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FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

Recommendations for reform of the National Prosecuting Authority

by

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Executive summary

The report builds on earlier work by ACJR on the National Prosecuting Authority (NPA). The aim with this report is to distil a set of key areas for reform based on lessons learnt, but also likely to have a multiplier-benefit impact. The report aims for a balance between benefit and achievability.

Appointment of the NDPP

The **appointment of the National Director of Public Prosecutions (NDPP)** (and other senior position in the NPA) must be clearly legislated, requiring an open, transparent process that relies on evidence, is based on merit, is protected from political interference, and assesses candidates objectively against the criteria set in section 195(1) of the Constitution. This requires a thorough and factual enquiry by the structure which has been mandated to identify suitable candidates.

Dismissal of the NDPP

The process for the **removal of the National Director of Public Prosecutions (NDPP)** as well as the bar for removal is too low when compared with other similar positions (e.g. Public Protector and Auditor General). To bring consistency it is proposed that the Constitution is amended at section 179, providing for a removal procedure along the lines of what has now been developed in respect of the removal of the President and functionaries of Chapter 9 institutions.

Transparency and inclusivity

The NPA needs to be more transparent and that means, amongst others, that the **Prosecution Policy Directives** should be a public document in the public domain, and developed through public consultation, inclusive of provincial governments and the police.

The decision not to prosecute

The approval from a senior prosecutor to prosecute should **apply both to decisions to prosecute and not to prosecute**, as well as decisions to refer a docket for further investigation, in all cases of serious crime and corruption, involving senior criminal justice system officials. Further, the NDPP should report to Parliament on all such decisions taken to prosecute or not to prosecute such officials.

Parliament should also give clear **guidance on substantive prosecution priorities** e.g. gender-based violence, drugs, corruption etc.

Referral to other agencies and performance

Parliament should require the NPA to report in detail on its decision on referrals for prosecution from state agencies, on a quarterly basis.

Parliament should set clear reporting requirements (substance and process) for the NPA on how it is working towards a safer South Africa and what it is doing to comply with prosecution priorities as identified by Parliament.

In all legislation which provides entities with powers in relation to particular statutory offences, Parliament should consider whether powers of prosecution under statutory right are appropriate.

Parliament should clarify that juristic persons with an interest in the matter may bring private prosecutions, where the NPA declines to prosecute.

Informal mediation

Parliament should enact legislation governing informal mediation covering the following:

- Independent mediation
- A searchable electronic mediation database of prior mediation
- Compulsory reporting to court of mediation as the reason for withdrawal
- The requirements for a valid mediation.

Parliament could also consider permitting compensation for all types of damages in respect of any conviction and removing the requirement for a criminal record in section 297 matters (*Conditional or unconditional postponement or suspension of sentence, and caution or reprimand*), and the creation of a separate section 297 database.

Structure

Parliament should require the NPA to explain the utility of its current arrangements and present the process to align boundaries in a way which maximises coordination and NPA resources.

General oversight

The NPA (the head of the National Prosecution Service (NPS)) should be required to submit quarterly reports to Parliament, on general performance and covering the matters listed above. Such reports should be available ahead of time and shared with the research community to allow debate.

The NPA's provincial-level Directors of Public Prosecution (DPP) should report to the National Council of Provinces (NCOP) Select Committee on their regional strategies as developed in conjunction with the SAPS Provincial Commissioners.

At provincial level, the NPA, represented by DPPs of the province, should participate in sessions whenever oversight is exerted over SAPS in terms of the provincial oversight mandate.

* * *

1. Introduction

Following inception in 1998 the National Prosecuting Authority (NPA) initially recorded improvements in its performance, and enjoyed the trust of 65 percent of South Africans in 2006.[1] However, since 2012 it has deteriorated on various measures, including perceptions of independence and accountability. This is reflected in a reduction in public trust to 55 percent,[2] and overall performance has deteriorated on range of measures, including numbers of prosecutions of serious crime and corruption.[3] This report seeks to clarify what underlies this deterioration and make concrete recommendations which are likely to result in improvements in trust in the NPA and its performance. The recommendations are, on the one hand, at a fairly high level, but are, on the other hand, also balanced with what should be achievable in the short to medium term. For example, legislating for informal mediation can be achieved in the short term, but aligning boundaries across different sectors in government is a medium to long term goal, and both are important.

This paper deals with appointments of senior members of the NPA; the removal process for the National Director of Public Prosecutions (NDPP); the Prosecution Policy Directives of the NDPP; referrals for prosecution from other agencies; informal mediation, including the issue of compensation of victims; the geographical structuring of the NPA; and improved oversight of the NPA through more rigorous reporting to Parliament. We regard these as priority areas for reform and acknowledge that more recommendations can be made, but we sought to strike a balance between priority and achievability.

2. Appointing the NDPP

From the history of the NPA since 1998 five key points concerning the appointment of the NDPP can be taken to inform proposals for reform. This has been described extensively in the literature and case law and is summarised below:

[1] Afrobarometer Survey 2006 measured 65 percent of South African trusting the NPA somewhat or a lot. See Chingwete A 'In South Africa, citizens' trust in president, political institutions drops sharply' Afrobarometer Dispatch No. 90 17 May 2016.
[2] In 2015, the Afrobarometer Survey measured 55 percent of South African trusting the NPA somewhat or a lot.
[3] Serious crime prosecutions have halved, so that between 2009 and 2017 drug crimes comprised half of all convictions, while other crimes dropped from almost 250 000 to around 150 000, according to SAPS Annual Reports. See ACJR Factsheet Performance of the NPA.

- There has been *perpetual instability* at the top of the and not one NDPP has served the full term of ten years. Since 1998, when the NPA came into being, there have been six permanently appointed NDPP's and three acting NDPPs.[4]
- 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.[5] This *centralisation and lack of transparency* pose significant risks for the NPA's independence and integrity.[6]
- The skills and experience *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'.[7] There is no requirement of specialist knowledge or numbers of years of experience.[8] In appointing the AGSA and the Public Protector specialist knowledge in the case of the AGSA, years of experience and specialist knowledge in the case of the Public Protector are set as explicit requirements in addition to being a fit and proper person.[9]
- Even if the legislation itself is not particularly helpful in guiding the President to appoint the correct person, the duty rests with the President to be as *thorough, rational and objective* as he or she could possibly be. In appointing the NDPP, the President:
    - must take all information into consideration,
    - the appointment process has to be rational, and

[4] Ngcuka hands in resignation, *News24*, 24 July 2004, https://www.news24.com/SouthAfrica/News/Ngcuka-hands-in-resignation-20040724 ; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018); 'Shaun Abrahams tells Zuma why he is fit to remain in his post as NDPP' *M&G*, 28 Nov 2016, http://mg.co.za/article/2016-11-28-shaun-abrahams-tells-zuma-why-he-should-keep-his-job ; Silas Ramaite appointed as acting NPA head, *News24*, 14 August 2018, https://www.news24.com/SouthAfrica/News/breaking-silas-ramaite-appointed-as-acting-npa-head-20180814 ; Adv Smalia Batohi, NPA website, https://www.npa.gov.za/content/adv-shamila-batohi

[5] Ss 11(1), 13(1), 15(1)(a and c) NPA Act.

[6] An important precedent was set with the appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public. 'High court orders NDPP interviews open to media *Mail & Guardian*, 13 November 2018, https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media/

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

[8] *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.

[9] S 193(2-3) Constitution; s 1A(3) Public Protector Act 23 of 1994.

- the President cannot cherry-pick the information on which he or she bases the decision to make an appointment.[10]

- The requirement that the NDPP be a *fit and proper person* is relevant in both the appointment and dismissal of the NDPP. [11] The Supreme Court of Appeal (SCA) placed the issue of fit and proper under scrutiny when it considered the appointment of Menzi Simelane as NDPP.[12] The Court stated 'Consistent honesty is either present in one's history or not, as are conscientiousness and experience.' The Court added that 'conscientious' is defined as 'wishing to do what is right and relating to a person's conscience'.[13] On this point the Court concluded that there is no doubt that the appointment of the NDPP is not to be left to the 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'.[14] When the Simelane-case reached the Constitutional Court, 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.[15] 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. In summary, the SCA concluded that:

[10] *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). *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008.
[11] S 9(1)(b) NPA Act.S12(6)(a) NPA Act. *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 14 and 18.
[12] *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). The judgment lists several synonyms and antonyms for integrity to support the Court's interpretation. 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'. *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.
[13] *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.
[14] *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.
[15] *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.

- Section 9(1)(b) of the National Prosecuting Authority Act does not use the expression "in the President's view" or some other similar expression but requires an objective assessment.
- The requirement of being fit and proper is couched in imperative terms, stating that the appointee "must" be a fit and proper person.
- Qualities like "integrity" can be objectively assessed and that such an assessment of a person's personal and professional life ought to reveal whether he or she has integrity.[16]

The Constitution sets nine values and principles for the public administration[17] and for the purposes of appointing an NDPP or other senior position in the NPA, guidance must be taken from these and they are consequently described below and questions presented to guide the assessment of candidates. The emphasis is placed here on assessing the suitability of candidates to be appointed as NDPP and not on what structural arrangement should or could exist to make such a decision, or at least make a recommendation to the President, or the body responsible for the appointment of the NDPP. We argue that regardless of who is tasked with making the appointment, the requirements raised in section 195(1) of the Constitution must be thoroughly and objectively applied when assessing candidates for the position of NDPP (and other senior positions in the NPA).

2.1. Professionalism, 'fit and proper' and ethics

The first requirement is then that a high standard of *professional ethics* must be promoted and maintained. The fundamental outcome being sought is that the NDPP must act without fear, favour or prejudice.[18] Professionalism and ethics are thus central to the position of the NDPP and the organisation itself. Professionalism is highly reliant on expertise (knowledge) and self-regulation, and less dependent

[16] *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.
[17] Section 195(1) (a) A high standard of professional ethics must be promoted and maintained. (b) Efficient, economic and effective use of resources must be promoted. (c) Public administration must be development-oriented. (d) Services must be provided impartially, fairly, equitably and without bias. (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making. (f) Public administration must be accountable. (g) Transparency must be fostered by providing the public with timely, accessible and accurate information. (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated. (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
[18] S 179(4) Constitution.

on compliance management. It is reasonable to have high expectations of expertise (knowledge) and a history of behaviour that is untarnished by unethical behaviour or behaviour lacking integrity.

It has been noted that ethics are essentially two things, the first being 'well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues.'[19] This would refer to conduct that must be refrained from (e.g. stealing, murder and fraud) as well as the virtues of honesty, compassion and loyalty. Furthermore, ethical standards also refer to standards relating to rights, such as the right to life, the right to freedom from torture and the right to privacy. Secondly, 'ethics refers to the study and development of one's ethical standards.'[20] It is because 'feelings, laws, and social norms can deviate from what is ethical'[21] that it is required to constantly reflect on one's standards to verify that they are reasonable and well founded. Following from this 'ethics also means, then, the continuous effort of studying our own moral beliefs and our moral conduct, and striving to ensure that we, and the institutions we help to shape, live up to standards that are reasonable and solidly-based.'[22]

In the public service a high standard of professional ethics would then mean that officials need to be firstly aware and comply with a known and accepted standard of ethical behaviour in service of the public and, furthermore, continuously assess their behaviour as well as the standards they are measured against to ensure that they meet a high standard and that the standard itself is relevant, accurate and sets a high bar. With reference to the appointment of the NDPP, it would mean that the process adheres to clear standards of what proper and ethical conduct is, and also that the people involved in appointment processes continuously reflect on their own decision-making and the results thereof.

Against this background, one can formulate some questions or criteria to guide the appointment of the NDPP and other senior people in the NPA with reference to a high standard of professional ethics.

- *The appointment criteria are clear in specifying honesty, integrity and expertise as key considerations for senior positions in the NPA.*

[19] Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010) *What is Ethics?* https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/what-is-ethics/
[20] Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).
[21] Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).
[22] Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).

In late 2019 a number of senior positions in the NPA (Deputy Director and Chief Director) were advertised and thus provide a good source of information to review advertised criteria selection.[23] Importantly, none of the advertisement set 'honesty and integrity' as requirements, but they were more specific with reference to qualifications and years of experience.

- *The appointment process is reviewed on a regular basis to assess if it has promoted a high standard of professional ethics.*

It should be recalled that the appointment process of the current NDPP was taken on judicial review[24] and from the available evidence there is nothing to indicate that a review is undertaken regularly as it is not required by law. A review of appointments and their processes since 1998 would clearly have shown that there are substantial problems with the process and the lack of transparency and concentration of power in the hands of the President were at least the two major issues.

- *Thorough background checks are performed to establish if candidates comply with a high standard of professional ethics.*

Noting the requirements set out in the preceding regarding professionalism, ethics and integrity it then follows that if there is any evidence indicating a possible risk, that this needs to be investigated properly. Importantly, such a background check must not be restricted to an applicant's professional career, but include all aspects of the person's life. There should also be clear guidance on what constitutes issues of concern, if not disqualification.

- *The appointment process considers all information when selecting candidates for shortlisting and invites submissions.*

That all information is relevant, was confirmed by the court in *Democratic Alliance v President of the Republic of South Africa and others*. It is definitely not necessary that such information must be the result of court proceedings, as was found with reference to the Ginwala Inquiry, and it seems rather a case of if there are credible claims, they are at least worthy of investigation. Moreover, the selection process must open itself to a variety of sources of information and enable public participation[25] through the making of submissions on specific candidates as was done, for example, in 2019 with the appointment of the Deputy Public Protector.[26]

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[23] On file with author.
[24] Court orders that media be allowed to attend NDPP interviews, *IOL*, 13 November 2019, https://www.iol.co.za/news/politics/court-orders-that-media-be-allowed-to-attend-ndpp-interviews-18102135
[25] Section 59 Constitution; *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
[26] PMG Call for comment, Portfolio Committee on Justice and Correctional Services, Suitability of candidates for Deputy Public Protector, Call for comments opened 26 September 2019, https://pmg.org.za/call-for-comment/861/

- *Has the candidate ever been reported to a Chapter 9 institution, a professional body or employer for criminal, unethical and/or unprofessional behaviour? If so, what was the finding?*

The question is specific and flows from the preceding lines of enquiry. That a person has been reported for some behaviour to an oversight structure does not necessarily mean that the person did something wrong, nor does it mean they did nothing wrong if acquitted. Posing the question rather ensures that the issue is canvassed with the applicant who is then afforded to explain the context and results. It would then be for the interview panel to weigh up the evidence in light of the high-standard-of-professional-ethics requirement and this can be objectively assessed as per the SCA and Constitutional Court.

- *Candidates not meeting the requirements of a high standard of professional ethics are not appointed*.

Even though this may be self-evident, the history of the NPA and specifically the NDPP have shown that candidates not meeting high standards of professional ethics were appointed and that this has had extremely adverse consequences for the level of public trust in the NPA as institution and upholder of the rule of law. Removing the NDPP is not easy and this is for good reason, but this makes it all the more important to ensure that the best possible candidate is indeed appointed.

- *Candidates should have a demonstrable level of knowledge of the criminal justice system and related sectors with preferably other specialist knowledge directly relevant to and needed by the NPA.*

Given the powers of the NDPP (and his or her senior team), it follows that they must be true experts in their fields and recognised as such. In contemplating reform of the current process for appointing the NDPP, a number of guidelines can be taken from the appointment process of the Public Protector and the AGSA. First, in both instances the positions are advertised and the appointment made by the President on recommendation of the National Assembly.[27] Second, candidates should reflect the race and gender composition of the population.[28] Third, in addition to a candidate being a fit and proper person, it should be a requirement that he or she has 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.'[29]

[27] S 193(4) Constitution.
[28] S 193(2) Constitution.
[29] S 193(3) Constitution.

- *Did the candidate proactively disclose any matters that might raise questions about his or her professionalism and ethics?*

Despite the requirements set out in a call for applications, there should be an expectation that candidates should proactively disclose any issues that he or she may believe has bearing on their ethics and professionalism. This shifts the onus to the applicant to demonstrate his or her standards of high professional and ethical behaviour, rather than placing the responsibility on the selection body to find evidence or claims of less-than-ethical-behaviour.

2.2. Efficient and effective use of resources must be promoted

Effectiveness is the degree to which something is successful in producing a desired result. Effectiveness refers only to whether the programme or department has achieved the desired objective, without reference to the costs or inputs. A programme may be effective, but not efficient or cost effective. For example, it may be an effective measure in preventing crime to provide all South Africans with a personal bodyguard, but this will not necessarily be an efficient or cost-effective measure, as it would entail an unreasonable cost. Cost-effectiveness is the extent to which a programme has "achieved results at a lower cost compared with alternatives … Shortcomings in cost-effectiveness occur when the programme is not the least-cost alternative or approach to achieving the same or similar outputs and outcomes."[30] With regard to overall public finances the overall aim is that a department's (or other public entity's) budget is utilised in line with a strategic plan.[31] The budget, as approved by Parliament, is therefore used to fund pre-determined activities. In order to achieve maximum value for money, it is important that the budget is utilised in the correct and approved manner.

When candidates are considered for the position of NDPP, care should be taken to ensure that they are able to and have experience in managing a similarly sized budget and organisation of comparable complexity. As the situation currently stands, it is the Director General of Justice that is responsible for the accounting of expenditure in the NPA[32] and even if this is an unsatisfactory situation,[33] it still means that the NDPP is responsible for overseeing the strategic utilisation of the budget.

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[30] *World Bank Sourcebook for Evaluating Global and Regional Partnership and Programs: Indicative Principles and Standards 2009*

[31] Section 39(1)(a) Public Finance Management Act (1 of 1999).

[32] Section 36(3) National Prosecuting Authority Act (32 of 1998).

[33] Paras 63-64 *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008 (Ginwala Enquiry).

Following from the preceding, a number of questions can then be asked to assess the suitability of candidates to utilise public finds in an efficient and effective manner.

- *Does the candidate have demonstrable experience in the efficient and effective use of a similarly sized and complex budget?*

The 2018/19 budget of the NPA was some R3.8 billion[34] and the institution was allocated 5 550 posts of which some 4 400 were filled in 2018/19.[35] The NPA can thus be considered in the same league as a large private company and the CEO of such a company must therefore have the skills and experience to ensure that the budget is used to the best possible benefit of the shareholders, in this case the public. In appointing a new CEO, the Board of Directors of a private company will scrutinise the experience and financial stewardship of applicants since a mistake will cost the company dearly. The same must apply to appointing the NDPP.

- *Has the candidate ever been directly associated with a finding of unauthorised, wasteful and/or fruitless expenditure in a public or private entity?*

According to the AGSA 'Fruitless and wasteful expenditure refers to expenditure that was made in vain and could have been avoided had reasonable care been taken. Such expenditure includes interest, the payment of inflated prices, and the cost of litigation that could have been avoided.'[36] That a candidate is associated with such a finding must always be seen in context and not necessarily grounds for exclusion. The principle to revert to is that all information must be taken into account.

- *Has the candidate ever been directly associated with audit findings other than a 'clean audit outcome' in a public or private entity?*

Following from the preceding, if a candidate has occupied sufficiently senior position in the public or private sectors, it is likely that their performance may have influenced audit results. The AGSA discerns five types of findings in respect of audits.[37] The question therefore relates to the applicant's influence on audit outcomes as a manager in previous positions.

[34] NPA (2019) *Annual Report 2018/19*, p. 106.
[35] NPA (2019) *Annual Report 2018/19*, p. 109.
[36] AGSA (2017) *General report on the national and provincial audit outcomes for 2016-17*, p. 108.
[37] (1) Clean audit outcome: The financial statements are free from material misstatements (in other words, a financially unqualified audit opinion) and there are no material findings on reporting on performance objectives or non-compliance with legislation. (2) Financially unqualified audit opinion: The financial statements contain no material misstatements. Unless we (AGSA) express a clean audit outcome, findings have been raised on either reporting on predetermined objectives or non-compliance with legislation, or both these aspects. (3) Qualified audit opinion: The financial statements contain material misstatements in specific amounts, or there is insufficient evidence for us to conclude that specific amounts included in the financial statements are not materially misstated. (4) Adverse audit opinion: The financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial

Again, it is a case of collecting the evidence in order to make an informed decision. An adverse finding may have occurred long ago or was historical and was adequately addressed by the applicant.

- *Has the candidate ever been declared a delinquent director or placed under probation in terms of the Companies Act?*

The Companies Act provide that a person may be declared a delinquent director or placed under probation as a director.[38] Such a declaration or placement under probation is made by a court upon application and if the declaration is made or the person placed under probation, it is important information in respect of the duties and integrity of the NDPP.

2.3. Public administration must be development-oriented

Although all rights are in one way or the other inter-connected, the Bill of Rights enumerates a number of rights related to individual and collective development: freedom of trade, occupation and profession; environment; property; housing; health care, food water and social security; children and education. The fact that socio-economic rights are justiciable gives further weight to the development obligation in the Constitution.[39] At the international level the 17 Sustainable Development Goals (SDGs) and the preceding Millennium Development Goals (MDGs) provide further guidance on a development-oriented approach.[40]

The NPA must understand and fulfil its role in a developmental state in an accountable and transparent manner. Vision 2030 requires a capable and developmental state: capable in that it has the capacity to formulate and implement policies that serve the national interest; developmental in that those policies focus on overcoming the root causes of poverty and inequality, and building the state's capacity to fulfil this role.[41] Moreover, it is a requirement of the Constitution to address the imbalances of the past and improve the quality of life of all.[42] Given the history of the prosecution service and how it was used to uphold apartheid laws, but also in more recent times the role of the prosecution service in a country

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statements. (5) Disclaimer of audit opinion: The auditee provided insufficient evidence in the form of documentation on which to base an audit opinion. The lack of sufficient evidence is not confined to specific amounts or represents a substantial portion of the information contained in the financial statements. (AGSA website, Audit terminology, https://www.agsa.co.za/AuditInformation/AuditTerminology.aspx)

[38] Section 162 Companies Act (71 of 2008).

[39] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 77-78.

[40] United Nations, SDGs, https://www.un.org/development/desa/disabilities/envision2030.html

[41] National Planning Commission (2012) *National Development Plan 2030: Our Future-make it work*, Pretoria, p. 409

[42] Preamble, Constitution.

that is suffering from high crime rates and especially violent crimes, it becomes all the more important that the NDPP must lead a service that is truly working towards a safer South Africa and enjoys public trust in working towards that goal. The NPA also has a critical role to play in recouping losses due to corruption and the prosecution of such perpetrators. Three questions can therefore be posed, as listed below.

- *Do the selection criteria emphasise the role of the NPA in building a capable and developmental state?*

Assuming that the recruitment process is open and transparent, the selection criteria need to, apart from the technical criteria, also articulate that the NDPP, as the pinnacle of law enforcement must have a deep understanding of crime, accountability, transparency and the imperative to create a safer South Africa. This requires knowledge and experience of South African society and how crime and the failures to address it since 1994 has done enormous harm. It also requires that applicants must have well-informed views based on what works in turning the situation around.

- *Does the candidate have a clear understanding of the position and functions of the NPA in a capable and developmental state?*

In a sense one can talk of pro-poor law enforcement, or law enforcement that would ultimately ensure the most favourable outcomes for victims, offenders as well as marginalised and excluded groups in society. It is also about utilising state resources (i.e. law enforcement) to the maximum public benefit. It is not law enforcement for the sake of law enforcement (e.g. number of prosecutions), but rather the impact that prosecutions have on making society safer and building trust in the criminal justice system and preventing losses through corruption.

- *Does the candidate have demonstrable experience in entities supportive of building a capable and developmental state?*

Such a track record must be visible in the applicant's history. It needs to speak to the realities of the developmental state and how policies were formulated and implemented to improve the lives of people.

2.4. Services must be provided impartially, fairly, equitably and without bias

Impartiality, fairness, equitability and absence of bias all speak to objectivity and objectivity requires that a decision-maker is able to express him or herself or deal with perceived facts or conditions, without distortion by personal feelings, prejudices, or interpretations, and not use its powers to favour individuals or groups. This requirement lies at the heart of the integrity of the prosecution service, namely, to act without fear, favour or prejudice.

- *Is there any historical evidence that the candidate has acted in a manner that would not be fair, equitable and without bias? Evidence constitutes preferably a clear finding, but it is at least more than a mere allegation*.

In the appointment of the NDPP the question then becomes whether there is a history of fair and equal treatment, or is the applicant's history tainted with allegations or facts of unfair discrimination? Whether or not there is a history of fair and equal treatment is something that can thus be tested objectively.

- *The selection process must be fair, impartial and without bias, based on objective criteria.*

In the appointment of the NDPP, it is not only the history of the applicant that is important (i.e. does it reflect a track record of being objective, fair and impartial), but also the structure and processes assessing the applicants (e.g. the committee that interviewed applicants in 2018 for the position of NDPP), and the minister or the President that makes the appointment.

2.5. People's needs must be responded to, and public encouraged to participate in policy-making

The appointment process for the NDPP must be transparent and the views of the public taken into account in a meaningful way. Moreover, the process of appointment is clear and documented. There must be opportunities for stakeholder input, and this is a matter of public record. Transparency is a constitutional requirement and a transparent appointment process will build trust in NPA (and NDPP) and thus its legitimacy. At minimum this means that those affected by decisions of the interviewing panel (or a similar structure) as well as stakeholders with an interest or mandate in respect of the NPA, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making.

To test this, the following questions can be posed.

- *Is the appointment process a known and documented process with clear timelines?*

Given the lack of transparency in previous NDPP appointments (and the mistakes made) there is a legitimate desire on the part of civil society to see a transparent process. The process of decision-making is as important as the substance and it must be clear that the process is of itself fair and does not favour or work to the detriment of any candidate of stakeholder. The position of NDPP is too important to besmirch it with any insinuation of manipulation, let alone foul play.

- *The public is given sufficient opportunity to make inputs.*

Case law provides guidance on public participation and that this must be meaningful and in *Doctors for Life*, the courts notes that a reasonable opportunity must be given and even if it concerned the work of the legislature, the principle remains applicable:

> The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.[43]

The SCA was even more descriptive of public involvement in the work of National Assembly:

> 'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.[44]

Public involvement is not an invincible or infallible measure against poor appointments, but it does make the process more transparent and consequently reduces the risk for manifestly poor selections.

- *Can the candidate demonstrate how he/she would reasonably incorporate transparency and public engagement into the NPA's operations?*

[43] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 111-3.
[44] *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA) para 22

The work of the NDPP naturally involves confidential and sensitive matters, an issue that came to the fore in the eventual dismissal of Vusi Pikoli as NDPP. But not all matters concerning the work of the criminal justice system are secret or confidential. There is little reason why the Prosecution Policy Directives should be regarded as confidential, as is the case currently. There are also other areas of the NPA's operations in desperate need of sunlight.

2.6. Public administration must be accountable

There is an inherent tension in the position of the NDPP (and the NPA as institution) between independence on the one hand and accountability on the other hand. The reasons why a person is prosecuted come, as a matter of course, under judicial review through a trial process or, in rare instances, a plea and sentence agreement. The opaquer aspect is when the prosecution decides not to prosecute and this can take the form of a withdrawal or a *nolle prosecui*, or, increasingly, through mediation. In these instances, there is no mechanism in law compelling the prosecution to explain the decision not to prosecute and this creates an obvious risk for abuse of prosecutorial discretion. As the law stands now, much reliance has to be placed on the individual integrity of the NDPP to account for decisions made

Depending on the particular procedure and structures involved in selecting an NDPP (and other senior positions) there are various possibilities, but for the sake of argument we call it a "Shortlisting Committee" that would submit a shortlist of preferred candidates to the President for appointment. Such a shortlisting committee must be able to explain its decisions in a manner that is rational when called to do so and must similarly be able to take responsibility and make amends for mistakes. This means that it is able to understand the mistake that was made and implement corrective measures for future recruitment processes.

- *Does the candidate have a demonstrable history of being accountable?*

Applicants need to have a history of being accountable, reflecting compliance with the principles of transparency (see below) answerability and controllability. Furthermore, since it is the President that makes the appointment, it is ultimately the President that must be accountable for the appointment as well as the appointment process.

- *Is the Shortlisting Committee willing and able to explain its decisions against a set of predetermined objective standards?*

Such predetermined objectives have already been set out in the preceding as they relate to professionalism, ethics, knowledge and so forth.

- *Have any appointments been taken on review (e.g. judicial or administrative) and set aside as a result of the decisions or processes of the Shortlisting Committee?*

The question seeks to interrogate the veracity of the selection process and if there are systemic or occasional mistakes or weak points.

2.7. Transparency must be fostered by providing the public with timely, accessible and accurate information

The appointment process for the NDPP must be transparent and the views of the public must be taken into account in a meaningful way. As already noted, the process of appointment is clear and documented, and there are opportunities for stakeholder input and this is a matter of public record. Transparency is a constitutional requirement and a transparent appointment process will build trust in the NPA and its legitimacy. It was already noted that this means decisions of the interviewing panel (or a similar structure) as well as stakeholders with an interest or mandate in respect of the NPA, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials and office bearers in the NPA have a duty to act visibly, predictably and understandably. The following standards can thus be set as guidelines.

- T*he public is kept informed of vacancies, appointments and dismissals, as well as the reasons thereto.*
- *The public is kept informed of the processes concerning the filling of vacancies.*
- *There are clear requirements for the vetting process, and this is public.*
- *The public is kept informed of the processes concerning the dismissal of senior members.*
- *The public has access to the CVs of long listed and short-listed candidates.*
- *There is sufficient time to review candidate CVs.*
- *Recommendations for appointment are clearly motivated and based on rational grounds.*
- *Following an appointment, there must be a published record on how the public was consulted and involved in the appointment*.

2.8. Good human-resource management and career-development practices, to maximise human potential, must be cultivated

The NPA must show results through competent performance and excellence through the effective and efficient management of staff in its recruitment and skills development practices. Human resource management, HRM, is the department of a business organization that looks after the hiring, management and firing of staff. HRM focuses on the function of people within the business, ensuring best work practices are in place at all times. This is a constitutional requirement with reference to the transformative goal of the Constitution. Investing in human potential stands central to the National Development Plan (NDP).

- *Has the candidate ever been accused of unfair labour practice, and what was the result of the accusation?*

- *Does the candidate have a track record in developing people's potential?*

Regardless of the seniority of the NDPP's position, it remains the case that he or she is the head of the NPA and must this be accountable for all aspects of operations, including HRM. Moreover, demonstrating a good track record in HRM in the South African context (and elsewhere) will only add to internal trust in the head of the institution.

2.9. Public administration must be broadly representative of the South African people

The senior management of the NPA and its staff must be representative of the people as required by the Constitution. This refers to race, gender and other constitutionally defined (see unfair discrimination) variables of the public. This is a constitutional requirement and obligation of all public sector institutions and large private institutions.

- *Do calls for applications and appointments to the position of NDPP reflect the representivity requirement?*
- *Does the composition of the Shortlisting Committee reflect the representivity requirement?*
- *Is there a clear plan in place to ensure representivity in the NPA and the Shortlisting Committee?*

- *Do candidates have a track record of promoting transformation and/or show an understanding of the issues of representivity and transformation?*

2.10. Recommendations

The appointment of the NDPP (and other senior position in the NPA) must be clearly legislated requiring an open, transparent process that relies on evidence, is based on merit and protected from political interference and assesses candidates objectively against the criteria set in section 195(1) of the Constitution.

3. Removing the NDPP

The current procedure for the dismissal of the NDPP has run into two major critiques – the one from Parliament itself and the other form the Constitutional Court. It is not necessary to describe the existing procedure here as it has been done elsewhere.[45] Firstly, it is important to note that the parliamentary Ad Hoc Committee that dealt with the suspension and dismissal of Advocate Pikoli as NDPP observed 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.'[46] It is common cause that this review has as yet not happened. The initiative to suspend with the intention to dismiss the NDPP is one coming from the President and not Parliament or any other authority and can create the impression of the legislature rubber-stamping the President's intentions. In the case of Pikoli there was more than enough evidence that Parliament was being used to remove Pikoli.[47] This consequently raises questions about the role of Parliament and its ability to act objectively, especially when one party dominates both houses.

Secondly, in August 2018 the Constitutional Court declared two sub-sections of the NPA Act dealing with the appointment and dismissal of the NDPP unconstitutional.[48] The first provided for the extension by

[45] Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.
[46] *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.
[47] Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.
[48] S 12(4) and 12(6) *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

the President of the term of office of the NDPP or a Deputy NDPP which must normally come to an end at age 65 years.[49] It empowered the President to extend the term of office of the NDPP (or DNDPP) for a period of two years or shorter periods which in the aggregate do not exceed two years, provided that an NDPP's term of office shall not exceed 10 years. The Court found that this power to extend an NDPP's term of office undermines the independence of the office as it may influence the incumbent's behaviour and decision-making to curry favour with the President in order to remain in the position of NDPP. This affected the independence of the office of the NDPP and is thus unconstitutional. Section 12(6) of the NPA Act empowered the President to suspend indefinitely with or without pay the NDPP. The Court further noted that there is no guidance in law on the discretion to continue remuneration and its quantum.[50] The declaration of invalidity of section 12(6) was suspended for 18 months to enable Parliament to fix the problem.[51] At the time of writing (August 2020) the proposed amendment was before Parliament.

Third, as the situation currently stands, the NDPP can be removed by a simple majority vote of the National Assembly as provided for in the NPA Act.[52] Given the vast powers of the NDPP this seems rather odd compared to the Public Protector and AGSA for which a two thirds majority in the National Assembly is required to remove them from office for misconduct, incapacity or incompetence.[53]

Following from the preceding, it is then proposed that the decision and procedure to dismiss the NDPP should also be covered by a procedure similar to the procedures dealing with the removal of the President[54] and Chapter 9 office holders.[55] In both instances there is now provided for a factual enquiry of some sort, following from which a recommendation if put to the vote in the National Assembly for which a two thirds majority is required to remove the President, Public Protector, or Auditor-General as the case may be.

[49] S 12(4) National Prosecuting Authority Act.
[50] Para 45 This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself. *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).
[51] The court went a step further ruling that during this period the suspension of an NDPP or Deputy NDPP shall not exceed six months and a suspended NDPP or Deputy NDPP shall receive their full salary. The Court further stated that if Parliament does not fix the problem within the 18-month period (by February 2020), the interim relief will become final.
[52] S 12(6)(c) NPA Act.
[53] Ss 194(1) and (2)(a) Constitution.
[54] Section 89 Constitution.
[55] Section 194 Constitution.

Section 89 of the Constitution deals with the removal of the President from power and following litigation, Parliament has now adopted rules in this regard as instructed by the Constitutional Court.[56] The amended Rule 129A of the Rules of the National Assembly sets out the procedure.

Any member of the Assembly may bring a substantive motion[57] for a section 89 enquiry, provided that the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in the Constitution,[58] showing *prima facie* that the President:

- committed a serious violation of the Constitution or law;
- committed a serious misconduct; or
- suffers from an inability to perform the functions of office.

The motion must include all the supporting evidence and the charge must relate to an action or conduct performed by the President in person. The motion must also be consistent with the Constitution, the law and these rules.[59]

If the motion is compliant with the set requirements, the Speaker must appoint a panel consisting of 'three fit and proper, competent, experienced and respected South Africans, which may include a judge, and who collectively possess the necessary legal competence and experience.'[60] It is the task of this panel to make a recommendation to the Speaker, within 30 days, whether sufficient evidence exists to show that the President committed a serious violation of the Constitution or law; committed a serious misconduct; or suffers from an inability to perform the functions of office. Once the panel has concluded its work and reported to the Speaker, it must be tabled in the National Assembly for consideration. If the Assembly resolves that a Section 89(1) (removal of the President) enquiry be proceeded with, the matter must be referred to the Impeachment Committee established for that purpose. The Impeachment Committee is constituted by MPs in proportional representation and it is tasked with three things: establish the veracity of the charges; establish the seriousness of the charges, and report to the Assembly thereon.[61] If the Impeachment Committee's Report recommends the removal of the President, this must be put directly to the vote in the Assembly, requiring a two thirds majority to remove the President from office.[62]

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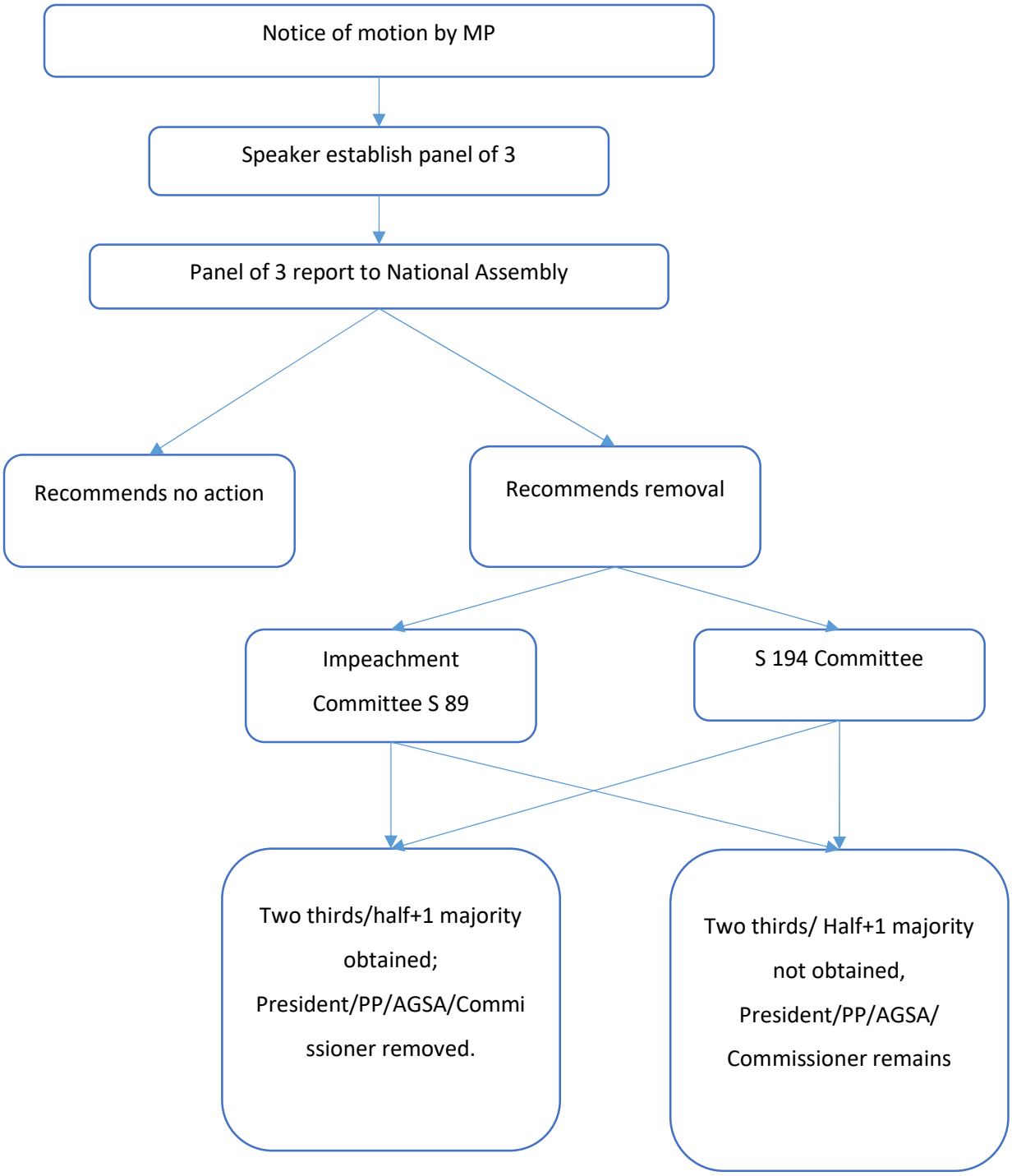
[56] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47.
[57] "motion" means - (a) a proposal made by a member in the form of a draft resolution that the Assembly do something, order something to be done or express an opinion concerning some matter; or (b) a proposal made by a member that the Assembly discuss a subject presented by the member for that purpose;(Rules of the National Assembly 2016).
[58] Section 89.
[59] Rule 129A Rules of the National Assembly 2016.
[60] Rule 129 E.
[61] Rule 129 M.
[62] Rule 129 O.

A near identical procedure has subsequently been adopted by Parliament with reference to Chapter 9 institution office bearers.[63] The procedure covers the Public Protector, SA Human Rights Commission, Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, Commission for Gender Equality Auditor-General and the Electoral Commission.[64] The differences being that the requisite majorities are different (two thirds for Public Protector and AGSA and simple majority for other Commissioners). The procedure for the removal of the President, AGSA, Public Protector and other Chapter 9 Commissioners, commencing with a motion tabled by an MP, a fact-finding mission (the panel of three as well as the Impeachment Committee or section 194 enquiry) and a two thirds majority or simple majority required, then seems like a reasonable procedure for the investigation and possible removal of the NDPP. Figure 1 below summarises the two procedures as set out with reference to the removal of the President and Chapter 9 institution office bearers.

[63] PMG Report on the meeting the National Assembly Rules Committee of 9 November 2019, *Proposals and recommendations from Subcommittee on Review of Assembly Rules (incl chapter 9 office-bearers)*, https://pmg.org.za/committee-meeting/29414/ Here's how Parliament might remove the Public Protector - step by step, *News24*, 27 November 2019, https://www.news24.com/news24/SouthAfrica/News/heres-how-parliament-might-remove-the-public-protector-step-by-step-20191127

[64] S 181(1) Constitution.



At present the Constitution does not provide for the removal of the NDPP, as this is regulated in the NPA Act and, as have been seen, is fraught with difficulties and in need of urgent repair.

3.1. Recommendation

It is proposed that the Constitution is amended at section 179 dealing with the NPA by providing for a removal procedure along the lines of what has now been developed in respect of the removal of the

President and functionaries of Chapter 9 institutions. This will bring consistency in the interpretation and application of constitutional principles and values as outlined in the Constitution.[65] A question that does arise, should this proposal be accepted, is if the substantial motion (as envisaged under the procedure for the President and Chapter 9 functionaries) can only be tabled by an MP or whether, in the case of the NDPP, such a motion (or similar communique) can be submitted to the Speaker by, for example, a judge or the President or a Premier etc, and that it be dealt with in the manner set out when submitted by an MP?

4. Prosecution Policy Directives

4.1 Serious crime and corruption by state officials

ACJR has noted in its work on torture, that serious human rights abuses fail to be prosecuted by the NPA and referring agencies (i.e. Independent Police Investigative Directorate - IPID) seldom receive feed-back on progress with the cases referred.[66] The dearth of prosecutions in relation to corruption by high-level state officials is also evident; despite the corruption uncovered by the Zondo Commission,[67] and cases referred by the Special Investigating Unit (SIU) to the NPA.[68] When the NPA fails to prosecute, especially in the light of solid evidence, it brings the entire accountability architecture of the state into disrepute because it simple means 'if you are senior enough, you can get away with it'. Thus, by implication it means the rule of law is attacked by the lack of fairness and objectivity.

Current prosecution policy directives set by the NDPP requires that prosecutors obtain approval from senior prosecutors for certain more serious prosecutions of certain categories of officials, primarily senior officials working in the criminal justice system, including law enforcement, prosecutors, magistrates and police.[69] Part 8 of the Prosecution Policy Directives which are determined by the NDPP, without public consultation, and with which prosecutors must comply, require a prosecutor to obtain

[65] S 195(1) Constitution.
[66] 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. Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.
[67] Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state GG 632 No 41436 of 9 February 2018.
[68] In October 2019, only 9 of 881 cases were prosecuted. See PMG minutes available at https://pmg.org.za/committee-meeting/29081/.
[69] Part 8, Prosecution Policy Directives NPA (2014 as amended).

authorisation only for the prosecution, and not the withdrawal, of cases against certain government officials, including senior members of SAPS and the prosecuting authority itself. [70]

This provision operates as an impediment to prosecution and makes it easier (less work) for prosecutors to decide not to prosecute rather than to decide to prosecute such officials. Only 760 complex

[70] In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions without the written authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases). This general rule is subject to the exceptions set out in paragraph 3 below.
2. The categories of persons in respect of whom written authorisation or instruction is required, are the following:
(a) Members of the South African Police Services ("SAPS").
(b) Members of the South African National Defence Force ("SANDF") where they assist in law enforcement activities.
(c) Members of Correctional Services.
(d) Municipal law enforcement officers (including traffic officers).
(e) Officials and employees of the Department of Justice and Constitutional Development.
(f) Prosecutors, magistrates and judges.
(g) Any person who is entitled to immunity in terms of the Diplomatic Immunities and Privileges Act, 37 of 2001, or foreign consuls-general.
No prior authorisation or instruction is required for the prosecution of persons in the SAPS, SANDF or Correctional Services below the rank of brigadier (in the SAPS – formerly director) or equivalent rank in respect of the following categories of offences:
(a) All traffic offences.
(b) All contraventions under the South African Police Service Act, 68 of 1995, or regulations promulgated in terms thereof.
(c) All assault (common).
(d) Malicious injury to property belonging to the State.
(e) Possession of cannabis (dagga) in contravention of section 4 of the Drugs and Drug Trafficking Act, 140 of 1992.
(f) Crimen injuria.
(g) Offences in terms of the Maintenance Act, 99 of 1998.
(h) Contraventions of the Firearms Control Act, 60 of 2000, other than those cases involving the—
(i) unlawful possession of a firearm or ammunition;
(ii) unlawful trading in firearms or ammunition;
(iii) unlawful manufacturing of firearms or ammunition;
(iv) unlawful import or export of firearms or ammunition; or
(v) performance of unlawful work contemplated in section 59 of the said Act.
(i) Cheque and credit card fraud, where the total amount involved does not exceed ten thousand Rand (R10 000).
(j) Theft, where the total value involved does not exceed ten thousand Rand (R10 000).
4. No prior instruction is required in respect of persons referred to in paragraphs 2(d) to (f) above for prosecutions in respect of speeding and stationary traffic offences.
5. The written authorisation of the DPP is not required for the arrest and first appearance in court of the persons mentioned in the categories under paragraph 2(a) to (f) above. In sensitive or high-profile matters, the DPP needs to be consulted and/ or informed.
6. Where any criminal charge involving violence or dishonesty is pending or a decision regarding prosecution is taken (including a decision not to prosecute), the prosecutor should forward a written notification thereof to—
(a) the Magistrates' Commission in respect of a magistrate;
(b) the Regional Head in respect of any official or employee of the Department of Justice and Constitutional Development;
(c) the National Director in respect of any official or employee of the NPA; and
(d) the relevant regulatory body where the suspect or accused person is a legal practitioner."

commercial crime investigations were carried out in 2018/19, primarily in relation to matters which were not high-profile in nature.[71] Only 210 government officials were convicted, of which only half were convictions emanating from outside the Specialised Commercial Crime Unit (SCCU).[72]

The provision creates a disincentive to prosecuting these officials: it makes it much easier to decide not to prosecute rather than to prosecute, as a prosecutor then need not expose her or his work to her or his superior. This operates to discourage prosecutions (in contrast to withdrawals) and its part of the reason for the low number of prosecutions for corruption and human rights abuses. To correct this, the provision should be amended so that both withdrawal and prosecution require the currently required approval and the NPA should report thoroughly to Parliament on these decisions.

4.2 Recommendations

The Prosecution Policy Directives should be a public document in the public domain, which should be developed through public consultation, which should include consultation with the provinces as well as the South African Police Service. The approval requirement should apply also to decisions not to prosecute, and decisions to refer to further a docket for investigation, in all cases of serious crime and corruption, involving the relevant officials. The original requirement was presumably put in place to prevent malicious prosecutions by junior prosecutors of more senior officials, and so that broader impact on the administration of justice can be managed, where senior officials are to be prosecuted. Clearly the danger also exists in the other direction i.e. that junior prosecutors may be unwilling to prosecute more senior officials. We recommend the following text changes to the policy (underlined bold text indicates inserted text):[73]

> In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not **make a decision to decline to prosecute nor refer for further investigation, nor** institute and proceed with prosecutions without the written authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases).

ACJR further recommends that Parliament requires the NDPP report to it, on all such decisions taken to prosecute or not to prosecute such officials. This will ensure that the NDPP put in place the relevant processes to track such information, which would include the suggested change alluded to above.

[71] NPA Annual Report 2018/19 pages 37-39.
[72] NPA Annual Report 2018/19 page 69.
[73] Part 8, Prosecution Policy Directives, National Prosecuting Authority.

Although it is for the NDPP to draft prosecution policy directives, Parliament should oversee them, suggests alterations, and monitor their implementation. It is accepted that the legislature can and should oversee strategic direction of the prosecution service (see *Venice Commission*)[74] and what we recommend should be built on that and support a more equitable balance between independence and accountability.

Parliament should also give clear guidance on substantive prosecution priorities e.g. gender-based violence, drugs, corruption etc.

5. Legislation and policy

5.1 Referrals from other agencies

Many specialised agencies, such as the Directorate for Priority Crime Investigation (DPCI or Hawks), SIU, Judicial Inspectorate for Correctional Services (JICS), IPID refer their investigations for prosecution to the NPA. There has been a failure by the NPA to either make a decision or to give feedback to the entity on cases concerned. It is not in the public interest when the NPA does not make a decision. Not making decisions when one is mandated to make decisions works against public interest and there are few better examples than the NPA not making decisions on 686 cases referred to it since 2013 by the SIU.[75] Similarly in 2016/17 IPID referred 1140 cases to the NPA and was awaiting feed-back on 97% of them.[76]

In relation to these, the NPA policy should provide for a decision (on whether to prosecute or not, or other feedback) to the agency within a defined time period, which should be benchmarked against current time periods, and adjusted regularly.

Where the recommendation from the agency is to prosecute, and the decision from the NPA is not to prosecute (rather than a referral for further investigation), then prosecutors should require prosecutors to issue detailed reasons and a *nolle prosequi* to allow for private prosecutions[77] by another party, which

[74] *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.
[75] NPA 'sitting on 686 cases', *City Press* 9 September 2018.
[76] IPID (2017) *Annual Report 2016/17*, pp. 59-60.
[77] In terms of both section 7(2)(a) (private interest) and section 8(2) (statutory right) of the Criminal Procedure Act 51 of 1977, a private prosecution may only proceed if the NDPP issues a *nolle prosequi* certificate or withdraws the right to prosecute.

include the agency itself. This latter provision should be legislated. Parliament could also consider legislating a *nolle prosequi* by default where there is a failure to respond after two years, unless clear cause has been shown not to apply the default.

The NPA should report thoroughly to Parliament on all cases it declines to prosecute which have been referred from other agencies, when the recommendation from the agency is to prosecute. Reasons should be given, which may not simply be of the nature of "no prima facie case". The reasons should detail exactly what evidence is missing on relation to what element of the offence, if the reason is insufficiency of evidence.

The decision not to prosecute may also be the result of a poor investigation, or related logistical practical issue, and these reasons needs to be provided to the referring agency to correct before a final decision is taken.

It is within the NPA's power to delegate powers of prosecution in relation to statutory offences to other parts of the public service, which it has done in relation to traffic and by-law offences to municipalities.[78] Consequently, if the reasons for not prosecuting relate to lack of capacity within the NPA itself, the NPA should be encouraged to delegate in terms of section 22(8)(b) of the NPA Act. Section 22(8)(b) provides that the NDPP or his or her designate may authorise "any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the National Director or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the National Director, in consultation with the Minister, may determine". This seems to limit the delegation to statutory offences and appears to exclude common law offences. As many offences investigated by specialist agencies are statutory in nature, such as the offences in the Prevention in Combating of Corrupt Activities,[79] and some IPID-mandate offences, such as discharge of an official firearm.

Parliament should consider, as envisaged by section 8 of the Criminal Procedure Act, according such agencies the right to prosecute on a statutory basis. The Constitutional Court in *National Society for the Prevention of Cruelty to Animals* [SPCA] *v Minister of Justice and Constitutional Development and Another*[80] affirmed private prosecution under statutory right in finding that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993, accorded the SPCA the right to

[78] Section 112 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000), provides that a staff member of a Municipality authorized in terms of section 22(8)(b) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), to conduct prosecutions, may institute criminal proceedings and conduct the prosecutions in respect of a contravention of or failure to comply with a provision of a by-law or regulation of the Municipality, other legislation regulated by a Municipality, and other legislation as the NDPP may determine,
[79] Act 12 of 2004.
[80] CCT1/16 [2016].

conduct private prosecutions in relation to offences directly connected with its functions. Parliament should consider expressly empowering other statutory entities in this fashion. Note that in terms of section 8(2) of the Criminal Procedure Act, such private prosecutions under statutory right may be exercised only after the NDPP has withdrawn the right of prosecution in relation to any offence or class or category of offences; the NDPP may attach conditions to such withdrawal, and resume prosecution by the NPA at any time.

In relation to offences which are not statutory offences, i.e. common law offences, or where there is no relevant statutory body, the only alternative where the NPA declines to prosecute, is private prosecution in terms of section 7 of the Criminal Procedure Act. Mujuzi has argued that Parliament should clarify that such private prosecutions may be brought by juristic persons.[81] This was the issue on which the *SPCA* matter discussed above originally came to the Constitutional Court, but the matter was decided using section 8 and thus the matter was not clarified. Mujuzi points out that in the past juristic persons have brought such cases without challenge, and that there is a strong constitutional argument that all persons with a clear interest in the matter, whether individual or juristic, should be able to bring a private prosecution where the NPA declines to prosecute, under the conditions set out in the Criminal Procedure Act, which include the provision of security[82] and a requirement to pay costs where the prosecution fails, if the court so orders,[83] and that the costs are "taxed",[84] a legal term which implies fees in the costs are to a set scale and may not be artificially inflated. Note that the Legal Aid Board should provide legal aid to the accused if they so qualify in terms of its rules, whomever brings such a prosecution.

5.2 Recommendations

Parliament should require the NPA to report in detail on its decision on referrals from state agencies, on a quarterly basis.

Parliament should set clear reporting requirements (substance and process) for the NPA on how it is working towards a safer South Africa and what it is doing to comply with prosecution priorities as identified by Parliament.

[81] Mujuzi, J.D. (2019) 'The history and nature of the right to institute a private prosecution in South Africa' *Fundamina*, Vol 25(1), pp. 131-169.
[82] Section 9 Criminal Procedure Act.
[83] Section 16 Criminal Procedure Act.
[84] Section 17 Criminal Procedure Act.

In all legislation which provides entities with powers of investigation in relation to particular statutory offences, Parliament should consider whether powers of prosecution under statutory right should be granted to that organisation.

Parliament should clarify that juristic persons with an interest in the matter may bring private prosecutions.

6. Informal mediation

It is currently the case that a large number of all cases (more than 100 000) brought to the NPA are resolved via "informal mediation." There is no explicit legal basis for this practice and appears to have developed via the notion of prosecutorial discretion and the power of the prosecutor as *dominus litis*: the state may decide, amongst others, whether or not to institute a prosecution; on what charges to prosecute; in which court or forum having jurisdiction to prosecute, and when to withdraw charges.[85] The implication of informal mediation is that the accused does not receive a criminal record and no trial is held in court. The victim, if there is one, also has the benefit of not testifying in what can be a protracted trial and there is the added possibility of restitution of some sort.

The development of informal mediation was influenced by notions of *restorative justice*. Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict. [86] A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate directly or indirectly in the resolution of matters arising from the crime, generally with the help of a facilitator (a neutral third party).[87] Restorative processes are generally intended to keep young (often children), first-time, less-serious offenders out of the formal criminal justice system and to avoid a criminal conviction.

It is a requirement of restorative processes that the person causing harm to acknowledge his or her role in that harm i.e. acknowledge responsibility.[88] This is not a requirement of informal mediation, and nor are community processes usually held. The process appears to involve little more than a conversation

[85] *S v Sehoole* 2015 2 SACR 196 (SCA) paragraph 10.
[86] UNODC Handbook on Restorative Justice Programmes p. 6, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf ; Muntingh, L. (1994) *The Development of a Victim Offender Mediation Programme*, Human Sciences Research Council, Pretoria.
[87] UNODC Handbook on Restorative Justice Programmes p. 6
[88] Zehr, H. (1990) *Changing Lenses*, Herald Press.

between the prosecutor and the victim, and the prosecutor and the accused.[89] This process is regulated only by way of the internal policy directives of the NPA. It is a fundamental flaw that a prosecutor is the facilitator in the process, not least because he or she has a strong incentive to reduce his or her workload in this manner. Furthermore, the prosecutor has the power to institute prosecution, which can be used to persuade even a party who is not guilty of any crime to agree to a monetary or other settlement in order to avoid a prosecution and possible conviction. It must be borne in mind that the NPA prosecutes on behalf of society, not on behalf of the victim alone. There is evidence to suggest some more serious matters are being resolved in relation to more serious offences and perceptions of corruption among the prosecution appears to have risen.[90]

This is partly related to the way in which performance is measured within the NPA. The incentive to not prosecute and withdraw and mediate is further enhanced by the emphasis on conviction rates rather than throughput, or cases finalised. This encourages prosecutors to avoid more difficult cases that they may not win. The emphasis placed on overall conviction rate compared to the total number of convictions or convictions (including rate) of certain types of crime or for priority crimes, draw prosecutors away from cases that are, or may appear, to be more onerous, even if their impact may be highly beneficial to society if successfully prosecuted.

Further, the directives do not rule out the payment of compensation to the victim. This raises the very real problem of more wealthy offenders being able to "buy" their way out of a criminal record. While undoubtedly many victims are happy to accept compensation, the lack of any central record-keeping around informal mediation means that wealthy serial offenders are able to continue to commit crimes while not facing justice, and are fee to commit further crimes against additional victims.

Mediation is not the only way in which a victim may receive compensation, while the accused obtains an opportunity to reform. Section 297 of the Criminal Procedure Act provides for conditional or unconditional postponement or suspension of sentence, in order to enable the imposition of conditions, such as payment of compensation or the undergoing of treatment, which may eventually lead to a caution and reprimand if the relevant time period passes and the accused complies with the conditions. At the end of the period such a caution and dismissal is in all respects an acquittal but is a criminal record. In other words, this has a very similar outcome to a mediation, save in that there is a criminal record. However, it is not available in relation to offences for which minimum sentences are

[89] Observations at various courts.
[90] Muntingh L When the rich buy indemnity, justice is denied'' *Daily Maverick* available at *https://www.dailymaverick.co.za/article/2020-01-23-when-the-rich-buy-indemnity-justice-is-denied/#gsc.tab=0*

prescribed. In addition to section 297, compensation may also be awarded in relation to any conviction, in terms of section 300 of the Criminal Procedure Act, where there is loss or damage to property.

Anecdotal evidence suggests that it seems to be the case that incidences of assault or sexual assault short of rape where the accused is a younger person are a particular situation in which mediation is sought. The victim does not wish the accused to be imprisoned, but does wish the behaviour of the accused to be addressed; payment of compensation by way of mediation often seems to the parties to be an appropriate solution. Yet compensation via section 297 would achieve this objective too, and is in terms of practice usually only applied when the entire sentence is suspended. [91] Section 300 seems to limit the payment of compensation to damage to property and thus seems to rule out personal damages via the criminal process, and so a separate civil claim in civil court would be required.[92] Parliament could consider removing this limitation of damage to property in respect of section 300 orders, and consider whether to remove the criminal record applicable to section 297 sentences. Another form of record could apply.

We are advised that the NPA itself is seeking to have legislation guiding informal mediations. It is our view that such legislation should contain a requirement for the NPA to create a centralised, searchable record of mediations listing **both** victim and accused. The prosecutor and mediator names should also appear in the database. Prosecutors should be required to consult the database before conducting a mediation, to inform the mediation process. Previous mediation should not categorically exclude further mediation but is information to be taken into consideration. Where there are serial victims and serial offenders this should raise a red flag. Senior prosecutors should be required periodically to review the database.

Mediation should be done by recognised or accredited mediators acting as neutral third parties. Under no circumstances should prosecutors facilitate the mediation themselves.

Prosecutors should be required by law to declare before court that the reason for withdrawal is a mediation and declare that they have checked the database for previous mediations before reaching a mediation agreement. The substance of the agreement should be recorded, and redress should be meaningful. Monetary compensation should under no circumstances preclude prosecution and can in many instances be handled through a compensation order under the Criminal Procedure Act, as indicated above.[93]

[91] South African Law Reform Commission (2004), *Compensation for Victims of Crime,* Project 82, pp. 47-48.
[92] SALRC (2004) pp. 47-48.
[93] Section 300 Criminal Procedure Act

Mediation agreements should be required to include at least the names of the parties, the incident to which the agreement relates, in sufficient detail so as to be able to distinguish it from other potential incidents, the time frame of the agreement, and the actions to be taken by the accused within the time frame. The prosecution should be responsible for ensuring the agreement is met, failing which the case should be re-enrolled.

6.2 Recommendation

Parliament should enact legislation governing informal mediation covering the following:

- Independent mediation
- A searchable mediation database of prior mediation
- Compulsory reporting to court mediation as the reason for withdrawal
- The requirements for a valid mediation

Parliament could also consider permitting compensation for all types of damages in respect of any conviction and removing the requirement for a criminal record in section 297 matters, through the creation of a separate section 297 database.

7. Structure

7.1. Structuring of the clusters of the NPA

Magisterial boundaries are currently declared by the Minister in the Gazette. NPA clusters should conform to these (currently they do not). So should the boundaries of policing clusters. This inhibits close co-operation between detectives and prosecutors and sometimes leads to detectives having to appear in different courts in different areas on the same day. Police stations may also be required to transport detainees to multiple courts. Which courts are served by which prosecutors also does not become clear.

7.2. Recommendation

Parliament should require the NPA to explain the utility of its current arrangements and present the process to align boundaries in a way which maximises coordination and NPA resources.

8. General oversight

8.1. Reporting to Parliament

The NPA needs to demonstrate in its reporting to Parliament that is contributing appropriately to the value chain of the criminal justice system, so contributing to public safety and trust in the criminal justice system.

The NPA should be required to report to Parliament on a range of performance issues, disaggregated by magisterial cluster and crime type. Currently the NPA chooses that which it reports on in relation to performance, and only reports on a national level, in a way which masks the true trends. The NPA should be required to report on its regionalised strategy at the level of the NCOP, which it should develop in consultation with SAPS Provincial Commissioners, and in consultation with provincial executive governments.

The NPA should be required to report on its decision-making and not only its performance.

- Data should be provided on prosecutions which includes the number and type of offences prosecuted per case
- Data should be provided on decisions in relation to referrals from agencies
- Performance indicators should emphasise throughput of more serious cases
- Data should be provided by province and magisterial area
- Data should be provided on the duration from charge to conclusion of the case
- Consultative processes with provinces should be reported upon

8.2. Recommendations

The NPA should be required to submit quarterly draft reports to the Portfolio Committee, on the above issues in relation to general performance, covering the matters listed above. This should be done by the head of the National Prosecution Service (NPS). Such reports should be available to the Committee researcher ahead of time and should be shared with the research community to allow debate.

The NPA's provincial-level DPPs should report to the NCOP Select Committee on their regional strategies as developed in conjunction with the SAPS Provincial Commissioners. At the level of the province, the NPA, represented by DPPs of the province, should participate in sessions whenever oversight is exerted over SAPS in terms of the provincial oversight mandate. It remains a constitutional lacuna that there is no formal relationship in law between the NPA and a provincial government and for the immediate future informal mechanisms need to be used.

9. Conclusion

In order for the NPA to meet its mandate and to operate independently, accountably, and effectively toward a safer South Africa, some changes need to be made. The way in which senior officials are appointed and removed needs to be tightened. Prosecution policy needs to be changed, to ensure that prosecutions of senior criminal justice system officials are neither swept under the carpet nor used capriciously. Legislation should give more investigative agencies specific prosecutorial powers related to their mandates, under the oversight of the NPA, to relieve the burden on the NPA, which currently must prosecute all cases. Legislation should widen the ambit of compensation for victims, and legislation should also circumscribe any mediation associated with criminal justice processes, to ensure both the interests of justice and the interests of victims are served. Parliament should call on the NPA to report to it more transparently and regularly, and in a manner, which serves the interests of the public. More linkages between the criminal justice value chain should be encouraged, and the provinces should have greater say in criminal justice system priorities within their regions. The current legal framework enabled the undermining and hollowing-out of the NPA as an institution and ultimately the rule of law. If the situation is to be turned around, then the inescapable conclusion is that the legal framework needs to change.