



UNIVERSITY *of the*
WESTERN CAPE



Submission to the Portfolio Committee on Justice and Correctional Services

On the National Prosecuting Authority Amendment Bill

13 October 2023

Contents

SUMMARY	2
1. INTRODUCTION	3
2. FINANCIAL INDEPENDENCE	3
3. SPECIALIST SKILLS	4
4. ACCOUNTABILITY AND TRANSPARENCY	5
5. LEADERSHIP	5
6. PROPOSED ADDITIONAL AMENDMENTS.....	5
6.1. <i>Financial Independence</i>	6
6.2. <i>Specialist Skills</i>	7
6.3. <i>Transparency and Accountability</i>	8
6.4. <i>Leadership</i>	9
7. SPECIFIC PROVISIONS OF BILL 29-2023	11
7.1. <i>Clause 2 (amendment of definition of head of IDAC)</i>	11
7.2. <i>Clause 5 ('substitution' of section 7)</i>	11
7.3. <i>Clause 5 (section 7) and Clause 11 (transitional provisions)</i>	11
7.4. <i>Clause 5 (section 7, in particular s7(1)(a)(iii))</i>	12
7.5. <i>Clause 5 (section 7)</i>	12
7.6. <i>Clause 7 (Insertion of Chapter 3B, in particular insertion of section 19E)</i>	12
7.7. <i>Clause 7 (Insertion of Chapter 3B, in particular insertion of section 19F(1))</i>	13
7.8. <i>Clause 9 (Insertion of section 22A)</i>	13
7.9. <i>Clause 10 (Insertion of section 29A)</i>	14
7.10. <i>Omissions</i>	14
8. CONCLUSION	14

Summary

The National Prosecuting Authority Amendment Bill (B29-23) (the Bill) seeks to provide for a permanent Investigating Directorate within which investigators with various powers may be appointed to serve. While this may go some way to providing for investigative capacity in the National Prosecuting Authority (NPA), the Bill does not address the many ways in which the NPA Act currently undermines the independence, effectiveness and accountability of operation of the NPA in its key function of prosecution. Section 179(4) of the Constitution requires that national legislation – the NPA Act – must ensure that the NPA exercises its functions without fear, favour or prejudice. It is toward achieving this that the proposed amendments as well as the existing legislation must be viewed. The Bill is an opportunity to effect amendments which better ensure that the NPA acts without fear, favour or prejudice. Accordingly, it is recommended that the NPA Act also be amended in order to provide for:

- Financial independence of the NPA via its own Budget Vote;
- Effective and transparent hiring of *ad hoc* specialist skills within an NPA budget;
- Greater accountability and transparency of the NPA
- Security of tenure balanced by dynamism in the leadership of the NPA

Draft amending provisions which may achieve this, have been included in this submission. In addition, concerns regarding the current version of the Bill (B29-23) are raised in the last section below.

1. Introduction

The National Prosecuting Authority (NPA) has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.¹ It is the only entity with original prosecutorial power in South Africa and accordingly is a key component of the constitutional accountability framework. If the NPA fails, accountability fails – and South Africa fails.

South Africa does not have a system of universal prosecution:² prosecutors exercise a discretion. In exercising its functions, including taking decisions to prosecute or not, the Constitution provides that national legislation must ensure that the NPA does so “without fear, favour or prejudice”.³ The Constitutional Court in certifying the Constitution affirmed that this provision confers a “constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts”⁴

The NPA has thus far failed to act speedily or effectively against key actors in state capture. This, in effect, amounts to the favouring of members of the political and financial elite. The National Prosecuting Authority Act (NPA Act) in its current form fails to ensure that the NPA is sufficiently able to carry out its functions independently and capably. We endorse the legal arguments contained in the submission of Open Secrets in this regard, and urge Parliament to rectify the situation. The NPA is in need of financial independence and the ability to hire specialist skills transparently and easily. It must also be transparent in the principles it applies in decision-making. The leadership of the NPA must be both secure and dynamic.

2. Financial Independence

Institutionally, in terms of funding, the NPA is not independent. The NPA does not submit its own Budget Vote, but must receive funding from National Treasury via a programme of the Department of Justice’s Budget Vote; the Director-General of Justice determines the Vote in consultation with the National Director of Public Prosecutions (National Director), and it is the Director-General of

¹ Section 179(1)(2) Constitution of the Republic of South Africa Act 108 of 1996.

² This is called the opportunity principle as opposed to the legality principle. In countries where the legality principle applies, all cases that meet the evidentiary requirements must be prosecuted.

³ Section 179(4) Constitution of the Republic of South Africa Act 108 of 1996.

⁴ *Re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996(10) BCLR 1253 (CC).

Justice which must account for the monies so expended.⁵ This has in practice constrained the operations of the NPA and its ability to prosecute effectively. It is submitted that the NPA Act should be amended to provide for the NPA to submit its own budget vote, save for the salary of the National Director, which should be a direct charge against the National Revenue Fund, as are the salaries of judges. The National Director should be responsible for accounting for the monies so expended.

3. Specialist Skills

Specialist skills may include those of forensic accountants and experienced legal counsel. This is important for the investigation and prosecution of complex cases, which is the target of the proposed Independent Directorate against Corruption (IDAC). Currently, section 38 of the NPA Act requires the concurrence of the Minister of Justice, in order for the NDPP, DNDPP or DPPs to 'engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases'. Only where there are 'no financial implication for the state' may the NPA engage such services without obtaining the concurrence of the Minister. Requiring the concurrence of the Minister – a political actor – for authorisation to hire skills in particular cases, particularly corruption cases which may involve members of government, is not only a bureaucratic impediment but almost certainly affects the ability of the NPA to act without fear, favour or prejudice. Accordingly, it is submitted that the NPA Act instead provide that the independent Budget Vote in relation to the NPA must include a specific line item toward the *ad hoc* hiring of additional specialist skills, within which the NDPP may exercise a discretion. The NDPP must of course account for such expenses as is normally required and the total remains constrained by the actual vote.

Furthermore, the NPA Act provides that the terms and conditions of service of such a person so engaged are determined 'from time to time' by the Minister of Justice and the Minister of Finance. This implies a degree of stagnancy and rigidity to these amounts which may not be appropriate to the case at hand. To remedy this but nevertheless to provide a degree of protection against possible abuse of this section, transparency is required. This is particularly so as it is not clear that the specialist skills which have in practice so far been utilised in terms of section 38, have been either appropriate or effective in the cases concerned. Accordingly, it is submitted that the NPA Act must provide for a policy to be determined by the National Director to guide the hiring of such skills, which must be tabled in Parliament and be subject to review. Furthermore, a full accounting after the fact to Parliament of hiring in terms of this section should be required.

⁵ Section 36, National Prosecuting Authority Act 32 of 1998.

4. Accountability and Transparency

Decisions by prosecutors in the NPA are currently guided by 'confidential' prosecutorial directives which are not in the public domain. These directives guide prosecutorial decisions. There is no way for the public to know whether in a particular case they have been followed or not. In strong democracies such directives are public documents. Greater transparency on decision-making in the NPA will boost public confidence and provide protection against abuse and misuse of the prosecutorial process.

5. Leadership

Security of tenure and a transparent and apolitical appointment processes encompassing a high standard of excellence and are likely to help to ensure independent leadership of the NPA. The National Director should not be appointed by the President alone without expert input, as is currently the case. The legislation should provide for criteria and a process similar to that for the Public Protector. However, given the problems with the Judicial Service Commission, a slightly different recommendation body is proposed, with more emphasis on legal expertise. Furthermore, the legislation currently provides that the NDPP must retire at 65, even if her or his ten-year term has not expired. This may prevent suitable older candidates from applying and serving at all, or from serving their full term.

By contrast, other Directors serve until age 65 years even if appointed at a young age. The risk is that the NPA may be stuck with a poorly performing Directors of Divisions for decades. Mature democracies tend to have term limits for directors of prosecutions. Accordingly, a term limit should also be placed on the tenure of these positions. The end of tenure of a Director need not result in salary sacrifice if the legislation provides for appointment thereafter as a Special Director.

6. Proposed Additional Amendments

The following amendments are proposed:

- Toward financial independence: amendments to section 36
- Toward specialist skills: amendments to sections: amendments to section 38
- Toward enhanced transparency and accountability: amendments to sections 21 and 35
- Toward enhanced leadership: amendments to sections 10, 12 and 14.

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

6.1. Financial Independence

Amendment of Section 36 of Act 32 of 1998 as amended

1. Section 36 of Act 32 of 1998 is hereby amended by:

(a) the substitution for subsection 1 of the following subsection:

36. 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, except that the remuneration of the National Director shall be a direct charge on the National Revenue Fund.

(b) the substitution for subsection 2 of the following subsection:

(2) **[The Department of Justice] The National Director** must **[in consultation with the National Director,]** after consultation with the Minister of Finance, prepare the necessary estimate of revenue and expenditure of the prosecuting authority.

(c) the substitution for subsection 3 of the following subsection:

(3) The National Director **[Director-General: Justice]** shall, subject to the Public Finance Management Act, 1999 (Act No. 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, in accordance with the requirements of the Public Finance Management Act.

(d) the substitution for subsection 5 with the following subsection:

(5) **[The Director-General: Justice may, on the recommendation of the]** The National Director **[and]** with the concurrence of the Minister of Finance, may order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an investigation contemplated in section 28 (1) be paid from **[State funds]** funds budgeted for that purpose to that person.

6.2. Specialist Skills

Amendment of section 38 of Act 32 of 1998 as amended

2. Section 38 of Act 32 of 1998 is hereby amended by:

(a) the substitution for subsection 1 of the following subsection:

38. Engagement of persons to perform services in specific cases.— (1) The National Director may **[in consultation with the Minister]**, and a Deputy National Director or a Director may, in consultation with **[the Minister and]** the National Director, on behalf of the State, engage, under agreements in writing, fit and proper persons having suitable qualifications and experience to perform services in specific cases.

(b) the insertion of section 1A:

(1A) The National Director must develop a policy for the appointment of persons meeting the requirements of specialist skills in terms of section 1, which policy must be tabled in Parliament annually.

(c) the substitution for subsection 2 of the following subsection:

(2) The terms and conditions of service of a person engaged by the National Director, a Deputy National Director or a Director under subsection (1) shall be as determined at least annually [from time to time] by the National Director [Minister in concurrence with the Minister of Finance] and published in the policy referred to in section 1A above.

(d) the deletion of subsection 3:

[(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State—

(a) the National Director; or

(b) a Deputy National Director or a Director, in consultation with the National Director,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection.]

(e) the substitution for subsection 4 of the following subsection:

(4) For purposes of this section, “services” include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be, and an investigation under the control and direction of the head of an Investigating Directorate .

(f) the insertion of subsection 5:

(5) The National Director must account for the appointments made in terms of section 38(1) at least annually in Parliament.

6.3. Transparency and Accountability

Amendment of section 21 of Act 32 of 1998 as amended

3. Section 21 of Act 32 of 1998 is hereby amended as follows:

(a) The substitution for subsection 1 of the following subsection:

21. Prosecution policy and issuing of policy directives.— (1) The National Director shall, in accordance with section 179 (5) (a) and (b) and any other relevant section of the Constitution—

(a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and

(b) after consulting the Directors, issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law.

(b) the insertion of subsection 6:

(6) The policy directives referred to in section 1(b) or amendments to such directives must be tabled in Parliament.

Amendment of section 35 of Act 32 of 1998 as amended

4. Section 35 of Act 32 of 1998 is hereby amended as follows:

(a) The substitution for subsection 1 of the following subsection:

35. Accountability to Parliament.— (1) 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 or not.

6.4. Leadership

5. Section 10 of Act 32 of 1998 is hereby amended as follows:

(a) The substitution for subsection 1 of the following subsection:

10. Appointment of National Director.— (1)The President must, in accordance with section 179 of the Constitution, appoint the National Director from a list of no more than three recommendations forwarded by the appointments committee referred to in subsection 2 convened for that purpose.

(b) The insertion of subsection 2:

(2) The committee referred to in subsection (1) must comprise the following:

(a) two representatives from the Legal Practice Council;

(b) two representatives from unions representing prosecutors;

(c) two legally qualified persons from civil society organisations or academia;

(d) two retired judges;

(e) two members from the Portfolio Committee of Parliament.

(c) The insertion of subsection 3:

(3) The committee must conduct an open and transparent process in arriving at those recommendations, which shall include an open nomination, interview and deliberation process.

(d) the insertion of subsection 4:

(4) The provisions of this section shall apply, with the necessary changes, to the appointment of Deputy National Directors and Directors.

Amendment of section 12 of Act 32 of 1998

6. Section 12 of Act 32 of 1998 is hereby amended as follows:

(a) Substitution of subsection 1 for the following subsection:

12. Term of office of National Director and Deputy National Directors.— (1) The National Director shall hold office for a non-renewable term of 10 years. **[but must vacate his or her office on attaining the age of 65 years].**

(b) Substitution of subsection 2 for the following subsection:

(2) A Deputy National Director shall hold office for a non-renewable term of 10 years. **[vacate his or her office at the age of 65].**

(c) Deletion of subsection 3:

[(3) If the National Director or a Deputy National Director attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.]

7. Section 14 of Act 32 of 1998 is hereby amended as follows:

(a) Substitution of subsection 1 for the following subsection:

14. Term of office of Director.— (1) Subject to subsection (2), a Director shall hold office for a non-renewable term of 10 years. **[vacate his or her office on attaining the age of 65 years.]**

(b) Insertion of subsection 1A:

(1A) A Deputy National Director or Director in good standing vacating office at the conclusion of his or her term who has not yet attained the age of 65, must be retained as a

Special Director with responsibilities to be specified by the President in consultation with the National Director.

7. Specific provisions of Bill 29-2023

The Bill seeks to provide for a permanent Investigating Directorate against Corruption (IDAC) within which investigators with various powers may be appointed to serve. Questions and comments relating to the provisions currently contained in the Bill include the following:

7.1. Clause 2 (amendment of definition of head of IDAC)

Clause 2 refers to the appointment of a Director of Public Prosecutions as head of the IDAC. It is unclear whether what is intended is the appointment of someone who is already a DPP to the position, or whether such a person becomes a DPP on appointment. Two issues arise:

1. If the person must already be a DPP, then it excludes appointments from outside the NPA. One of the best appointments as head of the Investigating Directorate Organised Crime (IDOC) was Frank Dutton, from outside the NPA.
2. The Act further provides that a DPP serves until age 65. Is it intended that a person appointed as head of the ID would serve as head until age 65? It is submitted that a clear term be provided for, such as 10 years, as submitted in our accompanying general submission, in relation to all senior positions in the NPA, irrespective of age.

7.2. Clause 5 ('substitution' of section 7)

The heading of clause 5 makes reference to the 'substitution' of section 7. However, the Bill does not provide for the deletion of the existing section 7. This creates uncertainty as it is unclear whether the intention is to substitute the existing section 7 in its entirety (all of sections 7(1),(2),(3) and (4), or only to amend section 7(1) and insert section 7(1)(A). It is submitted that the intention was to amend not substitute, as a substitution would not require an insertion numbered 7(1)(A). In any event, the intention should be clarified by amending the heading.

7.3. Clause 5 (section 7) and Clause 11 (transitional provisions)

These two provisions seek to ensure 1) the permanent establishment of an ID with an expanded mandate beyond that of the existing mandate contained in Proclamation 20 of

2019; 2) the continuation of the existing ID *as part of* the new permanent IDAC. The current manner in which this is done leads to uncertainty in that there is reference to Proclamation 20 in the mandate of the permanent IDAC, whose empowering provision will be deleted by the Bill. The transitional provisions do not cure this defect as there is no additional empowerment provided for in section 7(1)(a)(iv), to which the transitional provisions refer. It is submitted that a better formulation would be to reproduce the full text of the offences covered in Proclamation 20 in the new provision, while simply providing in the transitional provisions for the existing ID to form part of the new permanent ID.

7.4. Clause 5 (section 7, in particular s7(1)(a)(iii))

The inserted s7(1)(a)(iii) makes reference to the existing s27, as being another category of offence which the permanent IDAC is to investigate, which relates to specified offences reported by *any person*. The new provision does not use the word “may” nor the word “must”. It merely says the IDAC is established “to” investigate specified offences. It is unclear whether this creates an obligation on the IDAC to investigate all such reports by any person. The possibility exists that the ID may become overwhelmed by such reports and yet be obliged to investigate all of them. This should be clarified.

7.5. Clause 5 (section 7)

If section 7 is not deleted in its entirety, then s7(4)(a)(v) remains which provides as follows: “The head of an Investigating Directorate shall be assisted in the exercise of his or her powers and the performance of his or her functions by: - (v) any other person whose services are obtained by the head of the Investigating Directorate.” Is the intention of the provision to exempt the head of the ID from the provisions of section 38? Such an intention is welcomed. If there is not such an intention, then it is submitted that the provisions of section 38 should be amended as proposed in our accompanying submission to make it easier for the NPA and the ID to obtain specialist skills.

7.6. Clause 7 (Insertion of Chapter 3B, in particular insertion of section 19E)

The requirement in the inserted section 19E (1) that anyone to be hired by the ID first be issued with security clearance is of concern. The possibility exists for unreasonable delays in this regard. This can be remedied either by providing that applications from the ID be

prioritised by the Intelligence Service, or by allowing the head of the ID to allocate tasks which are not security-sensitive to the relevant employee. The provision that a subsequent security clearance failing leads to immediate discharge probably falls foul of labour laws. It is recommended that the provision provide for suspension pending confirmation of discharge.

7.7. Clause 7 (Insertion of Chapter 3B, in particular insertion of section 19F(1))

The insertion of section 19F(1) requires the Minister, the National Director, the Minister of Public Service and Administration and the Minister of Finance all to agree on the remuneration of investigators. This is yet another demonstration of the lack of financial independence of the NPA. It is submitted that the National Director should be permitted within an independent budget, to determine these salaries.

7.8. Clause 9 (Insertion of section 22A)

The inserted section 22A provides for a complaints mechanism relating to investigations by the ID, to be headed by a retired judge. Concerns are as follows:

1. Inserted section 22A(5) provides that the judge may investigate **or** refer a complaint. This suggests that the judge may refer without investigating. It is submitted this should not be the case. The judge should investigate at least cursorily **and** refer where appropriate, with a recommendation (to discipline, prosecute, further investigate, and so on). The judge should report not only on outcomes or referrals, but also the nature of the recommendation made. The failure to do so has been a key weakness of oversight bodies such as IPID.
2. There is no provision for independent prosecution. How likely is it that the NPA will prosecute its own people with fervour, where the recommendation is to prosecute? Provision should be made for an independent prosecutor to be delegated prosecutorial authority by the NDPP.
3. It is submitted that the judge should have the mandate to investigate and refer any NPA member, and not only members of the ID.
4. It is submitted that the judge should have a ring-fenced independent budget, as now required for the Judicial Inspectorate of Correctional Services.

7.9. Clause 10 (Insertion of section 29A)

The powers and functions accorded to ID investigators are primarily the powers accorded in terms of the Criminal Procedure Act. This excludes the powers of police officers contained in the SAPS Act. It should be clarified whether this was the intention or whether the intention was for their powers to be equivalent.

7.10. Omissions

The Bill does not clarify or make provision for an agreement or protocol between the Directorate for Priority Crime Investigation and IDAC. The experience during the years of the Scorpions suggests this is likely to become a key issue. It is our submission that IDAC must deal with matters where the identity of the suspect / accused is not in question.

8. Conclusion

The Bill is an opportunity for Parliament to rectify the constitutional defects of the NPA Act in terms of section 179(4) of the Constitution. It is within the power of Parliament to pass additional amendments and not only those drafted by the Department. We urge the committee to do so, so that the NPA can indeed act without fear, favour or prejudice, to the benefit of all South Africans.

Dr Jean Redpath
jredpath@uwc.ac.za

Prof Lukas Muntingh
lmuntingh@uwc.ac.za

Africa Criminal Justice Reform, Dullah Omar Institute, University of the Western Cape

13/10/2023