

Position Papers on State Reform

Thematic Area 2:

Position Paper on Appointments and Removals in key Criminal Justice System Institutions

DRAFT FOR COMMENT

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Prologue: Position Papers on State Reform

The position paper that follows forms part of a set of three that argue for crucial reforms of the South African state. The goals of these reforms are to realise a rigorous reduction in corruption and in the influence of patronage in South African politics, while improving the political responsiveness, efficiency, and the developmental effectiveness of its public administration.

- The present paper deals with reforms to the process of appointment and removal of senior leaders to key criminal justice institutions with an investigative and prosecutorial mandate
- A second position paper argues for reforms in appointments and removals in the Public Service and Municipalities in South Africa.
- A third paper deals with reforms to the public procurement system in South Africa.

In his 2019 State of the Nation Address, the President recognised that “our greatest efforts to end poverty, unemployment and inequality will achieve little unless we tackle state capture and corruption in all its manifestations and in all areas of public life.”ⁱ The President further committed government to working with South African society in the fight against these threats and in strengthening the state’s ability to promote its democratic mandate and address the needs of the people. These are significant commitments. They are indicative of a widely evidenced momentum in government, and in society in general, in favour of reversing the erosion of state institutions and reaffirming the values and aspirations of the anti-apartheid project. These position papers are aligned with that momentum. They aim to contribute to the development of an overarching strategy for state reform. They do so by underlining a set of concrete institutional adjustments that aim to achieve values of integrity, democratic control, and administrative effectiveness. By identifying these specific interventions, these proposals aim to support and coordinate reform-minded politicians, public servants, and civil society actors around a targeted reform movement.

South Africa’s approach to anti-corruption has emphasised the need to select more ethical leaders and to mobilise the citizenry for accountability. While these are important concerns, no country has transcended an episode of expansive corruption and patronage politics through such efforts alone. Rather, modern governance is about designing institutions in a way that minimizes reliance on the good character of leaders and citizens. It recognises that well-designed institutions ensure good people, that it is the institutions as they are that corrupts them.

Some South Africans focus on economic growth and equality, as self-standing values and as a means to reduce corruption and patronage. Undoubtedly this is necessary, but these arguments elide the extent to which corruption and patronage act as a constraint on economic advance. In contemporary conditions of globally competitive capitalism, a professional and appropriately insulated public administration has been a necessary condition for rapid development and effective redistribution.ⁱⁱ In fact, state-building and economic development are entangled. Insulated public administrations, an important boon to economic development, can only be sustainably founded on a reliable commitment to distributing the benefits of growth to everyone. South Africa has never closed this circle.

Radically reducing corruption and patronage, establishing the official professionalism and flexibility required by the developmental state, these goals necessitate constructing a public administration that is insulated in the right sorts of ways from political interference and factionalism. In this respect South Africa should emulate all countries that have successfully overcome political crises induced by corruption and patronage. As long as politicians retain effectively unrestrained powers over appointment and promotion, opportunities and incentives will favour pressures to violate the rules

in service to narrow political and private interests. Powers of appointment and promotion must therefore be checked and balanced, through the assignment of significant duties in the process to institutionally independent administrative commissions. In the same movement rules must be loosened, to enable professional public managers to perform the policy-directed, but technical function of improving South Africa.

The **first position paper, on reforming the processes for appointments and removals in South Africa's public service and municipalities** aims to ensure political control over appointment and removal processes, but simultaneously to make it difficult to manipulate appointment and removal in such a way as to build illicit or inappropriate political and personal networks in public administrations.

The **second paper on appointments and removals of senior leaders in the criminal justice sector** argues that the legal framework that governs the appointment to and removal of senior personnel from key institutions of the criminal justice system has contributed to a blurring of the political-administrative divide and has severely constrained efforts to contain corrupt practices. The paper proposes a series of reforms to the appointment and removal processes for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigation (DPCI), and the Independent Police Investigative Directorate (IPID) which aim to improve the transparency and rigour of these processes, to better guarantee their independence from partisan politics, while ensuring that the President as head of state, and the executive, retain their Constitutional powers to appoint without these powers becoming merely administrative or ceremonial in character.

The **third paper focuses on reforming the public procurement system in South Africa**: The state procurement system is a major site of corruption in the state (and in the business sector). Reforms to the public procurement system are needed, but they should, we suggest, focus on enabling the state to play its intended role in supporting economic and social development. This is a vital ingredient in reducing pressure to use state resources illicitly to build economic wherewithal. Here we propose a focus on loosening the rules to facilitate good purchasing practice and black economic empowerment, but strengthening mechanisms of contract management, including through an innovative mechanism incentivising private enforcement of contracts, to ensure that goods and services purchases are delivered and private sector capacities are built.

Reforms in the three proposed areas above are overlapping and they are mutually reinforcing. There are further areas of government that require concerted attention, such as the state-owned enterprises and other public entities. We do not deal with this subject. The reform principles developed here are relevant to public entities, but these are established under particular laws outside of the public service and will require reform measures tailored to their particular establishment. There are also problems specific to sectors, such as in education and health. Our view is that the sorts of problems that the reforms developed here intend to fix apply across sectors and are to some extent necessary to resolving their specific issues.

Further, the themes covered by these three position papers do not cover all of the reforms required in such a project – they are a start. We hope to expand from these initial papers to cover further potential areas under a state reform project, including, for example, reforms to improve the oversight role of Parliament.

The papers are informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. They are a collective product of partnership between civil society organisations, research institutes, and individuals committed to a politics oriented around

the achievement of a free and equal society, devoid of racism, sexism, and other forms of oppression and marginalisation as set out in our Constitution's founding provisions. These papers recognise the importance to this goal of a democratic, lawful, and developmental public administration. They are dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

While the three position papers include concrete proposals for reform, our suggestions in this regard are likely to be refined in ongoing conversation with government, experts in the field, and wider civil society. We welcome discussion and debate on the way to an effective reform coalition.

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POSITION PAPER ON APPOINTMENTS AND REMOVALS IN KEY CRIMINAL JUSTICE SYSTEM INSTITUTIONS

Alliance for State Reform #FixTheState

Second Draft

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Executive Summary

The criminal justice system is a pillar of the democratic state and its proper functioning is critical to uphold the rule of law and respect for the Constitution. Over the last decade, however, the criminal justice system has been subject to significant political manipulation. Corruption and patronage politics have put into question not only the independence and accountability of the key institutions that are within the criminal justice system, but also their legitimacy and ability to uphold constitutionalism and the rule of law in South Africa. Political interference has systematically eroded the public respect and trust in criminal justice institutions, as these have come to serve the interests of party factions rather than the public. In turn, political interference and patronage have enabled impunity for those who should be prosecuted and have allowed patronage to continue unabated (i.e. those who need to be prosecuted or investigated are not; resources are diverted from key cases; investigations are thwarted; particular types of crime increased, and so on). Importantly, the weakening and hollowing out of these institutions, through political interference to influence appointment and removal processes within them, has further helped to de-professionalise key institutions whilst enabling further patronage. There is therefore a need to re-establish the legitimacy, impartiality and independence of key criminal justice system institutions tasked with investigative and prosecutorial mandates.

The current processes for appointing and removing the most senior leaders of organisations in the criminal justice system require reform in a number of respects: currently the criteria outlining the minimum requirements for selection of these leaders are, in some cases, underspecified (qualifications, experience, other attributes); the processes by which members of the executive make appointments are insufficiently transparent; and do not sufficiently provide for the level of independence from partisan politics that these positions require for them to play their legislated role in oversight, investigation or prosecution.

In this paper we propose a series of reforms to the appointment and removal processes for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigations (DPCI), and the Independent Police Investigative Directorate (IPID). These proposals aim to improve the transparency and rigour of these processes, to better guarantee their independence from partisan politics, while ensuring that the President as head of state, and the executive, retain their Constitutional powers to appoint without this power becoming merely administrative or ceremonial in character.

The following proposals aim to reflect the views expressed by a number of civil society organisations and key experts working in the field which were consulted as part of the process of development of these proposals. The proposals are presented in terms of three key themes that cut across the different agencies describe above, namely: criteria for selecting appointees, the mechanisms for

assessment, selection and recommendation of candidates; and the mechanisms by which senior leaders are removed from their positions.

Criteria for selection

The criteria for selection can be defined in broad strokes, with the proviso that the mechanism/institution set up to apply such criteria might find it necessary to define the criteria or amend it accordingly depending on the post that is being filled.

Taking into consideration that the courts have provided important interpretation on key criteria such as 'fit and proper' and have reaffirmed the need for appointment decisions to be rational, criteria should include the following:

At a minimum, the criteria for selection should incorporate the following:

- Legal qualifications to entitle him or her to practice in the Republic; (particularly for NPA candidates)
- Fit and proper, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned
- A minimum number of years of experience in a particular field (particularly if it is a technical post) as is the practice in many countries including South Africa (i.e. criterion for SARS Commissioner)
- Degree of flexibility for selection panel/board to adjust criteria based on candidates who have applied (i.e. this method was adopted in the selection process for the SARS Commissioner)

Other generic criteria that could be incorporated

- Management and leadership skills;
- Professionalism — the willingness and ability to perform with the required skill and the necessary diligence;
- Track record of being able to act with integrity and impartiality;
- Knowledge of socio-economic context and government programme;
- Demonstrated ability to uphold principles in Section 195 of the Constitution

Mechanism(s) for assessment, selection and recommendation of candidates

It is possible that one mechanism or panel for the selection of senior leaders within criminal justice system institutions could be used. Whether it is one mechanism that is adapted to cater for the requirements of different positions within different agencies or whether the mechanisms are constituted separately, such panels should be guided by the following principles:

- 1) Selection panel(s) should be composed of up to 10 persons, representing a broad range of skills, knowledge and stakeholders to be able to assess candidates competently
- 2) Panels should be appointed by the President/Minister (depending on post)

- 3) After applications have been received, the panel should publish the names of candidates so that the public is able to lodge objections
- 4) The panel(s) shortlists, interviews and recommends up to 5 candidates; interviews should be held in public
- 5) Panel members should comprise stakeholders derived from professional bodies, academic institutions or individuals of high standing, suggestions include:
 - a) NPA: Auditor General, General Council of the Bar, Legal Practice Council, Advocates for Transformation, NADEL, Black Lawyers' Association plus chair (Minister)
 - b) SAPS/DPCI/IPID: Retired police general who has served with distinction; expert in criminal and police law; Treasury representative; Public Service Commission representative; expert in executive decision-making and ethics
- 6) Decisions made based on a majority of votes of panel members

Mechanism(s) for removal of persons holding senior leadership positions

- 1) Removal provisions are currently not contained in the Constitution for any of the criminal justice agencies examined and therefore they might be easier to amend/institute
- 2) Establish board of enquiry made up of judge or retired judge and two other persons to carry out investigations for removal on the basis of incapacity, incompetence or misconduct across agencies where such mechanisms do not already exist
- 3) Make recommendation to the President/Minister/Commissioner; ensure that President/Minister/Commissioner abides by the recommendation of the board of enquiry. Alternatively, if the recommendation is not followed, then such decision taken must be shown to be rational.
- 4) Parliament is then required to pass a resolution on whether to remove a person or not before such removal actually takes effect, in cases where this applies (NPA, IPID, DPCI).

1 Introduction

In his February 2019 *State of the Nation* speech, President Ramaphosa highlighted the erosion, in recent years, of the integrity and ability of vital public institutions, including law enforcement agencies, to fulfil their mandates as a result of the effects of state capture. In recognition of this, he committed to stabilising and restoring the credibility of institutions such as the National Prosecuting Authority (NPA), the South African Revenue Service (SARS), the State Security Agency (SSA) and the South African Police Service (SAPS) and highlighted the appointment of a new National Director of Public Prosecutions (NDPP) to 'lead the revival' of the NPA¹.

The criminal justice system is a pillar of the democratic state and its proper functioning is critical to uphold the rule of law and respect for the Constitution. Over the last decade, however, the criminal justice system has been subject to significant political manipulation. Corruption and patronage politics

¹ *State of the Nation Address* (2019), <http://www.wcpp.gov.za/sites/default/files/SONA%202019.pdf>, (accessed 15 March 2019), p.4.

have put into question not only the independence and accountability of the key institutions that are tasked with investigative and prosecutorial mandates within the criminal justice system, but also their legitimacy and ability to uphold constitutionalism and the rule of law in South Africa. Political interference has systematically eroded the public respect and trust in criminal justice institutions, as these have come to serve the interests of party factions rather than the public. In turn, political interference and patronage have enabled impunity for those who should be prosecuted and have allowed patronage to continue unabated (i.e. those who need to be prosecuted or investigated are not; resources are diverted from key cases; investigations are thwarted; particular types of crime increased, and so on). Importantly, the weakening and hollowing out of these institutions, through political interference to influence appointment and removal processes within them, has further helped to de-professionalise key institutions whilst enabling further patronage. There is therefore a need to re-establish the legitimacy, impartiality and independence of key criminal justice system institutions.

In view of the President's commitments, an opportunity is available to rethink key processes that militate against the ability of these institutions to operate independently and to carry out their work without fear or favour — as required by the Constitution. One such area focuses on the processes of appointment and removal of the senior leadership of these critical institutions. These processes tend to blur the political-administrative divide. Appointments are often made by politicians to these institutions (i.e. whether it be the President or Ministers), with limited oversight over what is often regarded as unlimited 'discretion' since such appointments are 'political'. In some cases, there are very limited requirements for individuals to head institutions such as the Police or the Independent Police Investigative Directorate (IPID). In other instances, requirements for a person being 'fit and proper' exist, yet such terms have only begun to acquire meaning in the past few years, as various court cases and enquiries have sought to give meaning to them. Even so, while courts and enquiries have played significant roles in clarifying criteria and the rationality of appointment or removal decisions by Presidents or Ministers, appointment and removal processes across criminal justice system institutions are in fundamental need of institutional reform to ensure that the process of review, selection and recommendation of appointees is carried out by competent individuals who have the necessary skills, knowledge and experience not only to interpret or define criteria but also to apply them conscientiously and consistently to select the best qualified persons for the posts. Ironically, recommendations to institute such mechanisms were made as early as 1995, at the time that South Africa was drafting its final Constitution². It would seem that we have now come full circle.

Civil society organisations have been active participants to ensure the independence and accountability of key institutions within the criminal justice system, through litigation and research, including the drafting of submissions to on-going enquiries. There are also important initiatives being driven by civil society, such as 'Judges Matter' in relation to the selection of judges through the Judicial Services Commission, or organisations such as ISS and Corruption Watch (in relation to the appointment of the National Commissioner of Police and the Public Protector). These bode well for possible reforms to appointment processes with a view to creating a capable and responsive state.

² Suggested Draft A Text contained in a Memorandum from a Panel of Constitutional Experts to the Chairpersons and Executive Director of the Constitutional Assembly, reads as follows:

3. *The National Director and each of the Deputy Directors of Public Prosecutions shall be appointed by the President acting on the advice of the Judicial Service Commission, with due regard to appropriateness of qualification, representativity, impartiality and independence, and the need for accountability.*

4. *The Director and Deputy Director of Public Prosecutions may be dismissed only on a recommendation by the Judicial Service Commission based on a finding of incapacity, incompetence or misconduct of any of the offices concerned,* Panel of Constitutional Experts: Memorandum, (20 September 1995), CP020095.MEM, Suggested Draft A Text, <http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP020095.PDF>, p.24 (accessed 13 October 2019).

This paper provides a brief description of the processes of appointment and removal of the senior leadership within key institutions with investigative and prosecutorial mandates within the criminal justice system, namely:

- The National Director of Public Prosecutions (hereinafter 'NDPP') (National Prosecuting Authority), Special Directors, National Deputy Directors, and Deputy Directors of Public Prosecutions;
- The National Commissioner of Police, the Deputy National Commissioner, and Provincial Commissioners within the South African Police Services;
- The Head of the Directorate for Priority Crime Investigations (DPCI or 'Hawks') and
- The Executive Director of the Independent Police Investigation Directorate (IPID).

There are a number of principles that guide the paper and the proposals emanating from it.

- Since the Constitution defines the role of the President in appointments (NDPP, National SAPS Commissioner), the focus of the proposals is on lessening the possibility for political interference without having to undertake the arduous process of amending the Constitution.
- The focus of proposals will be on the processes of appointment and removal within the institutions that are tasked with the investigative and prosecutorial functions within the criminal justice value-chain, namely: NPA, SAPS, DPCI (Hawks) and IPID. Proposals will not include the judiciary.
- The focus of the proposals is to extend beyond the national heads of these agencies (i.e. for NPA, include Directors at seats of High Court, as well as Deputy National Head and Deputy Directors; for SAPS/DPCI also focus on provincial commissioners/directors) – to focus on how the senior leadership of these agencies is appointed/removed.
- There is a general consensus across civil society organisations, and even the National Development Plan, that a selection panel should be established to shortlist, interview and assess candidates, and provide a maximum of five recommended candidates to the President/Minister, as the case may be, depending on the post.
- The selection panel should bring together a broad range of skills, knowledge and stakeholders to enable it to assess the integrity, substantive knowledge and leadership skills of candidates.
- In terms of removal processes, these should be informed by recommendations from investigations undertaken by independent panels chaired by a Judge or retired Judge and other persons (depending on the post).
- Parliament should play a role in the adoption of recommendations by independent panels for the removal of persons from their posts based on the suitability or performance of candidates (or lack thereof).
- Appointments to NPA, DPCI, IPID and SAPS should be non-renewable to prevent patronage; terms of office should, as much as possible, allow sufficient time to carry out duties (i.e. 5 to 7 years).
- Amendments to statutes will be required to put in check the power of the President and Minister, where he/she is responsible for appointments (i.e. NPA, DPCI, IPID).

The sections that follow provide a description of the processes for appointments and removals in the criminal justice system institutions described above and set out possible improvements to them, in relation to the criteria for selection, processes for appointment and for removal.

2 National Prosecuting Authority

Both the Constitution and the National Prosecuting Authority Act 32 of 1998 ('NPA Act') contain provisions regarding the processes of appointment and removal of the senior leadership within the NDPP. Over and above this framework, there are various court cases that have made changes to these aspects and which will be mentioned further below.

2.1 Appointment of NDPP, Deputy Directors, Directors and Acting Directors

2.1.1 Power to appoint

The prosecuting authority was established to assist the executive in the application and the execution of criminal law and it is associated with the executive branch of government rather than the judicial branch.³ The African National Congress, in its much-needed bid to democratise the prosecuting authority, pushed to establish a national prosecuting authority whose head would be appointed by the President. At the time, the constitutionality of this provision was challenged on the grounds that it offended the separation of powers; however, the Constitutional Court rejected this objection.⁴

Section 179 (1)(a) of the Constitution provides that there is a single prosecuting authority in the Republic consisting of a National Director of Public Prosecutions, as the head of the prosecuting authority, who is appointed by the President, as head of the national executive. Section 179(1)(b) states that the NPA is also made up of Directors of Public Prosecutions (DPPs) and prosecutors as determined by an Act of Parliament, and such legislation must ensure that the DPPs are appropriately qualified. Further, Section 179(4) expressly states that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

The National Prosecution Authority Act (hereinafter NPA Act) gives effect to Section 179 of the Constitution and regulates a number of matters, including the process of appointment of the NDPP, the Deputy National Directors of Public Prosecutions (DNDPP), Directors, Special Directors and Prosecutors. In particular, Chapter 3 (Sections 8 to 19) deals with the appointment, remuneration and conditions of service of members of the NPA.

In terms of the Constitution and NPA Act, the President *must* appoint an NDPP.

The NPA Act extends the President's power to appoint beyond that stated in the Constitution. The President may, *after consultation with* the Minister of Justice and the NDPP, also appoint a maximum of four persons as Deputy National Directors of Public Prosecutions (DNDPPs). Similarly, the President may also, *after consulting with* the Minister of Justice and the NDPP, appoint Directors of Public Prosecutions at the seat of each High Court in the Republic, in different provinces, as well as Special Directors. There is no prescribed statutory process of how the President is expected to assess a candidate's fitness for office.⁵ There is also the added concern that the President exercises its

³ WP De Villiers (2011), "Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models", 2011 (74) *THRHR (Tydskrif vir Hedensdaagse Romeins-Hollandse Reg)*, p.248.

⁴ Martin Schönreich (2015), 'A story of trials and tribulations: The National Prosecuting Authority, 1998 – 2014', *South African Crime Quarterly* Vol.50, <https://www.ajol.info/index.php/sacq/article/view/110362> (accessed 20 March 2019), p.6.

⁵ *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 107, p.38.

executive power, ‘after consultation with’ and not ‘in consultation with’ different parties – the President does not have to agree with those he is mandated to consult.

The NPA Act further extends political influence over appointments to the Minister of Justice who, *after consultation with* the NDPP, may appoint one or more Deputy Directors of Public Prosecutions (DDPPs) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director (i.e. Special DDPPs), as well as Acting Directors from amongst DDPPs. As some commentators have noted, the concentration of appointments in the hands of the President and the Minister effectively means that ‘the entire top echelon of the NPA (at least 14 positions) is appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general’.⁶ Further, as another commentator has pointed out, the political control over appointments does not end there — ‘to make matters worse, lower-ranking prosecutors are appointed on the advice of the NDPP who of course is a political appointee’.⁷

In the recent appointment of Adv Shamila Batohi as the new NDPP, President Ramaphosa called on organisations and public institutions to assist in identifying suitable candidates for the post⁸ and instituted a panel chaired by Energy Minister Jeff Radebe, consisting of the Auditor General, Mr. TK Makwetu, Adv. B Roux of the General Council of the Bar, Mr. R Scott of the Legal Practice Council, Adv. L Manye of Advocates for Transformation, Mr. LB Sigogo President of the Black Lawyers Association and Mr. Mvuzo Notyesi the President of NADEL, to evaluate applicants, conduct interviews and make recommendations to the President.⁹ This discretion by the President assisted in making the selection process more transparent, accountable and responsive to the current political climate in South Africa. Given this precedent, it is expected that the President will follow a similar procedure to appoint Deputy National Directors of Public Prosecutions.

Importantly, despite the initiative taken by the President, the opening of the NDPP appointment proceedings to the media and the public at large was only made possible after a successful urgent court application by the Right2Know Campaign to prevent the appointment process from being shrouded in secrecy.¹⁰ In opposing the application, the Presidency seemingly argued that neither the Constitution nor the NPA Act imposes a qualification on the procedure or manner in which executive power is exercised.¹¹ In its absence, the procedure to be followed falls within the discretion of the President – which can be dangerous.

⁶ Lukas Muntingh, Jean Redpath and Kristen Petersen (2017), ‘An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future’, *African Criminal Justice Reform*, Dullah Omar Institute, May 2017, p.15.

⁷ WP De Villiers (2011), “Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models”, *op cit*, p.260.

⁸ Cheryl Kahla, “Advocate Shamila Batohi appointed as new Director of Public Prosecutions” <https://www.thesouthafrican.com/advocate-shamila-batohi-appointed-as-new-director-of-public-prosecutions/>, 4 December 2018, (accessed 15 March 2019).

⁹ “Restoring the Independence of the Prosecutorial Authority in South Africa”, Press Statement issued on behalf of the National Association of Democratic Lawyers (NADEL), South Africa, 11 February 2019. <https://www.lssa.org.za/news-headlines/press-releases/restoring-the-independence-of-the-prosecutorial-authority-in-south-africa>, (accessed 15 March 2019).

¹⁰ Ra’eesa Pather, (2018), ‘High court orders NDPP interviews open to media’, 13 November 2018, <https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media> (accessed 17 July 2019). The case is *Right2Know Campaign vs President of the Republic of South Africa*, Case No: 81783/2018, High Court of South Africa, Gauteng Division, Pretoria.

¹¹ “Why President Ramaphosa wants NDPP interviews held behind closed doors”, News 24 article, 13 November 2018, <https://www.news24.com/SouthAfrica/News/why-president-ramaphosa-wants-ndpp-interviews-held-behind-closed-doors-20181113> (accessed 15 March 2019).

There is currently no legislative provision that requires the President to constitute a panel to interview candidates and make recommendations to him or her or to ensure that this process is open to the public. Despite the current President's willingness to make the appointment process more transparent, such a mechanism for appointments has yet to be institutionalised to guard against future Presidents who might not be as inclined to adopt an open and participative process for selection.

2.1.2 Requirements for appointment

Section 9 of the NPA Act provides:

(1) Any person to be appointed as National Director, Deputy National Director or Director must—

(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the National Director must be a South African citizen.

Section 32 of the NPA further states:

(1) (a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

In 2008, the Ginwala Enquiry, which was the first enquiry in terms of Section 12(6)(a) of the NPA Act, into the fitness of the then head of the NPA Adv. Pikoli, sought to expand on the requirement under Section 9(1)(b) of the Act — 'the fit and proper' requirement. The Enquiry held that the question of whether a person is fit and proper is fact-specific and context-dependent.¹²

In the case of the NDPP, the Enquiry noted that a legal qualification is only one of the requirements and that the incumbent must be a person of experience, integrity and conscientiousness to be entrusted with the responsibilities of the office of the NDPP. While these are the formal requirements, Ginwala sought to highlight that such requirements imply that the incumbent must have a broader experience. As the Enquiry's Report described it:

It cannot be a sufficient qualification that the NDPP has appropriate legal experience. To execute the responsibilities of the office of the NDPP, the incumbent must also have *managerial and leadership skills and qualities*. He or she sits at the apex of a complex organisation that employs large numbers of people, bringing together various elements of the

¹² Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions ("Ginwala Commission"), November 2008, Para 69, p52.

criminal justice system. He or she must also *possess an understanding of the socio-political climate that prevails as well as the policy programme of the government.*¹³

While it is welcomed that an NDPP should have the necessary managerial and leadership skills and qualities and broader experience, the idea that an NDPP should understand the socio-political conditions and government's policy programme as the context within which such office is situated and operates should not have a detrimental effect on prosecutorial decisions.

In relation to the requirement of **integrity**, the Enquiry held that it 'relates to the character of a person — honesty, reliability, truthfulness and uprightness',¹⁴ whereas **conscientiousness**, is related but different in that it 'relates to the manner of application to one's task or duty — thoroughness, care, meticulousness, diligence and assiduousness'. In Ginwala's view 'conscientiousness can be said to mean professionalism — the willingness and ability to perform with the required skill and the necessary diligence'.¹⁵

The Report noted that the requirement that a person must be fit and proper to be 'entrusted with the responsibilities of the office concerned' has neither been defined in the Act nor judicially defined. Nonetheless, the Report sought to highlight the gravity and importance of the position of an NDPP by noting that:

*...the person must possess an understanding of the responsibilities of such an office. There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority.*¹⁶

Echoing the sentiments above, in the Supreme Court of Appeal case challenging the appointment of Adv. Simelane to the position of NDPP, Navsa JA emphasised the importance of understanding the fit and proper requirement, as well as the need for persons who lead the NPA to be of utmost integrity and willing to act without fear, favour or prejudice, in relation to the 'awesome' powers of the NDPP and their centrality to the preservation of the rule of law.¹⁷ Some of these powers include deciding whether to prosecute someone or not, defining prosecution policy and intervening in a prosecution when policy directives are not complied with. In other words, a person who is fit and proper to be the NDPP will be able to 'live out in practice the requirements of prosecutorial independence'.¹⁸

2.1.3 What does s 9(1)(b) require of the President in the appointment process?

South African courts have established that, as much as the President exercises a public power, such power must be exercised rationally — not only must the decision be rationally related to the purpose for which the power was given, but the process of reaching it must also be so. In the case of *DA vs the President of RSA and Others* [2011] ZASCA 241, it was noted that the President must, at the very least, consider whether the person he has in mind for appointment as the NDPP has the qualities described in s9(1)(b).¹⁹ It was suggested that such a decision-making process would at least require the following:

¹³ Ibid, Para 70, pp.52-53, emphasis added.

¹⁴ Ibid, Para 71, p.53.

¹⁵ Ibid.

¹⁶ Ibid, Para 72, p.54.

¹⁷ *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 72, p.29.

¹⁸ *Pikoli v The President* 2010 (1) SA 400 (GNP) Du Plessis J (at 406E-F), quoted in *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 89, p.33.

¹⁹ Ibid, Para 96, p.36.

(a) obtaining sufficient and reliable information about the candidate's past work experience and performance;

(b) obtaining sufficient and reliable information about the candidate's integrity and independence; and

(c) in cases where the candidate is the subject of allegations calling his fitness to hold office into question, a satisfactory process to determine the veracity of the allegations in a reliable and credible fashion.²⁰

In other words, there must be insistence about the qualities that the NDPP must possess in order to lead the NPA on its constitutional path without fear, favour or prejudice. There has to be a 'real and earnest engagement' with the requirements of s 9(1)(b).²¹ Given the importance of the NPA and the office of the NDPP, the courts have argued that this is 'the least that "we the people" can expect and that s 9(1)(b) demands'.²²

2.1.4 'Fit and Proper' as an objective determination

Echoing the Ginwala Enquiry's comment that the requirement of 'fit and proper' is fact specific, both the Supreme Court of Appeal (SCA) and the Constitutional Court have agreed that the determination is an objective one, based on facts. The NPA Act does not say that the candidate for appointment as NDPP should be fit and proper 'in the President's view' — had this been the purpose, the Legislature could easily have done so and left it to the complete discretion of the President.²³ As noted by the SCA, 'an objective assessment of a person's personal and professional life ought to reveal whether one has integrity'; '[c]onsistent honesty is either present in one's history or not, as are conscientiousness and experience'. Importantly, as noted by Navsa AJ, 'having regard to the purposes of the Act, served also by s 9(1)(b) of the Act, there can in my view be no doubt that it is not left to the subjective judgment of transient Presidents, but to be objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law'.²⁴

In deciding to appoint Adv. Simelane to the position of NDPP, the President failed to take into consideration in his assessment of whether Simelane was a fit and proper person material information that was before him and which objectively had an impact on the integrity and honesty of Adv. Simelane (i.e. findings from the Ginwala Enquiry, a report by the Public Service Commission on whether Adv. Simelane should be subjected to a disciplinary inquiry, among others). As the Constitutional Court concluded:

The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside.²⁵

²⁰ Ibid, Para 98, p.36.

²¹ Ibid, Para 107, p.39.

²² Ibid.

²³ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), Para 22, p.18.

²⁴ *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241, Para 117, p.42.

²⁵ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012), Para 89, p.66.

Importantly, the above case did not necessarily pronounce on whether Adv. Simelane was indeed a fit and proper person; the Court found that the President acted in an irrational manner in assessing Adv Simelane for the position.

In contrast, in the recent case of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, the Constitutional Court was unwilling to reinstate Mxolisi Nxasana to the position of NDPP, despite having found that his removal from the post of NDPP (and Mr Abrahams appointment as a result) was constitutionally invalid. Even though Mr Nxasana sought to impress on the Court his fitness for the office and the Court recognised the undue pressure that he had experienced, Justice Madlanga noted, based on objective material before the Court that:

[Mr Nxasana] was willing to be bought out of office if the price was right. As much as I sympathise with him, I do not think that is the reaction expected of the holder of so high and important an office, an office the holder of which — if she or he is truly independent — is required to display utmost fortitude and resilience. Even allowing for human frailties — because Mr Nxasana is human after all — I do not think the holder of the office of NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.²⁶

2.2 Removal of NDPP

Just like the President has the power to appoint the NDPP, the President also has the power to remove an NDPP; however, this can only be done on specified limited grounds, after an enquiry has been held and with the concurrence of Parliament for dismissal on such grounds. Nonetheless, as some commentators have noted, '[t]hese appointment and removal provisions create the risk that the President will appoint a person who is unwilling, where necessary, to prosecute members of the executive or the ruling party, or persons politically connected to them; similarly, they create the risk that the President, with the concurrence of a Parliament dominated by the ruling party, will seek to remove an NDPP who is willing to do so.'²⁷ Unfortunately, such risks have indeed materialised in South Africa. Despite the fact that an NDPP can be appointed for a maximum period of 10 years, none of them has served a full term in the past 18 years²⁸.

Section 12(6)(a) of the NPA Act states as follows:

(6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

- (i) for misconduct;
- (ii) on account of continued ill-health;
- (iii) on account of incapacity to carry out his or her duties of office efficiently; or
- (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

²⁶ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p.26.

²⁷ Lukas Muntingh, Jean Redpath and Kristen Petersen (2017), *An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future*, African Criminal Justice Reform, Dullah Omar Institute, May 2017, p.12.

²⁸ *Ibid.*

(b) The removal of the National Director or a Deputy National Director, the reason therefore and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President.

In a recent case, the Constitutional Court declared Section 12(4) of the NPA Act in terms of which the President had the discretion to allow an NDPP to stay on in his or her position past the retirement age of 65 unconstitutional. It also found Section 12(6) to be constitutionally invalid for empowering the President to suspend an NDPP and Deputy NDPP without pay and for an indefinite duration. The Court was of the view that these conditions could be susceptible to abuse and could be invoked 'to cow and render compliant an NDPP or Deputy NDPP'.²⁹ In making such decisions, the Court sought to remove provisions that could have the potential to induce an NDPP to tailor his/her actions in order to curry favour with the President, either out of fear of being suspended for an undetermined period with no income or in the hopes of being allowed to continue on in the position after turning 65.³⁰

The Ginwala Enquiry in 2007/8 was the first enquiry conducted under Section 12(6) of the NPA Act. Although Ginwala found that Pikoli was indeed a fit and proper person to hold office as the NDPP, then President Kgalema Motlanthe decided to nevertheless remove him from office, a decision that was endorsed by Parliament.

Adv. Nxasana did not undergo an inquiry. When the inquiry was about to commence, the President proceeded to negotiate Mr Nxasana's exit. He purported to resign from office after an agreement had been reached with the President that he would receive R17,6m, the amount he would have earned had he remained in office for the remainder of his term. The Mokgoro Enquiry was instituted by President Ramaphosa after pressure by civil society organisations to compel the President to take steps to remove Advocates Jiba and Mrwebi from the NPA.

²⁹ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p.26.

³⁰ Glynnis Breytenbach (2018), "We should be considering constitutional amendments to ensure an independent NPA", 21 August 2018, <https://www.dailymaverick.co.za/article/2018-08-21-we-should-be-considering-constitutional-amendments-to-ensure-an-independent-npa/> (accessed 15 March 2019).

2.3 Suggestions to improve criteria and reform the appointment process of the NDPP

Some steps were taken by the President to improve the transparency of the appointment process for the most recent NDPP. However, the criteria for the NDPP are not fully defined in the NPA Act and there is no prescribed procedure for the appointment to be made by the President as the law currently stands. Further, if the unstable history of the NPA is taken into consideration, there is an urgent need to ensure that as much as the President is mandated to appoint the NDPP, this process becomes much more transparent and participatory.

2.3.1 Improving selection criteria

Recent work on this subject proposes that the criteria for the position of NDPP should be more specific and rely on the examples of requirements for the position of Public Protector or Auditor General of South Africa for guidance. For a person to qualify for the latter, Section 193(3) of the Constitution requires that a person must not only be ‘fit and proper’ but also that ‘specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard’.³¹

Over and above these requirements, there are suggestions that ‘a certain minimum number of years of experience in a particular field may also be set as a requirement, as is the case with the Public Protector who must not only have legal experience but at least ten years’ experience as one of the requirements’.³²

While criteria for appointment could be tightened, it is unlikely that they will be exhaustive. It is for this reason that the mechanism that is instituted to apply the criteria be robust enough to be able to, in a competent matter, assess the character, experience, skills, knowledge and abilities of those who seek to fill these posts.

2.3.2 Improving the mechanism to appoint candidates

A number of commentators have noted that there is an urgent need to create a panel or panels comprised of persons who are respected by the public that would undertake the tasks of reviewing the applications of candidates, shortlisting them, interviewing them and making recommendations to the President. This would apply not only to the position of NDPP, but also to the appointment process for Deputy NDPPs, Special Directors and Directors (seats of High Courts). It could also be used by the Minister in his/her appointment of Deputy Directors and Acting Directors.

Some are of the view that Parliament should play a more direct role in identifying suitable candidates as it has done in the case of the Public Protector, whereas others suggest that this task should be undertaken by the Judicial Services Commission (JSC), which currently performs similar functions in the process of appointment of judges.³³

Reliance on the procedure set out in Section 193(5) of the Constitution (which provides for the appointment of the Public Protector and members of Commissions provided for in Chapter 9 of the Constitution) would require the National Assembly to recommend to the President: candidates (a) nominated by a committee of the National Assembly that is proportionally made up of members of all parties represented in the Assembly and (b) approved by at least 60% of the members of the Assembly. It could be argued that if one party retains a significant majority, the reliance on this mechanism might result in the recommendation of candidates who are aligned to the majority party regardless of the person’s integrity and zeal for independence. One aspect that could be strengthened should this

³¹ Section 193(3) of the Constitution of the Republic of South Africa, 1996.

³² African Criminal Justice Reform (2018), “The Appointment and Dismissal of the NDPP: Instability since 1998”, October 2018, *ACJR Factsheet No.7*, p.3.

³³ Lukas Muntingh, Jean Redpath and Kristen Petersen (2017), *An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future*, pp.38-39.

model be adopted is the involvement of civil society in the recommendation, which is provided for in Section 193(6) as envisaged in Section 59(1)(a).

Another option would be to set up a structure similar to the JSC. Some of the advantages of the JSC are that its members exhibit a broad set of pertinent skills and represent different stakeholders — there is ample representation of members of the legal profession (attorneys, advocates, academics, as well as members of the National Assembly and the National Council of Provinces). If the aim is to instill a sense of professionalism in the position of the NDPP, a structure similar to that of the JSC might be a more suitable vehicle for the NDPP selection process. Importantly, interviews carried out by the JSC are open to the public, even if the JSC’s subsequent deliberations are held in private, but the record of such deliberations must be made available in certain circumstances.³⁴ Moreover, civil society organisations such as Judges Matter play an active role in raising awareness about the candidates appearing before the JSC, providing information about them, as well as developing questions to be asked of the candidates. The Democratic Governance Rights Unit within the Department of Public Law at the University of Cape Town produces reports whose aim are to assist the JSC by providing impartial insight into the judicial records of the short-listed candidates, as well as to provide civil society and other interested stakeholders with an objective basis on which to assess candidates’ suitability for appointment to the bench.³⁵

3 South African Police Services (SAPS)

3.1 Requirements for appointment of the National Commissioner

In comparison to the requirements that exist for the NDPP, the existing legislative framework has minimal requirements for the appointment of the National Commissioner of the South African Police Services, which employs approximately 195,000 members.³⁶ To put this deficiency into perspective, the selection criteria for the National Commissioner is ‘less rigorous than for the lowest rank of constable’ — and is an enabling factor to persons being appointed for political reasons rather than for their ability to do the work.³⁷ Whilst the top leadership of the SAPS should be bastions of integrity, all five of the most recent National Commissioners have been sanctioned for criminal acts including fraud, corruption, obstruction of justice, and even murder.³⁸ This is not aided by a legal framework that provides no guidance on requirements that such persons must meet before taking up such a critical post.

Section 207 of the Constitution: Control of police service

³⁴ *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018)

³⁵ See for instance, Democratic Governance Rights Unit (2019), Submission and Research Report on the Judicial Records of Nominees for Appointment to the Constitutional Court, Supreme Court of Appeal, High Court and Labour Court, April 2019. The reports are available at <http://www.dgru.uct.ac.za/research/researchreports/> (accessed 15 March 2019).

³⁶ Paul Nantulya (2018), “South Africa’s Strategic Priorities for Reform and Renewal”, 17 February 2018 <https://africacenter.org/spotlight/south-africas-strategic-priorities-reform-renewal/>, (accessed 18 March 2019).

³⁷ Institute for Security Studies, (2017), “How to appoint an honest and competent police commissioner”, July 2017, <https://issafrica.org/about-us/press-releases/how-to-appoint-an-honest-and-competent-police-commissioner>, (accessed 17 March 2019).

³⁸ Paul Nantulya (2018), “South Africa’s Strategic Priorities for Reform and Renewal”, 17 February 2018 <https://africacenter.org/spotlight/south-africas-strategic-priorities-reform-renewal/>, (accessed 18 March 2019).

1. The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.
2. The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.
3. The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.
4. The provincial commissioners are responsible for policing in their respective provinces
 - a. as prescribed by national legislation; and
 - b. subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).
5. The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.
6. If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

Section 199(7) of the Constitution further states:

7. Neither the security services, nor any of their members, may, in the performance of their functions
 - a. prejudice a political party interest that is legitimate in terms of the Constitution; or
 - b. further, in a partisan manner, any interest of a political party.

Despite this explicit attempt at ensuring that the police service is apolitical and non-partisan, the Constitution is quite minimalist in setting out any kind of criteria or description of the appointment process for the National Commissioner, except that the person can be a woman or a man. No more guidance can be found in the South African Police Services Act ('SAPS Act'), 68 of 1995.

Section 6 of the SAPS Act, entitled 'Appointment of National and Provincial Commissioners' states the following:

- (1) There shall be a National Commissioner of the Service who shall be appointed in accordance with section 207 (1) of the Constitution of the Republic of South Africa, 1996.
- (2) There shall be a Provincial Commissioner of the Service for each province who shall be appointed by the National Commissioner subject to section 207 (3) of the Constitution of the Republic of South Africa, 1996.

All one can gather from the provisions of the SAPS Act is that the President must appoint the National Commissioner of SAPS, while the latter, in turn, appoints Provincial Commissioners of SAPS, with the

concurrence of the provincial government. In principle, National and Provincial Commissioners are appointed for a period of five years. However, this term of office may be extended for successive periods of up to five years at a time if the President (in the case of the National Commissioner) or the National Commissioner (in the case of Provincial Commissioners) agrees to do so.³⁹ The issue of successive terms of office and the risks that this poses for the independence of key institutions was highlighted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23. While referring to the DPCI, Chief Justice Mogoeng said that renewal of terms of office ‘invites a favour-seeking disposition from the incumbent.... It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to “behave” herself in anticipation of renewal’.⁴⁰

In the absence of even the most minimal of requirements, it has not been possible to challenge, as has occurred in the case of the appointment of the NDPP, the appointment of the National Commissioner. To date, there have been no court cases challenging such requirements or the lack thereof.⁴¹

Sections of the SAPS Act dealing with misconduct and incapacity of the National Commissioner make mention of carrying out inquiries to establish whether the person is ‘fit for office’ and ‘capable of executing his or her official duties efficiently’⁴²; however, there is no detail regarding what is required. There has been some debate as to whether a National Commissioner should have policing experience as one of the basic requirements to qualify for the post. Those who support this contention point out that policing is a specialised field and therefore the person to hold such position should be career police official rather than a civilian. Policing is seen as a profession that requires a specialised set of skills, coupled with autonomous expertise, independent judgment and the ideal of service.⁴³ In contrast, there are others who hold that policing knowledge is secondary to having good management and leadership skills to lead the police service.⁴⁴ Against increasingly complex and broad-ranging police operational situations, the emphasis is on a high standard of interpersonal and communication skills, combined with the capability of using problem-solving techniques that are in line with the Constitution.

3.2 Process of appointment of the National Police Commissioner

There is limited information regarding the process of appointment of the National Commissioner, given that this process has historically taken place beyond the public eye at the discretion of the President.

³⁹ Sections (7)(2) and 7(3) of the South African Police Services Act 68 of 1995.

⁴⁰ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, quoted from *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) (Helen Suzman Foundation), Para 81.

⁴¹ Helen Suzman Foundation (2018), *The Criminal Justice System: Radical reform required to purge political interference*, December 2018, <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf> (accessed 7 March 2019), p.5.

⁴² Section 9 SAPS Act.

⁴³ See for instance, T.J Van Heerden. (1994), *Introduction to Police Science*, (Pretoria: Unisa); TL Bowman (2013), ‘Is policing a job or a profession? The case for a four-year degree’, Texas: CALEA Update Magazine 108.

⁴⁴ R Schulte (1996), *Which challenges will police managers have to meet in the future?* College of Police and Security Studies, Slovenia.

The National Development Plan has identified the challenges in the appointment process and has suggested the following:

*The National Commissioner of Police and Deputies should be appointed by the President on a competitive basis. A selection panel, established by the President, should select and interview candidates for these posts against objective criteria. The President should appoint the National Commissioner and Deputies from recommendations and reports received from this selection panel. This would enhance the incumbents' standing in the eyes of the community and increase the respect accorded them by their peers and subordinates.*⁴⁵

It is imperative for government to take immediate steps to implement this recommendation from the National Development Plan.

3.3 Removal of the National Police Commissioner

Sections 8 and 9 of the SAPS Act deal with the procedures to be followed in the event that the Cabinet loses confidence in the National Commissioner, or the National Commissioner faces allegations of misconduct, or questions about his or her fitness for office or capacity for executing his or her official duties efficiently.

Section 8 of the SAPS Act states as follows:

(1) If the National Commissioner has lost the confidence of the Cabinet, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson, and two other suitable persons, to-

- (a) inquire into the circumstances that led to the loss of confidence;
- (b) compile a report; and
- (c) make recommendations.

...

(3) (a) The President or National Commissioner, as the case may be, may, after hearing the Commissioner concerned, pending the outcome of the inquiry referred to in subsection (1) or (2) (c), suspend him or her from office.

In comparison to the appointment procedures, the removal procedures require the President to act upon the recommendation of a board of inquiry, established by the President, which must have at least a judge of the Supreme Court. The required presence of a Supreme Court judge on the board provides comfort as to the impartiality of the inquiry.⁴⁶ Upon completion of its work, the board must submit its recommendations to the President, the National Commissioner and Parliamentary Committees.⁴⁷ Based on the report's recommendations, the President may remove the National Commissioner or 'take any other appropriate action'.⁴⁸ If the President postpones his decision for a period, he is required to request the same board of inquiry, or a similar board established for that purpose, to compile a new report and to make a new recommendation.⁴⁹ An example of such inquiry was undertaken in 2012, chaired by Judge Moli to look into the fitness of National Commissioner Cele to hold office. The inquiry followed a damning report by the Public Protector where it was found

⁴⁵ National Development Plan, p.391.

⁴⁶ Helen Suzman Foundation (2018), *The Criminal Justice System: Radical reform required to purge political interference*, December 2018, <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf> (accessed 7 March 2019), p.5.

⁴⁷ Section 8(6)(a), SAPS Act.

⁴⁸ Section 8(6)(b) SAPS Act.

⁴⁹ Section 8(7) SAPS Act.

that Cele had failed to follow the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies in the conclusion of two controversial property leases — such failure amounted to improper conduct and maladministration.⁵⁰ He is now the Minister of Police.

3.4 *Suggestions to improve criteria and reform the appointment process of the National Commissioner*

3.4.1 *Improving selection criteria*

Suggested criteria for the position of National Police Commissioner or Deputy National Police Commissioner include that a candidate must:⁵¹

- be a citizen of South Africa, and must not hold citizenship of another country;
- have a degree from a university recognised in South Africa;
- have had a distinguished police career;
- have been employed in a senior management position for at least 15 years;
- have previous experience in either: criminal justice, policy development and implementation, finance and public administration, strategic management, security, law, sociology or government;
- not be a Member of Parliament or of a provincial legislature, or be a premier/ mayor or deputy mayor or hold office in a political party;
- not have, in the past five years, served as a Member of Parliament, provincial legislature or trade union member, or held office in a political party;
- not have been convicted of a criminal offence;
- not have violated the Constitution, and must meet the requirements of the Constitution;
- not be employed elsewhere;
- not be an un-rehabilitated insolvent;
- be a serving police officer of the rank of Superintendent or above, and have worked as a police officer for at least 15 years.

3.4.2 *Improving the mechanism to appoint candidates*

It would seem that the National Development Plan proposition as set out above calls for a mechanism similar to that being used for the appointment of the NDPP and, possibly, the Deputy NDPPs. One option would likely involve Parliament, whereas another might involve a separate structure or panel, akin to the JSC, which makes recommendations to the President. One suggestion put forward combines both approaches and advocates for the establishment of a National Police Service (NPS) Commission or Board which would advertise, interview candidates and submit a list of the top 15 candidates to Parliament for National and Deputy National Commissioner posts. The Board would be made up of representatives from the Presidency, the Ministries of Police and Public Service and Administration, Chapter 9 institutions, the Public Service Commission, the JSC, and the Legal Practice Council. Upon receipt of the list with the candidates in the order of preference, Parliament would vote on the candidates — 75% of votes would be required to be appointed as the National Commissioner.

⁵⁰ Public Protector of South Africa (2010), *Against the Rules: Report of the Public Protector on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service relating to the Leasing of Office Accommodation in Pretoria* http://www.pprotect.org/sites/default/files/Legislation_report/Report%20no%2033%20of%202010-11.pdf, (accessed 10 March 2019), p.13

⁵¹ M Montesh, (2014), "A Proposed Model for the Appointment and Dismissal of the National Commissioner of the South African Police Service: a comparative study", *Journal of Law, Society and Development* Vol 1(1) 2014, pp-86-87.

If Parliament does not agree on any of the names put forward, then the process would have to start again and the position re-advertised.⁵² This suggestion, however, would require constitutional amendments since the appointment would be done by Parliament and not the President.

A different panel-based mechanism was recently proposed to Parliament by the Institute of Security Studies (ISS) and Corruption Watch (CW) for the purposes of the appointments of the National Police Commissioner and the Head of the DPCI ('Hawks'). In their submission to Parliament, ISS and CW promoted the establishment of a Police Leadership Selection Panel as part of transparent and public participatory process that undertakes the following activities:⁵³

- 1 *The establishment of a panel of experts who can develop key selection criteria for both leadership positions;*
- 2 *Publically advertising the positions and making the selection criteria known;*
- 3 *Shortlisting the best possible candidates and releasing their CVs for public comments/objections;*
- 4 *Conducting the interview process in public and objectively assessing the candidates against the selection criteria;*
- 5 *Presenting no more than five of the best candidates to the President to choose from and appoint as SAPS National Commissioner;*
- 6 *Presenting no more than five of the best candidates to the Minister of Police to choose from and appoint as the head of the Hawks.*

The model proposed by ISS and CW allocates an important role to Parliament in the appointment process through its exercise of oversight by advising the Minister of Police to establish the recommended National Policing Board or selection panel that will develop the necessary selection criteria and requirements for employment, possibly based on criteria that already exists for the posts of SAPS divisional and provincial commissioners; advising the President to act on the recommendations of the National Policing Board or selection panel; and by facilitating public participation in the process, as was done in the recent appointments to the heads of various Chapter 9 institutions. This could include circulating the CVs of the applicants, providing space in Parliament for the interviews to be conducted, and facilitating public inputs on the candidates, so as to assist the selection panel in determining the shortlist of no more than five persons who meet the minimum criteria.⁵⁴ Importantly, it emphasises the key role to be played by civil society in providing information about the candidates and testing their integrity. As criteria for the post, the submission takes as a point of departure the criteria that have been defined for the purposes of selecting the Head of the DCPI/Hawks, which will be discussed below.

In addition to instituting a selection panel, there need to be amendments to SAPS Employment Regulations of 2018 to repeal all provisions that enable direct ministerial interference in appointments and promotions such as those requiring a number of senior management appointment and promotion

⁵² Ibid, p.86.

⁵³ Corruption Watch and ISS (2017), *Submission by Corruption Watch and the Institute for Security Studies to the Parliamentary Portfolio Committee on Police: Civil society support to the National Development Plan recommendations for the Appointment of the SAPS National Commissioner, that should also apply to the Head of the Directorate for Priority Crime Investigations ('the Hawks')*, 12 September 2017, p. 5.

⁵⁴ Ibid, pp.5-6.

decisions to be done ‘in consultation with the Minister’⁵⁵ and those that bypass clearly defined selection processes.

Lastly, and in order to initiate a process of renewal of the compromised management cohort of the criminal justice agencies, competency assessments against minimum standards, as supported by the National Development Plan, should be conducted at the top and senior management level focusing in particular on the SAPS, the Hawks and NPA. For the SAPS, an audit should be conducted to identify those who have been appointed or promoted in terms of regulations that allow the SAPS National Commissioner to appoint or promote without going through a selection process. Appropriate steps should be taken to remove or redeploy people who occupy posts for which they do not have the required competencies or where employees have criminal records. These posts should be filled following a transparent, merit based and competitive process⁵⁶.

7 Directorate of Priority Crime Investigations (DPCI)

The establishment of the DPCI or Hawks within the SAPS followed the disbandment of the Division of Special Operations (DSO) (‘Scorpions’) within the NPA. It was enabled by legislative amendments and established as a separate unit in the SAPS in terms of Section 17L of the SAPS Act (as amended).

7.1 Power to appoint

According to Section 17CA of the SAPS Act, it is the Minister, with the concurrence of the Cabinet, who appoints the Head of the DPCI for a period not shorter than seven years and not exceeding 10 years.

Upon appointment, it is the duty of the Minister to report to Parliament about such appointment within 14 days if Parliament is in session or within 14 days after the start of its next session.

Importantly, as much as the Minister has a discretion to appoint the Head with the concurrence of the Cabinet, the Minister has a duty, as set out in the judgments concerning the appointment of Adv. Simelane as NDPP, to positively establish that candidates for the post meet the requirements as set out in the SAPS Act. This matter was addressed in the case of *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others (23199/16) [2017] ZAGPPHC 68*. In this case, the North Gauteng High Court was scathing in its pronouncements against the Minister of Police in the process of appointment of General Ntlemeza as Head of the DPCI. In particular, it expanded on what is required in the process of determination if a person qualifies as ‘fit and proper’. The Court emphasised that all relevant material must be considered, including court pronouncements (judgments) that speak to the integrity of the person in question. As the Court put it:

*The judicial pronouncements made in both the main judgment and the judgment in the application for leave to appeal are directly relevant to and in fact dispositive of the question whether Major General Ntlemeza was fit and proper if one considers his conscientiousness and integrity. Absent these requirements Lieutenant General Ntlemeza is disqualified from being appointed the National Head of the DPCI.*⁵⁷

⁵⁵ See Section 47(1) of the SAPS Employment Regulations of 2018, and particularly Section 47(1)(n). For a discussion of this matter, refer to Institute for Security Studies (ISS) and Corruption Watch (CW), *State Capture and the Political Manipulation of Criminal Justice Agencies: A joint submission to the Judicial Commission of Inquiry into Allegations of State Capture*, April 2019, pp. 55-56.

⁵⁶ *Ibid*, p.53.

⁵⁷ *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others (23199/16) [2017] ZAGPPHC 68*, Para 37, p.26.

...The Minister simply brushed aside a considered opinion of a superior court. The question here is not one of discretion but whether the person who has been described by such judicial pronouncement can be appointed in the face of such pronouncements. This was a quintessential example of the Minister completely ignoring and brushing aside remarks by a Court.⁵⁸

Echoing the approach taken in the cases dealing with the appointment of Adv. Simelane as NDPP, the court found that the process of appointment was irrational since it excluded critical evidence in the form of court judgments that related directly to the requirements of fitness, propriety and integrity required of the post.

7.2 Requirements for appointment

Echoing some of the criteria set out for the NDPP, Section 17CA(1) of the SAPS Act states as follows:

The Minister, with the concurrence of Cabinet, shall appoint a person who is

- (a) a South African citizen; and
- (b) a fit and proper person,

with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.

The courts have had ample opportunity to pronounce on the meaning of the 'fit and proper' requirement following the findings of the courts in relation to Adv. Simelane. In the case of *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others (23199/16) [2017] ZAGPPHC 68*, the applicants emphasised that the DPCI is a premier law enforcement agency, integral to the battle against corruption and maladministration, which is why the Act requires the National Head to be a person of integrity. They contended that in appointing General Ntlemeza to that high office, Minister Nhleko had acted irrationally and unlawfully, had failed to fulfil his constitutional duty to protect the integrity and independence of the DPCI and to undertake a proper inquiry into whether General Ntlemeza was fit and proper to be the Head of the DPCI. The principal ground of review was that Minister Nhleko had not taken into account materially relevant considerations; more particularly, he failed to have proper regard to a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza's integrity was called into question.⁵⁹ In dealing with the 'fit and proper' requirement, the Court pronounced as follows:

To determine objectively whether a person is fit and proper, this Court would have to weigh up the conduct of the person against the conduct that is expected of a person occupying the office of that Head.⁶⁰

The judgments are replete with the findings of dishonesty and mala fides against Major General Ntlemeza. These were judicial pronouncements. They therefore constitute direct evidence that Major General Ntlemeza lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as more important as that of the National Head of the DPCI, where independence, honesty and integrity are paramount to qualities. Currently no appeal lies against the findings of dishonesty and

⁵⁸ Ibid, Para 39, p.27.

⁵⁹ The case was *Sibiya v Minister of Police & others (GP)* unreported case no 5203/15 (20 February 2015).

⁶⁰ *Helen Suzman Foundation and Freedom under Law v Minister of Police and Others (23199/16) [2017] ZAGPPHC 68, Para 35, p.25.*

impropriety made by the Court in the judgments. Accordingly, such serious findings of fact in relation to Major General Ntlemeza, which go directly to Major General Ntlemeza's trustworthiness, his honesty and integrity, are definitive. Until such findings are appealed against successfully they shall remain as a lapidary against Lieutenant General Ntlemeza.⁶¹

In addition to expanding on the meaning of the requirements, in November 2014 the Constitutional Court also found that Sections 17CA(15) and (16) of the SAPS Act which allowed for the extension of the Head's and the Deputy Head's terms of office beyond retirement age amounted to a renewal of their terms, which undermines the operational independence of the Head and Deputy Head of the DPCI. The Court therefore deleted these provisions from the Act.

7.3 Removal process

Section 17DA of the SAPS Act deals with the removal from office of the National Head of the DPCI. It states as follows:

(1) The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2)⁶², (3) and (4).

...(Sub-section 2 deleted)

(3) (a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.

(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.

(5) The Minister-

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

In relation to the removal of the Head of the DPCI, the "*Glenister*" cases resulted in the deletion of sub-section 2 of Section 17DA which allowed the Minister to provisionally suspend the Head of the DPCI and institute a commission of inquiry into his or her fitness to hold office as it offended against the independence of the DPCI. The Constitutional Court held that the Minister's power to remove the Head from office in section 17DA is a threat to his/her job security. The suspension and removal of

⁶¹ Ibid, Para 36, p.26.

⁶² In *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32 of 27 November 2014 the Constitutional Court declared the '(2)' in s. 17DA (1) inconsistent with the Constitution and therefore invalid, and deleted it from the date of the order. This is due to the fact that the entire subsection 2 was deleted by the court decision.

the Head through a parliamentary process, however, guarantees job security and accords with the notion of adequate independence. The Court deleted the provisions allowing the Minister to suspend and remove the Head of the Hawks, and any suspension without pay. The Court retained the sections which provide for the Head to be removed only by a two-thirds vote from Parliament.

8 Independent Police Investigative Directorate (IPID)

Section 206(6) of the Constitution states that upon receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province. In view of the fact that IPID is mandated to investigate police conduct, it is imperative that the institution be allowed to retain its independence both structurally and operationally. In a recent judgment, the High Court found that the independence of IPID is expressly guaranteed and protected under section 206(6) of the Constitution, which is 'significant and decisive'.⁶³ Moreover, in its role as 'watchdog over the police', it is necessary to IPID's credibility and the public confidence that it 'be not only independent but that it must also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister'.⁶⁴

However, as the sections below will show, South Africa is still far from ensuring such independence in relation to a key corruption fighting body such as IPID.

8.1 Power to appoint

Section 6(1) of the IPID Act, 1 of 2011, vests the Minister of Police with the power to nominate a person for appointment to the office of Executive Director to head IPID. Of extreme concern is that this section requires the Minister to follow whatever procedure the Minister determines. There is therefore no prescribed procedure to ensure that this process is fair, transparent and administratively just. One only needs to recall that the current Minister of Police is the same person who was found not to be fit as National Police Commissioner some years back.

The only oversight measure that the Act allows in the process of appointment is for the relevant Parliamentary Committee to confirm or reject such nomination within a period of 30 parliamentary working days from the date of nomination (Section 6(2)). The proportion of members of the committee necessary for such nomination to be confirmed is not clear, but it may be assumed that it will be in proportion to the National Assembly's composition. Further, reliance on parliamentary committees carry the obvious risk that party members would vote to support a particular party position and not necessarily on the merits of the candidate.

In the event that the appointment is confirmed, the successful candidate is appointed subject to the laws governing the public service to a term of office of five years, renewable for one additional term only (Section 6(3)). Presumably, if the appointment is not confirmed, the nomination process would need to start afresh. The North Gauteng High Court, in an unreported judgment of February 2019, sanctioned an agreement between the Minister of Police, Parliament's Portfolio Committee on Police and the head of IPID, where the Minister was permitted to recommend renewal or non-renewal, for consideration of the Portfolio Committee, which was then empowered to take a decision.⁶⁵ This Court Order was made in spite of several Constitutional Court judgments declaring that the renewal of terms of office of persons in positions which require independence cannot be subject to the discretion of

⁶³ *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (High Court judgment), Paras 15-16.

⁶⁴ *McBride v Minister of Police and Another* [2016] ZACC 30, Para 41, p.23.

⁶⁵ Helen Suzman Foundation in re Robert McBride and the Minister of Police, Case no. 6175/19 of 21 February 2019.

political actors. An application for leave to appeal to the Supreme Court of Appeal has been lodged and the response is being awaited.

The fact that the Executive Director is appointed subject to the laws governing the public service was challenged in the Constitutional Court, but only in relation to the *removal* of the head of IPID. As much as the Court allowed Parliament time to amend the IPID Act, these provisions cover the process of removal and not appointment of the Head of IPID. At present, the Amendment Bill has been approved by the National Assembly but has yet to be approved by the National Council of Provinces.⁶⁶

8.2 Requirements for appointment

The only requirement that appears in Section 6(1) of the IPID Act is that the person nominated must be 'suitably qualified'. The vagueness of the requirement is astounding given the vital role that IPID plays as part of the state machinery to fight corruption and police misconduct. This *lacuna* in the requirements is even more surprising considering that IPID has oversight and accountability responsibilities over the DPCI.

In view of this, at the very least, the Executive Director of IPID should meet the requirements set out for the Director of the DPCI, which are described above.

8.3 Removal process

Prior to a Constitutional Court judgment in 2016, the Executive Director could be removed at the sole and unfettered discretion of the Minister of Police with the total absence of an oversight mechanism. Moreover, the Executive Director of IPID was subject to the laws governing the public service in relation to suspension and removal. However, as the Constitutional Court noted:

*To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service — to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure — is **subversive** of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the **political control** of the Minister.⁶⁷*

The Constitutional Court confirmed that section 6 of the IPID Act gives the Minister of Police enormous political powers and control over the Executive Director to remove him without parliamentary oversight.⁶⁸ In the words of Bosielo AJ:

This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this

⁶⁶ Tammy Petersen (2018), "Greater independence for IPID closer as amendment bill approved", 4 September 2018, <https://www.news24.com/SouthAfrica/News/greater-independence-for-ipid-closer-as-amendment-bill-approved-20180904> (accessed 21 March 2019).

⁶⁷ *McBride v Minister of Police and Another* [2016] ZACC 30 Para 39, pp.22-23 (emphasis added).

⁶⁸ Helen Suzman Foundation (2018), *The Criminal Justice System: Radical reform required to purge political interference*, December 2018, <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf> (accessed 7 March 2019), p.9.

*compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.*⁶⁹

In view of the above, the Constitutional Court declared, sections 6(3) and 6(6) of the IPID Act to be unconstitutional. Section 6(6), which is the removal provision for the Executive Director, was amended to read like the remaining removal provisions for the National Head of the Hawks contained in the SAPS Act. Even though Parliament was given 24 months from the date of the order (6 September 2016) to permanently cure the defects in the IPID Act, the Amendment Bill has not yet become law. It is expected that when it is passed into law, the Act will require Parliament to have an oversight role in which a two-thirds majority vote will be needed in the National Assembly to suspend, discipline or remove the Executive Director of IPID⁷⁰. However, it is unlikely that current legislative amendments will incorporate changes to requirements and process of appointment.

9 Suggested Proposals

This position paper has provided a detailed breakdown of existing requirements, appointment and removal processes for senior leadership within the NPA, SAPS, DPCI and IPID. In a number of instances, there is a dearth of requirements for particular positions. In others, requirements are defined, but the mechanisms for appointment and, in some cases, removal, lack a degree of independence from improper political interference that is fundamental to ensure that these criminal justice institutions remain professionalised and are able to carry out their mandates and duties without fear or favour and in line with the values of the South African Constitution.

The following recommendations aim to reflect the views expressed by a number of civil society organisations and key experts working in the field which were consulted as part of the process of development of these proposals. The proposals are presented in terms of three key themes that cut across the different agencies describe above, namely: criteria for selecting appointees, the mechanisms for assessment, selection and recommendation of candidates; and the mechanisms by which senior leaders are removed from their positions.

9.1 Criteria for selection

The criteria for selection can be defined in broad strokes, with the proviso that the mechanism/institution set up to apply such criteria might find it necessary to define the criteria or amend it accordingly depending on the post that is being filled.

Taking into consideration that the courts have provided important interpretation on key criteria such as 'fit and proper' and have reaffirmed the need for appointment decisions to be rational, criteria for selection, at a minimum, should incorporate the following:

- Legal qualifications to entitle him or her to practice in the Republic; (particularly for NPA candidates)
- Fit and proper, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned

⁶⁹ *McBride v Minister of Police and Another* [2016] ZACC 30, Para 38, p.22.

⁷⁰ Tammy Petersen (2018), "Greater independence for IPID closer as amendment bill approved", 4 September 2018, <https://www.news24.com/SouthAfrica/News/greater-independence-for-ipid-closer-as-amendment-bill-approved-20180904> (accessed 21 March 2019).

- A minimum number of years of experience in a particular field (particularly if it is a technical post) as is the practice in many countries including South Africa (i.e. criterion for SARS Commissioner)
- Degree of flexibility for selection panel/board to adjust criteria based on candidates who have applied (i.e. this method was adopted in the selection process for the SARS Commissioner)

Other generic criteria that could be incorporated

- Management and leadership skills;
- Professionalism — the willingness and ability to perform with the required skill and the necessary diligence;
- Track record of being able to act with integrity and impartiality;
- Knowledge of socio-economic context and government programme;
- Demonstrated ability to uphold principles in Section 195 of the Constitution

9.2 Mechanism(s) for assessment, selection and recommendation of candidates

It is possible that one mechanism or panel for the selection of senior leaders within criminal justice system institutions could be used. Whether it is one mechanism that is adapted to cater for the requirements of different positions within different agencies or whether the mechanisms are constituted separately, such panels should be guided by the following principles:

- 1) Selection panel(s) should be composed of up to 10 persons, representing a broad range of skills, knowledge and stakeholders to be able to assess candidates competently
- 2) Panels should be appointed by the President/Minister (depending on post)
- 3) After applications have been received, the panel should publish the names of candidates so that the public is able to lodge objections
- 4) The panel(s) shortlists, interviews and recommends up to 5 candidates; interviews should be held in public
- 5) Panel members should comprise stakeholders derived from professional bodies, academic institutions or individuals of high standing, suggestions include:
 - a) NPA: Auditor General, General Council of the Bar, Legal Practice Council, Advocates for Transformation, NADEL, Black Lawyers' Association plus chair (Minister)
 - b) SAPS/DPCI/IPID: Retired police general who has served with distinction; expert in criminal and police law; Treasury representative; Public Service Commission representative; expert in executive decision-making and ethics
- 6) Decisions made based on a majority of votes of panel members

9.3 Mechanism(s) for removal of persons holding senior leadership positions

- 1) Removal provisions are currently not contained in the Constitution for any of the criminal justice agencies examined and therefore they might be easier to amend/institute
- 2) Establish board of enquiry made up of judge or retired judge and two other persons to carry out investigations for removal on the basis of incapacity, incompetence or misconduct across agencies where such mechanisms do not already exist
- 3) Make recommendation to the President/Minister/Commissioner; ensure that President/Minister/Commissioner abides by the recommendation of the board of enquiry. Alternatively, if the recommendation is not followed, then the decision taken must be shown to be rational.
- 4) Parliament is then required to pass a resolution on whether to remove a person or not before such removal actually takes effect, in cases where this applies (NPA, IPID, DPCI).

ⁱ <https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>

ⁱⁱ E.g. Peter Evans and James Rauch. 1999. "Bureaucracy and growth: a cross-national analysis of the effects of 'Weberian' state structures on economic growth," *American Sociological Review* 64 (5), pp. 748-65; Atul Kohli. 2007. *State-Directed Development: Political Power and Industrialization in the Global Periphery*. New York: Cambridge University Press.