

Strengthening prosecutorial accountability in South Africa

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Summary

As gatekeepers to the criminal justice system, prosecutors are its most powerful officials. Prosecutors' considerable discretion – about whom to charge and for which crimes – affects the lives and fate of thousands of criminal suspects, and the safety and security of all citizens. Yet, in South Africa, no dedicated oversight and accountability mechanism scrutinises the activities of the country's prosecutors. Constructive oversight can assist the National Prosecuting Authority (NPA) to enhance both its performance and public confidence in its work. The paper reviews a number of prosecutorial accountability mechanisms drawing on real-world examples. These mechanisms are assessed and their applicability to the South African context is critically explored.

AS GATEKEEPERS TO the criminal justice system, prosecutors are its most powerful officials. They decide whether criminal charges should be brought and what those charges should be. In South Africa, as in most common-law jurisdictions, prosecutors exercise considerable discretion in making these crucial decisions.

It is striking, therefore, that while in many jurisdictions – South Africa included – dedicated oversight and accountability mechanisms scrutinise the work and performance of the police and prison service and, in a more circumscribed manner, aspects of the judicial branch of government, such mechanisms do not exist for prosecution services.

This paper argues that independent and dedicated oversight of the South African National Prosecuting Authority (NPA) is crucial if the organisation is to succeed in its mission and regain the public trust it has lost over the past few years. The NPA's tremendous authority, its indispensable role in the criminal justice process and its essential function in upholding the rule of law underscore the need for the NPA to be accountable to the people it serves. In practical terms this demands accountability of a standard and quality that enhances public confidence in the NPA while helping the organisation improve its performance.

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by drawing on real-world examples such as prosecution service inspectorates, independent prosecutorial complaints assessor mechanisms and prosecutorial review commissions. These mechanisms are assessed and their applicability to the South African context is critically explored.

In South Africa, the NPA has to account to a variety of institutions, including the legislature and a number of executive bodies such as the Auditor-General's Office. The NPA is also endowed with a broad range of internal monitoring, oversight and standard-setting mechanisms. However, unlike the police or prison service, the NPA's policies and performance are not subject to review or scrutiny by any independent and dedicated entity.

The paper gives careful consideration to the importance of prosecutorial independence in order to protect the constitutional mandate that the NPA must exercise its function ‘without fear, favour or prejudice’. Prosecutorial independence and accountability do not need to be in conflict with one another; provided an appropriate balance between them is found, both principles can be protected.

Effective prosecutorial accountability contributes to the empowerment of the public. Accountability is an acknowledgement that prosecution services derive their powers from the state, which in turn derives its powers from the people. In 1998, shortly after the NPA’s founding, South Africa’s first National Director of Public Prosecutions (NDPP), Bulelani Ngcuka, implored the country’s prosecutors to see themselves as ‘lawyers for the people’.¹ This paper contends that this founding vision for the NPA is inextricably linked to the development and application of effective, independent and dedicated prosecutorial accountability mechanisms.

Democratic accountability and prosecutorial independence

In a democracy, the principle of accountability holds that government officials – whether elected or appointed by those who have been elected – are responsible to the citizenry for their decisions and actions. The concept of accountability is central to the idea of democratic governance based on the rule of law. In the absence of accountability, elections and the notion of the will of the people lose their meaning, and government has the potential to become arbitrary and self-serving.

Accountability in government is necessary to ensure that public officials do not abuse their power and that they face punitive consequences if they do.

This is especially important in modern states, where officials are endowed with considerable authority. For example, public officials routinely decide who to arrest, prosecute, convict or imprison; to criminalise some, but not other behaviour; or to award contracts worth millions to some, but not others.

The concept of accountability is central to the idea of democratic governance based on the rule of law

Government accountability is about limiting bureaucratic discretion through compliance with rules and regulations and is designed to accomplish three things: the proper use of public funds, the fair treatment of citizens and the achievement of policy objectives as determined through the democratic process; in short, accountability for finances, fairness and performance.²

Chirwa and Nijzing identify three core elements for the accountable exercise of public power:³ firstly, *answerability* – whereby the power holder explains and justifies how his/her powers are exercised; secondly, *responsiveness* – the requirement that the public and civil society participate in public decision-making, express their views, and contribute to the development of public policies; and, thirdly, *enforceability* – the presence of some form of sanction if the power holder neglects to answer for the exercise of his/her powers or is unresponsive to public expectations and needs. Accountable government, therefore, is one whose ‘institutions and agencies are open, transparent and responsive, explain or justify their actions and omissions, and enforce standards of accountability when maladministration, an error of judgement, abuse of power or injustice occurs’.⁴

Modern democratic states have developed a range of mechanisms through which government is held accountable and its actions are scrutinised

– not just at election times, but on an ongoing basis. The growth in oversight, review, and inspection mechanisms to strengthen the accountability and performance of public services has been called a ‘fourth arm of governance’⁵ to reflect both the growing influence of such accountability mechanisms and

their complementary role to other public sector accountability structures.

In 1997, the Inter-Parliamentary Union, of which the South African parliament is a member, adopted a Universal Declaration on Democracy with the following clause:

Public accountability, which is essential to democracy, applies to all those who hold public authority, whether elected or non-elected, and to all bodies of public authority without exception. Accountability entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms.⁶

This is in line with South Africa’s constitution, which establishes governmental accountability as a core tenet of the country’s political system, enshrining a ‘system of democratic government, to ensure accountability, responsiveness and openness’ as a founding provision of a democratic South Africa.⁷ South Africa’s constitutional mandate is also consistent with the message contained in a growing body of policy publications and academic literature about public accountability. This states that public accountability is necessary to provide a democratic means to monitor and control government conduct, prevent the development of concentrations of power, and enhance the learning capacity and effectiveness

of public administration.⁸ To give practical effect to open and accountable government, the constitution creates a number of independent statutory bodies, including the auditor-general and the public protector.⁹ An important mandate of these institutions is to hold the executive and legislature to account.¹⁰ Government accountability can take one of two forms – vertical and horizontal. Vertical accountability is when the government and its institutions must explain and justify their decisions to the public (e.g. through elections, public participation or where public authorities provide reasons for their decisions). Horizontal accountability occurs at the intra-governmental level, when one institution or agency of government holds another to account.¹¹

This paper discusses both forms of accountability mechanisms for prosecution services. These forms are complementary. Effective horizontal accountability mechanisms promote vertical accountability in that the public is better informed about a prosecution service's performance through effective intra-governmental oversight mechanisms with public reporting obligations. In turn, a better informed public and one willing to complain about poor service or official misconduct can provide valuable inputs to intra-governmental (or horizontal) accountability mechanisms tasked with inspecting and reviewing prosecutorial performance.

Three mechanisms through which prosecutorial accountability can be enhanced are discussed in this paper: firstly, an independent and statute-based prosecution service inspectorate that can strengthen a prosecution service's horizontal accountability; secondly, an independent prosecutorial complaints assessor mechanism incorporating both horizontal and vertical accountability arrangements; and, thirdly, a vertical accountability mechanism whereby prosecutorial decisions not to prosecute

specific cases receive public scrutiny. Prosecutorial accountability should not come at the expense of key tenets of prosecutorial independence.

South Africa's constitution is clear that the prosecuting authority must exercise its functions 'without fear, favour or prejudice'.¹² The law governing the NPA is equally explicit that no one, including any organ of state, may improperly interfere with, hinder, or obstruct the prosecuting authority in the exercise or performance of its powers and functions.¹³ Finding the appropriate balance between prosecutorial independence and accountability is challenging. Prosecutorial authorities must be sufficiently independent from external influence to permit the fair and impartial application of the law and prosecution policy. Yet prosecutors should be sufficiently transparent and accountable to the public to help ensure that prosecutorial authority is not abused.

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Protecting the impartiality or independence of the prosecutorial function while ensuring democratic accountability is not an either/or proposition. Within the confines of the constitution and the law, greater accountability strengthens prosecutorial independence. The expectation that a prosecution service acts impartially logically implies some means of monitoring and ensuring such impartiality, which entails accountability to other institutional actors and the public.¹⁴

Contini and Mohr argue that, in the context of the judiciary (which applies to prosecution services too), independence is not an end in itself, but must be understood instead as the guarantee of judicial impartiality:

[Accountability] cannot be limited to simply verifying productivity or efficiency, but includes a broader complex of values which public organisations must adopt based in the fundamental values of democratic regimes. These include legality, equality, independence and impartiality Accountability is conceived in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.¹⁵

In the case of South Africa's prosecution service – as with most such services in common-law jurisdictions – the importance of independence applies primarily to decisions (to investigate, to prosecute, or not to do so) in individual cases. The concept of prosecutorial independence does not principally apply to issues of general policy. The constitution is clear that the head

of the NPA, i.e. the NDPP, must determine prosecution policy with the concurrence of the Minister of Justice and Constitutional Development.¹⁶ In other words, the minister's agreement is indispensable for the prosecution policy to come into effect. Moreover, as described in greater detail below, the NPA is already subject to external review and oversight. The NPA's budget, for example, like that of all entities funded by the taxpayer, is controlled by parliament and regularly reviewed and audited by other executive government bodies.

South Africa's criminal justice accountability mechanisms

After an auspicious start in 1998, the NPA's public credibility has been undermined through multiple changes

in leadership,¹⁷ the quality of some of that leadership¹⁸ and significant public controversy surrounding the prosecution or non-prosecution of a number of high-profile cases.¹⁹ Moreover, the NPA has been riven by internal dissent,²⁰ is accused of prosecuting too few cases²¹ and has been criticised for losing a number of high-profile cases.²²

Given the NPA's tremendous powers to uphold and promote – but also to undermine – the rule of law and some of the core mechanisms upholding South Africa's democratic system, the organisation must restore its credibility.

they operate under significant limitations in respect of the NPA. They are staffed primarily by people who are not experts on prosecutorial issues. Employees from the Auditor-General's Office and the National Treasury, while highly skilled in terms of financial and budgetary issues, do not generally have a good understanding of the role, function and performance (or lack thereof) of the NPA. Moreover, their oversight role is statutorily narrowly defined around financial management and compliance issues.

Parliament has the power to hold the executive accountable. It does so by

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Consequently, it is crucial that the NPA enhances its accountability to the public, especially the people it serves on a daily basis in the country's courts, but also to other organs of the state.

General accountability mechanisms and their limitations

Some may question whether additional mechanisms are needed to promote the NPA's accountability. After all, it is already held to account by parliament²³ (in particular the parliamentary Portfolio Committee on Justice and Constitutional Development), the Auditor-General, the National Treasury,²⁴ and the Minister of Justice and Constitutional Development, who 'must exercise final responsibility over the prosecuting authority'.²⁵ Moreover, on occasion, the judiciary has reviewed and overturned NPA decisions.²⁶

The effectiveness of these oversight and accountability mechanisms is not the focus of this paper. However, even if it is assumed that they are adequate for the purposes for which they are designed,

requiring public accountability for funding and performance, and by reinforcing the distinction between the responsibility of a minister for policy and outcomes and of the head of the government department – the 'accounting officer' (the term used in the legislation to refer to the responsible officer) – for implementing the policy and achieving defined outputs.²⁷ In 2001 the NPA appointed a chief executive officer (CEO) as its accounting officer.²⁸ Accounting officers report regularly to both the minister and the National Treasury.²⁹

While the use of performance goals creates the environment for more effective parliamentary oversight, limited capacity among members of parliament (MPs) and their staff has meant that these roles are not always effectively fulfilled. Parliamentary committee members and research staff often fail to understand their roles and the issues they oversee, and have limited capacity to draft reports or track recommendations made to government officials.³⁰ MPs may also lack a fine understanding of the role and operation of the NPA. Even members of the Portfolio Committee on Justice

1998

THE AUSPICIOUS START OF THE NATIONAL PROSECUTING AUTHORITY

2001

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and Constitutional Development, while often lawyers, typically do not have a prosecutorial background. Moreover, members of this committee have a broad range of responsibilities covering a wide range of justice-related issues and institutions, including the judiciary, the legal profession, the courts, the Department of Justice and Constitutional Development, the Legal Aid Board, the South African Human Rights Commission and the South African Law Reform Commission. Unsurprisingly, it is one of parliament's busiest portfolio committees and has complained that shortage of time and lack of funding hinders its oversight role.³¹

Moreover, MPs hold their positions by virtue of being loyal members of a political party. Consequently, they labour under the (possibly unfair) public perception that their oversight role vis-à-vis the prosecution service is tainted by partisan loyalties and is neither independent nor motivated by objective criteria. The point has also been made that:

The most senior politicians in the ruling party tend to be deployed to executive positions. Consequently, more junior ruling party members who are Members of Parliament ... appear to find the exercise of strong oversight over the executive fraught with difficulty.³²

While the courts are independent and non-partisan, judicial review is conducted on a case-by-case basis, although findings made in any one case can affect the way in which the prosecuting authority conducts itself. Judicial review is by its nature retrospective – it occurs after the fact and only once a complaint has been filed in court. Using the courts to review the actions of the NPA thus typically occurs only after something has already gone wrong. Using the courts is also an expensive and time-consuming process and is consequently not a realistic option for most people.

Specialised accountability mechanisms

The drafters of South Africa's constitution and the country's legislators appear to have recognised the limitations of these more general accountability and oversight mechanisms. Consequently, since 1994 specialised oversight bodies for a number of criminal justice institutions have been established.

In respect of the police and the prison service, there are now dedicated independent oversight, review, and monitoring bodies to enhance the accountability of these criminal justice agencies vis-à-vis the executive, parliament and the general public. Even aspects of the judiciary – whose independence is guaranteed by the constitution – are overseen and regulated by the Judicial Service Commission in an effort to promote judicial accountability.

It is striking that there is no dedicated independent mechanism that specifically monitors and provides some form of oversight over the prosecution service. This is an especially glaring gap in the country's accountability architecture, given prosecutors' considerable powers as 'gatekeepers of the criminal justice system'.³³ The role of the prosecution service is central to the criminal justice system, with prosecutors determining which cases go forward into the system to be prosecuted at often-considerable public expense.

Decisions made by [prosecutors]... have an enormous impact on everyone experiencing the criminal justice system, whether victims, witnesses or defendants. They determine what happens to the work of the police, and of other investigative agencies, and effectively determine the workload of the courts (and therefore impact on the workload of the prison and probation services).³⁴

Before reviewing a number of oversight and accountability mechanisms for

prosecution services, it is helpful to summarise the mandate and activities of such mechanisms for the police, prisons and the judiciary in South Africa. This will help inform our thinking about the nature and ambit of suitable analogous mechanisms for the NPA.

Police

A constitutionally mandated police complaints body, the Independent Police Investigative Directorate (IPID) investigates the alleged misconduct of or offences committed by members of the South African Police Service (SAPS) and the various municipal police services.³⁵ IPID is an impartial investigative and oversight body that functions independently of the police.³⁶

IPID must investigate deaths in police custody or as a result of police actions, and complaints of torture or assault against police officers in the execution of their duties. Moreover, IPID may investigate any matter at the discretion of its executive director, or at the request of the minister of police, the head of the Civilian Secretariat for Police (see below), and provincial safety and security members of the provincial executive council. IPID may also investigate matters relating to systemic corruption involving the police.³⁷ The police have a statutory obligation to cooperate with IPID in its investigations.³⁸

IPID undertakes research and produces reports on issues dealing with police activity and performance.³⁹ Its reports typically contain recommendations for police to improve their performance and handling of certain issues.

The constitution provides for the establishment of a Civilian Secretariat for Police⁴⁰ that must exercise its powers and perform its functions 'without fear, favour or prejudice in the interest of maintaining effective and efficient policing and a high standard of professional ethics in the police service'.⁴¹ It is financed from monies appropriated by parliament and is financially independent of the police.⁴²

All state institutions are legally obligated to assist the secretariat and thereby ensure its effective functioning.⁴³ The police specifically have to provide the secretariat with the necessary information and records to enable it to perform its monitoring functions.⁴⁴ The secretariat must consider reports received from IPID, monitor the implementation of IPID recommendations by the police and provide the minister of police with regular reports on steps taken by the police to ensure compliance.⁴⁵

The secretariat – which reports directly to the Minister of Police – has the statutory mandate to, among other things, conduct quality assessments of the police and monitor and evaluate police performance; review police practices and develop best-practice models; recommend steps for improved service delivery and police effectiveness; develop frameworks and strategies to ensure improved police accountability; assess and monitor the police’s ability to receive and deal with complaints against its members; and provide policy advice to the minister of police.⁴⁶

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Prisons

The Judicial Inspectorate of Prisons is an independent statutory body⁴⁷ that provides ‘oversight ... over correctional facilities and/or the Department of Correctional Services, thus ensuring that the rights of inmates are upheld’.⁴⁸

The head of the inspectorate – an inspecting judge – is appointed by the country’s president. Detracting from the inspectorate’s independence is the fact that its budget comes from the Department of Correctional Services and not directly from the National Treasury – an arrangement that the inspectorate has criticised.⁴⁹

The inspectorate’s mandate is to inspect and monitor conditions in prisons and the treatment of prisoners, and to report to the president and the minister of correctional services. It is responsible for appointing independent prison visitors to visit prisoners and, should there be complaints, investigate these and seek to have them resolved. Independent prison visitors must be given access to any correctional centre and document or record requested.⁵⁰ The inspectorate also reports on corrupt or dishonest practices in prisons.⁵¹ From time to time it undertakes research on issues it feels need addressing by government.

Judiciary

The Judicial Service Commission (JSC), established by the constitution,⁵² is responsible for selecting fit and proper persons for appointment as judges; investigating complaints about judicial officers; and establishing tribunals to inquire into and report on allegations of incapacity, gross incompetence or misconduct against judges. The JSC also advises the government on any matters relating to the judiciary or the administration of justice.

The JSC’s budget comes from the Department of Justice and Constitutional Development’s budget. However, the JSC’s budget is earmarked by parliament and may generally not be used by the department for any other purpose.⁵³

The JSC’s members include the Chief Justice, the president of the Supreme Court of Appeal, the Minister of Justice, advocates and attorneys nominated by their profession, a legal academic nominated by academia, and six parliamentarians, of which three are from opposition party ranks.

Having summarised the responsibilities and mandates of accountability

mechanisms focused on specific criminal justice institutions in South Africa, it is useful to understand what prosecutorial accountability mechanisms exist elsewhere. The next section of this paper review the role that independent prosecution service inspectorates are playing in England and Wales (which form a single judicial unit) and Scotland. This is followed by an analysis of independent prosecutorial complaints assessor mechanisms in Northern Ireland and England and Wales, and prosecutorial review commissions in Japan.

The focus of the comparative analysis is on the United Kingdom (UK). This is because both the inspectorates and complaints assessors are new mechanisms and were first developed in the UK, where some – albeit limited – experience of their impact has developed. Moreover, the common law legal traditions of England and Wales and Northern Ireland and the existence of relatively new prosecution services in both judicial areas (similar to the newness of the NPA, which was established in 1998) make both jurisdictions useful case studies from a South African perspective.

Independent prosecution service inspectorates

Crown Prosecution Service Inspectorate, England and Wales

The Crown Prosecution Service (CPS) was established in 1986. It is responsible for public prosecutions of persons charged with criminal offences in England and Wales. The CPS is headed by the Director of Public Prosecutions (DPP), who answers to the attorney-general for England and Wales.⁵⁴ The attorney-general is accountable to parliament for the functioning of the CPS.

In 1995 the CPS established a quality assurance unit operating within the CPS itself. The head of the unit and its staff were all members of or on

secondment to the CPS. The head of the inspectorate reported to the DPP.⁵⁵ Following recommendations in an official review,⁵⁶ the CPS's quality assurance unit became an independent statutory body in 2000⁵⁷ – the Crown Prosecution Service Inspectorate (CPSI).⁵⁸ This was motivated by the desire that an inspectorate 'should be not only independent in practice but demonstrably independent'.⁵⁹

Chief inspector

The CPSI's chief inspector, who is responsible for appointing CPSI staff, is an independent statutory office holder appointed by and reporting to the attorney-general as the minister responsible for superintending the CPS. The chief inspector is appointed for a five-year term with a fixed salary, providing a measure of functional independence to the position.⁶⁰ The chief inspector must submit an annual report to the attorney-general, who is then obliged to lay that report before parliament.

The principal elements of the chief inspector's role include leading and developing an 'independent, robust, creative and innovative Inspectorate whose work enhances public confidence in prosecution services'.⁶¹ A key criterion for the appointment of the chief inspector is the 'ability to demonstrate sound judgement and independence'.⁶² The chief inspector has considerable discretionary powers and can, for example, inspect and report on any matter connected with the operation of the CPS.

Budget and staff

The CPSI's budget, which is independent of that of the CPS, is appropriated by parliament.⁶³ To further underscore the CPSI's functional independence, its offices are located in separate premises from those of the CPS. The CPSI comprises staff with a wide range of backgrounds and includes both lawyers and non-lawyers. The lawyers come from both a CPS and non-CPS background – 'enough of each to know what stones to turn over

and also provide wider perspective'.⁶⁴ For example, the CPSI's staff includes both legal and business management inspectors. In 2001, lay inspectors were introduced to enable members of the public to participate in aspects of the inspection process. For example, lay inspectors look at the way the CPS relates to the public through its external communications, its dealings with victims and witnesses, and its complaints-handling procedures.⁶⁵

Mission

The CPSI seeks to enhance the quality of justice through independent inspection and assessment of the CPS, and in so doing improve the prosecution service's effectiveness and efficiency and promote greater public confidence in the CPS.⁶⁶ The CPSI's approach to inspection 'takes account of the business needs of the CPS as well as the expectations of the general public as to whether the CPS provides an efficient service and gives value for money'.⁶⁷

Nature of oversight

Assisting the CPS to improve the quality of service it offers to the public is a key CPSI priority. It does so by, among other things, assuring the quality of the CPS's casework. Every year CPSI inspectors review a sample of case files from across all geographic regions of the CPS's operations.⁶⁸ Among other things, this annual review examines the quality of prosecutorial decisions (e.g. ensuring that the Code for Crown Prosecutors is applied correctly), case preparation and progress, victims' and witnesses' experiences of the criminal justice system, and prosecutors' adherence to custody time limits for detained accused persons.⁶⁹

These annual exercises allow the CPSI to provide the CPS with a comprehensive review of the latter's casework quality, including where improvement is needed and which aspects of casework are handled well, and can highlight CPS work where poor performance represents a risk

to the public or to the reputation of the CPS.⁷⁰ While CPSI reports concentrate on casework, they also provide an overview of CPS performance in each of its geographic regions, including management and operational issues. The CPSI also undertakes geographic inspections or audits of particular CPS offices, focusing on those with a history of poor performance.

A powerful tool available to the CPSI is that of follow-up or reinspections. Once the CPSI has inspected a particular CPS office or aspect of the CPS's work and made recommendations for improvement in performance or to processes, the CPSI will later review the extent to which its recommendations were adopted. This puts pressure on the CPS to comply with recommendations and generates publicly available reports on improvements to CPS operations previously criticised by the CPSI.

The CPSI regularly undertakes inspections of a thematic nature and produces reports on particular aspects of the CPS's work. Such thematic reports have covered issues as varied as prosecution policy in respect of certain types of crime, the effective use of CPS resources, custody time limits, the CPS's internal quality-monitoring scheme, the quality of prosecution advocacy and case presentation, and the CPS's progress towards the digitalisation of case files.

The attorney-general may refer matters to the chief inspector to report on and may ask the CPSI to undertake reviews of high-profile cases. For example, in 2005 six accused charged with attempting to bribe London Transport officials over contracts for extensions to the city's subway network were effectively acquitted after the trial collapsed.⁷¹ The collapse of a trial that had been running for almost two years at considerable public cost was regarded as an expensive failure that reflected poorly on the criminal justice system.

Immediately following the collapse of the case, the attorney-general referred the matter to the CPSI to ascertain what went wrong and make recommendations. This culminated in a detailed CPSI report reviewing the specific failings of the CPS, including, where relevant, the police.⁷²

Quality and Practice Review Unit that reported on the quality of professional practice and sought to identify and promote good practice. The unit reported internally to the crown agent and its reports were not automatically published or disseminated externally.

The joint review resulted in a balanced report identifying poor procedures and lack of training in both organisations

The CPSI report provided practical recommendations to improve the way in which the CPS deals with complex fraud trials. The CPSI also undertakes joint inspections with other criminal justice sector inspectorates. For example, past efforts to improve the quality of case files or investigation dockets used by the police to collate the evidence they collect and by prosecutors to inform their work have had limited success.

In response, the CPSI and Her Majesty's Inspectorate of Constabulary (a statutory body responsible for the inspection of the police in England and Wales) joined forces to review a sample of case files.⁷³ The joint review resulted in a balanced report identifying poor procedures and lack of training in both organisations.

Inspectorate of Prosecutions, Scotland

The Crown Office and Procurator Fiscal Service (COPFS) is the body responsible for prosecutions in Scotland. The COPFS's chief executive is the crown agent, a prosecutor and civil servant who runs the organisation and is responsible for its staffing and budget. The function of chief prosecutor lies with the Lord Advocate, who is the ministerial head of the COPFS.

The history of the Inspectorate of Prosecution in Scotland (IPS) is similar to that of the CPSI in England and Wales. Traditionally, the COPFS had an internal

Chief inspector

The IPS was created in 2003, initially on an administrative basis separate from the COPFS. The IPS was placed on a statutory footing in 2007.⁷⁴ It is headed by a chief inspector who is appointed by the Lord Advocate and reports to him. The IPS reports to the Lord Advocate on any matter connected with the operation of the COPFS that the Lord Advocate refers to it. The chief inspector may require any person directly involved in the operation of the COPFS to provide him with information for the purpose of his/her inspections.⁷⁵

Budget and staff

The IPS is a small organisation – in 2013 it had a full-time staff complement of four and an annual budget of £320 000.

Mission

The aim of the IPS is to inspect the operations of the prosecution service and make recommendations that contribute to improvements in service delivery, thereby 'making COPFS more accountable and enhancing public confidence'.⁷⁶

Nature of oversight

The IPS regularly produces reports on individual offices and regions of the prosecution service. These typically cover a review of closed cases, general performance issues, management and employment matters, the prosecution service's relationship with other criminal

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THE NUMBER OF FULL-TIME STAFF OF THE INSPECTORATE OF PROSECUTION OF SCOTLAND IN 2013

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justice agencies, criminal complaints against the police, and concerns about enhancing public confidence in the prosecution service. IPS reports usually conclude with a list of recommendations for enhancing the COPFS's performance at the local and regional level. All the IPS's reports are published and available from the inspectorate's website.⁷⁷

The IPS produces thematic reports on subjects as varied as community engagement, the nature and scope of particular forms of crime, case preparation, proceeds of crime, and investigating and prosecuting wildlife crime.⁷⁸ The IPS also publishes joint reports with other criminal justice inspection authorities.⁷⁹

The next section deals with a complementary institution to that of the prosecution service inspectorate –

the DPP, who is appointed by the attorney-general for Northern Ireland.

In 2005, with the establishment of the PPSNI, the independent assessor of complaints for the Public Prosecution Service for Northern Ireland was inaugurated. The independent assessor is governed by protocols developed in consultation with the DPP.⁸⁰ The independent assessor 'must be, and be seen to be, one of transparency and true independence'.⁸¹ The independent assessor can investigate any complaint after it has been investigated by the PPSNI if the complainant remains unsatisfied after the investigation has been concluded. The PPSNI cannot deal with either primarily prosecutorial matters or internal grievances from prosecutorial staff or former staff members.

recommendation, he/she is expected under the protocols agreed between him-/herself and the independent assessor to provide written reasons that the independent assessor may publish.⁸²

As well as handling complaints referred to him/her, the independent assessor reviews and audits between a quarter and a third of all complaints made to the PPSNI. This serves to identify any patterns in the types of complaints being raised, changes in such patterns over time, and examples of good practice by the PPSNI when responding to complaints. The independent assessor formally reports annually to the DPP. The aim of the reporting process is to provide the DPP with a basis for reflecting on and assessing the way in which complaints are handled by the PPSNI. The DPP publishes the independent assessor's annual report on the PPSNI website.

In dealing with complaints, the PPSNI has adopted a three-tier process.⁸³ The first tier is normally dealt with locally at the interface between the complainant and the Prosecution Service. If the complainant remains dissatisfied with the PPSNI's response, he/she can be taken to the second tier, which is primarily the responsibility of the PPSNI's senior management at the regional or central level. If at this stage the complainant remains dissatisfied, the complaint is taken to the third tier, which is the responsibility of the independent assessor.

The DPP can refer a complaint directly to the independent assessor, e.g. where the DPP feels that a complaint should be accelerated through the system because it has unusual features, or is sensitive in some manner, or is particularly serious or urgent. The relatively modest costs of the independent assessor are borne by the PPSNI. The present independent assessor is self-employed, has no staff and seeks no administrative support from the PPSNI. In 2012 the independent assessor provided 72 days' paid work.⁸⁴

All the IPS's reports are published and available from the inspectorate's website

the independent complaints assessor. Instituted in Northern Ireland in 2005, on the basis of its success it has since been replicated in England and Wales. Complaints assessors review and seek to adjudicate individual complaints. They also help with the detection of service delivery problems and make recommendations that can lead to systemic improvements in the way in which a prosecution service operates and deals with the public.

Independent complaints assessors

Independent assessor of complaints for the Public Prosecution Service, Northern Ireland

The Public Prosecution Service for Northern Ireland (PPSNI) is responsible for the prosecution of people charged with criminal offences. It is headed by

The independent assessor's role is to determine whether or not a complaint has been handled fairly, thoroughly and impartially by the PPSNI, and to influence the adoption of best practice in dealing with particular complaints. The independent assessor is not a champion for the complainant, nor does he/she take the part of the PPSNI. His/her role is strictly neutral in dealing with the complaint and seeking a resolution.

The independent assessor oversees the development of guidelines and protocols relating to the way in which complaints are handled by the PPSNI. He comments on the complaint procedures used and how they were applied, including quality of service, and makes recommendations for improvements to the DPP as head of the PPSNI. While the DPP must consider and respond to all recommendations, he/she is not obliged to implement them. If the DPP decides not to implement a

Independent assessor of complaints, England and Wales

In 2013 the Crown Prosecution Service, which is responsible for public prosecutions in England and Wales, adopted the Northern Ireland model of an independent assessor of complaints.⁸⁵

Like the PPSNI, the CPS has a three-tiered complaint procedure.⁸⁶ The first tier is managed by the local CPS office where the complaint originated. If the complainant remains dissatisfied with the response, he/she may refer the complaint to a chief crown prosecutor or a similarly high-ranking official. This is the end of the process for complaints relating to legal decisions.⁸⁷ If the complaint is service-related and the complainant remains dissatisfied following the first two stages of the complaints procedure, he/she can refer his complaint to the independent assessor of complaints (IAC) for review.

The IAC operates independently from the CPS and is responsible for handling and investigating complaints from members of the public in relation to the quality of the service provided by the CPS and adherence to its published complaints procedure. The IAC aims to ensure that the CPS conforms to its mandate to be transparent, accountable, and fair by providing an independent and accessible process for reviewing service complaints that have exhausted the CPS's internal process.⁸⁸ In its activities, the IAC focuses 'on outcomes and service improvement from a user perspective'.⁸⁹

The IAC routinely audits a proportion of all complaints to help identify problem areas and provide scrutiny of and assurance about the operation of the CPS's complaints-handling system. The IAC reports directly to the CPS Board and publishes an annual report.⁹⁰ With the office only established in 2013, the first independent assessor of complaints is expected to devote 24 days per year to his role.

The next section describes a prosecutorial accountability mechanism that provides a measure of review of prosecutors' decisions not to prosecute individual cases – that of the Japanese Prosecutorial Review Commission system. In many jurisdictions, including in South Africa, a prosecutor's authority to decline to prosecute is a particularly powerful one and open to largely unchecked abuse.⁹¹ A decision to prosecute is checked by the judiciary in the sense that a court can acquit an accused person who has been

Another check on prosecutors' decision not to prosecute or to suspend prosecution is 'quasi-prosecution through judicial action'. This process allows those who object to non-prosecution, in cases of the abuse of state authority or the use of violence by a police official, to request that the courts institute criminal proceedings against the accused through a special court-appointed prosecutor. The successful use of this mechanism is rare, however.

A more frequently used mechanism to curb prosecutorial discretion is the

A prosecutor's authority to decline to prosecute is a particularly powerful one and open to largely unchecked abuse

prosecuted unfairly or on insufficient incriminating evidence. But if the prosecution decides not to prosecute a case, the matter usually ends with this decision, and the courts are loathe to review a prosecutorial decision not to prosecute.⁹² When the discretion to decline to prosecute is wielded in politically sensitive matters on weak grounds, it appears that the prosecution service does not act independently.⁹³

Prosecutorial review commissions

Japanese prosecutors enjoy wide-ranging institutional discretion to prosecute, not to prosecute, or suspend a prosecution. Some legislative controls exist to check prosecutors' abuse of the discretion not to prosecute. A prosecutor who declines to prosecute an accused person must provide written notice of such action to the victim(s) of the crime who lodged the initial complaint. If a prosecutor does not prosecute an accused person who has been detained or arrested (as opposed to merely suspending the prosecution), the accused person may receive financial compensation from the state.⁹⁴

prosecutorial review commission (PRC). PRCs are lay advisory bodies that review a public prosecutor's exercise of discretion in decisions not to prosecute. PRCs may begin a review process by either of two methods. Firstly, a victim or his/her proxy may apply for a commission hearing. The commission must investigate these requests. Secondly, a commission may, upon a majority vote, carry out an investigation on its own initiative.⁹⁵

Commissions are composed of 11 members who are chosen at random from public voting lists for six-month terms. Meetings are held quarterly or on special call of the chairperson of the commission, who is elected by its members. There is at least one commission for each district court area in Japan. Politicians, elected officials, and those who perform vital political and criminal justice functions are disqualified from participating in PRCs. PRCs are assisted by secretaries who are appointed by the Supreme Court. Commissions investigate claims in private by summoning witnesses for examination (PRCs have the power to subpoena and interrogate witnesses), questioning the prosecutor and asking for expert advice.

In the past, PRCs submitted one of three recommendations: non-prosecution is proper, non-prosecution is improper, or prosecution is proper. For the first two options only a majority vote was necessary, but for the third option a super-majority consisting of eight of the 11 members of a commission was required. These recommendations were advisory and not binding on the prosecution.⁹⁶ Between 1949 (when the system first began operation) and 1989, PRCs undertook and disposed of an average of 1 930 cases a year. When viewed as a proportion of decisions not to prosecute, PRCs held hearings on an average of 34.5 suspects for every 10 000 (or 0.35 per cent) not prosecuted.⁹⁷ Over this 40-year period PRCs recommended prosecution in about 7 per cent of all cases heard. Of these, about 20 per cent resulted in prosecutors reversing their initial decisions not to prosecute.⁹⁸

Subsequent revisions to the law have provided PRCs with significantly greater powers. Since 2009, after a super-majority of eight out of the 11 PRC members determines that a prosecutor should have prosecuted a case, the commission's decision is sent to the prosecutor's office for it to re-examine its decision. If the prosecutor, after review, determines to prosecute, then a prosecution will follow and the PRC will be so advised. If the prosecution continues to decline to prosecute, it must advise the PRC as to why it refused to accede to the PRC's determination. The PRC then reconvenes to consider the matter. While doing so it may call witnesses, review facts and receive legal advice from private attorneys.⁹⁹ If the PRC decides (by the same super-majority of eight) a second time that the case should be prosecuted, then it will report this to the court. Thereupon the court must appoint a lawyer to perform the prosecution's role until a verdict is reached.

Discussion and appraisal

This section reviews and assesses the three prosecutorial accountability mechanisms described above. In particular, the focus is on interrogating claims that prosecution inspectorates can effectively complement and fill crucial gaps in the existing prosecutorial accountability architecture in South Africa, provided that certain risks inherent to inspection regimes are addressed. Moreover, the section will explore the suggestions that complaints assessors can empower the public, enhance public confidence that complainants enjoy a fair hearing, and contribute to improved complaints-handling systems to ensure prosecutors provide a better public service. It will also assess whether prosecutorial review commissions can be an effective mechanism to review prosecutors' discretion, foster civic engagement, and strengthen deliberative democracy. This is followed – in a subsequent section – by a discussion of all three prosecutorial accountability mechanisms in the context of South Africa in order, among other things, to explore the limitations of the country's existing accountability architecture dealing with the work and performance of the NPA.

Prosecution service inspectorates

Public confidence in any state entity – especially one endowed with considerable public authority such as a prosecution service – will likely be enhanced by an effective inspectorate mechanism. An inspectorate can provide independent and objective assurances to the public and other accountability bodies – such as parliament, the minister responsible for the prosecution service, and the auditor-general – that are typically responsible for overseeing aspects of the prosecution service's work in South Africa.

If, like the CPSI in England and Wales, an inspectorate is staffed with thematic experts, including previous

11

THE NUMBER OF MEMBERS
IN A PROSECUTORIAL REVIEW
COMMISSION. THEY ARE CHOSEN
AT RANDOM FROM PUBLIC VOTING
LISTS FOR SIX-MONTH TERMS

1930

THE AVERAGE NUMBER OF CASES
A YEAR THAT THE PROSECUTORIAL
REVIEW COMMISSIONS
UNDERTOOK AND DISPOSED
BETWEEN 1949 AND 1989

senior prosecutorial staff, it will enjoy greater insight into the workings of the prosecution service it inspects, compared to accountability mechanisms with a broader mandate and with the responsibility for overseeing the work of numerous organisations simultaneously. Thus, compared to MPs or the Auditor-General's Office, inspectorate staff would have the luxury of focusing their energies and attention on one organisation only. This would permit them to fully understand the nuances involved in the prosecutorial process and work constructively with the NPA to build a mutually respectful and beneficial relationship. The difference between the auditing approach taken by such institutions as the Auditor-General's Office and the National Treasury, on the one hand, and an inspection approach by an inspectorate, on the other, can be summed up as follows:

popularity of performance and value-for-money auditing means that auditors are taking an increasing interest in performance management targets and results.¹⁰¹ However, even with this blending of approaches, auditing entities in South Africa are limited in their capacity and ability to understand the NPA's general performance in a sophisticated and nuanced way.

Prosecution services with internal quality assurance units (as is the case with the NPA) or inspectorates will tend to self-inspect against the performance standards developed by the organisation itself. As a result the assumption is made that these standards are the right ones and acceptable to the public. Here lies the danger that the organisation will become inward looking and use resource constraints to justify poor service.¹⁰² An external inspectorate, by contrast, would be obliged to use objective criteria that

a prosecution service that consistently obtains low conviction rates in sexual offences prosecutions, or that has been lambasted by a court for a shoddy prosecution in a high-profile case, would benefit from an independent review of its performance. A constructive review would not only identify prosecutorial weaknesses, but also provide recommendations for improvement and help the prosecution service to avoid similar mistakes in future.

A prosecution service inspectorate can collaborate with other criminal justice inspectorates to examine systemic weaknesses or failures of the criminal justice system. For example, the orderly processing of case files or dockets between police investigators and prosecutors is often fraught with delays, and at times is burdened by misplaced or lost files. A typical response is for the police and prosecution to undertake separate investigations to identify bottlenecks in the system and identify solutions to the problem – an approach that leads to finger pointing and an unwillingness to take responsibility for institutional failures. A joint review by both a police and prosecution inspectorate should result in a more objective analysis of the system's weaknesses, apportion blame fairly yet constructively, and result in appropriate remedial action through a process of follow-up inspections.

This is not to say that prosecution service inspectorates are a panacea for holding prosecution services to account and improving their performance. Any inspection regime must be well thought out and structured in a way that achieves a sensible balance between oversight and public criticism, on the one hand, and objective comment and constructive engagement, on the other.

An inspectorate should not unduly add to the workload of the prosecution service it inspects. A review of the

A joint review by both a police and prosecution inspectorate should result in a more objective analysis of the system's weaknesses

Most define 'audit' ... as the process of providing assurances about financial viability and probity of public bodies through regular (often annual) checks of an organisation's accounts and financial management systems. By contrast inspection has traditionally been seen as concerned with service quality and outcomes and drawing upon quality assurance methods. It usually entails selective, episodic checks that organisations' are meeting their obligations as defined by law or according to professional norms and best practice. In contrast to auditors, inspectors usually have specialist professional knowledge and direct operational experience of running the services they are scrutinising.¹⁰⁰

This is not to say that the two approaches do not overlap. The rise in

measure aspects of the prosecution service's work that matter to the public. This does not imply an adversarial relationship between an inspectorate and the prosecution service it scrutinises.¹⁰³ In the case of England and Wales, for example, the CPSI collaborates with the Crown Prosecution Service (CPS) in developing an inspection framework and common performance measures, but reserves the right to reject a standard or performance measure that does not meet the public interest.

An inspectorate can research, objectively report on and provide constructive commentary on particular themes or issues affecting the performance or credibility of a prosecution service. Other existing oversight mechanisms generally lack the expertise, focus and resources to do this well. For example,

CPSI found that a common complaint from CPS prosecutors was the burden of producing copious amounts of documentary evidence for the CPSI without 'knowing if it contributed to the overall assessment'.¹⁰⁴ Such bureaucratic burdens, plus the related compliance costs,¹⁰⁵ should be minimised. The literature on inspection systems identifies a number of other potential risks of implementing a system of independent inspections. The first is the risk that the inspectorate's values and interests supersede those of the inspected organisation, with the latter focusing unduly on documenting processes and producing data solely for the benefit of the inspectorate. The second is the risk that the inspected organisation develops strategies to deliberately circumvent or marginalise the impact of inspections. Finally, external inspections – by elevating the fear of failure as an external incentive – may result in an unwillingness on the part of the inspected organisation and its staff to take risks or innovate.¹⁰⁶

To be effective, an inspectorate must attract suitably qualified staff and be responsive to changes in the overall prosecution landscape. For example, inspecting the NPA's Asset Forfeiture Unit, with its specialised approach to investigations, prosecutions and asset forfeiture, would require inspectorate staff with the requisite background and skills to constructively contribute to such an inspection. One approach – recommended for the CPSI – is for an inspectorate to use consultants and secondments from other government departments or the private sector for highly specialised assignments.¹⁰⁷ In England and Wales it was found that filling some CPSI positions with persons with recent prosecutorial experience provided such inspectors with first-hand knowledge of the operational environment, and helped them make recommendations that were less 'a counsel of perfection' and more

pragmatic.¹⁰⁸ It is important that an inspectorate is, and is perceived to be, independent – not just of the prosecution service but of all undue extraneous political influence.

An inspectorate would fail in its mandate if it is beholden to party political interests or executive pressure. Consequently, the position of chief inspectorate should be advertised widely and be open to a person with the necessary vision,

An inspectorate should not unduly add to the workload of the prosecution service it inspects

skills, commitment and independence of mind. The inspectorate and the post and responsibilities of the chief inspector should be placed on a statutory basis.

While the appointment of a chief inspector can be made by the executive, such appointment should be done on the advice of a selection panel, as is often the case in respect of judicial appointments. The chief inspector should report to and be directly accountable to the relevant minister, bypassing the internal management structure of the prosecution service. All of the reports of the inspectorate should be published and publicly available.

Independent complaints assessors

A complaint assessor mechanism – provided it is, and is perceived to be, independent of the prosecution service and other undue and partisan political interests – can reassure the public that their complaints will receive a fair hearing. This is an important benefit of a complaint assessor mechanism, as a prosecution service can be a particularly daunting institution from the point of view of the average citizen. It is largely staffed by lawyers who have considerable powers, and basically has a monopoly over the services it provides.¹⁰⁹ Moreover, criminal justice systems tend to deal

disproportionately with vulnerable populations – both in respect of victims of crime and those suspected of having committed crimes. These are often marginalised members of society easily inhibited from seeing complaints against a prosecution service through to the end or insisting on a fair resolution of their complaints.

An independent complaints assessor mechanism, as it exists in two UK

jurisdictions, has a number of benefits. It is private and free for the complainant; it is independent of the prosecution service; it can lead to a complaint being further investigated; it can result in improvements to the way in which the prosecution service operates, including the handling of complaints; and the annual report of the complaints assessor provides an important measure of public accountability for the prosecution service.

The approach of the independent complaints assessor in Northern Ireland is a good one, i.e. to view the receipt and processing of a complaint not primarily in order to blame someone in the prosecution service for making a mistake, but to improve the prosecution service's handling of complaints and reduce the likelihood of future mistakes.¹¹⁰ The mandate of the assessor in Northern Ireland – to audit all complaints received and concluded by the prosecution service (i.e. not just those referred to the assessor) – allows the assessor to recommend systemic improvements to the way the prosecution service deals with the public:

A complaint handling process should not solely or simply be about resolving complaints, from the point of view of the organisation, although from the point of view of the complainant

it is the most important element. The process should in fact be about improving service in the organisation. In the case of the Complaints Handling System in the PPS [Northern Irish prosecution service], this is precisely as it was designed, and what it is aimed at achieving. It is a mechanism for detecting problems which lead to inadequacies of service, as well as helping to detect where services can be improved. Such an approach can however only operate effectively in a context of professional and mutually respecting relationships between the persons of the Director PPS and the Independent Assessor.¹¹¹

Prosecutorial review commissions

Japan's PRCs have a number of benefits. The system serves as a watchdog over prosecutors by providing an indirect check on the abuses of prosecutorial discretion; the ability to register complaints ensures a level of victims' rights; and the system encourages citizen participation in the democratic process. Since their inception in 1948, more than half a million Japanese citizens have participated in PRCs.¹¹²

According to surveys and interviews of former PRC members, the deliberative engagement facilitated by PRCs enhanced participants' 'sense of civic engagement and social responsibility, elevated the feeling of civic empowerment over governmental functions and decision-making, and fostered long-lasting commitment to civic engagement and future deliberative opportunities'.¹¹³ Moreover, PRC members tended to express overwhelming confidence in prosecutors and courts, and their confidence in both the police and defence attorneys was considerably heightened by participation in deliberative participation.¹¹⁴ In Japan, PRCs impose a social check on prosecutorial power,

given the publicity that ensues in instances where prosecutors seek to reject a commission's recommendation. 'No prosecutor wants to see his name pasted across the front page in a negative fashion, the sure result of ignoring a prosecution review commission in a case on which the public has strong opinions.'¹¹⁵

Since their inception in 1948 more than half a million Japanese citizens have participated in PRCs

The following motivation for PRCs in Japan is relevant to all countries where the political executive (including the prosecution service) hinders the prosecution of or hesitates to prosecute high-ranking political leaders and state officials:

The refusal of the government to facilitate the prosecution of a select group of the privileged elites, despite their egregious conduct, has been well documented throughout Japan's modern history. Even today, both unethical conduct and outright illegal activities by high-ranking government officers are not subjected to prosecutorial scrutiny, indictment, or trial ... [The PRC] can exert a significant authority over, and insert public sentiments and equitable judgments into, prosecutorial decisions on politically sensitive cases or controversial issues that may affect the broader public interest. In addition, the PRC can help expose the fortified terrain of special protection and immunity given by the Japanese government to influential political heavyweights, high-ranking bureaucrats, and business elites. A single civic complaint by victims or their proxies in the PRC can initiate a public hearing to review incidents or alleged crimes committed by individuals whom the Japanese government did not indict.¹¹⁶

Recent legal developments in Japan, in terms of which PRCs can effectively overrule the prosecution's decision not to prosecute and compel a prosecution through a court-appointed special prosecutor, arguably empowers PRCs too much. It raises questions about the transferability of such a mechanism to jurisdictions – such as South Africa

– with deep societal cleavages or widespread support for vigilantism. Removing the prosecution's final control over the charging decision and 'replacing it with the unbridled discretion of lay persons whose focus may be unduly skewed by the notoriety of the event or potential accused' risks undermining individuals' right not to be prosecuted arbitrarily and, when prosecuted, strictly according to the prosecution service's written guidelines.¹¹⁷

There is also a danger that PRC members do not take into account the bigger picture or context in which decisions are made to prosecute or not to prosecute. In South Africa, as in many common-law systems, prosecutors face a two-stage test in deciding whether to prosecute someone. First, they have to consider the strength of the available evidence and conclude that there is a reasonable prospect of securing a conviction should they proceed with a prosecution. Second, once the first stage has been satisfied, prosecutors need to believe that it is in the public interest to proceed with a prosecution. It is this broader public interest consideration that PRC members may not always appreciate. In Japan, PRCs need not consider (and typically do not know) precedent in the prosecutors' office for the handling of similar cases. As one analyst of the Japanese system points out:

Emotion, a shared sense that someone must pay, and a potential to embarrass the government may subject individuals accused by the PRC to a loss of reputation, an emotionally draining criminal trial experience, and substantial financial harm when there is simply not enough evidence to proceed Thus, as currently structured, the PRC acts as a brake on the public prosecutor's ability to safeguard the unpopular but innocent.¹¹⁸

In Japan, the PRC system fails to properly protect prosecutorial discretion. Such an oversight in the PRCs' review architecture should be addressed before a similar system is considered in a country such as South Africa.

Applicability of accountability mechanisms

There is little disagreement about the virtues of public accountability. Like the related concept of good governance, the benefits of promoting public accountability have become a widely accepted orthodoxy. The challenge with public accountability is ensuring its practical application in the day-to-day functioning and performance of state institutions. It is consequently vital to ensure that 'accountability' is not just another political catchword, but is translated into concrete and sustained practices of account giving.¹¹⁹

This section describes a number of fairly typical situations demonstrating the shortcomings of the existing NPA accountability mechanisms, and the need for greater transparency and accountability by the organisation. This is followed by a discussion of the applicability of the three accountability mechanisms described and evaluated above – inspectorates, complaints assessors, and prosecutorial review committees – to the South African context.

Existing accountability mechanisms

As pointed out above, the NPA is accountable to a number of existing oversight institutions, e.g. parliament and the Auditor-General. However, notwithstanding the mandate and competence of such institutions, their fundamental weakness is their inability to focus specifically on the NPA. For example, in mid-2013 the Auditor-General presented his annual report on the NPA to parliament. In it, in terms of his mandate he reviews the NPA's achievements in relation to its planned targets for 2012/13, making the following finding:

Of the total number of 40 targets planned for the year [by the NPA], 22 were not achieved during the year under review. This represents 55% of the total planned targets that were not achieved during the year under review. This was mainly due to the fact that indicators and targets were not suitably developed during the strategic planning process.¹²⁰

The Auditor-General's report does not provide further reasons why the NPA failed to achieve over half its targets for the year. The NPA's annual report provides some information on the extent and reasons for the difference between its targets and actual performance,¹²¹ but its usefulness is limited.

The challenge with public accountability is ensuring its practical application in the day-to-day functioning and performance of state institutions

For example, while the NPA had a 2012/13 countrywide target of 50 convictions of persons engaged in corruption where the amount involved exceeds R5 million, only 42 convictions were achieved. The reason given is simply: 'Matters are complex and take a long time to finalise.'¹²²

It is questionable whether such a meagre explanation enhances public confidence – or the confidence of investors eyeing South Africa as an investment destination – in the NPA's capacity to effectively deal with complex and serious corruption trials. This perception may be unfair. It is plausible that the performance target is flawed or unrealistic. Without knowing how many such corruption matters were reported and/or investigated by the police and referred to the NPA for prosecution or how many specialist fraud prosecutors the NPA has at its disposal, it is difficult to say whether a target of 50 prosecutions was too ambitious or too modest.

The NPA is equipped with an impressive array of internal accountability mechanisms,¹²³ e.g. an Integrity Management Unit (IMU). The unit's objective is to increase the level of integrity of the NPA's employees through education, awareness and training, and to increase the levels of organisational integrity by ensuring the NPA's systems, policies, and procedures encourage a culture of ethical conduct.¹²⁴ In support of these efforts, the NPA has a number of ethics officers to assist it to assess its ethics-related risks and vulnerabilities.¹²⁵

While the existence and activities of the IMU are praiseworthy, its impact on public confidence in the NPA is limited. While the IMU produces reports on the ethical status of the NPA, these reports are only

disseminated to a few senior managers in the organisation. Very little about the IMU and its activities and impact can be found in the NPA's regular publications or on its website. Those with sufficient interest and time to look a bit deeper will come across a 2012 interview with the then-acting head of the IMU, who stated that the unit

is 'beginning to receive more and more cases of prosecutorial misconduct'.¹²⁶ Yet, according to the NPA's 2012/13 annual report, only five out of the organisation's 4 972 employees, or 0.1 per cent, were dismissed as a result of misconduct over a 12-month period.¹²⁷ This may be a sign of the NPA's institutional health, the IMU's good work, or an organisation unable to police itself and expel unethical employees. Barring an independent review, it is difficult to interpret these figures with any confidence. Public confidence is further diminished when media reports taint the IMU with biased behaviour and double standards.¹²⁸

Very little about the IMU and its activities and impact can be found in the NPA's regular publications or on its website

Independent inspectorate

The above examples are just two of many that justify the need for an independent inspectorate that can objectively – and in a focused and sustained way – scrutinise the NPA's work. Moreover, while, for example, parliament and the auditor-general are often quick to criticise and find fault with the NPA's performance, none of the NPA's existing external accountability mechanisms is designed to provide constructive input and recommendations based on sound research and an intimate understanding of the role of the organisation and the environment in which it operates. Only a dedicated inspectorate can play such a role effectively – and follow up with reinspections to verify that its recommendations have been taken seriously. This raises a question around the requirements of an independent inspectorate and the role it plays. At one end of the continuum is the need for a fully independent inspection body that provides assurance on the operation of the prosecution service. At the other

end is the need for an inspectorate that is aligned with the business needs of the prosecution service it inspects and one that provides a direct contribution to that service's performance improvement. Objectivity rather than independence is likely to be a greater asset in this context.¹²⁹ In the case of South Africa, collaboration between an inspectorate and the NPA should not imply a diminishing of the former's independence. The desire to support the performance development of the NPA, for example, would have to be tempered with the requirement for inspections to deliver an external critique of the

organisation's performance. The two, while not always compatible, can coexist.¹³⁰

The approach of the Scottish inspectorate seems appropriate for an organisation like the NPA that has a number of internal review and accountability mechanisms – recognising thereby that rigorous self-assessment has an important role to play in effective performance management. Thus, the work of the Scottish inspectorate and any criticisms it makes does not focus on individual members of the prosecution service. Rather, the objective is to improve the quality of service delivery and highlight good practice. While the inspectorate identifies shortcomings, this is in the context of dealing with systemic failure, as opposed to the apportionment of individual blame. South African policymakers should also note that according to the evolving literature on this issue, inspection criteria for independent inspection mechanisms are changing.¹³¹ Traditionally, inspection focused on past performance and

used measures of resource inputs and internal processes. Increasingly, however, inspection regimes focus on judging an organisation's capacity to achieve future targets for improvement, and emphasise outcomes or achievements.

One possible way forward is to establish an advisory board to guide the development of a South African prosecution service inspectorate and ensure that it is planned and implemented to the highest possible standard. Such a board should include external members to contribute an independent perspective to the work of the inspectorate and provide a focus for benchmarking performance. The board could also include senior NPA managers and, over time, senior inspectorate members. The functions of the board would be to provide advice on the work and agenda of the inspectorate and keep the working relationship between the NPA and the inspectorate under review.¹³²

Independent complaints assessor

Setting up an independent complaints assessor's office for the NPA should not be costly, given the UK experience, where both assessorships are part-time positions. More onerous for the NPA would be to set up a centralised complaints system so that an assessor can undertake an annual audit of the NPA's complaint-handling procedures. A first step might be to establish a complaints assessor whose office deals only with non-legal complaints that the NPA has been unable to resolve to the complainants' satisfaction. Such an office would not initially undertake an annual audit of complaints handled by the NPA as the assessors in the UK do.

To instil public confidence in the NPA's complaints system, the complaints assessor should be empowered to oversee the development and refinement of guidelines and protocols relating to the process of complaints handling in

the NPA. Like his Scottish counterpart, a South African complaints assessor's primary focus should be on 'outcomes and service improvements from a user [i.e. the public's] perspective'.¹³³ This would complement one of the NPA's five core values¹³⁴ – that of providing first class customer service and complying with the Batho Pele principles.¹³⁵

Also crucial for ensuring public confidence in the assessor's work – and, by implication, the NPA's complaints mechanism – is that the assessor's office should not only be, but also be seen or perceived to be, independent of the NPA and any partisan political interests. The choice of assessor will thus be important. It should be someone with the necessary stature, experience and skills to instil public confidence in the office. A retired High Court judge or senior magistrate, an experienced member of the bar (i.e. an advocate), or a legal academic could all be appropriate candidates for such a position. The assessor's annual report should be publicly available and ideally published on the NPA's website.

Prosecutorial review commissions

In South Africa, a system of prosecutorial review commissions with restricted powers merits cautious consideration. Unlike Japan's current commissions, which can compel prosecutors to reverse their decisions not to prosecute, South Africa would be better served by a system akin to Japan's pre-2009 commissions, i.e. commissions with the ability to make non-binding advisory recommendations to the prosecution service and with the authority to demand reasons from the prosecution service for decisions not to prosecute.

This is an important distinction. The present arrangement in Japan introduces a relationship of subordination on the part of the prosecution service, which presents a challenge to the

independence of the service. By contrast, the traditional Japanese model – and one worthy of consideration for South Africa – is one of 'explanatory and cooperative accountability', or answerability by the prosecution service vis-à-vis the review commissions. That is, the prosecution would be obliged to explain the bases upon which decisions were made. Such explanatory and cooperative accountability can be regarded as 'necessary to monitor the efficacy of discretionary decisions and to properly deal with the consequences of any unsustainable exercise in that discretion'.¹³⁶

Prosecutorial review commissions would strengthen fragile attempts at fostering 'deliberative democracy'¹³⁷ in South Africa. Commissions would empower communities by amplifying their voices and concerns through the commission process, and compel prosecutors to provide reasons where there is a sense of community outrage or disbelief about a decision not to prosecute. This would afford the prosecution an opportunity to explain its decision – that a particular case is either not likely to result in a conviction and/or that prosecution is not in the public interest. A balance will need to be struck between prosecutors' providing satisfactory reasons for non-prosecution, on the one hand, and the need to protect the reputation and privacy of individuals who have been investigated but not charged, on the other hand.¹³⁸ Moreover, information that may weaken the state's ability to investigate and prosecute criminal suspects, harm a particular investigation or undermine the country's national security may also need to be protected from automatic public disclosure.

From a public accountability perspective, a review commission mechanism could interrogate and draw attention to prosecutors' decisions not to prosecute politically or economically powerful

individuals. It could also be a useful mechanism to review cases where the prosecution decides not to prosecute one of its own or officials in other criminal justice departments (such as police officers or prison wardens), where public suspicions of a cover-up or preferential treatment exist.

A perception that wealthy individuals, high-level state officials and organised crime groups who have corrupted criminal justice officials are less likely to be prosecuted compared to 'ordinary' suspects can provoke a general sense of impunity. This weakens public trust in the criminal justice system and undermines the state's authority. Individuals are less inclined to cooperate with the police and prosecution service if they believe the system unfairly prosecutes suspects selectively. This in turn can engender a general sense of lawlessness, leading to higher levels of crime and communities taking the law into their own hands.

The NPA's perceived reluctance to prosecute President Jacob Zuma, senior SAPS official Richard Mdluli,¹³⁹ senior ruling-party politicians in KwaZulu-Natal,¹⁴⁰ and a number of individuals denied amnesty by the Truth and Reconciliation Commission¹⁴¹ has created the impression that some suspects receive special protection or preferential treatment from the country's prosecutors. There is also a perception that the NPA is reluctant to prosecute lesser-known suspects. A recent study concludes that the 'NPA policy providing for a wide discretion being exercised in the decision not to prosecute has been broadly interpreted, making a decision to prosecute the exception rather than the rule'.¹⁴² For example, of the 517 000 new dockets of a general criminal nature the NPA received from the police in 2005/06 (the latest period for which data is available), the NPA declined to prosecute in 60 per cent of cases and only about 72 000 (14 per cent) resulted in prosecutions.

An analysis of the underlying reasons for de facto impunity in South African law enforcement came to a somewhat dismal conclusion about the NPA's willingness to rigorously prosecute suspected offenders:

The NPA in general declines to prosecute in a very large proportion of ordinary criminal cases. This trend emanates from the wide discretionary powers held by the NDPP and further that there is little transparency when the NDPP declines to prosecute. Second, where the NDPP does decide to prosecute, it appears to be a case of 'selecting for success' to achieve conviction rate targets and the more difficult cases, or cases that require more time and effort are not pursued. Thirdly, where law enforcement officials are implicated in rights violations there appears to be an even greater reluctance to prosecute on the part of the NPA. While the NPA has the authority and the resources to conduct prosecutions, it appears to refrain in general from prosecuting law enforcement officials.¹⁴³

Prosecutorial review commissions would strengthen fragile attempts at fostering 'deliberative democracy' in South Africa

Data on the number of police officers and prison wardens prosecuted as a proportion of those suspected of having committed serious crimes while on duty is not available. However, a study by the Civil Society Prison Reform Initiative at the University of the Western Cape counted the number of police and prison officials who had been dismissed (typically as a result of being convicted of a criminal offence) and deduced that the number of prosecutions 'is very low seen against the total number of cases investigated'.¹⁴⁴

The Judicial Inspectorate of Prisons, a statutory body, laments the fact that very few prison officials are prosecuted for the deaths of prison inmates under their control. Not only do the police close the files in the majority of these cases, but where matters are referred for prosecution, 'the NPA returned a nolle prosequi i.e. they declined to prosecute'.¹⁴⁵ The NPA does not automatically provide reasons for not prosecuting, thereby potentially creating the perception that a decision not to prosecute a police officer or prison official is motivated by the institutional affiliation of the alleged perpetrator rather than the lack of incriminating evidence.

Prosecutorial review commissions could serve the useful purpose of investigating controversial NPA decisions not to prosecute police officers, prison officials and prosecutorial staff suspected of having committed serious offences. This would serve as a check on prosecutors' decisions not to prosecute their colleagues and other criminal justice officials where the available evidence seems compelling. Moreover,

in cases where alleged misconduct of a criminal nature by criminal justice officials generates particular public disquiet, a review commission could oblige the NPA to provide reasons for its decision not to prosecute. If some type of review commission system were instituted in South Africa, proper training for commission members would be important. For example, they should receive training on the use of prosecutorial discretion and why the general public interest, and not necessarily only the strength of

the incriminating evidence, is taken into account in the exercise of such discretion. The training should inform commission members about the value of prosecutorial discretion and the need for review commissions to consider victims' claims, the rights of alleged offenders and the public interest, so that commission members can apply similar standards to the decision whether to request the NPA to review its decision not to prosecute in a particular case.

To avoid acting for ulterior motives – such as vengeance, populist pressure or political considerations – commission members must also possess the knowledge prosecutors have as to the utility of prosecutorial discretion. This includes knowledge of the factors that should be considered when deciding not to prosecute, even in the face of evidence of guilt.

The aforementioned accountability mechanisms – especially inspectorates and complaints assessors – contain useful lessons for policymakers wishing to introduce similar mechanisms in South Africa. As discussed above, the structure and workings of such mechanisms would need to be adapted to the South African situation, taking into account the existing accountability architecture covering the operations of the NPA, its particular objectives and functions, and the available financial and human resources. These are largely technical considerations requiring technical solutions. Not to be overlooked, however, is the broader political environment that may supersede any quest for technical solutions to problems of prosecutorial accountability.

South Africa has been described as a 'dominant party democracy' as a consequence of the African National Congress's electoral dominance that, in turn, has eroded checks on the power of the country's political executive.¹⁴⁶

One such an important check is a prosecution service that fulfills its mandate without fear, favour or prejudice, and is both willing and able to prosecute the most senior members of the political executive if a dispassionate application of the facts, law and prosecution policy so indicates. This has not consistently been the case in South Africa's recent past.¹⁴⁷ The question therefore arises whether the political executive would countenance the creation of institutions that would serve as a check on and be critical of NPA decisions not to prosecute senior members of the executive and other influential members of the ruling party. This is an important question, because without the requisite political will, new accountability mechanisms for the NPA are unlikely to enjoy the support they need to function effectively.

Conclusion

Given the NPA's tremendous authority, its indispensable role in the criminal justice process and its essential function in upholding the rule of law, it is vital that it is accountable to the people it serves. In practical terms this demands accountability of a standard and quality that enhances public confidence and trust in the NPA while also helping the organisation to improve its performance.

This paper suggests that these accountability goals can be furthered through a dedicated prosecution service inspectorate complemented by an independent complaints assessor mechanism, and also that consideration should be given to some form of prosecutorial review body through which the public can scrutinise NPA decisions not to prosecute particular cases. Such a body should also have the general authority, limited by appropriate safeguards, to oblige the NPA to provide reasons for its decisions not to prosecute. The proposals contained in this paper are not a criticism of existing

NPA accountability mechanisms – neither the NPA's internal mechanisms nor those external to the NPA such as parliament or the Auditor-General. These have been effective within the confines of their restrictive mandates. However, the NPA's internal accountability mechanisms, by

The NPA is an anomaly among South Africa's criminal justice institutions. Unlike the police, prisons service and even the judiciary, the NPA is not subject to dedicated external oversight

definition, lack the independence and objectivity (either in fact or perceived) to assuage public concerns about the organisation's performance, decisions in controversial cases or level of service delivery. The external mechanisms are not sufficiently focused on the NPA to provide both dedicated and sustained oversight on a broad range of issues and constructive support to the organisation.

The NPA is an anomaly among South Africa's criminal justice institutions. Unlike the police, prisons service and even the judiciary, the NPA is not subject to dedicated external oversight. This omission in the country's criminal justice accountability architecture is particularly stark, given the NPA's influence on the performance of the other criminal justice agencies. For example, police investigations come to naught if they do not result in successful prosecutions; the criminal courts can generally only deal with those matters prosecutors decide to place before them; and the number of remand and sentenced prisoners is largely determined by the effectiveness and efficiency of the prosecution service.

All three of the prosecutorial accountability mechanisms reviewed in this paper exist elsewhere. They have been tested in the real world of criminal justice practice and under the myriad pressures that criminal justice systems,

including prosecution services, face on a daily basis. There is thus much that can be learnt from such comparative experiences. However, while the utility of comparative criminal justice research lies in its ability to provide helpful and practical advice to practitioners on

comparative practices and learning, foreign experiences are not automatically a panacea for national criminal justice reformers. Despite the pressure of uniformity embedded in processes of globalisation, criminal justice remains a local and varied phenomenon.

The inventory of ready solutions to the challenge of prosecutorial accountability is modest and fairly specific. Moreover, the history of specific institutional or legal transplants in the furtherance of national criminal justice reform efforts is full of instances of poor 'portability'.¹⁴⁸ South African criminal justice reformers should consequently take what is good and helpful from relevant international models and practices, but ensure that they are grounded in the country's local realities and context.

It is not suggested that the prosecutorial accountability mechanisms reviewed in this paper should be introduced indiscriminately to South Africa. Rather, the paper will have succeeded if it spurs a debate on the need for, and development of, appropriate and context-specific accountability mechanisms for the NPA. To do so, South Africa's policymakers and criminal justice reformers should be aware of, and be able to draw from, international good practice and experience.

Notes

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- 3 D M Chirwa and L Nijzink (eds), *Accountable government in Africa: perspectives from public law and political studies*, Cape Town: UCT Press, 2012, 5.
- 4 *Ibid.*, 5–6.
- 5 C Grace, *The rapidly changing world of audit and inspection*, Public Net, 20 May 2005, www.publicnet.co.uk/features/2005/05/20/the-rapidly-changing-world-of-audit-and-inspection/ (accessed 31 October 2013).
- 6 Universal Declaration on Democracy, adopted by the Inter-Parliamentary Council at its 161st session, Cairo, 16 September 1997, para 14, www.ipu.org/cnl-e/161-dem.htm (accessed 28 October 2013).
- 7 Constitution of the Republic of South Africa (Act 108 of 1996), as amended, sec 1(d), www.gov.za/documents/constitution/1996/a108-96.pdf (accessed 16 October 2013).
- 8 P Aucoin and R Heintzman, *The dialectics of accountability for performance in public management reform*, *International Review of Administrative Sciences* 66 (2000), 45–55.
- 9 Constitution of the Republic of South Africa, chap 9.
- 10 P de Vos, *Balancing independence and accountability: the role of Chapter 9 institutions in South Africa's constitutional democracy*, in Chirwa and Nijzink, *Accountable government in Africa*, 161.
- 11 Chirwa and Nijzink, *Accountable government in Africa*, 6.
- 12 Constitution of the Republic of South Africa, sec 179(4).
- 13 National Prosecuting Authority Act (Act 32 of 1998), as amended, sec 32(1), www.justice.gov.za/legislation/acts/1998-032.pdf (accessed 20 October 2013).
- 14 T Walters, *Overview: design and reform of public prosecution services*, in *Promoting prosecutorial accountability, independence and effectiveness: comparative research*, Sofia: Open Society Institute, 2008, 22.
- 15 F Contini and R Mohr, *Reconciling independence and accountability in judicial systems*, *Utrecht Law Review* 3(2) (December 2007), 31, www.utrechtlawreview.org/index.php/ulr/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-101065/46 (accessed 25 October 2013).
- 16 Constitution of the Republic of South Africa, sec 179(5)(a).
- 17 Notwithstanding that the head of the NPA, the NDPP, can by law hold office for a non-renewable term of ten years, in its first 15 years of existence the NPA had seven different NDPPs, three of which served in an acting capacity.
- 18 In the Constitutional Court case of *Democratic Alliance v President of South Africa and Others* [2012] CCT 122/11, the court held that dishonesty is inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of an NDPP. On evaluating the evidence Menzi Simelane (NDPP between 2009 and 2011) gave at the Ginwala enquiry into the fitness of Vusi Pikoli to hold the office of NDPP, the court concluded that the 'evidence was contradictory and, on its face, indicative of Mr Simelane's dishonesty and raised serious questions about Mr Simelane's conscientiousness, integrity and credibility'; see Explanatory note of Constitutional Court judgment, 2, www.saflii.org/za/cases/ZACC/2012/24media.pdf (accessed 4 October 2013). See also P Harper, *Top prosecutor got job despite facing a probe*, *City Press*, 6 October 2013, www.citypress.co.za/politics/top-prosecutor-got-job-despite-facing-probe/ (accessed 26 October 2013).
- 19 H Tamukamoyo and G Newham, *What to do about the steady erosion of the rule of law in South Africa?*, *ISS Today* (5 October 2012), www.issafrika.org/iss-today/what-to-do-about-the-steady-erosion-of-the-rule-of-law-in-south-africa (accessed 26 October 2013); *City Press*, *Former NPA head 'ignored recommendations to prosecute Zuma'*, 30 August 2013, www.citypress.co.za/politics/former-mpa-head-ignored-recommendations-to-prosecute-zuma/ (accessed 26 October 2013); *Business Day*, *SA ordered to probe Zim officials accused of torture*, 8 August 2012, www.bdlive.co.za/articles/2012/05/08/sa-ordered-to-probe-zim-officials-accused-of-torture;jsessionid=F91769C39600DD97C4ABE8256E5897EC.present1.bdfm (accessed 25 October 2013); J Herskovitz, *South Africa shocked by move to charge miners with massacre*, *Reuters*, 31 August 2012, www.reuters.com/article/2012/08/31/oukwd-uk-safrica-mines-idAFBRE87U0MC20120831?sp=true (accessed 25 October 2013).
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- 21 J Redpath, *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, *ISS Monograph no. 186*, Pretoria: Institute for Security Studies, 2012, 55, www.issafrika.org/uploads/Mono186WEB.pdf (accessed 23 October 2013).
- 22 G Newham, *The Tatane case raises hard questions for South Africa's National Prosecuting Authority*, *allAfrica*, 11 April 2013, allafrica.com/stories/201304111160.html (accessed 25 October 2013); L Steyn, *State bungalows, J Arthur Brown walks*, *Mail & Guardian*, 17 May 2013, mg.co.za/article/2013-05-17-00-state-bungalows-j-arthur-brown-walks (accessed 26 October 2013).
- 23 National Prosecuting Authority Act, sec 35.
- 24 In terms of the Public Finance Management Act (Act 1 of 1999) and the Public Finance Management Amendment Act (Act 29 of 1999); see National Treasury, *Legislation – Public Finance Management Act (PFMA)*, www.treasury.gov.za/legislation/PFMA/ (accessed 19 October 2013).
- 25 Constitution of the Republic of South Africa, sec 179(6).
- 26 See, for example, *Freedom Under Law v National Director of Public Prosecutions and Others* [2013] 26912/12, ZAGPPHC 271, 23 September 2013, in which the North Gauteng High Court ordered the NPA to reinstitute charges it had previously dropped against a high-profile accused and ensure the case is 'prosecuted diligently and without delay'.
- 27 National Treasury, *Legislation*, secs 1 and 36.
- 28 The CEO of the NPA serves as the organisation's accounting officer on the basis of a delegation of authority from the director-general of the Department of Justice and Constitutional Development.
- 29 National Treasury, *Guide for accounting officers: Public Finance Management Act*, Pretoria: National Treasury, October 2000, 21.
- 30 A du Plessis, J Redpath and M Schönteich, *Report on the South African National Prosecuting Authority*, in *Promoting prosecutorial accountability, independence and effectiveness: comparative research*, Sofia: Open Society Institute, 2008, 374.
- 31 Open Society Foundation for South Africa, *The Parliamentary Portfolio Committee on Justice and Constitutional Development: shadow legacy report 2004–2009*, Cape Town: Open Society Foundation for South Africa, 2010, 4.
- 32 Du Plessis, Redpath and Schönteich, *Report on the South African National Prosecuting Authority*, 372.
- 33 House of Commons Justice Committee, *The Crown Prosecution Service: gatekeeper of the criminal justice system*, House of Commons Justice Committee, Ninth Report of Session 2008–09, London: HMSO, August 2009, www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/18602.htm (accessed 18 October 2013); see also S Awan (prosecutor general, Sindh, Pakistan), *Role of prosecution in criminal justice system*, *Pakistan Today*, www.pakistantoday.com.pk (accessed 16 October 2013).

- 34 House of Commons Justice Committee, *The Crown Prosecution Service*, 5.
- 35 Constitution of the Republic of South Africa, sec 206(6).
- 36 Independent Police Investigative Directorate Act (Act 1 of 2011). IPID was formerly the Independent Complaints Directorate, which was established in 1997.
- 37 *Ibid*, sec 28. See also IPID brochure, www.ipid.gov.za/brochures/english/English%20final.pdf (accessed 16 October 2013).
- 38 Independent Police Investigative Directorate Act, sec 29.
- 39 See IPID (Independent Police Investigative Directorate), Research reports, www.ipid.gov.za/documents/research_reports.asp (accessed 16 October 2013).
- 40 Constitution of the Republic of South Africa, sec 208. Provincial secretariats assist the secretariat to achieve its objectives, and perform the functions and exercise powers of the secretariat in the provinces. For a detailed discussion of IPID and the Civilian Secretariat for Police, see A Faull, *Oversight agencies in South Africa and the challenge of police corruption*, ISS Paper 227, Pretoria: Institute for Security Studies, November 2011, www.issafrica.org/uploads/Paper227.pdf (accessed 1 November 2013).
- 41 Civilian Secretariat for Police Service Act (Act 2 of 2011), sec 4(4), www.policesecretariat.gov.za/downloads/acts/Civilian_Secretariat_for_Police_Service_Act_2_of_2011.pdf (accessed 16 October 2013).
- 42 *Ibid*, sec 4(6).
- 43 *Ibid*, sec 2.
- 44 *Ibid*, sec 32.
- 45 *Ibid*, sec 31.
- 46 *Ibid*, sec 6.
- 47 Correctional Services Act (Act 111 of 1998), as amended, sec 85, www.info.gov.za/view/DownloadFileAction?id=70646 (accessed 17 October 2013). For information on the inspectorate, see judicialinsp.dcs.gov.za/Default.asp (accessed 17 October 2013).
- 48 Judicial Inspectorate for Correctional Services, Annual report for the period 01 April 2012 to 31 March 2013, Cape Town: Judicial Inspectorate for Correctional Services, 2013, 15, judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf (accessed 17 October 2013).
- 49 *Ibid*.
- 50 Correctional Services Act, secs 93(2), 85(2).
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- 52 Constitution of the Republic of South Africa, sec 178(1).
- 53 Judicial Service Commission Act (Act 9 of 1994), as amended, sec 36, www.justice.gov.za/legislation/acts/1994-009.pdf (accessed 17 October 2013).
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- 57 Crown Prosecution Service Inspectorate Act 2000, London: HMSO, www.legislation.gov.uk/ukpga/2000/10/pdfs/ukpga_20000010_en.pdf (accessed 30 September 2013).
- 58 HM Crown Prosecution Service Inspectorate, London: HMSO, www.hmcp.si.gov.uk/ (accessed 30 September 2013).
- 59 Solicitor-general (Mr. Ross Cranston), *Crown Prosecution Service Inspectorate Bill [Lords]*, HC Deb 23 May 2000 vol 350 cc880–7, Hansard, 23 May 2000, London: House of Commons, hansard.millbanksystems.com/commons/2000/may/23/crown-prosecution-service-inspectorate (accessed 27 September 2013). In England and Wales the solicitor-general is also the deputy attorney-general.
- 60 In 2010 the chief inspector of the CPSI received a salary of £150,000; see House of Commons Justice Committee, *Appointment of HM CPS chief inspector*, Third Report of Session 2009–10, London: UK Parliament, 2010, 23.
- 61 *Ibid*, 22.
- 62 *Ibid*, 23.
- 63 The CPSI's budget comes from the Treasury Solicitor's Department. The Treasury Solicitor's Department for England and Wales is similar to the South African State's Attorney Office. In 2012/13 the CPSI's annual budget was £2.83 million. In 2010 the CPSI had some 45 permanent staff located in London and York. See UK Parliament, *Committee endorses appointment of new CPS chief inspector*, London: UK Parliament, 1 February 2010, www.parliament.uk/business/news/2010/02/committee-endorses-appointment-of-new-cps-chief-inspector/ (accessed 7 October 2013).
- 64 House of Commons Justice Committee, *Appointment of HM CPS chief inspector*, 20.
- 65 For a description of the work of CPSI lay assessors, see A Billington, *Inspecting the CPS*, *Criminal Justice Matters* 49(1) (2002), 22–23.
- 66 HM Crown Prosecution Service Inspectorate.
- 67 HM Chief Inspector of the Crown Prosecution Service, *Improvement through inspection: HM Chief Inspector of the Crown Prosecution Service annual report 2012–2013*, London: HM Crown Prosecution Service Inspectorate, 2013, 4, www.hmcp.si.gov.uk/documents/plans/PLAN/HMCPsi_CiAR_2012-13.pdf (accessed 2 October 2013).
- 68 In 2012/13 CPSI inspectors examined over 2,800 case files as part of the CPSI's Annual Casework Examination Programme.
- 69 For information on the methodology of the CPSI's Annual Casework Examination Programme, the performance indicators used in the examination, and the findings of the 2012/13 examination, see HM Chief Inspector of the Crown Prosecution Service, *Improvement through inspection*, Annexes 2 and 3.
- 70 *Ibid*, 32.
- 71 *Regina v. Rayment and Others* (generally known as the 'Jubilee Line case'), 2005.
- 72 CPSI (Crown Prosecution Service Inspectorate), *Review of the investigation and criminal proceedings relating to the Jubilee Line case*. (Pursuant to a reference by the Attorney General under section 2 (1)(b) of the Crown Prosecution Service Inspectorate Act 2000), London: CPSI, June 2006, www.hmcp.si.gov.uk/inspections/inspection_no/220/ (accessed 8 October 2013).
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- 74 *Criminal Proceedings etc. (Reform) (Scotland) Act 2007*, secs 78–79, www.legislation.gov.uk/asp/2007/6/contents (accessed 8 October 2013).
- 75 *Ibid*, sec 79(3).
- 76 Inspectorate of Prosecution in Scotland (IPS leaflet), www.scotland.gov.uk/Topics/Justice/ipis/IPS-leaflet (accessed 9 October 2013).
- 77 *Ibid*.
- 78 Inspectorate of Prosecutions in Scotland, *Thematic reports*, www.scotland.gov.uk/Topics/Justice/ipis/reps (accessed 9 October 2013).
- 79 For example, joint inspections with HM Inspectorate of Constabulary for Scotland on 'victims in the criminal justice system'; see Inspectorate of Prosecutions in Scotland and Inspectorate of Constabulary for Scotland, *Victims in the criminal justice system*, Edinburgh: Inspectorate of Prosecutions in Scotland and Inspectorate of Constabulary for Scotland, October 2010, www.scotland.gov.uk/Publications/2010/10/08133638/0 (accessed 9 October 2013), and inspections on 'case management'; see Inspectorate of Prosecutions in Scotland and Inspectorate of Constabulary for Scotland, *A case study: a joint thematic inspection of case management*, Edinburgh: Inspectorate of Prosecutions in Scotland and Inspectorate of Constabulary for Scotland, 2006, www.scotland.gov.uk/Publications/2006/08/08132435/0 (accessed 9 October 2013).

- 80 PPSNI (Public Prosecution Service for Northern Ireland), The independent assessor of complaints for the Public Prosecution Service, Belfast: PPSNI, August 2006, www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Complaints/The_Independent_Assessor_of_Complaints_for_pps.pdf (accessed 6 October 2013).
- 81 A MacLaughlin, The independent assessor for complaints for the Public Prosecution Service of Northern Ireland, first formal report 31st March 2006, Bangor: Independent Assessor for Complaints for the Public Prosecution Service, November 2006, 12, www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Complaints/Independent%20Assessor%20of%20Complaints%20for%20PPS%20Report%202005-06.pdf (accessed 6 October 2013).
- 82 A MacLaughlin, The independent assessor for complaints for the Public Prosecution Service of Northern Ireland, eighth formal report for 2012, Bangor: Independent Assessor for Complaints for the Public Prosecution Service, 31 March 2013, 6, www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Complaints/IAC%20Report%20for%202012-13%20FINAL.pdf (accessed 6 October 2013). At the time of writing there had been no instance of a refusal by the DPP to accept a recommendation made by the independent assessor.
- 83 The PPSNI accepts complaints from a variety of stakeholders, including legal-services professionals, judicial officers, victims of crime, witnesses, police officers, offenders, suppliers of goods and/or services, and members of the public.
- 84 MacLaughlin, The independent assessor for complaints for the Public Prosecution Service of Northern Ireland, eighth formal report for 2012, 22.
- 85 The CPSI is not the complaints authority for the CPS. While awareness of complaints about the CPS may spur the CPSI to undertake an inspection or audit of a specific aspect of the CPS's work, the CPSI does not have the mandate to receive and respond to specific complaints.
- 86 CPS (Crown Prosecution Service), Feedback and complaints guidance: how to provide feedback or make a complaint to the Crown Prosecution Service, London: CPS, www.cps.gov.uk/contact/feedback_and_complaints/complaints_guidance.html (accessed 4 October 2013).
- 87 Victims who wish to exercise their right to request a review of the CPS's decision not to bring charges or discontinue proceedings can utilise the CPS's Victims' Right to Review Scheme. See CPS (Crown Prosecution Service), Victims' Right to Review Scheme, www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html (accessed 8 October 2013).
- 88 CPS (Crown Prosecution Service), Independent assessor of complaints, Crown Prosecution Service, www.cps.gov.uk/contact/feedback_and_complaints/independent_assessor_of_complaints.html (accessed 7 October 2013).
- 89 Inspectorate of Prosecution in Scotland (IPS leaflet).
- 90 CPS (Crown Prosecution Service), Crown Prosecution Service annual report and accounts 2012–13 (for the period April 2012–March 2013), London: CPS, 2013, 12, www.cps.gov.uk/publications/docs/annual_report_2012_13.pdf (accessed 2 October 2013).
- 91 See, for example, K Culp Davis, Discretionary justice: a preliminary inquiry, Baton Rouge: Louisiana State University Press, 1969, 22: 'the power not to prosecute may be of greater magnitude than the power to prosecute, and it certainly is much more abused because it is so little checked.' In some systems there are limited and highly formalistic opportunities to intervene in prosecutorial decisions about charging. For example, in the German system a victim may appeal to the state Supreme Court to require the prosecutor to bring a case to trial (Klageerzwingungsverfahren). However, this possibility is available only if the case has been dropped for lack of evidence, not because of a prosecutor's discretionary determination that there is no public interest in prosecution. Since it has become common for prosecutors to drop cases for the latter reasons, in practice little control exists over prosecutorial discretion to drop charges. In any event, such appeals are rare and courts seldom grant them. Similarly, in South Africa private prosecutions are theoretically possible in cases where the NPA declines to prosecute in a matter. However, the procedural requirements to initiate a private prosecution are onerous and such prosecutions are exceedingly rare; see C Terreblanche and G Davis, 'Private prosecutions are rare – and expensive', Independent Online, 7 April 2009, www.iol.co.za/news/politics/private-prosecutions-are-rare-and-expensive-1.439333#Um3Y11Oma88 (accessed 27 October 2013).
- 92 See, for example, the English Court of Appeal decision of *R v DPP, ex p. Manning and Another* [2000] 3 WLR 463, where the court held that the DPP did not have a general duty to give reasons for a decision not to prosecute. However, in this particular case the court held that it was reasonable for the prosecution to provide reasons for non-prosecution where no compelling grounds suggested otherwise. Moreover, the court stated that in circumstances where an individual had died while in the custody of the state (which was the case in Manning) and a properly directed inquest had reached a verdict of unlawful killing, reasons should be given for a decision not to prosecute.
- 93 Redpath, Failing to prosecute?, 55.
- 94 M D West, Prosecution review commissions: Japan's answer to the problem of prosecutorial discretion, *Columbia Law Review* 92 (1992), 693.
- 95 Ibid, 697.
- 96 Ibid, 698.
- 97 Ibid.
- 98 Ibid, 702.
- 99 A practising lawyer is appointed as a 'legal advisor' to a PRC when it decides that legal knowledge and advice is necessary, especially when it may re-evaluate a prosecutor's second decision not to indict.
- 100 H Davis and S Martin, The rise of public service inspection, in H Davis and S Martin (eds), *Public service inspection in the UK*, London: Jessica Kingsley, 2008, 9–10.
- 101 A Midwinter and N McGarvey, In search of the regulatory state: evidence from Scotland, *Public Administration* 79(4) (Winter 2001), 843.
- 102 M Maguire, chief inspector of criminal justice in Northern Ireland, A peer review of Her Majesty's Crown Prosecution Service Inspectorate, October 2009, 16, www.cjini.org/CJINI/files/49/492ba686-9189-4de9-b2a9-95c5c9075217.pdf (accessed 5 October 2013).
- 103 For a discussion of public service inspection typologies and how inspectorates adopt approaches ranging from the 'hard-edged' to the 'consensual' vis-à-vis the public entity they are inspecting, see Davis and Martin, *The rise of public service inspection*, 10.
- 104 Maguire, A peer review of Her Majesty's Crown Prosecution Service Inspectorate, 19.
- 105 Compliance costs are the costs incurred by the inspected body to meet the requirements of those who inspect them. These costs are not routinely collected by governments and are consequently difficult to calculate. Compliance costs include the costs to the inspected body to interact with the inspection body, including additional costs involved in the provision of requested information, consultations with the inspectorate's staff, acting as guides on inspections, and helping the inspectorate interpret documentation and data.
- 106 G Simmonds and P Vass, *External review: theory and practice for the regulatory state*, Research Report 12, Bath: Centre for the Study of Regulated Industries University of Bath, 2002, 22.
- 107 Maguire, A peer review of Her Majesty's Crown Prosecution Service Inspectorate, 22.
- 108 Ibid.
- 109 Private prosecutions are theoretically possible in terms of South African law. However, the procedural requirements to initiate such a prosecution are onerous, so that they are exceedingly rare. Unlike many other state services, such as the provision of education,

- security, health, and transport services, for which many private sector alternatives exist, prosecutorial services are de facto a state monopoly.
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Acknowledgements



FORDFOUNDATION



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This paper was made possible with funding provided by the Ford Foundation and the Hanns Seidel Foundation. The ISS is also grateful for the support of the following core partners: the governments of Finland, Norway, Sweden, Australia and Denmark.

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