



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



Delegation of the prosecutorial function to state entities

Expanding prosecution of neglected crimes

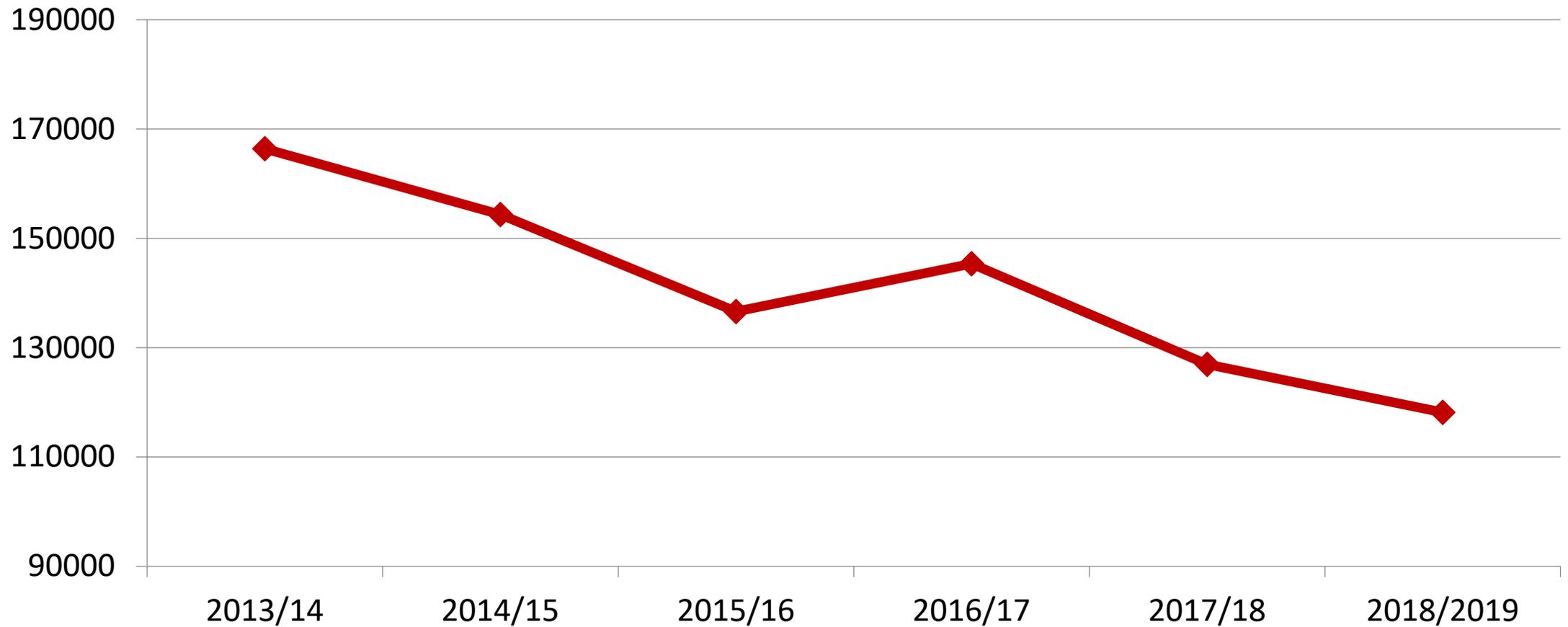
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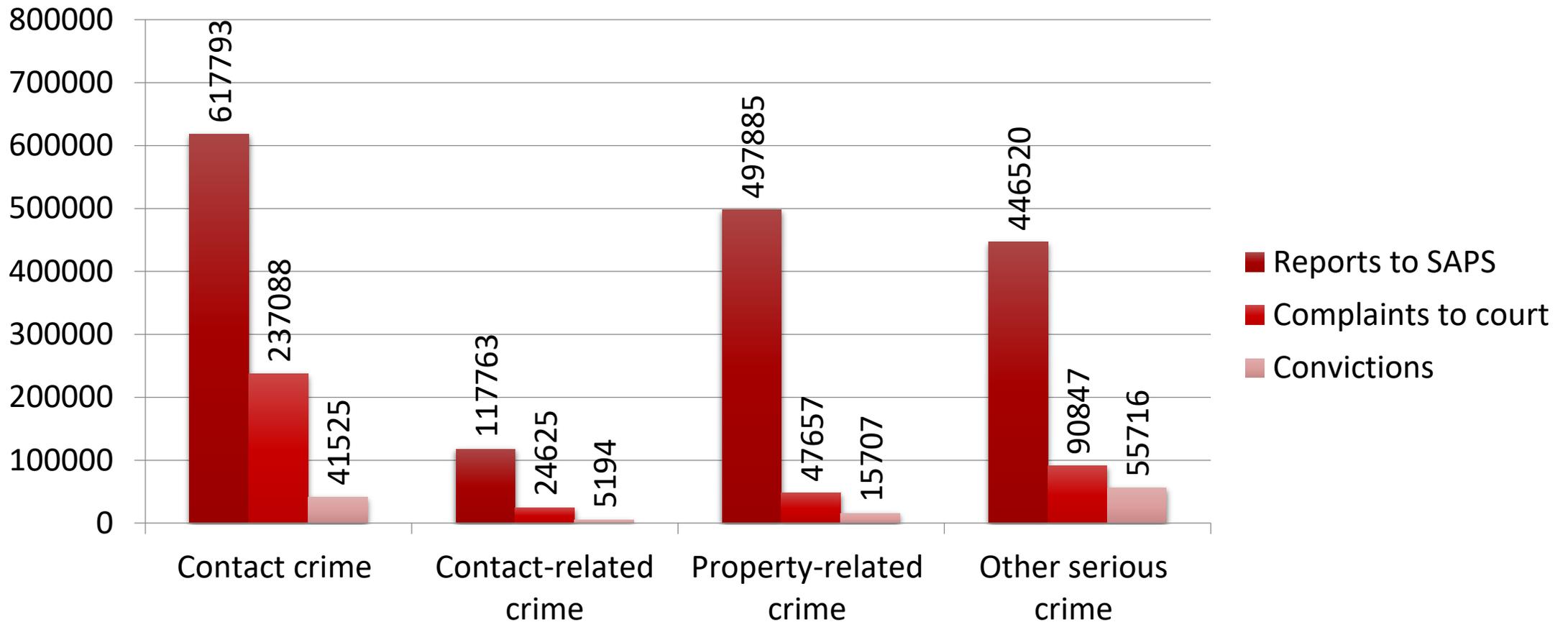
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Serious crime convictions



Serious crime reports, to court, and convictions 2018/19



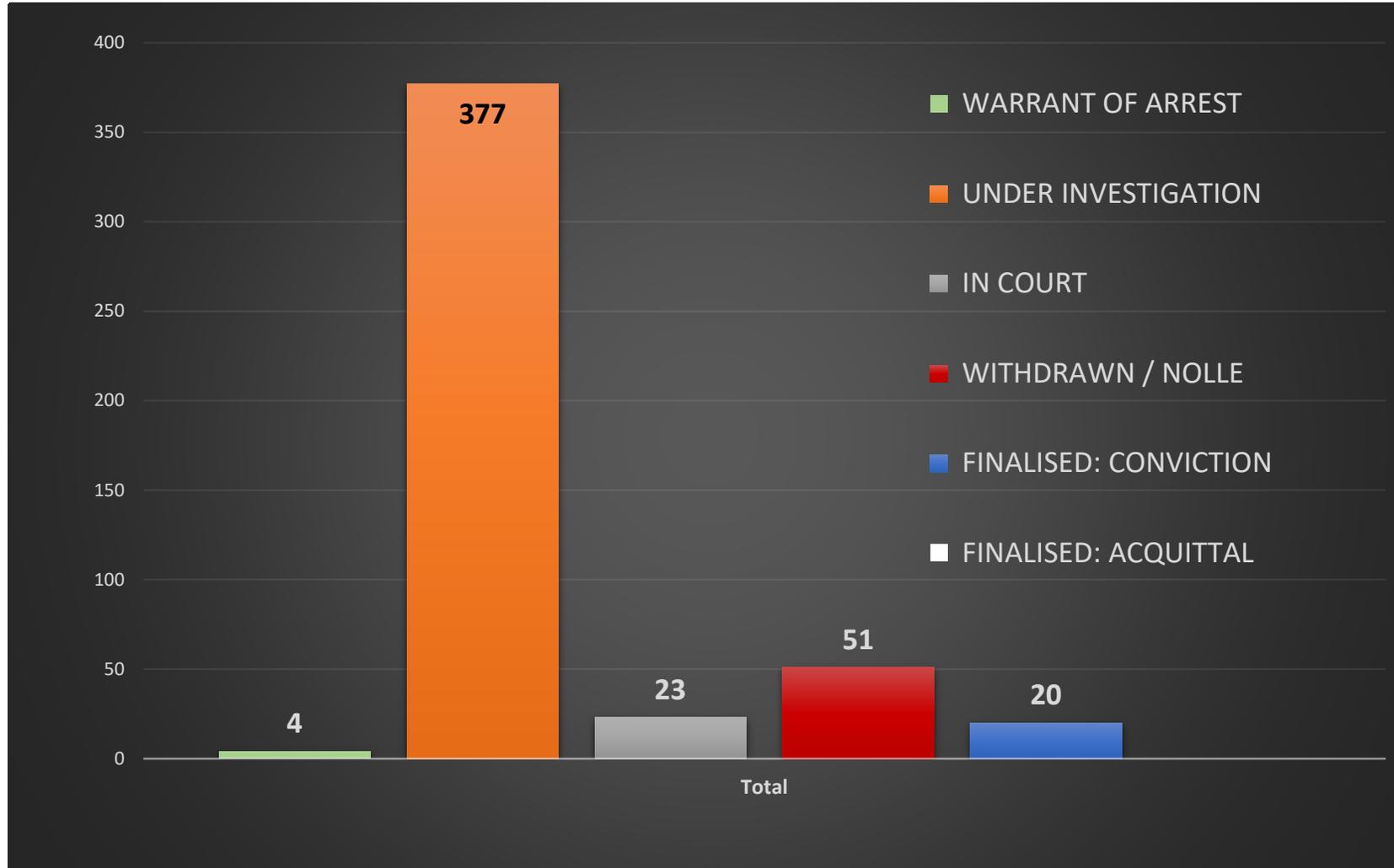
State entities with an interest in prosecution

- IPID investigations are carried out with the purpose of establishing whether SAPS and Metro Police officers should be disciplined and/or prosecuted, in respect of deaths as a result of police action or police custody, and other defined situations, such as discharge of an official firearm.
- SIU investigates misuse of public funds in state entities via proclamation by the President, with a view to recovering assets in civil litigation at the Special Tribunal or in ordinary courts.
- Municipal investigations of copper theft are carried out with the purpose of halting further thefts through incapacitation or deterrence.

Convictions in IPID matters in 2019/2020, by year of case number

| Year | Frequency | Percent of IPID convictions | Cumulative |
|--------------|-----------|-----------------------------|------------|
| | | | |
| 2011 | 1 | 1.45 | 1.45 |
| 2012 | 2 | 2.90 | 4.35 |
| 2013 | 3 | 4.35 | 8.70 |
| 2014 | 6 | 8.70 | 17.39 |
| 2015 | 6 | 8.70 | 26.09 |
| 2016 | 16 | 23.19 | 49.28 |
| 2017 | 20 | 28.99 | 78.26 |
| 2018 | 13 | 18.84 | 97.10 |
| 2019 | 2 | 2.90 | 100.00 |
| Total | 69 | 100.00 | |

BREAKDOWN OF SIU REFERRALS



Special Investigating Unit process

- In terms of section 4(1)(d) of the SIU Act, the SIU must where the evidence collected points to the possible commission of an offence refer the matter to the NPA as soon as is practicable
- Recent SIU and NPA Memorandum of Understanding
 - MoU to refine the referral process from the SIU to the NPA for investigation and prosecution. Currently in draft form.
 - The NPA refers these matters to the SAPS/DPCI to register a case docket and to obtain further court directed, admissible evidence required to make a decision
 - DPCI to be included in the refined MoU

Municipalities and metal theft

- From 2003/4 to 2007/8, recorded copper theft increased from 13,675 to 33,156 individual cases per year
 - Now counted under “other theft”
- SAPS 2016/17 Annual Report,
 - Docket analysis in KwaZulu-Natal metal theft accounted for 32 per cent of all recorded ‘other theft’
 - Only 17 052 “other theft” convictions in relation to 329 924 reports – a conviction throughput of only 5 percent
 - Watching briefs report delayed or low numbers of convictions

Delegation – The Constitution

- Section 238 an executive organ of state in any sphere of government may
 - (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed
 - (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis
- Section 239 (b)(ii) “organ of state” means any ... institution exercising a public power or performing a public function in terms of any legislation
 - But does not include a court or a judicial officer

Delegation – The National Prosecuting Authority Act

- s22(8)(b) of the National Prosecuting Authority Act :
 - The National Director OR a person designated by her in writing
 - May ***authorise*** to conduct prosecutions
 - In relation to
 - ***statutory offences***
 - *including municipal laws*
 - Any competent person
 - In the **employ** of *public service* OR any *local authority*
 - Subject to the directions of the National Director OR
 - a person designated by her in consultation with the Minister.

Delegation vs Private Prosecution

- The delegation of prosecutorial powers to state entities is not the same as private prosecutions by institutions where the NPA declines to prosecute,
- Prosecutions by institutions rather than by private persons have relatively recently been established as possible in our law
- *National Society for the Prevention of Cruelty to Animals (NSPCA) v Minister of Justice and Constitutional Development and Another 2017 (1) SACR 284 (CC)*
 - Unanimous court declared that “the National Society for the Prevention of Cruelty to Animals (NSPCA) has the statutory power of private prosecution
 - Section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read
 - Section 8 of the Criminal Procedure Act 51 of 1977
 - NSPCA had previously been barred from taking up a private prosecution because it was not a private individual person with an interest in the matter.
- Court remarked “that it unusual, but not entirely novel, for a body to have powers to police, investigate and prosecute”

Proposed guiding principles

- Proposed entities
 - Current investigative capacity in relation to specified statutory offences.
 - Clean or unqualified audits.
 - The willingness to prosecute.
 - Competent persons in their employ, preferably with right of appearance in court.
 - NPA does not already have any particular specialised capacity in relation to the crime concerned.
 - Oversight and guidance must be provided by the NPA
 - Active scrutiny, mere standard setting, checklist?
 - At least periodic random reviewing of matters should occur.

Content of delegation

- The delegation may conceptually involve one or both of:
 - Delegation of the decision to prosecute or not
 - Delegation of the actual prosecution?
- Preferable NPA only review periodically decisions not to prosecute
- Decisions to prosecute will ultimately be tested in court.
- By requiring NPA go-ahead delay will be retained in the process and benefits of delegation lost

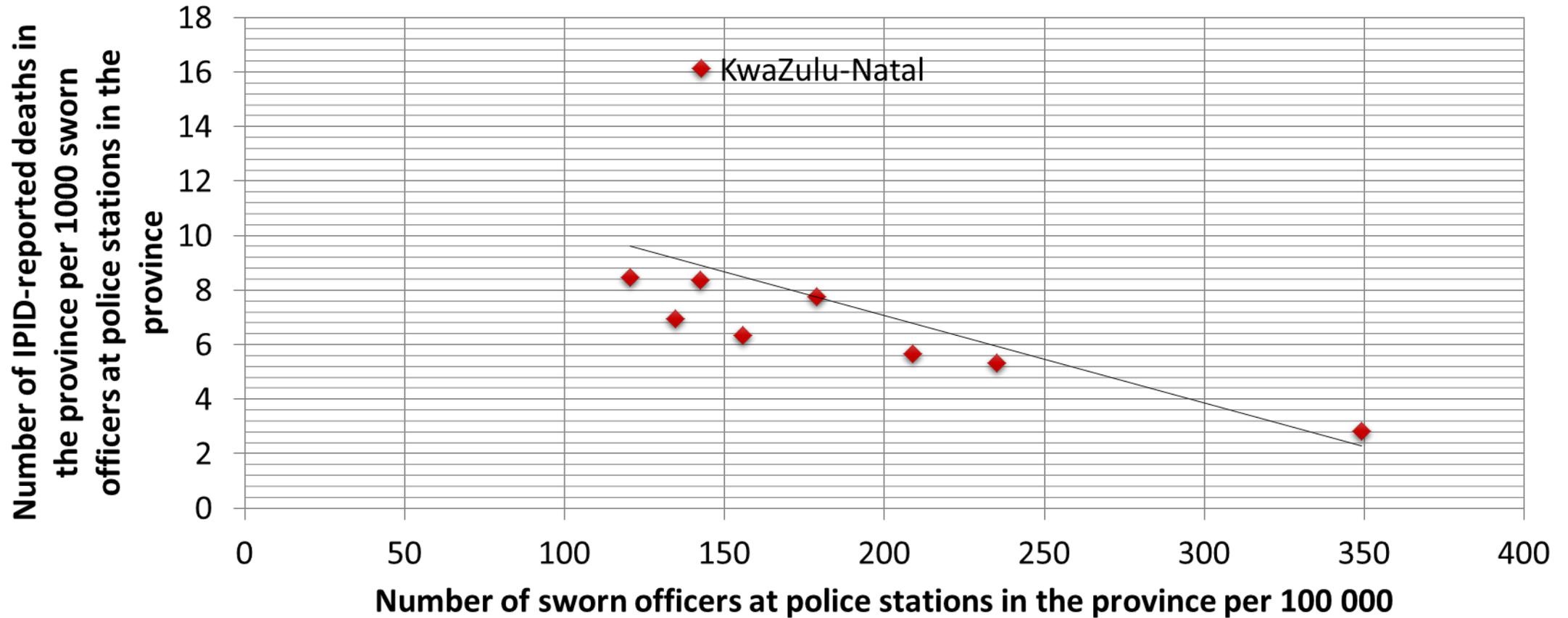
Practical considerations

- Universal record-keeping on SAPS CAS system
- Universal court record-keeping
- Designation of senior NPA officials for oversight
- Appeals

Possible delegation to IPID

- Competent persons
 - ‘Legal and Investigation Advisory Services’
- Statutory offences - mandate of IPID may lead to charges on statutory offences:
 - Section 28(c) refers to any complaint relating to the discharge of an official firearm by any police officer – section 120(3)(b) Firearms Control Act (FCA) provides for the offence ... *“it is an offence to discharge a firearm ... in a manner likely to injure or endanger the safety or property of any person or with reckless disregard”*
 - Section 28(f) refers to complaint of torture – section 4 read with section 3 of the Prevention and Combating and Torture of Persons Act 13 of 2013

Pilot proposal: KZN



Possible delegation to SIU

- SIU previously requested delegation of prosecution
- Statutory offences contained in Prevention and Combating of Corrupt Activities Act 12 of 2004
 - In particular section 4 - corruption of public officials
- SIU already has competent legally-qualified staff and has already investigated the matter
- Piloting and oversight by NPA

Possible delegation to municipalities for “damage to essential infrastructure”

- Municipalities already enjoy delegation in traffic and by-law matters
 - Frequently in “Municipal Courts”
- Section 112 Local Government Municipal Systems Act permits additional delegations in terms of NPA Act s22(8)(b)
- Criminal Matters Amendment Act 18 of 2015
 - “essential infrastructure” means any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public
 - Section 3 offence of tampering with essential infrastructure

Conclusion

- Delegation has the potential to
 - Relieve the burden on the NPA
 - Develop expertise on key statutory offences
 - Increase and speed up prosecutions of neglected offences causing significant harm and not currently being prosecuted significantly
- Delegations should be piloted
 - IPID matters relating to firearms
 - In KwaZulu-Natal
 - SIU matters
 - Piloted in ad hoc manner
 - Municipalities
 - On request and with oversight