



# Failing to prosecute?

Assessing the state of the National  
Prosecuting Authority in South Africa



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By Jean Redpath



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# Abbreviations and acronyms

AFU	Asset Forfeiture Unit
ANC	African National Congress
APLA	Azanian People's Liberation Army
CARA	Criminal Assets Recovery Account
CPS	Crown Prosecution Service
CSPR Board	Correctional Supervision and Parole Review Board
DA	Democratic Alliance
DDPP	deputy director of public prosecutions
DG	director general
DPP	director of public prosecutions
DSO	Directorate of Special Operations
IDSEO	Investigating Directorate: Serious Economic Offences
NDPP	national director of public prosecutions
NPA	National Prosecuting Authority
NPA Act	National Prosecuting Authority Act
OPW	Office for the Protection of Witnesses
OSEO	Office for Serious Economic Offences
PCLU	Priority Crimes Litigation Unit
POCA	Prevention of Organised Crime Act
PSC	Public Service Commission
SAPS	South African Police Service
SCCU	Specialised Commercial Crime Unit
SPP	senior public prosecutor
TRC	Truth and Reconciliation Commission
UN	United Nations
UNISA	University of South Africa

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# Executive summary

The National Prosecuting Authority (NPA) is pivotal not only in the criminal justice system, but also in the proper functioning of South Africa's democracy. This monograph focuses on the independence, accountability and performance of the NPA in relation to its core function of prosecution.

The monograph finds that the prosecutorial decision to decline to prosecute is both specifically and *systematically* exercised to such an extent that proportionally fewer cases are placed on the court roll each year and fewer still are brought to trial. The best indication of this is that the number of verdicts and the number of persons sentenced to prison show a general decline. It concludes that this tendency to decline to prosecute is currently the central malaise affecting the NPA.

In South African law, where a *prima facie* case exists, a duty to prosecute arises unless a compelling reason exists to decline to prosecute. Under a constitutional order such as the one that pertains in South Africa, the exercise of all public power is constrained by the principle of legality and the provisions of the Constitution. Yet the NPA has maintained that it has an unfettered discretion not to prosecute, which discretion is not generally subject to judicial review.

The monograph finds no evidence that the tendency to decline to prosecute is a function of lack of resources. Prosecutor and staff numbers have steadily increased since the establishment of the NPA, but efficiency per prosecutor in terms of cases prosecuted has declined. Nor does analysis of the evidence support the idea that the failure to prosecute is a function of pressure beyond the optimal level in terms of cases referred by the South African Police Service (SAPS). On the contrary, the evidence suggests that the NPA is operating at below optimal load. Various legislative and other impediments affecting its performance are identified.

It concludes that the primary factor affecting the credibility and performance of the NPA is the inappropriate exercise of the discretion not to prosecute, most

powerfully evident in the hands of the national director, who has a constitutionally sanctioned power of veto over the decisions of prosecutors under him. This veto has been exercised (or not exercised) with consequences that continue to cast doubt on the independence and impartiality of the NPA. This in turn affects internal morale and external public confidence.

The monograph recommends an overhaul of prosecutorial policy in order appropriately to delineate the circumstances under which the discretion to decline to prosecute should be exercised. Measures to assist the speedy resolution of cases should be mandated by Parliament and innovative means of increasing the number of appropriate resolutions of cases should be introduced. Performance reporting should determine optimal prosecutor workloads and there should be a focus on professional development to achieve the optimal throughput of cases.

# Methodology

This monograph made use of publicly available information on the NPA, gleaned from annual reports, *Government Gazettes*, reports to Parliament, and newspaper reports. In some instances, data collected from open sources, such as samples previously gathered from court records for research purposes, were re-analysed in order to explore particular issues. International and local literature was also considered.

The key findings were presented to peers at an ISS conference entitled 'National and international perspectives on crime reduction and criminal justice' in December 2011.

# 1 Prosecutorial independence

This chapter considers the issue of prosecutorial independence and its counterpart, accountability. International standards are clear that the core function of prosecution must be exercised without interference from the executive. The South African legislative framework, while emphasising independent prosecutorial decision making, does provide for executive involvement in the setting of policy and financial control. Presidential appointment of the national director of public prosecutions (NDPP) is counterbalanced by a ten-year tenure and an exhortation that legislation must ensure independence. This appears to have been insufficient in the controversial history of the NPA, in which the appearance of a lack of independence has been evident, as evidenced by there having been five leaders of the NPA in 13 years. The independence of the NPA thus does not appear adequately to have been secured in the democratic era.

## INTERNATIONAL STANDARDS

If justice is to be served, the pivotal role of the prosecution in the criminal justice system requires a prosecution service to provide neutral, non-political, non-arbitrary decision making about the application of criminal law and policy to

real cases.<sup>1</sup> Independence applies particularly in relation to the core functions of prosecutors common to most legal systems: deciding whether to initiate or continue a prosecution; conducting prosecutions before the courts; and appealing or conducting appeals concerning all or some court decisions.<sup>2</sup>

Yet there is little theoretical, academic, political or practical discussion about prosecutorial independence; indeed, in most Western European countries, the institutional dependence of prosecutors on the executive branch is the status quo.<sup>3</sup> Recognition of the problems related to prosecutorial dependence upon the executive branch is growing and there is a trend towards increasing the independence of prosecution services from the executive; this is especially evident in the transitional democracies of Central Europe and Latin America.<sup>4</sup>

With regard to international standards, the differences among public prosecution systems have made the task of finding common standards and ethical principles for public prosecutors across all systems difficult.<sup>5</sup> The need for prosecutors in nation states to be both independent and accountable in carrying out their role is, however, increasingly recognised in international instruments such as the United Nations (UN) Guidelines on the Role of Prosecutors<sup>6</sup> and the International Association of Prosecutors' Standards of Professional Responsibility, but there is little that is binding on nation states. South Africa's Constitution, however, directs courts to have regard to international law when making decisions.

International law does not contain a provision that guarantees the institutional independence of prosecutors. Nevertheless, the UN Guidelines recognise the crucial role played by prosecutors in ensuring that the Universal Declaration of Human Rights<sup>7</sup> principles of equality before the law, the presumption of innocence, and the right to a fair and public hearing by an independent and impartial tribunal are upheld, and exhort states to ensure that prosecutors 'are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability'.<sup>8</sup>

The UN Guidelines further provide that 'in countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution'.<sup>9</sup>

Council of Europe recommendations,<sup>10</sup> while recognising that prosecutorial agencies may be subject to institutional dependence, state that dependence does

not extend to the issuing of instructions by government on particular cases. Thus, in countries where the prosecuting agency is part of or subordinate to government, recommendation 13(f) provides that executive government ‘instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to ... (additional requirements) ... but also to an appropriate specific control with a view in particular to guaranteeing transparency’.

Thus, the thrust of international standards seems to be explicit protection of prosecutorial decision making around decisions to prosecute, while accepting a degree of institutional dependence on executive government.

## SOUTH AFRICAN LEGISLATIVE FRAMEWORK

Much of the controversy surrounding the NPA in the years since its establishment in 1998 relates to the interpretation of the extent to which the NDPP is independent of or subject to ministerial control; in other words, the extent to which the prosecution is independent of the executive. This becomes of particular pertinence in relation to decisions not to prosecute politically or economically well-connected persons. This problem is not unique to South Africa and is at the centre of controversy in many countries.

The key feature of the South African legislative framework is the centralisation of the prosecution service under the authority of the NDPP, who is a presidential appointment. Furthermore, the Constitution provides that ‘the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority’. The Constitution attempts to balance the presidential appointment with security of tenure for the national director and a requirement for legislation to ensure that the NPA operates without fear, favour or prejudice.

### The Constitution

The NPA arose out of South Africa’s transition to democracy. The constitutional position of the NPA in relation to the executive branch of government, represented by the Presidency and cabinet, has its origins in the transitional negotiations. The Interim Constitution<sup>11</sup> passed in 1993 was the result of negotiations leading to the transition to democracy.<sup>12</sup> This constitution not only provided for electoral

rules for the country's first democratic election in April 1994, but also contained constitutional principles on which the 'final' constitution was to be based.<sup>13</sup> Only provisions not in conflict with these constitutional principles could form part of the final constitution, which was to be legislated by the newly elected Parliament.

Constitutional principles IV, VI and VII are key for the purposes of understanding the constitutional position of the NPA today. These principles provide that the final constitution must be the 'supreme law' binding on all organs of state and all levels of government.<sup>14</sup> Furthermore, there must be a separation of powers among the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.<sup>15</sup> The judiciary must be appropriately qualified, independent and impartial, and have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.<sup>16</sup>

What are the implications of these principles for the constitutional establishment of the national prosecuting authority? The new Parliament of 1994, termed the Constitutional Assembly for the purposes of passing the final constitution, introduced a constitutional provision in the 1996 Constitution that dealt specifically with a prosecuting authority for the country.<sup>17</sup> Provisions that form part of the Constitution can only be changed by a two-thirds majority of Parliament, unlike provisions in other legislation, which can be changed by an ordinary majority of Parliament.

The provision for the prosecuting authority provided, *inter alia*, the following:

- A *single* national prosecuting authority, structured according to an Act of Parliament, should have the power to institute criminal proceedings on behalf of the state.<sup>18</sup> This marked a departure from the situation extant at the time, in which there were attorney-generals in each province.
- National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.<sup>19</sup> The provision is silent on how national legislation is to achieve this.
- The president shall appoint an NDPP who is head of the prosecuting authority.<sup>20</sup> This provision created the powerful position of national director who is directly appointed by the president.
- The NDPP determines, with the concurrence of the minister of Justice and after consultation with the directors of public prosecutions (DPPs), general policy to be observed in the prosecution process.<sup>21</sup>

- The NDPP must issue policy directives to be observed in the prosecution process<sup>22</sup> and he/she may intervene in the prosecution process when policy directives are not complied with.<sup>23</sup>
- The NDPP may review a decision to prosecute or not prosecute, after consulting the relevant DPPs.<sup>24</sup>
- The minister of Justice must exercise final responsibility over the prosecuting authority.<sup>25</sup> The exact ambit of this 'final responsibility' was not spelt out.

Attorney-general of the then-Transvaal and legal scholar A. C. Cilliers objected to the constitutional provisions regarding the NPA during the constitutional certification process provided for in the Interim Constitution.<sup>26</sup> The grounds raised were that the provisions impinged on the separation of powers among the legislature, executive and judiciary, and interfered with appropriate checks and balances – i.e. that they interfered with the constitutional principles contained in the Interim Constitution, under which the Constitutional Court was required to certify the final constitution.

Cilliers referred the court to the Namibian example. The Namibian Constitution provides that there should be an attorney-general and a prosecutor-general. The attorney-general is a political appointment and holds office at the discretion of the president without any security of tenure. The prosecutor-general is appointed by the president on the recommendation of the Judicial Service Commission and under the Constitution is vested with the power to prosecute in the name of the Republic of Namibia.<sup>27</sup> The Namibian Constitutional Court determined that the prosecutor-general is not subject to the instructions of the attorney-general.<sup>28</sup>

The Constitutional Court found that Cilliers' objection rested on the presidential appointment of the NDPP and ultimately rejected the objection, arguing that the prosecuting authority is not part of the judiciary and that the appointment of the NDPP by the president does not in itself contravene the doctrine of separation of powers.<sup>29</sup> Moreover, the court noted that the constitutional provision requiring that subsequent legislation must ensure the prosecuting authority exercise its functions 'without fear, favour or prejudice' was in fact a guarantee of prosecutorial independence.<sup>30</sup>

The court did not expressly consider the provision relating to ministerial control over the prosecuting authority, but did quote authority on the 'lack of uniformity in Commonwealth countries in regard to the status of the prosecuting

authority’, stating that ‘there is no single policy to be discerned in these countries as their constitutions have adopted different models and, in some cases, a hybrid mixture. Moreover in none of them has the same language been used as in the Constitution of Namibia’:<sup>31</sup>

*Ex parte Attorney-General* was concerned with the application of the particular prosecuting model selected by the Namibian Constitution. The decision as to the model to be adopted for the prosecuting authority in the New Text is not prescribed by the Constitutional Principles and was a decision to be taken by the Constitutional Assembly. If that decision complies with the requirements of the Constitutional Principles we have no power to set it aside. The choice that was made is not inconsistent with Constitutional Principle VII nor with any other of the Constitutional Principles.<sup>32</sup>

The constitutional text presented to the South African Constitutional Court was rejected on other grounds,<sup>33</sup> but after some amendment, the Final Constitution was certified with the provision regarding the prosecuting authority intact.<sup>34</sup> Parliament duly passed the National Prosecuting Authority Act (Act 32 of 1998) (NPA Act) to give effect to the constitutional provision and to spell out the details of a new prosecutorial system for the country.<sup>35</sup>

## Legislation

The NPA Act is the main legislative text governing the NPA. Amendments to the original text have been occasioned by the creation of the Directorate of Special Operations (DSO) and subsequently for the deletion of these provisions after a political decision was taken to remove the DSO from the NPA and to create a new entity under the SAPS. The essential text remains unchanged.

## Appointment of the NDPP

The appointment of the NDPP by the president is largely discretionary – the only requirements are that whomever the president appoints must have legal qualifications to practise law in all courts of the country, be a South African citizen, and ‘be a fit and proper person’.<sup>36</sup> Read into these requirements may be the requirements of administrative law in relation to decisions, e.g. that the president must

apply his/her mind to the decision of whom to appoint. The president sets the remuneration and terms of service for the NDPP, but the salary of the NDPP by law must be at least that of a High Court judge,<sup>37</sup> which is currently R1.3 million per annum.

## Tenure of the NDPP

The law provides that the NDPP be appointed by the president for a non-renewable term of ten years, and that he/she can only be removed by the president and Parliament for misconduct, sustained ill-health, incapacity or because he/she generally is not a fit or proper person for office.<sup>38</sup> The NPA in its 12 years of existence has already experienced three NDPPs and two acting NDPPs. This is a symptom of the intense political battles that have played out in the arena of the office of the NDPP.

## Appointment of senior staff

The NDPP does not directly appoint senior staff; the president or the minister of Justice makes senior appointments. The president appoints up to four deputy NDPPs, after consultation with the minister of Justice and the NDPP.<sup>39</sup> These deputy NDPPs serve for life and have considerable influence over continuity in the national office of the NPA. The president may also appoint special directors of public prosecutions by proclamation, with specific mandates.<sup>40</sup> The president also appoints, after consultation with the minister of Justice and NDPP, provincial directors of public prosecutions.<sup>41</sup> The minister of Justice appoints provincial deputy directors of public prosecutions after consultation with the NDPP.<sup>42</sup> As with the NDPP, the remuneration and terms and conditions of service of the deputy national directors and the provincial directors are determined by the president.<sup>43</sup>

### *Notice of outside interests by senior staff*

The NDPP, deputy NDPPs and directors must give written notice to the minister of Justice of all direct and indirect pecuniary interests. Moreover, directors and deputy directors may not perform any paid work outside their official duties without the consent of the president.<sup>44</sup>

## Accountability to the minister

The minister of Justice must exercise final responsibility over the prosecuting authority.<sup>45</sup> As noted above, the Constitution is silent on the ambit of this responsibility. The NPA Act seems to circumscribe this responsibility to the accounting function: the director general (DG) of Justice and Constitutional Development is legislatively responsible for accounting for state monies paid out for the NPA.<sup>46</sup> Despite this responsibility, the NPA assumed separate responsibility from 1 April 2001 for all support services previously rendered by the Department of Justice and from this date was responsible for its own accounting systems and the preparation of separate financial statements.<sup>47</sup> Such a delegation of responsibility does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.<sup>48</sup> The ambit of the DG's accounting function was the subject of some dispute between then-NDPP Vusi Pikoli and then-DG: Justice and Constitutional Development Menzi Simelane, which dispute also formed part of the Ginwala Commission Inquiry. Pikoli restricted the interpretation to 'bean-counting', while Simelane's interpretation was in favour of a wider degree of control over the NPA by the DG.<sup>49</sup> The latter interpretation has a restrictive implication for the degree of institutional independence enjoyed by the NPA.

## Accountability to Parliament

The NPA Act provides that the NPA is accountable to Parliament in respect of its powers, functions and duties under the Act, including decisions regarding the institution of prosecutions.<sup>50</sup> The Act provides that the NDPP must submit an annual report to the minister of Justice, which the minister must then submit to Parliament within 14 days of its next sitting.<sup>51</sup> The report must include information on the activities of the NDPP, his senior staff and the NPA as a whole; the personnel situation of the NPA; the financial status of the administration and operation of the NPA; recommendations or suggestions regarding the NPA; information relating to training programmes for prosecutors; and any other information the NDPP deems necessary.<sup>52</sup> At his discretion, the NDPP may also submit to the minister or Parliament reports on matters relating to the prosecution service.<sup>53</sup> This has been done with increasing regularity since the appointment of Menzi Simelane as NDPP. The annual budget proposal is also a means by which

a measure of transparency is obtained regarding the NPA. The NPA is reliant on the Department of Justice and Constitutional Development for the appropriation of funds from and preparation of a budget for approval by Parliament. The budget includes 'service delivery' objectives and indicators, with quantifiable goals for performance in certain functional areas<sup>54</sup> and performance indicators – such as, for example, conviction rates, number of incidents threatening witness safety and average court cycle times.<sup>55</sup>

## PROSECUTION BEFORE 1998

The motivation of the Constitutional Assembly in introducing the provisions establishing a centralised NPA must be understood in the light of the legislative history of attorneys-general dating back to 1910. Prior to the formation of the Union of South Africa in 1910, the prosecution authority, at least in the Transvaal, was vested absolutely in the attorney-general. With the formation of the Union, this was confirmed,<sup>56</sup> and in turn reflected in the Criminal Procedure and Evidence Act of 1917, as follows: 'This right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control.'

Until 1926 the prosecuting authority had absolute autonomy and was free from political control. However, in that year legislative amendments by the government of Prime Minister JBM Hertzog (who succeeded JC Smuts in 1924 after the 1922 miners' strike) placed the attorneys-general under the control and direction of the minister.<sup>57</sup> Direct and indirect political influence on the prosecution process was therefore possible, as there was no formal or substantive separation of powers between South Africa's most senior prosecutors – the provincial attorneys-general – and the executive.<sup>58</sup> This was made even more explicit by a legislative amendment in 1935:

Every Attorney-General and Solicitor-General shall exercise their authority and perform their functions under this Act and under any other Act subject to the control and direction of the Minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or a Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function.<sup>59</sup>

Thus, from 1935 the prosecuting authority became part of the authority and power of the minister of Justice. The minister had the legal right to take over the role of the attorneys-general and solicitors-general at his own discretion.

Such tight control of the prosecutorial authority has always been closely related to the political situation in South Africa. In the aftermath of the 1976 student revolt, the government of John Vorster was adamant it would control all spheres of society. The then-new Criminal Procedure Act of 1977 – the Act South Africa still uses today – was passed by this government and was but one of a series of oppressive pieces of legislation emanating from that period; unsurprisingly, it reiterated the 1935 position,<sup>60</sup> which was still in place at the time of the constitutional negotiations that commenced in 1991.

However, in 1992, via a legislative amendment introduced by the FW de Klerk government, the minister's power to interfere with an attorney-general's decisions was removed and the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of ministerial interference.<sup>61</sup> The function of the minister of Justice in relation to attorneys-general was, by this amendment, reduced to that of a co-coordinator, ensuring that the reports of the attorneys-general were submitted to Parliament; at most, the minister could ask an attorney-general to furnish him/her with reports and provide explanations regarding the handling of particular cases.<sup>62</sup> The 1992 amendment was at the time viewed with some cynicism, promulgated as it was by the apartheid government barely two years before a new government was to come into being.<sup>63</sup> The legislation also provided that an attorney-general held office until age 65 and could not be removed except for misconduct, ill-health or incapacity.<sup>64</sup> Security of tenure is one of the key methods legislatures use in order to protect the independence of an office.

The African National Congress (ANC), however, regarded the legislation as 'an attempt by the old-order prosecutors to protect their entrenched positions'.<sup>65</sup> Hence the provisions regarding the NPA introduced by the Constitutional Assembly in the Final Constitution were to some extent a reaction to the 1992 amendments and thus provided for an NDPP, to be appointed by the executive, who would have final say over decisions to prosecute or not to prosecute and over prosecutorial policy.

## THE NDPP, 1998–2011

In this section, the record of the NDPPs who have led the NPA thus far is considered with reference to the major political challenges they have faced, with a view to understanding the extent to which they may have perceived to have operated independently, without bias and accountably. In many ways, the facts speak for themselves. To be NDPP is to invite criticism in terms of a lack of independence or of pursuing a political agenda; for this reason, decisions need to be made on the basis of clear legal principle and policy that are well known before such decisions are taken. The appearance of a lack of independence or bias by the NDPP, who holds the final say over all prosecutions, is perhaps just as damaging to the office and to criminal justice as the real existence of a lack of independence or bias. In this regard, the record of the candidate for appointment as NDPP should be closely considered by a president considering whom to appoint.

### NDPP Bulelani Ngcuka 1998–2004

The first NDPP, appointed by President Thabo Mbeki, was Bulelani Ngcuka. Ngcuka's decision publicly to announce in August 2003 the existence of a *prima facie* case of corruption linked to Schabir Shaik and then-Deputy President Jacob Zuma and to state his intention not to prosecute the deputy president was the most controversial of his tenure and widely viewed as politically motivated. In the fallout, he was accused of being an apartheid spy, but was cleared by a commission of inquiry<sup>66</sup> instituted by Mbeki.

Ngcuka resigned in July 2004, six years into his tenure and less than a year after the pivotal press briefing. He resigned after the Public Protector, Lawrence Mushwana, had found that by issuing the press statement, Ngcuka had infringed Zuma's right to human dignity and improperly prejudiced him. An ANC-dominated parliamentary committee adopted the Public Protector's report. The ANC majority committee was selected by a meeting chaired by Zuma; the committee refused to grant Ngcuka a hearing.<sup>67</sup>

Prior to his appointment as NDPP, Ngcuka had been deputy chairperson of the National Council of Provinces, as well as an ANC member of the pre-1994 multi-party negotiations. He received his legal education at Fort Hare and the University of South Africa (UNISA). Like many lawyers, he started his professional life as an articled clerk in 1978. He was articled and became a professional assistant at

the GM Mxenge law firm in Durban, a firm that specialised in representing anti-apartheid activists. GM Mxenge was murdered in 1981 by an askari hit squad and his wife Victoria was murdered in 1985 while preparing to represent the United Democratic Front and Natal Indian Congress in court. During Ngcuka's tenure, the NPA building in Silverton, Pretoria was named the Victoria and Griffiths Mxenge Building after the Mxenges. Ngcuka was imprisoned in the 1980s for refusing to testify for the state against an ANC guerrilla.

Because of his close history with the ANC, opposition parties at the time of his appointment questioned the extent to which the NPA under him would operate independently and in particular whether the NPA would act in relation to crimes linked to high-profile ANC members, and indeed in relation to Truth and Reconciliation Commission (TRC) matters. Despite these concerns, during his tenure, struggle icon Alan Boesak was charged and found guilty of fraud committed during the apartheid years (which he justified as 'struggle accounting') in March 1999. Prosecutions of two senior ANC politicians, MP Winnie Madikizela-Mandela and party chief whip Tony Yengeni, both culminated in 2003, also under Ngcuka's tenure.

Cynics would argue that these latter cases were no evidence of independent action by Ngcuka, but rather a function of his close association with the Mbeki-oriented faction of the ANC, which association was also mooted as underlying his press statement incriminating Zuma in 2003.

Within a year of Ngcuka's departure, Zuma was relieved of his duties as deputy president in 2005 by Mbeki after Judge Hilary Squires found Schabir Shaik guilty of corruption on the basis largely of his dealings with Zuma. Ngcuka's wife, Phumzile Mlambo-Ngcuka, was subsequently appointed deputy president in Zuma's stead.

Corruption commentator Hennie van Vuuren, writing in the *Mail & Guardian* in 2010, was of the view that Ngcuka

initially gave life to the constitutional vision of an NPA willing to prosecute corruption in the arms deal. But he also crossed the political line, joining former justice minister Penuell Maduna in announcing that he had a *prima facie* case of corruption against Zuma. The media grandstanding and reluctance to proceed with charging Zuma while raiding his homes for evidence as far back as 2003 were politically calculated acts. Within six years the Scorpions had been caught in the crossfire and dismantled.<sup>68</sup>

Looking at the performance of the NPA more broadly during Ngcuka's tenure, the number of cases prosecuted with a verdict achieved in 2003, at the peak of Ngcuka's tenure, has yet to be matched subsequently (see chapter 2). Although Ngcuka served for only six years, he remains the longest-serving NDPP South Africa has yet had.

## Acting NDPP Silas Ramaite, 2004–2005

Silas Ramaite was appointed acting NDPP in September 2004. He was a caretaker acting NDPP for less than a year until the appointment of Vusi Pikoli in January 2005, during a time when morale was particularly low in the NPA after Ngcuka's exit. Ramaite adopted a comparatively low profile, in line with his academic and more conservative legal background and his position as acting NDPP. He has, however, been a key member of NPA leadership throughout its turbulent history.

Ramaite received his university education at Fort Hare and UNISA, and was briefly a prosecutor and magistrate in the 1980s and then a candidate attorney in the state attorney's office, after which he became a state advocate.

In 1989 he received his LLM from UNISA with a thesis entitled 'Parliamentary sovereignty and the entrenchment of human rights in South African constitutional law'. He was appointed acting attorney-general in Thoyandou between 1993 and 1996, and was deputy attorney-general in Pretoria from 1997 until he took up a position as deputy DPP (DDPP) in the NPA. In 1996 he received his LLD from UNISA with a thesis entitled 'The role of the judiciary in a modern state with a tradition of legislative supremacy'.

Ramaite remains a DDPP in the NPA, a post that legislation permits him to hold until retirement age. Thus he provides a measure of continuity and institutional memory within the NPA – he served in the NPA head office even during Ngcuka's tenure. However, Ramaite appears to have a conservative nature and is unlikely to encourage politically difficult decisions.

## NDPP Vusi Pikoli, 2005–2007

Vusumzi Pikoli was deputy DG and DG: Justice before being appointed NDPP of the NPA in February 2005 by President Thabo Mbeki, only to be suspended by Mbeki in September 2007. His dismissal on dubious grounds brings into question the extent to which the NDPP's tenure provides sufficient protection for an

NDPP wishing to undertake politically difficult prosecutions that have a basis in law. It is unfortunate for South Africa that Pikoli chose to accept a settlement rather than have the legality of his dismissal determined in a court of law. Had a strong legal precedent been established protecting NDPPs from dismissal on dubious grounds, a greater degree of independence would have been established for the NPA.

Pikoli's short tenure as NDPP was closely associated with the prosecution of high-profile politically connected people such as Jacob Zuma and the then-commissioner of police, Jackie Selebi.

In December 2005 rape charges were formally filed against then-former Deputy President Jacob Zuma, who was tried but ultimately acquitted less than a year later. Zuma's trial was finalised relatively speedily and during the case he was out on bail of R20 000 (a study has shown that 90 per cent of rape accused are denied bail, largely because legislation stipulates the existence of exceptional circumstances for the release of rape accused on bail).<sup>69</sup>

Zuma had at the time of the rape trial been relieved of his duties as deputy president by President Mbeki in mid-2005 after Judge Squires' conviction of businessman Schabir Shaik. Pikoli charged Zuma on associated charges around the same time. However, in 2006 the High Court dismissed the charges because the prosecution was not ready to proceed.

On 27 December 2007 Zuma was recharged via an 87-page indictment, shortly after he had been elected as president of the ANC at the party's 2007 Polokwane conference. At this conference, he defeated Mbeki for the leadership position of the ruling party.<sup>70</sup>

Also in 2007 a warrant of arrest for the then-commissioner of police, Jackie Selebi, who was perceived to be a Mbeki ally, was authorised. Soon after the existence of the warrant became known, Mbeki suspended Pikoli on 24 September 2007 on the basis of an 'irretrievable breakdown' in the relationship between Pikoli and then-Justice Minister Bridget Mabandla.

Frene Ginwala, a former speaker of the National Assembly, was appointed on 28 September 2007 to head a commission of inquiry into Pikoli's fitness to hold office and on the breakdown of the working relationship between him and Justice Minister Mabandla. In December 2008 Ginwala found that most of the allegations against Pikoli were unfounded. She found, however, that Pikoli should have agreed to Mbeki's request that he be given two weeks before proceeding against Selebi, on the basis of national security. On this basis, Mbeki's caretaker

successor, then-President Kgalema Motlanthe, refused to reinstate Pikoli as head of the NPA. Pikoli's decision to prosecute Selebi has been justified by Selebi's ultimate conviction and sentencing.

In her findings, Ginwala made negative findings around the then-DG: Justice and Constitutional Development, Menzi Simelane. She found Simelane's conduct to be 'irregular' and suggested that his drafting of a letter to Pikoli, in which Simelane instructed Pikoli to abort the imminent arrest of Selebi, was contrary to law.

Prior to becoming NDPP, Pikoli received his university education at the University of Lesotho and was awarded an LLM from the University of Zimbabwe in 1988. He worked in the private sector for the Munich Reinsurance Company of Africa in the early 1990s before becoming special adviser to the then-minister of Justice (the late Dullah Omar) in 1994.

Pikoli challenged his dismissal in court, but ultimately accepted a settlement of R7,5 million before the case could be heard. The latter period of Pikoli's tenure was marked by a dramatic reduction in the number of cases finalised with a verdict recorded by the NPA (see chapter 2, below). It is unclear whether this may be attributable to poor leadership on the part of Pikoli or low morale occasioned by the intense political pressure under which the NDPP – and thus the NPA – was operating at the time, or whether it was caused by the factors discussed in chapter 2.

## Acting NDPP Mokotedi Mpshe, 2007–2010

Mokotedi Mpshe became acting NDPP at a time of high controversy. He was appointed after the suspension of Vusi Pikoli by then-President Thabo Mbeki. At the time of his appointment he was head of the National Prosecuting Service, the entity within the NPA responsible for public prosecutions.

Like caretaker acting NDPP Silas Ramaite before him, Mpshe's background is one of an academic and homeland government lawyer rather than a struggle activist, which is suggestive of a more conservative approach to prosecution. The most important act of his caretaker tenure was his announcement of the NDPP decision not to prosecute Jacob Zuma.

This he subsequently justified in court by claiming an unfettered discretion for NDPPs in deciding not to prosecute and further claiming that such decisions are not in the ordinary course susceptible to judicial review. This illustrates the close link between independence and impartiality and the duty to prosecute.

Without a clear legal basis to make decisions on whether to prosecute or not, the decisions of NDPPs will always be subject to question.

Mpshe has degrees in law from the Universities of Zululand and Bophuthatswana, including an LL.M. He was a prosecutor in the Bophuthatswana Department of Justice for 11 years, from 1978 to 1989, and lectured and practised as an advocate in the Pretoria area in the early 1990s. In the post-apartheid years he was chief leader of the Gauteng TRC and became a director of public prosecutions in KwaZulu-Natal in 1998, and is still a director in the NPA. In 1999, when he was KwaZulu-Natal director of public prosecutions, Mpshe was found guilty of four counts of misconduct by the Pretoria Bar Council, of which he was a member, relating to his conduct as an advocate in 1992.<sup>71</sup>

In September 2008 President Mbeki was 'recalled' by the ANC, after which he tendered his resignation. Kgalema Motlante was elected to the presidency by the National Assembly and served from 25 September 2008 to 9 May 2009. This formed the background to Mpshe's public announcement on 6 April 2009 that he had decided not to prosecute Jacob Zuma, in the light of allegations of abuse of process, particularly around the timing of the decision to charge Zuma.

These allegations of abuse of process were linked to leaked intelligence recordings of telephone conversations between Leonard McCarthy, who was then head of the Scorpions and who had been responsible for the proceedings against Zuma, and former NPA head Bulelani Ngcuka. Mpshe's speech was much criticised for relying on dubious international legal authority and for appearing to have plagiarised a Hong Kong judge's written judgment. His affidavit in court supporting this decision is discussed below.

The timing of Mpshe's announcement not to prosecute Zuma removed the last obstacle to the Zuma presidency. On 22 April 2009 the national election was held in which the ANC won a majority. Zuma, as leader of the ANC, was elected by the National Assembly and inaugurated as president in May 2009. It is worth noting that because Jacob Zuma was never asked to plead, he is not entitled to an acquittal and prosecution may later be instituted.

## **NDPP Menzi Simelane, 2010 –**

Although Simelane is too young to have been involved in the struggle (he was born in 1970), he comes from a struggle family. His father, Bekumdeni

Simelane, was a regional commander of the Azanian People's Liberation Army (APLA). Menzi Simelane was schooled in Zimbabwe and received an LLB in December 1995 from the University of KwaZulu-Natal, after initially receiving a BProc from the same institution in February 1994. He attended the School for Legal Practice for practical training, usually attended by those intending to become attorneys, for six months after receiving his LLB. Thereafter, his CV records pupillage with the Durban Bar Council. It is unclear with whom his pupillage was served.

He practised at the Johannesburg Bar from 1997 to 1998. In March 1999 he was appointed chief legal counsel in the legal services division for the Competition Commission and a mere nine months later was elevated to competition commissioner, where he served for five years. During this period he received much favourable publicity from the business community, as he was perceived to be performing his role as competition commissioner with gusto.<sup>72</sup>

In June 2005 he became DG: Justice and Constitutional Development, where he initiated a review of the criminal justice system. (This review was not related to that publicised by the then-deputy minister of Justice, Johnny de Lange.) As DG: Justice and Constitutional Development he was perceived as frustrating local investors' attempts to cooperate with foreign counterparts probing arms trade corruption.<sup>73</sup>

In April 2006 Menzi Simelane's father, Bekumdeni Simelane, won a Cape High Court order to set aside the TRC's decision not to grant him amnesty.<sup>74</sup> The court ordered the Department of Justice, then headed by Menzi Simelane as DG, to reconstitute the amnesty committee in order to rehear the application. No record of the amnesty committee having been reconvened could be found.

In 2008 it emerged during the Ginwala Commission that Simelane had drafted an instruction to Vusi Pikoli to halt the prosecution of the former police commissioner, Jackie Selebi. Commission chairwoman Frene Ginwala described Simelane's conduct and testimony as 'highly irregular'. This is even more apparent in the light of Selebi's ultimate conviction.

Then-Justice Minister Enver Surty asked the Public Service Commission (PSC) to investigate and advise on the criticism of Simelane contained in the Ginwala report. The PSC recommended the Department of Justice take disciplinary action against Simelane. However, in November 2009 Justice Minister Jeff Radebe rejected the PSC's recommendation and did not order a disciplinary inquiry into Simelane's conduct; two days later he was appointed NDPP.

At the end of November 2009 President Zuma appointed Simelane NDPP, a few days after Vusi Pikoli withdrew his application for the nullification of his dismissal on receipt of a settlement.

The opposition Democratic Alliance (DA) brought a case in the High Court, currently (November 2011) on appeal before the Supreme Court of Appeal, in which it contests the appointment of Simelane on the basis that he is not a 'fit and proper person' to lead the NPA.

Early on in his tenure, Simelane controversially attempted to 'demote' several senior prosecutors, restructure internal reporting lines and change the way in which asset forfeiture is pursued by the state.

The Asset Forfeiture Unit (AFU) (see Appendix C) has since its inception been closely associated with Deputy National Director Willie Hofmeyr, who was originally appointed special director responsible for asset forfeiture.<sup>75</sup> In early 2010 it was reported that the NPA would require AFU staff to report to provincial DPPs rather than to Hofmeyr.<sup>76</sup> Hofmeyr would remain 'co-ordinator' of the unit. Justice Minister Radebe reportedly intervened to put this 'restructuring' on hold.<sup>77</sup> Hofmeyr has concurrently been head of the Special Investigating Unit (formerly headed by Judge Heath), an entity outside of the NPA that investigates specific instances of corruption by presidential proclamation. Although it was reported that he would be asked to relinquish one of these posts, at the time of writing it was unclear what had transpired in this regard.<sup>78</sup>

In April 2010 it was reported that Simelane had intervened in the attempt by the AFU to freeze the foreign assets of businessman Fana Hlongwane, former adviser to the late former defence minister, Joe Modise, as part of the arms deal investigation. The AFU was seeking a finalisation of a preservation order freezing Hlongwane's assets in the tax haven of Lichtenstein. An initial preservation order had been granted by the High Court in Pretoria on 5 March.<sup>79</sup>

Simelane was at the helm when the DSO entity was finally absorbed within the SAPS; he did not oppose the loss of the DSO from the NPA. In May 2010 Simelane told Parliament's Standing Committee on Public Accounts that the NPA was no longer involved in any arms deal investigations and that these were now the responsibility of the Directorate of Priority Crime Investigation (the Hawks) within the police.

High-profile ANC luminaries have, however, not been immune from prosecution during Simelane's time in office. For example, in January 2010 Sheryl Cwele, wife of State Security Minister Siyabonga Cwele, was arrested on

drug-trafficking charges. In May 2011 she was convicted and sentenced to 12 years' imprisonment.

In July 2010 the prosecution of former Police Commissioner Selebi, initiated under Pikoli's tenure and which Pikoli claimed lay behind his dismissal, was finalised, with the court finding Selebi guilty of corruption. In August he was sentenced to 15 years' imprisonment.

In November 2010 ANC Northern Cape provincial chairperson John Block was charged with tender fraud. The ANC Youth League in the Northern Cape has described the charges against Block as being politically motivated.<sup>80</sup> The case had been postponed to 2012 at the time of writing.

Whether these cases suggest a current willingness on the part of the NDPP to prosecute the politically connected is not clear. Without knowing the full extent of possible cases presented to the NPA and the degree of political connectedness to in-favour factions of those convicted, this cannot be determined.

## DISCUSSION

The degree to which the NDPP – and in turn the NPA – is independent and to whom and in what way he/she and it are accountable are questions of both legal and practical import. The record of the five NDPPs and acting NDPPs referred to in this chapter illustrates how the prosecuting authority has been integrally involved in political events, often creating the perception of a compromised independence.

The independent operation of a prosecuting authority is increasingly seen as crucial to the just operation of criminal justice systems internationally. Yet the framers of the South African Constitution appear to have envisaged a degree of institutional dependence of the NPA on the executive, particularly in relation to the setting of prosecution policy and around the accounting of finances.

This institutional dependence does not, however, imply that the NDPP is subject to instruction by the executive in specific cases that are otherwise prosecuted within the law. Furthermore, authority and legal theory suggest that decisions not to prosecute may be distinguished from decisions to prosecute and under certain circumstances will be subject to judicial review.

The NPA is in addition accountable to Parliament. However, the implications of this accountability have not been tested, as members of Parliament from the majority party are frequently politically 'junior' to members of the executive.

For justice to be done and to be seen to be done, a prosecution service must be independent, impartial, fair and effective, and be accountable for its actions and decisions. The shaping of the prosecuting authority in this direction appears still to be in progress.

## NOTES

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# 2 General prosecution performance

This chapter covers various ways of measuring the performance of the NPA in carrying out its core function of prosecution. The analysis further considers ways of calculating the optimal workload for prosecutors and finds that prosecutors are probably operating at below optimal levels of workload. The analysis suggests a decreasing efficiency in terms of finalisations and theorises that this is due to undue emphasis on success in court and legislative impediments to alternative and early resolution of cases that could reduce the trial burden on prosecutors and increase the conviction throughput rate.

## MEASURING PERFORMANCE

Implicit in the mandate of the NPA is the requirement that it comply with constitutional obligations on the state to ensure that the rights of victims, witnesses, suspects and accused persons are not limited unjustifiably in the institution, conduct and discontinuation of prosecutions. The present assessment will judge the performance of the NPA based on its core mandate to conduct criminal proceedings on behalf of the state. Although the NPA has a range of incidental functions such as witness protection, asset forfeiture and community prosecution,

these are ancillary to prosecution. Furthermore, the analysis does not consider separately prosecutions carried out by special units of the NPA (see Appendix C).

## Conviction rates as a performance measure

Measuring the performance of the NPA in fulfilling the core mandate of prosecution is less straightforward than it seems. It has been argued by many – including the author of this assessment – that the most sensible measure of the performance of the criminal justice system is the number of convictions (i.e. successful prosecutions) in relation to the number of crimes reported to the police, on a year-on-year basis.<sup>1</sup> This measures the extent to which the criminal justice system is addressing crimes reported to the authorities in the manner agreed upon by the democratic state.

Obviously, this measure incorporates the performance of a variety of state actors in contributing to such a successful prosecution: the police in handling complaints, investigating crimes, handling arrests and providing evidence in court; the NPA in conducting prosecutions; magistrates in managing the progress of cases and reaching decisions; the Department of Correctional Services in ensuring persons in custody remain in custody and are available for transport to court at the correct time; and even the Legal Aid Board in providing a reliable service that ensures the smooth and speedy conclusion of cases. Consequently, this overall performance measure is not generally accepted as a measure of the performance of individual contributing entities such as the NPA or SAPS.

Yet each entity is crucial to such outcomes. In the early years of the SAPS, detective service performance was not measured in relation to outcomes in court. This was in spite of the fact that the evidence on which a conviction must rest was, in the absence of the involvement of another investigating agency, provided entirely by the detective service. Today, one of the official measures of the performance of the detective service is whether or not the NPA chooses to prosecute on a docket.

The NPA has tended to emphasise ‘conviction rates’ as the major measure of the performance of the prosecution service. The NPA also records a range of other performance measures in its annual reports and has more recently under NDPP Simelane begun to emphasise increases in finalisations as a performance measurement<sup>2</sup> and also to measure the number of convictions in the regional and

high court measured against the number of new cases enrolled in those courts in a year.<sup>3</sup> A possible perverse incentive of the latter measure is for the prosecution to seek to enrol fewer cases.

Nevertheless, the conviction rate retains some prominence and it is worth understanding how the NPA continues to calculate its conviction rate. It calculates the number of cases convicted as measured against the number of cases finalised with a verdict in court in a year. According to recent performance reports, a conviction is counted at the date of sentencing or not-guilty verdict, irrespective of the date when the plea was first entered.<sup>4</sup> In other words, a case that was instituted in 2007 but is concluded in 2009 will form part of the 2009 conviction rate.

Typically, the NPA records a conviction rate in excess of 80 per cent (usually closer to 90 per cent). For example, in 2009/10 the conviction rate was 88.6 per cent.<sup>5</sup> This means that only around 1 in 10 cases concluded in court with a verdict in 2009/10 resulted in an acquittal. Put differently, 9 out of 10 cases finalised in 2009 resulted in convictions.

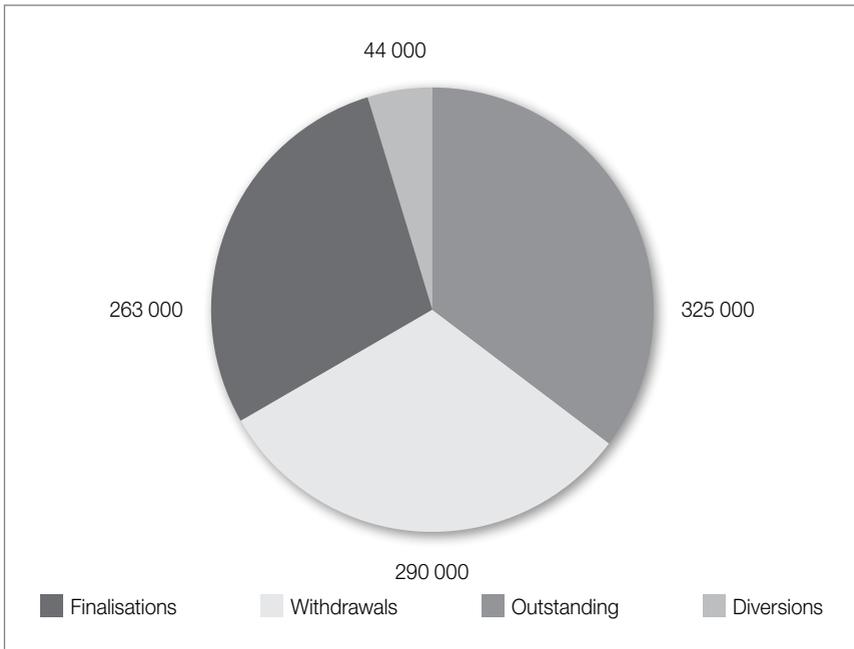
The authors of a US study note that ‘any system which pays attention to conviction rates, as opposed to the number of convictions, is liable to abuse’.<sup>6</sup> They point out that a prosecutor could choose to make only one successful prosecution and boast a ‘100 per cent conviction rate’. Without understanding the extent to which convictions are meeting the demand for justice represented by completed dockets forwarded to the NPA, a ‘100 per cent conviction rate’ is almost meaningless.

## Finalisations as a performance measure

Aware of this criticism, the NPA does also report on the number of cases finalised each year. Such finalisations include verdicts in the usual sense, as well as cases where admission of guilt fines before plea have been imposed by a prosecutor in terms of section 57A of the Criminal Procedure Act.<sup>7</sup> It is unclear whether the measure requires the accused to pay the admission of guilt fine for this to be counted as a successful finalisation.

Such finalisations also include the stopping of a prosecution after plea in terms of section 6(b) of the Criminal Procedure Act, but do not include withdrawals before the accused has entered a plea.<sup>8</sup> This is because an accused whose prosecution is stopped is entitled to an acquittal, while an accused whose case is withdrawn is not entitled to an acquittal.

**Figure 1 Trends in case outcomes in the NPA, 2006–09**  
(approximate yearly figures)



*Source Author*

Over the last four years the total number of all finalisations (verdicts, issued admission of guilt fines and stopped prosecutions) has averaged around 325 000 each year.

The problem, however, is that around a million new cases are enrolled each year. Arithmetically it is clear that there will be intense pressure on the system if there are one million new enrolments each year but only 325 000 finalisations. Inevitably, the shortfall of around 700 000 has to be accounted for in ways less desirable (withdrawals average at 290 000, while the outstanding roll averages at 263 000) or less conventional (diversions are around 44 000).

The NPA tends to judge the number of finalisations on whether they represent an increase or decrease on previous years' figures or on arbitrarily determined 'targets' based on prior performance. However, these incremental 'improvements' in numbers do not appear to take account of the fact that the human resources available to the NPA have increased each year. Thus, in the analysis

below, an attempt is made to measure performance taking into account the increase in resources, in particular the number of prosecutors.

### *Finalisations in terms of resources*

The NPA employs 2 500 prosecutors and around another 450 advocates.<sup>9</sup> This means that 2 950 prosecutors are responsible for the average 325 000 finalisations each year. On average, each prosecutor thus yields around 110 finalisations per year, or if we divide by 50 working weeks, just over two per week. If we add withdrawals to finalisations, the number 'concluded' rises to four cases per prosecutor removed from the system per week. Yet to deal with one million new enrolments each year would require 2 950 prosecutors to finalise closer to seven cases per week each on average.

Is seven cases per week finalised a totally unreasonable target? By way of comparison, the Crown Prosecution Service (CPS) for the City of London, England, had 490 prosecutors who finalised 204 000 cases in 2009 – around nine per week per prosecutor.<sup>10</sup> This apparently higher productivity of the CPS London is associated with a rate of conviction after trial of around 60–70 per cent, compared to South Africa's 80–90 per cent.<sup>11</sup> Each prosecutor in London thus yielded around 270 convictions, compared to South Africa's 110.

Comparing figures with other countries is fraught with difficulty, given that no criminal justice system operates in exactly the same manner as another. However, the figures above do suggest that the NPA is not and has not for some time been operating in an optimal fashion. It is frequently claimed that this is a result of the inordinate workload experienced by prosecutors in South Africa.

The initial analysis that might suggest whether this is the case is to determine whether South Africa is comparatively under-resourced in terms of prosecutors. To give one example, the various CPSs for the whole of the UK have roughly the same number of prosecutors as South Africa, serving a population 35 per cent larger than South Africa's. Roughly five million crimes are reported to the police in the UK, a number similar to the total number of crimes reported in South Africa. Of course, there may be a great deal of difference in the quality of the crimes reported. Nevertheless, this comparison does suggest that it does not appear that the NPA is obviously under-resourced in terms of prosecutor numbers.

Thus, in the next section the available South African data is analysed in order better to understand the relationship between workload and prosecutor

performance in South Africa. The first step is to understand the relationship between workload and rate of throughput.

### *The relationship between workload and prosecutor throughput*

If it were the case that workload had no impact on the rate of prosecutor throughput, then it would be expected that the same ratio of verdicts to workload would be recorded no matter the workload. This would imply that no matter whether a prosecutor had a load of 10 or 50 or 200 cases, he/she would succeed in obtaining a verdict in roughly the same percentage (for example, 60 per cent) of cases. This would mean that if he/she had 10 cases, he/she is likely to get 6 verdicts, and if he/she had 100 cases, he/she would get 60 verdicts, and if he/she had 200 cases, he/she would get 120 verdicts.

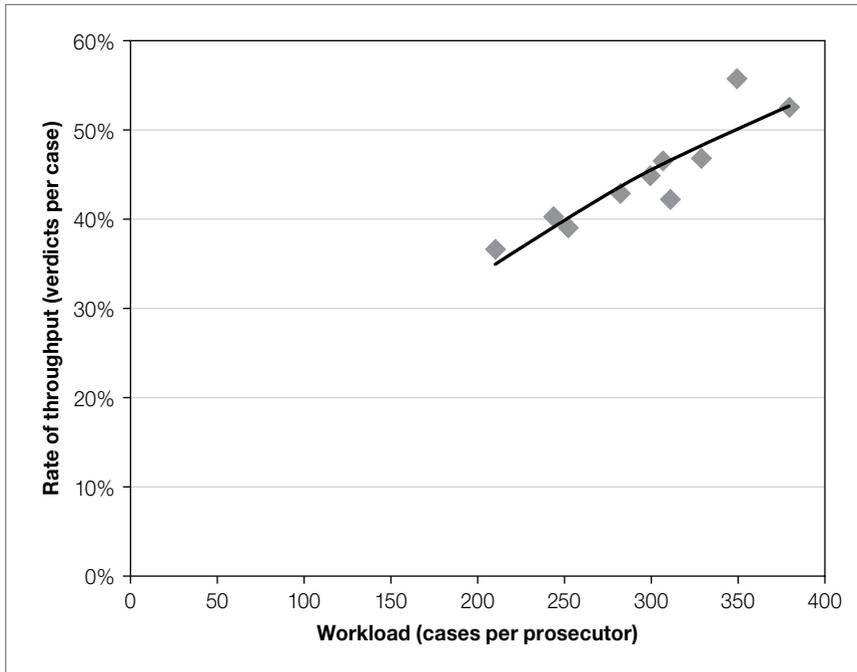
It is, however, often assumed that prosecutor performance, in the sense of how many cases an individual prosecutor is capable of finalising, is *negatively* affected by caseload. The argument is that high workload increases stress and makes prosecutors less efficient, which means that their rate of throughput – the ratio of verdicts to workload – is reduced. Thus, with a light load of only 10 cases, a prosecutor might manage 7 verdicts (70 per cent), but with a load of 100, he/she would only manage 50 (50 per cent). In other words, the theory argues that throughput percentage is negatively dependent on workload.

It is frequently assumed that in South Africa prosecutors are overworked and that this negative dependence applies. It is reasoned that if the workload on each prosecutor could be reduced, then the ratio of verdicts to workload would improve. In this section, historical data from 2000 is analysed to determine whether this data supports the argument that prosecutors in that year were overworked and that a reduction in workload would improve throughput. SAPS data from 2000 on cases referred to court and outcomes per province<sup>12</sup> was cross-referenced with prosecutor numbers<sup>13</sup> per province in that year.<sup>14</sup>

The prosecutor **workload** in a province was calculated as the number of cases referred to the NPA by SAPS for the 20 most serious crimes divided by the number of prosecutors in that province. The prosecutor **throughput** in a province was calculated as the number of verdicts for the 20 most serious crimes divided by the number of prosecutors.

The **rate of throughput** was calculated as the throughput (number of verdicts per prosecutor) divided by the workload (number of cases per prosecutor) and expressed as a percentage.

**Figure 2 Relationship between prosecutor workload and rate of throughput, 2000**



Source Author

Figure 2 shows the resultant relationship between **workload** and **rate of throughput**.

This data suggests that at the range of average workloads present in 2000 among the provinces (211–380 cases per prosecutor per year), an increase in the workload per prosecutor *increased* the rate of throughput. According to this data, prosecutors in provinces with a higher-than-average burden (350 or more cases per prosecutor) achieved the best rate of throughput (53–56 per cent), while those with the least burden (211 cases per prosecutor) achieved the worst rate of throughput (37 per cent).

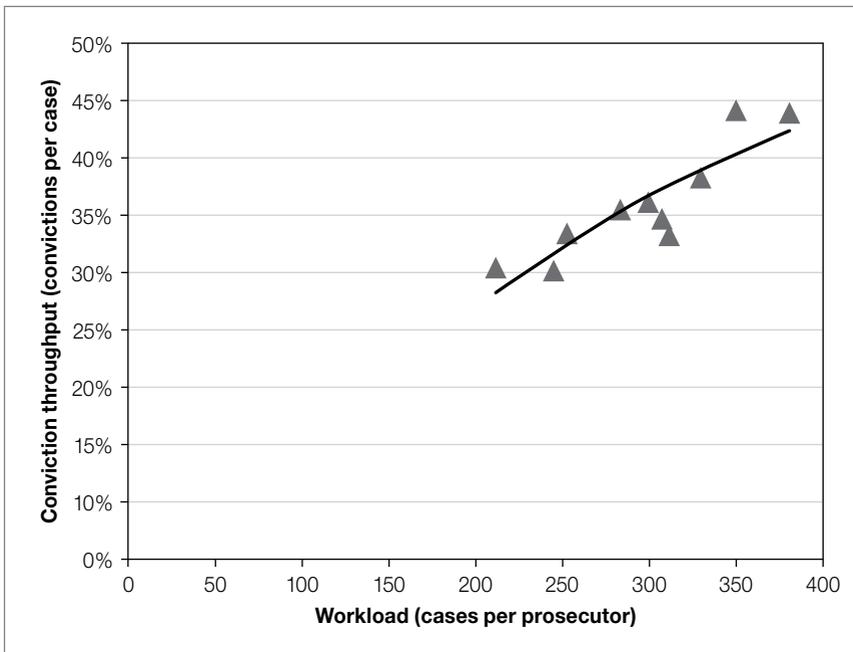
A similar picture emerges when the relationship between the rate of conviction throughput and workload is considered. **Conviction throughput** is calculated as the number of convictions obtained per prosecutor. The **rate of conviction throughput** is calculated as the conviction throughput (number of convictions per prosecutor) divided by the workload (number of cases per prosecutor).

The graph below shows the resultant relationship between **workload** and **rate of conviction throughput**.

Again, the data suggests that at the range of workloads present in 2000 (211–380 cases per prosecutor per year), an increase in the workload per prosecutor *increased* the rate of conviction throughput. According to this data, prosecutors with a higher average burden (more than 350 cases per prosecutor) achieved higher rates of conviction throughput (44 per cent), while those with lower burdens (under 250 cases per prosecutor) achieved lower rates of conviction throughput (28 per cent). The data strongly suggests that the optimum level of workload is at 350 cases referred per prosecutor or higher. Accurately predicting the optimum workload would require more data. Unfortunately, more recent and detailed data of this nature is not currently available.

The relationship between workload and throughput may be understood in relation to issues specific to the function of prosecution. A US study has explored

**Figure 3 Relationship between workload and rate of conviction throughput, 2000**



Source Author

the relationship between resources and prosecutor throughput.<sup>15</sup> The author theorises that faced with more resources (a higher number of prosecutors per 100 000 cases), prosecutors could either increase the number of cases they undertake or increase the effort they put into each case. Increasing cases would maximise throughput and increasing effort per case would maximise conviction rates.

In South Africa, particular emphasis has been placed on conviction rates as a performance measure of individual performance, expressed as a percentage of cases finalised in court rather than as a percentage of cases referred. Thus, it may be theorised that in South Africa prosecutors faced with more resources (a relatively lighter caseload) may choose to spend more time on ensuring their cases are successful rather than choosing to undertake more cases. This is also echoed in prosecutorial policy. Given our immense case backlog, this may not be the most desirable response.

Given the small number of observations plotted, it may also be the case that the relationship observed is coincidental, i.e. that the differences in throughput observed are not a function of workload, but a result of the relative prosecutorial strength of each of the nine provinces. When identifying the provinces involved, however, Gauteng, an urban, relatively well-resourced province, emerges as the 'weakest' (it has both the least apparent workload and the lowest rate of throughput). Gauteng is not generally considered to be the weakest of the provinces in terms of prosecutorial strength. Thus, this alternative explanation of the trend does not accord with perception, suggesting that the original explanation is more likely to be correct.

The analysis above has given each case an equal weight. Yet cases that are finalised on first appearance through a guilty plea are obviously far less resource-consuming than cases that are finalised after trial. An increase in the ratio of cases that go to trial to cases disposed of quickly will clearly affect the rate of throughput. It is likely to be the case that prosecutors faced with a higher burden may be more willing to find more efficient means of resolving cases, thus increasing their rate of throughput. An exploration of the 'trial burden' in South African courts follows in the next section.

## Measuring trial burden

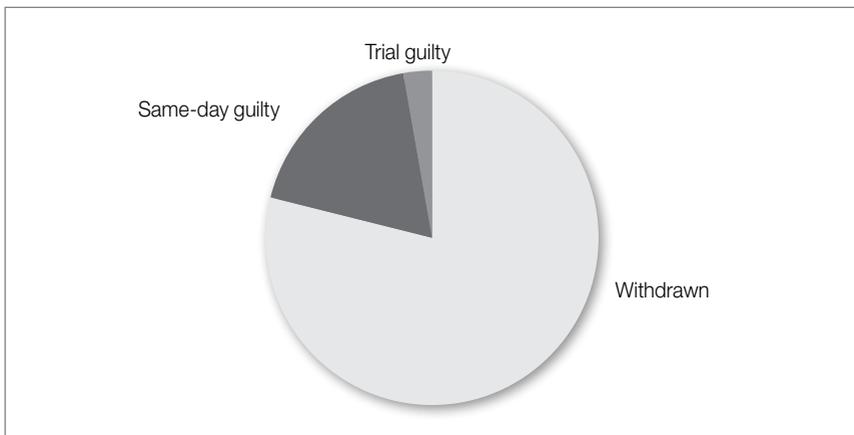
Reports from the Department of Justice and Constitutional Development and the NPA do not routinely provide information that can provide insight into the trial burden experienced by prosecutors. Thus, other sources of data are required.

A randomly sample from Mitchells Plain courts drawn in late 2007 can provide some insight on the extent to which cases go to trial.<sup>16</sup> Obviously, such a sample is not necessarily representative of South Africa as a whole. As the sample was randomly drawn, however, it can at least be expect to be reasonably representative of Mitchells Plain. Insights can be obtained by analysing the data.

Among the 71 district court cases sampled, as many as 56 were withdrawn, struck off or resulted in the issuing of a warrant. Thirteen cases were resolved with a guilty verdict on the day of first appearance. All of the 13 accused represented themselves. This strongly suggests a scenario of the accused appearing before the magistrate and immediately admitting guilt. The effort required by a prosecutor in these cases would at least have involved perusing the file and consulting briefly with the accused, and presenting the case in court – no extensive trial preparation was required.

A further two cases were resolved on a date after first appearance, both also with a guilty verdict. In one of these, the accused represented himself, while in the second case, use was made of a legal aid attorney. These cases probably required a greater degree of preparation and may or may not have involved a trial. There were no ‘not guilty’ verdicts. Thus, on the NPA measure of ‘convictions per prosecutions’, this district court scored 100 per cent. The ‘rate of conviction throughput’, however, was only 21 per cent. Furthermore, only 2 out of the 15 convictions probably involved anything more than a first appearance,

**Figure 4 Mitchells Plain district court sample by outcome, 2007**



Source Author

and only 1 out of the 15 'convictions' may have involved a trial against another legal professional.

In the regional court, 42 cases were drawn in the sample. As many as 26 (62 per cent) were withdrawn or struck off or resulted in a warrant. This high withdrawal rate is of some concern, given that cases in the regional court are relatively serious cases for which less than half of the relevant accused were granted bail.

Two guilty verdicts occurred on the same day as first appearance, while ten guilty verdicts were handed down after first appearance. There were a further five 'not guilty' verdicts. Thus, in this court there was an NPA conviction rate of 70 per cent, but a rate of conviction throughput of 24 per cent. Thus, while on the NPA measure the regional court looks 'worse' than the district court, on the rate of conviction throughput it appears somewhat 'better' due to the lower rate of withdrawals.

With an aggregation of the district court with the regional court data, on the NPA measure we get a conviction rate of 87 per cent for Mitchells Plain, which is in line with national figures, and a rate of conviction throughput of 22 per cent. The ratio of 'trial burden' cases – by which is meant cases likely to consume a significant amount of time and effort – to finalised cases in this court is around 1:7. This means only 1 in 7 cases consumed a disproportionate amount of resources.

**Figure 5** Mitchells Plain regional court sample by outcome, 2007



Source Author

If this ratio is representative of all South African courts, it is possible to estimate the likely trial burden on prosecutors. Some 296 391 cases were finalised with a verdict in 2007.<sup>17</sup> If 1 in 7 cases is a trial matter, this means that 42 342 trials were shared among 2 984 state advocates and prosecutors in that year.<sup>18</sup> This works out to 14 trials each per year, or 1,2 per month. Of course, even trial matters can vary widely in burden, thus it is difficult to determine whether this is a heavy or light average burden.

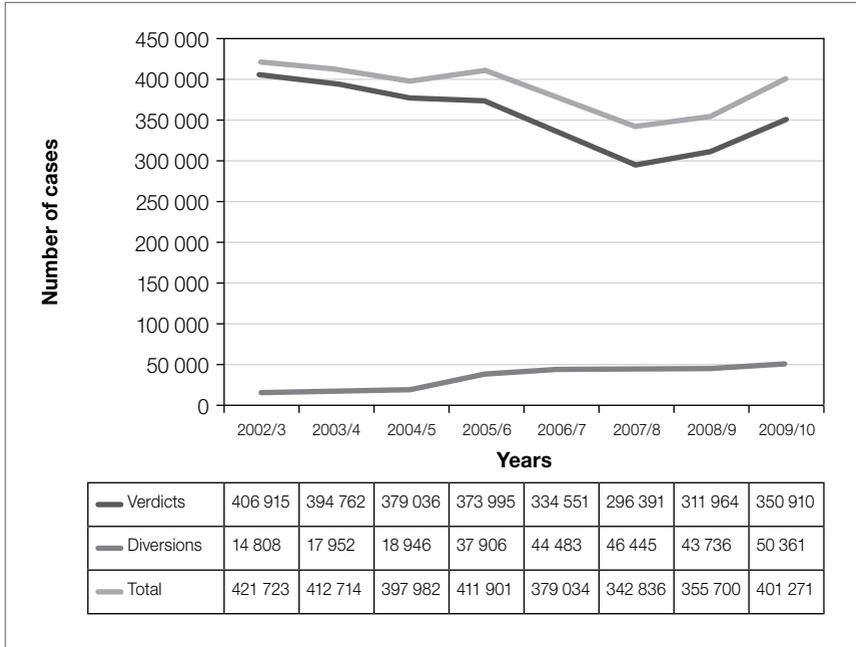
Trial burden is part of the explanation of why so few backlog cases are resolved each year. Backlog cases are highly likely to involve trial burden. In addition, such cases are highly likely to involve accused persons in custody, which is of great concern, given that many such accused are never convicted. A study on bail in 2008 found that around half (48 per cent) of all cases in which accused were in custody until the case was 'finalised' were ultimately withdrawn and only 6 per cent of persons held in custody until the finalisation of their cases were ultimately sentenced to a term of imprisonment.<sup>19</sup> Trials mean delays and pressure on resources in other parts of the system, such as the magistracy, judiciary and Legal Aid Board.

## Trends in finalisations

In the absence of detailed information on trial burden, it is difficult to judge absolute performance. However, if it is assumed that trial burden is similarly distributed around the country and has remained similar year on year, comparisons can be made in order to measure *relative* performance over time. When this is done, the more recent performance of the NPA does not fare well. This is because while the number of prosecutors in the NPA has increased year on year, the number of finalisations has not kept pace with the increase in human resources.

Since 2003 the number of employees in the NPA increased by 33 per cent from 3 525 to 4 690 (see Appendix D). Over the same time period the number of verdicts has shown a general downward trend. Although there has been a recent upswing in verdicts from 2007/8 to 2009/10, the NPA has not yet reached the levels achieved in 2002/3, in spite of enjoying staff numbers a third greater than they were in 2002/3, even taking into account the greater use of diversion by the NPA (see Figure 6).

The period 2003–2008 can also be explored using prisons admissions data. This data shows a marked decline in the number of sentenced admissions to prison.

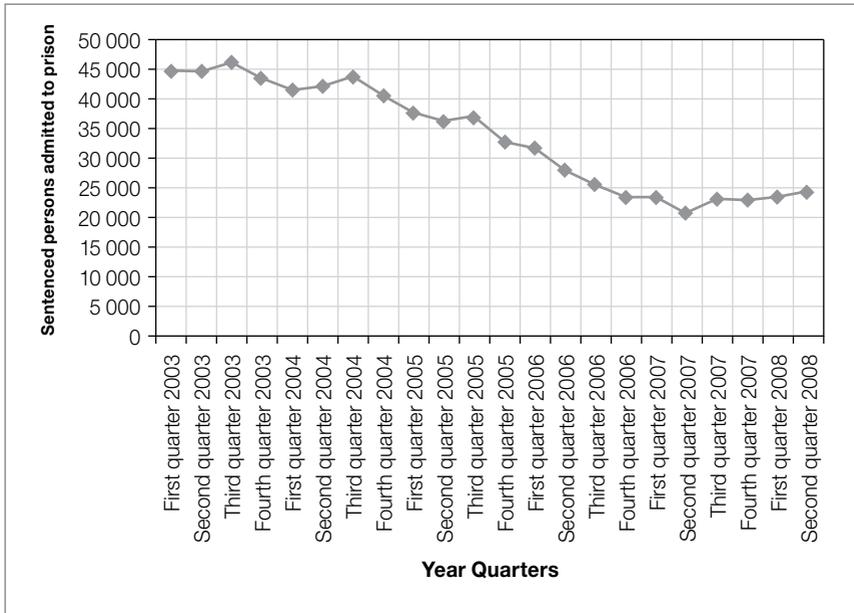
**Figure 6 Verdicts and diversions, all courts, 2002/3–2009/10<sup>20</sup>**

Source Author

While this author would not like to suggest that it would be preferable to send more people to prison, the evidence merely serves to confirm the downward trend in total convictions and to suggest that the greatest decline in throughput has been in more serious cases worthy of prison admissions. Verdicts dropped 25 per cent over the period 2003–2008, while sentenced admissions to prison dropped 45 per cent (see Figure 7), comparing quarter to quarter. This is in spite of a far more punitive environment around sentencing (see Factors affecting performance).

A further source of data is that emanating from the SAPS on the serious charges (in relation to the top 20 serious crimes) it refers to court. Although the data is not strictly comparable, combined with data from the NPA on cases finalised (remember that more than one charge can be finalised per case), some insights emerge. While in 2002/3 there were around seven court cases resulting in a verdict for every ten serious charges referred by the SAPS, since 2007/8 this figure has remained at under four court cases resulting in a verdict for every ten serious charges referred by the SAPS.

**Figure 7 Sentenced admissions per quarter, 2003–2008**

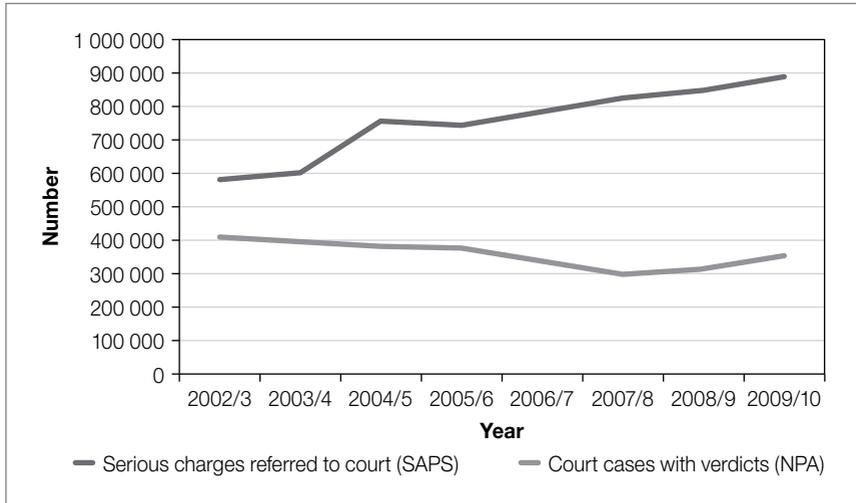


Source Author

While it can be theorised that this trend may relate to a greater tendency for cases to comprise more than one charge or a deterioration in the quality of dockets received from the SAPS, what it does indicate is that the drop in verdicts is not a result of a drop in the number of charges referred by the SAPS. Given our analysis earlier that greater load should increase the proportion of cases prosecuted with a verdict, it further does not seem likely that it is the increased load itself that is to blame for the drop. Indeed, a further analysis of the data indicates that the drop is due to the increasing rate of withdrawal in the system.

Withdrawals are by far the most common outcome of cases enrolled in court. Acting National Director Mpshe outlined the extent of withdrawals in his answering affidavit in the Zuma review matter in formulating an argument in support of the contention that a decision to decline to prosecute is not subject to judicial review:

Of the 1,5 million criminal matters, 300 000 to 400 000 cases are withdrawn per year. In an audit conducted during September 2007 it was established

**Figure 8 Serious charges referred to court and court cases with verdicts**

Source Author

that about 25% of the criminal matters were withdrawn at the request of the complainant. About 21% were withdrawn because, in the assessment of the prosecutor, there was no *prima facie* case. In about 5% of the matters the withdrawal was because the magistrate refused a postponement and 4% because a witness statement was outstanding.<sup>21</sup>

Mpshe does not say what happened in the remaining 45 per cent of cases. In the absence of further information, it must be that in such cases the prosecutor must have exercised his/her discretion and decided not to prosecute.

## FACTORS AFFECTING PERFORMANCE

Legislation in the criminal justice sector since 1998 has taken its toll on the performance of the NPA. Clumsily drafted legislation on minimum sentencing passed in 1998, which initially provided for a time-consuming high court confirmation of sentence process (subsequently done away with), took up valuable court time and consumed resources in the preparation of court records. While the confirmation process no longer exists, doing away with the process was achieved by vastly increasing the sentencing jurisdiction of regional magistrates.

All offences except treason may now be heard in the regional court, and regional court magistrates can apply so-called 'minimum' sentences of life imprisonment.

The accompanying increase in the number of long sentences is theorised to have led to an increase in the number of criminal appeals. The legislation provides for an automatic right of appeal where life imprisonment is imposed by the regional court. The number of people in prison in relation to a sentence of life imprisonment increased from 1 436 in 2000 to 9 651 in 2010.<sup>22</sup> Similarly, the number of inmates serving a sentence in excess of ten years increased from 23 702 to 53 944 in 2010.<sup>23</sup> Thus, in effect the confirmation of sentence process has simply been substituted by the appeals process. One of the major categories of complaints received by independent prison visitors are in relation to appeals – in 2010 some 15 000 prisoners made complaints in relation to the appeals process.<sup>24</sup>

Another major effect of minimum sentencing legislation is the discouraging effect it has on the extent to which plea-and-sentence agreements are taken up. Plea-and-sentence agreements remain rare, except in the Western Cape, because the bar on sentencing has been raised so high that there is little room to bargain on serious crimes. Most accused would like to take their chances on the case being withdrawn (a depressingly likely event) rather than agree to stiff sentences of 15 years or more. This potentially useful means of speeding the conclusion of cases – which in the US accounts for the majority of convictions – thus remains under-utilised. The number of plea-and-sentence agreements concluded each year remains at less than one per cent of the total cases finalised.

Legislation that did away with the right to after-hours bail (except for a short-list of offences on which authorised prosecutors may be prevailed upon to grant bail) has shifted weekend arrest bail applications to Monday mornings in court. The legislation also reduced the likelihood of bail being granted, which means bail is increasingly denied. This in turn leads to appeals against the denial of bail and the resultant consumption of court and prosecutor time. Further, if bail is granted, there is no further bail application at a later stage. But if bail is denied, the accused may at any later stage bring another bail application, especially if the matter is taking time to come to court. Thus, any single case may involve a whole series of bail applications until the matter comes to court. For example, Najwa Petersen's series of bail applications and appeals even involved at one stage a full bench of high court judges and two prosecutors. (Petersen was tried for the murder of Taliep Petersen, her husband.)

These factors will have taken their toll on the performance of the prosecution service, measured in the rate of finalisation throughput. Combined with an increasingly broad interpretation, which has been placed on prosecutorial discretion not to prosecute, these factors have encouraged the extent to which cases are withdrawn.

## DISCUSSION

In South African law, a prosecutor in South Africa has a duty to prosecute if there is a *prima facie* case and there is no compelling reason for a refusal to prosecute.<sup>25</sup> A *prima facie* case means that the allegations and supporting statements available to the prosecution are of such a nature that if proved in a court of law on the basis of admissible evidence, the court should convict.<sup>26</sup>

In the post-1994 era the Constitutional Court has noted that '[t]he constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework'.<sup>27</sup> Yet the performance data above suggests that NPA policy providing for a wide discretion being exercised in the decision not to prosecute has been broadly interpreted, making a decision to prosecute the exception rather than the rule.

To illustrate, in 2005–2006 the NPA received 517 101 new dockets from the police, but prosecutions were instituted in only 74 059 (14 per cent) of cases, and declined in 307 362 (60 per cent), while 136 589 (26 per cent) were referred for further investigation.<sup>28</sup> While the NPA would tend to blame withdrawals on poor docket preparation by the police and this may indeed be the cause of withdrawal in many cases, the NPA's own audit of 2007 withdrawals does not give a proper account for the reasons for 55 per cent of withdrawals.

The figures in this report on the overall tendency to decline to prosecute, coupled with such indicators as the handful of prosecutions in relation to TRC matters (see Appendix C), the decision not to prosecute high-level NPA officials despite the recommendation of the Special Investigating Unit, and the high-profile terminations of prosecutions and forfeitures against the politically connected (see chapter 1), suggests that the decision not to prosecute is being exercised without due regard to the constitutional duty to prosecute. Indeed, it is perhaps ironic that the latest Code of Conduct of the NPA published in 2010 appears subtly to encourage prosecutorial discretion not to prosecute:

The prosecutorial discretion to institute *and to stop* criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public *and judicial* interference.

Prosecutors should perform their duties fairly, consistently and expeditiously and: ... *give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from the formal justice system, particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate.*

... in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence.<sup>29</sup>

The problem is that the decision not to prosecute is fundamentally different from the decision to prosecute, precisely because it will not in the normal course be tested in court, as would a decision to prosecute. Coupled to this message in favour of not prosecuting is the attitude within the NPA, conveyed in court documents, that such decisions not to prosecute are not ordinarily subject to review in the courts (see chapter 1).

Then-Acting NDPP Mpshe, in his answering affidavit to the application by the DA to review, correct and set aside his decision taken on 6 April 2009 to discontinue the criminal proceedings against Jacob Zuma, outlines the NPA's understanding of whether decisions to prosecute or not to prosecute are ever subject to review. Mpshe contended that such decisions are only reviewable on very narrow grounds such as bad faith (and not broader constitutional and administrative law grounds such as rationality). He claimed (without reference to authority) that 'this is the approach that our courts have always adopted in relation to prosecutorial decisions, and it is the approach adopted in other jurisdictions'. It is indeed correct that for many years in pre-1994 South Africa the discretionary powers of prosecutors were regarded as non-justiciable.<sup>30</sup> However, this began to change during the 1980s with the normal standards of review being applied to both prosecutors and attorneys-generals. Furthermore, under a constitutional order, the exercise of all public power is constrained by the principle of legality and the provisions of the constitution. With regard to other jurisdictions, in the UK, a jurisdiction closely connected with South Africa, although the courts express

their reluctance to intervene, they have intervened and overturned decisions not to prosecute, particularly where the original decision was not based on a sound application of the evidential test.<sup>31</sup>

As one academic has put it:

The decision not to prosecute is different. It is very unlikely ... that an accused would seek to overturn a decision not to prosecute .... It is therefore left to the victim or those close to the victim to seek redress. One avenue is through a private prosecution, but this is problematic and costly. Similarly, a civil action for damages could be brought but this also has inherent problems. ... every legal system has a vested interest in ensuring that all such decisions are seen to be fair and just. Unfair and unjust decisions not to prosecute, as stated above, have significant potential to bring a justice system into disrepute and it is accordingly the responsibility of both the government and the courts to safeguard against this.<sup>32</sup>

## NOTES

- 1 This author would today prefer to measure the number of 'appropriate resolutions'.
- 2 See NPA, *NPA Strategic Plan 2011, 2009*, <http://www.pmg.org.za/report/20090901-department-justice-national-prosecuting-authority-their-strategic-pla>.
- 3 See NPA, *Quarter 2: performance overview report of public prosecutions 2011–2012*, 18 October 2011, 12, <http://www.npa.gov.za/UploadedFiles/Quarter%202%20Quarterly%20Performance%20Overview%20Report%20of%20Public%20Prosecutions%202011-2012.pdf>.
- 4 NPA, *October 2010 performance information report*, 29 November 2010, 20, <http://www.npa.gov.za>.
- 5 Ibid.
- 6 Ibid., Abstract.
- 7 57A. Admission of guilt and payment of fine after appearing in court. –
  - (1) If an accused who is alleged to have committed an offence has appeared in court and is –
    - (a) in custody awaiting trial on that charge and not on another more serious charge;
    - (b) released on bail under sec. 59 or 60; or
    - (c) released on warning under sec. 72,
 the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice, or cause such notice to be

delivered to the accused by a peace officer, containing an endorsement in terms of sec. 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

(2) Such notice shall contain –

(a) the case number;

(b) a certificate under the hand of the prosecutor or peace officer affirming that he or she handed or delivered, as the case may be, the original of such notice to the accused and that he or she explained to the accused the import thereof; and

(c) the particulars and instructions contemplated in paragraphs (a) and (b) of sec. 56 (1).

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56 (2) and (4) and 57 (2) to (7), inclusive, shall apply mutatis mutandis to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

8 Power to withdraw charge or stop prosecution. – An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may –

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.

9 NPA, *NPA annual report 2009/10*, n.d., <http://www.npa.gov.za/ReadContent502.aspx>.

10 Her Majesty's Crown Prosecution Inspectorate, *Review of the performance of CPS London*, March 2010, [http://www.hmcpis.gov.uk/documents/services/reports/LDN/SUMM\\_LBPA\\_Mar10\\_rpt.pdf](http://www.hmcpis.gov.uk/documents/services/reports/LDN/SUMM_LBPA_Mar10_rpt.pdf).

11 *Ibid.*, Annexure D.

12 Data obtained by the ISS from the SAPS in 2001.

13 Senior state advocates, state advocates, senior state prosecutors and state prosecutors.

14 NPA, *NPA annual report 2000/1*, Pretoria: NPA, 2001, 47.

15 E Rasmusen, M Raghav & M Ramseyer, Convictions versus conviction rates: the prosecutor's choice, *American Law and Economics Review* 11(1), (Spring 2009), 47–78.

- 16 The sample was a pilot sample drawn manually for the purposes of an Open Society Foundation study on bail. The sample consisted of 70 district court cases and 42 regional court cases and covered cases disposed of on 13 consecutive court days in November (district court) and over 30 regional court days sufficient to harness the required number of observations. The sampling methodology was ultimately abandoned as too time consuming and use was made of electronic records for the final report. This data is used with permission.
- 17 NPA, *NPA quarterly performance report 2010*, <http://www.npa.gov.za/ReadContent506.aspx>.
- 18 NPA, *NPA annual report 2007/8*, Pretoria: NPA, n.d.
- 19 Karth, O'Donovan & Redpath, *Between a rock and a hard place*.
- 20 NPA, *NPA performance overview report quarter 1: April–June 2010*, Pretoria: NPA, October 2010; charts from NPA, *National performance overview 2002–2005*, Pretoria: NPA, October 2005.
- 21 Answering affidavit of Mokothedi Mpshe in the Zuma review application, 20 October 2009, <http://constitutionallyspeaking.co.za/answering-affidavit-of-mokothedi-mpshe-in-the-zuma-review-application/>.
- 22 D Hurter van Zyl, *Report of the inspecting judge, 2009/10*, n.d., <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202009%20-2010.pdf>.
- 23 Ibid.
- 24 Ibid.
- 25 T Geldenhuys et al. *Criminal procedure handbook*, Kenwyn: Juta, 1994, 50.
- 26 Ibid.; E du Toit et al., *Commentary on the Criminal Procedure Act*, Kenwyn: Juta Law, 2006, 1-4M.
- 27 *S v Basson* [2004] (6) BCLR 620 (CC), 32.
- 28 C de Beer, Charts of national performance overview 2002–2005, NPA spreadsheet obtained via email, 26 May 2006.
- 29 GNR.1257, *Government Gazette* no. 33907, 29 December 2010; emphasis added.
- 30 See L Baxter, *Administrative law*, Kenwyn: Juta, 1994, 333, note 184.
- 31 *R v DPP, ex p. Jones* [2000] Crim L R 858; 4 R v DPP, ex p. *Manning and Another* [2000] 3 WLR 463.
- 32 I Dobinson, The decision not to prosecute, *International Conference of the International Society for the Reform of Criminal Law papers*, 26 August 2001, <http://www.isrcl.org/Papers/Dobinson.pdf>.



# 3 Prosecutors' duty and decision to prosecute

The common law or adversarial legal tradition on which South Africa's criminal procedure is based is founded on the notion that the best way of determining guilt or innocence is by contest between two parties, the accuser and the accused, with the prosecutor filling the role of the accuser rather than the victim, while the judge plays the role of a detached umpire between warring parties.<sup>1</sup> The prosecutor is *dominus litis*, i.e. in control of the prosecution.

This is in contrast with the more centralised inquisitorial model in which the evidence before the court is a product of an enquiry for which a public prosecutor or investigating judge is responsible; the investigation of a crime is a neutral enquiry conducted by a judicially trained official.<sup>2</sup>

South Africa's is, however, not a pure accusatorial system: elements of the inquisitorial approach have been adopted, particularly where this is necessary to protect vulnerable accused persons.<sup>3</sup> For example, a presiding officer may not simply accept a plea of guilty, but must question an accused pleading guilty to establish whether in fact the accused should be found guilty.<sup>4</sup>

In South Africa, prosecutors' primary function is 'to assist the court in ascertaining the truth'.<sup>5</sup> This principle sits somewhat uneasily in an accusatorial system in which the emphasis is on one party 'winning' in court. A

prosecutor is ethically bound to display the highest degree of fairness to an accused.<sup>6</sup> For example, information favourable to the defence must be disclosed,<sup>7</sup> and if there is a discrepancy between a witness's oral testimony in court and earlier written statement, the prosecutor must draw attention to this fact and make the written statement available to the defence for purposes of cross-examination.<sup>8</sup>

## DUTY TO PROSECUTE

A prosecutor in South Africa, however, also has a duty to prosecute if there is a *prima facie* case and there is no compelling reason for a refusal to prosecute.<sup>9</sup> The Constitutional Court has noted: 'The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.'<sup>10</sup>

The usual test for the institution of a prosecution is set out in the well-known commentary on the Criminal Procedure Act:

A prosecutor has a duty to prosecute if there is a *prima facie* case and if there is no compelling reason for a refusal to prosecute. In this context 'prima facie case' would mean the following: The allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. Sometimes it is asked: Are there reasonable prospects of success? The prosecution, it has been held, does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution – see generally *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) at 137 and *S v Lubaxa* 2001 (2) SACR 703 (SCA).<sup>11</sup>

Notably, the prosecution does not have to ascertain whether there is a defence, but whether there is reasonable and probable cause for prosecution.<sup>12</sup> A *prima facie* case means that the allegations and supporting statements available to the prosecution are of such a nature that if proved in a court of law on the basis of admissible evidence, the court should convict.<sup>13</sup>

There is no closed list of 'compelling reasons' not to prosecute. Legal precedent has, however, established that where the offence is trivial,<sup>14</sup> the accused is

very old or very young,<sup>15</sup> or where there are tragic personal circumstances of the accused,<sup>16</sup> this may amount to a compelling reason that justifies a decision not to prosecute a prospectively successful case.

The NDPP has authority over all members of the NPA, as well as over the exercise of all powers by members of the prosecution service.<sup>17</sup> Most importantly, the NDPP may review a decision to prosecute or not.<sup>18</sup> The NDPP can also intervene in any prosecution process in which policy directives are not being followed.<sup>19</sup> Even if a prosecutor follows all policy directives, the NDPP may still review the decision to prosecute or not to prosecute after consulting the relevant director of public prosecutions (DPP) and taking representations from the accused, the complainant and any other person whom the NDPP considers relevant.<sup>20</sup> It has, however, been argued that the NDPP may not intervene in the conduct of the case other than the decision to prosecute.<sup>21</sup> More broadly, the NDPP may conduct any investigation he/she deems necessary concerning a prosecution, and may order DPPs to submit reports on any case or prosecution.<sup>22</sup> The NDPP's power was anticipated to possess a 'potential danger that the NDPP could prevent a prosecution that would be politically embarrassing'.<sup>23</sup>

In practice, the NDPP may receive representations from the public relating to the way in which specific cases are being prosecuted. If deemed necessary, a meeting is arranged with the relevant DPP to discuss the case in question. The DPP has the final say on the way in which the case is prosecuted within the relevant jurisdiction, within the bounds of policy directives.

The NDPP sets policy for the NPA, with the concurrence of the minister of justice and constitutional development and after consulting the DPPs.<sup>24</sup> The minister's right of concurrence means that he/she can effectively veto policy proposals, but the NDPP can disregard provincial NDPPs' advice.<sup>25</sup> The NDPP issues policy directives that 'must be observed in the prosecution process'.<sup>26</sup>

The first prosecution policy had to be submitted to Parliament within six months of the NDPP being appointed.<sup>27</sup> The first set of policy directives came into operation in 1999 'to deal with all the professional duties of prosecutors',<sup>28</sup> and all subsequent amendments must be included in the NDPP's annual report to the minister, who in turn submits it to Parliament.<sup>29</sup>

A DPP may also issue circulars with general instructions to prosecutors in his/her jurisdiction, provided these are not inconsistent with the policy directives of the NDPP.<sup>30</sup> The NPA has also issued prosecutors with an ethics manual.<sup>31</sup>

## NPA POLICY ON WHETHER TO PROSECUTE

According to prosecution policy,<sup>32</sup> prosecutors may decline to prosecute even prospectively successful cases should the 'public interest demand otherwise'.<sup>33</sup> In determining the public interest, prosecution policy says that factors such as the nature and seriousness of the offence, the interests of the victim and the broader community, and the circumstances of the offender must be considered.<sup>34</sup> Prosecution policy also provides that 'the test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution'.<sup>35</sup>

Prosecutors must in this and all other decisions act impartially and in good faith: '[T]hey should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnicity or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.'<sup>36</sup> More broadly, the NPA as a whole and individual prosecutors are to exercise this discretion so as to 'make the prosecution process more fair, transparent, consistent and predictable'.<sup>37</sup>

The TRC, at the conclusion of its work, handed the NPA a list of 300 names for prosecution of people who had been denied amnesty or who did not apply for amnesty.<sup>38</sup> In December 2008 Judge Legodi of the North Gauteng High Court rejected a 2005 amendment to NPA prosecution policy<sup>39</sup> that purported to permit negotiating 'amnesty' with such persons.<sup>40</sup>

The case, represented by the Legal Resources Centre, was brought by family of the Cradock Four, who were tortured and killed in the 1980s. The policy allowed open-ended criteria under which the NDPP could decline to prosecute, even where there was enough evidence to obtain a conviction. The policy also did not allow victims to see or hear the 'truth' disclosed by perpetrators because the process was to occur behind closed doors.<sup>41</sup>

No TRC prosecution policy has subsequently been finalised. The 2009/10 annual report of the NPA reports that the NDPP was advised by the NPA's Priority Crimes Litigation Unit (see Appendix C) not to proceed with the prosecution of persons implicated in the inquest held in relation to the death of Namibian freedom fighter Anton Lubowski.

## How the decision to prosecute is made

In most larger courts, dockets sent to the prosecution by the police are received

by the control prosecutor, who acknowledges receipt and registers the case documents in an NPA docket register. The docket contains the evidence and an investigation checklist. The control prosecutor is generally an experienced prosecutor with some managerial control.<sup>42</sup>

In courts with a high intake, a group of prosecutors usually sort dockets by court in which the case should be heard (district, regional or high court) and screens them to ensure a *prima facie* case exists. The general criteria for enrolment of a case is documentary evidence under oath in the docket that a crime has been committed and that the accused is linked to the crime.<sup>43</sup>

Greater emphasis on the screening function has increasingly ensured that senior, experienced prosecutors such as control prosecutors or senior public prosecutors tend to undertake this screening.<sup>44</sup> The prosecutor responsible for screening can decline to enrol the case in the absence of sufficient evidence and give reasons for this decision in the docket; or if sufficient evidence exists, he/she will draft a charge sheet and enrol the case. If the case is to be enrolled, the docket and charge sheet are handed to a prosecutor with directives as to whether a plea can be taken immediately or whether the case should be postponed to allow for further investigation to be conducted. If further investigation is required, the prosecutor provides written directives to the police in the investigation diary portion of the docket.<sup>45</sup>

In general, it is the case that prosecutors of a more senior rank with administrative authority over junior colleagues in a territorial jurisdiction can overrule a prosecutor's decision whether to prosecute or not.<sup>46</sup> This happens frequently at the lower levels of the prosecution service, with inexperienced junior prosecutors asking their seniors for advice and guidance in individual cases; among middle and higher ranks of the prosecution service, however, such interference – especially if unsolicited – is rare.

## The role of the police investigation in the decision whether to prosecute

Many crimes reported to the police do not reach the prosecution. In some instances, police may discourage a complainant from reporting. A CIET Africa study, as referred to by Artz and Smyth, found in 1998 that of 272 people who reported a rape to the police, only 6 per cent became rape cases.<sup>47</sup> Dockets can also be closed by the police as 'undetected' (investigation did not reveal the

identity of the perpetrator) 'undetected – warrant issued' (identity of perpetrator known but whereabouts not), 'undetected – complainant not traced' (complainant cannot be found after reporting the matter) or 'withdrawn – no consequence' (complainant makes an affidavit requesting withdrawal).<sup>48</sup> In these cases, a decision was taken by a police official, rather than a prosecutor, not to proceed with a matter.

Detective performance indicators published in the SAPS Annual Report until 2007/8 focussed on increasing the number of dockets referred to the prosecution. The quality of dockets declined even as their number increased.<sup>49</sup> During the period in which detectives were measured on the number of dockets sent to the prosecution, it is probable that the decision not to proceed would tend to come from the prosecution rather than the police, as detective performance is measured on referrals to court.

For 2007/8 and 2008/9, conviction rates were included as detective performance indicators at the request of the Portfolio Committee on Safety and Security. From 2010/11, however, this was dropped in favour of 'court-ready case dockets'.<sup>50</sup> It has been suggested that the change created a tendency for detectives to place subtle pressure on the prosecution to enrol inadequately prepared cases.<sup>51</sup> These cases can then subsequently be withdrawn by the prosecution to ensure the NPA conviction rate is not negatively affected.

Within the specialised units of the NPA (see Appendix C) there is much closer control over the investigative pre-trial phase by the prosecution, which, it is sometimes argued, results in better prepared cases. For example, the Specialised Commercial Crime Unit makes use of 'prosecutor-guided' investigations,<sup>52</sup> while the Sexual Offences and Community Affairs Unit has adopted a 'victim-centred, prosecutor guided, and court directed approach' to the prosecution of sexual offences in these courts.<sup>53</sup>

## LEGAL IMPLICATIONS OF A DECISION NOT TO PROSECUTE

Any matter that has been withdrawn before an accused has pleaded to the charge can be prosecuted on the same or related charges if new evidence is subsequently discovered.<sup>54</sup> By contrast, if a case is *stopped* after an accused has pleaded to the charge but before conviction, the accused is entitled to an acquittal and cannot be prosecuted in respect of the same facts again.<sup>55</sup> A case can only be stopped with

the consent of the NDPP or a person authorised by him/her, such as the DPPs in a province.<sup>56</sup>

## JUDICIAL REVIEW OF A DECISION NOT TO PROSECUTE

There is precedent to the effect that a court will not interfere with a *bona fide* decision to prosecute<sup>57</sup> or not to prosecute,<sup>58</sup> nor will it compel a decision on whether to prosecute within a specified time period.<sup>59</sup> However, there is also precedent to the effect that the exercise of discretion by a DPP can be reviewed by the courts on the basis of ordinary administrative law grounds of review, such as *male fides* (bad faith).<sup>60</sup>

The Promotion of Administrative Justice Act, while explicitly excluding the decision to prosecute from review, fails to make a similar exception for decisions not to prosecute, suggesting these decisions are subject to review in terms of this Act.

Acting NDPP Mpshe on behalf of the NPA in an affidavit before court has disputed that the decision to prosecute can be distinguished from the decision not to prosecute, claiming that the Promotion of Administrative Justice Act does not apply to the decision not to prosecute.<sup>61</sup>

These arguments were made in the North Gauteng High Court in the application of the DA for judicial review of the NDPP's decision not to prosecute Jacob Zuma on corruption charges. The DA's application was dismissed on the basis that the party did not have sufficient standing (direct legal interest) in the case to bring the application.<sup>62</sup> The court decided only to deal with the matter of standing and thus did not deal with reviewability of a decision not to prosecute. The DA appealed to the Constitutional Court.

The greater susceptibility of the decision not to prosecute to judicial review<sup>63</sup> is accepted in the UK, as there is 'no other way for an aggrieved party to raise their challenge within the court process'.<sup>64</sup> Indeed, in the Supreme Court of Appeal, where the court overturned the infamous Nicholson judgment (which had overturned a decision to charge Zuma), the court remarked *obiter* that 'such a decision is not subject to review' when referring to the decision to prosecute.<sup>65</sup> The judgment however appended the following footnote:

The review of a decision not to prosecute is not excluded by PAJA and although the Constitutional Court in *Kaunda v President of the RSA* (2) 2005 (4) SA 235

(CC) para 84 left the question open, the court below held that it could be reviewed (para 58). As to a decision not to prosecute in the UK: *Corner House Research v The Serious Fraud Office* [2008] UKHL 60 (30 July 2008).<sup>66</sup>

This footnote suggests that the approach of the Supreme Court of Appeal would be to distinguish the decision not to prosecute from that to prosecute, and further for it to entertain judicial review of decisions not to prosecute.

## DISCUSSION

The prosecution has a pivotal role in modern criminal justice. In each criminal case it is a prosecutor who represents the public interest in prosecuting crime. A credible prosecution service is key to the operation of the criminal justice system. For justice to be done and to be seen to be done, it has been argued that a prosecution service must be independent (free from outside influence, especially from the political leadership of the state) and impartial (unbiased), fair (consistent) and effective, and be accountable for its actions and decisions.<sup>67</sup> For that accountability not to run counter to independence, it has been theorised that prosecutors must be accountable to the courts for prosecutorial decisions and not to politicians.<sup>68</sup> The NPA has denied reviewability of decisions whether to prosecute and has claimed a wide discretion in relation to these decisions. Yet the law seems clear that such discretion is constrained by the duty to prosecute prospectively successful cases in the absence of a clear and legitimate public interest to decline to prosecute. The exercise of this discretion must be subject to some degree of review. In South Africa, the prosecution has also taken a range of functions outside of the core function of prosecution. These include the investigation of crime and the forfeiture of assets. Unless its powers in this regard are exercised independently, fairly and impartially, and are subject to review, the potential for abuse exists.

## CONCLUSIONS

It appears that since the inception of the NPA there has been an increasing dilution of the duty to prosecute. This monograph finds that the prosecutorial decision to decline to prosecute is, in the NPA, systematically exercised to such an extent that proportionally fewer cases are placed on the court roll each year

and fewer still are brought to trial. As a consequence, the number of verdicts and the number of persons sentenced to prison show a general decline. The assessment is of the view that this tendency to decline to prosecute is the central malaise affecting the system, rather than as a result of excessive caseload or lack of resources.

The NPA has recently published a code of conduct in which it maintains that prosecutorial discretion not to prosecute should be exercised free even of ‘judicial interference’. This is an echo of a proposed 2005 prosecutorial policy amendment on TRC prosecutions, struck down by the High Court, which sought to give the NPA the power to decline to prosecute – i.e. to give ‘amnesty’ – to persons denied or who did not seek amnesty in the TRC process.

The tendency to decline to prosecute has been encouraged by a focus on achieving high conviction rates as well as a constraining legislative environment that does not encourage the speedy appropriate resolution of matters, e.g. through plea and sentence agreements, and which places pressure on the system in the form of increases in the number of bail applications and appeals. The high rate of new employment may also have placed tremendous strain on training and mentoring.

When the discretion to decline to prosecute is wielded in politically sensitive matters on weak grounds, the appearance of a lack of independent operation of the prosecution service arises. The constitutional mandate of the NPA to prosecute carries with it an obligation. The Constitution requires ‘national legislation’ to ensure the prosecuting authority acts without ‘fear, favour or prejudice’. It seems to be self-evident that our legislation has not ensured that this is the case.

## RECOMMENDATIONS

The report recommends an overhaul of prosecutorial policy to clarify the ambit of ‘reasonable prospects for success’ in the light of the duty to prosecute. In particular, the circumstances under which the discretion to decline to prosecute, despite the existence of reasonable prospects, should be exercised must take proper account of the duty to prosecute.

Policy encouraging the speedy resolution of cases via plea-and-sentence agreements, and the appropriate alternative resolutions of cases, such as via diversion, should be supported by appropriate budgets set aside by Parliament and by legislative amendments, where appropriate.

Performance reporting should be amended to distinguish between matters resolved in a summary manner and matters resolved in lengthy trial processes, i.e. to provide a proper 'weighting' of cases before the courts, and should be coupled with employment figures. Such data should be thoroughly analysed to identify optimal prosecutorial loads and to identify courts or prosecutors in need of intervention. Members of Parliament should be assisted in interrogating performance reports from the prosecuting authority.

Human resources policy should, in the scarce skills environment, focus on the professional development of existing prosecutors to assist them in achieving optimal workloads.

Partners in the criminal justice process should be approached to consider innovative means of increasing the number of appropriate resolutions of cases. Measures that should be considered include holding two sessions of court per day and holding summary trials where appropriate.

Parliament should consider legislative amendments to further secure the independent operation of the NPA. Such independence may require a greater degree of institutional independence from the executive branch of government. Such legislation should also entrench the susceptibility of decisions to decline to prosecute to judicial review.

## NOTES

- 1 Geldenhuys et al., *Criminal procedure handbook*, 14.
- 2 E Cape, J Hodgson, T Prakken & T Spronken (eds), *Suspects in Europe: procedural rights at the investigative stage of the criminal process in the European Union*, Antwerp & Oxford: Intersentia, 2007.
- 3 Du Plessis, Redpath & Schönsteich, Report on the South African National Prosecuting Authority, 359.
- 4 *Criminal Procedure Act 1977* (Act 51 of 1977), sec. 112.
- 5 *S v Jija* [1991] (2) SA 52 (E).
- 6 *S v Mofokeng* [1992] (2) SACR 261 (O), 264C.
- 7 *S v Van Rensburg* [1963] (2) SA 343 (N).
- 8 *S v Kamte* [1992] (1) SACR 677 (A).
- 9 Geldenhuys et al., *Criminal procedure handbook*, 50.

- 10 *S v Basson* [2004] (6) BCLR 620 (CC), 32.
- 11 Du Toit et al. *Commentary on the Criminal Procedure Act, 1-4M*.
- 12 *Beckenstrater v Rotcher and Theunissen* [1955] (1) SA 129 (A), 137.
- 13 Geldenhuys et al., *Criminal procedure handbook*, 50.
- 14 *S v Snyman* [1980] SACC 313, 314.
- 15 *Stoker & Van Der Merwe* [1981] SACC 73.
- 16 See *Richings* [1977] SACC 143, in which the accused's negligent driving caused the death of his young children.
- 17 NPA Act 1998, sec. 22(1).
- 18 *Ibid.*, sec. 22(2)(c).
- 19 *Ibid.*, sec. 22(2)(b).
- 20 *Ibid.*, sec. 22(2)(c).
- 21 See Van Zyl Smit & Steyn, *Prosecuting authority in the new South Africa*, 9.
- 22 NPA Act 1998, sec. 22(4)(a).
- 23 J Sarkin & S Cowen, *The draft National Prosecuting Authority Bill: a critique*, *South African Criminal Journal* 1 (1997), 70.
- 24 Constitution 1996, sec. 179(5)(a); NPA Act 1998, sec. 21(1).
- 25 Van Zyl Smit & Steyn, *Prosecuting authority in the new South Africa*, 9.
- 26 NPA Act 1998, sec. 21(1).
- 27 *Ibid.*, sec. 21(2).
- 28 NPA, *National Prosecuting Authority of South Africa policy manual*, Pretoria: NPA, October 1999, B.1.
- 29 NPA Act 1998, sec. 21(2).
- 30 *Ibid.*, sec. 24(4)(c)(ii)(bb) read with sec. 24(5).
- 31 NPA, *Ethics: a practical guide to the ethical code of conduct for members of the National Prosecuting Authority*, Pretoria: NPA, March 2004. The manual is authored by the NPA's Research and Policy Information Service Centre and vetted by the organisation's senior leadership. It covers a wide array of issues, including serving the public interest, prosecutors' duties to the court, prosecutors' responsibilities to unrepresented accused, professional integrity and responsibility, and how prosecutors should interact with defence lawyers and state witnesses. The manual is advisory and describes its aim as 'merely to provide a practical guide that will point prosecutors in the right direction' (p. iv).
- 32 NPA, *Prosecution policy*, revised 1 December 2005, [http://us-cdn.creamermedia.co.za/assets/articles/attachments/02475\\_npaprosecutionpolicy.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02475_npaprosecutionpolicy.pdf).

- 33 Ibid., A4–A5.
- 34 Ibid., A5–A6.
- 35 Ibid., A3.
- 36 Ibid., A2.
- 37 Ibid., A1. However, the policy is written in 'general terms to give direction rather than to prescribe ... to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions' (ibid., A2).
- 38 B Greenbaum, *Post Truth and Reconciliation Commission (TRC) alternative prosecution policy framework for political violence of the past*, CSVr, 8 July 2008, <http://www.csvr.org.za/docs/prosecution0708.pdf>.
- 39 See [http://us-cdn.creamermedia.co.za/assets/articles/attachments/02475\\_npaprosecution-policy.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02475_npaprosecution-policy.pdf) for a copy of the amendments.
- 40 J Gordin & A Quintal, *Amnesty door slammed*, *Independent Online*, 14 December 2008, <http://www.iol.co.za/news/politics/amnesty-door-slammed-1.428893>.
- 41 Ibid.
- 42 I Matthews, *The National Prosecuting Authority*, in C Gould (ed), *Criminal (in)justice in South Africa*, Pretoria: Institute for Security Studies, 2009, 101.
- 43 Ibid., 102.
- 44 Ibid.
- 45 Ibid.
- 46 See NPA Act 1998, sec. 25.
- 47 L Artz & D Smythe, *Losing ground: making sense of attrition in rape cases*, *SA Crime Quarterly* (22 December 2007).
- 48 Ibid.
- 49 To illustrate, the number of dockets referred increased by almost 7 per cent between 2002/3 and 2005/6, but the number prosecuted dropped by 3 per cent, while the number referred back increased by 7 per cent over the same time period (De Beer, *Charts of national performance overview 2002–2005*).
- 50 See SAPS, *SAPS annual report 2009/10*, 31 August 2010, 96 [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_report/ar\\_archive.htm](http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/ar_archive.htm).
- 51 Matthews, *The National Prosecuting Authority*, 102.
- 52 NPA, *NPA annual report, 2005/6*, n.d., 46, <http://www.npa.gov.za/ReadContent487.aspx>.
- 53 Ibid., 44.
- 54 *Criminal Procedure Act 1977*, sec. 6(a).

- 55 Ibid., sec. 6(b).
- 56 Ibid.
- 57 *Allen v Attorney-General* [1936] CPD 302.
- 58 *Gillingham v Attorney-General* [1909] TS 572.
- 59 *Wronsky v Prokureur-Generaal* [1971] (3) SA 292 (SWA).
- 60 See *Mitchell v Attorney-General, Natal* [1992] (2) SACR 68 (N).
- 61 Answering affidavit of Mokothehi Mpshe in the Zuma review application, para. 18.
- 62 *Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2011] ZAGPPHC 57, 22 February 2011.
- 63 *R v director of public prosecutions, ex parte Manning and another* [2000], All ER (D) 674.
- 64 Serious Fraud Office UK, The decision to prosecute, n.d., <http://www.sfo.gov.uk/media/98174/decision%20to%20prosecute%20web%201.pdf>.
- 65 *National director of public prosecutions v Zuma* (573/08) [2009] ZASCA 1; [2009] (2) SA 277 (SCA); [2009] (1) SACR 361 (SCA); [2009] (4) BCLR 393 (SCA); [2009] (2) All SA 243 (SCA) (12 January 2009), para. 35.
- 66 Ibid., footnote 33.
- 67 Jackson, The role of the public prosecution service within the administration of justice.
- 68 Ibid.



# Appendices

## A. FUNCTIONS OF PROSECUTORS

### Prosecution-associated functions

In prosecuting cases before the court, prosecutors have a range of associated powers and functions that assist them to prosecute a crime.

#### *Secure attendance of accused and witnesses in court*

The prosecution (or a commissioned officer of the police) has the power to apply to a magistrate to issue a warrant of arrest for an accused who is not in police custody.<sup>1</sup> An arrest is but one of the means to secure the attendance of an accused in court. Other means of doing so include a summons, a written notice or an indictment.<sup>2</sup> An indictment is the document in which a charge is laid in a superior court and contains a summary of the substantial facts of the case.<sup>3</sup> The prosecutor may also request a magistrate to issue a summons to a witness to ensure his appearance at trial.<sup>4</sup> A summons is not a requirement for witnesses to give evidence, however, and witnesses may also be informally requested to appear.<sup>5</sup>

#### *Grant bail in respect of some offences*

For serious offences such as murder and rape, the court must decide whether to grant an accused bail. The prosecutor can oppose bail or not oppose bail during such a bail application. The DPP may appeal to the high court having jurisdiction against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail.<sup>6</sup> In respect of certain specified offences,<sup>7</sup> a DPP or duly authorised prosecutor may, in consultation with the detective investigating the case, authorise the release of an accused on bail.<sup>8</sup> For minor offences, the police may grant bail.<sup>9</sup>

### **Select court**

The court before which an accused appears for the purposes of a bail application must refer such an accused to a court designated by the prosecutor for purposes of trial.<sup>10</sup> If an accused appears in a magistrate's court and the prosecutor informs the court that the alleged offence merits punishment in excess of the jurisdiction of a magistrate's court, the court must, if so requested by the prosecutor, refer the accused to the regional court for trial without the accused having to plead to the relevant charge.<sup>11</sup>

### **Conclude plea and sentence agreements**

Prosecutors have the power to conclude plea and sentence agreements. This much-misunderstood procedure has the potential to increase the number of matters that can be finalised by the NPA, as it avoids a lengthy trial process. The law provides that a prosecutor authorised by the NDPP and an accused who is legally represented may, before the accused pleads to the charge, negotiate and enter into an agreement in respect of a guilty plea by the accused to the offence charged (or to an offence of which he or she may be convicted on the charge) and a just sentence to be imposed by the court.<sup>12</sup>

The court must satisfy itself of the guilt of the accused and the justice of the sentence agreement, or determine a sentence it considers to be just.<sup>13</sup> Both the accused and the prosecution then have an opportunity to withdraw from the agreement upon being informed of what the court considers to be a just sentence.<sup>14</sup> If they abide by the agreement, the conviction is passed and the just sentence imposed.<sup>15</sup> If they withdraw, the trial must then proceed *de novo* before another presiding officer, and no reference may be made to the agreement in the trial.<sup>16</sup>

During 2005–2006, just over 3 000 cases were finalized by way of plea and sentence agreements.<sup>17</sup> By comparison during April to September 2010 (six months), 481 plea agreements were reached while a total of 527 agreements were concluded for the same period in 2009.<sup>18</sup> The reduction in the number of plea and sentence agreements is due to delegation of this authority being minimised while revised policy directives relating to plea and sentence agreements were submitted to the minister, for tabling in Parliament on approval.<sup>19</sup> It has been theorised that government policy in favour of punitive sentencing continues to hamper the extent to which plea bargaining can be used to reduce the pressure on courts.<sup>20</sup> It is feared the new policy directives may similarly act to discourage

plea and sentence agreements. This is despite the fact that NPA data indicates that in respect of the few serious cases of violent crime finalised by way of plea and sentence agreements, 95 per cent of such cases resulted in direct imprisonment, compared to a conviction rate of 90 per cent among cases that go to court in the usual manner. In other words, plea and sentence agreements provided a better 'return' in terms of prison sentences being handed down than ordinary trials.<sup>21</sup>

### *Apply for recusal of assessors*

Although South Africa abolished the jury system in 1969,<sup>22</sup> a judge may in certain cases summon not more than two assessors to assist him at the trial.<sup>23</sup> There is no 'assessor selection process' akin to the US jury selection process, and no statutory provision for the recusal of superior court assessors. However, the High Courts have inherent jurisdiction to entertain an application for recusal of an assessor. Magistrates may also be assisted by assessors in specified cases.<sup>24</sup> Where a magistrate is assisted by an assessor, both the prosecution and the defence may apply for the recusal of an assessor whose impartiality is in question and address arguments to the magistrate on the desirability of the recusal.<sup>25</sup>

### *Address the court before evidence is adduced*

The prosecutor plays a key role at trial. The prosecutor may at trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he/she intends to adduce in support of the charge.<sup>26</sup> The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge.<sup>27</sup> After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.<sup>28</sup> The prosecutor may reply on any matter of law raised by the accused in his address and may, with leave of the court, reply on any matter of fact raised by the accused in his address.<sup>29</sup>

### *Address the court on sentencing*

A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received and on the matter of the sentence, and thereafter the prosecution may likewise address the court.<sup>30</sup> Prosecutorial

policy provides that prosecutors must ensure that the court is informed of the existence of aggravating circumstances and – where an accused is undefended – mitigating factors.<sup>31</sup> In cases involving crimes of a serious nature, including violent crimes and sexual offences against women and children, the prosecution is supposed to provide evidence relating to the impact of the crime on the victim and the community, statistics regarding the frequency and relative seriousness of the offence, and any relevant previous convictions the accused might have.<sup>32</sup> The judge – who generally has a wide range of sentencing options to choose from – is not obliged to take heed of the suggestions made by either the prosecution or the defence, however.<sup>33</sup>

## Non-core functions

### *Forfeiture of assets*

The term asset forfeiture refers to the seizure by the state of assets linked to crime. Legislation providing for the forfeiture of assets in South Africa was introduced through the Prevention of Organised Crime Act (Act 121 of 1998) (which also introduced racketeering, criminal gang and money-laundering prohibitions). Two types of forfeiture are enabled by the legislation: civil and criminal. Civil forfeiture does not require proof beyond reasonable doubt that any crime has been committed. Instead, it must be shown on a balance of probabilities that the asset concerned is either the proceeds of crime or an instrumentality of an offence. The legislation has a number of procedural safeguards, including reverting to court at various stages of the process, an ‘innocent owner’ defence, and the right to apply for leave to appeal. The courts have also read in constitutional requirements that deprivation of property in terms of civil forfeiture should not be arbitrary and that the forfeiture satisfies the requirement of proportionality.<sup>34</sup>

Because forfeiture is highly technical and procedural in nature, it was decided at the time of the promulgation of the legislation that a specific unit employing prosecutors who would develop specific forfeiture expertise would be responsible for all forfeiture applications. In 1999 Willie Hofmeyr was appointed by presidential proclamation as a special director of public prosecutions, with specific powers and functions in relation to the forfeiture of assets.<sup>35</sup> Such applications were brought in relation to investigations carried out by both the police and the DSO, when it existed within the NPA.

### *Investigation of crime*

The Constitution provides that the NDPP has the power to carry out any ‘necessary functions incidental to instituting criminal proceedings’. The NPA Act was passed around the same time as the Prevention of Organised Crime Act, and the original version of the NPA Act provided that the president may, with the concurrence of the minister and the NDPP, establish no more than three ‘investigating directorates’ in the Office of the National Director in respect of specific offences or specific categories of offence.<sup>36</sup>

In October 1998 the Special Investigating Directorate: Organised Crime and Public Safety was proclaimed<sup>37</sup> and in February 2000 the Investigating Directorate: Corruption<sup>38</sup> was proclaimed. In December 1998 the categories of offences for the Investigating Directorate: Serious Economic Offences (IDSEO) was proclaimed.<sup>39</sup> IDSEO succeeded the Office for Serious Economic Offences (OSEO), which had been established under the Serious Economic Offences Act of 1991, which was repealed by the passage of the NPA Act. Section 43(7)(a) of the NPA Act provided that the OSEO should become the IDSEO and be deemed to have been established under section 7 of the NPA Act.

In September 1998 then-President Mbeki announced the launch of the ‘Scorpions’, initially the Directorate of Special Investigations (DSI) and later formally the Directorate of Special Operations (DSO). An Amendment Act was passed in 2000 to provide for the DSO and to make provision for the existing Investigating Directorates to become part of the DSO.<sup>40</sup>

In April 2005, under pressure of allegations of political misuse of the DSO, Mbeki appointed the Khampepe Commission of Inquiry into the role and mandate of the DSO. The key issue was the location of the DSO under the NPA. Khampepe recommended that the DSO should remain under the NPA, but that political oversight and responsibility over the law enforcement component of the DSO should be transferred to the minister of safety and security. A cabinet statement of 29 June 2006 reveals that it endorsed the National Security Council’s decision to accept in principle the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA.<sup>41</sup> However, the ANC, the ruling party, at its 52nd national conference in Polokwane in December 2007, adopted a resolution calling for a single police service and the dissolution of the DSO.<sup>42</sup>

Ultimately, on 27 January 2009, President Zuma signed into law two amendment acts amending the NPA Act and the SAPS Act, the combined effect of which was to ‘disband the DSO and establish the “Directorate of Priority Crime

Investigation” under the SAPS’ (the ‘Hawks’).<sup>43</sup> The decision to initiate the Bills was unsuccessfully challenged by businessman Hugh Glenister in the High Court. The constitutional validity of the laws passed was also challenged unsuccessfully in the High Court. Glenister appealed to the Constitutional Court, where he succeeded.

The majority of the court<sup>44</sup> declared that ‘Chapter 6A of the South African Police Service Act 68 of 1995 is inconsistent with Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation’.<sup>45</sup> The court found:

[T]he absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI’s power to investigate at the hands of members of the executive, who control the DPCI’s policy guidelines, are inimical to the degree of independence that is required in terms of international obligations and which are ‘intrinsic to the Constitution itself’.<sup>46</sup>

The court suspended the declaration of constitutional invalidity for 18 months in order to give Parliament the opportunity to remedy the defect.<sup>47</sup> The ruling does not imply that the DSO should be returned to the NPA, nor that the amendment to the NPA Act was unconstitutional; it says only that the corruption fighting entity as provided for in amendments to the Police Act does not have an adequate degree of independence.

The provisions in the NPA Act allowing for the proclamation of investigating directorates remain in existence and have not been excised from the NPA Act.

### *Community prosecution*

Strategy 2020, released in March 2007, said that the NPA is to ‘add a new dimension to its traditional role’ to become an ‘advocate of proactive and alternative justice solutions’ that would see it ‘extend its role beyond that of prosecution to include caretaker, resolver, and preventer of victimisation’.<sup>48</sup> In line with this strategy, community prosecution was established as an integral component of the NPA’s delivery strategy to prevent and resolve crime and victimisation. Community prosecution is a proactive approach to addressing crime and quality of life issues that brings prosecutors in contact with residents to identify problems and solutions. Community prosecutors do not sit in court or in their offices,

but go out into the community to identify problems and solutions to crime in specific locations. It is unclear the extent to which community prosecution remains a key policy of the NPA under NDPP Simelane.

### *Parole Board representation*

The NPA also has representation on the Correctional Supervision and Parole Review Board (CSPR Board).<sup>49</sup> This board takes decisions by majority vote and has the power to confirm decisions of the Correctional Supervision and Parole Board or to substitute a decision of its own.<sup>50</sup> The Correctional Supervision and Parole Board makes decisions regarding granting or cancellation of correctional supervision, parole, or day parole,<sup>51</sup> and its decisions are final and can only be referred to the CSPR Board by the minister or commissioner of correctional services.<sup>52</sup>

## **B. REGULATORY FRAMEWORK FOR THE EMPLOYMENT OF PROSECUTORS**

### **Appointment and qualifications**

Prosecutors are appointed on the recommendation of the NDPP.<sup>53</sup> The minister, in consultation with the NDPP and after consultation with the provincial directors, prescribes the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court; currently, prosecutors must have a university law degree.<sup>54</sup> Line prosecutors' career paths are largely governed by public service rules. According to the Public Service Act, anyone appointed to the public service must:

- Be a South African citizen
- Be of good character
- Comply with any prescribed requirements<sup>55</sup>

Due regard to equality and the other democratic values and principles enshrined in the Constitution must be taken into account in making appointments. All persons who qualify for the appointment must be considered. The evaluation of persons must be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.<sup>56</sup> The NPA's staffing should 'reflect broadly the racial

and gender composition' of the country.<sup>57</sup> The extent to which this is so will be discussed in more detailed below.

## Conditions of service

Conditions of service of DDPPs and prosecutors, except remuneration, must be determined according to the Public Service Act, including the advertisement of positions, appointment, benefits, disciplinary actions and dismissal. Promotions are determined at head office level on the basis of performance reports received from line managers.

In addition, all prosecutors are required to sign a performance contract when they are appointed, and all senior managers (above the level of DDPP) are required to sign standardised yearly performance contracts; these contracts outline the key performance indicators for the individual prosecutor.

The security of tenure of prosecutors below the level of director is the same as for any government employee, as dictated by the Public Service Act.<sup>58</sup> According to the Act, public servants may only be dismissed on a number of prescribed grounds. These include continued ill-health, the abolition of a post or institutional reorganisation, where a dismissal will promote efficiency in the department where the person concerned is employed, where it is in the interest of the public service, on account of unfitness to perform the job or incapacity to perform it efficiently, on account of misconduct, or where continued employment constitutes a security risk for the state.<sup>59</sup> Unless one or more of the aforementioned reasons for dismissal are present, prosecutors below the level of director have security of tenure until they reach the age of 65, at which time they are generally obliged to retire.<sup>60</sup>

During the first 12 months of their appointment, prosecutors below the level of director are on probation and can be dismissed with one month's written notice, or immediately, if the person's conduct is unsatisfactory.<sup>61</sup>

## Training

Aspirant prosecutors must have a school Senior Certificate pass with matriculation exemption (i.e. university entrance pass) followed by a BProc or LLB.<sup>62</sup> Thereafter, prosecutors undergo an aspirant prosecutor training course, which is a six-month programme offered by the NPA at Justice College.<sup>63</sup> Justice College is a branch of the Department of Justice that is responsible for the training of

magistrates, prosecutors, clerks of the court, interpreters and other court officials.<sup>64</sup> Prosecutors who are advocates of the High Court with an LLB qualification and at least two years' prosecutorial experience can become state advocates and present cases in the High Court.<sup>65</sup>

Yearly national training is organised for all prosecutors, including refresher courses in general criminal procedure, evidence and trial advocacy, and dedicated training in the latest legal developments relevant for prosecutors.<sup>66</sup> Such training occurs via a selection process, as places on courses are limited.<sup>67</sup> A detailed record is kept of prosecutors' attendance. The NPA also encourages staff members to further their professional qualifications. Various scholarship schemes are offered to employees, ranging from full scholarships to interest-free student loans. Training is recorded on employees' employment records and consequently considered together with performance reports for evaluation purposes.

## Salaries

Prosecutors below director level are paid a salary in accordance with the scale for rank and grade determined by the minister of Justice, after consultation with the NDPP and the minister of public service and administration and with the concurrence of the minister of finance, and subject to Parliament's approval.<sup>68</sup> The salary scales of prosecutors (including DDPPs) must be published in the *Government Gazette*.<sup>69</sup> A reduction in the salaries of DDPPs and prosecutors requires an Act of Parliament.<sup>70</sup> The salary range for prosecutors varies from just over R100 000 per annum on the lowest notch to just over R1 million per annum for the top salary notch.<sup>71</sup> Prosecutors, as public servants, may not perform outside remunerative work without authorisation from the NDPP.<sup>72</sup> Prosecutors may not accept any gift, donation, treat, favour or sponsorship (other than in a *bona fide* private capacity) that may compromise or may appear to compromise their professional integrity or that of the profession as a whole.<sup>73</sup>

## Unions and strikes

Prosecutors are permitted to join unions; most belong to a union representing either public servants or prosecutors specifically.<sup>74</sup> Many senior prosecutors also belong to a professional association for state advocates.<sup>75</sup> Prosecutors perform an 'essential service', under the terms of labour legislation.<sup>76</sup> The import of this is that

participation in a strike may constitute a fair reason for dismissal, i.e. if the strike is illegal and not protected.<sup>77</sup> However, in both 2001 and 2007 prosecutors participated in strike action during public servants' strikes.<sup>78</sup> It is unclear whether dismissals of prosecutors followed these strikes. Requests by prosecutors that a minimum service agreement be signed have been rejected by the minister of Justice.<sup>79</sup>

## Ethics

A member of the NPA is obliged to 'serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favor or prejudice and subject only to the Constitution and the law'.<sup>80</sup> Prosecutors must take an oath or make an affirmation to this effect.<sup>81</sup> Prosecutors, as public servants, may belong to and serve on the management of a lawful political party and attend public political meetings, but they may not preside or speak at such meetings and are prohibited from drawing up or publishing any writing or delivering a public speech to promote or prejudice the interests of any political party.<sup>82</sup> No one may interfere with or obstruct the work of the prosecuting authority.<sup>83</sup> Individual prosecutors are not criminally or civilly liable for anything they do in 'good faith' in performance of their duties.<sup>84</sup> The state is held vicariously liable for any wrongful conduct (including negligent acts or omissions) by any prosecutor acting in his/her official capacity.<sup>85</sup> This has recently been extended to cover damage inflicted by a party unrelated to the state as a result of negligence on the part of a state official.<sup>86</sup>

The NPA has a code of conduct, with which all prosecutors must comply.<sup>87</sup> A new code of conduct was published in the *Government Gazette* in 2010. Prosecutors' performance contracts include an undertaking to comply with the code of conduct; prosecutors who fail to comply can have internal disciplinary proceedings instituted against them.<sup>88</sup> The NDPP drafts the code of conduct for the NPA in consultation with the minister of Justice, the deputy NDPPs and the provincial DPPs.<sup>89</sup> The code of conduct must be published in the *Government Gazette*<sup>90</sup> and all new prosecutors receive a copy.

## Administration

All human resource functions of the prosecution service – appointment, transfer, discipline and dismissal – are centralised in Corporate Services at the head office.

For example, if a senior prosecutor in a specific office wants to appoint additional staff, he/she must submit a request through the provincial DPP to the head office. If approved, the position is advertised and the human resources division at the head office conducts a short-listing process; the senior prosecutor normally sits on the interviewing panel as well, however. During the existence of the NPA, Corporate Services has been criticised to varying degrees for poor performance, which negatively affects the work of prosecutors.<sup>91</sup> The NPA has also received qualified audits due to poor management.<sup>92</sup>

## Management

Senior and chief prosecutors are responsible for the day-to-day management of the prosecutors under their control. Senior public prosecutors must complete progress and evaluation reports for all prosecutors in their office; these reports are submitted to the chief prosecutor and provincial director. After approval by the director, the reports are then submitted to the NPA's human resources department at head office. Such reports influence the awarding of promotions and performance bonuses.

## Misconduct

The NDPP is obliged, after consultation with the deputy NDPPs and DPPs, to advise the minister of Justice on creating a process allowing individuals to register complaints about improper conduct by members of the NPA.<sup>93</sup> The Integrity Management Unit launched a dedicated toll-free integrity hotline in 2005 to provide both NPA employees and the public with a mechanism to report concerns.<sup>94</sup> Disciplinary hearings<sup>95</sup> are carried out in accordance with applicable labour law.<sup>96</sup>

## C. ORGANISATIONAL STRUCTURE OF THE NPA

Ultimate authority lies with the NDPP, who, with the minister, sets policy directives which must be observed in the prosecution process and who has the power of veto over decisions to prosecute. There are DPPs in each division of the High Court.

The Specialised Commercial Crime Unit (SCCU) prosecutes complex commercial crime and has offices only in the major centres. The Sexual Offences and

Community Affairs Unit supports the prosecutions of cases involving women and children as victims. The Priority Crimes Litigation Unit (PCLU) manages and directs investigations and prosecutions of specified crimes, including those relating to the TRC process. The AFU is responsible for bringing applications for the forfeiture of assets that are the proceeds of crime or the instrumentalities of offences.

The Office for the Protection of Witnesses provides protection and support to vulnerable and intimidated witnesses and related persons in any judicial proceedings and in the criminal justice system. All support services are under the chief executive officer via a delegation of the accounting function from the DG: Justice.

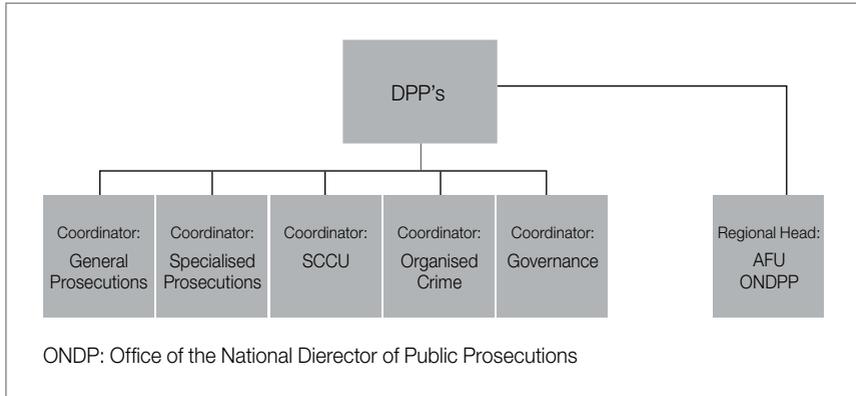
## Public prosecutions

In the past the National Prosecution Service was led by a deputy national director or director of public prosecutions; general prosecutions are now led directly by the NDPP. Leadership of general prosecutions at the seat of each High Court is provided by DPPs.<sup>97</sup> The primary responsibility for instituting and conducting criminal proceedings lies with the DPPs in respect of offences committed in their jurisdiction, except for prosecutions falling within the exclusive authority of the NDPP.<sup>98</sup> In practice, the DPPs authorise prosecutors within their jurisdiction to institute and conduct criminal proceedings.<sup>99</sup>

The current DPPs (June 2011) are:

- Acting DPP South Gauteng, Xolisile Khanyile
- Acting DPP Free State, André du Toit
- DPP North Gauteng, Sibongile Mzinyathi
- DPP Northern Cape, Ivy Thenga
- Acting DPP KZN, Simphiwe Mlotshwa
- DPP Eastern Cape – Grahamstown, Lungi Mahlati
- DPP Western Cape, Rodney de Kock
- Acting DPP Eastern Cape – Mthatha, Silumko Ngqwala
- DPP North West, Johan Smit<sup>100</sup>

The exact ambit of the various coordinators' functions indicated in the diagram above is not clear. What is notable in the diagram is the requirement for the AFU regional head and SCCU coordinators to report to the DPPs.

**Figure A1 NPA at each seat of the High Court April 2011<sup>101</sup>***Source Author*

Each DPP is supported by senior managers, i.e. corporate managers, deputy DPPs and chief prosecutors, who have responsibility in the high courts and lower courts respectively.<sup>102</sup> Deputy Directors of Public Prosecutions (DDPPs) oversee and conduct prosecutions in the High Courts. In addition, there are several senior state advocates and state advocates (who, unlike senior public prosecutors and prosecutors, have a right of appearance in the High Court), who conduct most of the High Court prosecutions.<sup>103</sup>

DPPs usually prosecute the most serious and contentious cases, while the DPP very rarely appears in court. However, this practice may change, particularly in relation to high-profile cases. NDPP Menzi Simelane in November 2010 wore prosecutor's robes in relation to the bail application of Ithala Bank chief executive Siphon Shabalala, where he did not oppose bail. This was followed by Western Cape DPP Rodney de Kock appearing for the state in matters related to the Dewani case. It is unclear whether this is an actual policy directive or simply a change of convention.

The lower courts are overseen by chief prosecutors, who are each responsible for an allocated number of magisterial districts. Every magisterial district has one court centre, which may encompass a number of district and regional courts. There is a prosecution office associated with each court centre. The size of a prosecution office varies considerably, from those larger metropolitan offices with a few dozen prosecutors to offices staffed by a single prosecutor. There are 354 magisterial district areas in the country.<sup>104</sup> Nationally, there are 36

chief prosecutors based at the major metropolitan courts,<sup>105</sup> on average about 1 for every 10 magisterial district areas. In practice the number of areas for which a chief prosecutor is responsible varies considerably. The chief prosecutor is responsible for the overall management of all the prosecutors in the cluster. This management role is largely related to administrative employment issues and the chief prosecutor seldom interferes with prosecutors' day-to-day prosecutorial decision-making. The chief prosecutor has weekly meetings with the senior public prosecutors (SPPs) in his/her cluster.

Each office, depending on its size, may have a chief prosecutor and/or one or more SPPs and/or control prosecutors (responsible for case allocation) who provide leadership and oversight at that court centre, plus public prosecutors. Individual offices generally have their own internal arrangements and hierarchy structures; there is no standard or mandatory pattern. Prosecutors assigned to prosecute in the regional court at a court centre are termed regional court prosecutors. Those assigned to prosecute in the district courts are termed district court prosecutors.

A very small court centre may have only a district court (more serious cases are referred to the nearest regional court) with a small prosecutors' office headed by an experienced prosecutor and not an SPP. By contrast, larger offices normally have more than one SPP among whom responsibilities are divided. The SPP is responsible for the general management of the prosecutors under him/her and can overrule prosecutorial decisions taken by any prosecutor under him/her. In practice, the decision whether to prosecute most serious and high-profile regional cases is taken by the SPP as a matter of course. The SPP is also usually the only prosecutor in the office who can take informal appeals from the public<sup>106</sup> on matters within the relevant court's jurisdiction.

## National Special Services Division

The president may appoint one or more DPPs (referred to as special directors) to exercise certain powers, carry out certain duties and perform certain functions assigned by the president by proclamation in the *Government Gazette*.<sup>107</sup> These proclamations of special directors have resulted in the formation of the entities that fall under this division, which have specific functions in the NPA. At the time of writing, deputy NDPP Silas Ramaite exercised direct oversight over these units.

### *Specialised Commercial Crime Unit*

The SCCU prosecutes complex commercial crime. It was established on 1 August 1999<sup>108</sup> and is headed by Chris Jordaan.<sup>109</sup> The unit has offices only in the major centres of Pretoria, Johannesburg, Durban, Cape Town, Bloemfontein and Port Elizabeth, with a satellite office in East London, and an office in Randburg dedicated to matters involving fraudulent claims against the Road Accident Fund. The unit's offices are located on the premises of the commercial crime courts, which are also home to the Commercial Branch of the SAPS, allowing for close co-operation between the unit and the detectives investigating commercial crime. In April 2010 NDPP Simelane revealed plans to restructure the SCCU, which was interpreted by opposition parties as the 'disbandment and decapitation' of the unit.<sup>110</sup> The plans, which would have required revocation of the unit head's presidential proclamation as special director, appeared not to have been implemented at the time of writing.<sup>111</sup>

### *Sexual Offences and Community Affairs Unit*

This unit was established in October 1999 under Thoko Majokweni through a presidential proclamation and has the mandate to support the prosecutions of cases involving women and children as victims.<sup>112</sup> This is done mainly by advocating and implementing measures that prevent and react to gender-based violence and minimise secondary victimisation in the criminal justice process. Measures adopted include courts dedicated to sexual offences as well as 'Thuthuzela Care Centres' that provide a one-stop service to victims of sexual offences. The unit comprises four sections, i.e. Sexual Offences, Domestic Violence, Maintenance and Child Justice.<sup>113</sup>

### *Priority Crimes Litigation Unit*

The PCLU was created by presidential proclamation in 2003<sup>114</sup> and Anton Rossouw Ackerman was appointed special director of the unit, also by presidential proclamation.<sup>115</sup> Although the unit has no investigative capacity, it has the mandate to manage and direct investigations and prosecutions relating to the TRC process (missing persons and prosecutions); the Rome Statute (genocide, crimes against humanity, war crimes); crimes against the state (domestic and international terrorism); contraventions of various weapons and intelligence legislation; and any other priority crimes determined by the NDPP.<sup>116</sup> At the conclusion of its work, the TRC handed the NPA a list of 300 names for prosecution of people who had

been denied amnesty or who did not apply for amnesty.<sup>117</sup> Only a handful of these cases have been prosecuted, such as those of Adriaan Vlok and Wouter Basson.<sup>118</sup>

However the focus of the PCLU appears to have been on missing persons and thus the unit has a Missing Persons Task Team.

### *Office for the Protection of Witnesses*

The Office for the Protection of Witnesses (OPW) (originally termed the Witness Protection Unit) was created after the passage of the Witness Protection Act in 1998, which formed part of the package of legislation designed to address organised crime. The unit provides witness protection support to vulnerable and intimidated witnesses and related persons in any judicial proceedings and in the criminal justice system.<sup>119</sup> All of the OPW functions and duties are classified as secret. Five branches of the OPW were established by the minister in 2001.<sup>120</sup>

## **Asset Forfeiture Unit**

Civil and criminal asset forfeiture were introduced in South Africa in 1998 with the passage of the Prevention of Organised Crime Act of 1998 (POCA), in line with international legal instruments to which South Africa is signatory. This was over the same time period in which the DSO (Scorpions) was created, with the intention that offences arising from POCA would be their particular focus. The legislation permits assets that are the proceeds of crime or an instrumentality of an offence to be 'frozen' (via a preservation order) and ultimately forfeited to the state into the Criminal Assets Recovery Account (CARA) or to victims. Although a criminal conviction is not required for a preservation order, the order must be linked to the prosecution of a person on criminal offences.

Because of the complicated and highly procedural legal process involved in forfeiture proceedings, a specialised unit within the NPA was established, staffed with a small number of highly skilled lawyers, some of whom were drawn from academia, to carry out forfeiture proceedings. Although the unit initially dealt with forfeitures arising out of investigations carried out by the former DSO (Scorpions), forfeiture proceedings have been available on any investigations brought to the attention of the unit.

The unit has since its inception been closely associated with Deputy National Director Willie Hofmeyr, who was originally appointed special director responsible for asset forfeiture.<sup>121</sup> In early 2010 it was reported that the NPA

would require forfeiture unit staff to report to provincial DPPs rather than to Hofmeyr.<sup>122</sup> Hofmeyr would remain 'co-ordinator' of the unit. Justice Minister Radebe reportedly intervened to put this 'restructuring' on hold.<sup>123</sup> Hofmeyr has concurrently been head of the Special Investigating Unit (formerly headed by Judge Heath), an entity outside of the NPA that investigates specific instances of corruption by presidential proclamation. Although it was reported that he would be asked to relinquish one of these posts it is unclear what has transpired in this regard.<sup>124</sup>

Actual payments into the CARA by the AFU over the last four years have averaged R45.6 million per year, or a total of R182 million.<sup>125</sup> The average value of assets forfeited each year over the last four years was R171 million, or a total of R684 million.<sup>126</sup> The difference is apparently accounted for by payments in favour of the direct victims of the crimes concerned. However, the expenditure estimate for the AFU over the last four years was R247 million. Thus, every rand spent on the AFU resulted in R2,70 forfeited, but only R0,73 being paid into CARA. Current NDPP Simelane has criticised the lack of transparency around forfeitures:

We are going to have to be more transparent about that process because in an insolvent situation the creditors have a ranking order and that ranking order has to be strictly followed ... R52 million is a lot of money but I'm as curious as I'm sure you are now as to who in each case got paid.<sup>127</sup>

## Legal Affairs Division

This entity in the NPA was established in 2010 to bring together all functions that render legal assistance and advice to the NDPP.<sup>128</sup> The division covers mutual legal assistance and extraditions under Alta Collopy; civil litigation under Karin Vorster; representations under Sara Mitchley; and drafting of legislation, prosecution policy and policy directives under Bradley Smith.<sup>129</sup> The division is headed by newly appointed DNDPP Nomvula Mokhatla.

## Strategy and Operations Division

This division is under the newly appointed DNDPP Nomgcobo Jiba. The exact ambit of this division is not yet clear.

## Support services under the chief executive officer

In terms of the NPA Act, expenses incurred in connection with the exercise of the powers, the carrying out of the duties and the performance of the functions of the NPA; and the remuneration and other conditions of service of members of the NPA are defrayed out of monies appropriated by Parliament, and the Department of Justice must in consultation with the NDPP prepare the necessary estimate of revenue and expenditure of the NPA.<sup>130</sup> The DG: Justice is charged with the responsibility of accounting for state monies received or paid out for or on account of the prosecuting authority and must ensure that the necessary accounting and other related records are kept.<sup>131</sup> The NPA assumed separate responsibility from 1 April 2001 for all support services previously rendered by the Department of Justice, and from this date was responsible for its own accounting systems and preparation of separate financial statements.<sup>132</sup>

The Office of the Chief Executive Officer is responsible for the coordination of all support to enable the NPA to fulfil its mandate. The entities within Support Services are Corporate Services, the Integrity Management Unit, the Communications Unit, Security and Risk Management, Strategy and Risk, and Internal Audit. The largest of these is Corporate Services, which covers human resource management, IT, finance and procurement. It is unclear to what extent the office of the CEO retains this structure, dating from 2008.

The NPA's *Khasho* newsletter reported in February 2011 that the DG: Justice, Nonkululeko Sindane, had reported to the Audit Committee that the reintegration of Corporate Services into the Department of Justice and Constitutional Development was no longer under consideration.<sup>133</sup> It further reported that the DG would communicate officially to all NPA staff once all processes related to the NPA 'having its own accounting officer' were concluded.<sup>134</sup>

## D. DEMOGRAPHIC COMPOSITION OF THE NPA

During 2004 the NPA formally committed itself on the road to fundamental change with the launch of an ambitious transformation programme: the Serurubele Transformation Programme, which commenced with an 'understand' phase and culminated with the launch of Strategy 2020, released in March 2007.

The Serurubele process placed some emphasis on expanding the mandate of the NPA beyond the prosecution of cases. This expanded mandate was

incorporated in the NPA's Strategy 2020, which said the NPA is to 'add a new dimension to its traditional role' to become an 'advocate of proactive and alternative justice solutions' that would see it 'extend its role beyond that of prosecution to include caretaker, resolver, and preventer of victimisation'.<sup>135</sup> It is unclear the extent to which the new NDPP has aligned himself to this strategy.

Before, during and after the Serurubele process, the NPA underwent a remarkable change in the demographic composition of its staff. As prosecution was so closely linked to the apartheid apparatus, a racially representative prosecution service was considered a priority. Thus the NPA Act requires the NPA staff to 'reflect broadly the racial and gender composition' of the country.<sup>136</sup>

The Public Service Act further requires that in making appointments, due regard to equality and the other democratic values and principles enshrined in the Constitution must be taken into account and all persons who qualify for the appointment must be considered. Evaluation of persons must be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.<sup>137</sup>

Unlike the legal profession, since 1998 the demographic composition of the NPA has changed markedly, in line with the political and legislative imperative that those responsible for prosecution should be representative of the country's population.

This is in spite of the fact that at the same time as the imperative for demographic change has been in place, requirements were introduced to the effect that prosecutors should at least be qualified with a university degree in law, whereas lesser qualifications were previously acceptable for prosecutors.<sup>138</sup>

This raising of the bar reduces the pool of people from which prosecutors can be drawn and further exacerbates the difference between the demographic composition of the pool of potential prosecutors and the demographic composition of the population at large. Although the size of the NPA has increased by a third over the period 2003–2009, there still exists a vacancy rate in the region of 15 per cent in the NPA.<sup>139</sup>

This may partly be because the demographic composition of the pool of qualified people who could potentially be prosecutors does not match the demographic composition of the country. The 2001 Labour Force Survey indicates that in 2001 black Africans with university degrees (i.e. those who could be appointed

as prosecutors or NPA managers) comprised 31 per cent of the population with university degrees in South Africa, although black African people comprise 79 per cent of the total population (including children). By contrast, the same survey indicates that women comprised 46 per cent of the population who have university degrees.

## The demographics of the NPA in 2001

The first year in which demographic data for the NPA was published was 2001. Figures by race and gender, for persons above the level of state advocate only, were published in the NPA annual report. The figures indicate that by 2001 the NPA at senior level had a racial demographic composition similar to that of university graduates indicated in the Labour Force Survey of 2001, but a gender demographic composition which under-represented women. These figures show that senior management in the NPA was 33 per cent black in 2001. At the time 'black' as reported implied all those not 'white'. Gender figures indicate that 34 per cent of senior leadership was female in 2001.

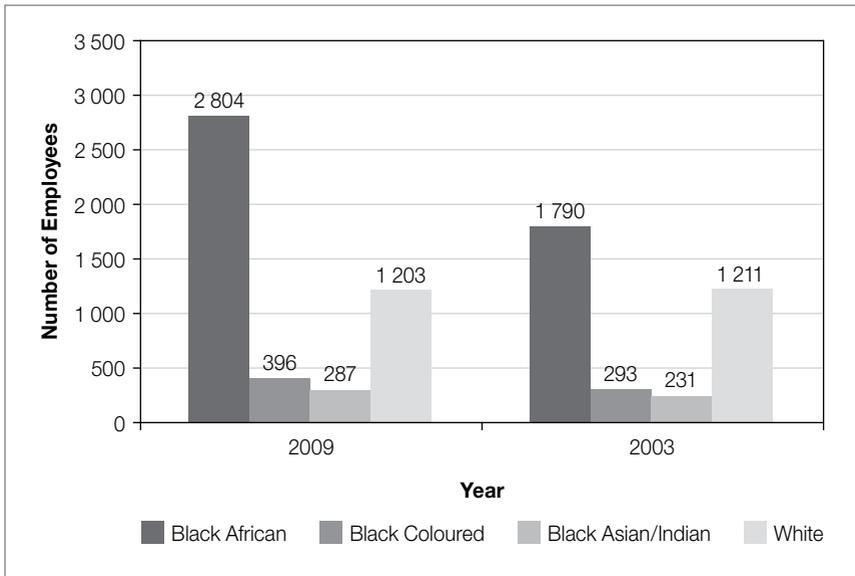
Figure A2 shows the change in racial demographic composition over time of the NPA as a whole. The changing racial composition of the NPA from 2003 to 2009 is largely due to a 57 per cent increase in the employment of black African people, a 35 per cent increase in the number of black Coloured people employed, and a 24 per cent increase in the number of black Indian people employed, compared to a virtual stagnation (0.7 per cent reduction) in the number of white people employed.

## The demographics of the NPA in 2009

By 2009 some 74 per cent of the total number of people employed by the NPA were black, compared to 66 per cent in 2003. This is also echoed at professional and managerial level, at which level 69 per cent of people are black. More recent reporting on demographic composition distinguishes between black Africans and other black people. Black Africans comprised 54 per cent of the 3 435 senior employees in the NPA 2009.

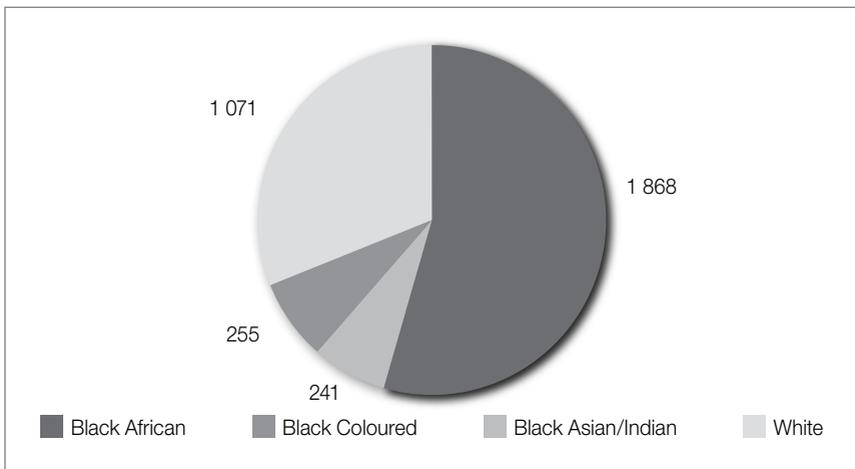
The racial composition of the NPA professionals and management contrasts with that of the attorneys' profession, which remains 80 per cent white. Law Society information shows that in 2007 the number of white practising attorneys

**Figure A2** Employment equity profile by race, all NPA employees, 2003 and 2009



Source Author

**Figure A3** NPA employment equity profile by race, senior management, professionals and mid-management, 2009<sup>140</sup>



Source Author

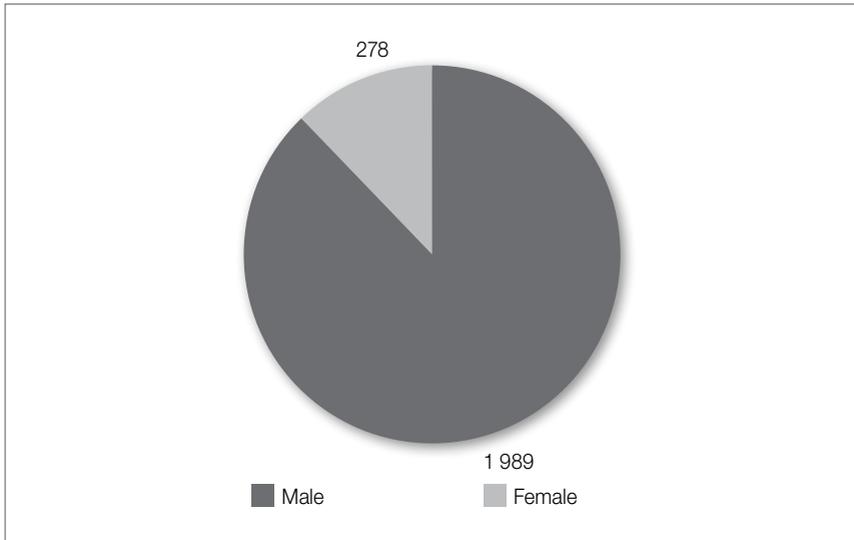
was close to 11 000 – compared to under 3 000 black African attorneys and less than 1 000 coloured and Asian attorneys together.<sup>141</sup>

The change in racial composition of the NPA is particularly notable given that there was a *decline* in the number of black African and coloured LLB graduates by race between 2002 and 2006, and an increase in the number of white and Asian graduates. In other words, despite a declining supply of black law graduates, the NPA has managed to attract black staff.

This decline follows a short period in which black African graduates outnumbered white graduates. White LLB graduates in 2006 outnumbered black African graduates (1 200 white versus 1 000 black African), reversing the picture of 2003 (1 400 black African graduates to 1 000 white).<sup>142</sup> The 2007 Labour Force Survey indicates that black Africans comprised 38 per cent of people with university degrees in South Africa by 2007.<sup>143</sup>

By contrast, the gender profile of senior management in the NPA has become more male since 2001. In 2001 some 34 per cent of NPA employees above state advocate were female and 66 per cent male. By 2009 some 87 per cent of professionals and senior management employed in the NPA were male. This suggests

**Figure A4** NPA employment equity profile by gender, senior management, professionals and mid-management, 2009



Source Author

that while demographic change based on race has occurred at pace, gender employment equity appears to have regressed.

This is despite the fact that first-year LLB registrations are equal in gender, women have overtaken men in final year enrolments and graduations, and in 2006 women outnumbered men in terms of articles registered and had overtaken men in admissions to practise as attorneys.<sup>144</sup> However, men still make up the vast majority of practising attorneys, with around 37 per cent in 2007 being women. Despite this, women are still under-represented at management level in the NPA, where only 13 per cent are female.

During research conducted in 2003 among members of the then-DSO, then an entity of the NPA, it was frequently mentioned by interviewees that it was their perception that working groups comprised black male investigators and prosecutors did not respond well to female leaders. It appears that rather than address these underlying issues, the NPA has instead reduced the proportion of women in leadership positions. By way of further comparison with the pool of available resources, the 2007 Labour Force Survey indicates that women comprised 51 per cent of people with university degrees in South Africa in 2007.

The imperative for demographic change has contributed to an increase in employment of a third again of new employees in eight years, placing pressure on mentoring and management systems. This imperative appears to have been exclusively in the direction of racial demographic change, while in relation to gender the situation appears to have regressed. The number of black African *men* employed has almost tripled.

The increasing maleness and continued hierarchical structure of the NPA has implications for how services are delivered and how the organisation is managed. Given that the number of female law graduates has outpaced that of male graduates for some years, this increasing maleness does not appear to be a trend related to the pool of potential employees. Indeed, even the private sector has managed to retain a greater proportion of female lawyers than the NPA has at mid-senior level. In this the NPA is not alone among criminal justice agencies.<sup>145</sup>

The NPA has managed to align the racial demographics of the NPA more closely to those of South Africa relatively quickly, despite legal skills being a 'scarce skill' in South Africa. It is often assumed that an organisation that presents transformed demographics is also transformed in its processes and practices. Whether this racial demographic change has been accompanied by

other less easily measurable forms of positive change, such as inclusively and respect, is not readily measurable. The Serurubele Transformation Programme has not been formally evaluated.

The fact that the NPA has succeeded in creating a racially representative organisation in an environment of scarce skills suggests the focus in the years to come should be on consolidating this achievement with the emphasis on the professional development of existing employees.

## NOTES

- 1 *Criminal Procedure Act 1977*, sec. 43(1).
- 2 *Ibid.*, sec. 38.
- 3 *Ibid.*, sec. 144.
- 4 *Ibid.*, sec. 205(1).
- 5 *S v Matisonn* [1981] (3) SA 302 (A).
- 6 *Criminal Procedure Act 1977*, sec. 65A.
- 7 *Ibid.*, schedule 7: 'Public violence. Culpable homicide. Bestiality. Assault, involving the infliction of grievous bodily harm. Arson. Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence. Malicious injury to property. Robbery, other than a robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20,000. Theft and any offence referred to in section 264(1)(a), (b) and (c) (receiving stolen property), if the amount involved in the offence does not exceed R20,000. Any offence in terms of any law relating to the illicit possession of dependence-producing drugs. Any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20,000. Any conspiracy, incitement or attempt to commit any offence referred to above.'
- 8 *Ibid.*, sec. 59A (inserted by sec. 3 of Act 85 of 1997).
- 9 *Ibid.*, sec. 59.
- 10 *Ibid.*, sec. 75(3).
- 11 *Ibid.*, sec. 75(2)(b).
- 12 *Ibid.*, sec. 105A.
- 13 *Ibid.*, sec. 105A(8) & (9)(a).
- 14 *Ibid.*, sec. 105 (9)(b).
- 15 *Ibid.*, sec. 105(9)(c).

- 16 *Ibid.*, sec. 105(9)(d).
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- 20 Michael O'Donovan & Jean Redpath, *The impact of minimum sentencing in South Africa*, Cape Town: Open Society Foundation for South Africa, 2006.
- 21 NPA, Programme 4, vote 23, Justice & Constitutional Development, 31. In April–September 2010 the few serious cases of violent crime finalised by way of plea and sentence agreements (17/18 of murder and 25/28 of aggravated robbery) mostly involved sentences of direct imprisonment. These figures of ~95% of cases yielding imprisonment are 'better' than the average conviction rate (90 per cent) among cases which go to trial in the usual manner.
- 22 *Abolition of Juries Act 1969 (Act 34 of 1969)*.
- 23 *Criminal Procedure Act 1977*, sec. 145.
- 24 *Magistrates Courts Act 1994 (Act 32 of 1944)*, sec. 93 *ter*.
- 25 *Ibid.*, sec. 93 *ter* (10)(a) & (c).
- 26 *Criminal Procedure Act 1977*, sec. 150(1).
- 27 *Ibid.*, sec. 150(2)(a).
- 28 *Ibid.*, sec. 175(1).
- 29 *Ibid.*
- 30 *Ibid.*, sec. 274.
- 31 NPA, *National prosecuting authority of South Africa policy manual*, B.61, B.63.
- 32 *Ibid.*, B.61–B.62.
- 33 See Martin Schönteich, 'Sentencing in South Africa: public perception and the judicial process', ISS Papers, no. 43, Pretoria: Institute for Security Studies, November 1999, 13–17 (discussing the more commonly used sentencing options).
- 34 J. Redpath, Prophet no poster boy for forfeiture critics, 2007, <http://analysis.quanta.org.za/criminal-justice/wp-content/uploads/2007/03/Prophet%20no%20poster%20boy%20for%20forfeiture%20critics.pdf>.
- 35 Proclamation no. 57, *Government Gazette* no. 20072, 14 May 1999: 'Under section 13 (1) (c) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), I hereby confer, impose and assign the following powers, duties and functions on or to Mr W. A. Hofmeyr, a Special Director of Public Prosecutions, appointed in terms of the said provision: To exercise the powers, carry out the duties and perform the functions necessary, within the Office of the

National Director of Public Prosecutions, for the planning, establishment, management and operation of an Asset Forfeiture Unit, including the development of detailed policy guidelines for forfeiture proceedings, the institution of forfeiture proceedings and the co-ordination of the management of assets subject to restraint orders as well as generally giving such advice and rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred, imposed on or assigned to him by the Constitution, the said Act, the Prevention of Organized Crime Act, 1998 (Act No. 121 of 1998), or any other law.’

36 NPA Act 1998, sec. 7.

37 Proclamation R103, *Government Gazette* no. 19372, 16 October 1998.

38 Proclamation R14, *Government Gazette* no. 20997, 24 March 2000.

39 Proclamation R123, *Government Gazette* no. 19579, 4 December 1998.

40 *National Prosecuting Authority Amendment Act 2000* (Act 61 of 2000), sec. 43A: ‘(1) Any Investigating Directorate (in this section referred to as a former Investigating Directorate) which had been established prior to the amendment of section 7 by the National Prosecuting Authority Amendment Act, 2000, shall, as from the date of the commencement of that Act, cease to exist as a separate Investigating Directorate and become part of the Directorate of Special Operations.’

41 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011), para 7.

42 *Ibid.*, para. 8.

43 *Ibid.*, para. 2.

44 Justice Froneman, Justice Nkabinde, Justice Skweyiya, Deputy Chief Justice Moseneke and Justice Cameron. The minority of Chief Justice Ngcobo, Acting Justice Brand, Justice Mogoeng and Justice Yacoob disagreed.

45 *Glenister v President of the Republic of South Africa and Others*, para. 251.

46 *Ibid.*, para. 248.

47 *Ibid.*, para. 251.

48 NPA, *NPA Strategy 2020*, 16 March 2007, 8, <http://www.npa.gov.za/UploadedFiles/Executive%20Summary%20final%20proof%2016%2003%2007.pdf>.

49 *Correctional Services Act 1998* (Act 111 of 1998), sec. 76.

50 *Ibid.*, sec. 77.

51 *Ibid.*, sec. 75.

52 *Ibid.*, sec. 75(8).

- 53 NPA Act 1998, sec. 16(1): 'Prosecutors shall be appointed on the recommendation of the National Director or a member of the prosecuting authority designated for that purpose by the National Director, and subject to the laws governing the public service.'
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- 55 Public Service Act 1994 (Act 103 of 1994), sec. 10(1).
- 56 Ibid., sec. 11(1).
- 57 NPA Act 1998, sec. 8.
- 58 Ibid., sec. 19; Public Service Act 1994, sec. 17(2).
- 59 Public Service Act 1994, sec. 17(2).
- 60 Ibid., sec. 16(1).
- 61 Ibid., sec. 13(5).
- 62 NPA Act 1998, sec. 16(2); GNR.423.
- 63 NPA, *Career opportunities at the NPA*, n.d., <http://www.npa.gov.za/UploadedFiles/Career.pdf> (accessed 7 July 2007).
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- 67 See *ibid.*
- 68 NPA Act 1998, sec. 18(1).
- 69 *Ibid.*
- 70 *Ibid.*, sec. 18(6).
- 71 GN 666, Determination of salaries of prosecutors, *Government Gazette* no. 33412, 28 July 2010.
- 72 Public Service Act 1994, sec. 30.
- 73 NPA, *National Prosecuting Authority of South Africa policy manual*, B.121.
- 74 Public Service Association and National Union of Prosecutors of South Africa.
- 75 Society of State Advocates.
- 76 GNR.1216, *Government Gazette* no. 19579, 12 September 1997: Notice published by the essential services committee: 'Under section 71(8) of the Labor Relations Act, 1995 (Act No. 66 of 1995), the Essential Services Committee hereby gives notice that—1. it has designated the following services as essential services: (a) ... (i) the service required for the functioning of courts.'
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- 80 NPA Act 1998, sec. 32(1)(a).
- 81 *Ibid.*, sec. 32(2)(a).
- 82 *Public Service Act* 1994, sec. 36.
- 83 NPA Act 1998, sec. 32(1)(b); see also sec. 41(1) (providing for a fine or imprisonment for such an offence).
- 84 *Ibid.*, sec. 42.
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- 86 *Minister of Safety & Security & another v Carmichele* [2003] JOL 12119 (SCA).
- 87 NPA Act 1998, sec. 22(6)(a).
- 88 In terms of applicable labor legislation.
- 89 NPA Act 1998, sec. 22(6)(b). In framing the code of conduct, account was taken of the values and principles enshrined in the Constitution, the aims set out in the NPA Act and the UN Guidelines on the Role of Prosecutors.
- 90 NPA Act 1998 (as amended), sec. 22(6)(b).
- 91 See for example, Matthews, The National Prosecuting Authority.
- 92 NPA, *NPA annual report 2009/10*, n.d., <http://www.npa.gov.za/ReadContent502.aspx>.
- 93 NPA Act 1998, sec. 22(5).
- 94 NPA, *Annual report 2005/6*, 15. What constitutes improper conduct is found at p. 85.
- 95 A 'disciplinary hearing' is a formal procedural step at which the employee has an opportunity to present his/her case against the employer's allegations before an employer may dismiss an employee, even in the case of serious misconduct such as assault or theft.
- 96 Labour relations in the public service are governed by a myriad of acts. The legislative framework is further enhanced through a number of collective agreements reached in the Public Service Coordinating Bargaining Council and the various sectoral bargaining councils. In this context, the Disciplinary Code and Procedures for the Public Service, effective as of 1 July 1999, and schedule 8: Code of Good Practice: *Dismissal Public Service Act* 1995 (Act 66 of 1995) are particularly relevant.
- 97 NPA, *Directors of public prosecutions*, n.d., [http://www.npa.gov.za/UploadedFiles/Directors%20of%20Public%20Prosecutions%20\(NPA\).doc](http://www.npa.gov.za/UploadedFiles/Directors%20of%20Public%20Prosecutions%20(NPA).doc).

- 98 NPA, *Career opportunities at the NPA*.
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- 101 M Simelane, Presentation of the NPA Strategic Plain 2016 and Annual Plan 2011, 30 March 2011.
- 102 M Mpshe, Justice in our society so that people can live in freedom and security, paper presented at the Stakeholder Conference 2007 hosted by the National Prosecuting Authority, 28 March 2007, 3, <http://www.npa.gov.za/UploadedFiles/M%20Mpshe.pdf>.
- 103 Ibid.
- 104 Stats SA (Statistics South Africa), *Magisterial districts*, n.d., <http://www.statssa.gov.za/census01/census96/HTML/Metadata/Codelists/Magdist.html>.
- 105 NPA, *Chief prosecutors*, n.d., [http://www.npa.gov.za/UploadedFiles/Chief%20Prosecutors%20\(NPA\).doc](http://www.npa.gov.za/UploadedFiles/Chief%20Prosecutors%20(NPA).doc).
- 106 These include appeals to have charges dropped and admission of guilt fines reduced (very common in respect of traffic infringements) or to reconsider a decision not to prosecute.
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- 112 SOCA (Sexual Offences and Community Affairs Unit), *SOCA Unit annual report 2006/7*, n.d., [http://www.powershow.com/view/11f86f-ZTQ2M/Sexual\\_Offences\\_and\\_Community\\_Affairs\\_SOCA\\_Unit\\_Annual\\_report\\_20062007\\_flash\\_ppt\\_presentation](http://www.powershow.com/view/11f86f-ZTQ2M/Sexual_Offences_and_Community_Affairs_SOCA_Unit_Annual_report_20062007_flash_ppt_presentation). Although various government sources refer to the presidential proclamation of the SOCA unit, this researcher has been unable to identify the relevant notice and gazette.
- 113 Ibid.
- 114 NPA, *Priority Crimes Litigation Unit*, n.d., <http://www.npa.gov.za/UploadedFiles/About%20PCLU%20signedoff.pdf>.
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- 116 NPA, *Priority Crimes Litigation Unit*.

- 117 Greenbaum, *Post Truth and Reconciliation Commission (TRC) alternative prosecution policy framework for political violence of the past*.
- 118 Adriaan Vlok, former minister for law and order during apartheid; Johannes van der Merwe, former commissioner of police; and three other police officials were prosecuted for the attempted murder of Frank Chikane in 1989. Through a plea bargain agreement they were given a suspended sentence of ten years imprisonment. Wouter Basson, also known as 'Dr Death', was acquitted of murder and other charges by a High Court judge in 2002, largely on the basis he could not be tried for activities outside of the country. However, the Constitutional Court said the country was obliged under international law to prosecute charges amounting to crimes against humanity. After studying the cases, the NPA decided not to retry Basson, on a technical reading 'he had in fact already been tried' in relation to the specific original charges. The NPA has not instituted charges against him in relation to crimes against humanity. The most recent annual report for 2009/10 reports that during that period nine cases relating to the TRC required 'attention'. Only two of these are reported on in the annual report. The case in relation to the murder of the anti-apartheid activists known as the PEBCO Three was withdrawn in court, pending the amnesty review of one of the accused. In the second case the NDPP was advised by the unit not to proceed with the prosecution of persons implicated in the inquest held in relation to the death of Namibian freedom fighter Anton Lubowski.
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- 128 Khasho, March 2011, <http://www.npa.gov.za/UploadedFiles/Khasho%20March%202011.pdf>.
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- 131 *Ibid*.
- 132 DJCD (Department of Justice and Constitutional Development), *Annual financial statements 2007/8*, n.d., 100, [http://www.justice.gov.za/reportfiles/anr200708/ANR200708\\_part4a.pdf](http://www.justice.gov.za/reportfiles/anr200708/ANR200708_part4a.pdf).

133 *Khasho*, Jan.–Feb. 2011, 3.

134 *Ibid.*

135 NPA, *NPA Strategy 2020*, 8. In line with this strategy, community prosecution was established as an integral component of the NPA's delivery strategy to prevent and resolve crime and victimisation. Community prosecution is a proactive approach to addressing crime and quality of life issues that brings prosecutors in contact with residents to identify problems and solutions. Community prosecutors do not sit in court or in their offices but go out into the community to identify problems and solutions to crime in specific locations. It is unclear the extent to which community prosecution remains a key policy of the NPA under NDPP Simelane.

136 *NPA Act 1998*, sec. 8.

137 *Public Service Act 1994*, sec. 11(1).

138 See Appendix B, 'Appointment and qualifications', above.

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The National Prosecuting Authority (NPA) is pivotal in the criminal justice system and to the proper functioning of South Africa's democracy. This monograph analyses the independence, accountability and performance of the NPA, in relation to the NPA's core function of prosecution. The monograph finds that the tendency to decline to prosecute is the central malaise affecting the NPA, and that this is neither a function of a lack of resources nor of an overburdening of the prosecution service. The monograph identifies reasons for the declining trend and proposes various corrective measures.

L'Autorité nationale chargée des poursuites (NPA) joue un rôle fondamental dans le système de justice pénal et dans le bon fonctionnement de la démocratie en Afrique du Sud. Cette monographie analyse l'indépendance, la responsabilité et l'efficacité du NPA par rapport à sa fonction essentielle dans la poursuite judiciaire. Cette monographie trouve que la tendance à refuser d'intenter des poursuites est au centre du malaise qui affecte le NPA, et que ce n'est ni une fonction du manque de ressources, ni de surcharge du service des poursuites judiciaires. La monographie identifie les raisons derrière la dite tendance et propose diverses mesures correctrices.

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