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Good day,

The Helen Suzman Foundation is an NGO that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the Discussion Paper 165, Project 151: Review of the Criminal Justice System: Non-Trial Resolutions: Deferred Prosecution, Alternative Dispute Resolution and Non-Prosecution.

We would like to confirm our interest in making oral representations at a convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za

Yours sincerely

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1. Introduction

1.1. An unfortunate mix of capacity constraints, mismanagement and political interference has left our National Prosecution Authority ("**NPA**") infamous for its dismal record of holding high-level corruption accused accountable.

1.2. Ostensibly to expand the NPA's corruption-fighting toolkit, the South African Law Reform Commission ("**SALRC**") has recommended that "non-trial resolutions" ("**NTRs**") replace traditional prosecutions for certain corruption-related crimes.[1] While the NPA has already published, and used, its own Corporate Alternative Dispute Resolution Policy ("**C-ADP**"), the SALRC suggests that a more comprehensive NTR regime be formalised in legislation.[2]

1.3. NTRs come in many forms, but they are all agreements between a would-be corruption accused and the state which trade-off criminal liability for: (i) cooperation in further investigation of the crimes at issue, (ii) a negotiated financial penalty, and (iii) reshaping a would-be accused's behaviour to prevent future corruption. They are generally reserved for companies seeking to avoid corporate criminal liability,[3] but the SALRC recommends that they be extended to natural persons as well.[4]

1.4. NTRs are used worldwide to resolve complex corruption matters that may otherwise unduly stretch a resource-scarce prosecuting authority's capacity in lengthy trials and investigations.[5] As such, the SALRC's proposal to usher in a statutory regime for NTRs in South Africa is welcome in principle.

1.5. However, in summary, HSF submits the following to prevent their abuse:

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[1] Discussion Paper 165, Project 151: Review of the Criminal Justice System: Non-Trial Resolutions: Deferred Prosecution, Alternative Dispute Resolution and Non-Prosecution. ("**Discussion Paper**") para 59, p 28.
[2] The NPA's C-ADR can be read here. The NPA used its C-ADP to reach a settlement with McKinsey and Company Africa to pay a R1.1bn fine, and to cooperate in further investigation into the crimes which its employees committed. A similar agreement was struck with Asea Brown Boveri Ltd. We discuss this more below in para 4 of this submission.
[3] Section 332 of the Criminal Procedure Act provides for corporate criminal liability in South Africa.
[4] Discussion Paper para 87, p 40.
[5] Collette Ashton "Dismantling 'The Machine': a Role for Non-Trial Resolutions in Anti-Corruption Enforcement in South Africa?" International Anti-Corruption Academy, p 51, available here.

1.5.1. Given that any effective NTR regime requires a prosecuting authority that is a credible threat to corruption accused in the first place, NTRs are premature in South Africa unless they are preceded by general reform that strengthens and capacitates the NPA;

1.5.2. If NTRs are to be used in the short term, they should be available subject to strict conditions that secure the public's interest in holding corruption accused accountable – and deterring future corrupt actors; and

1.5.3. Given the NPA's past susceptibility to political influence, NTRs must be subject to robust judicial scrutiny, notwithstanding the SALRC's concerning recommendation to blunt judicial supervision over NTRs by limiting the standing of civil society to challenge NTRs;[6] and

1.5.4. An NTR regime should be subject to transparency and accountability mechanisms that disclose an NTR's central terms to the public, so we can be confident that the NPA is negotiating from a position of principle when striking deals with powerful corruption accused.

1.6. HSF's reasoning in support of these submissions follows in the paragraphs below.

2. NTRs Can Be A Useful Corruption-Fighting Tool When Used By Credible Prosecuting Authorities

2.1. NTRs harness the threat of prosecution to incentivise a would-be corruption accused to enter a bargain with the state that balances their own interests with the public's interest in a way that may not be achieved in a traditional prosecution.[7]

2.2. This can serve the public interest because the economic crimes associated with corruption[8] are complex and often characterised by an asymmetry of knowledge and expertise in favour of the offending party.[9] Rather than risk a prosecuting

[6] Discussion Paper para 57, p 29.
[7] State Capture Report Part 1, Volume 1, para 591 at p 812.
[8] The SALRC suggests that NTRs be limited to "restricted to cases involving economic crimes such as fraud, bribery, money laundering, corruption and related offences including accounting offences." See Discussion Paper para 60, p 30.
[9] Op cit note 5 p 51.

authority's resources in a lengthy investigation and trial, it is often sensible to trade criminal liability for valuable 'inside information' to efficiently resolve the matter.[10]

2.3. However, given that NTRs forgo criminal liability for a *potentially* greater public good, care must be taken that an NTR's terms do not tip the balance of interests in favour of powerful accused corporations and/or natural persons.

2.4. This can easily happen in a context like South Africa's, where we have a weak NPA, and relatively powerful corporate and individual interests that enable state corruption. Indeed, it is concerning to read that the SALRC seemingly admits defeat in this regard when it suggests that South Africa explore NTRs that are even more lenient than their international counterparts. In its own words:

> *"Careful consideration should also be given to the incentive structure for companies to enter into NTRs in South Africa. While South Africa should adopt elements of models from other countries most likely to be effective in South Africa, it may need to offer more incentives than countries with stronger enforcement capabilities. Such incentives may include greater leniency in areas like debarment/blacklisting, or lower penalties, or no corporate monitor."*[11]

2.5. The NPA's current state of incapacity should never justify exploring NTRs, let alone uniquely lenient ones. Any NTR regime should be premised on eventually capacitating our NPA so that NTRs can be entered into from a position of strength to preserve prosecutorial capacity – not to replace it.

2.6. However, if government is moved by the SALRC's recommendations in the short term, it should ensure that NTRs do not allow powerful private interests to win out over an incapacitated NPA.

[10] Ibid.
[11] Discussion Paper para 50, p 26.

3. Any NTR Regime Should Be Subject To Strict Conditions That Secure The Public Interest

3.1. One way to secure the public's interest is to subject NTRs to minimum conditions. This would ensure a threshold past which private corrupt interests could not travel in their bargain with the state when striking an NTR.

3.2. To this end, the SALRC has recommended a commendably strict set of conditions to which NTRs may be subject.[12] They include, but are not limited to:

3.2.1. Payment of a penalty, reparations and the surrender of any ill-gotten profits;

3.2.2. Full co-operation in any investigation into the offenses at issue, "including offences committed by its directors and employees (as natural persons)".

3.2.3. In cases of a would-be corporate accused, strengthening internal controls to prevent future corruption;

3.2.4. Parties who breach an NTR's terms should be debarred from doing business with the state; and

3.2.5. Instituting disciplinary and/or civil action against implicated directors and employees.[13]

3.3. If conditions such as these were made mandatory by legislation, it would go a long way to ensuring that NTRs do not allow powerful corruption accused to take advantage of a weakened NPA.

3.4. However, this proposal raises, once again, the importance of capacitating the NPA to pose a credible threat to corruption accused. This is because the more weight that legislation gives to the public's interest in NTRs, the weaker the incentive will be for would-be accused parties to enter into them. Unless, of course, there is a credible threat of successful prosecution in the offing.

[12] Ibid para 69, p 32.
[13] Ibid.

4. The NPA's Own C-ADR Policy And The Importance Of Transparency And Accountability In An NTR Regime

4.1. The NPA's C-ADR, commendably, provides several internal guardrails that ensure deals struck with would-be corruption accused do not neglect the public's interest. These include:

4.1.1. A list of criteria that the NPA expressly intends to guide its discretion when deciding whether to enter into NTRs over traditional prosecutions;[14]

4.1.2. Procedures which the NPA will follow when it decides to enter into an NTR;[15]

4.1.3. Detailed considerations that guide the calculation of penalties;[16] and

4.1.4. Transparency and accountability mechanisms that require: (i) the NPA to publish a summary of any agreement struck under the C-ADR on its website; and (ii) that quarterly reports be sent to the NDPP "on all engagements with companies in respect of [the agreement] and on adherence to [their] terms".[17]

4.2. The NPA has struck two high-profile agreements under its C-ADR – one with Asea Brown Boveri Ltd ("**ABB**") in December 2022;[18] and another with McKinsey Africa ("**McKinsey**") in December 2024.[19] Both agreements saw significant penalties and undertakings to cooperate with the NPA's investigations into individuals allegedly involved in the crimes at issue.

4.3. However, the NPA's C-ADR does not require it to publish these agreements in full. As such, the South African public has not been able to see for itself how closely the NPA has followed its own policy in its engagements with ABB and McKinsey.

4.4. This is concerning because the extent to which the NPA deviates from its C-ADR is a crucial measure of its bargaining position in NTR negotiations. As such,

[14] The NPA's C-ADR p 2 to 4.
[15] Ibid p 5 to 6.
[16] Ibid p 8 to 9.
[17] Ibid p 11.
[18] See the NPA's press statement here.
[19] The deal was reported on here.

agreements struck under the C-ADR should be disclosed in full, much like the Department of Justice does in the USA.[20]

4.5. Further, it is not clear how the C-ADR's quarterly reporting requirement to the NDPP will keep the NPA accountable in further engagements with powerful corruption accused. Without accountability outside the NPA itself, we are left with the NDPP's say-so on the status of further investigations following NTRs. As such, reporting on the status of NTRs should involve Parliament through the Portfolio Committee on Justice and Correctional Services ("**JCS Committee**").

4.6. Nonetheless, given that the NPA has an established NTR policy in the form of the C-ADR that it has used in high-profile cases, the SALRC should use it as a starting point when crafting a more comprehensive statutory regime for NTRs.

5. The Case for Broader Reform at the NPA

5.1. While it cannot be denied that much of the NPA's recent trouble with corruption cases speaks to more general concerns with the quality of its personnel,[21] there remains room for structural reform that can help. We suggest three potential reforms here.

5.2. First, there should be appointment reform for top positions in the NPA.

5.2.1. The President has sweeping powers to appoint the NPA's top leadership. He appoints the NDPP on his own – DNDPPs and DPPs after consulting with the Minister of Justice ("**Minister**"), but he may choose candidates even if the Minister opposes them.[22]

[20] The DOJ's deferred prosecution agreement with McKinsey can be found here; and its agreement with ABB can be found here.
[21] *S v Thabethe and Others* (15/2023) [2024] ZAFSHC 317 (7 August 2024), para 122, available here.
[22] See sections 10, 11 and 13 of the National Prosecuting Authority Act 32 of 1998 ("**NPA Act**").

5.2.2. Centralising appointment power in the President has long been criticised as disposing the NPA to undue political influence.[23]

5.2.3. Given the crucial role that the NDPP, DNDPPs and DPPs play in carrying out the NPA's mandate, it is essential that the process for their appointment be designed to reduce the risk of undue political influence; and to give the public confidence that the most suitable candidates are chosen.

5.2.4. In this regard, the NDPP, DNDPPs and DPPs should be appointed by the JCS Committee in consultation with the Minister and the President, after a panel of suitably qualified persons suggests a candidate(s).

5.2.5. While Parliament will need to amend section 179(1)(a) of the Constitution to formally change the process for appointing the NDPP, nothing prevents the President from informally involving other stakeholders as members of a suitably qualified panel that supports his appointment process.[24]

5.2.6. Further, section 179(7) of the Constitution allows ordinary legislation to govern the process for appointing DNDPPs and DPPs. As such, nothing prevents Parliament from designing the appointment process we suggest for DNDPPs and DPPs by amending the National Prosecuting Authority Act 32 of 1998 ("**NPA Act**").

5.3. Second, DPP's tenure should be subject to renewal.

5.3.1. As matters stand, section 14 of the NPA Act provides that DPPs, once appointed, serve until they retire at age 65. It has been suggested that this risks politically compromised appointees overstaying their welcome; and

[23] Public Affairs Research Institute Report 'Appointments and Removals in Key Criminal Justice System Institutions April 2020 at p 10, available here; and Lukas Muntingh and Jean Redpath 'Recommendations for Reform of the National Prosecuting Authority', August 2020 at p 1, available here.

[24] The President did this when he appointed current NDPP, Shamila Batohi – although he did not involve stakeholders from Parliament. However, section 179(1)(a) certainly does not *prevent* the President from seeking the views of Parliament or the Minister as panel members in the appointment process for future NDPPs. See Public Affairs Research Institute Report 'Appointments and Removals in Key Criminal Justice System Institutions April 2020 at p 13.

that it creates bottlenecks for upward mobility given the strict conditions under which DPPs can be removed from office.[25]

5.3.2. As such, DPPs should be appointed to fixed terms of service, renewable at the instance of the Minister in consultation with the JCS Committee. This ensures that performing DPPs will continue to add value and that underperforming ones will have an opportunity to move on.[26]

5.4. Third, it should be easier for the NPA to make use of third-party skills in complex commercial cases.[27]

5.4.1. Currently, section 38 of the NPA Act provides for private counsel to conduct, or assist on conducting, complex prosecutions on the NPA's behalf.

5.4.2. Making use of section 38 may well be a crucial first step on the road towards capacitating the NPA to conduct more complex prosecutions in the future itself. However, unless private counsel provides their services pro bono, ultimate sign-off on their involvement resides with the Minister, who is in turn appointed by the President.[28]

5.4.3. This blunts section 38's capacity-building potential by subjecting its use to political actors in the executive, rather than to the NPA itself. As such, section 38 should be amended to better facilitate the use of private counsel in assisting the NPA to carry out its mandate.[29]

6. NTRs Should be Subject to Judicial Review with Public Interest Standing

6.1. Even with a properly reformed and capacitated NPA, NTRs should be properly overseen by the courts to ensure that they are not abused.

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[25] Dr Jean Redpath, 'Prosecutorial Independence and the Prosecution of Corruption' (2024) p 10, available here. For the conditions under which a DPP can be removed, see section 14(3) of the NPA Act, read with the relevant parts of section 12 of the NPA Act.
[26] This is similar to the security of tenure awarded to the Executive Director of the Independent Police Investigative Directorate. See section 6(3) of the Independent Police Investigative Directorate Act 1 of 2011.
[27] Op cit note 25 at p 9 and 14.
[28] Ibid.
[29] Ibid.

6.2. The State Capture Commission recommended that NTRs be overseen by the judicial arm of its proposed Public Procurement Anti-Corruption Agency ("**PPACA**"), an independent organ of state that would be dedicated to detecting, investigating and prosecuting procurement related offenses.[30]

6.3. The SALRC, rightly in HSF's view, finds this arrangement constitutionally inappropriate for NTRs, given that the NPA is established by section 179 as South Africa's sole prosecuting authority.[31] Moreover, if NTRs are to be an effective anti-corruption fighting measure, we cannot wait for the PPACA to be established but should instead use already existing state infrastructure, like the NPA, to administer them.

6.4. While the SALRC supports judicial oversight over NTRs, it bemoans broad public interest standing for litigants wishing to challenge them. In its own words:

> *"The South African legal context [provides] unusually wide grounds of locus standi for parties to challenge NTRs as well as a progressive written constitution in terms of which such challenges can be brought. In the South African context, it is necessary to insulate NTRs from such challenges to the extent that it is constitutional to do so. Legislation providing for NTRs should not invite judges to impose their views on the desirability of NTRs in general or the DPA/NPA before them in particular."*[32]

6.5. These remarks are troubling because, it is a feature – not a bug – of our constitutional order that broad public interest standing allows civil society to bring cases in the public interest.

6.6. Wishing away public interest standing in the interests of prosecutorial expediency is not only unprincipled in our constitutional order, it also ignores chapters in the NPA's recent history where public interest litigation has been a crucial check on improper decision-making.[33]

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[30] The PPACA would be composed of an Inspectorate, Litigation Unit, a Tribunal and a Court. See State Capture Commission Report Part 1, Volume I, p 845 -852, para 682 – 690.
[31] Discussion Paper para 55, p 28.
[32] Ibid para 57, p 27,
[33] See Unabridged Report, 1 April 2019, Following Section 12(6) Enquiry of the National Prosecuting Authority Act of 32 of 1998 p43 to 227. The report can be read here.

6.7. As such, any legislation that regulates NTRs in South Africa should not keep judicial scrutiny at bay, lest it open itself to constitutional challenge – and allow for their abuse. Rather, it should facilitate both the victims of the offense at issue, and the public at large, to have orderly access to mechanisms of judicial review.

7. Conclusion

7.1. In this submission, HSF has argued that NTRs cannot be ruled out in principle as a useful addition to the NPA's corruption fighting toolkit. However, any statutory regime introducing NTRs cannot ignore our unique context – an incapacitated NPA with a demonstrable history of political influence.

7.2. As such, HSF recommends that South Africa either:

7.2.1. Hold off on ushering in a statutory NTR regime until the NPA has been reformed and strengthened into an institution whose institutional integrity and prosecutorial capacity can act as genuine incentive to enter into NTRs on terms that favour the South African public interest; or

7.2.2. In the short term, subject NTRs to rigorous judicial review and strict conditions to ensure they do not allow corporations and powerful individuals to take advantage of the NPA's current lack of prosecutorial capacity.

7.3. Either way, reforming and building up the NPA's prosecutorial capacity is an indispensable first step in ensuring an effective NTR regime in South Africa.