



Africa Criminal Justice Reform
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Delegations of the prosecutorial function to state entities

Expanding prosecution of neglected crimes

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1. Introduction

The National Prosecuting Authority (NPA) has exhibited a downward trend in the prosecution of offences generally, with convictions other than drug convictions declining steadily since 2012.¹ As the current sole, highly centralised, custodian of enforcing accountability for criminal offences including those committed by state officials, it is currently struggling adequately to ensure sufficient accountability of those accused of criminal acts. Ways in which to expand the reach of accountability through the criminal justice system are urgently required. Appropriate delegation of the prosecutorial power may ease the burden on the NPA and increase the extent to which persons are held to account.

Currently, existing law enforcement agencies with investigative powers, such as the Independent Policing Investigative Directorate (IPID), recommend prosecutions to the NPA, but their matters tend not to be adequately prosecuted by the NPA, or at least it is not transparently evident what causes the delays in making a decision on whether to prosecute or not. The separation of investigation from prosecution in these matters appears to create additional delay. This consequently affects the agencies' reputation and ability to fulfil their mandate.

By delegating the prosecution of selected matters to state entities with an interest in the matter, ideally, which have investigated the matter, some of the burden on the NPA can be removed and matters currently not receiving adequate prioritisation can be prosecuted by such entities. Both the Constitution and the National Prosecuting Authority Act currently permit such delegation and no legislative change is required.

Further rationales in favour of delegation include the fact that certain kinds of matters are relatively routine and predictable, such as traffic offences. In addition, in such cases the potential impact of error is relatively low. Furthermore, some prosecutions may be assisted by specialist knowledge in both investigation matters and in actual prosecution, such as tax matters and torture cases. The NPA is a highly centralised structure; delegation may encourage an appropriate form of decentralisation.

2. Problem Statement

The NPA has limited resources and is currently faced with years of backlog in relation to serious and violent crime: in 2019/2020, the NPA reported that its reduced finalisation of cases translated into a growing backlog, with the backlog figure increasing by 5 106 cases (15 percent) to 39 186, with almost half of the backlog (18 869 cases or 48 percent) being more serious Regional or High Court matters.² In addition, it has embarked on the burden of prosecuting state capture cases, through its Investigating Directorate.³

At the same time, few prosecutions are occurring in relation to criminal offences arising from police action, which has the result that violent and abusive police officers are not brought to account. Matters referred from the Special

¹ Africa Criminal Justice Reform (ACJR) Fact Sheet: Performance of the NPA (2018).

² National Prosecuting Authority (NPA) Annual Report 2019/2020 p. 76.

³ See NPA website available at https://www.npa.gov.za/Investigating_Directorate/.

Investigating Unit (SIU), which seeks to recover lost state funds in civil matters, have not been expeditiously prosecuted when referred to the NPA. Similarly copper theft, which is decimating South Africa's infrastructure, also appears not to be prioritised. These kinds of cases are ripe for delegation. The Judicial Inspectorate of Correctional Services (JICS) is discussed as another entity, which may in future be ripe for delegation.

2.1. Independent Policing Investigative Directorate cases

The problem of an historically violent and abusive police was among the priorities which had to be addressed in the transition to democracy. Absent in the apartheid era was an independent investigative agency to bring errant police officers to account. Such an agency could help to bring legitimacy and accountability to policing. Accordingly, the Independent Complaints Directorate (ICD) was established in 1997 by Chapter 10 of the *South African Police Services (SAPS) Act No 68 of 1995 (SAPS Act)* as initially provided for in Section 222 of the Interim Constitution.⁴

However, as a result of shortcomings identified in the operation of the ICD, and the passage of the final Constitution⁵, the *Independent Police Investigation Directorate Act No 1 of 2011 (IPID Act)* was promulgated in 2012. The IPID Act gives effect to Section 206(6) of the *Constitution of the Republic of South Africa of 1996*, which refers to “an independent complaints body established by national legislation” which “must investigate any alleged misconduct” of the police. The IPID Act requires the Directorate to investigate:

- Deaths in police custody;
- Deaths as a result of police action;
- Any complaint relating to the discharge of an official firearm by any police officer;
- Rape by a police officer, whether the police officer is on or off duty;
- Rape of any person while that person is in police custody;
- Any complaint of torture or assault against a police officer in the execution of his or her duties;
- Corruption matters within the police initiated by the Executive Director, or upon receipt of a complaint by a member of the public, or referred by the Minister, Member of the Executive Committee (MEC), or the Secretary of Police; and
- Any other matter referred to it following a decision by the Executive Director, Minister, a MEC, or the Secretary of Police.
- In addition, IPID *may* investigate matters involving systemic corruption involving the police.⁶

This refined mandate narrowed the focus of IPID compared to the ICD, but also increased the mandatory obligations for investigation of an increased category of offences. By contrast the ICD functions outlined in the 1995 SAPS Act included a discretionary category, in respect of general complaints and mandatory obligation only in cases in relation to deaths in custody or as a result of police action.⁷

⁴ Constitution of South Africa Act 200 of 1993 (Interim Constitution), s222.

⁵ Constitution of the Republic of South Africa Act 108 of 1996.

⁶ Independent Policing Investigative Directorate Act 1 of 2011 (IPID Act), s28.

⁷ South African Police Service Act 68 of 1995 (SAPS Act), s53 (2).

Upon completion of an investigation, IPID must refer any criminal offences which the investigation has uncovered to the Director of Public Prosecutions (DPP) for criminal prosecution.⁸ The Executive Director must notify the Minister of such referral.⁹ The NPA is required to notify the Executive Director of its intention to prosecute, the Executive Director is required to notify both the Minister and Secretary.¹⁰ There does not appear to be any requirement of notification where the NPA decides not to prosecute, even if it is the case that the recommendation by the IPID has been to prosecute, and the NPA countermands this.

There is no mechanism or formal structure provided for in the Act or Regulations to facilitate IPID's relationship with the DPP.¹¹ Furthermore, legislation does not prescribe the regularity of reporting on prosecutions or the nature of such reporting arrangement i.e., monthly or quarterly. Standard Operating Procedures (SOPs) do however require that in cases involving the probability of an arrest of a member of SAPS, the IPID Investigator should maintain a warrant of arrest or consult with the Prosecutor to 'give a go-head' (which is then noted in the docket), prior to effecting the arrest.¹²

In the 2019/2020 IPID Annual Report, IPID reports that the NPA made a decision to prosecute in only 55 cases in respect of 2443 referrals of matters for a decision, while IPID was still awaiting a response from the NPA in 1594 matters. In other words, in 65 percent of matters referred to the NPA, the NPA had not provided a response by the time of the writing of the Annual Report.¹³ (This is not anomalous: In the previous year, IPID recorded that the NPA had made 55 decision to prosecute, with 1475 matters still awaiting a decision on 2044 referrals, with 91 convictions.¹⁴) Furthermore, there appear to be extensive delays in obtaining convictions. Table 1 below shows the year in which the IPID case was opened, in relation to convictions obtained in 2019/2020:

Table 1: IPID Convictions 2019/2020, by year of case number¹⁵

Year	Frequency	Percent	Cumulative
2011	1	1.45	1.45
2012	2	2.90	4.35
2013	3	4.35	8.70
2014	6	8.70	17.39

⁸ IPID Act s7 (Executive Director); sec 21(d) (Provincial Office), investigators.

⁹ IPID Act s7(4).

¹⁰ IPID Act s7(5).

¹¹ L Muntingh and G Dereymaeker, *Understanding Impunity in the South African Law Enforcement Agencies*, ACJR Research Report (Bellville: Dullah Omar Institute, 2013), p.46.

¹² IPID Standard Operating Procedures (IPID-SOP) (2015) 6.15.

¹³ In the previous year, it was 55 decisions to prosecute and 1475 awaiting a decision on 2044 referrals, with 91 convictions.

¹⁴ Independent Policing Investigative Directorate (IPID) Annual Report 2018/2019.

¹⁵ IPID Annual Report 2019/2020, p. 84 et. seq.

2015	6	8.70	26.09
2016	16	23.19	49.28
2017	20	28.99	78.26
2018	13	18.84	97.10
2019	2	2.90	100.00
Total	69	100.00	

In total, only 69 criminal convictions occurred in 2019/2020; half of matters convicted were opened in 2016 or earlier. In addition, the conviction rate of matters actually prosecuted appears to be low: also in 2019/2020, there were 67 acquittals,¹⁶ suggesting a conviction rate of only 51 percent, a much lower rate than is recorded for other serious matters prosecuted: regional courts in the NPA in 2019/2020 recorded a conviction rate of 83 percent.¹⁷ The data is suggestive of excessive delays in IPID matters which are prosecuted by the NPA; the poor conviction rate may in turn may be related to the excessive delays: the longer cases are delayed, the more difficult it is to retain or uncover evidence, particularly where witness evidence is involved.

In the interests of providing a complete picture, it is worth remarking that not all referrals to the NPA are in relation to matters in which the IPID investigators have recommended that the NPA prosecute; all matters are referred, whether the IPID has recommended a prosecution or not. The IPID Annual Reports do not record the nature of their recommendations to the NPA. However, a study of more detailed data extracted from 2014/2015 found that in more than one third of referrals (36 percent), there was an explicit recommendation to prosecute from IPID in matters referred to the NPA.¹⁸ Assuming a similar ratio still applies, this would suggest that in the most recent year, the IPID recommended prosecution in 870 cases, but the NPA affirmed it would prosecute in only 55 (6 percent of cases referred for prosecution) and succeeded on convicting in only 69 (with all save two convictions emanating from previous years).

The record in relation to prosecutions for matters referred from the IPID is thus poor (see above). The new management of the NPA does not seem to have improved matters, at least as far as IPID is concerned, with trends for the most recent few years remaining poor. In particular, the excessively long time periods from report of the incident to conviction are inimical to justice; if the accused is detained for all this time, this is inimical to justice; if the accused is not detained, then there is a police official potentially guilty of a serious offence either drawing pay on suspension, or continuing to work as a police official.

¹⁶ IPID Annual Report 2019/2020, p. 88.

¹⁷ NPA Annual Report 2019/2020, p. 23.

¹⁸ Muntingh, L. (ed) (2015) *Human Rights Violations and South Africa's Law Enforcement - Assessing Investigation Processes by Oversight Mechanisms*, Report by APCOF and CSPRI, p. 37.

It is intolerable that police officers who commit such serious crimes are sometimes convicted only a decade later or not at all; a conviction from a 2011 case concerned was a matter of assault with intent to commit grievous bodily harm from Limpopo. This is an extremely serious matter for which a police officer was presumably only held accountable after more than a decade (see above).

Given the extremely poor record of the NPA in these matters, a pilot delegation to IPID of prosecutions on some matters is unlikely to do much worse. Indeed, it seems clear that the interests of the NPA may not necessarily coincide to the same level with a specialised agency such as IPID. IPID has a particular interest in seeing police officials implicated in crime prosecuted. It is in this sense that institutional achievement, impact and reward come into play. At present, IPID invests a lot of time and effort in investigating police officials, but is entirely dependent on the NPA to prosecute. At present, IPID can at best be responsible for quality inputs, but stands as a spectator to the outcome of accountability. Should the responsibility of prosecution be delegated to IPID, it would be able to effect accountability itself, and would be entirely responsible for the success or failure of their investigations and prosecutions.

2.2. Special Investigating Unit matters

The Special Investigating Unit (SIU) was established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996. The SIU investigates serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public, with a view to conducting civil litigation to recover the funds. The legislation requires the SIU to refer any evidence which points to the commission of a criminal offence to the NPA.¹⁹

David Bruce in his 2019 monograph on the SIU records that prosecutions arising from these referrals have been few; in addition, the outcome of such referrals has not been consistently tracked.²⁰ In July 2021 the NPA and the Directorate for Priority Crime Investigation (DPCI, or Hawks) appeared before Parliament to discuss the issue of SIU referrals.²¹ They reported only 20 convictions from more than 475 referrals (4 percent); it is unclear over what time period the referrals were made. The vast majority (377 or 79 percent) were still under investigation.

The NPA indicated that a new Memorandum of Understanding (MOU) between the NPA and SIU was in the process of being drafted which would also include the DPCI, as it is through the DPCI that cases are registered on the SAPS CAS system and they must carry out any further investigation required. The presentation outlined a relatively onerous referral system within the NPA, and consultation process between all the parties. Yet Bruce in his monograph indicated that the SIU had requested delegation of prosecution functions in relation to some matters. This no longer appears to be on the agenda.

¹⁹ Section 4(1)(d)

²⁰ Bruce D 'Accountability for corruption: the role of the Special Investigating Unit' *Institute for Security Studies Monograph* (2019) Table 5.

²¹ NPA presentation to Parliament 6 July 2021 available at <https://pmg.org.za/committee-meeting/33278/> accessed 31 August 2021.

2.3. Copper theft cases

Data obtained from SAPS indicates that from 2003/4 to 2007/8, recorded copper theft increased by 240 per cent from 13,675 to 33,156 individual cases per year; the SAPS, however, stopped using the code for metal theft after 2008 and thereafter it was simply recorded as ‘theft-other’; tracking trends became more difficult, as metal theft was subsumed in the broader category.²² Yet it is likely to have continued to increase. This is illustrated by the fact that in their 2016/17 Annual Report, the SAPS said that a docket analysis in KwaZulu-Natal showed that metal theft accounted for 32 per cent of all recorded ‘other theft’,²³ suggesting that in that year more than 15,000 cases were recorded in that province alone; if the same percentage were to apply to the whole country, it would suggest in the region of 115,000 cases of copper theft nationwide. In the same year, the SAPS Annual Report indicated only 17 052 “other theft” convictions in relation to 329 924 reports – a conviction throughput of only 5 percent.²⁴ Furthermore, it is not clear to what extent copper theft convictions formed part of this number; even if it comprised all, it would be a small fraction of the total.

Apart from the effect on parastatals such as Eskom and Transnet, municipalities suffer the consequences of cable and metals theft. With damages reportedly amounting to three times the cost of the material stolen, specialist law enforcement task teams have been formed in Cape Town, Tshwane and Johannesburg Municipalities.²⁵ Umsunduzi and eThekweni have also taken measures. The measures adopted by municipalities often include an explicit investigatory component with a view to prosecuting.

The Tshwane Metro Council initially launched a technologically equipped centre operated by a private company, Combined Private Investigations (CPI), which relies on technology to combat copper cable theft.²⁶ In 2010 it was reported that approximately 248 copper cable thieves were arrested and successfully prosecuted through the investigation by CPI.²⁷ Such prosecutions would have occurred via referrals to the SAPS and then to the NPA. In 2017, an Anti-Cable Theft Unit was established within the TMPD to provide static guarding at open and new tranches and substations, regular patrols of hotspots, regular inspections of scrapyards, response to cable theft complaints, and apprehension of suspects involved in cable theft.²⁸ Again, prosecution would have to be via the SAPS and NPA.

In September 2017, it was reported that the City of Johannesburg had established within the Johannesburg Metro Police Department(JMPD) a specialised copper unit, after the previous month saw 32 km of cables being ripped out, stolen or damaged, leaving the city with a R45 million repair bill.²⁹ In 2014, Mzunduzi Municipality formed an electricity theft task team to work together with other law enforcement partners in addressing cable theft.³⁰

²² Rasool F ‘DA proposes copper theft solution’ *ITWeb*, 25 August 2011.

²³ SAPS *Annual Crime Report 2015/16 Addendum to the SAPS Annual Report*, p. 70.

²⁴ SAPS Annual Report 2016/2017 p. 185.

²⁵ Yorke-Smith, L ‘Solving copper theft’ *HiTech Security Solutions Magazine* January 2010 available at <http://www.securitysa.com/article.aspx?pkIarticleid=5905> accessed 14 February 2019.

²⁶ Yorke-Smith L (2010).

²⁷ Yorke-Smith L (2010).

²⁸ City of Tshwane Official Facebook page 20 April 2017.

²⁹ AFP ‘Johannesburg gripped by copper cable warfare’ *News24* 29 October 2017.

³⁰ Peters S ‘Team tasked with eradicating copper cable theft’ *IOL* 16 May 2014.

eThekweni Municipality established a similar task team in 2009, with the explicit aim of conducting investigations in support of the SAPS.³¹ In 2019, it reported that they had secured a successful prosecution – the first of its kind for the city.³² If “first of its kind” is correct, it suggests an extremely low rate of prosecutions in the city.

The City of Cape Town established a Copper Theft Task Team, known as the Copperheads, in 2007-2008.³³ In 2017, the Minister of Justice extended powers of search and seizure to this law enforcement unit, providing it with greater investigatory powers, so that it would be able to execute search warrants on properties, conduct search and seizure operations, and close premises where illicit second-hand goods are being traded in contravention of the Act.³⁴ This was strongly lobbied for by the City of Cape Town. However, despite investigations and arrests, the City laments that it “has no hand in prosecutions” and accordingly successful convictions are not as high as they would like.³⁵

Thus, municipalities are forced to police, and conduct investigations either themselves or in support of the SAPS, to protect their infrastructural interests. However, once investigated, the cases have to be processed through both SAPS and the NPA, for any prosecution to occur. This does not appear to be happening to any significant degree, based on available data. While crimes committed in the Rail Environment have become a priority of SAPS, and this is likely to include copper theft, where the damaged infrastructure is a municipality, there does not appear to be similar prioritisation. Again, the interests of municipalities may not necessarily coincide with that of the SAPS and the NPA, as they both juggle a vast range of matters. If such municipalities could prosecute the matters, which they investigate directly, there may be more success in grappling with this problem.

3. Delegations of prosecutorial function to other state entities

The Constitution provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed.³⁶ The National Prosecuting Authority Act provides for the delegation of prosecutions of statutory offences to competent persons in the employ of the state.³⁷ The required elements for a delegation are distilled from s22(8)(b) of the National Prosecuting Authority Act as follows:

- The National Director OR a person designated by her in writing
- May authorise to conduct prosecutions

³¹ eThekweni Municipality ‘Cable Theft’ available at http://www.durban.gov.za/City_Services/electricity/Pages/Cable%20Theft.aspx accessed 30 November 2019.

³² http://www.durban.gov.za/Resource_Centre/Press_Releases/Pages/Cable-Theft-Conviction-Final.aspx

³³ Booysen J ‘Copper theft: 100 arrests in six months’ *IOL* 27 March 2008 available at <https://www.iol.co.za/news/south-africa/copper-theft-100-arrests-in-six-months-394392> accessed 30 November 2019.

³⁴ Charles M ‘Metal theft unit gets more teeth’ *Cape Argus* 27 August 2017.

³⁵ <https://www.capetown.gov.za/Media-and-news/Metal%20Theft%20Unit%20attacked%20as%20its%20arrest%20rate%20soars>

³⁶ Constitution of the Republic of South Africa Act 108 of 1996, s238.

³⁷ NPA Act, s22.

- In relation to *statutory offences* including municipal laws
- Any competent person
- In the employ of public service OR any local authority
- Subject to the directions of the National Director OR a person designated by her in consultation with the Minister.

Both the IPID and municipalities are therefore candidates for delegation. However, there may well be other additional candidates, such as State-Owned Entities (SOEs) or institutions of government such as the South African Revenue Service (SARS). For example, Eskom and PRASA infrastructure is also a victim of cable theft, which they attempt to address through prevention and investigation. SARS does currently enjoy delegations of criminal tax prosecutions on an ad hoc basis, as these require highly specialised knowledge.

Delegation of prosecutorial powers must be distinguished from private prosecutions. The delegation of prosecutorial powers to state entities is not the same as private prosecutions by institutions where the NPA declines to prosecute, which have relatively recently been established as possible in our law (by institutions rather than private persons). In 2017 in the *National Society for the Prevention of Cruelty to Animals*³⁸ case ultimately heard in the Constitutional Court, the unanimous court declared that “the National Society for the Prevention of Cruelty to Animals (NSPCA) has the statutory power of private prosecution conferred upon it by section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read with section 8 of the Criminal Procedure Act 51 of 1977.”³⁹

The NSPCA had previously been barred from taking up a private prosecution because it was not a private individual person with an interest in the matter. What is important for this paper, is that the court remarked “that it unusual, but not entirely novel, for a body to have powers to police, investigate and prosecute.”⁴⁰

The suggestion of this paper is that some investigative agencies of the state should be empowered directly by the NPA via delegation of prosecutorial power to state agencies permitted by the NPA Act, rather than via private prosecution, which would necessarily be *ad hoc* in nature. This is preferable because via delegation, policies, processes and checks and balances could be put in place, with the NPA retaining oversight over all matters.⁴¹

3.1. Proposed Guiding Principles

The NPA should be guided in its delegations by some broad general principles. It is accordingly suggested that entities to which prosecutions are delegated should be limited to entities which have:

- Current investigative capacity in relation to specified offences.
- Clean or unqualified audits.
- The willingness to prosecute.

³⁸ *National Society for the Prevention of Cruelty to Animals (NSPCA) v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC).

³⁹ NSPCA para 65.

⁴⁰ NSPCA para 61.

⁴¹ NPA Act, section 22.

- Competent persons in their employ, preferably with right of appearance in court.

Furthermore, it would make sense that the NPA not already have any particular specialised capacity in relation to the crime concerned. Some degree of oversight and guidance must be provided by the NPA, which could range from active scrutiny, to mere standard setting, for example, in the form of a checklist that the NPA provides to the delegated authority to ensure that the correct cases are prosecuted on sufficient evidence. At a minimum, periodic random reviewing of matters should occur. The delegation may conceptually involve one or both of:

- delegation of the decision to prosecute or not
- delegation of the actual prosecution.

However, this is not explicitly referred to in the legislation and may be carried out in practice by the exercise of oversight by a designated NPA official. Delegation of the actual decision to prosecute or not may be more controversial than delegation of the actual prosecution. It may be that during a transition period, a designated NPA official first reviews and affirms all decisions to prosecute or not prosecute, particularly in relation to agencies such as IPID. Unfortunately, this may cause delay as evidenced from the IPID data showing extreme lengths of time for the NPA to indicate a decision on a matter; thus, such a proposal would remove one of the benefits of delegation, unless strict time limits applied. Consequently, it is preferable that the NPA only review periodically decisions not to prosecute, as decisions to prosecute will ultimately be tested in court.

3.2. Practical considerations

Universal record-keeping would require that all matters, except possibly traffic and by-law matters, be registered on the SAPS CAS system, regardless of investigation agency or prosecution. This is to ensure proper maintenance of criminal records.

Enrolment of matters in court is also a practical concern. While the matters would be registered on the CAS system, usually, such dockets are usually delivered to the NPA and then enrolled in court. A practical method of enrolling matters to be prosecuted by delegated prosecutors in the ordinary courts should be sought.

The NPA may made need to designate senior officials responsible for delegations, which should include the responsibility of regular oversight.

The question of appeals would need to be clarified. It is suggested that the entity to which prosecutions have been delegated, also be responsible for handling any appeals.

3.3. Independent Police Investigative Directorate (IPID)

As discussed above, IPID cases are not currently prosecuted to any degree and some degree of delegation should be considered. In relation to IPID, the elements required for delegation in terms of NPA Act are present in relation to IPID.

3.3.1. Competent persons

The IPID has created a programme called “Legal and Investigation Advisory Services” which inter alia reviews the feedback provided by the NPA, and also advises investigators on their investigations. The Director of this programme is required to have, inter alia:

“An LLB/ B. Proc Degree (NQF 7) as recognised by SAQA. 5 years Middle Management (MMS level) with experience in litigation, criminal, civil and labour relations environment especially in dealing with corruption/systemic corruption matters. Driver’s license. An admitted Attorney/Advocate. Knowledge and understanding of the IPID Act, PFMA and other relevant legislation and regulations that govern the Public Service, including knowledge of corporate and administrative law. Litigation experience in dealing with criminal and civil matters especially corruption/systemic corruption matters.”⁴²

The salary offered for this position in 2019 was over R1m p.a. Thus, there is already some degree of legal expertise within IPID. Performance management of IPID should then be adjusted to take into account convictions obtained through IPID prosecutions.

3.3.2. Statutory offences

In relation to IPID, the legislative requirement in s22(8)(b) of the NPA Act relating to delegation of statutory offences would limit prosecutions of police officials, to a shorter list of statutory offences, than the list of offences which IPID is empowered to investigate, provided for in section 28 of the IPID Act. Each section is considered in more detail below:

Section 28(a) refers to any deaths in police custody and 28(b) any deaths as a result of police action. If the charge is murder or culpable homicide, prosecutions arising from these investigations cannot be delegated as they are common law offences; however, if a lesser charge resulting from the death is statutory in nature, for example, relating to the discharge of a firearm, then this prosecution could be delegated.

Section 28(c) refers to any complaint relating to the discharge of an official firearm by any police officer. The discharge of an official firearm is not in itself an offence. But a complaint relating to the discharge of an official firearm (section 28(1)(c)) is likely to amount to an alleged criminal offence such as attempted murder or assault with intent to inflict grievous bodily harm (assault GBH) which are common law offences, or offences under the Firearms Control Act. For example, section 120(3)(b) Firearms Control Act (FCA) provides for the offence ... “it is an offence to discharge a firearm ... in a manner likely to injure or endanger the safety or property of any person or with reckless disregard” ... prosecution of such an offence and any other FCA offences may therefore be delegated. Offences under the Firearms Control Act may be delegated.

⁴² IPID Vacancies available at <https://www.govpage.co.za/independent-police-investigative-directorate-ipid-vacancies-blog/independent-police-investigative-directorate1957467> accessed 16 July 2021.

Section 28(d) refers to rape by a police officer, whether the police officer is on or off duty and section 28(e) rape of any person while that person is in police custody. The Sexual Offence Act 2007 in section 3 has repealed the common law offence of rape and created a statutory offence; the prosecution of this offence may therefore be delegated; however as there is already specialist capacity in the NPA in relation to such matters, it may be preferable for these not to be delegated.

Section 28 (f) refers to any complaint of torture or assault against a police officer in the execution of his or her duties. The offence is provided for in section 4 read with section 3 of the Prevention and Combating and Torture of Persons Act 13 of 2013 (the definition of torture) and prosecution may thus be delegated. To date there have not been any prosecutions for torture in South Africa.

Section 28 (g) refers to corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be. An investigation which reveals statutory offences in terms of Prevention and Combatting of Corrupt Activities Act (2004), including the general offence of corruption contained in section 3 (defined as agreeing to give and/or receive gratification toward public power being used unfairly or illegally), may be delegated. However, as there is specialised corruption capacity in the NPA, a blanket delegation may not appropriate, but a delegation in relation to less serious matters may be.

28 (h) any other matter referred to it as a result of a decision by the Executive Director, or if so, requested by the Minister, an MEC or the Secretary as the case may be. Here it would depend on whether these are statutory offences or not, whether delegation is possible.

Consequently, it seems that there is indeed potential for delegation in a range of IPID matters. However, it is worth considering possible concerns around delegation, which will briefly be considered below.

3.3.3. Delegation considerations

The question remains whether there is a conflict of interest for an investigative agency also to prosecute? As noted above, the Constitutional Court has already remarked *obiter* that this is not necessarily ruled out. As IPID is independent of both the police and the NPA, it is in fact preferable that decisions on prosecutions not be the sole preserve of the NPA, as prosecutors who potentially work with a police officer may be called upon to decide on a matter, and this may constitute an even greater potential conflict of interest. Although the Prosecution Directives in Part 8 require approval from the NDPP or DPP for the prosecution of SAPS and Municipal law enforcement officials, a decision not to prosecute does not require such approval. As indicated above, in fact it is preferable that decisions not to prosecute be checked, rather than decisions to prosecute.

In the case of IPID, the agency already makes recommendations to the NPA in relation to prosecutions. The data would suggest that the NPA declines to prosecute in more cases than the IPID recommends not prosecuting, and that

they fail to give a decision timeously in the vast majority of cases. Furthermore, the data suggests the NPA (appropriately) prioritises death matters; it would make sense, therefore, to delegate the less serious statutory matters to the IPID itself.

A key question however is whether perverse incentives may operate: might IPID be incentivised not to prosecute in order to manage their workload? Will a delegated authority also report misleadingly on its conviction rates, by considering only those cases it chooses to prosecute?

Theoretically, risk may be managed by separating out the decision to prosecute from the actual prosecution (“subject to the directions of a person designated by the NDPP”), with as suggested above, with the NPA reviewing primarily decisions not to prosecute. The caseload of potential delegations should determine the number and level of seniority of the NPA person who should exercise oversight, as well as the geographical distribution of IPID “prosecutors”, as there is a small number of police stations responsible for the majority of complaints to IPID. IPID could then directly be held to account for failures properly to address these crimes via both investigation and prosecution.

As a matter of piloting and practicality, it may make sense initially to limit the delegation to IPID, to matters falling within IPID Act section 28(c) (discharge of firearms offences) and later introduce s28(f) torture offences. This is because there are already specialist prosecutors in the NPA in respect of rape, and there are also specialised corruption prosecution entities. The NPA is not currently prosecuting torture and IPID could become the entity which specialises in such prosecutions where they relate to the police. However, it is probably advisable first to begin with firearm offences, in order to build prosecutorial confidence both within and in IPID.

It may also make sense to limit the delegation to one or two provinces in which to locate IPID prosecutorial ability; currently, only one discharge of a firearm matter was convicted in KwaZulu-Natal in 2019/2020 (dating from 2017) despite IPID receiving the highest number of referrals for discharge of a firearm over two years from the province (241 referrals).⁴³ Eastern Cape, with the next largest number of referrals, had 4 convictions.⁴⁴

Indeed, it may be appropriate to pilot delegated prosecutions of IPID firearms matters first in KwaZulu-Natal: by far the highest number of referrals for deaths as a result of police action over two years (202) emanate from the province.⁴⁵ Only 10 such cases in the whole country resulted in conviction in 2019/2020, although 216 such matters were referred to the NPA in 2019/2020 alone.⁴⁶

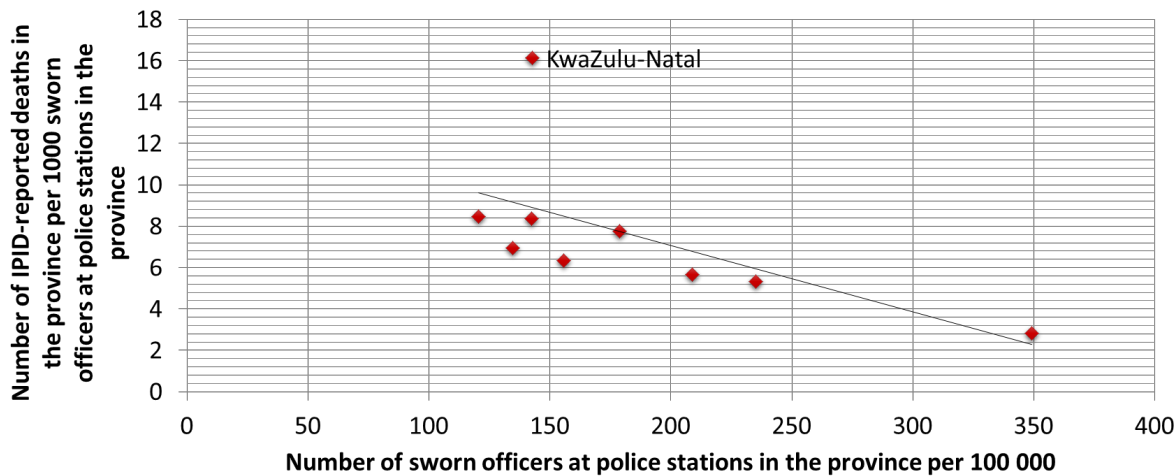
⁴³ IPID Annual Report 2019/2020 p. 48.

⁴⁴ IPID Annual Report 2019/2020 p. 48.

⁴⁵ IPID Annual Report 2019/2020 p. 45.

⁴⁶ IPID Annual Report 2019/2020 p. 70.

Figure 1: The relationship between per capita police resources and deaths as a result of police action



Indeed, while in general the data suggests that the greater propensity for police to kill during police action is correlated to poorer level of resourcing (see Figure 1 above), KwaZulu-Natal is a complete outlier in respect of such deaths compared to the number of police officers: the province is calling out for intervention (Figure 1). An initial pilot project should accordingly be implemented in KwaZulu-Natal.

The offences of negligent discharge of a firearm and deaths as a result of police action are clearly linked; it is expected that more accountability for the former, via a greater number of prosecutions by IPID through delegation, may encourage less of the latter, through the operation of suspended sentences.

Indeed, in 2019/2020, the Annual Report also shows that such offences under the category “discharge of a firearm” usually receive a wholly suspended sentence or a fine; direct imprisonment was ordered in only three out of the ten matters.⁴⁷ If a greater number of police officers are curbed in their reckless and negligent shooting via suspended sentences from further negligence, the result may well be a reduction in deaths as a result of police action. Finally, if IPID itself is held responsible for convictions in at least one category of offences, its standard of investigation may improve, as it becomes entirely responsible for results.

Finally, there are considerations relating to court time. Might more prosecuting agencies result in courts becoming overwhelmed? Data from the NPA Annual Report shows a steady decrease in court utilisation hours, to barely more than an average of three hours per court.⁴⁸ Accordingly, it appears that there is currently room for more court hours to be utilised.

3.4. Special Investigating Unit

The SIU has a competent legally trained staff who are already dealing with civil matters in the Special Tribunal. Furthermore, it has been responsible for amassing the evidence it refers to the NPA. The most obvious statutory offence for which it could be responsible is “corruption of a public official” contained in Section 4 of the Prevention

⁴⁷ IPID Annual Report 2019/2020 p. 84.

⁴⁸ Africa Criminal Justice Reform (ACJR) Fact Sheet: Performance of the NPA (2018).

and Combating of Corrupt Activities Act 12 of 2004. Although this is not a straightforward offence, expertise could be developed by the SIU on this offence. Again, it may be preferable to pilot delegations in some matters, and for the NPA to exercise oversight over these prosecutions. Ultimately, all matters arising from SIU proclamations leading to an offence of corruption of a public official should ultimately be for the SIU to prosecute.

3.5. Municipalities

As discussed above, many metropolitan municipalities (Johannesburg, Tshwane, Cape Town) already have units of their law enforcement or metropolitan police engaging with preventing and investigating damage to essential infrastructure, in particular copper theft. The statutory offence necessary for the delegation is the offence contained in the Criminal Matters Amendment Act of 2015 which makes it a criminal offence to tamper with, destroy, or damage 'essential infrastructure'. It is submitted that prosecution of such offences be delegated to municipalities who have the capacity to investigate, on their request.

Some of these offences have discretionary minimum sentences which would suggest prosecution in the High Court, which may have implications for the seniority of the person to whom prosecutorial powers are delegated. Currently, municipalities already enjoy some limited prosecutorial delegations, in relation to traffic matters and by laws, via their power to make the latter.

Municipalities are the local sphere of government and vested with executive and legislative authority.⁴⁹ Municipalities have the authority to administer local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matter assigned to it by national or provincial legislation.⁵⁰ Municipalities may make and administer by-laws for the effective administration of matters. Local government law together with the NPA Act affirm that municipalities may enjoy delegation of prosecutorial power. Section 112 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) provides as follows:

"Prosecution of offences – 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 the 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 administered by the municipality*
- *Other legislation as the National Director of Public Prosecutions may determine in terms of section 22(8)(b) of the National Prosecuting Authority Act, 1998."*

Some municipalities, particularly metropolitan municipalities, already have delegated authority to prosecute some offences, including by-law offences. While traffic matters tend to dominate, a study in 2006 found that in practice a small number of violations relating to building regulations as well as those relating to air pollution, dog nuisance, fire

⁴⁹ Constitution of the Republic of South Africa, s151(1)-(2).

⁵⁰ Constitution, s156(1).

control, land use, electricity, and water, are also prosecuted.⁵¹ Nuisance by-laws, however, were not prosecuted by the municipality at the time (2000) but by a District Court designated for such offences. This may be appropriate to prevent abusive or overzealous prosecutions by municipalities in petty matters.

Municipalities with delegated prosecutorial power in relation to traffic or by-laws tend to run their own “Municipal Courts” with their own prosecutors – with delegated authority from the NPA – presided over by magistrates from the Department of Justice; magistrates are assigned to Municipal Courts by the Chief Magistrate of the responsible cluster.⁵² Section 113 of the Municipal Systems Act further provides that fines and bail recovered in respect of offences or alleged offences in item 2 of Schedule 4 to the Public Finance Management Act 1 of 1999, must be paid into the revenue fund of the municipality. Item 2 of Schedule 4 covers fines or bails in relation to offences in respect of by-laws enacted by municipalities; or (b) national or provincial legislation, the administration of which is assigned to municipalities.

However, in relation to copper theft matters, such matters would need be heard in the usual District or Regional Courts where appropriate. Fines in relation to any sentences in relation to copper theft would therefore continue to accrue to the Department of Justice, unless the administration (and not only the prosecution of offences) of the relevant legislation is formally assigned to the municipality.

3.6. Judicial Inspectorate for Correctional Services (JICS)

One particularly important agency is the Judicial Inspectorate for Correctional Services (JICS), whose mandate it is to uphold and protect the rights of all inmates who are incarcerated, including by investigating the treatment of inmates, conditions of detention and any corrupt or dishonest practices at Correctional Centres.⁵³ The mandate of JICS is different in nature from that of IPID. It is mandated to inspect and report on the treatment of inmates and conditions of detention. The Inspecting Judge may only receive and deal with the complaints submitted by the National Council, the Minister, the Commissioner, a Visitors’ Committee and, in cases of urgency, an Independent Correctional Centre Visitor and may of his or her own volition deal with any complaint.

The Inspecting Judge reports to the Minister and Parliament. There is no relationship in law between JICS and the NPA. There is thus currently no routine referral of large volumes of matters to the NPA with recommendations to prosecute or not to prosecute in relation to investigations carried out and the current investigative capacity of JICS is limited. In theory, any statutory offence, most notably matters of torture could be delegated to JICS for prosecution. However, this would need to be preceded by a vastly increased investigative capacity.

⁵¹ See Redpath, J. & Lue-Dugmore, M. *A Study of Municipal Courts in South Africa: Research Report for the City of Cape Town on behalf of Institute for Security Studies, for the City of Cape Town* (2006) (137 pages).

⁵² Lue-Dugmore & Redpath (2006).

⁵³ Correctional Services Act 111 of 1998, s85(2) and s90.

Consequently, JICS does not appear to be a likely candidate for delegation in the short term, but in light of the *Sonke* decision,⁵⁴ in favour of greater independence for JICS, there may be scope to explore this in future. In the *Sonke* matter, sections 88A(1)(b) and 91 of the Correctional Services Act 111 of 1998 were confirmed to be constitutionally invalid to the extent that they fail to provide an adequate level of independence to JICS. Research has also found that monitoring places of detention is of itself not highly effective in preventing torture, but when the monitoring entity has a close and effective relationship with the prosecution service, there is a reduction in the incidence of torture.⁵⁵

It is therefore the case with both IPID and JICS that it is ultimately prosecutions that give real impact to their mandates since perpetrators are held accountable. While JICS remains effectively beholden to the DCS, it may be preferable to first adequately secure the independent investigative capacity of the JICS, and later confer prosecutorial powers. Thus, delegation would be appropriate once the relevant independence and investigative capacity is obtained.

4. Conclusion

The NPA is suffering large backlogs on matters of serious and violent crime and holds the burden of prosecuting state capture. Other priorities of the South African democracy include the prosecution of inappropriate police action amounting to criminal offences and damage to essential infrastructure via copper theft. Current legislation permits some of these prosecutions to be delegated to state entities. Such delegations should be piloted to test policy and processes. As a pilot, delegations of prosecutorial power in relation to offences arising from firearms legislation could be piloted in KwaZulu-Natal. The NPA should exert oversight in particular over decisions not to prosecute in relation to these mandatory investigations. Delegations to the SIU have the potential to raise corruption prosecutions. Delegations of prosecutorial power in relation to copper theft could be delegated to metropolitan municipalities with investigative capacity who seek to carry out such prosecutions. In all such delegations, appropriate oversight should be exerted by the NPA, and regular and transparent reporting on prosecutions should occur. The matters should be heard in the appropriate District or Regional courts in the usual way.

⁵⁴ *Sonke Gender Justice NPC v President of the Republic of South Africa and 2021 (3) BCLR 269 (CC) (4 December 2020).*

⁵⁵ Carver, R. and Handley, L. (2016) 'Conclusion' IN Carver, R. and Handley, L. (eds) *Does Torture Prevention Work?* Liverpool: Liverpool University Press, p. 631.