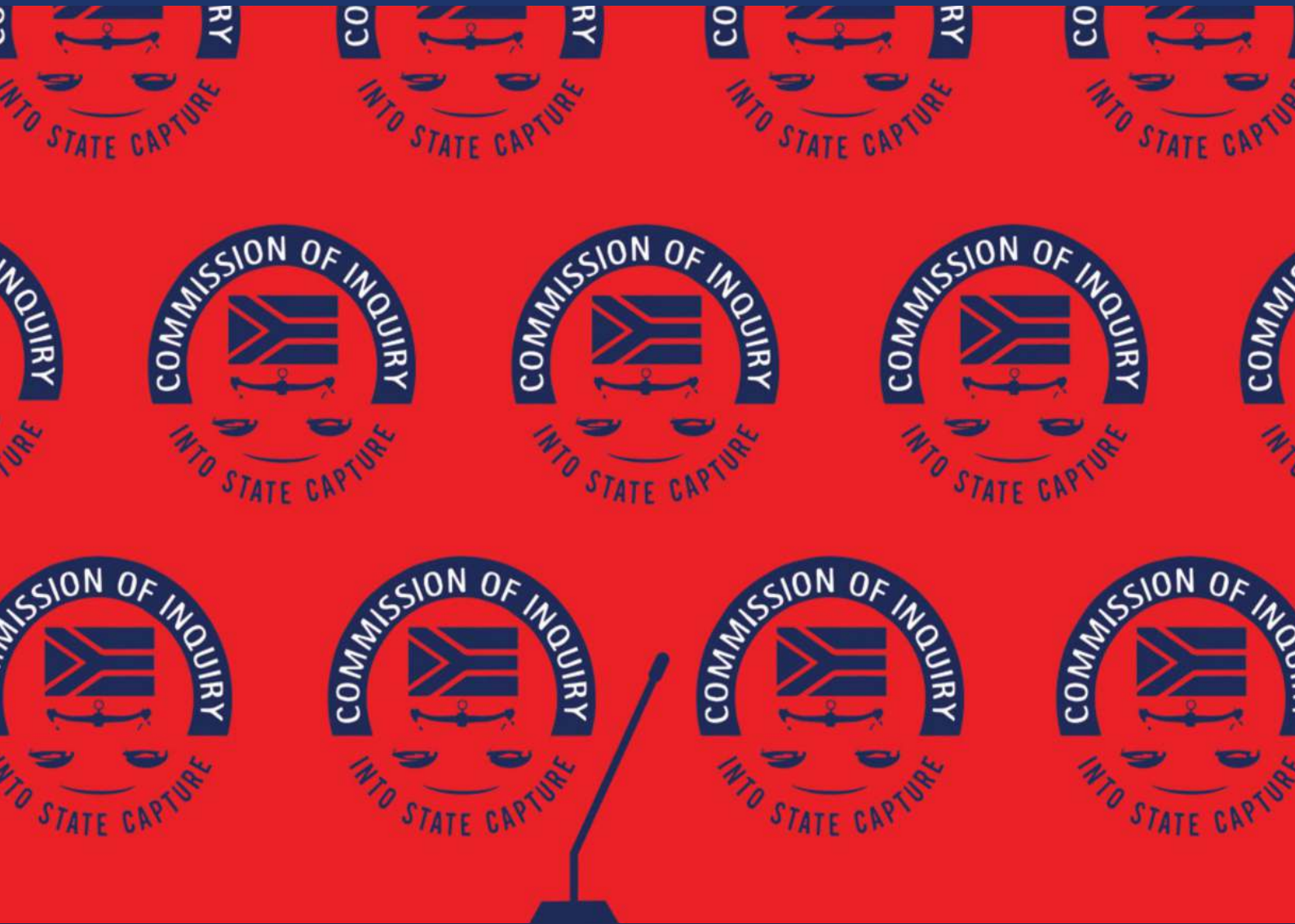


State capture and the political manipulation of criminal justice agencies

A joint submission to the Judicial Commission
of Inquiry into Allegations of State Capture



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A joint submission by Corruption Watch and the Institute for
Security Studies to the Judicial Commission of Inquiry
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April 2019

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Executive summary

Introduction

This joint submission from Corruption Watch and the Institute for Security Studies, two South African civil society organisations, is concerned with the manipulation of criminal justice agencies by the Executive under the administration of former president Jacob Zuma. This manipulation was a critical factor in entrenching state capture.

The criminal justice agencies that are focused on are the South African Police Service (SAPS), particularly its crime intelligence division; the Directorate for Priority Crime Investigation (the Hawks); the National Prosecuting Authority (NPA); and to a lesser degree, the Independent Police Investigative Directorate (IPID).

Manipulation of these agencies by the Executive has ensured impunity for members of the Executive (including the former president himself), their key political allies, and those involved in their networks of patronage. It has also been used to intimidate and coerce opponents, as well as employees of the criminal justice system. In addition, the crime intelligence division of the SAPS was used to promote the power of the dominant faction within the ANC during the Zuma era, inter alia by manipulating party processes such as national, provincial and local internal elections.

Manipulation of the criminal justice system was also in evidence during the Thabo Mbeki era. However under the Zuma era it was pursued more consistently and aggressively, to the point where it was pursued at the expense of the criminal justice system and thus of the safety and security of South Africans.

The issue of manipulation of criminal justice agencies is directly relevant to the terms of reference of this Commission. Increased manipulation of criminal justice agencies during the Zuma era was strongly connected to the viability of the state capture project. Apart from explicitly protecting Zuma and his family and friends from prosecution, the manipulation of criminal justice agencies functioned to secure control of the ANC for the Zuma faction. The viability of state capture in South Africa relied on the control of the ANC by Jacob Zuma and his allies and ensuring that they were not held accountable for illegal activity.

At its broadest level the Commission is concerned with the involvement of public representatives, public servants and personnel attached to state entities in criminal acts that constitute corruption and fraud, and that involve illegal 'inducements for gain'.¹ Manipulation of criminal justice agencies allowed high-level corruption to proliferate by ensuring that criminal justice agencies largely disregarded it.

Manipulation of criminal justice agencies has not affected all criminal justice agencies equally at all times. In some cases senior leaders of agencies have resisted interference. Nevertheless, during the Zuma presidency, the Executive, and their agents within state agencies, consistently and repeatedly sought to undermine the ability of criminal justice agencies to function independently and in line with constitutional principles.

Structure and purpose of this submission

A major part of this submission is devoted to outlining evidence that provides the basis for the contention that criminal justice agencies have been manipulated. Currently, partly as a consequence of various court judgments pertaining to the Hawks, IPID and NPA, the legal provisions regarding these bodies may be regarded as largely consistent with international standards for the independence of anti-corruption bodies and criminal justice agencies.

However one source of vulnerability has been the authority of the Executive regarding senior appointments in the SAPS, Hawks and NPA. These have amounted to an ‘Achilles heel’ with respect to their integrity and independence. Provisions relating to procedures for removal from office have also been undermined. The submission discusses in some detail the way in which appointment and removal processes have been manipulated. It also outlines the basis for allegations regarding the involvement of some of those appointed in undermining the functioning of the key criminal justice agencies.

However the evidence that is provided in this regard is merely provided in order to demonstrate the basis for the assertion that there has been systematic manipulation of the criminal justice system. The purpose of this submission is ultimately preventive in nature as encapsulated in the recommendations at the end of this submission. These are proposed steps that, it is motivated, should be taken by government to reduce the risk of future manipulation of criminal justice agencies, which has been a key enabler for state capture.

Impact of manipulation of criminal justice agencies

The period of Jacob Zuma’s ascendancy to and occupation of the position of president was a deeply debilitating one for South Africa’s criminal justice agencies. A clear link can be drawn between manipulation of the criminal justice agencies and declines in their performance. These agencies have become a hostile environment for those who are committed to, and invested in, the principles of the rule of law and equality before the law, that are embedded in the constitution.

Visible consequences of this manipulation have included a surge in key categories of aggravated robbery and declines in prosecutorial performance. Another major casualty of the disruption and mismanagement of criminal justice agencies has been the capacity for investigating complex commercial crimes, including corruption. There can be no doubt that the abuse of Executive authority in respect of criminal justice agencies has been central in allowing the current proliferation of corruption. A further consequence of this manipulation has been to undermine the organisational culture that supports criminal justice agencies in operating ‘without fear or favour’ in line with principles of the rule of law.

Recent positive developments

The submission takes note of a number of positive developments relating to the criminal justice agencies since Jacob Zuma’s resignation as president in February 2018. In line with the submission’s concern with the manipulation of appointment processes the submission argues that President Cyril Ramaphosa’s decision, announced in October 2018, to appoint a panel to advise him on the appointment of a new National Director of Public Prosecutions (NDPP), is particularly important. This process led to the appointment of Shamila Batohi as the National Director of Public Prosecutions as from 1 February 2019.

As reflected in our proposed recommendations (see Recommendation 6) we are strongly in favour of institutionalising mechanisms to ensure that those who are appointed to leadership roles in the criminal justice agencies are selected from the most suitable candidates. We regard the 2018 NDPP appointment process as holding considerable promise for the future.

Recommendations

Fixing the legacy of the manipulation of criminal justice agencies

Recommendation 1: Overall reform of senior management within criminal justice agencies

In order to initiate a process of renewal of the management of the criminal justice agencies, competency assessments against minimum standards should be conducted at the senior management and top management level, focusing in particular on the SAPS, including the crime intelligence division and the Hawks. In addition an audit should be conducted to identify those who have been appointed or promoted in terms of regulations that allow the SAPS national commissioner to appoint or promote without going through a selection process (see Recommendation 8). Appropriate steps should be taken to address any situation where people occupy posts for which they do not have the required competencies or where employees have criminal records.

Recommendation 2: Building an organisational culture of accountability and commitment to the rule of law

A process should be undertaken to renew commitment to key values of accountability, fairness and impartiality that underpin the principle of the rule of law amongst officials in the criminal justice system. Training programmes, and other measures, should seek to revive, affirm and strengthen a culture within these agencies that supports their ability to operate in an accountable manner and in line with principles of the rule of law.

Recommendation 3: Strengthening anti-corruption investigation and prosecution capacity of criminal justice agencies

Corruption is a multifaceted phenomenon, and overlaps with the problem of serious financial crime in the private sector. The soon-to-be-established NPA investigating directorate cannot carry the burden of addressing the overall problem of these crimes. Current systems for investigating corruption and serious financial crime should be evaluated and steps should be taken to strengthen the capacity of criminal justice agencies to address these problems.

Recommendation 4: Accountability of SAPS crime intelligence division

A review should be conducted of accountability systems pertaining to the SAPS crime intelligence division, including management of the crime intelligence secret service account. Pursuant to such a review, steps should be taken to establish more effective mechanisms for oversight and accountability of crime intelligence, in line with overall efforts to improve the accountability of all intelligence agencies.

Addressing risk factors for future manipulation of criminal justice agencies

Recommendation 5: Strengthening transparency regarding the interface between the Executive and criminal justice leadership

Two constitutional provisions may be seen to promote ambiguity in respect of the relationship between the Executive and senior leadership of major criminal justice agencies. The two provisions are Section 179(6), concerning the relationship between the minister of justice and the NDPP, and Section 207(2) which, inter alia, requires the national commissioner of the SAPS to comply with 'directions' issued by the minister of police. In line with the constitution's emphasis on accountable transparent government, legislative provisions should seek to ensure that there is greater transparency with respect to the relationship between the Executive and the NDPP and SAPS national commissioner.

Recommendation 6: Mechanisms to ensure professional criminal justice leadership

Legislative measures should institutionalise a mechanism or mechanisms to ensure that the best possible candidates are put forward for appointment to leadership roles to criminal justice agencies. In addition to the criminal justice agencies discussed in the report, such mechanism/s should also play a role in the appointment of the head of the Special Investigating Unit as the SIU plays a key role in the investigation of corruption and its head is also appointed directly by the president.

Recommendation 7: Consistent legislative provisions governing appointments in independent bodies

The provisions governing IPID should be brought in line with the provisions regarding the non-renewability of the term of office of the executive director that apply in relation to the senior leader of the Hawks and NPA. Such legislative amendments should also allow for the IPID executive director to serve a term of office longer than the current five years.

Recommendation 8: Amendments to SAPS employment regulations regarding senior management appointments

SAPS employment regulations should be amended to provide that all appointments must follow a clearly defined selection process oriented towards ensuring that the most suitable candidates are appointed in all cases. Provisions authorising direct ministerial interference in appointments and promotions should be repealed.

Recommendation 9: Limits on duration of acting appointments for senior leaders of independent bodies

Legislative measures should set reasonable but clear limits on the duration of acting appointments in situations where the office is vacant. A period of six months would be appropriate in this regard.

Recommendation 10: Reporting on the progress of investigations into allegations of wrong doing and disciplinary matters against senior managers

A performance measure across the criminal justice system should address efficiency in completing investigations and disciplinary measures against senior management where allegations of wrong doing are made. In their annual reports criminal justice agencies should provide clear data on the allegations formally lodged, and progress of investigations and disciplinary processes taken against senior managers as a means of building public trust that allegations of misconduct will be taken seriously and acted on.

Recommendation 11: Cross-agency annual report on corruption investigation and prosecution

It is important to better be able to assess the response by criminal justice agencies and other departments of government to corruption. For this purpose government should produce an annual report dealing with progress made in the investigation and prosecution of corruption, and in respect of disciplinary steps taken for corruption and other financial misconduct. In addition to providing statistical data this report should provide an update on the status of all major cases.

Recommendation 12: Eligibility for political office

Political parties should change their codes of conduct or other internal policies to provide that where office bearers or candidates are facing accusations or charges there should be an independent assessment of the basis for the accusations against them. Where these are well-grounded, people should be regarded as unsuitable for political office.

Conclusion

For South Africa to address corruption decisively, its criminal justice agencies must be appropriately capacitated. However, unless these bodies are demonstrably and identifiably independent, their efforts to address corruption will continuously be undermined by the suspicion, and accusations, that they are applying the law selectively for ulterior motives. Along with capacity building, measures that increase public confidence in the independence of these bodies will be necessary if South Africa is going to address corruption more vigorously and decisively.

Section A: Introduction

Corruption Watch

1. Corruption Watch (CW) is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption and abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption-free South Africa, one in which informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice, and importantly where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to CW's mandate is the promotion of transparency and accountability within the private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. CW seeks to expose corruption and abuse of public funds. It aims to expose those who engage in corrupt activities, nepotism and abuse of public funds in both the public and private sectors. Accordingly, as part of CW's mandate, it is committed to strengthening the criminal justice system, including supporting strengthening of the ability of criminal justice agencies to better detect and address corruption.

The Institute for Security Studies

5. The Institute for Security Studies (ISS) is a non-profit organisation headquartered in South Africa that builds knowledge and skills to enhance human security in order to achieve sustainable peace and prosperity. The ISS's work covers transnational crimes, migration, peacekeeping, crime prevention and criminal justice, peacebuilding, and the analysis of conflict and governance.
6. It undertakes qualitative and quantitative research and analysis to provide evidence-based policy advice, technical support and capacity building to a variety of stakeholders including regional bodies, governments and civil society.
7. The aim of the ISS is to inform local and international policy and strategy so as to enable decision makers to test the implications of their policy choices well into the future.
8. In addition the ISS uses its networks and influence to seek to promote better policy and practice, because senior officials can make informed decisions about how to deal with Africa's human security challenges.

Joint submission

9. Because of CW's and the ISS's common commitment to addressing the political manipulation and misuse of major criminal justice agencies, we have decided to make a joint submission to the Judicial Commission of Inquiry into Allegations of State Capture. It is hoped that this submission will be of value to the Commission and the two organisations thank the Commission for providing them with the opportunity to engage with these important issues. CW and the ISS have been assisted by David Bruce, an independent researcher in the field of criminal justice, in compiling this submission.

Section B: Focus of this submission – manipulation of criminal justice agencies

10. The submission is not made for the purposes of making or proving allegations against any person. Rather it is intended to highlight the role played by manipulation of the criminal justice system in facilitated entrenched corruption and state capture at the highest levels of government. The purpose of this submission is ultimately preventive in nature as encapsulated in the recommendations at the end of this submission. These are proposed steps that, it is motivated, should be taken by government to reduce the risk of a similar situation re-emerging in the future. However, prior to making these recommendations we set out the basis for our concern that manipulation of criminal justice agencies by the Executive has been a chronic feature of the past decade in South Africa, by providing an analysis of the form that this has taken and its impact on the functioning of these agencies.
11. Since 2016 the concept of 'state capture' has become part of everyday language in South Africa. The term may be understood to refer to a situation 'where small corrupt groups used their influence over government officials to appropriate government decision making in order to strengthen their own economic positions'.² Insofar as it is associated with the alleged influence of the Gupta family, there appears to be some level of agreement that the start of the state capture period may be dated to 2012. Thus the *Betrayal of the Promise* report argues that 'from about 2012 onwards the Zuma-centred power elite ... sought to centralise the control of rents to eliminate lower-order, rent-seeking competitors'.³ It is reported that, in his evidence before this Commission of Inquiry, ANC chairperson Gwede Mantashe also said that the ANC 'had experienced the rise of state capture between 2012 and 2017'.⁴ However evidence that has been submitted to the Commission, notably in relation to Bosasa,⁵ highlights the fact that though its characteristics may have changed, chronic corruption long predates the era of state capture in which the Gupta family are alleged to have played a leading role.
12. It is our view that the problem of manipulation of criminal justice agencies that this submission is concerned with became entrenched roughly 10 years ago, with the ascent to power of Jacob Zuma as president. Some of the key measures that were taken date back to the beginning of Zuma's first presidential term. For instance, as will be discussed, one of the key events is the appointment of Richard Mdluli as head of SAPS crime intelligence. This occurred on 1 July 2009, less than two months after Zuma's appointment as president of South Africa on 9 May 2009. As discussed briefly below, there is evidence of manipulation of criminal justice agencies under Zuma's predecessor, South Africa's former president Thabo Mbeki. However this type of manipulation was far more extensive and consistent during the Zuma era.⁶
13. The manipulation of criminal justice agencies that this submission is concerned with is primarily high-level manipulation that is effected by the Executive. It may serve various purposes including:
 - a. Impunity – to ensure that the law is enforced selectively. Manipulation of criminal justice agencies therefore serves to protect members of the Executive, their key political allies, and those involved in networks of patronage with them against the operation of the law, notably in relation to financial irregularities of one kind or another that frequently amount to acts of corruption (broadly understood as the abuse of public power for private gain).
 - b. Intimidation and coercion – personnel in criminal justice agencies who act as instruments of the Executive have also allegedly used the criminal justice agencies to victimise political or other

opponents. Employees of the criminal justice agencies who wish to act in line with principles of independence and impartiality have also been victimised in a similar way.

- c. Misuse of state intelligence capacity to promote the interests of the dominant faction within the ANC – this extends to manipulation of political processes such as national, provincial or local party elections.⁷ The manipulation of intelligence capabilities within the criminal justice system (i.e. the crime intelligence division of the SAPS) overlaps with issues that are of concern in relation to other intelligence agencies situated outside of the criminal justice system.
 - d. Political manipulation may also be used for nepotistic purposes in terms of which family members or associates benefit from appointments and promotions in state agencies. As detailed in this submission, though there has been extensive abuse of appointment processes by the Executive during the post-1994 era, this kind of manipulation of criminal justice agencies has generally not been for nepotistic purposes.⁸ However, some of those who have been elevated for the purpose of manipulating criminal justice agencies have allegedly used their positions to the advantage of their family members and associates (the most significant allegations in this respect again concern Richard Mdluli).
14. As indicated, this submission is focused on high-level manipulation of criminal justice agencies by the Executive. However the Executive is not necessarily a unified entity. In this submission references to manipulation of criminal justice agencies by the Executive should be understood to refer to manipulation by the president of the day and members of the cabinet politically aligned with, or compliant with, the president.
 15. It should be noted that other politicians, including in provincial and local government, have also been known to interfere with the functioning of criminal justice agencies in various ways. However this issue is not discussed in this submission.

Relationship between manipulation of criminal justice agencies and state capture

16. Proclamation 3 of 2018 provides that this Judicial Commission of Inquiry has been established ‘to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud’, inter alia including ‘whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including deputy ministers), office bearers and/or functionaries employed by or office bearers of any state institutions or organs of state or directors of the boards of SOEs’. At their broadest level therefore this Judicial Commission’s concerns include the involvement of public representatives, public servants and personnel attached to state entities, in criminal acts, that constitute corruption and fraud, and that involve illegal ‘inducements for gain’. This begs a question as South Africa already has mechanisms that have been established to investigate corruption, fraud and other crimes: why, if South Africa already has mechanisms in place to address these problems, has it been necessary to establish a Judicial Commission to investigate them? The answer, we believe, has to do with manipulation by the Executive of the criminal justice agencies.
17. As detailed in this submission, manipulation of criminal justice agencies by the Executive has been an endemic feature of the Zuma era, and has played an important role in enabling the state capture project. This is firstly because the viability of state capture in South Africa hinged on the control of the ANC by Jacob Zuma and his allies. Apart from explicitly protecting Zuma himself and his family from prosecution, the manipulation of criminal justice agencies has primarily functioned to secure control of the ANC for the ‘Zuma-centred power elite’. It has done so in the following ways:
 - a. Not only has Zuma’s family been linked to a large number of company directorships with many of these companies having benefited from state procurement contracts,⁹ but there are also allegations of links between Zuma’s family and organised crime.¹⁰ Manipulation of the criminal justice agencies has not only functioned to protect Zuma directly against facing charges for corruption and other irregularities but also to protect those close to Zuma, such as Thoshan Panday (see below in relation to the efforts to remove Johan Booysen from office), from facing charges of corruption.

- b. More broadly, while government has repeatedly pronounced itself to be strongly in favour of rigorous measures against corruption, these measures have generally been targeted at rank and file officials. Politicians, especially members of the ruling party, and high-level officials who have assisted them, have generally enjoyed impunity against corruption charges. It is possible that this is partly motivated by the fact that any such prosecutions would have opened Zuma to allegations that he was manipulating criminal justice agencies in order to target his political opponents. Zuma had previously used allegations of this kind to mobilise against Thabo Mbeki. He would therefore have been strongly aware of the potential for such prosecutions to contribute to divisions and instability within the ruling party, potentially posing a threat to his hold on power.
 - c. Another major way in which manipulation of criminal justice agencies has been used to secure power for Zuma is related to the misuse of state intelligence capacity to promote the interests of the dominant faction within the ANC. The available information indicates that Richard Mdluli has been the primary figure who has been used to facilitate this. The priority given to appointing Mdluli as head of the SAPS crime intelligence division, and to protecting him from accountability for various alleged crimes, is highlighted in this submission. Allegations that have been made include that Mdluli, and those associated with him, assisted Zuma and his allies by gathering information on possible rivals,¹¹ and by providing 'intelligence reports', of doubtful reliability, against alleged opponents of Zuma or of Mdluli himself.¹² Another set of allegations is that crime intelligence members linked to Mdluli played a major role in ensuring that the outcome of ANC elective conferences was favourable to Zuma.¹³ Mdluli and SAPS crime intelligence also appear to have played a prominent role in generating 'leaks' in order to gain leverage over and undermine criminal justice officials who were seen to pose a threat to the interests that Zuma represented (discussed below).
 - d. In addition to the role played by crime intelligence in generating leaks, it is reasonable to believe that the Hawks and NPA have also directly targeted those who are seen as opponents of, or as obstructing, state capture. Pravin Gordhan, currently minister of public enterprises, gave testimony about this before the Commission on Tuesday 20 November 2018¹⁴ (also discussed below).
18. The undermining and manipulation of criminal justice agencies has therefore served directly to protect people associated with corruption and state capture from investigation and prosecution. The most far-reaching evidence provided to the Commission on this issue up to this point has been the testimony by Angelo Agrizzi, the former chief operating officer of Bosasa. If his evidence is taken to be reliable then it points to the conclusion that former president Zuma gave his personal backing and support to attempts to close down the investigation and prosecution of the case against Bosasa:
- a. Part of the evidence introduced at the Commission on 24 January 2019 were copies or photographs of confidential National Prosecuting Authority documents that had been provided by Agrizzi to the Commission's investigators. In his evidence Agrizzi stated that these documents were initially provided to Bosasa via an intermediary (Linda Mti) by high-level officials at the NPA and that the officials concerned (alleged to be advocate Nomgcobo Jiba, advocate Lawrence Mrwebi and Jackie Lepinka) were, to the best of his knowledge, provided with payment in return. (This aspect of Agrizzi's evidence is discussed further below.) However the facts alleged in Agrizzi's testimony, if correct, appear to point to the conclusion that documents and other assistance were not only provided to Bosasa by these officials in return for payment, but also because this was approved of by Zuma. Agrizzi also gave testimony in which he alluded to efforts by Bosasa's chief executive, Gavin Watson, to secure president Zuma's assistance in protecting Bosasa against prosecution.¹⁵ Agrizzi alleged that after a meeting with Zuma, Watson stated that, 'Jiba is the president's man – is the president's person and he is waiting for her to actually make the first move in shutting down the case.'¹⁶ In a recording, alleged to be the recording of a later meeting between Watson, Mti and Agrizzi in May 2015, in which Watson appears to be preparing for a meeting in which he hopes to secure Zuma's further assistance in protecting Bosasa against prosecution, Watson also appears to make a similar statement (referring to Zuma, Watson remarks that, 'He said Jiba is his person.'). He also seems to report that Zuma appears to be concerned about Jiba's public profile ('Jiba is buggered up in the press.').¹⁷

- b. The possibility that attempts to obstruct the investigation against Bosasa had Zuma's blessing is also highlighted by Agrizzi's allegations that Bosasa was provided with confidential NPA documents by Dudu Myeni in September 2015.¹⁸ The documents that Agrizzi provided to the Commission were progress reports from the Anti-Corruption Task Team (ACTT) dated August 2015.¹⁹ Insofar as it may be true that Myeni provided these documents to Bosasa, and that officials in the NPA provided them to her, it is noteworthy that Myeni's power and influence were connected to her personal relationship with then president Zuma.
 - c. In Agrizzi's evidence on 21 January he also alleged that payments to Nomvula Mokonyane had been made in order to secure her assistance, inter alia, 'for the protection from the SIU investigation, the Hawks and the NPA', though Agrizzi testified that he had become disillusioned as he felt that Bosasa was not getting anything in return for these payments.²⁰ Alleged efforts to secure Mokonyane's assistance in trying to ensure that the Hawks 'shut down' the Bosasa case were also referred to in Agrizzi's testimony on 28 January.²¹
 - d. In his evidence on 21 January, Agrizzi also alleged that a man by the name of Sesinyi Seopela had a longstanding arrangement with Bosasa in terms of which he would receive money from Bosasa for the payment of bribes to various people in government.²² According to Agrizzi's evidence, Seopela informed him that those receiving payments from him included people in the NPA.²³ It is not clear from Agrizzi's testimony however which NPA officials were alleged to be receiving bribes from Bosasa. Seopela's arrangement with Bosasa allegedly dated back to as early as 2005/6.²⁴ It is not indicated in Agrizzi's testimony that Seopela's alleged access to the NPA was in any way facilitated, or in any other way supported, by members of the Executive.²⁵
19. Evidence of the role played by criminal justice agencies in ensuring impunity for those alleged to be directly involved in state capture was also provided on Friday 24 August 2018 in the evidence by former deputy minister of finance Mcebisi Jonas. In his evidence Jonas referred to events in June 2016 in which a senior Hawks official, Major General Zihle Mnonopi, allegedly asked him to assist in closing an investigation into how Ajay Gupta allegedly tried to bribe him to accept the post of finance minister. This followed a March 2016 media report about the alleged bribery attempt. Following the report a case had been opened against Ajay Gupta by David Maynier of the Democratic Alliance. The following week evidence from former ANC MP Vytjie Mentor and former government spokesperson and head of the Government Communication and Information System, Themba Maseko, also raised questions about the Hawks acting in an apparently partisan and politically motivated manner. The lodging of disciplinary charges against prosecutor Glynnis Breytenbach in 2012 not only served to prevent Breytenbach from pursuing the criminal charges against Richard Mdluli but also to obstruct prosecution of Imperial Crown Trading (ICT), a company that by that time was linked to the Gupta family and Jacob Zuma's son Duduzane.²⁶
20. The process of manipulation of South Africa's criminal justice agencies that is the focus of this submission has therefore had a symbiotic and reciprocal relationship with the process of state capture.

Continuities from the Mbeki era

21. This submission focuses on the Zuma era. However, though state capture is associated with the Zuma era, it is important to note that there are continuities between the Zuma era, and those of Zuma's predecessors, regarding the relationship between the Executive and criminal justice agencies. This submission will not elaborate on this point in detail but some of the issues around which comparisons can be made are highlighted.
- a. Utilisation of the presidential prerogative to make senior appointments: During the Mbeki era the major appointments to positions of leadership within the key criminal justice agencies were ANC members. These included those of Bulelani Ngcuka (National Director of Public Prosecutions (NDPP) from July 1998 until he resigned in July 2004), Jackie Selebi (national commissioner of the SAPS from January 2000 until placed on 'special leave' in January 2008) and Vusi Pikoli who was appointed as NDPP in

February 2005. As provided for in the constitution, these appointments were made by the president. The appointments were also in line with the ANC deployment process of putting ‘people who had been in [the] struggle or had been sympathetic or who were wanting to use their professional skills for a new South Africa’ into the civil service, which at that time was ‘occupied by people from the apartheid era’.²⁷ Appointing party members was seen as a way of ensuring that people who shared the principles and vision of the governing party were positioned to drive the process of transformation. Those who were appointed by Mbeki were consistently people who were highly regarded and had credible records of service to the liberation struggle or the new democratic government. For those who perceived the ANC at that time as embodying the national interest, it appeared reasonable to claim that these appointments were being made in the interests of the country and not purely those of the ANC, or its dominant faction. However the manner in which these appointments were made institutionalised the practice by means of which senior appointments were made exclusively at the president’s prerogative. The basis on which people were selected was therefore never clearly defined. In addition, though ‘political appointments’ should not be reduced to appointments intended to enforce law selectively, the practice had conflicting loyalties embedded within it. There is a fine line between this type of practice and appointing people to apply the law in a biased and selective manner. Notwithstanding principles of loyalty to the constitution embedded in oaths of office, implicit to the practice is an ambiguity about to what degree the job of ‘cadres’ is to serve the ANC, a faction within it, its president, or to give effect to the constitution. Furthermore the consequence of ‘deployment’ was that the politics of the ANC was carried into state agencies. It is therefore not surprising that the rivalries within the ANC were also played out in power struggles within key state agencies, something most visibly demonstrated in developments in the intelligence agencies during the Mbeki era.²⁸

- b. A consistent feature of the Mbeki and Zuma eras has been Executive disapproval of, and interference to prevent, the prosecution of apartheid-era crimes that were classified as gross human rights violations by the Truth and Reconciliation Commission. The Promotion of National Unity and Reconciliation Act 34 of 1995 (‘the TRC Act’), passed in line with the interim constitution (Act 200 of 1993), provided for amnesty to be given subject to certain conditions. Implicit to the act was that ‘criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty’.²⁹ Many of those who applied for amnesty had already been convicted. However, after finalisation of the amnesty process, the TRC handed over files of 300 cases that had not yet been subject to prosecution. Prior to the finalisation of the TRC process, some prosecutions for apartheid-era gross human rights violations had already commenced.³⁰ Subsequently there have been only seven such prosecutions, with some of these a consequence of extensive efforts by families of the victims to ensure that justice is done.³¹ Evidence is that former NDPP Vusi Pikoli faced direct pressure not to pursue prosecutions for these crimes and that Thabo Mbeki ‘was considering measures to prevent prosecuting those who had not applied or were denied amnesty at the TRC’.³² In the period since Mbeki’s removal from power in 2008 however the indications are that the Executive has continued to discourage such prosecutions.
- c. Questions around the investigation of the arms deal: In late 2000 and early 2001 Mbeki vigorously opposed involvement of the Heath Special Investigating Unit in the arms deal investigation.³³ The Heath SIU may be seen to have been the most independent of the investigative agencies in existence at that time. This therefore raises questions about Mbeki’s motivation for opposing its involvement in the investigation. While the Scorpions came to enjoy a reputation for ‘fearlessness’ partly for their rigorous investigation into Zuma’s alleged involvement in arms deal-related corruption, there are questions about whether they indeed pursued all of the allegations relating to arms deal-related corruption with equal vigour.
- d. The suspension of Vusi Pikoli in September 2007: This episode is referred to below in this submission in relation to the issue of removal from office of senior criminal justice officials. There are different views of this issue with many people, including Pikoli, taking the view that the disciplinary process against him was initiated to prevent him from pursuing the charges against the then national commissioner

of the SAPS, Jackie Selebi.³⁴ However it may be noted that the inquiry into Pikoli's fitness for office did not accept his 'assertion that the reason for his suspension was to stop the prosecution of the National Commissioner'.³⁵

- e. Political influence on NPA decision making was documented in recordings of conversations that took place between Bulelani Ngcuka (at that time a former NPA NDPP) and Leonard McCarthy (then head of the Scorpions) in November and December 2007. These recordings were first publicised when the corruption charges were withdrawn against Jacob Zuma in April 2009, and were subsequently the focus of legal contestation in what has come to be referred to as the 'spy tapes' saga.³⁶ This episode also raises questions about illegitimate interference in criminal justice decision making.
22. It is clear that control of the criminal justice agencies has become fundamental to the ability of South Africa's leaders to exercise power, above all it seems because of the power that it provides in relation to internal party rivalries. As the writer and academic Jonny Steinberg put it, 'controlling the agencies' that investigate corruption has become 'a crucial tool of control inside the ANC. For the question of whom criminal justice agencies went after and whom they left alone became critical to determining who would control the ANC in the near future. The discretion of the leaders of investigative agencies became explosively political'.³⁷
 23. Over a sustained period the ruling party has therefore demonstrated an inconsistent and ambivalent approach to the rule of law and supremacy of the constitution. The Executive in particular has not always acted in a manner consistent with the principles of equality before the law and the rule of law that are embedded in the constitution. Nevertheless, while there is evidence of inconsistencies in this regard during the Mbeki era, as this submission highlights, during the Zuma era manipulation of criminal justice agencies was practised consistently and aggressively and reached a level where the interests of the country in addressing crime and corruption were entirely subordinated to the interests of Zuma, in enjoying impunity, and of the ruling faction of the ANC, in retaining power.

Section C: Criminal justice agencies and the investigation of corruption

Criminal justice agencies

24. The key criminal justice agencies that are the focus of this submission are:
- a. The South African Police Service (SAPS) including their intelligence division. The national commissioner is the head of the SAPS.
 - b. The Directorate for Priority Crime Investigation (the Hawks). The Hawks are a directorate within the SAPS. From the point at which they were established in 2009 the issue of whether the Hawks enjoyed 'sufficient structural and operational autonomy' to shield them from 'undue political influence'³⁸ was the subject of ongoing legal contestation. As a consequence various changes have been made to the legislative framework governing the Hawks and as a result the legal framework now provides the Hawks with a high level of autonomy from the SAPS. The head of the Hawks is, in general, not subject to the authority of the SAPS national commissioner.³⁹
 - i. The predecessor to the Hawks was the Directorate of Special Operations (the Scorpions) which was an investigating directorate within the National Prosecuting Authority. The legislative provisions in terms of which the Scorpions had been established were repealed when legislation providing for the Hawks was passed in 2008.⁴⁰ The process by means of which the Scorpions were disbanded and the Hawks established in their place involved claims by those aligned with Zuma that the Scorpions were subject to political manipulation and that the corruption charges that Zuma was facing were politically inspired. However there was obviously a high degree of cynicism behind these claims. In the wake of the destruction of the Scorpions an environment has been created that has facilitated gross manipulation of the criminal justice agencies. As outlined in this proposal this has been achieved primarily through the manner in which the Executive has utilised its powers, or otherwise intervened, in respect of the appointment and removal of senior leaders within these agencies.
 - c. The National Prosecuting Authority (NPA). The National Director of Public Prosecutions (NDPP) is the head of the NPA.
 - i. In addition to providing for the NPA to institute prosecutions, Section 7 of the NPA Act (32 of 1998) also provides for the president, by proclamation, to establish investigating directorates in the office of the national director. In the event that such directorates are established, the NPA is also authorised, by Section 28 of the act, to carry out investigations.
 - d. The Independent Police Investigative Directorate (IPID). IPID is headed by an executive director.
 - e. The legislative framework pertaining to the Hawks forms part of the South African Police Service Act.⁴¹ The National Prosecuting Authority⁴² and the Independent Police Investigative Directorate⁴³ are each governed by their own acts.
25. In this submission criminal justice agencies are understood as agencies that have formal powers related to the process of arresting, detaining and/or prosecuting people on the basis that they are alleged to have committed crimes. These powers are provided for, and limited by, parts of Section 35 of the constitution as well as the Criminal Procedure Act (Act 51 of 1977) and other legislation. In referring to these powers, specifically the powers of the NPA, the Supreme Court of Appeal (SCA) has said that, 'It hardly needs stating that these are awesome powers and that it is central to the preservation of the rule of law that

they be exercised with the utmost integrity. That must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice.'

26. This submission does not focus on the Judiciary. The Judiciary is typically regarded as part of the 'criminal justice system'. However, while the police and prosecuting authority are part of the Executive arm of government, the Judiciary is a separate arm in terms of the principle of separation of powers as reflected in Section 165(2) of the constitution. This submission focuses on specific criminal justice agencies rather than the criminal justice system as a whole. The importance of the criminal justice agencies that are the focus of this submission is that they are involved in a process that culminates in cases being presented in court with the intention that those who are found guilty will be subjected to imprisonment or other types of sanctions. The power to determine guilt or innocence, and to impose sanctions, is however exercised by the courts.

The investigation of corruption

27. South Africa does not have a dedicated anti-corruption agency that carries out investigations into allegations of corruption with a view to charging and prosecuting those allegedly involved in it.
- a. Policy documents refer to South Africa having a 'multi-agency anti-corruption' system in which there are a range of bodies that contribute to addressing corruption.⁴⁴
 - b. All of the criminal justice agencies referred to above, as well as the SIU, Asset Forfeiture Unit (situated within the NPA), Public Protector, South African Revenue Service (SARS) and the State Security Agency (SSA), among others, may be regarded as part of this multi-agency system.⁴⁵
 - c. Nevertheless, in Constitutional Court judgments on the matter, the Hawks are identified as the agency through which South Africa fulfils its obligations in terms of the constitution and international law, to establish 'effective bodies for fighting corruption'⁴⁶ This is in part a reflection of the fact that the Hawks were established as a successor to the Scorpions and that the Scorpions were involved in a number of high-profile investigations into corruption. However the legislative mandate of the Hawks is a broad one. In terms of Section 17B(a) of the SAPS Act (68 of 1995), the establishment of the Hawks is founded on the need to establish a directorate in the SAPS to 'prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption'. In line with the manner in which their responsibilities are defined, the Hawks have established three components for investigating 'serious organised crime', 'serious commercial crime', and 'serious corruption' respectively. The available evidence suggests that the Hawks have not invested significant resources in developing their capacity to investigate 'serious corruption', and that the 'serious corruption' component is relatively ineffectual and has primarily focused on corruption cases involving rank and file public servants.⁴⁷
 - d. In practice the agency that best qualifies as a dedicated anti-corruption agency is the Special Investigating Unit. Though its mandate is also diverse (it refers for instance to 'serious maladministration'), in practice virtually all investigations carried out by the SIU have been focused on forms of financial crime and misconduct involving state resources, that may be regarded as corruption (if the term is broadly understood as the abuse of public power for private gain). However the SIU operates primarily in the domain of civil law.⁴⁸ In terms of the approach taken in this submission it does not qualify as a criminal justice agency.
28. Government also established the Anti-Corruption Task Team (ACTT)⁴⁹ in 2010.⁵⁰ This includes the Hawks, the NPA, the SIU and SARS as members, among others. Information on whether the SAPS itself is part of the ACTT is inconsistent⁵¹ and IPID and the Public Protector are not part of the ACTT. Through participation in the ACTT, agencies such as the SIU may feed quite directly into the process of criminal investigation.⁵² Nevertheless the officials of the criminal justice agencies are the ultimate gatekeepers over decisions to expedite the criminal justice process by arresting, charging and prosecuting alleged law breakers.

Section D: The constitutional and legal framework pertaining to the independence of criminal justice agencies

29. The principle that all are subject to the law and that no one should enjoy impunity against the operation of the law is a fundamental principle of the South African constitution. It is embedded in:
 - a. Section 1(c) of the constitution which provides for 'Supremacy of the Constitution and the rule of law'.
 - b. Section 3(2)(b) of the constitution which provides that all citizens are 'equally subject to the duties and responsibilities of citizenship'.
 - c. Section 9(1) of the constitution which states in part that 'Everyone is equal before the law'.
30. The constitution confers independence on the courts in order to enable them to give effect to the principle of equal application of the law. This is reflected in Section 165(2) of the constitution which provides that, 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'
31. Similar wording is used in Section 179 with respect to the National Prosecuting Authority (the constitution refers to the 'prosecuting authority'). Section 179(4) says that, 'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.' In line with the constitution, Section 32(1)(a) of the NPA Act (32 of 1998) requires members of the prosecuting authority to carry out their duties without fear, favour or prejudice, and subject only to the constitution and the law. The Constitutional Court has also stated that section 179(4) of the constitution 'requires that there be national legislation which guarantees the independence of the prosecuting authority'.⁵³
32. The main legislative provisions regarding the Hawks are to be found in Section 16 and in Chapter 6A of the SAPS Act (68 of 1995). Section 16 was initially amended, and Chapter 6A inserted, by the SAPS Amendment Act (57 of 2008), the legislative provision that provided for the establishment of the Hawks. Chapter 6A provides, inter alia, that there is a need to ensure that the directorate 'has the necessary independence to perform its functions'.⁵⁴ However subsequent to the establishment of the Hawks, a 2011 judgment by a majority of the Constitutional Court held that the SAPS Act did not adequately protect the independence of the Hawks.⁵⁵ As a consequence the legislation was amended by Parliament in 2012.⁵⁶ In addition, in a further judgment in 2014, the court struck down provisions of the amended act that compromised the Hawks' independence.⁵⁷
33. By virtue of Section 206(6) of the constitution which refers to 'an independent police complaints body established by national legislation', it is also accepted that the independence of the Independent Police Investigative Directorate is constitutionally protected.⁵⁸
34. The independence of the NPA, the Hawks and IPID is therefore either explicitly or implicitly protected by the constitution. These agencies are therefore part of the Executive arm of government but the constitution (explicitly or by implication) upholds their right to operate independently. Implicitly the purpose of securing independence for these agencies is to protect them from 'undue influence'⁵⁹ in order to uphold the principles of the rule of law and equality before the law that are fundamental to the constitution. (Of the other agencies referred to above, the only other one whose independence is explicitly protected is the Public Protector. This is by virtue of it being a Chapter 9 institution.)

35. The principal Constitutional Court judgments on the issue of independence recognise that these bodies cannot be and should not be absolutely independent. In its 2011 judgment on the legislative framework pertaining to the Hawks, the Constitutional Court quoted with approval a report by the Organisation for Economic Co-operation and Development (OECD) which states, inter alia, that, 'One of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting "pre-emptive obedience".'⁶⁰ In its judgment the court therefore stated that 'to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence'.⁶¹ The question of independence is therefore not one of absolute independence but is understood to be one of 'the necessary', or sufficient or adequate independence.⁶²
36. The SAPS is the only one of the four criminal justice agencies that are the focus of this submission whose independence is not expressly constitutionally protected. Nevertheless SAPS members are clearly also subject to the constitution (see Sections 4 and 199(5)) and the Bill of Rights (see Section 8(1)) and thus should be guided by the principles of the rule of law and equality before the law that are embodied in it. What differentiates the SAPS from the other three agencies is therefore merely that the constitution does not provide its members with additional protections against manipulation and undue influence.
37. The 2011 and 2014 Constitutional Court judgments regarding the Hawks have been followed by other court judgments that have built up a body of law in relation to the attributes that an agency requires in order to have the necessary independence.⁶³ Collectively these judgments identify a number of factors that are critical to whether or not an agency enjoys sufficient independence. These factors have included:
 - a. Security of tenure of senior leadership.⁶⁴ This is achieved by providing for clearly defined procedures that provide for the removal from office of senior leadership in a manner that is intended to protect them from arbitrary dismissal.⁶⁵
 - b. Appointment of senior leaders for a single fixed term and prohibition of the renewal or extension of the period of appointment. The potential for renewal or extension are seen as factors that may render them more susceptible to undue influence.⁶⁶
 - c. Provisions preventing interference in the level of remuneration and conditions of service that senior leaders enjoy.⁶⁷
 - d. Autonomy in determining what may or may not be investigated or prosecuted and the exclusion of executive interference or influence over decision making.⁶⁸
 - e. An adequate budget.⁶⁹
38. The current position is that, partly as a consequence of judgments pertaining to the Hawks, IPID and NPA that are referred to in this submission, these three bodies might currently be regarded as to a significant extent enjoying the 'necessary independence'. One limitation in this regard was highlighted in the early months of 2019 in respect of the legal provisions regarding renewal of the contract of the IPID executive director (see further below).
39. However, as highlighted in the following section of this submission, the authority of the Executive in respect of senior appointments in the SAPS, Hawks and NPA has amounted to an 'Achilles heel' with respect to their integrity and independence. Provisions relating to procedures for removal from office have also been undermined.

Section E: Appointment and removal from office of senior leadership

Constitutional and legal provisions regarding senior leadership appointments

40. In its 2011 judgment relating to the Hawks, the Constitutional Court refers to a set of criteria for the independence of anti-corruption agencies, compiled by the Organisation for Economic Co-operation and Development (OECD). One of these 'important elements to prevent undue interference' referred to by the OECD is whether there are 'transparent procedures for appointment and removal of the director'.⁷⁰ Unfortunately the practice in South Africa has been that in virtually all cases, the process that has been followed by the Executive in making appointments has been far from transparent, with it being unclear in what manner the suitability of appointees was assessed (as highlighted below the sole exception to this was the process leading to the appointment of Shamila Batohi as the new NDPP on 1 February 2019).
41. An important characteristic of the constitutional and legal framework in South Africa is that it provides the president or other members of the Executive with the power to appoint many of the senior leaders of the country's key criminal justice agencies. In virtually all cases where this power is conferred (the exception being the appointment of the IPID executive director) the president and Executive are authorised to act unilaterally. With respect to the major criminal justice agencies, the SAPS, the Hawks, and the NPA, the Executive has a virtual monopoly of control over the appointment of the main senior leadership figures.
 - a. In the case of the SAPS:
 - i. The power of the Executive in relation to appointments applies primarily to the appointment of the national commissioner. The national commissioner is appointed by the president (Section 207(1) of the constitution).
 - ii. The constitution also provides for a role for the national Executive in the appointment of provincial commissioners in the event of disagreement between the national commissioner and provincial Executive about this. Section 207(3) of the constitution provides that: 'The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.'
 - iii. Until 2017 the formal provisions therefore authorised Executive influence in relation to the position of national commissioner and provincial commissioners but not in relation to any other appointments. The other major senior leadership positions within the SAPS are those of the deputy national commissioners and divisional commissioners (as with the provincial commissioners these are also at the rank of lieutenant-general). Deputy national commissioner positions are not advertised and are appointed by the national commissioner at his or her discretion. However, as with other positions in the senior management service, divisional commissioner posts are advertised and appointments are supposed to be made by means of a selection process that is regulated by SAPS national instructions subject to regulations that are issued by the minister. Until 2017 the binding regulations were regulations issued in 2008.⁷¹ A notable feature of the regulations passed in 2017 (and amended again in 2018) was that much of the authority in relation to employment matters that had previously been exercised by the national commissioner now required the approval of the minister of police.

This applies both in relation to the appointment of deputy national commissioners and divisional commissioners. Rather than taking care to ensure that appointments are consistently made on merit-based criteria, employment regulations issued during the Zuma era expanded the scope for Executive interference in senior management appointments.

- b. In the case of the Hawks very broad powers are provided to the Executive in respect of senior appointments:
 - i. The national head is appointed by the minister of police 'with concurrence of the Cabinet' (Section 17CA(1) of the South African Police Service Act, 68 of 1995).
 - ii. The deputy national head is appointed by the minister of police 'in consultation with the National Head of the Directorate and with the concurrence of the Cabinet' (Section 17CA(4) of the South African Police Service Act, 68 of 1995).
 - iii. Similarly the provisions pertaining to the provincial heads also provide for the minister to appoint 'in consultation with the National Head of the Directorate and with the concurrence of the Cabinet' (Section 17CA(6) of the South African Police Service Act, 68 of 1995).
- c. With respect to the leadership of the NPA, not only the national director, but a wide range of other senior leadership figures, are all appointed by the president or other members of the Executive.
 - i. The National Director of Public Prosecutions (NDPP) is appointed by the president (Section 179(1)(a) of the constitution; Section 10 of the NPA Act, 32 of 1998).
 - ii. Acting national directors are appointed from the ranks of deputy national directors by the NDPP. However if the office of NDPP is vacant, or the NDPP is unable to make the appointment, the appointment is made by the president (Section 11(2)).
 - iii. Deputy National Directors of Public Prosecutions are appointed by the president, after consultation with the minister and the national director (Section 11).
 - iv. Directors are also appointed by the president after consultation with the minister and the national director (Section 13).
 - v. Deputy directors are appointed by the minister after consultation with the national director (Section 15).
 - vi. Other provisions however apply in respect of acting deputy national directors (Section 11(3)) and acting directors (Section 13(3)).

42. The IPID Act (Act 1 of 2011) also confers major powers on the police minister, in that Section 6(1) provides that, 'The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.' However the act reflects a departure from the above pattern in that it also provides a role for Parliament in the appointment process. Section 6(2) provides that, 'The relevant Parliamentary Committee must, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.' Since 1994 Parliament has functioned in a manner that is largely compliant with the Executive.⁷² Therefore in practice this provision may not amount to a significant limitation on the unilateral power of the Executive over appointments.

- a. The November 2013 announcement by police minister Nathi Mthethwa that Robert McBride was being nominated by cabinet to become the new head of IPID (this followed the resignation of the previous head of IPID in August 2012) indicated that 'the process of appointing a permanent head was carried (sic) through advertising the position via media platforms and various public service circulars' and that 'Mr McBride was the successful candidate following the shortlisting, interviewing processes as well as Cabinet's endorsement'. This would appear to indicate that a competitive process was followed. However it is obviously not a transparent one, with no indication being provided with regard to how eligibility was assessed.⁷³

- b. In the early months of 2019 the legal provisions regarding renewal of the contract of the IPID executive director became the focus of controversy. As indicated above the general position taken by the courts has been that provisions authorising renewal of the contracts of senior leadership figures may compromise independence. Such provisions may encourage senior leaders to modify decisions to ensure that they are viewed in a favourable light by the Executive. As indicated the IPID Act provides for the executive director to be nominated by the minister, subject to this appointment being approved by the relevant parliamentary committee. However while the act allows for renewal,⁷⁴ it is silent on the process to be followed in this regard. In January 2019, minister of police Bheki Cele announced that he would not renew the contract of Robert McBride, IPID's executive director. However McBride has contested Cele's decision, asserting that the minister does not have the authority to make this decision unilaterally and that the decision has to be reviewed, and may be overturned, by the parliamentary committee. As of mid-February 2019 the parties have agreed that Cele's decision not to renew McBride's term is a 'preliminary decision that must still be confirmed or rejected by the Portfolio Committee on Police'. A process has been established to resolve the issue by the end of February 2019.⁷⁵

Appointment of individuals who are manifestly not suited for senior leadership

43. Notwithstanding the legislative provisions and court judgments that have sought to uphold the independence of these agencies, the Executive has considerable powers in relation to the appointment of senior leaders. Implicit within the constitution is the assumption that the Executive will exercise these powers in good faith in order to appoint people who are likely to discharge their responsibilities effectively in line with the constitution. However, notably during the Zuma era, a number of senior appointments were made by the Executive that were apparently intended to ensure that the powers of these agencies were exercised in a selective manner favourable to the Executive.
44. In some circumstances, concerned organisations have been able to contest appointments that appear to be grossly inappropriate through litigation on whether the appointments comply with eligibility criteria.⁷⁶ The two major cases in this regard have focused on:
 - a. The appointment of Menzi Simelane as NDPP in November 2009. The litigation was initiated in December 2009 and eventually culminated in a judgment of the Supreme Court of Appeal (in December 2011) finding that the appointment of Simelane was unconstitutional and invalid.⁷⁷ This was confirmed by the Constitutional Court on 5 October 2012.⁷⁸ The Constitutional Court judgment revolved in part around the question of whether Zuma had applied his mind properly when making the appointment⁷⁹ or inappropriately ignored information pertaining to Simelane's 'credibility, honesty, integrity and conscientiousness'.⁸⁰ The question of whether Zuma had applied his mind in turn arose from the fact that questions about Simelane's integrity had been raised by various formal bodies. These included the Ginwala Commission of Inquiry, established to look into the fitness for office of Vusi Pikoli as NDPP, and a subsequent report of the Public Service Commission.
 - b. The appointment of Berning Ntlembeza as head of the Hawks in September 2015.⁸¹ This culminated in a judgment of the Supreme Court of Appeal on 9 June 2017 in which the court dismissed an appeal against a March 2017 judgment of the Gauteng High Court setting aside the appointment of Ntlembeza. Material to these judgments were a series of decisions by the Gauteng High Court, given in 2015 prior to Ntlembeza's appointment. These related to a dispute over Ntlembeza's decision, taken in January 2015 while he was still serving as acting head of the Hawks, to suspend the Gauteng head of the Hawks, Shadrack Sibiyi. In these judgments the court had repeatedly raised concerns about Ntlembeza's integrity as well as that he had acted in a contemptuous manner towards the court.⁸² (The allegations that provided the putative justification for Sibiyi's suspension were that he had been involved in illegal renditions along with the national head of the Hawks, Anwa Dramat. These allegations are discussed later in this submission.)

45. As reflected below, it is reasonable to argue that the appointment of Richard Mdluli as head of crime intelligence in July 2009, and that of Nomgcobo Jiba as acting NDPP in December 2011, also amounted to the appointment of people who were manifestly unsuitable for these positions. At the time that he was appointed, Mdluli had unresolved murder allegations against him. When Jiba was appointed, there was a disciplinary matter that had resulted in her being placed on suspension. At the end of 2009 she returned to work and the matter was swept under the carpet and was not properly resolved. These cases are discussed below.

Acting appointments – the role played by Nomgcobo Jiba as acting NDPP and after

46. It is reasonable to conclude that the appointment of Nomgcobo Jiba as acting NDPP, in December 2011, was effected on the basis of the understanding that she would perform the function in a manner advantageous to Zuma. The appointment, which ultimately lasted for 21 months, involved taking advantage of the fact that there are no strict legal limitations on the duration of acting appointments.
47. Jiba has herself been the subject of a considerable amount of judicial criticism as well as being the focus of litigation. Much of this relates to allegations of impropriety in the exercise of her powers while she was acting NDPP. One of the matters that has been prominent in this is the December 2011 withdrawal of corruption charges against Richard Mdluli. In this matter she faces allegations alongside her colleague, Lawrence Mrwebi. The two are currently facing a board of inquiry into their fitness to hold office, chaired by Justice Yvonne Mokgoro (retired).⁸³ In respect of Mrwebi the questions around his fitness for office in many ways revolve around the Mdluli matter. However in Jiba's case the questions around her fitness for office revolve much more broadly around her role in the NPA in the period from 2007 onwards.
48. Jiba started working as a prosecutor in 1988 until 1997 when she temporarily left her employment in the NPA. After a period in the private sector during which she qualified as an attorney she rejoined the NPA in 1999 (initially in the Investigating Directorate: Serious Economic Offences) and was appointed as a deputy director in 2001.⁸⁴ Zuma appointed Jiba as a Deputy NDPP in December 2010.⁸⁵ This was somewhat unusual as it involved being promoted by two levels, bypassing the director level.⁸⁶ When she was promoted, she had already become personally indebted to Zuma. Three months earlier, in September 2010, Zuma expunged the criminal record of her husband Booker Nhantsi. In 2005 Nhantsi was convicted of theft for stealing R193 000 worth of trust funds from a client while practising as an attorney. By the time in 2005 when he was convicted, Nhantsi was working for the Scorpions as an advocate. It is reported that Jiba's evidence before his disciplinary inquiry was dismissed as unreliable.⁸⁷
49. When she was appointed as Deputy NDPP Jiba had also already been linked to allegedly irregular actions within the NPA. In December 2008⁸⁸ Jiba was suspended from the NPA, and faced charges of misconduct for dishonesty, unprofessional conduct, conduct unbecoming and bringing the NPA into disrepute. The charges related to her alleged involvement in a police conspiracy to arrest Scorpions prosecutor Gerrie Nel, a colleague of hers in the NPA. The police conspiracy against Nel was intended to sabotage the Scorpions investigation into allegations of corruption against SAPS national commissioner Jackie Selebi. The conspiracy was headed by Richard Mdluli, who was then an SAPS deputy provincial commissioner in Gauteng, and culminated in Nel's arrest in January 2008.⁸⁹ Charges against Nel were withdrawn six days after his arrest on the grounds that there was 'no case to be answered'.⁹⁰ Jiba's suspension led to extended contestation including unsuccessful litigation by Jiba to have the disciplinary action against her declared unlawful.⁹¹ However late in 2009 the disciplinary action against her was dropped by the Acting NDPP Mokotedi Mpshe, allegedly after she approached minister of justice Jeff Radebe to intervene on the matter.⁹² Advocate Mrwebi was also a participant in these matters. It is alleged that there are telephone records showing communication between Mrwebi and both Mdluli and Jiba during the investigation against Nel. This shows that the relationship between the three goes back to this point in time.⁹³
50. A year after her appointment as Deputy NDPP, on 28 December 2011, Jiba was appointed as the Acting NDPP. This was less than a month after the SCA judgment holding that the appointment of Menzi Simelane as NDPP had been invalid (discussed above) as a result of which Simelane was placed on

special leave pending his appeal to the Constitutional Court.⁹⁴ Ten months later, on 5 October 2012, the SCA judgment was confirmed by the Constitutional Court.⁹⁵ Jiba's term as Acting NDPP would last for virtually another full year after the Constitutional Court judgment. The next person to be appointed as NDPP, Mxolisi Nxasana, took office on 1 October 2013.

51. Some of the major questions that have been raised about Jiba relate to events that took place during, or immediately prior to, her term of office as Acting NDPP. Prominent among these are the unlawful withdrawal of corruption charges against Richard Mdluli⁹⁶ in December 2011 and the charging of Johan Booysen, the then KwaZulu-Natal head of the Hawks, for racketeering in August 2012.

Unlawful withdrawal of corruption charges against Richard Mdluli

52. As reflected above both Jiba and Mrwebi had been involved in or connected to the police conspiracy, headed by Mdluli, against Scorpions prosecutor Gerrie Nel. Mdluli had also provided an affidavit in support of Jiba during the disciplinary matter against her. There is also evidence that, on 9 September 2010, Jiba flew to Durban to meet 'someone from the ANC' on a flight on which Mdluli was also a passenger. Jiba's flight was paid for by SAPS crime intelligence.⁹⁷ This was at about the time that Zuma withdrew the charges against her husband and three months before he promoted her to become a Deputy NDPP. The withdrawal of charges against Mdluli therefore needs to be viewed against the fact that there was already an established relationship between Jiba, Mrwebi and Mdluli as well as the priority given by the Executive to appointing Mdluli to head crime intelligence (discussed below) and to protect him from accountability for alleged crimes.
53. The corruption charges against Mdluli at that point were relatively straightforward, relating to transactions that took place in 2010 in which the secret service account had been used to finance a vehicle transaction that allegedly benefited Mdluli personally in various ways. The charges against Mdluli were withdrawn on 4 or 5 December⁹⁸ 2011 by Lawrence Mrwebi who had been appointed by Zuma as a Special Director of Public Prosecutions and head of the Specialised Commercial Crime Unit (SCCU) on 1 November 2011.⁹⁹ The SCCU was responsible for the fraud and corruption case against Mdluli. Mrwebi's decision was ultra vires as the National Prosecuting Authority Act clearly provides that any decision by a special director to discontinue a prosecution needs to be taken with the agreement of ('in consultation with') the director of the area concerned.¹⁰⁰ It was therefore not a decision that he was authorised to take unilaterally.
54. The withdrawal of charges took place a few days after the SCA had found that the appointment of Menzi Simelane as the NDPP was invalid¹⁰¹ and a little over three weeks before Jiba took over as Acting NDPP on 28 December. Though Jiba had not yet been appointed as Acting NDPP it is highly likely that Mrwebi was acting with Jiba's approval when he withdrew the charges against Mdluli. The SCA decision about the invalidity of Simelane's appointment would still be appealed to the Constitutional Court. But after the SCA judgment on 1 December, Simelane would no longer have been in the NPA driving seat. Jiba was not only already superior to Mrwebi in the NPA hierarchy but, according to evidence provided by former NPA prosecutor Glynnis Breytenbach to the Mokgoro Inquiry, it was evident that there was a very close relationship between Jiba and Mrwebi with Mrwebi visiting her frequently in her office after she was appointed Deputy NDPP.¹⁰² As indicated, it would appear that this relationship dated back to the time of the investigation and arrest of Gerrie Nel in late 2007 and early 2008. Evidence that Mrwebi's unlawful decision to withdraw the charges against Mdluli had Jiba's approval is also reflected in the fact that she declined to review¹⁰³ the decision despite sufficient evidence that Mrwebi had acted irregularly and of criminal conduct on the part of Mdluli.¹⁰⁴ In April 2014 the SCA confirmed a High Court order setting aside Mrwebi's decision to withdraw the fraud and corruption charges against Mdluli.¹⁰⁵ At the time when he withdrew the charges against Mdluli, Mrwebi had been in the position of special director and head of the SCCU for little more than a month. Without Jiba's backing it is unlikely that Mrwebi, having only just been appointed special director, would have rushed in to act in this unilateral manner.
55. As will be discussed further, at the same time that NPA prosecutors were being put under pressure by senior members of the NPA to withdraw charges against Mdluli, the acting SAPS national commissioner

was also being pressured by the Executive into withdrawing disciplinary charges against him. (See the section dealing with the appointment of Richard Mdluli for more detail on this as well as the withdrawal of the murder charges against Mdluli.) If it is true that the withdrawal of charges against Mdluli was a 'common cause' of Jiba and Mrwebi, it would also appear to be true that their approach to the matter was aligned with the desire of the Executive to protect Mdluli from prosecution.

56. At the Mokgoro Inquiry the approach taken by Jiba and Mrwebi in justifying the decision to withdraw, and Jiba's failure to review the decision, was that the withdrawal was provisional. This was due to the fact that the matter required further investigation. However the evidence is that this was not provided as a justification for withdrawing the charges at the time. Instead Mrwebi maintained that the investigation fell under the jurisdiction of the Inspector-General of Intelligence despite staff from the inspector-general's office confirming that this was a matter that should be investigated by the police. Furthermore the Hawks investigating officer, Colonel Kobus Roelofse, has been adamant that the docket was court-ready. He was also not consulted by Mrwebi before the charges were withdrawn despite this being standard practice.

The charging of Johan Booyesen

57. At face value there is a striking contrast between the Mdluli matter and the Booyesen matter. In the Mdluli matter high priority was given to ensuring that Mdluli did not face charges despite the fact that, according to Colonel Roelofse's evidence, the case was clearly court-ready. By contrast in the Booyesen matter the evidence may be seen to indicate that high priority was given to charging Booyesen with racketeering, despite the fact that there was no evidence that would provide the basis for a coherent case against Booyesen at the time that the charges were instituted. A common feature of the two matters is that they were both characterised by direct intervention by the then police minister Nathi Mthethwa. In the Mdluli matter there is evidence of direct involvement by Mthethwa, in ensuring that Mdluli enjoyed impunity against disciplinary charges. In relation to the Cato Manor matter, in connection with which Booyesen was charged with racketeering, there is evidence of direct involvement by Mthethwa in ensuring that the case was treated as a matter of urgency.¹⁰⁶
58. Jiba's alleged responsibility regarding the matter is related to the fact that while the NDPP is generally not involved in making decisions about whether or not to charge people, the Prevention of Organised Crime Act¹⁰⁷ requires that charges of racketeering have written authorisation from the National Director of Public Prosecutions.¹⁰⁸ Jiba's authorisation in this matter was signed on 17 August 2012. The view that Jiba had acted irregularly in the matter was given considerable impetus by a February 2014 judgment in the Durban High Court which found that Jiba's authorisation did not make sense in terms of 'the least stringent test for rationality imaginable'.¹⁰⁹ Booyesen was also cleared of wrongdoing in a subsequent police internal disciplinary inquiry, headed by advocate Nazeer Cassim SC, which concluded that '[t]he facts demonstrate an agenda to get rid of Booyesen because he was perceived (rightly so, I may add), as a determined, professional, competent, and tenacious policeman'.¹¹⁰ Cassim's judgment is aligned with the widespread perception that the motivation for charging Booyesen was in order to neutralise an investigation on corruption matters which, inter alia, implicated Thoshan Panday, an associate of Zuma.
59. But the court judgments are not all one-sided. In September 2016 the Pretoria High Court rejected the idea that Jiba had acted 'mala fides' or with an 'ulterior motive' in authorising the charges against Booyesen, and appeared to accept that Jiba had reasonable grounds for doing so.¹¹¹ At face value the case was also one that was worthy of prioritisation as it involved the alleged murder of 28 people by members of the Cato Manor Organised Crime Unit. Nevertheless there is evidence that appears to suggest that Jiba's interest in and involvement in the case was unusual in various respects, inter alia in that, without his knowledge, she allegedly excluded the KwaZulu-Natal Director of Public Prosecutions from any authority over decision making,¹¹² claimed without justification that the KZN DPP had asked for a national prosecuting team to be appointed,¹¹³ and circumvented the established procedure within the National Prosecuting Authority for approving racketeering authorisations.¹¹⁴

60. The fact that the case involved the alleged murder by police of 28 people does not necessarily account for the fact that it was treated as such a high priority by Jiba. The NPA does not consistently pursue cases involving large numbers of killings by the police with anything like the degree of urgency that was initially applied in the Cato Manor matter. On 16 August 2012, the day before Jiba authorised the racketeering charges against Booyesen, members of the SAPS shot dead 34 men, most of them striking mineworkers, at the Lonmin platinum mine in Marikana. As of February 2019 it is more than three and a half years since the release of the report of the inquiry into the massacre. As yet the NPA has not clarified whether it will charge any members of the SAPS for the massacre. Similarly the Cato Manor case, first lodged in August 2012, remains in a type of legal limbo (in October 2018 it was adjourned until 4 October 2019).¹¹⁵ Though this is partly due to delays that have been requested by the defence, there appears to be little importance attached to the case by the NPA. This reinforces the impression that the urgency that was attached to the case was motivated by the desire to neutralise Booyesen.

Allegations of Angelo Agrizzi at the State Capture Commission

61. As indicated above there are also very serious allegations, in which Jiba and Mrwebi are both alleged to be implicated, that were made to the State Capture Commission by Angelo Agrizzi, the former COO of Bosasa. Agrizzi provided copies or photographs of confidential NPA documents to the Commission. In his evidence he stated that these documents were initially provided to Bosasa by senior officials at the NPA, via an intermediary, Linda Mti. Mti had previously been the national commissioner of the Department of Correctional Services and was implicated, along with senior Bosasa officials, in a Special Investigating Unit report on corruption in the department. Agrizzi's testimony was that these documents were initially provided to Mti by high-level officials at the National Prosecuting Authority and that the officials concerned were Jiba, Jackie Lepinka and Mrwebi. Lepinka had previously worked for Mti but at this time she was working at the NPA as a senior assistant to Jiba in the office of the NDPP.¹¹⁶ Agrizzi's evidence was that Bosasa provided Mti with cash in order to pay Jiba, Lepinka and Mrwebi. Agrizzi's evidence was that Mti's meetings were typically only with Jiba and Lepinka.¹¹⁷ However many of the documents that Agrizzi received appeared to have emanated from the SCCU environment and his evidence is therefore consistent with the possibility that Mrwebi was also directly involved. According to Agrizzi, Jiba and Lepinka would not only provide Mti with documents but also with information about the 'detailed statuses' of the case against Bosasa.¹¹⁸
62. It is not clear from transcripts of the hearings when, according to Agrizzi, Bosasa started receiving documents from the NPA. Some of the documents provided by Agrizzi for instance appear to have been received in 2010 prior to Mrwebi being appointed to head the SCCU.¹¹⁹ Two documents dated February 2010 (65, 66) are correspondence between SCCU prosecutor Glynnis Breytenbach and NDPP Menzi Simelane in which Simelane instructs Breytenbach to terminate NPA involvement in the Bosasa matter and refer it back to the SAPS.¹²⁰ A document of March 2009 also reflects a report from Simelane in which he appears to go to great lengths to discredit the SIU investigation into Bosasa.¹²¹ In his testimony Agrizzi referred to the 'assistance of advocate Menzi Simelane in helping us shut [the investigation] down' suggesting that, possibly prior to the alleged involvement of Jiba, Lepinka and Mrwebi, there was direct involvement by Simelane in attempting to derail the case against Bosasa.¹²² A November 2010 internal memorandum addressed to Simelane from advocate Marijke de Kock provides information on the status of the Bosasa investigation and highlights apparent problems with the SIU investigation.¹²³ From later testimony provided by Agrizzi¹²⁴ and later documents emanating from De Kock,¹²⁵ it appears that the highlighting of problems by De Kock may have been based on genuine concerns rather than being motivated by a wish to derail the SIU investigation.¹²⁶ However, the documents appear to show that Menzi Simelane pursued the objective of obstructing and shutting down the Bosasa investigation. The subsequent documents, referred to below, and related testimony provided by Agrizzi, appear to demonstrate that Jiba and Mrwebi carried forward Simelane's efforts in this regard.
63. Subsequent to the November 2010 internal memorandum there are a series of documents that are referred to during Agrizzi's testimony. Those that are dated cover the period October 2011 to August

2013. This period overlaps significantly with the period in which Mrwebi was appointed to head the SCCU (1 November 2011) and in which Jiba was promoted from Deputy National Director to Acting NDPP (28 December 2011) until Jiba's period as acting NDPP ended (30 September 2013). The documents include a number from the SCCU environment focusing on the Bosasa investigation, many of them written by De Kock. Various documents are allegedly related to assistance that was being provided to Bosasa, from within the NPA, relevant to strategising on how to obstruct the possibility of investigation and prosecution of Bosasa. Notable among these is a copy of an email from Jackie Lepinka to Silas Ramaite (a Deputy NDPP) and Mrwebi, written on behalf of Jiba, dated 22 November 2012. The email is accompanied by an email chain which refers to a meeting to be held on 22 November to review some cases including Bosasa.¹²⁷ The email of the 22nd may be a follow-up to the meeting and is concerned with Jiba's request for a status report on a number of cases that is to be provided by 28 November. Agrizzi indicates that when he received the printed copies of the emails from Mti, Mti told him that 'they cannot just isolate and close down the Bosasa case. It would raise too many concerns so they would have to do it as part of five other cases'. (98) In other words the review of the five cases is, according to Agrizzi, a subterfuge to close down the Bosasa case. The email from Lepinka indicates that it is the opinion of Jiba that the Bosasa case has gone on for too long, that there is no prospect of a conviction, and that it constitutes fruitless and wasteful expenditure.¹²⁸

64. Notwithstanding this alleged initiative to bring an end to the prosecution of Bosasa it appears that NPA prosecutors continued to pursue the prosecution of Department of Correctional Services (DCS) and Bosasa personnel. A document on the letterhead of the SCCU dated 26 November 2012 indicates that there is a clear case against some DCS personnel but says there will still be a delay before it is ready for enrolment.¹²⁹ A further progress report from advocate De Kock to advocate Mrwebi dated 30 April 2013 says it should be possible to enrol the matter during 2013.¹³⁰ A draft charge sheet against one of the DCS personnel, dated 30 April 2013, and a draft of a proposed memorandum¹³¹ for the lodging of racketeering charges against Bosasa personnel in terms of the Prevention of Organised Crime Act, dated 8 August 2013, are also among the documents. According to Agrizzi's evidence this document was received by him in mid-August 2013.¹³²
65. In addition to the copies of what appear to be formal NPA documents, and internal email correspondence, there are also some handwritten notes included in the series of documents provided by Agrizzi, that are contemporaneous notes from two meetings that Agrizzi allegedly had with Linda Mti. According to Agrizzi's evidence the first meeting was in effect a report from Mti to Agrizzi about a recent meeting with Jiba and Lepinka. Allegedly the points that are recorded on the note are advice that Mti received from Jiba and Lepinka on legal steps that Bosasa should take to get the case against it closed down.¹³³ The second note reflects steps that had allegedly been taken to follow up on the previous meetings. According to Agrizzi's evidence, he had requested that the attorneys draft a motivation for prosecutors to issue a declaration that they would not pursue the Bosasa matter any further (a *nolle prosequi*). Agrizzi alleges that he had provided the written motivation from the attorneys to Mti. Allegedly Mti had then discussed it with Jiba and Lepinka. They allegedly provided further directions to Mti on how Bosasa should motivate for the case against them to be closed down. Agrizzi was told categorically that the advice originated from Mti's meeting with Jiba.¹³⁴ According to Agrizzi the first of these meetings took place in 2013.¹³⁵ The impression created is that the second meeting took place fairly soon after the first, though dates are not provided. The meetings, if they did take place, would therefore have taken place towards, or shortly after, the end of Jiba's term as Acting NDPP on 30 September 2013.
66. Evidence provided to the Commission on 24 January also included the recording of part of an alleged conversation between Gavin Watson, Linda Mti and Angelo Agrizzi which is reported to have taken place on 8 May 2015. Agrizzi was asked to interpret some aspects of the conversation by the commission. On his interpretation, which at face value appears to be consistent with transcripts of the recording, in this conversation Gavin Watson claimed, *inter alia*, that Jiba 'wanted to get the docket ... because she wanted to close it up' but that Anwa Dramat, a former head of the Hawks, would not release the docket to her¹³⁶ and that 'Jiba had tried to take Adv de Kock off the case'.¹³⁷ (It may be noted that, if Watson indeed made

these remarks – something that is apparently clearly reflected in the recording – and his information was correct, then the implication is that he would have been referring to events that had taken place some months, or years, prior to this meeting. Anwa Dramat was suspended as head of the Hawks roughly four months prior to this meeting in December 2014. Mxolisi Nxasana had taken over from Jiba as NDPP 18 months prior to this meeting on 1 October 2013. She nevertheless continued to have influence in the NPA as she remained a Deputy NDPP. It is not clear whether Watson’s reported claims in relation to Jiba would have been referring to the period when she was still acting NDPP or to the period after this.)

67. The fact that it is alleged that Jiba was one of the people involved in providing NPA documents to Bosasa during a period that coincided with her role as Acting NDPP (28 December 2011 to 30 September 2013) raises a question about the source of documents allegedly provided to Dudu Myeni in the August-September 2015 period. As indicated, on 23 September 2015, Agrizzi was also allegedly provided with confidential NPA documents by Myeni¹³⁸ including an August 2015 progress report on the DCS/Bosasa investigation reports from the Anti-Corruption Task Team (ACTT).¹³⁹ In so far as it may be true that she provided Bosasa with NPA documents it is likely that her access to these would have been facilitated by NPA personnel at the very highest level. Though this was during the tenure of Shaun Abrahams as NDPP, Jiba maintained her position in the NPA as Deputy NDPP. In relation to the allegation that she provided documents and information to Bosasa during her tenure as Acting NDPP, this raises the possibility that she may also have been the source of the documents at this time.

Replacement of the KZN Acting Director of Public Prosecutions

68. During interviews that were being conducted in November 2018 by the selection panel, appointed to advise President Cyril Ramaphosa on suitable candidates for the office of NDPP, advocate Simphiwe Mlotshwa alleged that Jiba had convened a meeting at which she put pressure on him to drop corruption-related charges against KwaZulu-Natal MEC Mike Mabuyakhulu and Legislature speaker Peggy Nkonyeni in what is known as the ‘Amigos’ case.¹⁴⁰ At the time, in early 2012, Mlotshwa was Acting Director of Public Prosecutions in KwaZulu-Natal.¹⁴¹ It would appear that it was because of his refusal to submit to pressure from Jiba that he was removed from the position of Acting DPP for KwaZulu-Natal in July 2012. Advocate Moipone Noko was then, in July 2012, appointed as Acting KZN DPP in Mlotshwa’s place. Within roughly a month, in August 2012, Noko then withdrew the charges against Mabuyakhulu and Nkonyeni.¹⁴² A year later, as from 1 September 2013, Noko was appointed as the KZN DPP.¹⁴³
69. In his subsequent appearance before the Mokgoro Inquiry into the fitness for office of Jiba and Mrwebi, the evidence provided also appeared to show that, without his knowledge, Mlotshwa had been excluded from the Booysen investigation, and that this had been handed over to a prosecution team from other provinces. Mlotshwa had refused to sign an indictment against Johan Booysen without a prosecutorial memorandum attached to it.¹⁴⁴
70. The evidence appears to be consistent with the conclusion that Mlotshwa was removed as Acting DPP because he was unwilling to comply with political manipulation of prosecutorial decision making. Appointments to the position of Acting DPP are supposed to be made by the minister of justice ‘after consultation with’ the NDPP.¹⁴⁵ The implication is therefore that if Jiba played a role in the removal of Mlotshwa from the position of Acting DPP, this was through the input that she provided to the minister. (Press reports in July 2012, shortly before Noko replaced Mlotshwa as Acting DPP, also indicated that Mrwebi had been actively involved in efforts to ensure that the charges against Mabuyakhulu and Nkonyeni were dropped.)¹⁴⁶
71. At the time that Noko was appointed as Acting DPP the NPA denied that this was motivated by Mlotshwa’s refusal to withdraw the charges against Mabuyakhulu and Nkonyeni and stated that ‘it was public service policy not to keep acting appointees in their post for longer than a year’. However strict conformity to this policy was obviously not a priority as Mlotshwa had already been in the position for two years.¹⁴⁷ It is reasonable to conclude that the KZN DPP position was maintained as an ‘acting’ position as this would enable a ‘non-compliant’ incumbent to be removed easily. Once it became apparent that

Mlotshwa would not be compliant in the manner required he was removed from the post. On the other hand, inter alia after withdrawing the 'Amigos' prosecution, Noko was appointed to the full DPP position. It is likely that the Executive would have given high priority to ensuring that the KZN DPP position was filled by someone who was regarded as 'reliable' as the KZN DPP would potentially have influence over decisions about the charging of Zuma himself.

The spy tapes case

72. Another matter that has been the subject of some controversy concerns Jiba's response to litigation requesting that the NPA be ordered to provide the record of proceedings regarding then Acting NDPP Mokotedi Mpshe's April 2009 decision to discontinue the prosecution against Jacob Zuma on corruption charges.¹⁴⁸ However the courts have reached different conclusions on this matter.¹⁴⁹ From remarks made by the evidence leader at the Mokgoro inquiry it also appears that Jiba's actions in this case may be defensible on the basis that she took a course of action that was required of her by law and was in line with legal opinion that she had received.¹⁵⁰ The fact that the manner in which she conducted herself in this matter was consistent with what someone would have done if they wished to protect Zuma from being prosecuted on the corruption charges is therefore not necessarily something that she can be criticised for. Nevertheless it also does not show her to have acted in a manner independent of what the Executive would have wanted her to do. The challenge in Jiba's case is to find any evidence that she ever acted in a manner that was consistent with principles of prosecutorial independence but that did not have Executive approval.

General remarks regarding appointment of Jiba as acting NDPP

73. As indicated above testimony by Angelo Agrizzi, as well as tape recordings, appear to show that Bosasa chief executive Gavin Watson reported that Zuma had said to him that 'Jiba is his person'. The available evidence is consistent with the conclusion that this may be an accurate characterisation. It may nevertheless also be true that, following the debacle around Mrwebi's withdrawal of charges against Richard Mdluli, Jiba took care to ensure that her actions, at least insofar as these faced the possibility of review and scrutiny in the public domain, were outwardly clothed in a cloak of legality. It would also appear to be true however that Jiba was viewed as pivotal to the exercise of Executive influence at a time that there was a clear agenda to subvert the criminal justice agencies. Her appointment as acting NDPP can reasonably be viewed in this light. There is an allegation from Angelo Agrizzi that Bosasa was providing money to Linda Mti for payment to Jiba, Mrwebi and Lepinka. However the broader picture is that Jiba in particular was appointed to perpetuate a policy of selective prosecution. This suggests that the payment of bribes would not necessarily have been a precondition for Bosasa to receive favourable treatment.

Reasons for the removal of Mxolisi Nxasana

74. It would appear that Zuma was in favour of retaining Jiba as acting NDPP though he realised that he could not appoint her permanently because if he did he would be likely to face litigation, similar to that which he had faced in the Simelane matter, around her suitability for office. In July 2013 the Council for the Advancement of the South African Constitution (CASAC) filed papers in the Constitutional Court asking for a declaration by the court that Zuma had failed in his constitutional obligation to appoint a prosecutions chief 'diligently and without delay'.¹⁵¹ Though government indicated their intention to oppose the application,¹⁵² it appears likely that they recognised that this might not be successful. After 1 October 2013, when Mxolisi Nxasana took over as NDPP, Jiba would therefore no longer serve as NDPP. However the period from October 2013 until February 2018, when Jacob Zuma resigned, may be seen as one in which Jiba was still the senior leader of the NPA who was favoured by the Executive. This was notwithstanding the fact that she was in theory subordinate to the two NDPPs who served during this period, and that she and Mrwebi were supposedly on 'special leave' from September 2016 onwards.

75. Mxolisi Nxasana was head of the NPA from 1 October 2013 until May 2015.¹⁵³ In the period immediately before and following his appointment there were a series of court judgments, in the Mdluli, Booysen, and spy tapes matters, that were severely critical of Jiba (and Mrwebi in the Mdluli matter). In June 2014 Nxasana solicited an opinion from senior counsel in private practice on whether disciplinary steps ought to be taken against Jiba and Mrwebi as a result of the judicial criticism against them.¹⁵⁴ Motivated by the legal opinion, Nxasana wrote to Zuma in September 2014 requesting that he institute an inquiry into Jiba's and Mrwebi's fitness to hold office. Nxasana's actions at this point also coincided with his appointing retired Constitutional Court Judge Zak Yacoob to head a fact-finding committee into the NPA.¹⁵⁵ Advocates Jiba and Mrwebi allegedly refused to cooperate with the Yacoob inquiry.¹⁵⁶ According to press reports the final report of the inquiry, submitted in October, made damning findings against them.¹⁵⁷ There was however no response from Zuma to Nxasana's request.¹⁵⁸ The following year, in March 2015, Nxasana then instituted charges of fraud and perjury against Jiba in relation to the Booysen matter. She first appeared in court in relation to these charges on 21 April 2015.¹⁵⁹
76. On 4 July 2014 Nxasana first received notification from Zuma informing him that Zuma intended instituting an inquiry into his fitness to hold the office of NDPP.¹⁶⁰ There seems little doubt that the fact that Nxasana was considering whether it would be appropriate to pursue disciplinary or legal action against Jiba and Mrwebi played a major role in his removal from office as NDPP. In this regard it is reported that in his evidence before the Commission of Inquiry on 28 November advocate Samuel Muofhe, who was the adviser to former minister Ngoako Ramatlhodi in the Department of Mineral Resources at the time, stated that he was invited to a meeting with Zuma in March 2015 at which he was offered the position of NDPP.¹⁶¹ At the meeting, in response to Muofhe's question about his reason for removing Nxasana, Zuma's response was "why did Mr [Nxasana] charge Ms [Nomgcobo Jiba]?" According to Muofhe, Zuma 'was unhappy that Mr [Nxasana] decided to charge Ms [Nomgcobo Jiba]'. Muofhe also said that he came to the conclusion that what Zuma had in mind was that, while he would be in the formal role of NDPP, Jiba would be the real person in charge. He 'felt that the former president wanted to appoint me as the director of NPA, but Ms [Nomgcobo Jiba] as the default director of the NPA. The message that I understood was I am appointing you as long as you do not touch Ms [Nomgcobo Jiba]'.¹⁶²
77. It should be noted that the explanations that have been put forward for Zuma's decision to remove Nxasana have also included allegations that:
- a. Zuma had been informed that Nxasana was considering reinstating the corruption charges against him personally. Nxasana has alleged that Zuma's decision to initiate proceedings to remove him from office was precipitated by 'Jiba and others, who approached the president, to say I was planning to reinstate charges against him'. He has recounted details of a meeting that he had with Zuma at which Zuma allegedly indicated that his motivation for wishing to remove Nxasana from office was related to information that he had received indicating that Nxasana was intending to reinstate corruption charges against him.¹⁶³ (Nxasana says however that by the time he left office he had not seen the docket on the Zuma matter.)
 - b. Zuma initiated the process to institute an inquiry into Nxasana's fitness to hold office at a point when the NPA was about to recharge Richard Mdluli in relation to the murder and related charges.¹⁶⁴ (This followed an undertaking given by the NPA, recorded in the April 2014 SCA judgement regarding the Mdluli matter, to decide which of the criminal charges of murder and related crimes that were withdrawn against Mdluli in 2012 'are to be reinstated and to make his decision known within 2 months' – see further below.)¹⁶⁵ If this is correct it may also have implicated Jiba and would have been consistent with the role that she seems to have played in protecting Mdluli during her tenure as acting NDPP.
78. These explanations are not mutually inconsistent. It is likely that Nxasana's inquiry into pursuing disciplinary or legal action against Jiba and Mrwebi, the possibility that he would ensure that the charges against Mdluli were reinstated, and the risk that he might reinstate charges against Zuma himself, would

all have been seen as factors that motivated for his removal. Nevertheless, the sequence of events indicates that Zuma's initial steps to remove Nxasana were influenced by the fact that the NPA was considering disciplinary action against Jiba, and possibly the threat of criminal charges being reinstated against Mdluli. This is consistent with other evidence indicating that overwhelming importance was attached to ensuring that these two individuals would continue to exercise authority within the NPA and crime intelligence, and that these were seen as critical 'strategic points for manipulation' from the point of view of the Executive.

Role of Jiba and litigation against her during Shaun Abrahams's term of office

79. It has been suggested that the appointment of Shaun Abrahams as NDPP, in June 2015,¹⁶⁶ was because he was favoured by Jiba.¹⁶⁷ Abrahams had been a senior state advocate at the NPA when he was appointed as NDPP. His appointment as NDPP therefore involved promotion by four levels. Preference was given to Abrahams over a number of NPA personnel senior to him. In July 2015, a month after taking office, Abrahams initiated a process to review the fraud and perjury charges against Jiba. On 18 August 2015 Abrahams announced that the charges would be withdrawn. This was notwithstanding advice from two prosecutors to proceed with the charges.¹⁶⁸ Abrahams also simultaneously promoted Jiba to the position of overall head of prosecutions within the NPA, effectively the second most powerful position within the NPA.¹⁶⁹ Jiba therefore continued to exercise formidable influence within the NPA under Abrahams.
80. In September 2015, Freedom Under Law, a public interest NGO, initiated litigation motivating for the courts to review and set aside (a) Shaun Abrahams's decision to withdraw fraud and perjury charges against Jiba in relation to the Booyesen matter and (b) Zuma's alleged failure to suspend Jiba and Mrwebi and institute inquiries into their fitness to hold office, as provided for in Section 12(6)(a) of the NPA Act. Freedom Under Law received a judgment in their favour on these matters in December 2017.¹⁷⁰ (After initially indicating that they would appeal against the judgment, subsequent to Zuma's resignation in February 2018 both the Office of the President and the NPA indicated that they would not pursue these appeals.)¹⁷¹
81. The eligibility of Jiba and Mrwebi to serve as advocates has also been the subject of litigation brought by the General Council of the Bar in April 2015. In September 2016 the North Gauteng High Court held that Jiba and Mrwebi were not fit and proper persons to remain on the roll of advocates.¹⁷² In July 2018 the judgment was overturned by a majority of three of the five judges before the SCA.¹⁷³ However the matter is still the subject of an appeal to the Constitutional Court.
82. In September 2016, following the High Court judgment in the General Council of the Bar matter, Jiba and Mrwebi were placed on special leave. However Jiba and Mrwebi retained the use of their NPA computers and continued to have access to the NPA offices.¹⁷⁴
83. In December 2017 the High Court, in the Freedom Under Law matter, ordered that until the General Council of the Bar litigation against them had been completed, Jiba and Mrwebi were to be prohibited from performing any functions relating to their positions in the NPA, from presenting themselves at the NPA offices and from discussion concerning any pending cases under consideration by the NPA.¹⁷⁵ However it would appear likely that Jiba continued to play an influential role in the NPA while Abrahams remained the NDPP. This was reflected in the fact that Jiba was seen visiting the NPA offices a number of times during the months prior to August 2018¹⁷⁶ when Abrahams's appointment was held by the Constitutional Court to be invalid. Following his removal it would appear that Jiba lost her key point of leverage over the NPA.
84. On 25 October 2018 it was announced that Ramaphosa had suspended Jiba and Mrwebi from the NPA, pending an inquiry into their fitness to hold office. The inquiry is being chaired by retired Constitutional Court Justice Yvonne Mokgoro and is due to submit its report to Ramaphosa. As of February 2019 the inquiry is in progress and is due to submit its report in March.¹⁷⁷

Acting appointments in the ICD and IPID

85. It may be noted that Jiba's period of tenure as Acting NDPP was not the longest acting appointment among the key criminal justice agencies. The longest period in which the most senior leadership position was filled by an 'acting' incumbent is likely to have been the period of almost four years from late 2005¹⁷⁸ to August 2009¹⁷⁹ during which the Independent Complaints Directorate (ICD) did not have a permanent executive director. The ICD was the institutional predecessor to the Independent Police Investigative Directorate which came into existence in March 2012. IPID also had an acting head for 18 months from September 2012 until Robert McBride took office in March 2014. It was during this period that IPID submitted an investigative report implicating Anwa Dramat, the national head of the Hawks, and Shadrack Sibiyi, the Hawks Gauteng head, in unlawful renditions. There are allegations that the IPID acting director was directly involved in the process by means of which IPID produced an investigative report implicating Dramat and Sibiyi (see further below).

Irregular appointment processes – Richard Mdluli

86. As indicated above the constitutional and legal framework provides the Executive with extensive powers in relation to appointments. However these powers have apparently not provided the degree of control that they regard as sufficient in all cases. In the case of Richard Mdluli, appointed as the head of the SAPS crime intelligence division on 1 July 2009,¹⁸⁰ extraordinary steps were taken in which the Executive acted outside the established procedures regarding appointments and promotions in the SAPS.
87. With respect to the appointment of senior leaders of the SAPS and the control and management of the SAPS, the constitution says the following:
- a. Section 207(1) provides that 'The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.'
 - b. Section 207(2) provides that 'The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.'
 - c. Section 207(3) provides that 'The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.'
88. The minister of police therefore may have a role in the appointment of provincial commissioners and is also authorised to develop the national policing policy (Sections 206(1) and (2)) and to provide 'directions' to the national commissioner. However in terms of the regulations that were in force at the time appointments and promotions were clearly defined as a responsibility of the national commissioner.¹⁸¹
89. The July 2009 appointment of Richard Mdluli, as head of crime intelligence (i.e. the divisional commissioner: crime intelligence), was by means of an irregular appointment process involving the Executive.¹⁸² Instead of being appointed following a process initiated by the national commissioner, he was appointed after being interviewed by a panel composed of police minister Nathi Mthethwa and three other cabinet members, Siyabonga Cwele (then minister of state security), Malusi Gigaba (then minister of home affairs) and Susan Shabangu (then safety and security deputy minister).¹⁸³
90. Excerpts from a 2011 press report quoting Tim Williams, acting national commissioner at the time of Mdluli's appointment, said, inter alia, that:
- a. 'The normal process would involve the commissioner, deputy national commissioners and the deputy minister.' It was 'unknown' for a ministerial panel to usurp the appointment processes.
 - b. He was 'instructed' by Mthethwa that a 'special' ministerial panel would interview Mdluli and make a recommendation.

- c. 'At the time, there were a lot of arguments about this between myself and the minister (Mthethwa). I was completely opposed to it.'
- d. Asked if Mdluli's appointment had been politically motivated, Williams said: 'I regarded it as such at the time. He was appointed by the minister. They couldn't give me a reason why there was such a special panel to appoint an officer. I asked for reasons why he was appointed differently and they wouldn't give me any reasons.'¹⁸⁴
91. The position occupied by Williams prior to his appointment as acting national commissioner was that of deputy national commissioner responsible for crime intelligence and detection.¹⁸⁵ It is thus particularly surprising that he should have been marginalised in the process of appointing the head of the crime intelligence division.
92. Mdluli's appointment as head of crime intelligence by means of an irregular process therefore took place within less than two months of Jacob Zuma being appointed as president (9 May 2009). The appointment of Mdluli was prioritised over the appointment of a new national commissioner. Bheki Cele, who was appointed as national commissioner on 29 July 2009, was therefore faced with the appointment of Mdluli as a *fait accompli*.
93. Not only did the Executive appoint Mdluli irregularly but members of the Executive, most notably police minister Nathi Mthethwa, also went to extraordinary lengths to ensure that Mdluli enjoyed impunity both from criminal charges and disciplinary measures. These related firstly to a February 1999 murder in which the evidence pointed to the strong possibility of Mdluli's involvement and for which Mdluli was arrested in March 2011 after the investigation was reopened. Mdluli was also arrested a second time, in September 2011, on charges of corruption and fraud. These charges related to the alleged misuse of the secret service account by Mdluli and other members of crime intelligence subsequent to Mdluli's appointment as head of crime intelligence in July 2009.
94. As indicated, the withdrawal of the criminal charges against Mdluli in relation to the allegations of fraud and corruption was effected *ultra vires* by Mrwebi.¹⁸⁶ On 5 December 2011, roughly a month after being appointed as a special director and head of the Specialised Commercial Crime Unit, Mrwebi notified Mdluli's legal representatives that he had withdrawn the charges against him. Mrwebi's decision was taken notwithstanding the fact that the two NPA advocates concerned with the matter had advised against withdrawing the charges. In addition the matter was one that fell under the authority of the Director of Public Prosecutions for North Gauteng. It was not a decision that Mrwebi was authorised by law to take.¹⁸⁷
95. The SAPS national commissioner at the time was Lt-Gen Nhlanhla Mkhwanazi. He had been appointed in October 2011, after the suspension of Bheki Cele in relation to an allegedly irregular SAPS lease agreement.¹⁸⁸ Minister Mthethwa would intervene to place pressure on Mkhwanazi to withdraw disciplinary charges against Mdluli and to lift his suspension.¹⁸⁹ Mdluli had been suspended since May 2011 when Cele had authorised the charging of Mdluli, and suspended him, in relation to the murder allegations.¹⁹⁰ At a meeting with Mkhwanazi that was called by Mthethwa in early 2012, the Inspector-General of Intelligence, advocate Faith Radebe, who had advised that the disciplinary and criminal charges against Mdluli should be pursued, was also placed under pressure to withdraw her letter recommending this.¹⁹¹ Mkhwanazi later confirmed in Parliament 'that he was instructed by authorities "beyond" him to withdraw disciplinary charges and reinstate Mdluli in his office'.¹⁹² A March 2012 press report also indicated that there were allegations that Mthethwa was 'responsible for instructions to the Hawks to shut down the investigation of Mdluli and the broader crime intelligence probe' in relation to the fraud and corruption charges.¹⁹³
96. As indicated, at this time Mdluli was also facing charges, *inter alia* for attempted murder, murder and kidnapping, which dated back to events that had taken place in 1998 and 1999, including the February 1999 murder of Tefo Ramogibe, the husband of a woman with whom Mdluli had been romantically involved. Despite the fact that there was strong *prima facie* evidence implicating Mdluli,

the initial investigation into these allegations had previously been abandoned. Subsequent to Mdluli's appointment as head of crime intelligence the investigation into these allegations had been reopened. As a consequence Mdluli was arrested and charged on 31 March 2011 and suspended from his position as head of crime intelligence. However in early February 2012 the Gauteng South Director of Public Prosecutions, advocate Andrew Chauke, withdrew the charges against Mdluli and referred the case to an inquest. Chauke's decision to refer the matter to an inquest was unusual. An inquest is primarily convened for the purposes of determining cause of death. This may include, in the case of a homicide, whether the death was wrongfully caused.¹⁹⁴ In Tefo Ramogibe's case there was no doubt that he had been wrongfully killed. In addition the evidence that had been collected pointed overwhelmingly to the probability that Mdluli was behind the killing.¹⁹⁵ The most forthright assessment of the evidence against Mdluli is perhaps that provided by Breytenbach, who says that: 'The murder case against Mdluli was circumstantial, which was much harder to prove but not impossible. The only reasonable inference from the evidence was that Mdluli had had Ramogibe killed – the probable killer, one of Mdluli's accomplices, is now dead – but nobody else had anything to gain from Ramogibe's death except Mdluli.'¹⁹⁶ The subsequent finding of the inquest, by the magistrate of Boksburg, was also unusual. According to Judge John Murphy of the High Court, the findings suffered from 'a measure of incoherence' and were ultimately 'contradictory'.¹⁹⁷ The magistrate's conclusions were both that, 'The theory of Mdluli being the one who had orchestrated the death of [the deceased] is consistent with the facts,' and that, 'There is no evidence on a balance of probabilities implicating Richard Mdluli [and his co-accused persons] in the death of the deceased.'¹⁹⁸ Therefore during a period where there was repeated irregular interference in the prosecution system, as well as pressure from the Executive on the SAPS national commissioner, to withdraw disciplinary charges against Mdluli, both the Gauteng DPP and the magistrate of Boksburg also acted in an unusual manner in relation to the evidence of murder against Mdluli. There is no evidence that anyone influenced these decisions. But it appears to be valid to make note of the fact that during a period when both Mrwebi and the police minister acted irregularly on Mdluli's behalf, these two other public officials also made 'unusual' rulings that served to benefit Mdluli. No further action was taken against Mdluli in respect of the murder or any of the other allegations for several years afterwards. (Mdluli eventually appeared in court again with a co-accused in October 2016¹⁹⁹ after the NPA had given an undertaking in this regard in April 2014 – see below.)

97. The high point of the conflict over the criminal and disciplinary charges against Mdluli was a period of roughly six months from December 2011 to the beginning of June 2012.
 - a. 5 December 2011: (Approximate date) Lawrence Mrwebi notifies legal representatives of Richard Mdluli that he has withdrawn corruption charges against him.
 - b. 28 December 2011: Nomgcobo Jiba is appointed as the Acting NDPP by Zuma.
 - c. 1 or 2 February 2012: Charges are withdrawn against Richard Mdluli in relation to the 1999 murder case by the South Gauteng Director of Public Prosecutions, advocate Andrew Chauke. Chauke refers the matter for an inquest.
 - d. 27 March 2012: Richard Mdluli is reinstated as the head of crime intelligence following the withdrawal of disciplinary charges against him by the acting national commissioner, Lieutenant-General Nhlanhla Mkhwanazi.
 - e. 15 May 2012: Freedom Under Law lodges a court application for criminal and disciplinary charges to be reinstated against Mdluli and for the suspension to be reinstated.
 - f. 27 May 2012: Mdluli is again suspended by Lt-Gen Mkhwanazi.
 - g. 1 June 2012: Suspension of Mdluli is lifted by the labour court.
 - h. 3 June 2012: Following legal action by the SAPS, the suspension of Richard Mdluli is reinstated by the labour court.²⁰⁰

98. The 15 May 2012 Freedom Under Law court application culminated in a judgment by the SCA in April 2014. The judgment:
- a. Set aside Mrwebi's decision to withdraw the fraud and corruption charges against Mdluli.
 - b. Set aside the SAPS national commissioner's decision to terminate the disciplinary proceedings against Mdluli.
 - c. Set aside Mdluli's reinstatement by the commissioner on 28 March 2012.²⁰¹ (The SCA decision invalidated the lifting of Mdluli's suspension in March 2012. However at the time of the judgment this was no longer in effect as he had been suspended again on 3 June 2012 as a result of court action taken by the SAPS.)
99. The court also recorded an undertaking by the NPA to 'decide which of the criminal charges of murder and related crimes that were withdrawn on 2 February²⁰² 2012, are to be reinstated and to make his decision known to the respondent [i.e. Freedom Under Law] within 2 months of this order'.²⁰³
100. The case of Richard Mdluli is therefore remarkable in relation to the priority given to appointing him (this having been treated as a matter of urgency following the appointment as president of Jacob Zuma and taking priority over the appointment of a new national commissioner), the irregular process that was followed in order to appoint him, and the degree of effort that was expended, including by the police minister Nathi Mthethwa, on ensuring impunity for him. A number of observers have tried to account for the high level of importance given by the Executive to appointing Mdluli and retaining him in the position of head of crime intelligence.
- a. It is possible that the association between Mdluli and Zuma goes back to 2006 when Mdluli as a deputy provincial commissioner would have had overall authority over the detectives who investigated the rape case against Zuma.²⁰⁴
 - b. An alliance between Jiba and Mdluli appears to have first taken shape in the 2007-8 period when they were both associated with efforts to undermine the Scorpions investigation into the corruption allegations against Jackie Selebi.²⁰⁵ Mdluli, who was a Gauteng SAPS deputy provincial commissioner responsible for crime intelligence, filed an affidavit in support of Jiba during her disciplinary hearing in which he revealed that the SAPS had been monitoring the telephone conversations of Scorpions head Leonard McCarthy. Related to this it is widely believed that it was Mdluli who later unlawfully provided Zuma's lawyers with copies of the recordings of some of McCarthy's telephone conversations. These were then used by Zuma's lawyers to persuade Acting NDPP Mokotedi Mpshe to withdraw the corruption charges against Zuma in April 2009, shortly before the May 2009 elections and Zuma's appointment as president.
 - c. However it is clearly not simply that Zuma felt that he owed Mdluli a debt of gratitude but that Mdluli was seen by Zuma, and members of the Executive aligned to him, as essential to their ability to retain and exercise power. This is believed partly to have been through surveillance of members of the ANC which in turn enabled Zuma to obtain advance warning of signs of disloyalty. Shortly after Mdluli was reinstated at the end of March 2012 his power and authority was expanded by placing members of the SAPS VIP protection unit (prior to this they were in the Protection and Security Services division) under his control.²⁰⁶ Press reports at the time commented that this would give Mdluli 'direct access to the most intimate day-to-day details of the activities of all of Zuma's political rivals'.²⁰⁷ In May 2012 Fikile Mbalula, then sport minister, raised concerns that his phone was being monitored by crime intelligence.²⁰⁸ This suggests therefore that a primary motivation for Mdluli's appointment as head of SAPS crime intelligence was to enable Zuma to police disloyalty within the ranks of the ANC. Members of the VIP protection unit were known to be personally loyal to Zuma and therefore would have been seen as suited to this type of role.²⁰⁹
 - d. Related to this, Mdluli appears to have been a central role player in giving effect to Executive machinations relating to the criminal justice agencies. There are allegations that he was a key behind-

the-scenes role player in generating the allegations that Anwa Dramat and Shadrack Sibiya were implicated in illegal renditions (see below) and that he was likely to have been instrumental in identifying Berning Ntlemeza as the favoured candidate to succeed Dramat.²¹⁰

- e. Police minister Nathi Mthethwa, who vigorously intervened to try to ensure that Mdluli's suspension was lifted, also had a clear conflict of interest in the matter. Mthethwa directly benefited from the misuse of the SAPS crime intelligence slush fund that Mdluli was accused of defrauding. This therefore would have given him a direct interest in closing down the investigation by the Hawks into the abuse of the fund, and ensuring that the investigation was rather dealt with by the Auditor-General, whose investigative powers are far more limited.²¹¹
101. In this respect therefore manipulation of criminal justice agencies overlaps with the issue of manipulation of the intelligence agencies and the role that this has come to assume both in relation to political contestation within the ANC and in relation to providing justification for processes of removal of senior criminal justice officials who are seen to be uncooperative (see further below in relation to the issue of 'leaks' to the media).
102. Mdluli was initially suspended on 8 May 2011. Though his suspension was temporarily lifted over April and May 2012, it was reinstated on 3 June 2012. The level of impunity enjoyed by Mdluli enabled him to remain on suspension on full pay for more than six and a half years altogether without disciplinary action against him being taken in relation to either the 1998-99 murder and related allegations, or the corruption allegations. In January 2018 the SAPS and police minister reached an agreement with Mdluli for him to take early retirement.²¹²
103. The period of Mdluli's suspension overlaps with the full 40-month period during which Riah Phiyega was SAPS national commissioner. Phiyega was appointed in June 2012 and suspended in October 2015 to face a board of inquiry on the basis of the recommendations of the Marikana Commission of Inquiry.²¹³ It is notable that Phiyega did nothing to ensure that the disciplinary allegations against Mdluli were resolved thus enabling him to remain on full paid suspension with all his benefits intact. (See also the press report below in relation to the withdrawal of corruption charges against Mdluli in July 2015.)²¹⁴
104. During the period that Mdluli was on suspension there is evidence suggesting that he continued to exercise some level of authority within SAPS crime intelligence including some authority over crime intelligence personnel and some use of SAPS resources. In April 2017 it was reported that private investigator Paul O'Sullivan had written a letter to members of Parliament alleging that Mdluli 'is still running crime intelligence (CI) from his home in Dawn Park' and that while doing so 'he has been arranging for illegal appointments by third force elements into CI'.²¹⁵
105. Charges of intimidation, kidnapping, assault with intent to commit grievous bodily harm and defeating the ends of justice against Mdluli were eventually reinstated in 2016.²¹⁶ At this point it is unclear what point the proceedings against him have reached with Mdluli and his legal team repeatedly trying to persuade the court that the case against him is the product of a conspiracy.²¹⁷ Without effective and independent criminal justice agencies it would typically be very difficult to secure a conviction against someone who wields the kind of power that Mdluli has wielded. Such a person would have an extensive ability to ensure that the investigation and prosecution process is compromised.
106. Notwithstanding his past as a policeman appointed in the apartheid era, it appears reasonable to conclude that Richard Mdluli became a key instrument in the exercise of power by Jacob Zuma. It is interesting that both of them faced the possibility of prosecution related to alleged crimes committed in the late 1990s. Their mutual interest in ensuring that Zuma retained power as president may be seen to have been driven, in both cases, by the fact that it enabled them to avoid being held accountable for these crimes. It is also likely to be significant that Zuma's career in the ANC in exile was largely in the intelligence sector. Zuma no doubt has deep insight into the workings and 'uses' of intelligence. It is therefore not surprising that he should have chosen to rely on Mdluli as a key instrument for sustaining his hold on power.

Other irregular appointments

107. The following appointments have also been found to be irregular by the courts:
- a. The court judgment regarding the September 2015 appointment of Berning Ntlemeza as head of the Hawks is discussed above. The appointment of Ntlemeza also disregarded an earlier process to find a replacement for Dramat²¹⁸ and was irregular in various other respects.²¹⁹
 - b. The courts have also found that the June 2015 appointment of Shaun Abrahams as NDPP was irregular as a result of the fact that it was achieved by the irregular removal of Mxolisi Nxasana from the position in May 2015 (see further below).

Removal from office of senior leadership

108. One aspect of the manipulation of criminal justice agencies has therefore involved the attempt to ensure that those who are appointed in senior leadership roles are willing to exercise their powers in a manner favourable to the Executive. However not all appointment processes have achieved this purpose. The Executive has therefore sought to remove senior leadership figures from office in certain cases.
109. Questions to do with the motivation for the removal of Mxolisi Nxasana from the position of NDPP are discussed above. As indicated above explanations that have been put forward for Zuma's decision to remove Nxasana from the position of NDPP have included Nxasana's willingness to pursue disciplinary or criminal charges against Jiba, that Zuma had been informed that Nxasana was considering reinstating the corruption charges against him, and that this was related to indications that the NPA was about to recharge Mdluli.
110. As with the issue of appointments, attempts to remove senior officials from office have also resulted in a considerable amount of litigation.
- a. In January 2015 the North Gauteng High Court found that the police minister, Nathi Nhleko, was not authorised to suspend the head of the Hawks, Anwa Dramat.²²⁰ Nhleko informed Dramat that he was placing him on suspension in December 2014. However, the provision in terms of which Nhleko had tried to suspend Dramat was section 17DA(2) of the SAPS Act. On 27 November, shortly before the initiation of disciplinary steps against Dramat, the Constitutional Court had found section 17DA(2) to be invalid and unconstitutional. This meant that the national head of the Hawks could now only be removed from office through a process initiated by 'a Committee of the National Assembly' under section 17DA(3) and (4). The minister therefore retained the power to suspend the head of the Hawks in terms of Section 17DA(5) (that is 'after the start of the proceedings of a Committee of the National Assembly for the removal of the head') but not in the absence of such proceedings.²²¹
 - b. There has also been a series of court cases regarding the March 2015 suspension of Robert McBride as head of the Independent Police Investigative Directorate.²²² McBride's suspension was related to an IPID investigative report, submitted shortly after his appointment, that exonerated Dramat and Shadrack Sibiyi from involvement in illegal renditions (discussed below).²²³ Following his suspension McBride initiated court action against the minister on the basis that the provision in terms of which he had been suspended was unconstitutional. The eventual outcome of this process was that the provisions of the IPID Act (Act 1 of 2011) regarding the minister's powers to suspend and remove from office the IPID executive director were found to be unconstitutional.²²⁴ As directed by the court, Parliament has therefore initiated a process for amendment of the act. However, though a bill was drafted and passed by the National Assembly, Parliament has now approached the Constitutional Court for an extension to the 6 September 2018 deadline for amendment of the bill.²²⁵
 - c. See below also regarding the Constitutional Court's striking down of provisions of the NPA Act pertaining to the possibility of suspension of the NDPP without pay (this was part of the Nxasana matter).²²⁶

111. Though the current legislative framework (as indicated above this now excludes provisions of the legislative framework governing the Hawks and the NPA that have been struck down by the courts) protects senior officials of the key criminal justice agencies against summary dismissal, the Executive has also sought to use other mechanisms in order to optimise its ability to ensure that those holding senior positions in these agencies are sufficiently compliant. The issue of the use of 'leaks' to precipitate the initiation of disciplinary or criminal charges will be discussed further below. Once disciplinary charges have been put in place, one other mechanism that has been noteworthy has been a 'carrot and stick' approach in terms of which the threat of disciplinary action (involving a public inquiry into the incumbent's fitness for office) is combined with the offer of a generous financial settlement. This has been used:
- a. In relation to Mxolisi Nxasana, who assumed office as head of the NPA on 1 October 2013: In July 2014 Zuma initiated a process to remove Nxasana from office.²²⁷ In May 2015 Zuma and the justice minister signed a settlement agreement with Nxasana in terms of which he agrees to vacate his office on condition of payment of an amount of R17.3 million. Zuma first wrote to Nxasana in early July 2014 to notify him that he intended initiating a process for his removal from office. Nxasana maintained throughout the process that followed that he was a fit and proper person to hold the position of NDPP and 'that he did not want to vacate office as there was no basis for him to. He stated that he would, however, consider stepping down only if he was fully compensated for the remainder of the contract period'.²²⁸ It appears that the amount of R17.3 million that was paid to him was equivalent to the contractually agreed salary for the remainder of Nxasana's term of office.
 - b. In relation to Anwa Dramat, who was appointed as the first head of the Hawks when they were launched in July 2009: After being suspended in December 2014, Dramat accepted a financial settlement and resigned from the Hawks in April 2015.²²⁹
112. In August 2018 the Constitutional Court confirmed a High Court declaration that the decision to authorise payment to Nxasana of an amount of R17 357 233 in terms of the settlement agreement was invalid.²³⁰ The issue of the settlement paid to Dramat has however not been the subject of litigation.
113. In this judgment the Constitutional Court also confirmed that Section 12(6) of the National Prosecuting Authority Act is unconstitutional 'to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay'.²³¹ The court's conclusion is based on the fact that the threat of suspension without pay would increase the vulnerability of the NDPP to political manipulation.
114. In the case of former NDPP Vusi Pikoli, the matter was eventually also resolved by means of a financial settlement, though after a far more protracted process. Pikoli was appointed as NDPP in February 2005 by president Thabo Mbeki but suspended by Mbeki in September 2007 and subjected to an inquiry into his fitness to hold office in terms of Section 12 of the NPA Act. According to Pikoli's autobiography various financial settlement offers were made to him after he was suspended.²³² However he initially chose to contest the removal process. During the inquiry process he defended his suitability to serve as NDPP. The report of the inquiry was submitted in November 2008, after Mbeki had resigned from office, during the period that Kgalema Motlanthe was president. Though the report did not conclude that Pikoli was unsuitable for the office of NDPP or recommend his dismissal, he was removed from office by Motlanthe in December 2008. 'As is required by Section 12(6)(b) of the Act, the President referred his decision to remove the applicant from office to Parliament. The National Assembly resolved on 12 February 2009 and the National Council of Provinces resolved on 17 February 2009 not to recommend the applicant's restoration to office.'²³³ Pikoli then launched an application for a court order to review and set aside Motlanthe's decision to remove him from office. However Pikoli eventually agreed to allow the matter to be addressed through mediation²³⁴ and in November 2009 it was announced that Pikoli and government had reached a financial settlement and that he would be withdrawing his court application.²³⁵ One consequence of this therefore is that the courts have not evaluated whether or not the removal from office of Pikoli should be regarded as having been lawfully done.

115. It was after this point that Menzi Simelane was appointed as National Director of Public Prosecutions by Zuma in November 2009. The great irony of this appointment was that, though the Ginwala Inquiry into Pikoli's fitness to hold office had made some critical comments in respect of Pikoli, it had endorsed his suitability to serve as NDPP. By contrast the Ginwala Inquiry had made findings that were severely critical of Simelane. These findings would later be central to the later court application to have Simelane removed from office.²³⁶ As indicated, it was following the judgment of the Supreme Court of Appeal in this matter, on 1 December 2011, that Jiba was appointed as acting NDPP on 28 December 2011. Thus the removal of Vusi Pikoli, a process initiated by Mbeki, created an opening for Zuma to appoint two candidates of uncertain suitability to exercise the powers of the NDPP over a period of almost four years (over 46 months) extending from November 2009 to September 2013.

Using the media – 'leaks' to journalists

116. The issue of 'leaking of information' to the media and its role in the process of the removal of 'uncooperative' senior officials in criminal justice agencies has received substantial attention over recent years. It is now widely accepted that in a number of high-profile cases, media agencies, most notably the *Sunday Times*, were fed with information aimed at discrediting the leadership of key agencies who were seen to pose a threat to Jacob Zuma or his family or allies or as presenting an obstacle to the process of state capture. The primary cases in relation to which it is now widely accepted that this has taken place are:
- a. The allegations that the Cato Manor Organised Crime Unit, a unit of the Hawks in KwaZulu-Natal, was functioning as a 'death squad' and that Johan Booyesen, the head of the Hawks in KwaZulu-Natal, was complicit in these activities. The allegations first appeared in a *Sunday Times* front page story in December 2011.²³⁷ These allegations ultimately led to the charging of Booyesen, along with the members of the unit, in 2012, and the suspension of Booyesen from the SAPS. As referred to above, one of the instances in which Jiba was alleged to have acted irregularly was in relation to authorising racketeering charges against Booyesen. However the courts have reached different conclusions on whether her actions were indeed irregular. Whether Jiba acted legitimately in this matter or not, it appears reasonable to conclude that the information about the alleged killing by members of the unit was leaked to the *Sunday Times*. There are grounds for believing that there is some substance to the allegations against the members of the Cato Manor unit. But the apparent motivation for the 'leak', and subsequent official action taken against Booyesen, was to neutralise certain corruption investigations that he was in charge of. These included an investigation against one of Zuma's associates, Thoshan Panday, in a case that also implicated the KwaZulu-Natal SAPS provincial commissioner.²³⁸
 - b. The allegations that Hawks national head Anwa Dramat and Gauteng head Shadrack Sibiyi were implicated in unlawful renditions of Zimbabwean nationals who were handed over to the Zimbabwean police in November 2010. It was alleged that two of the Zimbabweans, Witness Ndeya and Gordon Dube, were killed by members of the Zimbabwe police after they had been handed over. These allegations first appeared in the *Sunday Times* six weeks before the Cato Manor allegations, in October 2011.²³⁹ However unlike the Cato Manor exposé which very quickly resulted in action being taken against Booyesen and the members of the Cato Manor unit, these allegations would only be used as a pretext for taking action against Dramat and Sibiyi three years later in late 2014. It has been alleged that the motivation behind the initial leak in October 2011 was the fact that Sibiyi, with the support of Dramat, was charged with investigating the murder allegations against Richard Mdluli.²⁴⁰ As indicated below, it is alleged that Mdluli and Ntlemeza were directly involved in producing the allegations that Dramat and Sibiyi had been implicated in the renditions and that this was directly linked to the intention to install Ntlemeza as head of the Hawks.²⁴¹ This is consistent with the fact that the allegations that Sibiyi was present when the renditions took place emanated from members of SAPS crime intelligence.²⁴² Dramat alleged that it was after he had 'recently called for certain case dockets involving very influential persons to be brought or alternatively centralised under one investigating arm' that police minister Nathi Nhleko initiated the action against him at the end of 2014.

- c. The allegations that there was a ‘rogue unit within’ the South African Revenue Service (SARS) that operated unlawfully and was involved in various irregular activities. The allegations regarding the ‘rogue unit’ were part of a long-running ‘exposé’ of SARS that appeared in the *Sunday Times* over a 20-month period starting in August 2014.²⁴³ The alleged rogue unit was first referred to in a report that appeared in the *Sunday Times* on 12 October 2014, two weeks after the appointment of Tom Moyane as the new SARS commissioner.²⁴⁴ Moyane would then use the exposé as a pretext for disbanding the SARS executive committee. The rogue unit allegations would also be used to justify disciplinary action against a number of key officials, despite being advised that the evidence in this regard was ‘far from conclusive’.²⁴⁵ The High Risk Investigative Unit, the unit described in the reports as a ‘rogue unit’, was also closed down, thereby destroying a key SARS investigative unit, and undermining state capacity for investigating tax violations and crime.²⁴⁶ In his book *The President’s Keepers*, the investigative journalist Jacques Pauw argues that part of the motivation for undermining the SARS investigative capacity was a concern of senior officials that SARS investigations would place in jeopardy associates of members of the Executive who were allegedly linked to or associated with individuals involved in organised crime networks.²⁴⁷
117. The key state personnel involved in these leaks would appear to be members of the intelligence community. It is likely that SAPS crime intelligence was the main state role player in the Cato Manor/Booyesen and Dramat/Sibiya²⁴⁸ leaks while personnel employed by the State Security Agency, as well as disgruntled SARS employees, appear to have played a prominent role in generating the SARS ‘rogue unit’ allegations.²⁴⁹
118. Evidence that SAPS crime intelligence was involved in producing the first IPID report that claimed that Dramat and Sibiya were directly involved in the renditions is contained in an affidavit submitted by the IPID investigator responsible for the investigation into the allegations against Dramat and Sibiya. IPID investigator Innocent Khuba submitted an affidavit in which he alleged that following the publication of the October 2011 *Sunday Times* reports about the alleged involvement of Dramat and Sibiya in the renditions (this summary is based on a press report):
- a. ‘IPID was asked by the police secretariat to begin investigating but was then told to hold off, “apparently on the instruction of the then minister of police, Mr Nathi Mthethwa”.’
 - b. About a year later, a Colonel Moukangwe of the police’s crime intelligence gathering component (CIG)²⁵⁰ came to IPID and presented a docket he had already prepared on the rendition. It was passed on to Khuba for further investigation.
 - c. The then acting IPID director Koekie Mbeki instructed him to collaborate with Moukangwe in conducting the investigation, and to keep this collaboration secret. ‘Mbeki’s instruction was an unusual and problematic one because members of the CIG were themselves involved in the arrest of the Zimbabwean nationals’ ... ‘It also seemed to be a problematic instruction, given the widely known history of animosity between ... Mdluli ... and Sibiya.’ (As indicated, Sibiya was placed in charge of the murder investigation against Mdluli after this was reopened.)
 - d. Khuba says he relayed concerns at his first meeting with McBride after McBride took up the position of IPID executive director on 1 March 2014: ‘I told McBride that I felt uncomfortable and suspicious of the involvement of CIG.’²⁵¹
119. After McBride was appointed, IPID produced a second report into the matter that concluded that there was no basis for linking Dramat and Sibiya to the renditions.
120. It should be noted that there appears to have been a tendency to conclude that all the allegations that have been made in these press ‘exposés’ were unfounded. There is considerable justification in rejecting the allegations relating to the so-called SARS rogue unit. These are, at best, an elaborate blend of fact and fiction. However there are reasonable grounds for believing that the Cato Manor organised crime unit was indeed linked to a pattern of irregular killings. The unit was responsible for an exceptionally high rate of killings, with 51 over the 2008 to 2011 period, identified by the *Sunday Times* as linked to the unit.²⁵²

Furthermore the allegations that many of the killings that the unit was linked to were highly irregular had first emerged in 2009. In November 2009 the Sunday Independent ran a feature on various killings of members of the KwaMaphumulo Taxi Association. The Cato Manor unit was responsible for most of the killings though other police units in KwaZulu-Natal, notably the National Intervention Unit, were also implicated in one of them.²⁵³ A further indication that there was merit to the allegations against the unit may be found in a May 2015 affidavit drafted by NPA advocate Anthony Mosing, then a senior deputy director at the NPA. In the affidavit Mosing refers to a meeting in early March 2012 in which investigators from the Hawks and IPID 'mentioned that [they are] seized with 51 cases, but that in 12 of the cases they are convinced they have a case. Of the 12 cases, 6 of them were now ready and they wanted me to decide on the six dockets by tomorrow'.²⁵⁴ The *Sunday Times* editor at the time of the December 2011 *Sunday Times* exposé has also vigorously disputed the claim that the allegations against the Cato Manor Unit were unjustified.²⁵⁵ An expert in violence in KwaZulu-Natal has also indicated that she regards as highly credible the original claims against the Cato Manor unit,²⁵⁶ though Booysen has disputed her assertions.²⁵⁷

121. It is important to distinguish between the motivation for the leaks and the allegations that formed their substance. Thus in relation to the leaks about the activities of the Cato Manor unit it is clear that the leaks were not motivated by a concern with the high number of irregular killings that the Cato Manor unit was allegedly implicated in. Indeed in the early years of the Zuma era it was official policy to encourage excessive force by police.²⁵⁸ It is therefore clear that the motivation for the 'Cato Manor' leaks was that these would provide a pretext for removing Johan Booysen from his position as head of the Hawks, thereby enabling the Thoshan Panday investigation to be undermined. The key concern behind the leaks was therefore to link Booysen to the Cato Manor killings. The legal and media dispute over the matter has essentially been concerned with whether there is any evidence linking Booysen to the killings. There have not been court findings thus far indicating that the allegations against the Cato Manor unit itself do not have merit.
122. Likewise the disputes about the rendition case are focused on whether Dramat and Sibiya were implicated in them. In the court judgment on Dramat's suspension there is no indication that such renditions did not take place. What is clearly disputed by Dramat is that he was implicated in them in any way.²⁵⁹ The conclusion of the Hawks disciplinary process against Sibiya in relation to the renditions is for instance that 'on a balance of probabilities, General Sibiya could not have been present during the operation on the 5th November 2010'.²⁶⁰ This indicates that there was considerable dishonesty on the part of the crime intelligence members who provided statements alleging that Sibiya was present. Nevertheless Sibiya was not completely exonerated as the disciplinary process concluded that he did know about them.²⁶¹ The renditions did indeed take place and members of SAPS crime intelligence from the Pretoria Central crime intelligence station were directly involved in them.²⁶² The Pretoria head of the Hawks, Lesley Maluleke, is also alleged to have directly participated in them. In September 2018 the NPA announced that it was provisionally withdrawing criminal charges against Dramat and Sibiya in relation to the alleged renditions. However the prosecution against Maluleke is continuing.²⁶³

Security of tenure in practice

123. The Constitutional Court has repeatedly emphasised that security of tenure is a foundational element for ensuring the 'necessary independence' for agencies like the NPA, the Hawks and IPID.²⁶⁴ The major mechanisms for ensuring security of tenure that are applicable to this submission are provisions that protect senior officials from being removed from office in an arbitrary manner. Along with the requirement that senior leaders be appointed for a single term, and that their terms of office may not be extended, this is intended to encourage independent decision making and action as it removes the need for senior leaders to curry favour with the Executive. (As indicated above IPID is distinct from the NPA and Hawks in that the IPID Act continues to allow for the renewal of the term of office of the executive director.)

124. However in practice the manner in which the Executive has observed and given effect to this principle has been farcical. Those whose tenure has been most vigorously protected have been those who could reasonably be regarded as unsuitable for office. Those whom the Executive have sought to remove from office have been those who have tried to act independently.
125. It is reasonable to argue that those whose security of tenure was given pre-eminence during Jacob Zuma's presidency were Jiba and Mdluli. It is astonishing that despite the fact that he was charged with murder and corruption in 2011, Mdluli was able to accept early retirement from the SAPS in January 2018. Likewise, despite the various adverse findings against her, after the lifting of her first suspension in late 2009, Jiba was only actually suspended from her position in the NPA again nine years later in October 2018.²⁶⁵ The degree of protection provided to Jiba and Mdluli is also reflected in the fact that the removal from office of Nxasana was motivated, at least in part, by the fact that he had authorised the charges to be laid against Jiba and may also have been influenced by the possibility that he would allow charges to be reinstated against Richard Mdluli.
126. A second category of those who enjoyed security of tenure may be seen to include the SAPS national commissioner Riah Phiyega and NDPP Shaun Abrahams. Phiyega was appointed on 13 June 2012 at the high point of the contestation over Mdluli. She was suspended in October 2015, more than six months after Zuma received the report of the Marikana Commission of Inquiry which recommended that she face disciplinary action.²⁶⁶ Zuma's tardiness in pursuing disciplinary action against her and acting on the findings that were made is likely to have benefited her by assisting her to conclude her full five-year term without being dismissed. Though the board of inquiry report in November 2016 recommended that Phiyega be removed from office,²⁶⁷ she filed a review application and this had not been resolved by the time her term of office expired in June 2017. After his appointment in June 2015 Abrahams also enjoyed a relatively long period in office. While steps to remove Nxasana from office were first initiated against him nine months after taking office, no action was taken to remove Abrahams from office, indicating that the manner in which he exercised his authority was seen as favourable by the Executive. Eventually it was a judgment of the Constitutional Court in August 2018 that resulted in his term of office being terminated.
- a. At the Marikana Commission one of the distinguishing features of Phiyega's testimony was her elaborate evasiveness in response to questions about the role that Nathi Mthethwa may have played in relation to the decision to take action against the Marikana strikers.²⁶⁸ However, apart from her apparent endeavours to protect Mthethwa from being incriminated in relation to the Marikana massacre, Phiyega may also have received approval because she accommodated the Executive concern to protect Mdluli. This would have included refraining from interfering in the management of crime intelligence thereby allowing Mdluli to continue to have influence over the crime intelligence division. One allegation against her in this regard is that Phiyega protected Mdluli by putting pressure for Hawks members involved in the investigation into the murder, kidnapping and assault charges against Mdluli to stop their investigation.²⁶⁹ In addition questions have been raised about Phiyega's role in relation to the corruption charges against Mdluli and whether she deliberately obstructed the NPA in pursuing these with the result that the case was struck off the roll in July 2015.²⁷⁰ Another related allegation is that Phiyega's motivation for removing Godfrey Lebeya from the position of deputy commissioner in 2014 was influenced by the fact that Lebeya had overseen and supported efforts to hold Richard Mdluli accountable for his alleged abuse of the secret service account.²⁷¹
 - b. Likewise, after taking office as NDPP, Abrahams appears to have protected Jiba, and potentially deferred to her. He ensured that the fraud and perjury charges against her were withdrawn. Even after Jiba and Mrwebi were placed on 'special leave' he apparently allowed her to continue to exercise influence.
127. Similarly the advancement of Berning Ntlemeza to the position of head of the Hawks is likely to be linked to the assistance he gave Mdluli during the inquest in 2012 into the 1999 Oupa (Tefo) Ramogibe murder. Notwithstanding the strong prima facie case against Mdluli, Ntlemeza compiled a report exonerating Mdluli 'and saying that the allegations that he had murdered Ramogibe were part of a plot to prevent his

becoming crime intelligence head'.²⁷² The fact that he was aligned with Mdluli and had acted in his favour is likely to have contributed to his being identified as a suitable head of the Hawks. A process to find a replacement for Dramat was first initiated in 2013 under a panel that included representatives of the State Security Agency and Department of Home Affairs. At this point Ntlemeza, who was an SAPS deputy provincial commissioner in Limpopo, was already anticipating that he would be appointed to head the Hawks.²⁷³ However though he was one of the 22 applicants, Ntlemeza was not one of the five candidates who was shortlisted by the panel in December 2013.²⁷⁴ Nhleko nevertheless appointed him as acting head of the Hawks when he suspended Dramat in December 2014.²⁷⁵ (Despite the fact that Dramat's suspension was overturned by the courts the following month,²⁷⁶ Ntlemeza never left office as acting head.)²⁷⁷ After the settlement with Dramat, in April 2015, Nhleko then restarted the appointment process under a new selection panel comprised primarily of cabinet members. Despite the large number of candidates for the job it was decided that a competency assessment would be superfluous 'considering the experience and track record of the preferred candidate'.²⁷⁸ As indicated above, at the time at which he was appointed as permanent head, in September 2015, questions about his integrity had been raised by the courts. This was disregarded, as was the fact that he had failed to make the earlier shortlist of candidates. (In his evidence before the Mokgoro Inquiry, Hawks investigator Colonel Kobus Roelofse, who had been responsible for the investigation, stated that when Berning Ntlemeza took over the Hawks at the end of 2014, the docket dealing with the fraud and corruption allegations against Mdluli was transferred to another investigator. Thereafter the docket was lost and no further progress was made with the investigation.)²⁷⁹

128. On the other hand the evidence supports the conclusion that where the Executive has taken action to remove senior officials from office, this has been motivated for by the concern that they are too independent, or at least that there is a risk that they will act independently. This applies in relation to:
- a. The replacement of KZN Acting DPP Simphiwe Mlotshwa by Moipone Noko in July 2012.
 - b. The steps to remove Anwa Dramat that resulted in his suspension in December 2014 and culminated with his agreeing to a financial settlement in April 2015.
 - c. The efforts to remove Robert McBride that were initiated by Nathi Nhleko in March 2015.
 - d. The steps to remove Mxolisi Nxasana from office that culminated in his accepting a financial settlement in May 2015.
 - e. The point may also apply in relation to the removal from office of Vusi Pikoli, initiated by Thabo Mbeki in September 2007. However, as indicated, the Ginwala Inquiry did not endorse this view.
129. In addition it would appear that the senior leaders of criminal justice agencies have themselves played a key role in seeking to remove from office officials who have not complied with the unofficial policy of selective prosecution oriented towards ensuring impunity for the political elite. It is argued above that Jiba is likely to have influenced the replacement of Simphiwe Mlotshwa. Specialised Commercial Crime Unit prosecutor Glynnis Breytenbach has also alleged that she was targeted due to her determination to pursue the corruption charges against Richard Mdluli. The available evidence also appears to be consistent with the conclusion that KwaZulu-Natal Hawks head Johan Booysen was targeted in part because of his commitment to pursuing corruption charges against Thoshan Panday, an associate of Zuma.

Broad picture emerging from processes of appointment and removal and associated litigation and court judgments in respect of the leadership and independence of key criminal justice agencies

Abuse of executive power

130. The explicit provisions of the constitution and the interpretations thereof by the Constitutional Court require that the Hawks, IPID and NPA should enjoy the necessary independence. Though the constitution

does not entrench the independence of the SAPS, the SAPS is nevertheless a creature of the constitution as well:

- a. As a body of the state it must 'respect, protect, promote and fulfil the rights in the Bill of Rights' in terms of Section 7(2).
 - b. As one of the security services it must inter alia 'act, and must teach and require their members to act, in accordance with the Constitution and the law' in terms of Section 199(5).
 - c. In terms of Section 205(3) its responsibilities include the prevention, combating and investigation of crime and 'to uphold and enforce the law'.
131. Manipulation of criminal justice agencies has not affected all criminal justice agencies equally severely at all times. In some cases senior leaders of agencies have resisted interference. Nevertheless, especially during the presidency of Jacob Zuma, the Executive, and their agents within state agencies, have consistently and repeatedly undermined, or sought to undermine, the ability of criminal justice agencies to function independently and in line with constitutional principles through various methods including:
- a. During the Zuma era the process of making senior appointments was used in order to ensure that a policy of selective investigation and prosecution was followed by the key criminal justice agencies. This was done by seeking to appoint individuals who were not independently minded and were likely to be compliant. In some cases people were appointed notwithstanding strong indications that they were unsuitable for office. Factors that were seen to recommend people for appointment apparently include the willingness to act irregularly on behalf of the Executive. The willingness to 'accommodate' the influence of particular individuals who are favoured by the Executive (Riah Phiyega regarding Mdluli, Shaun Abrahams regarding Jiba) also appear to have been factors that were seen to recommend people for appointment.
 - b. The Executive frequently appointed individuals with tarnished records. This raises the possibility that such individuals were preferred because it was assumed that they would be easier to manipulate. It may also have been assumed that these aspects of their past history could be used as part of the justification for removing them from office should they prove not to be compliant. Richard Mdluli, Menzi Simelane, Nomgcobo Jiba, Berning Ntlemeza and Robert McBride were all appointed (Jiba only in an acting capacity) notwithstanding the fact that there were aspects of all of their pasts that should have raised questions about their suitability for office. There were also aspects of Mxolisi Nxasana's history that should have raised questions about his suitability for office, though it is not entirely clear that Zuma was aware of these aspects when he appointed him.²⁸⁰ Nevertheless it should be noted that, notwithstanding their past histories, Nxasana and McBride acquired reputations for acting independently. Related to this, it would appear, they were among those targeted for removal from office.
 - c. The instability of senior appointments in the criminal justice agencies,²⁸¹ the power to make acting appointments, and the absence of clear limits on the duration of such appointments also provided leeway for people who were likely to act in a compliant manner to be appointed to senior positions in acting roles for extended periods of time.
 - d. The Executive flouted established procedures and disregarded constitutional provisions regarding the control and management of the police service in order to appoint Richard Mdluli to the position of head of the crime intelligence division. Where individuals were appointed who were obviously unfit for office, or people were removed by irregular procedures in order to appoint others, these processes were also, by their nature, irregular.
 - e. Protection of favoured individuals against accountability – this included interference to ensure that disciplinary or criminal charges against key favoured individuals, who were relied on to exercise

influence within criminal justice agencies, were withdrawn. Certain officials appear to have had the status of untouchables to the extent that their seniors faced removal from office if they threatened to take action against them for infractions that they had allegedly committed.

- f. Even if suspended, favoured individuals still enjoyed Executive protection and the full benefits of office irrespective of the cost to the fiscus of retaining them on suspension for extended periods of time.
 - g. The removal from office of individuals who were not sufficiently compliant – in cases where there were indications that senior leaders would not act in a manner that was sufficiently compliant²⁸² the Executive has generally relied on ‘carrot and stick’ type methods of coercion in order to secure their removal. Financial offers were made to encourage officials who appeared to be independently minded to resign from their positions.
 - h. Reliance on subversion of senior leadership by intelligence agencies – SAPS crime intelligence, as well as the State Security Agency, were mobilised to ‘leak’ information (often misleading or fictitious but sometimes having an element of truth) to the media in order to provide a pretext for the removal of ‘uncooperative’ senior officials in the Hawks and in other agencies (specifically SARS).
 - i. Favoured individuals continued to have influence in key criminal justice agencies despite supposedly being suspended or on ‘special leave’. The case of Nomgcobo Jiba is particularly interesting because the evidence suggests that even after she no longer held the position as acting head of the NDPP, and even after she was later placed on ‘special leave’, she continued to exercise a major influence due to the fact that she was trusted by the Executive to ensure that the NPA acted in their favour. Similarly it has been alleged that Richard Mdluli retained a level of power over the crime intelligence division over a protracted period, notwithstanding the fact that he was allegedly implicated in serious crimes and was on suspension.
 - j. Manipulation of criminal justice agencies is often directly carried out by members of the Executive. However, it is also frequently the case that personnel within criminal justice agencies, who are aligned with the Executive, carry out acts of harassment and victimisation, or other forms of manipulation, in a manner that is intended to serve the interests of the Executive. (This is discussed further below.)
132. Many of the points raised here have been highlighted in the series of court judgments, notably during the period from 2011 to 2018, that have overturned executive actions, including actions relating to appointments and removals, and decisions by individuals within the criminal justice agencies. Collectively these judgments highlight a pattern in respect of actions by the president or other members of the Executive in terms of which they have consistently failed to ensure that the key criminal justice agencies are able to function independently in a manner that is consistent with the rule of law, and are provided with the best possible type of leadership in order to accomplish their tasks. During the Zuma era there has been a sustained failure by the Executive to comply with the obligation to ensure that key criminal justice agencies are managed effectively, that they are able to address high-level corruption and economic crime in an effective manner, and that they are able to operate in a manner consistent with the principles of equality before the law, and the rule of law, that are embodied in the Bill of Rights and constitution.
133. It should be noted that Parliament has also been implicated in this process. Evidence by MP Dennis Bloem to the State Capture Commission was that, prior to the Zuma era, he faced pressure from colleagues in Parliament not to raise questions about corruption in committee meetings.²⁸³ In the sequence of events during which the Scorpions were closed down and the Hawks were established to replace them, Parliament was itself used as an instrument for achieving this and passed the two laws that enabled this to take place. Parliament was actively involved in creating an investigative agency that was highly vulnerable to political manipulation using allegations that the Scorpions were themselves being

politically manipulated as a justification. During the period of very active manipulation of criminal justice agencies during Zuma's presidency, Parliament largely stood by and raised few questions about this.

Abuse of office by favoured individuals

134. As indicated misuse of criminal justice agencies does not only take place through direct action by the Executive. Certain personnel who are aligned with the Executive carry out acts of harassment and victimisation, or other forms of manipulation, on behalf of the Executive. As indicated above, in his testimony on 24 January 2019, Angelo Agrizzi alleged that Bosasa regularly gave upwards of R100 000 in cash to Linda Mti and that this was supposed to be provided to Nomgcobo Jiba, Jackie Lepinka and Lawrence Mrwebi. This was allegedly to secure their assistance in helping Mti and other Department of Correctional Services officials, and Bosasa, to avoid prosecution.
135. In the case of Richard Mdluli there is substantial information alleging not only that he has misused his authority to advance the interests of the Executive but also for his own enrichment. Mdluli continued to enjoy protection notwithstanding the fact that he was alleged to have systematically abused the secret service account after being appointed as head of crime intelligence in 2009. The November 2011 report provided by crime intelligence personnel to the Inspector-General of Intelligence included allegations pertaining to:²⁸⁴
- a. The 'appointment/promotion' by Mdluli 'of his current wife, her brother and other members of her family, his ex-wife, her daughter and his son, as well as two "girlfriends" in the Eastern Cape'.
 - b. 'The alleged abuse of covert vehicles by Lt-Gen Mdluli, who it is alleged was not entitled to the use of such vehicles in the way he did.' Vehicles that were allegedly being used irregularly that were identified at his two properties included BMWs, a Jeep Cherokee SRT8, two E-Class Mercedes-Benzes and a Lexus. The investigation allegedly also generated evidence of Mdluli's use of some of these vehicles while on vacation.
 - c. During a trip to Singapore at the end of 2009 'for purposes of viewing and purchasing technical equipment for crime intelligence' Mdluli allegedly paid for his wife's air ticket out of crime intelligence funds.
 - d. The report also included allegations that: '[B]esides the employment, inappropriate promotion and placing of family members of Lt-Gen Mdluli in the agent programme of crime intelligence, [in addition] family members of a major general and colonel in the division, as well as that of a prominent person, were placed in the programme. ... In total, approximately 23 persons that fall in the above category are deployed as "principal agents" in the programme. As far as can be ascertained, none of these are actually involved in bone fide undercover operations in pursuance of the operational objectives of the SA Police Service Crime Intelligence Division.'
 - e. 'Mdluli and his cohorts were also flown around the country courtesy of the secret service account. A travel agent in Westville, Durban, was tasked with the duty of providing a travel-office service to the SSA²⁸⁵ environment, ostensibly a covert air travel service. This arrangement was discovered when Lt-Gen Mdluli's journeys were analysed. No agents of consequence utilised the service, rather it was abused by a small group of persons, [many of them being] principal agents, many of them appointed and promoted in the same covert promotion process as Lt-Gen Mdluli's family. Lt-Gen Mdluli and his family travelled on more than 50 occasions.'
 - f. Various safe houses were 'rented for the exclusive use of Mdluli and his family. One was rented ostensibly for him to use for strategic meetings with component heads. No such meetings occurred there. Instead, he used it to house his Cape Town family (second wife and two children). They would fly up to Johannesburg and reside in the house. A property in Gordon's Bay, belonging to Lt-Gen Mdluli, was rented by crime intelligence, but used only by him'.

Concerns regarding appointments and promotions made during the term of office of Berning Ntlemeza as head of the Hawks

136. Allegations that Richard Mdluli irregularly appointed and promoted numerous individuals are referred to above. Allegations in this regard have also been made in relation to Berning Ntlemeza. Shortly before he was appointed as permanent head, while he was still acting head of the Hawks, it was reported that he had ‘fast-tracked around 60 promotions and appointments, sidelined experienced people, and suspended key senior Hawks figures’ and that there had also been serious concerns about the composition of selection panels he had appointed to interview and select candidates for jobs.²⁸⁶ In court papers Ntlemeza denied these allegations. However he has acknowledged ‘filling posts’ once he was permanently appointed.²⁸⁷ Considering the questionable role that has been played by Ntlemeza, and the questions raised about his integrity, there are therefore substantial grounds for concern that numerous questionable appointments and promotions were made while he was in charge of the Hawks.²⁸⁸ These for instance include Major General Zinhle Mnonopi, who is alleged to have pressured Mcebisi Jonas to assist in closing the investigation against Ajay Gupta.
137. A press report regarding break-ins at the Hawks office in July 2017 stated that ‘thieves stole hard drives and computers that contained personal staff information’ which were ‘at the centre of a high-level anti-corruption investigation into staff appointments made by former Hawks boss Berning Ntlemeza’.²⁸⁹

Section F: Other processes of manipulation of criminal justice agencies

138. The main focus of this submission has been on manipulation of the criminal justice agencies through appointments and removals, and processes related thereto (such as using ‘leaks’ to the media to provide a basis for taking action against key officials). It may reasonably be argued that this set of processes has been the major means through which manipulation of criminal justice agencies has been carried out. However such manipulation has not been limited to processes of this kind. In this section we sketch out some of the other key practices associated with the manipulation of criminal justice agencies.
139. Broad campaigns to undermine agencies and institutions that are seen to present a threat:
- a. A primary example of this was the campaign, referred to above, to undermine the Scorpions. It may be dated roughly to the period from 2004 to 2008 and was taken forward by a broad alliance of those who were opposed to Thabo Mbeki and supported Jacob Zuma. It is therefore in many ways distinct from many of the practices discussed here in that, over much of its duration, it involved mobilisation against the Executive. Under Mbeki the Executive were defenders of the Scorpions.
 - b. During the Zuma presidency there may be seen to have been a campaign, under the leadership of the Executive, to undermine SARS.²⁹⁰ In this submission this is referred to in the discussion of ‘leaks’.
140. Use of authority to exert direct pressure on individuals to change decisions that are not aligned with the interests of the Executive. This may be carried out:
- a. Directly by members of the Executive – an example would be the allegations that police minister Nathi Mthethwa directly intervened to place pressure on SAPS acting commissioner Nhlanhla Mkhwanazi and Inspector-General of Intelligence Faith Radebe in relation to the disciplinary charges against Richard Mdluli.
 - b. On the other hand it may be something carried out by senior officials – allegedly pressure of this kind was exerted on Mlotshwa by Jiba in 2012 to drop corruption-related charges against KwaZulu-Natal MEC Mike Mabuyakhulu and legislature speaker Peggy Nkonyeni.²⁹¹
141. Action to undermine or neutralise non-compliant individuals has taken a variety of forms. Some examples of action of this kind are reflected in the discussion above related to removal from office of senior leaders, including the use of leaks in this regard. In other cases criminal or disciplinary charges have been lodged against individuals, or the threat of such charges has been used ostensibly as a form of harassment. Other examples include:
- a. Pravin Gordhan has faced harassment of this kind on two occasions. On 11 October 2016 Gordhan, as well as Ivan Pillay and Oupa Magashula, were summonsed to appear in court on 1 November 2016 on charges of fraud related to an allegedly irregular process through which Pillay retired early but was then rehired by SARS on a contract basis. On the day before their scheduled court appearance Shaun Abrahams announced the withdrawal of the charges against them.²⁹² Earlier in 2016, while Gordhan was preparing to deliver his budget speech, the Hawks submitted a set of vague and poorly formulated questions on the SARS ‘rogue unit’ to Gordhan in what was understood to be a form of harassment and intimidation.²⁹³ This was referred to in testimony before the Commission by Pravin Gordhan on Tuesday 20 November 2018.²⁹⁴

- b. In March 2016, at the same time that the Hawks were pursuing Gordhan in relation to the 'rogue unit', the NPA announced that Robert McBride and two others from IPID were to be charged with fraud and defeating the ends of justice relating to the IPID reports on the alleged involvement of Dramat and Sibiya in illegal renditions. In November 2016 the NPA announced that it would be withdrawing the charges.²⁹⁵
 - c. In November 2016 it was reported that the Hawks were intending to charge Mcebisi Jonas, as well as ANC Secretary-General Gwede Mantashe, and treasurer Zweli Mkhize, for failing to report the alleged offer of a bribe by Ajay Gupta to Jonas. Again there were concerns that this was a measure intended to intimidate opponents of Zuma, rather than an unbiased application of the law.²⁹⁶
 - d. The NPA went to extraordinary lengths to sanction NPA prosecutor Glynnis Breytenbach, who had disciplinary charges lodged against her by the NPA in 2012 (she was acquitted of these in May 2013) and criminal charges lodged against her by the NPA in February 2016 (she was acquitted of these in February 2018). Breytenbach, who was employed in the Specialised Commercial Crimes Unit, was adamant that the charges against her were originally a means of preventing her from charging Richard Mdluli for corruption.
142. It goes without saying that many acts of manipulation are accompanied by an elaborate game of 'smoke and mirrors' intended to legitimate steps that are taken, such as the victimisation of adversaries. This point is in the discussion of 'leaks' above where the need to distinguish between the motivation for the leaks and the allegations that formed their substance are highlighted.
143. Another way of undermining the criminal justice agencies or other mechanisms of accountability has been to divert critical investigations to bodies that are less independent or have fewer powers. There are a number of instances where Nathi Mthethwa, the former police minister, was alleged to have engaged in this including:
- a. In 2012, when the Hawks were investigating abuses of the crime intelligence fund, instructions were given for the investigation to be suspended. It was alleged that the instruction emanated from Mthethwa and 'more than a dozen investigation dockets relating to abuse of crime intelligence funds had been transferred to the Inspector-General of Intelligence on Mthethwa's instructions'. Allegedly this was a means of sidelining the Hawks investigation.²⁹⁷ After allegations emerged in 2012 that R196 000 from the fund had been used to pay for a wall around Mthethwa's house in northern KwaZulu-Natal, the matter was referred to the Auditor-General.²⁹⁸
 - b. In relation to state expenditure on Jacob Zuma's homestead at Nkandla – in March 2013 Mthethwa refused to cooperate with a Public Protector investigation into the expenditure on the basis that the matter was due to be investigated by the Special Investigating Unit. Zuma in fact only signed the proclamation authorising investigation by the SIU nine months later in December 2013.²⁹⁹
144. Zuma was able to rely on allies within the criminal justice agencies to assist him in evading prosecution but he also made extensive use of state resources in order to neutralise legal action against him that has been intended to hold him accountable for allegations of corruption and the abuse of state resources. In this regard the Supreme Court of Appeal has commented that 'there is the broader pattern of the president's conduct in litigation, of defending what ultimately turns out – on the president's own concession – to have been the indefensible all along, banking on any advantage that the passage of the time may bring. This pattern has played out in well publicised cases in the courts and would be naive to ignore'.³⁰⁰ Likewise a newspaper editorial refers to 'four successive court cases' in which 'lawyers acting for President Jacob Zuma have presented arguments, sometimes holding to their stance for years through the original applications and the appeal proceedings, only to make major legal concessions at the very last moment'. The examples cited are: (i) In November 2017 Zuma's lawyer conceded 'that the R17m golden handshake offered to former National Prosecuting Authority (NPA) boss Mxolisi Nxasana was unlawful'; (ii) The acknowledgment in the Supreme Court of Appeal in Bloemfontein that the NPA's 2009 decision to drop corruption charges against Zuma had been irrational;³⁰¹ (iii) After an extended process 'he told

the Constitutional Court that he would pay back the money for the Nkandla “security upgrades”, turning the court case into a kind of laughing stock’; (iv) His litigation, initially to prevent the release of the Public Protector’s state capture report, and then to challenge the report’s recommendations.³⁰²

145. This recklessness with regard to public money is also reflected in circumstances where individuals who are apparently unfit for office remain on suspension for extended periods of time at public expense (most evidently in the case of Richard Mdluli) and the willingness to use expensive financial settlements to remove officials such as Nxasana and Dramat.
146. On the other hand it has been pointed out that those who have been victimised as a result of not being willing to apply the law selectively and become accomplices in the abuse of state resources often face great financial and other difficulties as a result.³⁰³
147. It will be apparent to anyone who has read the report of the recent commission of inquiry into tax administration at SARS that the practices that have been identified as a cause for concern in this report have not exclusively impacted on the criminal justice agencies. Notably, as already discussed in this report, those in charge at SARS were also targeted by means of leaks, apparently as a means of destabilising the agency in order to subordinate it to Executive manipulation. Other points of similarity include the fact that Tom Moyane was appointed to head SARS without any previous experience in tax administration³⁰⁴ (the obvious point of comparison during the Zuma administration is the June 2012 appointment of Riah Phiyega as SAPS national commissioner).³⁰⁵ As with Berning Ntlemeza,³⁰⁶ it would also appear that Moyane had advance knowledge that he would be appointed. The report of the commission of inquiry on tax administration suggests that as early as October 2013, just short of a year before his eventual appointment, Moyane was aware that he would be appointed as the commissioner of SARS, and had begun to prepare his ‘offensive’ against the organisation.³⁰⁷ Another similarity is the liberal use of taxpayers’ money to pay for frivolous litigation.³⁰⁸

Section G: The impact of manipulation of criminal justice agencies

148. As highlighted above manipulation of the criminal justice agencies serves various purposes including ensuring that numerous politicians and politically connected individuals enjoy impunity against investigation and prosecution, most notably in relation to allegations of corruption, using intelligence agencies to support control of the ANC by the Jacob Zuma faction, and providing tools for the harassment and intimidation of opponents. The ability to control criminal justice agencies for these purposes has been the guiding factor that has shaped the approach of the Executive to 'management' of the leadership of criminal justice agencies, including the selection of individuals for senior leadership positions and identification of individuals for removal.
149. It is interesting to note that during the period that Jacob Zuma and his supporters were contesting the leadership of the ANC with those aligned to Thabo Mbeki, one of the ways in which they tried to distinguish themselves from Mbeki was that they would tackle crime more effectively. In practice however the period of Jacob Zuma's ascendancy to and occupation of the position of president has been a deeply debilitating one for South Africa's criminal justice agencies. This provided conditions favourable to increases in key crime categories such as aggravated robbery and murder.
150. It is no secret why this has happened:
- a. The period of Jacob Zuma's ascendancy to power is associated with the destruction of the Scorpions, an effective anti-crime and anti-corruption investigative agency. As indicated, allegations that the Scorpions were being politically manipulated were used to justify their destruction. Rather than taking steps to create an agency that was less vulnerable to political manipulation, the legislation that was passed in 2008 to create the Hawks created an agency that was highly vulnerable to political manipulation. It has been as a result of litigation, initiated by members of the public and civil society organisations, that the legislation has been reviewed by the courts. Even after it was amended the courts still found that legislation did not adequately protect the independence of the courts, and struck down certain provisions.
 - b. The criminal justice environment in South Africa is a complex and daunting one. The SAPS for instance is an organisation of over 190 000 personnel (members of the Hawks are included in this number). While other agencies are smaller, they all have a formidable set of responsibilities. These agencies therefore all require the leadership selection process to ensure that those who are appointed are the best possible candidates for the job. However, particularly during the Zuma era, considerations to do with the skills and effectiveness of leaders have been, at best, entirely secondary.
 - c. Starting with the removal of Vusi Pikoli in 2009 (initiated by Thabo Mbeki in 2007) the executive has repeatedly sought to remove non-compliant leaders irrespective of whether they are doing their jobs effectively. At the same time within criminal justice agencies an environment has been created that has been hostile to skilled personnel who have sought to work in a manner that is consistent with constitutional principles. Leaders such as Menzi Simelane, Nomgcobo Jiba, Riah Phiyega, Laurence Mrwebi, Richard Mdluli, Shaun Abrahams and Israel Kgamanyane (who served as acting head of IPID during McBride's suspension) have all taken action to protect compromised personnel, to remove effective and principled members of staff, and to destabilise or shut down components of their organisations that are effective and operate in line with constitutional principles. In this kind of

environment the criminal justice agencies have become increasingly toxic working environments. Many skilled and dedicated personnel have become demoralised and therefore also resigned.

151. One illustration of this is crime intelligence. The main purpose of crime intelligence is to focus on forms of organised crime. This is serious crime that is linked to ongoing criminal activity involving criminal groups or networks. The purpose of intelligence activity is to disrupt these criminal networks and remove prolific offenders by gathering information against them for purposes of prosecution.³⁰⁹ Where intelligence gathering of this kind is operating effectively it works, subject to clear systems of oversight and accountability, through a combination of methods including the use of informants, undercover officers and covert means of gathering intelligence. Crime intelligence systems are particularly important in taking action against organised crime networks or groups that operate in a range of geographic areas, potentially including involvement in cross-border crime.³¹⁰ Certain types of aggravated robbery, most notably car hijacking, business and home robberies, and cash-in-transit heists, are frequently linked to organised crime groups. These crimes are identified by the SAPS itself as ‘more policeable’ particularly because policing methods including intelligence-based investigations can be used to reduce them. However during the Zuma era there were major increases in all of these categories of aggravated robbery contributing to an overall increase in aggravated robbery itself. Aggravated robbery is one of the drivers of the murder rate and it is likely that these increases in aggravated robbery have also contributed to the increase in the murder rate during this period (see Table 1). As reflected in the statistics provided, car hijacking, residential robbery and truck hijacking reached a low point in the third year of the Zuma presidency in 2011–12 (for non-residential robbery this was prior to the Zuma presidency in 2008-9). Related to this trend overall aggravated robbery itself also reached a low point of 100 789 cases in this year.³¹¹ Since then levels of all of these sub-categories of aggravated robbery, including non-residential robbery, have increased substantially, making a major contribution to the overall 40% increase in aggravated robbery in this period. Trends in murder have also paralleled trends in aggravated robbery with a 31% increase in murder since 2011–12. Cash-in-transit robbery marks a slight departure from this trend in that it reached a low point in 2014–15. Cash-in-transit robbery has however also increased substantially since that point. By the end of the Zuma presidency it had reached levels comparable to those in Zuma’s early years as president.

Table 1: Increases in selected crime sub-categories and categories

	Sub-categories of aggravated robbery frequently linked to organised crime					Total aggravated robbery	Murder
	Car hijacking	Residential robbery	Non-residential (business) robbery	Cash-in-transit robbery	Truck hijacking		
2008–9	14 855	18 438	13 885	386	1 437	120 920	18 084
2009–10	13 852	18 786	14 504	358	1 412	113 200	16 767
2010–11	10 541	16 889	14 637	290	999	101 039	15 893
2011–12	9 417	16 766	15 912	182	821	100 769	15 554
2012–13	9 931	17 950	16 343	145	943	105 488	16 213
2013–14	11 180	19 284	18 573	145	991	118 963	17 023
2014–15	12 773	20 281	19 170	119	1 279	129 045	17 805
2015–16	14 602	20 820	19 698	137	1 184	132 527	18 673
2016–17	16 717	22 343	20 680	152	1 183	140 956	19 016
2017–18	16 325	22 261	20 047	238	1 202	138 384	20 336

Source: SAPS crime statistics 2017/18, September 2018.

152. Another illustration of the stagnation and decline of criminal justice agencies is reflected in NPA figures for cases finalised by means of a verdict in court. Between 2009–10 and 2015–16 the total fell from 350 910 to 310 850, a 12% decline. Since then there has been a partial recovery with this number reaching 316 098 in 2016–17 and 335 161 (971 High Court, 30 837 regional court and 303 353 district court) in 2017–18. Nevertheless the number is still 4.5% lower than the 2009–10 figure.³¹² Problems with performance also appear to be reflected in declining public confidence in criminal justice agencies. Figures from the Statistics South Africa Victims of Crime Survey show that measures of public satisfaction in the police declined by 10% between 2011 and 2017–18 while confidence in the courts (presumably including the NPA) declined by 23% during this period.³¹³
153. One of the major casualties of the disruption and mismanagement of criminal justice agencies has been the capacity for investigating complex commercial crimes including corruption: In an August 2018 press report, Godfrey Lebeya, the head of the Hawks, is reported to have told Parliament’s Portfolio Committee on Police that the Hawks were struggling to deal with serious commercial crimes and that they did not have sufficient capacity to deal with some of the cases. He said the unit had had to look outside for assistance. He told MPs the organisation did not have enough personnel with financial or forensic investigative skills, forcing the unit to engage auditing firms. He said the Hawks had advertised various such positions as part of the unit’s restructuring.³¹⁴ ISS analyst Johan Burger is quoted in the report stating that the current situation is a combination of ‘bad appointments and loss of skilled personnel’.³¹⁵
154. Corruption is notoriously difficult to measure and there are not statistics that can be seen to adequately reflect levels of corruption. Nevertheless anyone who has been exposed to the news would be fully aware of the litany of reports on corruption, including particularly procurement corruption, which have become routine in news reports in recent years. There can be no doubt that the mismanagement of criminal justice agencies by the Executive has been a central contributing factor in allowing this situation to emerge. This type of situation, where criminal justice agencies are poorly managed by leaders who are obviously unsuitable, is also inevitably a recipe for chronic corruption within the criminal justice agencies themselves. As indicated, the testimony of Angelo Agrizzi, the Bosasa COO, provides allegations of active collusion by criminal justice officials in facilitating corruption by ensuring impunity for those alleged to be involved in corruption. While the name of Bosasa has become especially prominent in respect of this issue, there can be little doubt that there are numerous other examples of this kind.
155. These may not be the worst consequences however. A situation where those who act in favour of the Executive are elevated and favoured, while those who seek to act independently are victimised, has a profoundly debilitating impact on the culture of criminal justice agencies. In order for these agencies to operate ‘without fear or favour’ in line with principles of the rule of law and equality before the law, it is necessary for a culture of integrity and independence to be nurtured. Whatever culture of this kind may have begun to emerge within these agencies is likely to have been profoundly undermined. It is imperative that any new leadership within these agencies should prioritise rebuilding such a culture.

Section H: Recent positive developments

156. There have recently been several positive developments in relation to re-establishing the integrity of criminal justice agencies, some of which date back to the latter months of 2017 and the last days of the Zuma era at the beginning of 2018. This has included the retirement of Berning Ntlemeza (announced in September 2017)³¹⁶ and Richard Mdluli (January 2018)³¹⁷ and the suspension of advocates Jiba and Mrwebi (October 2018) as well as others. The suspension of Major General Zinhle Mnonopi, who allegedly pressurised Mcebisi Jonas to cooperate in closing down a case against Ajay Gupta, may also be a development that falls within this category.
157. Many people have also been reassured by the appointment of Godfrey Lebeya as head of the Hawks given his experience, expertise, qualifications and an absence of questions about his integrity.
158. However the development that may be regarded as holding out the greatest promise for the future was the announcement by President Cyril Ramaphosa on 10 October 2018 that he would appoint a panel to advise him on appointment of the new NPA. Appointment of the panel was followed by public interview with shortlisted candidates after which the panel recommended five candidates for consideration by Ramaphosa.³¹⁸ This culminated in the appointment of Shamila Batohi as the new NDPP on 4 December 2018. Batohi took office as NDPP on 1 February 2019.
159. A further positive development was the announcement by Ramaphosa during his State of the Nation Address on 7 February that in terms of Section 7 of the NPA Act he would be authorising the establishment of an investigating directorate within the NPA to deal with serious corruption and associated offences.³¹⁹ As reflected in Ramaphosa's speech, the advantage of such a directorate is that the legislation provides for investigators from other state agencies to be seconded to the directorate. Personnel from outside government, such as auditors and accountants, may also be contracted to work for the directorate.³²⁰ This enables a directorate to establish prosecution lead teams to investigate complex financial, or other, crimes.
160. The February 2019 announcement of the re-establishment of a Special Tribunal,³²¹ as provided for in terms of the Special Investigating Units and Special Tribunals Act,³²² is also to be welcomed. The tribunal will enable the SIU to have the adjudication of civil matters relating to the recovery of state funds prioritised, thus ensuring that there is a judicial unit dedicated to dealing with SIU cases and facilitating quicker recovery of state resources that have been illicitly used.

Section I: Recommendations

161. The chairperson of the Commission, Judge Raymond Zondo, has indicated that the Commission is interested in interrogating questions about aspects of the legal and political system in South Africa that have resulted in the entrenchment of corruption and state capture and the steps that can be taken to seek to enhance the resilience of the South African political system against a repeat of these problems. These remarks were made in the context of a discussion of senior appointment processes in state-owned enterprises.³²³ The questions that they highlight are directly relevant to the role of criminal justice agencies in facilitating state capture and corruption. The following recommendations are therefore made with a view to promoting the resilience of criminal justice agencies against manipulation and corruption of the kind that has facilitated state capture.

The legacy of the manipulation of criminal justice agencies

162. **Recommendation 1: Overall reform of senior management within criminal justice agencies –**

An appropriately skilled senior management echelon is required to restore trust and confidence in criminal justice agencies and to rebuild the morale of their staff. In 2012 the National Development Plan recommended that all officers³²⁴ undergo a competency assessment³²⁵ with a view to ensuring that the SAPS becomes a professional police service staffed by highly skilled officers. The need for such competency assessments is now much greater and should not be limited only to the SAPS. One of the major legacies of the manipulation of criminal justice agencies during the Zuma era is that numerous irregular appointments and promotions were made by senior leaders. However according to the latest figures with regards to the SAPS, there are nearly 25 000 SAPS personnel of commissioned officer rank (captain and above).³²⁶ A competency assessment targeted at all officers would therefore be a costly and cumbersome task. In order to initiate a process of renewal of the management of these agencies competency assessments against minimum standards should be conducted at the senior management and top management level. In the SAPS, this would include the ranks of Lieutenant-General, Major-General and Brigadier. Particular attention should be given to posts of strategic importance (for example the SAPS crime intelligence division, and the Hawks.) In addition an audit should be conducted to identify those who have been appointed or promoted in terms of regulations that authorise the SAPS national commissioner to appoint or promote without going through a selection process (see Recommendation 8 below), or other possible irregular appointments and promotions in the Hawks, the SAPS crime intelligence division, and the SAPS generally. Appropriate steps should be taken to address any situation where people have been appointed to posts for which they do not have the required competencies, experience, have criminal records or where there are unresolved questions relating to the individuals integrity.

163. **Recommendation 2: Building an organisational culture of accountability and commitment to the rule of law –** A process should be undertaken to renew commitment to key values of accountability, fairness and impartiality that underpin the principle of the rule of law amongst officials in the criminal justice system. Training programmes, and other measures, should seek to revive, affirm and strengthen a culture within these agencies that supports their ability to operate in an accountable manner and in line with principles of the rule of law.

164. **Recommendation 3: Strengthening anti-corruption investigation and prosecution capacity of criminal justice agencies** – As indicated, there have been various recent announcements, including the establishment of an investigating directorate in the NPA and the re-establishment of the SIU Special Tribunal, that promise to strengthen state responses to corruption. However corruption is a multi-faceted phenomenon, and overlaps with the problem of serious financial crime in the private sector. These mechanisms alone cannot address the overall problem of these crimes. Current systems for investigating corruption and serious financial crime should be evaluated in order to identify key obstacles to such investigation. In line with such an evaluation steps should be taken to strengthen the response of the criminal justice agencies to addressing these problems including addressing shortfalls in capacity and skills. A major priority in the medium term should be to strengthen the capacity of these agencies, particularly the Hawks and the NPA, to tackle these problems. In line with this, steps should be taken to ensure that the working environment in these agencies supports the maintenance and growth of investigative and prosecutorial capacity to tackle these problems.
165. **Recommendation 4: Accountability of SAPS crime intelligence division** – As yet no major review has been undertaken in relation to the SAPS crime intelligence division. The high-level review panel that was appointed by President Ramaphosa in June 2018 was focused exclusively on the State Security Agency (SSA).³²⁷ The review commission appointed in 2006 was focused on various intelligence structures including the National Intelligence Agency and the South African Secret Service, but did not deal with crime intelligence.³²⁸ One overall lesson from the Ministerial Review Commission on Intelligence, established in 2006, is that South Africa's intelligence agencies are far less transparent than equivalent agencies in other democratic countries.³²⁹ A similar independent review should be conducted of the SAPS crime intelligence division with a specific focus on enhancing performance, transparency and accountability. Particular attention should be given to the management and oversight of the crime intelligence secret service account which appears to have been routinely abused over the years. Pursuant to such a review steps should be taken to establish more effective mechanisms for oversight and accountability of crime intelligence, in line with overall efforts to improve the accountability of all intelligence agencies.

Addressing risk factors for future manipulation of criminal justice agencies

166. **Recommendation 5: Strengthening transparency regarding the interface between the Executive and criminal justice leadership** – There are two constitutional provisions regarding the relationship between the Executive and the heads of major criminal justice agencies which are implicitly ambiguous and may enhance the risk of manipulation of criminal justice agencies. One of these is Section 179(6) which provides that, 'The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.' The other is Section 207(2) which, inter alia, requires the national commissioner of the SAPS to comply with 'directions' issued by the cabinet member responsible for policing. As noted the Constitutional Court has held that the independence of the NPA is formally protected and from this point of view Section 179(6), which affects the relationship between the minister and the NDPP, may be seen to be of greater concern. However Section 207(2), dealing with the relationship between the police minister and the national commissioner, may be seen to go further than Section 179(6), in that it would appear to provide the minister with even greater power. In addition, while the NPA Act sets out some parameters for compliance by the NDPP with the 'final responsibility' of the justice minister, there are no formal limits or guidelines regarding the authority of the police minister to issue 'directions'. In addition there are no provisions setting out the means by which directions may be issued (such as requirements that directions be provided in writing) or providing for transparency or accountability in respect of them. These provisions may facilitate inappropriate political influence on operational decisions of law enforcement agencies such as the SAPS and Hawks. Legislative provisions should therefore seek to ensure that there is greater transparency with respect to the relationship between the Executive and the senior leadership of criminal justice agencies. The current process to amend the South African Police Service Act should introduce provisions that ensure that the relationship between

the police minister and SAPS national commissioner is more transparent. This could be done by requiring that directions be given in writing and that the minister reports to Parliament about all directives issued. Moreover, a specific clause should be added to the SAPS Act that prohibits the Minister of Police from issuing directives that require operational experience and training in law-enforcement. Likewise the process of amendment of the NPA Act, as provided for by the Constitutional Court in its August 2018 judgment regarding the removal from office of Mxolisi Nxasana,³³⁰ should also provide for greater transparency in the relationship between the minister of justice and the NDPP.

167. **Recommendation 6: Mechanisms to ensure professional criminal justice leadership** – As highlighted above various constitutional and other provisions are seen to authorise the president or other members of the Executive to make senior appointments to criminal justice agencies unilaterally without following any formal process to ensure that appointees are selected from the most suitable available candidates.³³¹ Though constitutional provisions specify that the appointments are to be made by the president in the final instance, they do not specify the processes that should be followed. Some provisions also provide for some form of consultation in the appointment process, but even these do not ensure that the most suitable candidates are appointed.³³² As indicated in October 2018, in a major departure from past practice, Ramaphosa appointed a panel to advise him on the appointment of the NDPP. A recommendation of this kind is also made in the 2012 National Development Plan which motivates for the SAPS national commissioner to be appointed by the president on the recommendations of a panel.³³³ In line with these approaches legislative measures should institutionalise a mechanism or mechanisms to ensure that the best possible candidates are put forward for appointment to leadership roles in criminal justice agencies. Potentially the Judicial Service Commission should be used as the model for an agency tasked with nominating candidates for key positions in these agencies. In addition to the criminal justice agencies discussed in this report such mechanism/s should also play a role in the appointment of the SIU senior leadership as the SIU plays a key role in the investigation of corruption and its head is also appointed directly by the president.³³⁴ (Note that the report of the recent commission on tax administration also discusses and makes recommendations for strengthening the appointment process for the SARS commissioner.)³³⁵
168. **Recommendation 7: Consistent legislative provisions governing appointments in independent bodies** – As highlighted above the courts have consistently held that the renewability of the contracts of senior leadership amounts to a limitation on the independence of these bodies. However the IPID Act provides for the term of office of the IPID executive director to be renewed. The IPID Act is therefore inconsistent with the legal provisions governing the NPA and the Hawks. In the case of the NDPP the current provision is for ‘a non-renewable term of 10 years’.³³⁶ In the case of the Hawks the current provision is for ‘a non-renewable fixed term of not shorter than seven years and not exceeding 10 years’.³³⁷ The provisions governing IPID should be brought in line with these provisions.
169. **Recommendation 8: Amendments to SAPS employment regulations regarding senior management appointments** – A major focus of this submission has been on senior leadership appointments that are governed by constitutional and legislative provisions. It is however also necessary to address other provisions that facilitate political manipulation of the appointment process and irregular appointments. One of the key provisions that are of concern here are the SAPS Employment Regulations of 2018. Notable in this regard are various provisions of Section 47(1) that require that decisions regarding senior management appointments and promotions are made ‘in consultation with the Minister’ and therefore, in effect, expand the scope for political interference in the SAPS.³³⁸ Of particular concern is also section 47(1)(n) that authorises the national commissioner in consultation with the minister to promote officials in the SAPS without following an established selection process.³³⁹ Section 47(1)(n) effectively replaces Section 45(5) of the 2008 SAPS employment regulations which authorised the national commissioner to unilaterally promote personnel. Rather than strengthening the provision, the requirement that there be agreement by the minister is merely a reflection of the manner in which the 2018 regulations have broadly expanded the scope for ministerial interference in the senior level appointments. The regulations should therefore be amended to provide that all appointments must follow a clearly defined selection process including an

independent assessment of skills and abilities so as to enhance the chance that only the most suitable candidates are appointed in all cases. Provisions authorising direct ministerial interference in appointments and promotions at senior management level must be removed.

170. **Recommendation 9: Limits on duration of acting appointments for senior leaders of independent bodies** – Legislative measures should set reasonable but clear limits on the duration of acting appointments in situations where the office is vacant. A current example of this kind of provision is to be found in the IPID Act which provides that ‘[i]n the case of a vacancy, the Minister must fill the vacancy within a reasonable period of time, which period must not exceed one year’.³⁴⁰ The time frames provided by this provision are too permissive and not appropriate to an independent body. Shamila Batohi took office less than four months after Ramaphosa announced that he was initiating the process to find a new NDPP. It would be reasonable to set a six-month time limit on acting appointments where positions are vacant to ensure both stability and independence of independence institutions.
171. **Recommendation 10: Reporting on the progress of investigations into allegations and disciplinary matters against senior managers** – In certain cases, officials within criminal justice agencies have been able to remain on suspension for a considerable period of time. In the case of Richard Mdluli his period on suspension exceeded six years after which he took early retirement with all of his benefits intact. However, criminal justice agencies disciplinary regulations do provide for time limits on the duration of disciplinary processes³⁴¹ but it is evident that in some cases these are not complied with, notably in relation to senior managers. A key reportable performance measure across the criminal justice system should address progress of investigations into allegations of misconduct and disciplinary measures taken against senior management. Criminal justice agencies should provide clear data on the duration of all investigations and disciplinary processes against senior managers in their annual reports as a way of demonstrating that they take such allegations seriously and will act when necessary. This is one way to build public trust in these institutions.
172. **Recommendation 11: Cross-agency annual report on corruption investigation and prosecution** – The investigation and prosecution of corruption currently involves a number of different agencies. In numerous State of the Nation and other addresses government has identified tackling corruption as a priority. Nevertheless there is no clear system of reporting on the collective efforts of these agencies to investigate and prosecute corruption. This has facilitated the situation where major corruption investigations, such as that involving Bosasa’s relationship with the Department of Correctional Services, can be derailed without public attention being drawn to this issue. In order to be able to assess the response by criminal justice agencies and other departments of government to corruption government should produce an annual report dealing with progress made in the investigation and prosecution of corruption, and in respect of disciplinary measures for corruption and other financial misconduct. In addition to providing statistical data this should provide an update on the status of all major cases.
173. **Recommendation 12: Eligibility for political office** – This submission is focused on the criminal justice agencies. However there are clearly aspects of our political culture that serve as major risk factors for manipulation of criminal justice agencies. The example of Jacob Zuma’s ascendancy to power shows that there is a high risk that people who are facing serious and well-founded allegations of wrongdoing, can be elected to positions of power, and as a result will use their positions to subvert the operation of the law against them with negative consequences for the rule of law. Though not all accusations made against politicians can necessarily be taken seriously, political parties should not apply the blanket legal standard of ‘innocent until proven guilty’ approach to questions of eligibility for political office. Political parties should change their codes of conduct or other internal policies to provide that where office bearers or candidates are facing well founded questions about their integrity (e.g. court findings or other hard evidence such as video or voice recordings of dishonesty), such people should be regarded as unsuitable for political office until they can formally clear their names through an independent hearing.

Section J: Conclusion

174. During the presidency of Thabo Mbeki it is possible that the law was applied selectively. Accusations about criminal justice agencies being used to target political opponents of the president were used to mobilise against, and ultimately unseat, him. During the Zuma era there was generalised impunity for the political class. However this was also not sufficient to secure Zuma's hold on power as the scale of corruption, and above all the phenomenon of state capture, led eventually to Zuma's political demise.
175. Corruption has undoubtedly profoundly undermined prospects for development and growth in South Africa in recent years. In addition allegations of the political use of criminal justice agencies have contributed to political instability rendering political power insecure. One of the conclusions of the National Anti-Corruption Strategy Diagnostic Report, produced on behalf of government, is that 'apart from the technical (policing and legal) skills required, anti-corruption agencies tend to stand and fall on the basis of their perceived fairness and independence'.³⁴² In order for South Africa to address corruption more decisively it is necessary for the criminal justice agencies to be appropriately capacitated. However, unless these bodies are demonstrably and identifiably independent, their efforts to address corruption will continuously be undermined by the suspicion, and accusations, that they are applying the law selectively for ulterior motives. The ability of South Africa's criminal justice agencies to consistently demonstrate that they are acting impartially and independently will be one of their greatest safeguards against those who seek to discredit and undermine them.

Notes

- 1 Proclamation 3 of 2018 provides that this Judicial Commission of Inquiry has been established 'to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud' inter alia including 'whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institutions or organs of state or directors of the boards of SOEs. (Proclamation 3 of 2018, as published in Government Gazette 41403 of 25 January 2018.)
- 2 John Crabtree & Francisco Durand, *Peru: Elite Power and Political Capture*. London, United Kingdom: Zed Books Ltd, quoting Hellman, et al 2000, 2017.
- 3 Haroon Borat, Mbongiseni Buthelezi, Ivor Chipkin, Sikhulekile Duma, Lumkile Mondli, Camaren Peter, Mzukisi Qobo, Mark Swilling & Hannah Friedenstein, *Betrayal of the Promise: How South Africa Is Being Stolen*, Centre for Complex Systems in Transition, Public Affairs Research Institute, et al, 2, 2019.
- 4 Neo Goba, Mantashe: State capture became a problem in Zuma's second term, *Times Live*, <https://www.timeslive.co.za/politics/2018-11-27-mantashe-state-capture-became-a-problem-in-zumas-second-term/>, 27 November 2018.
- 5 The name Bosasa is used in this submission, however in June 2017 the company changed its name to African Global Operations.
- 6 See the remarks of former prosecutor Glynnis Breytenbach at the Mokgoro Inquiry: 'I am not going to pretend that there's never been political pressure in the NPA, of course there has and I think that's common throughout the world, but never of the sort that we were experiencing at this time. And so the people that were supposed to protect the prosecutors from this type of pressure were not doing it. They were weak, they were vacillating. It was my view and the view of many of my colleagues that this was being facilitated by people within the NPA ... allowing political interference of a nature that simply cannot be allowed in an independent body.' *YouTube*, Justice Mokgoro Inquiry, Glynnis Breytenbach, 21:28, www.youtube.com/watch?v=purbPoNrlb4, 29 January 2019.
- 7 Allegations to this effect can be found in: Staff reporter, Mbalula, Senior SAPS Members In Alleged Cash-For-Votes Scam, www.huffingtonpost.co.za/2018/02/04/mbalula-senior-saps-members-in-alleged-cash-for-votes-scam_a_23352756/; Jan Gerber, Cops' rogue gallery still in SAPS posts, *News24*, www.news24.com/SouthAfrica/News/cops-rogue-gallery-still-in-saps-posts-20180306, 6 March 2018; Marianne Thamm, IPID vs SAPS procurement mafia, continued, *Daily Maverick*, www.dailymaverick.co.za/article/2018-09-05-ipid-vs-saps-procurement-mafia-continued/, 5 September 2018; Marianne Thamm, NASREC PLOT: IPID targets senior SAPS members and former ministerial adviser in ANC vote-buying scandal, *Daily Maverick*, www.dailymaverick.co.za/article/2019-01-07-nasrec-plot-ipid-targets-senior-saps-members-and-former-ministerial-adviser-in-anc-vote-buying-scandal/, 7 January 2019; Marianne Thamm, National police commissioner turns to court to flush out info on ANC vote-buying scandal *Daily Maverick*, www.dailymaverick.co.za/article/2019-01-11-national-police-commissioner-turns-to-court-to-flush-out-info-on-anc-vote-buying-scandal/, 11 January 2019.
- 8 One prominent exception to this concerns allegations that emerged in July 2015 regarding the appointment of the daughter of the then deputy minister of police, Maggie Sotyu, to the position of deputy director of investigations in the Free State provincial office of IPID, Abram Mashego, Minister's daughter scores top job, *City Press*, www.news24.com/SouthAfrica/News/Ministers-daughter-scores-a-top-cop-job-20150711, 12 July 2015.
- 9 Roger Southall, Family and favour at the court of Jacob Zuma, *Review of African Political Economy* 38, no. 130: 617-26, <https://doi.org/10.1080/03056244.2011.633829>, 1 December 2011.
- 10 Jacques Pauw, *The President's Keepers: Those Keeping Zuma in Power and out of Prison*, Cape Town: NB Publishers, 2017.
- 11 See for instance Pauw, 295 [Note 10]: 'City Press reported in August 2017 that police minister Fikile Mbalula was embroiled in a war against rogue police spies who threatened his life, as well as the lives of his family. The newspaper was in possession of a report of a top secret undercover crime intelligence operation called Project Wonder. The report detailed illegal cellphone taps on five ministers, and plans to plant evidence against Mbalula to get him fired, and to use "young women" to "trap" him and his senior staff.'
- 12 These included the October 2010 'Ground coverage' report that alleged that Zuma's opponents had met 'in Estcourt, KwaZulu-Natal, supposedly to concoct a plot to unseat him'. Mdluli's signature was on the report 'but after it was discredited, he claimed his signature was forged'. (Pauw, *The President's Keepers*, 225 [Note 10]); and another letter to Zuma in November 2011 in which Mdluli alleged that SAPS national commissioner Bheki Cele, former Gauteng provincial police commissioner Mzwandile Petros, Hawks head Anwa Dramat and deputy national commissioner Godfrey Lebeya were 'working together' to unseat him as head of crime intelligence, Sally Evans

& Zwanga Mukhuthu, Phiyega sends deputies packing, *Mail & Guardian*, <https://mg.co.za/article/2014-06-13-phyiyega-sends-deputies-packing>, 13 June 2014; Pauw, *The President's Keepers*, 234 [Note 10]). See also the following note.

- 13 See Note 7 above. Allegations in this regard also include: (i) Claims by Mdluli that one of his close associates, Nkosana 'Killer' Ximba, had assisted in securing Zuma's victory at the Polokwane conference in 2007. Mdluli made this claim in a letter to Zuma written in March 2011 in which, it appears, he was trying to emphasise his loyalty and support for Zuma. The significance of the reference to the Polokwane conference is related to this, as Mdluli is aiming to persuade Zuma that Mdluli's own associates have consistently been Zuma's allies. At the time of Polokwane, Ximba was in the process of applying to be reappointed to serve in the SAPS (Pauw, page 225-6, 231 [Note 10]); (ii) An infamous letter that Mdluli wrote to Zuma and minister of police Nathi Mthethwa in November 2011 in which he complained about the charges he was facing and his related suspension and said, 'It is alleged I support the minister of police and the president of the country. In the event that I come back to work I will assist the president to succeed next year.' (The letter is available in a link to this media article: www.news24.com/SouthAfrica/News/Zuma-letter-led-to-Mdlulis-removal-20120509-2.) This has been generally understood as signalling his availability to assist Zuma in retaining leadership of the ANC at the ANC elective conference that would take place in December 2012 in Mangaung (discussed in Pauw, page 234); (iii) Allegations that Ximba, who was then part of SAPS crime intelligence, was involved in using crime intelligence funds to buy votes at the ANC Mangaung conference on Zuma's behalf. At the time of the conference Mdluli was again on suspension (his suspension was briefly lifted at the end of March until early June 2012) but it is believed that Mdluli retained considerable authority in the crime intelligence environment (discussed in Pauw, 306-7); (iv) Allegations that in 2017, the acting SAPS national commissioner attended a meeting with the Umkhonto we Sizwe Military Veterans Association (MKMVA) which discussed the appointment of Major General Pat Mokushane, as acting head of crime intelligence. Mokushane, who was also allegedly a Mdluli ally, was appointed as acting head of crime intelligence in June 2017. It is alleged that at the meeting there was a discussion 'that crime intelligence must gather covert intelligence to assist the ANC in the build-up to the elective conference scheduled to take place in December 2017. They should gather information on individuals and organisations that were anti-Zuma and place them under surveillance. These included journalists, opposition party members, civic organisations "fighting the state" and individuals who were vocal against the president'. (Pauw, 297-298)
- 14 Qaanitah Hunter, Harassment 'worse than during apartheid' – Pravin Gordhan, *Times Live*, www.timeslive.co.za/politics/2018-11-20-harassment-worse-than-during-apartheid-pravin-gordhan/, 20 November 2018; Pieter du Toit, Deconstructing Gordhan's testimony: Everything you need to know, *Times Live*, www.news24.com/SouthAfrica/News/deconstructing-gordhans-testimony-everything-you-need-to-know-20181120, 20 November 2018.
- 15 Commission of Inquiry into State Capture, Transcript, 97 (Angelo Agrizzi), www.sastatecapture.org.za/site/files/transcript/44/28_January_2019_Sessions.pdf, 28 January 2019.
- 16 Ibid.
- 17 Commission of Inquiry into State Capture, Transcript, 141, www.sastatecapture.org.za/site/files/transcript/43/24_January_2019_Sessions.pdf, 24 January 2019.
- 18 Commission of Inquiry into State Capture, Transcript, 11-12 (Paul Pretorius), www.sastatecapture.org.za/site/files/transcript/43/24_January_2019_Sessions.pdf, 16 January 2019.
- 19 Ibid; Commission of Inquiry into State Capture, Transcript, 78-90 (Note 15), 28 January 2019.
- 20 Commission of Inquiry into State Capture, Transcript, 29-35 (Angelo Agrizzi), see also page 71, www.sastatecapture.org.za/site/files/transcript/43/24_January_2019_Sessions.pdf, 21 January 2019.
- 21 Commission of Inquiry into State Capture, Transcript, 96-98 (Angelo Agrizzi) (Note 15), 28 January 2019.
- 22 Commission of Inquiry into State Capture, Transcript, 29-35 (Angelo Agrizzi) 44-93 (Note 20), 21 January 2019.
- 23 Ibid, 49-50.
- 24 Ibid, 44.
- 25 See for instance Ibid, 45. Peter Mokaba had been a deputy minister but passed away in 2002.
- 26 See Glynnis Breytenbach and Nechama Brodie, *Rule of Law*, Johannesburg: Pan Macmillan South Africa, 162-170, 2017. The allegedly fraudulent conduct by ICT took place in May 2009. In March 2010 ICT handed over a 50% stake to JIC Mining, a Gupta-controlled company. (Lionel Faull, Sam Sole, Shock and ore: Dirt flies in Sishen battle, *Mail & Guardian*, <https://mg.co.za/article/2012-02-10-shock-and-ore-dirt-flies-in-sishen-battle>, 10 February 2012.)
- 27 Commission of Inquiry into State Capture, Transcript, 40 (Barbara Hogan), www.sastatecapture.org.za/site/files/transcript/25/12_November_2018_Session.pdf, 12 November 2018.
- 28 This came to the fore in relation to the allegations of abuse of the intelligence agencies against National Intelligence Agency head Billy Masetlha, and the related 'hoax email' saga that first came to public attention in 2005.
- 29 Former commissioners of the Truth and Reconciliation Commission, Call for apology to victims & for appointment of a commission of inquiry to investigate the suppression of the TRC cases, www.scribd.com/document/399025456/TRC-Letter-to-the-President-Feb-5-2019#from_embed, 6 February 2019; Ra'eesa Pather, NPA admits to political interference in prosecutorial decisions, *Mail & Guardian*, <https://mg.co.za/article/2019-02-06-mpa-admits-to-political-interference-in-prosecutorial-decisions>, 6 February 2019.
- 30 These included the prosecution of several people including former minister of defence Magnus Malan in relation to the so-called KwaMakutha Massacre, the prosecution of Eugene de Kock, and that of Ferdi Barnard for the murder of David Webster.
- 31 According to a 2012 article by Hugo van der Merwe, by 2012 there had been five completed cases at that point (Hugo van der Merwe, Prosecutions, pardons and amnesty: The trajectory of transitional accountability in South Africa, in Nicola Palmer, Phil Clarke and Danielle Granville et al (eds.), *Critical Perspectives in Transitional*

- Justice, Cambridge: Intersentia, 447, 2012; See also: Zelda Venter, Vlok not the first to be charged, *IOL*, www.iol.co.za/news/politics/vlok-not-the-first-to-be-charged-364534, 2 August 2007. The most high-profile of these were those of Wouter Basson, who was acquitted in April 2002, and Adriaan Vlok, General Johan van der Merwe and three other former police officers who received suspended sentences in August 2007. In the subsequent period there have been two prosecutions that are ongoing: that relating to the 1983 murder of Nokuthula Simelane (Athandiwe Saba, NPA to prosecute police officers for death of Nokuthula Simelane, *Mail & Guardian*, <https://mg.co.za/article/2016-02-11-npa-to-prosecute-police-officers-for-death-of-nokuthula-simelane>, 12 February 2016); that relating to the 1971 death of Ahmed Timol (Ra'eesa Pather, Apartheid cop to finally stand trial for Timol murder, *Mail & Guardian*, <https://mg.co.za/article/2018-10-22-apartheid-cop-to-finally-stand-trial-for-timol-murder>, 22 October 2018). In 2004 a prosecution was initiated in relation to the 1985 murders of Sipho Hashe, Champion Galela and Qaqawuli Godolozu, the so-called Pebco Three (*News24*, Pebco 3 accused in court, *News24*, www.news24.com/SouthAfrica/News/Pebco-3-accused-in-court-20040603, 3 June 2004). The case was never finalised.
- 32 Greg Nicholson, NPA blames Mbeki government for failure to prosecute TRC cases, *Daily Maverick*, www.dailymaverick.co.za/article/2019-02-06-npa-blames-mbeki-government-for-failure-to-prosecute-trc-cases/, 6 February 2019.
 - 33 Paul Holden, *The Arms Deal in Your Pocket*, Jonathan Ball Publishers, 49–53, 2008.
 - 34 Vusi Pikoli and Mandy Wiener, *My Second Initiation – The Memoir of Vusi Pikoli*, Johannesburg: Picador Africa, 2013.
 - 35 F Ginwala, Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, 205 paragraph 346, www.justice.gov.za/commissions/2008_ginwala.pdf, 4 November 2008.
 - 36 *Zuma v Democratic Alliance and Others* (836/2013) [2014] ZASCA 101; [2014] 4 All SA 35 (SCA) (28 August 2014), www.saflii.org/za/cases/ZASCA/2014/101.html; *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017), www.saflii.org/za/cases/ZASCA/2017/146.html.
 - 37 Jonny Steinberg, Policing, state power, and the transition from apartheid to democracy: A new perspective, *African Affairs*, Volume 113, Issue 451, pages 173–191, 185, 1 April 2014.
 - 38 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), para 121. See also 124.
 - 39 See for instance Section 16(3) of the South African Police Service Act, 68 of 1995 which provides: 'In the event of a dispute between the National Head of the Directorate for Priority Crime Investigation and the National Commissioner or the National Head for Priority Crime Investigation and a Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto falls within the mandate of the Directorate, the determination by the National Head of the Directorate for Priority Crime Investigation [in accordance with the approved policy guidelines,] shall prevail.' The words 'in accordance with the approved policy guidelines' have been excised from Section 16(3) by the Constitutional Court, *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014), www.saflii.org/za/cases/ZACC/2014/32.pdf, paragraph 99.
 - 40 The legislation that did away with the Scorpions (National Prosecuting Authority Amendment Act, 56 of 2008) and that provided for the Hawks to be established (South African Police Service Amendment Act, 57 of 2008) came into effect in January 2009.
 - 41 The Hawks are regulated by Section 16 and Chapter 6A (Sections 17A–17L) of the South African Police Service Act, 68 of 1995.
 - 42 National Prosecuting Authority Act 32 of 1998.
 - 43 Independent Police Investigative Directorate Act 1 of 2011.
 - 44 National Planning Commission, National Development Plan – Our future, make it work, 448, 2012; Public Affairs Research Institute (PARI), National Anti-Corruption Strategy Diagnostic Report, October 2016, 32–37, https://www.gov.za/sites/default/files/gcis_document/201705/nacs-diagnostic-report-final1.pdf.
 - 45 Public Affairs Research Institute (PARI), National Anti-Corruption Strategy Diagnostic report [Note 44].
 - 46 *Glenister v President of the Republic of South Africa and Others*, para 83 (p 39) onwards [Note 38].
 - 47 See for instance the February 2018 media report noting that 'from November 1, 2017 to date, about 92 officials from different government entities across all the provinces had been arrested by the Hawks serious corruption crime units for various offences, including corruption, armed robbery, and theft, she said in a statement'. 'The breakdown of the perpetrators comprises, among others, 28 police officers, 45 traffic officers, six home affairs and other government officials, including municipalities. A staggering 34 traffic officers out of 45 are from Limpopo alone.' (*eNCA*, Too many public officials being arrested: Hawks head, *eNCA*, www.enca.com/south-africa/too-many-public-officials-being-arrested-hawks-head, 4 February 2018.) Presentations on efforts by the Hawks to address corruption to the Standing Committee on Public Accounts hearings on the Anti-Corruption Task Team have tended to be presented by the head of Serious Commercial Crime rather than the head of the Serious Corruption component (Parliamentary Monitoring Group, Standing Committee on Public Accounts meeting – Anti-Corruption Task Team (ACTT): pending cases and Criminal Asset Recovery Account (CARA), <https://pmg.org.za/committee-meeting/24612/>, 14 June 2017); Parliamentary Monitoring Group, Standing Committee on Public Accounts meeting – Hawks current cases, <https://pmg.org.za/committee-meeting/25963/>, 13 March 2018.
 - 48 Insofar as their investigations reveal evidence of criminal conduct this is referred to the NPA who in turn frequently refer the matter to the Hawks for it to be further investigated.
 - 49 The National Anti-Corruption Strategy Diagnostic Report lists the current members of ACTT as: the National

- Prosecuting Authority, the Asset Forfeiture Unit, the Directorate for Priority Crime Investigation (Hawks) in the South African Police Service, the Special Investigating Unit, the South African Revenue Service, the Office of the Accountant-General and the Chief Procurement Officer in the National Treasury, the Financial Intelligence Centre, the National Intelligence Coordinating Committee, the State Security Agency, the Presidency, the Department of Justice and Constitutional Development, the Department of Public Service and Administration, and the Government Communication and Information System. (PARI, National Anti-Corruption Strategy Diagnostic Report, 5 [Note 44].)
- 50 Ilham Rawoot, Adriaan Basson, Corruption crackdown, *Mail & Guardian*, <https://mg.co.za/article/2010-10-29-corruption-crackdown>, 29 October 2010.
- 51 Information on the exact composition of the ACTT is inconsistent (Rommel Roberts, Unsigned founding affidavit, 116–117, <https://accountabilitynow.org.za/wp-content/uploads/2018/09/CTPC-GIV-1st-Draft-Founding-Affidavit-updated-NUMBERAUTOMATED-to-9-September-2018-final-xx-1.pdf>, 2018).
- 52 See for instance: Jan Gerber, SIU ensures conviction of City of Tshwane fraudster, *News24*, www.news24.com/SouthAfrica/News/siu-ensures-conviction-of-city-of-tshwane-fraudster-20181030, 30 October 2018.
- 53 *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 (13 August 2018), paragraph 18, www.saflii.org/za/cases/ZACC/2018/23.html.
- 54 South African Police Service Act, 68 of 1995, Section 17B(b)(ii).
- 55 *Glenister v President of the Republic of South Africa and Others* [Note 38].
- 56 South African Police Service Amendment Act 10 of 2012.
- 57 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [Note 39].
- 58 *McBride v Minister of Police and Another* [2016] ZACC 30. Section 206(6) of the constitution states that: On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.
- 59 *Glenister v President of the Republic of South Africa and Others*, inter alia paragraphs 117–121, 183–4, 188, 208 [Note 38].
- 60 *Glenister v President of the Republic of South Africa and Others*, paragraph 188 (see also paragraph 121 with respect to the minority judgment) [Note 38].
- 61 *Glenister v President of the Republic of South Africa and Others*, paragraph 197 [Note 38].
- 62 See also the 2011 judgment at paragraph 214 and *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*, paragraphs 16 and 17 [Note 39].
- 63 Other key judgments in this regard include: *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016); *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [Note 53].
- 64 *Glenister v President of the Republic of South Africa and Others*, paragraphs 217–226 [Note 38].
- 65 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*, see for instance paragraphs 83–91 [Note 39].
- 66 *Ibid*, paragraphs 77–82; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*, paragraphs 42–44 [Note 53].
- 67 *Glenister v President of the Republic of South Africa and Others*, paragraph 227 [Note 38].
- 68 *Ibid*, paragraphs 228–250; *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*, notably in paragraphs 96–105 [Note 39].
- 69 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*, notably in paragraphs 40–42 [Note 39].
- 70 Organisation for Economic Co-operation and Development (OECD), *Specialised Anti-Corruption Institutions: Review of Models* (2008) at 6 quoted in *Glenister v President of the Republic of South Africa and Others*, paragraph 119 [Note 38]. The quoted paragraph reads in full: ‘Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability; specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work.’
- 71 Regulations for the South African Police Service, No R. 973, 12 September 2008.
- 72 Some of the dynamics within Parliament are highlighted in the testimony of Dennis Bloem to the Commission on 1 February 2019 (Commission of Inquiry into State Capture, Transcript, 28–32 (Dennis Bloem), www.sastatecapture.org.za/site/files/transcript/48/01_February_2019_Sessions.pdf), 1 February 2019.
- 73 Nathi Mthethwa, Minister Mthethwa on the appointment process of the Executive Director of the Independent Police Investigative Directorate, Politicsweb, www.politicsweb.co.za/terms-and-conditions/weve-chosen-robert-mcbride-to-head-ipid--nathi-mth, 12 November 2013; Sarah Evans, ANC MPs say yes to McBride’s IPID appointment, *Mail & Guardian*, <https://mg.co.za/article/2014-01-29-mps-say-yes-to-mcbrides-ipid-appointment>, 29 January 2014.

- 74 Section 6(3)(b) of the Independent Police Investigative Directorate Act 1 of 2011.
- 75 Jeanette Chabalala, McBride vs Cele: Police committee to comply with court deadline, *News24*, www.news24.com/SouthAfrica/News/mcbride-vs-cele-police-committee-to-comply-with-court-deadline-20190213, 13 February 2019.
- 76 See for instance: *Zuma v Democratic Alliance and Others* (836/2013) [2014] [Note 36]; *General Council of the Bar of South Africa v Jiba and Others* (23576/2015) [2016] ZAGPPHC 833; [2016] 4 All SA 443 (GP); 2017 (1) SACR 47 (GP); 2017 (2) SA 122 (GP) (15 September 2016), www.saflii.org/za/cases/ZAGPPHC/2016/833.html; *Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* (141/17 and 180/17) [2018] ZASCA 103 (10 July 2018), www.saflii.org/za/cases/ZAGPPHC/2016/833.html.
- 77 *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), www.saflii.org/za/cases/ZASCA/2011/241.html.
- 78 *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), www.saflii.org/za/cases/ZACC/2012/24.pdf.
- 79 Ibid, see inter alia paragraphs 113 and 121.
- 80 Ibid, paragraph 86.
- 81 *Ntlemenza v Helen Suzman Foundation and Another* (402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (9 June 2017), www.saflii.org/za/cases/ZASCA/2017/93.pdf.
- 82 Ibid, paragraphs 8–10.
- 83 The inquiry started on 21 January 2019.
- 84 *General Council of the Bar of South Africa v Jiba and Others*, paragraph 114.1.1 [Note 76].
- 85 National Prosecuting Authority, National Prosecuting Authority (NPA) welcomes appointment of two Deputy National Directors of Public Prosecutions, South African Government, www.gov.za/national-prosecuting-authority-mpa-welcomes-appointment-two-deputy-national-directors-public, 13 January 2011.
- 86 The NPA is headed by the National Director of Public Prosecutions (NDPP). Beneath the NDPP are four deputy NDPPs appointed beneath the single NDPP. Beneath this is the rank of Director of Public Prosecutions and beneath this is a Deputy Director of Public Prosecutions.
- 87 *City Press*, NPA boss backed 'thieving' hubby, *City Press*, www.news24.com/Archives/City-Press/NPA-boss-backed-thieving-hubby-20150429, 15 January 2011.
- 88 December is cited as the date in paragraph 4 of the judgment in the case regarding her suspension and the disciplinary charges against her (*Jiba v Minister of Justice and Constitutional Development and Others* (J167/09) [2009] ZALC 57; (2010) 31 ILJ 112 (LC); [2009] 10 BLLR 989 (LC) (19 May 2009), www.saflii.org/za/cases/ZALC/2009/57.html). Elsewhere it is given as November (Staff Reporter, Inside operation Destroy Lucifer, *Mail & Guardian*, https://mg.co.za/article/2009-06-19-inside-operation-destroy-lucifer, 19 June 2009).
- 89 See inter alia, Pauw, 222-3 [Note 10]; *City Press*, Spy tapes: the sequel, *City Press*, www.news24.com/Archives/City-Press/Spy-tapes-the-sequel-20150429, 9 June 2012.
- 90 Staff reporter, Charges against Gerrie Nel withdrawn, *Mail & Guardian*, https://mg.co.za/article/2008-01-14-charges-against-gerrie-nel-withdrawn, 14 January 2008.
- 91 *Jiba v Minister of Justice and Constitutional Development and Others* [Note 88].
- 92 *City Press*, NPA boss backed 'thieving' hubby, *City Press* [Note 87]; *City Press*, Spy tapes: the sequel [Note 89]; *City Press*, Jiba wanted Nel 'by hook or by crook', *City Press*, www.news24.com/Archives/City-Press/Jiba-wanted-Nel-by-hook-or-by-crook-20150430, 4 August 2012.
- 93 *YouTube*, Justice Mokgoro Inquiry (Willie Hofmeyr), 1 hour and 42 minutes, www.youtube.com/watch?v=b6_glcCqPv4, 15 February 2019.
- 94 *Democratic Alliance v The President of the RSA & others*, (ZASCA, 1 December 2011), paragraphs 113 and 121 [Note 77].
- 95 *Democratic Alliance v President of South Africa and Others* (CCT, 5 October 2012) [Note 78].
- 96 As discussed, the withdrawal of murder charges against Mdluli, both criminal and disciplinary, has also been a source of controversy and contestation.
- 97 The Mokgoro Inquiry has been informed that Jiba denies having flown to Durban at this time. However the evidence before the inquiry is that the difference between the Voyager number used by the passenger on the flight and that of Jiba is only the last digit. Under re-examination, Col Kobus Roelofse, a Hawks investigator, accepts that there may have been a mistake on his part in recording the number. A copy of the original document with the number was attached to one of the dockets relating to a Hawks investigation into corruption allegations against Mdluli. After Berning Ntlemenza took over as head of the Hawks, Roelofse was removed from the case, and the docket was then lost. (*YouTube*, Justice Mokgoro Enquiry, 01 February 2019 Part 2 (Kobus Roelofse) www.youtube.com/watch?v=5jnA2QCzz80; *YouTube*, Justice Mokgoro Enquiry, 05 February 2019 (Kobus Roelofse) www.youtube.com/watch?v=5jnA2QCzz80.) The evidence that Jiba was on the flight is revisited by the evidence leaders on 5 February. See in particular 2.17 to 2.21.
- 98 *National Director of Public Prosecutions v Freedom Under Law* (67/14) [2014] ZASCA 58 (17 April 2014), paragraph 2, paragraph 32–42, www.saflii.org/za/cases/ZASCA/2014/58.html.
- 99 Ibid, paragraph 2.
- 100 Section 24(3) read with Section 20(1), National Prosecuting Authority Act 32 of 1998.
- 101 *Democratic Alliance v The President of the RSA & others* (ZASCA, 1 December 2011) [Note 77].
- 102 *YouTube*, Justice Mokgoro Enquiry, 29 January 2019, at 11 minutes [Note 6].
- 103 The NDPP's powers to review a decision are set out in Section 179(5)(d).
- 104 *National Director of Public Prosecutions v Freedom Under Law*, paragraph 37 [Note 98].
- 105 Ibid.

- 106 *YouTube*, Justice Mokgoro Enquiry, 1 February 2019 (Simphiwe Mlotshwa), 1:24–1:30, <https://www.youtube.com/watch?v=kKQuKhed8to>. The evidence is from an affidavit, and attached handwritten notes, by advocate Anthony Mosing that refers to a meeting at which the then minister Nathi Mthethwa, inter alia, bemoaned the slow progress of the investigation.
- 107 Act 121 of 1998.
- 108 Section 2(4).
- 109 *Booyesen v Acting National Director of Public Prosecutions and Others* (4665/2010) [2014] ZAKZDHC 1; [2014] 2 All SA 391 (KZD); 2014 (9) BCLR 1064 (KZD); 2014 (2) SACR 556 (KZD) (26 February 2014), paragraph 36, www.saflii.org/za/cases/ZAKZDHC/2014/1.html.
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- 118 *Ibid*, 44.
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which is justified in terms of this provision. Even if so, it fell clearly outside the established procedures.

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- 197** *Freedom Under Law v National Director of Public Prosecutions and Others* (26912/12) [2013], paragraphs 74, [Note 195]. See also *National Director of Public Prosecutions v Freedom Under Law*, paragraph 13 [Note 98].
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- 281** Nomgcobo Jiba was appointed as acting NDPP following the court findings against Simelane while Ntlemeza was appointed as acting head of the Hawks following the suspension of Dramat.
- 282** See for example the letter of Anwa Dramat to the minister of police, excerpts of which are quoted in *Helen Suzman Foundation v Minister of Police and Others* (1054/2015) [2015] ZAGPPHC 4 (23 January 2015). Paragraph 11 of the judgment quotes several points from this letter. In relation to Mxolisi Nxasana see: *Eyewitness News*, 'Jiba used Zuma corruption case to end my career', <https://ewn.co.za/2017/09/15/jiba-used-zuma-corruption-case-to-end-my-career>, 15 September 2017; See also: eNCA, Former prosecutions boss Nxasana wants Zuma in the witness box, www.enca.com/south-africa/former-prosecutions-boss-nxasana-wants-zuma-in-the-witness-box, 16 September 2017.
- 283** Commission of Inquiry into State Capture, Transcript, 1 February 2019, 28–32 (Dennis Bloem) [Note 72].
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- 324** The term 'officers' applies to 'commissioned officers' who are those from the rank of captain and above.
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- 332** See: Section 207(3) of the constitution; provisions of the South African Police Service Act, regarding appointment of the head of the hawks, the deputy head, and the provincial heads; provisions of the NPA Act regarding appointment of Deputy National Directors, Directors and Deputy Directors; provisions of the IPID Act regarding appointment of the IPID executive director.
- 333** The passage in question states that 'The National Commissioner of Police and Deputies should be appointed by the President on a competitive basis. A selection panel, established by the President, should select and interview candidates for these posts against objective criteria. The President should appoint the National Commissioner and Deputies from recommendations and reports received from this selection panel.' (National Planning Commission, National Development Plan – Our future, make it work, 391 [Note 44].) Arguably the National Development Plan should have motivated for a selection panel also to be involved in the appointment of provincial commissioners. Also it should be noted that the deputy national commissioners are not appointed by the president but by the national commissioner.
- 334** Special Investigating Units and Special Tribunals Act, Act 74 of 1996 (SIU Act), Section 3(1). As indicated above the SIU operates in the domain of civil law and, in terms of the approach taken in this submission, does not qualify as a criminal justice agency.
- 335** Commission of Inquiry into Tax Administration and Governance by SARS, Final Report, paragraphs 6 (page 170), 18 (pages 171–2), 20 (page 178), 24 (page 181), 40 (187) and 16.3 (page 197) [Note 244].
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- 338** Minister of Police, South African Police Service Employment Regulations 2018 as published in Government Gazette 41754 of 6 July 2018. In addition to regulations 47(1)(n), provisions that are of concern are 47(1)(d) (chair of a selection committee for the SMS must be appointed by the national commissioner with the concurrence of the minister), 47(1)(k) (appointments or promotions recommended by a selection committee may only be approved by the national commissioner with the concurrence of the minister) and 47(1)(m) (regarding promotion to vacant posts).
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About this submission

This is a joint submission by Corruption Watch and the Institute for Security Studies to the Judicial Commission of Inquiry into Allegations of State Capture. The submission addresses the manipulation of criminal justice agencies under the administration of South Africa's former president Jacob Zuma. This manipulation was a critical factor in entrenching and facilitating state capture. The submission provides a detailed examination of evidence about the nature of manipulation and interference in the South African Police Service and its intelligence division, the Directorate of Priority Crime Investigation, the National Prosecuting Authority and the Independent Police Investigative Directorate. A major focus is on manipulation by the Executive of the appointment of the senior leaders of these agencies. Recommendations are made for legislative and other measures intended to reduce the risk of this type of manipulation in the future.

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Corruption Watch is a non-profit organisation that aims to fight corruption and hold leaders accountable for their actions. Corruption Watch investigates selected reports of alleged acts of corruption, conducts research, and builds campaigns to mobilise the public, community groups and other organisations such as trade unions, against corruption.

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