased exponentially. While formal mediations such as those in terms of the Child Justice Act have remained at around 45 000 per year, total 'alternative dispute resolution mechanisms' (ADRM) (formal and informal mediation) have, according to the NPA, increased by 1144% from 14,808 in 2002/3 to 184,314 in 2014/15, decreasing to 159 654 in 2017/18.
34. No data is available in the NPA Annual Reports on the nature of cases informally mediated, but they would necessarily exclude cases which do not have a direct complainant (such as drug offences and firearm offences). Seen in the light of the trends in relation to convictions, they probably include all crime types except those which have demonstrated an increase in convictions, such as sexual offences.
35. The Zondo Commission should recommend that there be better record-keeping and **accounting for opaque processes such as decision dockets and informal mediations**. Reporting should permit disaggregation by geographic regions to permit the detection of inconsistent application of the law or inconsistent performance.
36. **The Zondo Commission should recommend that there be a central database of participants in informal mediations** as this is crucial to prevent serial offenders escaping the law, abuse of the process, and corruption.

[25] S 24 NPA Act.
[26] ACJR (2018) *NPA Performance*, ACJR Factsheet Nr 8.

6. Improved prosecution policy

37. Current prosecution policy and directives appear designed to discourage prosecution and to discourage prosecution of state officials in particular, as additional layers of approval are required when a state official is to be prosecuted.[27] The UN Guidelines on the Role of Prosecutors are alive to this problem inasmuch as 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.[28] The Venice Commission acknowledges that not bringing a prosecution which ought to be brought is probably a more common problem than incorrectly brought prosecutions and, furthermore, that it is more difficult to counter due to lack of judicial control.[29] The Supreme Court of Appeal (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.[30]
38. The Zondo Commission should recommend that policy be changed such that whenever a docket is received implicating a state official or whenever an agency or commission recommends prosecution of a state official, that **the decision to prosecute or not to prosecute be subject to the same requirements and that there is no special treatment**, which should include detailed reasons for the decision. "No prima facie case" is not a sufficiently detailed reason for failing to prosecute. The reason for the lack of prima facie case i.e. in what respects the docket is lacking, should be clearly articulated.
39. The current practice of the NPA passively waiting for dockets from the SAPS before prosecuting, while the SAPS only opens a docket when a charge is laid, contributes to impunity. **There is nothing preventing the NPA from *mero motu* instructing an investigating agency such as the SAPS to investigate matters relating to potential criminal offences** by state officials which have been brought into the public domain. The Zondo Commission

[27] NPA (2014) Prosecution Policy Directives, Part 8.2-4.
[28] '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.
[29] *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.
[30] See also *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

should recommend that a robust policy in relation to instructions to investigate be developed.

7. Improved morale and conditions

40. The NPA is currently suffering from a large number of vacancies which exacerbate working conditions and negatively affect morale. The Zondo Commission should recommend that the **NPA contract in legal practitioners and investigators** in good standing from other institutions to assist the NPA with preparing cases.

8. Zondo Commission and prosecutions

41. It is likely that the NPA Investigating Directorate specifically established to deal with prosecutions arising out of the Zondo Commission will have a great deal of potential prosecutions to evaluate. It is further likely that the Investigating Directorate's decisions on which cases to prioritise may be viewed as biased, further undermining trust in the NPA. Consequently, the Zondo Commission should **assist the NPA by clearly listing potential prosecutions**.
42. Whistle-blower protection should form part of that decision-making as set out in the Protected Disclosure Act of 2000. Plea-bargains should be considered where whistle-blowers have themselves been implicated, for those who have co-operated fully with the Commission and who co-operate by testifying in court. It is consequently **recommended that the Zondo Commission clearly list who it considers as having co-operated with the Zondo Commission**. The Zondo Commission should further recommend the future prioritisation for Witness Protection for whistle-blowers.

Contact person:

Prof Lukas M. Muntingh
lmuntingh@uwc.ac.za
021-959 2950