



Africa Criminal Justice Reform
 Organisation pour la Réforme de la Justice Pénale en Afrique
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The independence and structure of the prosecuting authority

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Prosecutorial power and independence from political interference

Importance of an independent prosecution authority

An independent prosecution authority that is free from political interference is fundamental to any democracy's criminal justice system. This is because the prosecution authority wields substantial power and discretion to prosecute cases, or not, and are required to provide objective, a-political, non-arbitrary decision-making in the application of criminal law and policy to real cases.¹ In its essence, the prosecution service is responsible for law enforcement and upholding the rule of law. 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. Thus, in order for prosecution services to operate justly, the legislation and policy they are bound by, which ultimately determines its structure and functions, should guarantee its independence.²

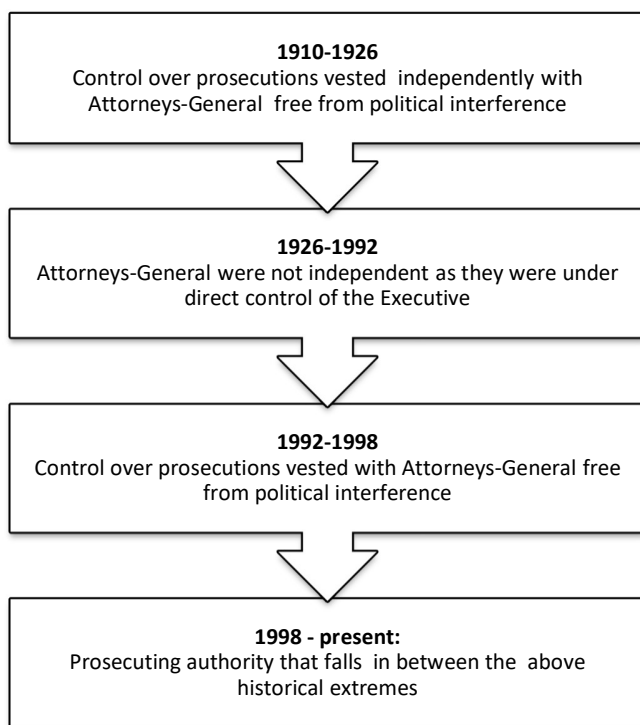
The National Prosecuting Authority

The National Prosecuting Authority (NPA) in South Africa was established through the NPA Act 32 of 1998 on 1 August 1998, replacing the provincial Attorneys-General.³ The Constitution makes provision for a single national prosecuting authority and bestows a considerable amount of power onto the National Director of Public Prosecutions (NDPP).⁴ Despite constitutional and legislative provisions enacted after 1994 to ensure an independent NPA, and one that is immune from political interference, it is regrettably the case that the NPA was compromised in recent years.

This factsheet maps the history and structure of the prosecution authority before and after 1994 showing that the independence of the prosecution authority oscillated between extreme points with reference to the relationship with the executive.⁵ The historical developments of the prosecution authority must be seen

against the devolution and centralisation of prosecutorial power and its independence, or not, from political control and interference. The discussion below reviews four eras before and after the transition to democracy as shown in Figure 1.

Figure 1 History of the prosecution authority



Mapping the history of the prosecution authority

The prosecution authority: 1910 - 1926

When the Union of South Africa was formed in 1910, the power to prosecute was entrusted to four provincial Attorneys-General, with each province having a separate and independent Attorney-General.⁶ The Attorneys-General were not responsible to a national Attorney-General, thus exercising total authority over prosecutions in their respective jurisdictions.⁷ During this period, the

prosecuting authority had autonomy and was free from legislated political control.⁸

The prosecution authority: 1926 - 1992

In 1926 the final control over prosecutions was removed from the Attorneys-General and vested in the Minister of Justice.⁹ In that year legislative amendments by the government of Prime Minister JBM Hertzog placed the Attorneys-General under the control and direction of the minister.¹⁰ It has been reported that the reason for this shift was due to the refusal by the Attorney-General's office to prosecute a man who tried to derail a train carrying the Justice Minister at the time.¹¹ This was made even more explicit by a legislative amendment in 1935 stating "every Attorney-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 and may himself in general or in any specific matter exercise any part of such authority and perform any such function."¹²

Throughout this period, the prosecuting authority fell under the Minister of Justice and the role and duties of the prosecuting authority were effectively controlled and overtaken by the executive.¹³ The executive had political influence over the entire prosecution authority including the most senior prosecutors, the provincial Attorneys-General and the executive, thus offering no substantive separation of powers.¹⁴ In 1976, after the aftermath of the student revolt, the government of John Vorster was adamant it would control all spheres of society.¹⁵ The then-new Criminal Procedure Act of 1977 was passed by this government reiterating the 1935 position.¹⁶

The prosecution service: 1992 - 1998

Against the background of negotiations towards democracy, the National Party government amended the Attorney-General Act, a move that was not well received by the African National Congress (ANC). The government removed the Minister's power to interfere in the decision-making of the Attorneys-General. 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.¹⁷ The 1992 amendment was viewed with suspicion by some ANC members who saw it as an attempt by the 'old order prosecutors to protect their entrenched positions' as it was promulgated by the apartheid government barely two years before a new government was to come into being.¹⁸

The Attorney-General Act regulated the appointment, powers and functions of Attorneys-General.¹⁹ In terms of the Act, the President appoints Attorneys-General and the Minister of Justice appoints Deputy Attorneys-General.²⁰ The Attorney-General Act required an Attorney-General to fulfil the following requirements before the President could appoint him or her:

- has been admitted to practice as an advocate in terms of the Admission of Advocates Act, 1964;
- has been concerned in the application of the law for a continuous period of at least ten years after

his or her admission to practice as an advocate;
and

- possesses such experience as, in the opinion of the State President, renders him or her suitable for appointment as an Attorney-General.²¹

The most significant consequences of the amendment to the Attorney General Act was that ministerial control was removed. They were no longer subject to the control and directions of the Minister. The Minister could at most request an Attorney-General to furnish information or a report and to provide reasons regarding matters handled by the Attorneys-General.²² Furthermore, the removal of Attorneys General was subjected to onerous standards. The President could only remove an Attorney-General from office when requested to do so by both houses of Parliament.²³

In an attempt to constitutionalise the prosecuting authority, the Interim Constitution vested the authority to institute criminal prosecutions on behalf of the State in the Attorneys-General.²⁴ The Interim Constitution noted that 'no person shall be appointed as Attorney-General unless he or she is appropriately qualified in terms of a law regulating the appointment of Attorneys-General in the Republic.'²⁵ The Interim Constitution more or less preserved the situation as regards to the Attorneys-General as created by the amendment to the Attorney General Act of 1992.²⁶

The prosecution service after 1998

South Africa's transition to democracy saw drastic changes to the structure of the prosecution authority.

Although the Interim Constitution made reference to a prosecution authority, with each province having a separate and independent Attorney-General, the provisions in the 1996 Constitution altered this position by providing for a single national prosecuting authority, to be headed by a National Director of Public Prosecutions.²⁷ The structure of the single prosecuting authority consists of the Office of the National Director and the offices of the prosecuting authority at the High Courts in each of the nine provinces.²⁸

The NPA head office consists of the National Director (NDPP), Deputy National Directors (DNPP), Directors, Deputy Directors, prosecutors and members of the administrative staff of the office.²⁹ The prosecution authority is centralised, with provincial or regional Directors of Public Prosecutors reporting to the NDPP, as set out in Figure 2.

The National Director of Public Prosecutions (NDPP) is the head of the NPA. There are four Deputy National Director of Public Prosecutions (DNDPP) in charge of the following branches of the NPA:

- Deputy National Director of Public Prosecutions: Administration and Office for Witness Protection (DNDPP: Admin & OWP) - provides a support service for the criminal justice system and judicial proceedings, providing temporary protection, protection, support and related services to vulnerable and intimidated witnesses and related persons, enabling such witnesses to testify without intimidation, fear or danger. The OWP is established in the Department of Justice and Constitutional Development with the

Director-General as the accounting officer, but is administered by the NPA.

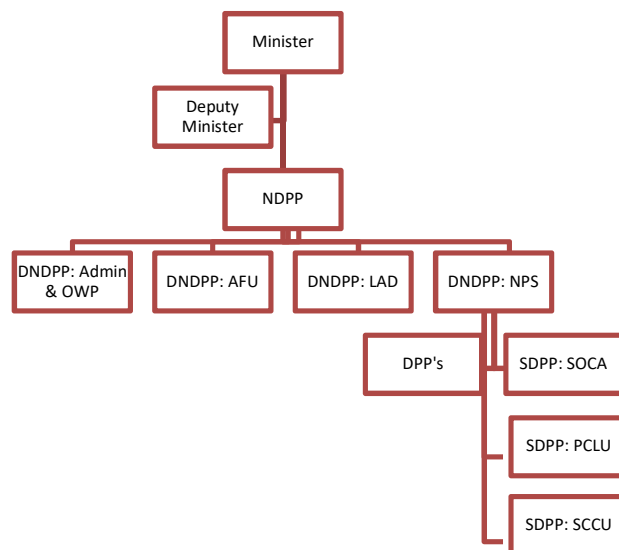
- Deputy National Director of Public Prosecutions: Asset Forfeiture Unit (DNDPP: AFU) – This branch is in charge of seizing assets that are the proceeds of crime or have been part of an offence through a criminal or civil process
- Deputy National Director of Public Prosecutions: Legal Affairs Division (DNDPP: LAD) - deal with civil litigation against the NPA and provides legal advisory services to the NDPP.
- Deputy National Director of Public Prosecutions: National Prosecutions Service (DNDPP: NPS) - is primarily responsible for general and specialised prosecutions. This includes resolving criminal matters outside of the formal trial process through alternative dispute resolution mechanisms, settling admissions of guilt for minor offences and considering dockets submitted by the police where persons have not been charged. DNDPP: NPS manages the Directors of Public Prosecutions (DPPs), as the NPA heads at various seats of the high courts, and Special Directors of Public Prosecution (SDPP) who are assigned specific powers. The SDPP further has the following specialised units:
 - SDPP: Sexual Offences and Community Affairs Unit (SOCA) focus on specialised prosecution services related to sexual offences.
 - SDPP: Specialised Commercial Crime Unit (SCCU) focus on specialised prosecution

services related to complex commercial crimes.

- SDPP: Priority Crimes Litigation Unit (PCLU) is a small specialist prosecutions unit that manages investigations and prosecutes crimes that impact on state security, nationally and internationally.

The first concern relates to the appointment and requisite qualifications of the NDPP.³¹ The Constitution and the NPA Act mandates the President to appoint the NDPP.³² The NPA Act further requires that any person appointed as NDPP must possess the necessary legal qualifications that would entitle him or her to practise in all courts in the Republic and must ‘be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.’³³ The provisions relating to the

Figure 2: Composition of the NPA



The constitutional framework of the prosecution authority after 1998 resulted in a situation where the NDPP exercises final authority over decisions to prosecute or not to prosecute without interference by the executive, unlike the period between 1935 and 1992.³⁰ This highly centralised structure *vis a vis* the devolved structure of the erstwhile Attorneys-General are not without problems. Some provisions in the NPA Act and the Constitution are cause for concern, affecting the overall, or at least perceived, independence of the NPA.

appointment and qualifications for appointment as NDPP are problematic because the NPA Act does not define what a ‘fit and proper’ person is. This vague provision leaves it open to interpretation by the President, who is solely responsible for choosing a ‘fit and proper’ candidate. This was to some extent addressed in two decisions regarding the appointment of Menze Simelane as NDPP by the Supreme Court of Appeal and the Constitutional Court – see [ACJR Fact sheet #7](#) for a detailed description. Furthermore, the appointment provisions create the risk that the President will appoint a person who can be easily influenced to not prosecute

certain persons or members of the executive or the ruling party.³⁴ This is particularly worrisome because 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.³⁵

It is important that prosecutors need to possess certain qualities of character to prevent the misuse of prosecutorial power and the discretion they are entrusted with. Appointing the head of the prosecuting authority becomes very difficult when the head of state is responsible for executing the appointment under vague provisions. It can be argued that the NPA is not completely sheltered from political interference because of inadequate legislative measures in the appointment of the NDPP.³⁶

The second concern relates to the President's power to remove the NDPP in terms of Section 12(6) (a) of the NPA Act, pending a resolution passed by Parliament to endorse or dismiss the decision of the President. This also 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.'³⁷ It was indeed such a situation that led to the dismissal of then NDPP, Adv. Vusi Pikoli. Similarly, the President may also remove the NDPP from office on the basis that he or she is no longer a fit and proper person.³⁸

The third concern relates to ministerial control over the prosecution service. The Constitution and the NPA Act states that the Minister of Justice must exercise final

responsibility over the prosecuting authority.³⁹ The Constitution and the NPA Act also states that the NDPP must determine prosecution policy with the concurrence of the Minister of Justice.⁴⁰ The fact that the NDPP must determine prosecution policy with the concurrence of the Minister of Justice creates a risk whereby prosecutorial policy is influenced by the Executive which could lead to the effect of discouraging prosecutions in certain instances.⁴¹ The phrasing of these provisions could imply a great deal of ministerial control of the prosecuting authority and hence a restriction of its independence.⁴² In law, it appears that the accountability to the Minister does not extend to influencing decisions to prosecute or not to prosecute and is general rather than specific to particular cases, and relates to the formulation of policy, reporting to Parliament, financial probity and furnishing information or a report regard to any case.⁴³ The Ginwala Enquiry into the fitness of Advocate VP Pikoli to hold the office of NDPP found that the ambit of ministerial control did not include decisions around prosecution; but did however; find that the Minister of Justice has a veto over prosecution policy.⁴⁴

It is evident that the NPA Act allocates much of the ministerial responsibility to the Director-General of Justice, as the accounting functionary of the Minister. Legislatively, the Director-General is responsible for accounting for State monies received or paid out for or on account of the prosecuting authority.⁴⁵ Section 36 (3) of the NPA Act states that 'the Director-General: Justice shall, subject to the Public Finance Management Act, 1999 be charged with the responsibility of accounting for State monies received or paid out for or on account of the

prosecuting authority, and cause the necessary accounting and other related records to be kept.’ The ambit of the Director-General’s accounting function was the subject of dispute which formed part of the Ginwala Enquiry.⁴⁶ Vusi Pikoli, then NDPP, ‘restricted the interpretation of legislation to ‘bean-counting’, whereas then Director-General of Justice: Menzi Simelane’s interpretation was in favour of a more overreaching control of the NPA by the Director-General.’⁴⁷ The Ginwala Enquiry found that Menzi Simelane had an incorrect understanding of his role in relation to the NPA and that it was probable that many of the difficulties between Vusi Pikoli and the Minister relating to how each was to discharge their responsibilities were based on Menzi Simelane’s incorrect understanding of his accounting responsibilities vis-à-vis those of the NDPP.⁴⁸

Lastly, 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’. ‘It was with reference to ‘decisions regarding the institution of prosecutions’ that the then NDPP, Shaun Abrahams, was summoned to appear before the Portfolio Committee on Justice and Correctional Services in late 2016 to explain why the Minister of Finance, Pravin Gordhan, and two others were charged with fraud, only for the charges to be withdrawn a few days later.’⁴⁹ The concern in relation to the NDPP and NPA’s accountability to Parliament is whether accountability for individual cases (as described above in relation to the Gordhan case) could on another occasion

lead to inappropriate influencing of the actions of the NDPP by Parliament.⁵⁰

Conclusion

The way in which the structural independence of and political control over the NPA has played out over the last century in South Africa, clearly illustrates how shifts in political dispensation influenced and manipulated the context of the NPA and its prosecutorial independence and autonomy. It appears the beginning of the century (1910-1926) guaranteed more structural independence and lack of interference from political control. It is the case that post-1998, the constitutional framework of the NPA resulted in a prosecuting authority that falls somewhere in between the historical extremes.⁵¹ At the one extreme was the situation prior to 1926, where there was absolute autonomy, and at the other, the situation between 1926 and 1992, during which the decisions of the Attorney General could be reversed by the Minister of Justice.⁵²

It is unfortunate that despite being a democracy, South Africa’s legislative developments post-1998 do not provide substantial protections to the structural independence of the NPA and that the shortage of structural safeguards has resulted in an prosecution service that has not been held to account in a thorough manner.⁵³ In the drafting of the Interim Constitution, the finalisation of the 1996 Constitution and subsequently in the drafting of the NPA Act it appears that none were stress tested for a ‘bad’ president or a ‘bad’ NDPP. It appears to have been a widely held assumption that personal integrity and a broad commitment to constitutional values would ensure an independent

prosecution service that would indeed prosecute without fear or favour. Performing thorough stress testing on draft legislation is perhaps the most valuable lesson to be taken from the history of the NPA.

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¹ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, 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.9.

² 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.7.

³ 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.10.

⁴ Section 179 (1), Constitution of the Republic of South Africa.

⁵ 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.11.

⁶ Panel of Constitutional Experts Memorandum dated 20 September 1995, page 5. Available at: <http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF>. [Accessed on 29 October 2018]

⁷ Panel of Constitutional Experts Memorandum dated 20 September 1995, p.5. Available at: <http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF> [Accessed on 29 October 2018]

⁸ S 10 (1) Public Service Act 1994 (Act 103 of 1994), Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.

⁹ Panel of Constitutional Experts Memorandum dated 20 September 1995, p.5. Available at:

<http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF> [Accessed on 29 October 2018]

¹⁰ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.

¹¹ Panel of Constitutional Experts Memorandum dated 20 September 1995, pages 5 - 6. Available at: <http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF> [Accessed on 29 October 2018]

¹² S 7 (4) General Law Amendment Act 46 of 1935.

¹³ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.

¹⁴ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.

¹⁵ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 9.

¹⁶ S 3(5) of the Criminal Procedure Act 51 of 1977.

¹⁷ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 10.

¹⁸ Redpath J. (2012) Failing to Prosecute? Assessing the State of the National Prosecuting Authority of South Africa, Pretoria: Institute for Security Studies, ISS Monograph 186, p. 10.

¹⁹ S 108 (2) Interim Constitution; Attorney-General Act 92 of 1992.

²⁰ S 2 Attorney-General Act 92 of 1992.

²¹ S 2 (1) Attorney-General Act 92 of 1992.

²² S 5 Attorney-General Act 92 of 1992.

²³ S 4 Attorney-General Act 92 of 1992.

²⁴ S 108 (3) Interim Constitution of the Republic of South Africa. (Interim Constitution)

²⁵ S 108 (3) Interim Constitution.

²⁶ Interim Constitution Act 200 of 1992 s 108 (1) The authority to institute criminal prosecutions on behalf of the state shall vest in the attorneys- general of the Republic. (2) The area of jurisdiction, powers and functions of an attorney-general shall be as prescribed by or under law. (3) No person shall be appointed as an attorney-general unless he or she is appropriately qualified in terms of a law regulating the appointment of attorneys-general in the Republic.

²⁷ S 179 (1), Constitution.

²⁸ S 3 National Prosecuting Authority Act 32 of 1998 (NPA Act).

²⁹ S 3-5 NPA Act, S 5 NPA Act, Annual Report National Director of Public Prosecutions 2017/18, p.34.

³⁰ S 179 (1), Constitution.

³⁰ S 179 (5) (d), Constitution.

³¹ See ACJR Factsheet: The Appointment and Dismissal of the NDPP, Available at: <https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf>.

³² S 10 NPA Act, 179 (1) (a), Constitution.

³³ S 9(1) NPA Act.

³⁴ 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.12.

³⁵ S 179 (5) (a) of the Constitution, S 22 (2) (c) NPA Act.

³⁶ S 179 (1)(a) of the Constitution, S 179 (5) (a) of the Constitution, S 21 (1) NPA Act, S 179 (6) of the Constitution, S 33 of NPA Act.

³⁷ S 12 (6), NPA Act, 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.12.

³⁸ S 12(6) (a), NPA Act.

³⁹ S 179 (6) Constitution, S 33, NPA Act.

⁴⁰ S 179 (5) (a) Constitution, S 21 (1) NPA Act.

⁴¹ 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.40.

⁴² 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.26.

⁴³ S 33 (2) NPA Act: To enable the Minister to exercise his or her final responsibility over the prosecuting authority , as contemplated in section 179 of the Constitution , the National Director shall, at the request of the Minister -(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions; (b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions; (c) furnish the Minister with information with regard to the prosecution policy referred to in section 21 (1) (a) ; (d) furnish the Minister with information with regard to the policy directives referred to in section 21 (1) (b) ; (e) submit the reports contemplated in section 34 to the Minister ; and (f) arrange meetings between the Minister and members of the prosecuting authority. 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.26.

⁴⁴ Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, Nov.

2008, para. 63. (Ginwala Commission)

⁴⁵ S 36 NPA Act: Expenditure of prosecuting authority: (1) The expenses incurred in connection with- (a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the prosecuting authority ; and (b) the remuneration and other conditions of service of members of the prosecuting authority , shall be defrayed out of monies appropriated by Parliament for that purpose. (3) The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)- (a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the prosecuting authority ; and (b) cause the necessary accounting and other related records to be kept.

⁴⁶ Ginwala Commission, para 63.

⁴⁷ Ginwala Commission, para 63.

⁴⁸ Ginwala Commission, para 103.

⁴⁹ 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.25; 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/>.

⁵⁰ 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.26.

⁵¹ 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.11.

⁵² 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.11.

⁵³ See: ACJR Factsheet: National Prosecuting Authority Performance, available at: <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf>.