



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África

**ACJR SUBMISSION TO THE NATIONAL
COUNCIL OF PROVINCES SELECT
COMMITTEE ON SECURITY AND JUSTICE ON
THE JUDICIAL MATTERS AMENDMENT
BILL B13B OF 2019**

2 JULY 2020

Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR seeks to carry out engaged research, teaching and advocacy on criminal justice reform and human rights in Africa.
2. ACJR welcomes the opportunity to provide comment on the Judicial Matters Amendment Bill B13 of 2019 (the Bill). This submission addresses the amendments to the National Prosecuting Authority Act ('NPA Act')¹ dealing with aspects pertaining to the term of office of the National Director of Public Prosecutions ('NDPP') and the Deputy National Directors of Public Prosecutions ('DPP') in accordance with a Constitutional Court judgment of *Corruption Watch NPC and Others v The President of South Africa and Others*.²
3. An independent prosecution authority that is free from political interference is fundamental to any democracy's criminal justice system. It is our submission that the President's power to unilaterally extend the term of office of the NDPP, the power to suspend an NDPP or a DPP for an indefinite period and without pay, compromises the independence and integrity of the NPA. Thus, we welcome the amendments provided for in the Bill.
4. We are however concerned that the amendment deviates from the Constitutional Court judgment order of *Corruption Watch NPC and Others v The President of South Africa and Others* in which the court ordered Parliament to ensure that legislative provisions governing the suspension process of the NDPP or DPP should take six months from the time the President suspends the NDPP or a DPP to the time she or he decides whether or not to remove such incumbents. We briefly address this issue below.
5. It is further our submission that the Bill fails to address holistically, other shortcomings that the NPA faces, which undermines its independence. Such provisions relate to the appointment and dismissal of the NDPP, ministerial control over the prosecution service and the accountability of the National Prosecution Authority ('NPA') to Parliament. We also address these concerns below in our submission. Whilst it may not be within the scope of the Bill to address these shortcomings, we want to impress on the Portfolio Committee that these issues need to be addressed as a matter of urgency as they are vital to the trust that the public has in the NPA.

¹ National Prosecuting Authority Act 32 of 1998. (Hereafter referred to the 'NPA Act')

² *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) (13 August 2018)

Proposed Amendments – Time frame on decision to remove NDPP and DPP

6. In *Corruption Watch NPC and Others v The President of South Africa and Others* the Constitutional court ordered Parliament 18 months to amend the NPA Act by inserting a maximum period of six months from the time which the President suspends the NDPP or a DPP to the time she or he decides whether or not to remove such incumbents.³ We are concerned that while the Constitutional Court judgment ordered that the period of suspension to removal of a NDPP or a DPP by the President may not exceed six months, the proposed amendment deviates from this order and suggests that the period should be 12 months.⁴
7. The explanation provided by the proposed amendment is that it is virtually impossible to complete an investigation within six months.⁵ However, we submit that the positions of NDPP or DPP are one of the most important positions in any country. It is thus important that all the necessary processes (appointment and disciplinary) involving such incumbents be expedited to ensure that the office of the NPA retains its credibility and that swift decision making and action be taken in regards to investigate and decide on any misconduct to safeguard the independence of the NPA and to ensure that the office of the NDPP or DPP is not compromised due to the extended time frame.

Appointment of National Director of Public Prosecution (NDPP)

8. The Constitution and the NPA Act provide that the President appoints the NDPP,⁶ who may also, after consultation with the NDPP and Minister of Justice, appoint four Deputy National Directors of Public Prosecution (DNDPP).⁷ Legislatively, the President and Minister of Justice may appoint at least 14 top positions within the NPA.⁸
9. This poses significant risks for the NPA's independence as the President and Minister of Justice may appoint the entire top echelon of the NPA without any input from other key stakeholders, such as Parliament, professional bodies or the public in general.⁹

³ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*, para 94.

⁴ Section 2 of the Judicial Matters Amendment Bill B13 of 2019.

⁵ Section 2.2.2 of the Judicial Matters Amendment Bill B13 of 2019.

⁶ S 10 NPA Act, 179 (1) (a), Constitution.

⁷ S 11(1) NPA Act.

⁸ S 13(1), 15(1) (a), 15 (1) (c) NPA Act. The President appoints the Provincial Directors of Public Prosecutions (PDPP). The Minister, after consultation with the NDDP, appoints the deputy PDPP. In addition, the Minister may 'in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director'.

⁹ Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority – A Controversial Past and Recommendations for the Future*, Bellville: ACJR, p.15.

10. Unlike other institutions and Chapter 9 organisations, such as the Judicial Services Commission (in appointing judges) or the office of the Public Protector, there is no transparent selection and appointment process, which entails calling for nominations or an assessment panel.¹⁰ In the appointment process recently adopted in the appointment of Adv. Batohi as NDPP, the President appointed a panel responsible for shortlisting candidates, interviewing them, and making recommendations as to who should be appointed to the position of NDPP. This was an important step in the right direction and set an important precedent, but since it is not set out in law, remains discretionary.
11. The NPA Act merely requires that any person appointed as NDPP must be a ‘fit and proper person’ and ‘possess legal qualifications that would entitle him or her to practice in all courts in the Republic.’¹¹ There is no requirement of any specialist knowledge or numbers of years of experience the incumbent for NDPP must have.
12. This vague provision leaves it open to interpretation by the President, who is solely responsible for choosing a ‘fit and proper’ incumbent.¹² The appointment provisions create the risk that the President will appoint a person who can be easily influenced to not prosecute certain persons or pursue others. The NDPP has the power to review the decisions of the provincial or regional directorates of public prosecutions and can interfere in their decisions to prosecute or not to prosecute.¹³
13. Given the powerful position of the NDPP, it is particularly worrisome that the threshold for the position of NDPP is relatively low when compared to other institutions such as the Public Protector and Auditor General of South Africa.¹⁴ Much can be learnt from the appointment process of these institutions and used to improve the appointment of the NDPP, particularly the emphasis on experience, expertise and the process by which the candidate is identified.¹⁵
14. The appointment of the NDPP should not be the sole prerogative of the President and the appointment process of the NDPP should be transparent.¹⁶ We are of the view that the NPA is not completely sheltered from political interference because of inadequate legislative measures in the appointment of the NDPP. It is our submission that a structure identifying the suitable candidate would benefit from the advice of experts from the legal community and civil society.¹⁷

¹⁰ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.37.

¹¹ S 9(1) NPA Act.

¹² Muntingh, L., Redpath, J. & Petersen, K. (2017), p.38.

¹³ S 179(6) Constitution.

¹⁴ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.37.

¹⁵ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.40.

¹⁶ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.40.

¹⁷ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.38.

Dismissal of the National Director of Public Prosecution (NDPP)

15. In terms of the NPA Act, the President has the power to remove the NDPP for misconduct, on account of ill health, incapacity to carry out his or her duties, and on account that he or she is no longer a fit and proper person, pending a resolution passed by Parliament to endorse or dismiss the decision of the President.¹⁸ This legislative provision creates the risk that ‘the President, with the concurrence of a Parliament dominated by the ruling party, will seek to remove an NDPP who is not willing to co-operate with the President’s requests.’¹⁹

Ministerial control over the prosecution service

16. The Constitution and the NPA Act states that the ‘Minister of Justice must exercise final responsibility over the prosecuting authority and that the NDPP must determine prosecution policy with the concurrence of the Minister of Justice.’²⁰ The phrasing of these legal provisions could imply a great deal of ministerial control of the prosecuting authority and a restriction of its independence.²¹

Prosecuting Authority accountable to Parliament

17. Section 35 of the NPA Act states that the prosecuting authority shall be accountable to Parliament ‘in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions.’ The concern in relation to the NDPP and or the NPA’s accountability to Parliament is whether accountability for individual cases could on another occasion lead to inappropriate influencing of the actions of the NDPP by Parliament.²²

18. An example of an NDPP reporting to Parliament on ‘decisions regarding the institution of prosecutions’ is when Shaun Abrahams (then NDPP) was summoned to appear before the Portfolio Committee on Justice and Correctional Services in 2016 to explain why Pravin Gordhan (then Minister of Finance), and two others were charged with fraud.²³ Charges against them were subsequently withdrawn a few days later.²⁴

¹⁸ S 12(6) of the NPA Act.

¹⁹ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.12.

²⁰ Section 33(2) of the NPA Act, section 179 of the Constitution.

²¹ Muntingh, L., Redpath, J. & Petersen, K. (2017), p. 20.

²² Muntingh, L., Redpath, J. & Petersen, K. (2017), p.25.

²³ PMG Report on the meeting of the Portfolio Committee on Justice and Correctional Services of 4 November 2016, <https://pmg.org.za/committee-meeting/23596/>, Muntingh, L., Redpath, J. & Petersen, K. (2017), p.38.

²⁴ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.38.

19. The Venice Commission recommends that while the prosecuting authority should be accountable to Parliament, the scope of such accountability should be limited, in the sense that it should exclude decisions in individual cases and instead address issues such as the prosecution policy.²⁵ It is recommended that Parliament's role be limited to reviewing performance and influencing policy and policy directives as per the Venice Commission.

Conclusion

20. We therefore submit that the proposed amendment complies with the Constitutional Court judgment of *Corruption Watch NPC and Others v The President of South Africa and Others* regarding the disciplinary process time frame of the NDPP or DPP.

21. A weak or compromised prosecution service can place the rule of law in grave danger and those that head up the prosecution service must be without doubt above reproach.²⁶ The NPA is perhaps the primary custodian of the constitutional value of accountability – it is the only arms of state empowered to institute criminal proceeding against any individual or company. Therefore, the legislation the prosecution service is bound by, should guarantee its independence.²⁷ The Bill fails to address various aspects of the NPA Act, which are not completely sheltered from political interference, and compromises the independence of the NPA. The legislative provisions on appointment and removal of the NDPP creates the risk that the President will appoint a person who is unwilling, where necessary, to prosecute members of the executive or the ruling party, or persons politically connected to them.²⁸ There is also the risk that the President, with the concurrence of a Parliament dominated by the ruling party, will seek to remove an NDPP who is indeed willing to do so.²⁹ There is a need for reform on the selection and appointment process of the NDPP and other senior officials. Higher requirements for NDPP incumbents and a more transparent appointment process needs to be addressed.³⁰ Furthermore, legislative provisions on ministerial control must be diffused and Parliament's role must be limited to reviewing performance and influencing policy and policy directives.³¹

22. Events of recent years have shown that the NPA faces significant challenges and that it will not be sufficient to tinker here and there with legislation and other policy issues. We are therefore

²⁵ Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, paras. 42-43.

²⁶ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.12.

²⁷ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.12.

²⁸ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.12.

²⁹ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.12.

³⁰ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.5.

³¹ Muntingh, L., Redpath, J. & Petersen, K. (2017), p.20 - 25.

requesting the Portfolio Committee to initiate a comprehensive programme of reform of the NPA that would look at all aspects of the legal frameworks, policies, and operations with a view to rebuild public trust in the institution.

Prof LM Muntingh
ACJR Project Coordinator
Dullah Omar Institute
University of the Western Cape
lmuntingh@uwc.ac.za

Ms K. Petersen
ACJR Researcher
Dullah Omar Institute
University of the Western Cape
kepetersen@uwc.ac.za

Ms J. Mangwanda
ACJR Researcher
Dullah Omar Institute
University of the Western Cape
jmangwanda@uwc.ac.za

Date: 2 July 2020