

# REFORMING PUBLIC ADMINISTRATION IN SOUTH AFRICA: A PATH TO PROFESSIONALISATION

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## CHAPTER 2

FLORENCIA BELVEDERE

## APPOINTMENTS AND REMOVALS IN KEY CRIMINAL JUSTICE SYSTEM INSTITUTIONS

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# Reforming Public Administration in South Africa

A PATH TO PROFESSIONALISATION

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## About PARI

Established in 2010, the Public Affairs Research Institute (PARI) is a Johannesburg-based organisation, affiliated to the University of the Witwatersrand, that works to support the development of a more effective and accountable state—one that better supports a more economically and socially just society. Much of PARI’s work studies the effectiveness of state institutions in service delivery and infrastructure. Also running a postgraduate teaching programme, the organisation generates high-quality academic research that aims to uncover and understand the structural dynamics shaping state practice and to develop strategies for reform. PARI works with change agents in the public service and civil society to improve the implementation of policies in relevant fields as well as to advocate for changes to relevant legislation, government systems, or ways of thinking about or framing a governance challenge. Its work inside departments and agencies across government and collaborations with other organisations in the country and the global South provide unique insights into state performance and state-society relations.

## About the Authors

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Jonathan Klaaren is a Professor at the University of the Witwatersrand, serving at the Law School and the Wits Institute for Social and Economic Research (WiSER). His current research interests include the African legal profession, regulation and competition policy, public procurement, and migration.

# Preface

We wish briefly to set out the history of this publication and to acknowledge the personnel at PARI who contributed to this collective effort.

This book had its origins in the research, writing, dissemination, and advocacy efforts surrounding three policy position papers produced by PARI. These three papers treated distinct parts of the South African public administration: high-level appointments within the criminal justice sector<sup>1</sup>, public procurement<sup>2</sup>, and the system of recruitment and appointment of public servants<sup>3</sup>. Versions of these papers were presented and discussed at several advocacy forums including a conference jointly hosted by PARI and the Ahmed Kathrada Foundation in 2019, workshops with civil society in the same year, and various public ‘webinars’ over the last 18 months.

The position papers were informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. The proposals they articulated constitute 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. More specifically, the proposals emanate from and demonstrate PARI’s commitment to seeing a reformed state administration support the achievement of a more just and equitable society along such lines. Our inclusive process recognised the importance to this politics of a democratic, lawful and developmental public administration. PARI is dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

These papers went through a process of several stages of collaborative review during their initial production. This process included a series of workshops where some external advocates and academics offered written comments and others discussed earlier drafts. PARI wishes to thank here the persons who participated in this process, which yielded considerable constructive criticism: Geo Quinot, David Bruce, David Lewis, Lukas Muntingh, Lawson Naidoo, Gareth Newham, Anton van Dalsen and Lee-Anne Germanos, Robert Cameron, Kris Dobie, Brian Levy, Vinothan Naidoo, Ben Turok, Michael Nassen Smith, Niall Reddy, Glen Robins, Lisa Seftel, Ron

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<sup>1</sup> Florencia Belvedere, ‘Appointments and Removals in Key Criminal Justice System Institutions’ (Public Affairs Research Institute, April 2020), <https://pari.org.za/position-papers-criminal-justice-system/>.

<sup>2</sup> Ryan Brunette and Jonathan Klaaren, ‘Reforming the Public Procurement System in South Africa’ (Public Affairs Research Institute, May 2020), <https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PROC05-05-20.pdf>.

<sup>3</sup> Ryan Brunette, ‘Position Paper on Appointment and Removal in the Public Service and Municipalities’ (Public Affairs Research Institute, April 2020), <https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/REC05-05-20.pdf>.

Watermeyer, Johan Kruger, John Jeffery, Trish Hanekom, and Anthony Butler. In addition, representatives from at least the following organisations attended at least one of the events at which these papers were discussed: the Ahmed Kathrada Foundation, ANC Stalwarts and Veterans Group, Auwal Socio-Economic Research Institute (ASRI), Black Sash, Centre for Complex Systems in Transition, Centre for Development and Enterprise, Corruption Watch, Council for the Advancement of the South African Constitution (CASAC), Dullah Omar Institute (DOI), Freedom House, Helen Suzman Foundation (HSF), Institute for Security Studies (ISS), Johannesburg Against Injustice (JAI), Nelson Mandela Foundation, Organisation Outdoing Tax Abuse (OUTA), Public Service Accountability Monitor (PSAM), SANGOCO, Strategic Dialogue Group (SDG), Studies in Poverty and Inequality Institute (SPII), and #UniteBehind.

Each of the papers underwent a further stage of blind peer-review from two legal academics in the field of administrative law and revisions in response to those reviews. It is the individual authors of each of the three chapters and the editor that take final academic and professional responsibility for the content and any errors that may exist.

A number of persons at PARI contributed specifically and significantly to this effort. Vishanthi Arumugam, holder of the communications portfolio, got this publication started—collating and reformatting most of the original files. Sarah Meny-Gibert, PARI's research coordinator, contributed to the writing throughout (in particular to the introduction) and copy-edited much of the final product. Florencia Belvedere contributed not only as the author of one of the substantive chapters but also as head of PARI's State Reform Programme, where this project was housed. Jonathan performed the duties of a book editor, overseeing the peer review process and the compiling, writing, and final editing of this book. Mbongiseni supported the project enthusiastically from its inception.

Finally, it is worth noting here that this book is published in a digital form and is available through open access. We thank our publisher, Simon Sephton, for exploring this electronic path with us. With this publication, PARI is continuing to experiment with the best ways to disseminate ideas and stimulate debate around themes of reform and reinvention for the South African state. In a number of state sectors such as judicial reform, recent trends in the literature have demonstrated that policy-oriented research can play an important role.<sup>4</sup> We believe state transformation is a process that is fundamentally based in practices of democratic citizenship and is something in which all citizens may usefully contribute. Noting that the digitalization of academic production and scholarly publication raises many and complex issues (worthy of a book in its own right?), we wholeheartedly support the aim of access to knowledge which lies behind open access publishing.

MBONGISENI BUTHELEZI *and* JONATHAN KLAAREN  
*Johannesburg, September 2021*

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<sup>4</sup> Hugh Corder and Justice Mavedzenge, eds., *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (Cape Town, South Africa: Siber Ink, 2019).



# Introduction

## Conceiving (of) State Reform in South Africa

This short book analyses three distinct and key features of the state: the system of appointment and removal in the public service and municipalities, high-level appointments and removals within the criminal justice sector, and public procurement. A state's politics and its capacities are constituted in important ways by how it fills its public administrative offices (including its prosecution service) and purchases its necessities. The book, considering outcomes in South Africa, advocates for specific reforms in each area. It argues that the timely consideration and adoption of reforms along these lines is an urgent task. With that in mind, the book has been written chiefly for two audiences: both for activists keen to build a state which can play its role in advancing the progressive transformation of South African society, and for scholars who are interested in understanding the character and possibilities of the evolving South African public administration.

In 2019, President Cyril Ramaphosa acknowledged 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'.<sup>1</sup> He promised, on behalf of government, to work with South African society to fight these threats and strengthen the state's ability to promote its democratic mandate and address the needs of its people. As this book is published more than two years later, it is clear that efforts to address the system of patronage in the public sector have been limited. Further, the COVID crisis has highlighted just how pressing the need for a state reform agenda (and its execution) is. It remains urgent to reverse the degradation of state institutions and to rearticulate and reaffirm, in a concrete form, the values and aspirations underlying the role of the public service in our as-yet-untransformed society. This book endeavours to contribute to the development of an overarching strategy for state reform by proposing concrete ways to promote institutional integrity, democratic control and administrative effectiveness.

Even before the Covid-19 pandemic, when Ramaphosa made his speech, the South African state was manifestly in crisis. The high ideals of the anti-apartheid movement had decomposed in corruption and the politics of patronage. The fiscus, the public administration and critical infrastructure were deteriorating. The economy, partly in consequence, had stalled. These well-attested propositions received greater recognition when the pandemic struck. Government's early decision to lockdown, decisive and informed by science, at first won near-universal

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<sup>1</sup> <https://www.gov.za/speeches/President-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>.

goodwill as South Africans rallied against a common threat. Within weeks, however, this rare amity evaporated. The police and army were implicated in gratuitous acts of violence against ordinary people. A series of poorly justified and sometimes imprudent lockdown regulations accumulated. Corruption plagued the emergency procurement of personal protective equipment and other items needed to save lives. The lockdown lingered, it was extended twice, as the state failed to establish the test, trace and quarantine capacities needed to safely lift it. Economic and social support to businesses, workers, and the unemployed, was limited by fiscal concerns and rolled out late and haphazardly. Criticism, often warranted, sometimes opportunistic, exploded from all quarters.

The pandemic had caught South Africa unprepared and incapacitated. The country, already overwhelmed by the routine problems of normal times, now had to respond nimbly to a great and unforeseen public health emergency. It had to communicate clearly and elaborately, to quickly construct largescale and complex administrative operations, and coordinate tens of millions of people into new patterns of behaviour. In these tasks, it mostly fell despairingly short. The pandemic may be a prelude to what is shaping up globally to be an age of catastrophe—defined first and foremost by climate change—and it showed what South Africa might look like if it doesn't move to address its state crisis. By the end of 2020 the economy had contracted by 7 percent. The expanded unemployment rate had breached 40 percent. In surveys, 18 percent of households reported hunger.<sup>2</sup>

The book charts a path between and beyond two positions which have long had an out-sized place in South Africa's discussion about its contemporary governmental and public administrative problems. First, there is what we could call the moralist position. It stresses the need for ethical leaders. In their absence, it urges accountability, mobilising the polity behind disciplinary action, prosecutions and, for some, electoral turnover. The authors of this book do not deny the importance of ethics and accountability, but no country has ever satisfactorily resolved an episode of corruption and patronage politics of contemporary South African proportions through such efforts alone. There are simply too many people to prosecute, and too many others ready to take their place in the patronage system.

The second position can be labelled economistic, because it reduces the issues of corruption and patronage to economic causes. Proponents of this position argue that these issues are a consequence of the prevalence of poverty in South African society and its extreme inequality. As solutions, they promote economic development and redistribution, by whatever methods they might prefer. The most cursory look at the world will show the importance of such considerations. The richer and more equal countries have a visibly lesser incidence of corruption, but the economistic position elides the extent to which corruption and patronage are themselves impediments to economic advance. In contemporary conditions of globally

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<sup>2</sup> <https://cramsurvey.org/wp-content/uploads/2021/02/10.-Van-der-Berg-S.-Patel-L.-Bridgman-G.-2021-Hunger-in-South-Africa-during-2020-Results-from-Wave-3-of-NIDS-CRAM-1.pdf>

competitive capitalism, a professional and capable state is important for driving rapid development and associated redistribution.<sup>3</sup>

The chapters of this book accept the relevance of the factors addressed by moralism and economism. They emerge, however, from the view that official conduct, whether ethical or malfeasant, is powerfully framed, constrained and enabled by the structure of the institutions within which officials operate. They arise from a recognition that this structuration of the state has significant consequences in terms of economic outcomes. The chapters move with contemporary politics, by building on official policy statements which point in a serviceable direction. By building on these statements, the chapters also try to push government to move beyond them. They articulate a more encompassing and fundamental strategy for change. Moreover, although these chapters draw on policy and contain extensive analysis of law, they develop their arguments with an appreciation of their political-sociological context.

Chapter 1 is on reforming processes for appointment and removal in the public service and municipalities. In the South African system, politicians hold largely unchecked powers over these processes. Ryan Brunette, tracing the legal framework, shows how it allows politicians to bring their political and personal connections into public administrative office, which downplays technical competence and enables circumvention of the procedural controls which protect public administrative functions from corruption. Given the country's levels of economic deprivation and inequality, politicians can and often do use the opportunities entailed to accumulate wealth and to generate the patronage resources needed to build support and to evade democratic accountability. Destabilisation and paralysis are often further effects—as energy and resources are directed away from government programmes and policy formulation/implementation and towards private interests and factional battles. Countries which have successfully overcome expansive, systemic episodes of corruption and patronage have reformed personnel systems to close down those opportunities, and South Africa should emulate them. In ways that preserve democratic control, Brunette argues that political powers must be checked and balanced by dividing appointment and removal processes into stages and giving the Public Service Commission and other independent bodies power over some of these.

Chapter 1 sets the stage for Chapter 2, which deals with appointment and removal processes in key criminal justice institutions. The legal framework that governs appointment and removal in these organs of state, which have investigative and prosecutorial functions, has blurred the lines between politics and regulation, undermining the independence that these institutions need to address corruption and other forms of malfeasance without fear or favour. Florencia Belvedere

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<sup>3</sup> For example: Evans, P., & Rauch, J. E. (1999). 'Bureaucracy and growth: A cross-national analysis of the effects of Weberian state structures on economic growth'. *American Sociological Review*, 748–765; Kohli, A. (2004). *State-Directed Development: Political Power and Industrialization in the Global Periphery*. Cambridge, UK: Cambridge University Press.

discusses and justifies 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 and 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. President Ramaphosa's appointment of Shamila Batohi as head of the National Prosecuting Authority (NPA) is one example of the positive effects of appropriate selection processes and credible appointments. Chapter 2 considers how to diffuse similar processes through the NPA and other criminal justice institutions.

Finally, chapter 3 deals with reform of the public procurement system. Ryan Brunette and Jonathan Klaaren give a sense of the scale and significance of public procurement in South Africa, the historical forces which have shaped it, and the problems which have emerged in the course of this history. They make the case for a process of reform which moves through the recently published draft Public Procurement Bill and which optimises imperatives—often viewed as competing—of integrity, operational efficiency and the promotion of socio-economic goals such as industrial development and black economic empowerment. The reforms considered in chapters 1 and 2 would serve to insulate procurement processes from inappropriate political and other forms of interference, a central cause of corruption. Beyond this, Brunette and Klaaren propose shifting the burden of public procurement integrity from restrictive rules, which constrain legitimate actors and are rarely enforced against the corrupt, to stronger methods of enforcement. They offer a lighter regulatory framework to enable good purchasing practice and advance black economic empowerment, and then they complement this with a series of innovative mechanisms for frustrating corruption, including a system of financial rewards for whistleblowers.

The reforms articulated and argued for in these three key features of the South African state are overlapping and mutually reinforcing. The authors readily acknowledge that other sectors and dimensions of the state also require concerted attention. The state-owned enterprises and other statutorily-defined public entities are an obvious omission. The authors also do not address the specific problems of particular sectors, like health, education and water. The basic principles and models developed in these chapters are relevant to this broader context, but will need to be tailored where distinctive legal frameworks and specific political and organisational contingencies require it. In any event, the ideas and arguments made in these pages are only a start. We hope to expand from this early foray to cover other areas in future, under an expansive state reform project.

Indeed, the focus of the book can be understood as necessarily preparatory in the sense of providing a vision for a better recalibration of the relationship between politics and administration in units of the South African state. Taking this forward will require work in both politics and administration. As recalibrated here, we

believe this relationship is foundational for a range of interventions to reduce corruption and improve public administration.

Additionally, getting this relationship right underpins the model of economic development seen perhaps most clearly in chapters 1 and 3 (as well as the culture of the rule of law directly supported by the criminal justice sector institutions treated in chapter 2). The work presented here on the public procurement system sees the relationship between politics and administration as playing an important role in ensuring procurement activity plays an active and contributory role in economic development, including local economic development. The work presented here on the potential for reform of state recruitment practices is likewise based upon a vision of the state as embedded within a society of material as well as ideal interests. At least in present-day South Africa, the fortunes of the state administration and the fate of the economy are mutually implicated. The state reform project is an iterative process between two spheres most often incorrectly seen as completely separate: the public and the private. In this sense, the book contributes to the articulation of a distinct developmental path for South African society.

# Appointments and Removals in Key Criminal Justice System Institutions

FLORENCIA BELVEDERE

## INTRODUCTION

In his February 2019 State of the Nation address,<sup>1</sup> 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 NPA.<sup>2</sup>

The criminal justice system is a pillar of the democratic state; 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 brought into question not only the independence and accountability of the key institutions 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 public respect and trust in criminal justice institutions, which have come to serve the interests of party factions, rather than the public. This has enabled impunity; patronage has been allowed to continue unabated. Those who need to be prosecuted or investigated are not, resources are diverted from key cases, investigations are thwarted and certain types of crime have increased. The weakening and hollowing out of these institutions, through undue influence over appointment and removal processes within them, has further helped to de-professionalise them while enabling further patronage. There is a need to re-establish the legitimacy, impartiality and independence of key criminal justice system institutions.

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<sup>1</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>.

<sup>2</sup> 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).

The President's commitments are an opportunity to rethink the key processes that militate against the ability of these institutions to operate independently and carry out their work without fear or favour—as required by the Constitution. One such area—the appointment and removal processes of the senior leadership of these institutions—tends to blur the political-administrative divide. Appointments to criminal justice institutions are often made by politicians (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 as with SAPS or the Independent Police Investigative Directorate (IPID). In other instances, where there are requirements for a person to be 'fit and proper', these terms have only begun to acquire meaning over the past few years as court cases and inquiries have sought to do so.

Although courts and inquiries have helped to clarify criteria and the rationality of appointment or removal decisions by the President or ministers, appointment and removal processes across criminal justice institutions need fundamental institutional reform. To ensure selection of the best-qualified persons, the review, selection and recommendation of appointees must be carried out by panels or committees of competent individuals with the necessary skills, knowledge and experience to interpret and define criteria and apply them conscientiously and consistently. Ironically, recommendations for such mechanisms were made as early as 1995, when South Africa was drafting its final Constitution<sup>3</sup> and continued, at least in relation to the National Prosecuting Authority, during discussions of the NPA Bill in the late 1990s. More recently, key figures like Deputy Chief Justice Dikgang Moseneke have questioned whether the democratic project is best served by vast powers of appointment by the national executive and have enjoined us to think about 'how best to shield appointments of public functionaries to institutions that gird our democracy, from the personal preferences and vagary of the appointing authority'.<sup>4</sup> It seems we have now come full circle.

Through litigation and research, which includes drafting submissions to ongoing enquiries, civil society organisations have been active participants in ensuring the independence and accountability of key institutions within the criminal justice system. There are also important initiatives being driven by civil society, such as Judges Matter, an organisation that focuses on the selection of judges through the Judicial Services Commission, and organisations such as the Institute for Security Studies (ISS) and Corruption Watch (in relation to the appointment of the National Commissioner of Police and the Public Protector). This bodes well for possible

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<sup>3</sup> Moseneke, D. C. J. (2014). 'Reflections on South African Constitutional Democracy—Transition and Transformation'. In keynote address at the MISTRA-TMALI-UNISA conference (Vol. 20). <http://www.casac.org.za/wp-content/uploads/2016/11/Dikgang-Moseneke-Keynote-address.pdf> (accessed 20 March 2020), p. 18.

<sup>4</sup> De Villiers, W. P. (2011). Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models. *Journal of Contemporary Roman-Dutch Law*, 74, 247.

reforms to appointment processes with a view to creating a capable and responsive state.

This chapter briefly describes 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), Deputy National Directors, Directors, Special Directors and Deputy Directors of Public Prosecutions; the National Commissioner of Police, the Deputy National Commissioner, and Provincial Commissioners within the South African Police Service; the Head, Deputy Head and Provincial Heads of the Directorate for Priority Crime Investigations (DPCI or ‘Hawks’) and the Executive Director of the Independent Police Investigation Directorate (IPID).

The following principles guide the chapter and the reforms it argues for:

- Since the Constitution defines the role of the President in appointments (NDPP, National SAPS Commissioner), the focus of reforms should be to reduce the possibility for political interference without having to undertake the arduous process of amending the Constitution.
- The scope of the chapter will be on the processes of appointment and removal within the institutions that perform investigative and prosecutorial functions within the criminal justice value chain, namely: NPA, SAPS, DPCI (Hawks) and IPID. The discussion will not cover the judiciary.
- The argument extends beyond the national heads of these agencies (i.e., for NPA, proposals will include directors at seats of the High Court, as well as the deputy national head and Deputy Directors; for SAPS and DPCI, the argument will also focus on provincial commissioners and 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 within the National Development Plan, that a selection panel should be established to shortlist, interview and assess candidates, and provide recommended candidates to the President or Minister, as the case may be, depending on the post.
- The selection panel should bring together a broad range of skills, knowledge and stakeholders that will 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 resolutions if they disagree with 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 far as possible, allow sufficient time to carry out duties (i.e., a minimum of five years).



- Amendments to regulations will be required to put in checks to the power of the President and Minister, where they are responsible for appointments (i.e. NPA, DPCI, IPID).

The remaining sections of this chapter describe the processes for appointments and removals in the criminal justice system institutions above and set out possible improvements to them, in relation to the criteria for selection, and processes for appointment and removal.

## 1. THE 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 which have had significant influence in these processes and which will also be analysed below.

The prosecuting authority was established to assist the executive in the application and the execution of criminal law. It is associated with the executive branch of government rather than the judicial branch.<sup>5</sup> The African National Congress, in its much-needed bid to democratise the prosecuting authority, sought to establish a national prosecuting authority with a head appointed by the President. At the time, the constitutionality of this provision was challenged on the grounds that it offended the separation of powers but the Constitutional Court rejected this objection.<sup>6</sup>

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 (NDPP), 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 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 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.

<sup>5</sup>Schönteich, M. (2015). 'A story of trials and tribulations: The National Prosecuting Authority, 1998–2014'. *South African Crime Quarterly*, 50(1), 5–15. <https://www.ajol.info/index.php/sacq/article/view/110362> (accessed 20 March 2019), p. 6.

<sup>6</sup>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.

## 1.1 Requirements for appointment of the National Director of Public Prosecutions, Deputy National Directors and Directors

The NPA Act provides for a number of requirements for appointment. In particular, Section 9 notes that any person who is to be appointed as National Director, Deputy National Director, or Director must be a South African citizen, have legal qualifications that would allow him or her to practice in all courts in the country and 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’. Section 32 of the NPA Act further states that a member of the prosecuting authority is expected to ‘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 Inquiry, which was the first inquiry held in terms of Section 12(6)(a) of the NPA Act and probed into the fitness of the then head of the NPA, Adv. Vusi Pikoli, sought to expand on the requirement under Section 9(1)(b) of the Act — ‘the fit and proper’ requirement. The inquiry held that the question of whether a person is fit and proper is fact specific and context dependent.<sup>7</sup>

The inquiry noted that a legal qualification is only one of the requirements for appointment; the incumbent must also be a person of experience, integrity and conscientiousness to be entrusted with the responsibilities of the office of the NDPP. Although these are formal requirements, Ginwala sought to highlight that they imply that the incumbent must have a broader experience. As the inquiry’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 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*.<sup>8</sup>

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 sociopolitical 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 inquiry held that it ‘relates to the character of a person — honesty, reliability, truthfulness and uprightness’,<sup>9</sup> 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 profes-

<sup>7</sup> Ibid, Para 70, pp. 52–53, emphasis added.

<sup>8</sup> Ibid, Para 71, p. 53.

<sup>9</sup> Ibid.

sionalism—the willingness and ability to perform with the required skill and the necessary diligence’.<sup>10</sup>

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. It sought, nonetheless, to highlight the gravity and importance of the position of an NDPP by noting:

... 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.<sup>11</sup>

Echoing the sentiments above, in a Supreme Court of Appeal case challenging the appointment of Adv. Simelane to the position of NDPP, Justice JA Navsa 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.<sup>12</sup> These powers include deciding whether or not to prosecute someone, 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’.<sup>13</sup>

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

In addition to providing guidance on the interpretation of existing requirements, South African courts have also assisted in setting out what the process of applying such requirements should entail. In this regard, 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 or she has in mind for appointment as the NDPP has the qualities described in s 9(1)(b).<sup>14</sup> It was suggested that such a decision-making process would at least require the following:

- (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

<sup>10</sup> Ibid, Para 72, p. 54.

<sup>11</sup> *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 72, p. 29.

<sup>12</sup> *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 and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 89, p. 33.

<sup>13</sup> Ibid, Para 96, p. 36.

<sup>14</sup> Ibid, Para 98, p. 36.

- (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.<sup>15</sup>

In other words, there must be insistence about the qualities the NDPP must possess 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).<sup>16</sup> 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’.<sup>17</sup>

### 1.1.2 ‘Fit and Proper’ as an objective determination

Echoing the Ginwala Inquiry’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.<sup>18</sup> 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 JA, ‘[...] 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’.<sup>19</sup>

In his assessment of whether Adv. Simelane was a fit and proper person and in his subsequent decision to appoint him to the position of NDPP, the President had failed to consider material information before him which brought into question the integrity and honesty of Adv. Simelane (i.e., findings from the Ginwala Inquiry, and 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

<sup>15</sup> Ibid, Para 107, p. 39.

<sup>16</sup> Ibid.

<sup>17</sup> *Democratic Alliance v The President of the SA 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.

<sup>18</sup> *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241, Para 117, p. 42.

<sup>19</sup> *Democratic Alliance v The President of the RSA 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.

job effectively. The means employed accordingly colour the entire decision which falls to be set aside.<sup>20</sup>

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

In contrast, in the later 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 the appointment of Mr Abrahams 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.<sup>21</sup>

From the above discussion, it can be gleaned that South African courts and inquiries have assisted not only in expanding on the meaning of existing requirements but also in setting out how such requirements should be assessed (i.e., considering all relevant information and making rational decisions). However, they have not questioned the mechanisms or individuals currently tasked with giving effect to such guidance. In this regard, the thoroughness and rationale required to carry out selection and appointment decisions have highlighted the importance of selection mechanisms or panels made up of persons with the insight, knowledge, skills and capability to conduct the analyses required for decision-making. This is a key concern of this chapter, as robust mechanisms that enable thorough and informed selection processes that are insulated from possible improper political interference are generally lacking across the key criminal justice institutions canvassed in this paper.

## 1.2 Process and power to appoint the NDPP, Deputy National Directors and Directors

In terms of Section 179(1)(a) of the Constitution and Section 10 of the NPA Act, the President *must* appoint an NDPP. It should be noted however, that over and above

<sup>20</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p. 26.

<sup>21</sup> *Democratic Alliance v The President of the RSA and Others* (263/11) [2011] ZASCA 241 (1 December 2011), Para 107, p. 38.

this mandate, Section 11 of the NPA Act extends the President's powers of appointment beyond those in the Constitution. In particular, 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 (Section 13 of the NPA Act).

There is, however, no prescribed statutory process of how the President is expected to assess a candidate's fitness for office;<sup>22</sup> another concern is that the President exercises executive power, 'after consultation with' and not 'in consultation with' different parties. In other words, the President does not have to agree with those he is mandated to consult, which would seem to reduce the ability of an NDPP to influence such decisions, despite the fact that many appointees are accountable to the NDPP, and the NDPP must work closely with such appointees.

The NPA Act extends similar political influence 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'.<sup>23</sup> Existing processes also strenuously limit the influence of the NDPP and Deputy NDPPs in the appointment of Directors, Special Directors and Deputy Directors; appointees are thus under the control and direction of superiors with limited influence in their appointment.

Some commentators have pointed out that political control over appointments also extends to lower levels because 'lower-ranking prosecutors are appointed on the advice of the NDPP who of course is a political appointee'.<sup>24</sup> In principle, if the process of selection of the NDPP were more consultative, and competent candidates were to be selected, it would not be inappropriate for the NDPP to have influence over lower-ranking appointments or to be responsible for such appointments, as is the case with the National Head of the DPCI in relation to its staff. The

<sup>22</sup>Muntingh, L., Redpath, J., & Petersen, K. (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.

<sup>23</sup>De Villiers, W. P. (2011). Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models. *Journal of Contemporary Roman-Dutch Law*, 74, 247.

<sup>24</sup>Kahla, C. (2018, December 4) Advocate Shamila Batohi appointed as new Director of Public Prosecutions. *The South African*. Retrieved from <https://www.thesouthafrican.com/news/advocate-shamila-batohi-appointed-as-new-director-of-public-prosecutions/>, 15 March 2019.

positive influence of the current NDPP is evident in the President's appointment of the professionally well-regarded Adv. Cronje to head the Investigative Directorate in the NPA. President Ramaphosa engaged in meaningful consultation with the current NDPP and followed her recommendation, even though the President is not required to do so. The challenge is that we cannot legislate or reform institutions with specific individuals in mind; mechanisms for selection need to provide safeguards, while being flexible enough to allow for meaningful consultation and thorough assessment of candidates.

While it is not the topic of this chapter to examine the model of appointments for staff prosecutors, there are some significant features of these appointments, as set out in Section 16 of the NPA Act, that should be taken into account including the explicit institutional context of legal professionalism (e.g. of the legal profession) for appointments within the NPA and other features such as the institutionalisation of an internship programme for aspirant prosecutors<sup>25</sup>, and a greater role for the NDPP in either recommending someone for appointment or designating someone to do so. In comparison to higher level appointments, the NDPP has a greater say on who is recommended for appointment. As part of the appointment process for prosecutors, the Minister can prescribe legal qualifications but must do so with the agreement of the NDPP and after consultation with DPPs. If the NDPP is appointed through a consultative process that has integrity (i.e. by making use of panels of independent experts), then it could be expected that such a process could influence better prosecutor appointments.<sup>26</sup>

In the appointment of Adv. Shamila Batohi as NDPP, President Ramaphosa called on organisations and public institutions to assist in identifying suitable candidates for the post<sup>27</sup> and exercised his discretion to institute a panel to evaluate applicants, conduct interviews and make recommendations,<sup>28</sup> chaired by Energy Minister Jeff Radebe. Panel members were: 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, President of NADEL. This made the selection process more transparent, accountable and responsive to the current

<sup>25</sup> More information on the Aspirant Prosecutor Internship Programme is available at, <https://www.npa.gov.za/sites/default/files/NPA%20APP%20Brochure%202.pdf> (accessed 9 August 2021).

<sup>26</sup> Prosecutors are appointed subject to public service laws which prescribe the establishment of selection panels, albeit composed of internal members, many of whom should be legally trained.

<sup>27</sup> Law Society of South Africa. (2019, February 11) 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. Retrieved from <https://www.lssa.org.za/news-headlines/press-releases/restoring-the-independence-of-the-prosecutorial-authority-in-south-africa>, 15 March 2019.

<sup>28</sup> Pather, R. (2018, November 13). High court orders NDPP interviews open to media. Mail and Guardian. Retrieved from <https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media>, 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.

political climate in South Africa. It is expected that the President will exercise his discretion and follow a similar procedure to appoint Deputy National Directors of Public Prosecutions.

However, despite the President's initiative to consult and institute a panel, NDPP appointment proceedings were only opened to the media and the public-at-large after a successful urgent court application by the Right2Know Campaign to prevent the process from being shrouded in secrecy.<sup>29</sup> 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.<sup>30</sup> In the absence of such a qualification in law, the procedure to be followed falls to the discretion of the President—which can be dangerous, as attested to by South Africa's recent political history.

There is currently no legislative provision that requires the President (or the Minister in relation to the appointment of DDPPs and acting directors) 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 (or Ministers) who might not be as inclined to adopt an open and participative process for selection. It is for these reasons that this chapter argues for the adoption of regulations to cement this process.

### 1.3 Removal of the NDPP and Deputy NDPPs

The President has the power to remove an NDPP but only on specified and limited grounds after an inquiry has been held, and with the concurrence of Parliament for dismissal on such grounds. Nonetheless, as some commentators have noted, '[...] these 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.'<sup>31</sup> These risks have materialised in South Africa; not one NDPP has served a full term in the past 18 years.<sup>32</sup>

<sup>29</sup> Correspondent. (2018, November 13). Why President Ramaphosa wants NDPP interviews held behind closed doors. News 24. Retrieved from <https://www.politicsweb.co.za/news-and-analysis/why-ramaphosa-wants-ndpp-interviews-held-behind-cl> (accessed 15 March 2019).

<sup>30</sup> Muntingh, L., Redpath, J., & Petersen, K. (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.

<sup>31</sup> Ibid.

<sup>32</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, Para 45, p. 26.



Section 12(6)(a) of the NPA Act enables the President to provisionally suspend the National Director or a Deputy National Director from his or her office, pending an enquiry into his or her fitness to hold such office and, based on such enquiry, remove that person from office on the grounds of misconduct, continued ill-health, incapacity to carry out duties efficiently or no longer being a fit and proper person to hold the office concerned. After such removal, the President must communicate the reason for the removal and representations by the National Director or Deputy National Director (if any) to Parliament (within 14 days if Parliament is in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session). Within 30 days after this message is tabled in Parliament, Parliament is expected to pass a resolution as to whether or not the restoration to office of the National Director or Deputy National Director so removed, is recommended. In terms of Section 12(7), the President can also remove the National Director or a Deputy National Director from office if he or she is presented with 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 above.

In a 2018 case, the Constitutional Court 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’.<sup>33</sup> 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.<sup>34</sup> As noted above, the Ginwala Inquiry in 2007/8 was the first conducted under Section 12(6) of the NPA Act. Although Ginwala found that Adv. Pikoli was indeed a fit and proper person to hold office as NDPP, then-President Kgalema Motlanthe, with the endorsement of Parliament, decided nevertheless to remove him from office. Adv. Nxasana did not undergo a section 12(6) inquiry. The most recent inquiry is the Mokgoro Inquiry, 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.

While it is encouraging that the NPA Act allows for an inquiry to be carried out before the removal of an NDPP or Deputy NDPP, there is no guidance on the form it should take or who should chair it; section 12(6)(a) of the NPA Act only refers to the President undertaking an enquiry ‘as the President deems fit’ into a person’s

<sup>33</sup> Breytenbach, G. (2018, August 21). We should be considering constitutional amendments to ensure an independent NPA. Daily Maverick. Retrieved from <https://www.dailymaverick.co.za/article/2018-08-21-we-should-be-considering-constitutional-amendments-to-ensure-an-independent-mpa/>, 15 March 2019.

<sup>34</sup> Section 193(3) of the Constitution of the Republic of South Africa, 1996.

fitness to hold office. Once again, more explicit regulation to safeguard the independence of the process against vagaries of a sitting President is required.

## 1.4 Suggestions to reform the appointment process of the NDPP

Although the President took important steps to improve the transparency of the appointment process for the most recent NDPP, the selection criteria are not fully defined in the current NPA Act and there is no prescribed procedure for the appointment to be made by the President. In light of the NPA's unstable history there is an urgent need to ensure that inasmuch as the President is mandated to appoint the NDPP, the process becomes much more transparent and participatory to safeguard the independence of the prosecuting authority.

### 1.4.1 *Improving selection criteria*

Although there are certain selection criteria in place, recent work on this subject proposes that criteria for the position of NDPP should be more specific and look to the requirements for the positions of Public Protector or Auditor-General. To qualify for the latter, for example, 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'.<sup>35</sup>

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'.<sup>36</sup> 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, as set out in recent court judgments.

### 1.4.2 *Improving the mechanism to appoint candidates*

There is an urgent need for 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.

<sup>35</sup> African Criminal Justice Reform (2018, October). The Appointment and Dismissal of the NDPP: Instability since 1998. ACJR Factsheet No.7, p. 3.

<sup>36</sup> Muntingh, L., Redpath, J., & Petersen, K. (2017). An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future. pp. 38–39.

Some commentators advocate for Parliament to 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.<sup>37</sup>

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 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).

A sense of professionalism in the position of the NDPP could be instilled by structuring the selection process like that of the JSC. Members of the JSC have a broad set of pertinent skills, and represent different stakeholders with ample representation from members of the legal profession (attorneys, advocates and academics), as well as members of the National Assembly and the National Council of Provinces, who do not make up the majority. Interviews carried out by the JSC are open to the public—even if the JSC's subsequent deliberations are held in private, the record of such deliberations must be made available in certain circumstances.<sup>38</sup> Moreover, civil society organisations such as Judges Matter are able to play an active role in raising awareness about the candidates appearing before the JSC, by providing information about them, and developing questions for them to respond to. The Democratic Governance Rights Unit within the Department of Public Law at the University of Cape Town produces reports that aim 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 the suitability of candidates for appointment to the bench.<sup>39</sup> Although it could be argued that the recent panel to identify and recommend candidates for NDPP was inspired by the composition of the JSC, the panel

<sup>37</sup> *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).

<sup>38</sup> 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/reports-candidates-jsc-hearings> (accessed 15 March 2019).

<sup>39</sup> National Treasury. (2019, February 4). Terms of Reference: Selection Panel to recommend new Commissioner for SARS. Retrieved from [http://www.treasury.gov.za/comm\\_media/press/2019/2019020401%20Panel%20TOR\\_final.pdf](http://www.treasury.gov.za/comm_media/press/2019/2019020401%20Panel%20TOR_final.pdf) 20 March 2020, p. 1.

did not include members of the National Assembly or the NCOP. Considering that independence is a critical quality for the leadership of the prosecuting authority, the lack of panel members selected on the basis of parliamentary membership is to be welcomed. This was also the case with the panel to select and recommend the current SARS Commissioner, which followed the recommendations of the Nugent Commission's Second Interim report (November 2018). The report called for panel members who 'should be apolitical and not answerable to any constituency, and should be persons of high standing who are able to inspire confidence across the tax-paying spectrum'.<sup>40</sup> The composition of the SARS panel is instructive in that it allowed for individuals to form part of the panel as a result of their knowledge, expertise or technical know-how without a specific institutional or professional affiliation. The panel established to recommend NDPP candidates, on the other hand, was constituted by members with professional body or institutional backing selected by such bodies to form part of the panel. Although institutional backing can act as an added safeguard for panel members, the composition of selection panels should be flexible enough to accommodate individuals of 'high standing' with a well-known reputation for their work, skills and abilities, who can contribute to the integrity of the selection process.

## 2. SOUTH AFRICAN POLICE SERVICE (SAPS)

### 2.1 Requirements for appointment of the National Commissioner and Provincial Commissioners

In comparison with requirements for the NDPP, the existing legislative framework has minimal requirements for the appointment of the National Commissioner of the South African Police Service, which has approximately 195,000 members.<sup>41</sup> To put this deficiency in perspective, according to a press release by the Institute for Security Studies in 2017, the selection criteria for the National Police 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.<sup>42</sup>

Contrary to the assumption that the top leadership of the SAPS should be a bastion of integrity, all five of the most recent national commissioners have been sanctioned for criminal acts including fraud, corruption, obstruction of justice,

<sup>40</sup>Nantulya, P. (2018, February 17). South Africa's Strategic Priorities for Reform and Renewal. Africa Center. Retrieved from <https://africacenter.org/spotlight/south-africas-strategic-priorities-reform-renewal/>, 18 March 2019.

<sup>41</sup>Institute for Security Studies. (2017, July). How to appoint an honest and competent police commissioner. July 2017. Retrieved from <https://issafrica.org/about-us/press-releases/how-to-appoint-an-honest-and-competent-police-commissioner>, 17 March 2019.

<sup>42</sup>Nantulya, P. (2018, February 17). South Africa's Strategic Priorities for Reform and Renewal. Africa Center. Retrieved from <https://africacenter.org/spotlight/south-africas-strategic-priorities-reform-renewal/>, 18 March 2019.

and even murder.<sup>43</sup> 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.

To illustrate, section 207(1) of the Constitution simply indicates that '[t]he 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'. In relation to the appointment of provincial commissioners, section 207(3) states that the 'National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province'. It further calls on the Cabinet member responsible for policing to mediate between the parties in instances where the National Commissioner and the provincial executive are unable to agree on the appointment.

Section 199(7) of the Constitution cautions against the security services or any of its members prejudicing political party interests that are legitimate in terms of the Constitution or acting in a political party partisan manner. Yet, 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 (or Provincial Commissioners), except that such persons can be a woman or a man. No more guidance can be found in the South African Police Service Act ('SAPS Act'), 68 of 1995.

All one can glean from section 6 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.<sup>44</sup> 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

<sup>43</sup> Sections (7)(2) and 7(3) of the South African Police Service Act 68 of 1995.

<sup>44</sup> *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.

this position of high responsibility should be exposed to the temptation to 'behave' herself in anticipation of renewal'.<sup>45</sup>

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.<sup>46</sup> Sections of the SAPS Act dealing with misconduct and incapacity of the national commissioner make mention of inquiries to establish whether the person is 'fit for office' and 'capable of executing his or her official duties efficiently'.<sup>47</sup> 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 a 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.<sup>48</sup> In contrast, there are others who hold that policing knowledge is secondary to having good management and leadership skills to lead the police service.<sup>49</sup> 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.

## 2.2 Process of appointment of the National Police Commissioner and Provincial Commissioners

There are no legislative provisions that set out the appointment process to be followed in relation to the National Police Commissioner or Provincial Commissioners. There is also limited information regarding these processes since they have historically taken place beyond the public eye at the discretion of the President or the National Commissioner, respectively.

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,

<sup>45</sup> 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.

<sup>46</sup> Section 9 SAPS Act.

<sup>47</sup> See for instance, Van Heerden, T. J. (1982). *Introduction to police science*. Pretoria: University of South Africa; Bowman, T. L. (2010). *Is policing a job or a profession? The case for a four-year degree*. CALEA Update Magazine, 108.

<sup>48</sup> Schulte, R. (1996). *Which challenges will police managers have to meet in the future?* College of Police and Security Studies, Slovenia.

<sup>49</sup> National Development Plan, p. 391.

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.<sup>50</sup>

The suggestions made in this chapter for the institution of selection and recommendation panels are aligned with the recommendations from the National Development Plan.

### 2.3 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.

In such cases, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson, and two other suitable persons, to conduct an inquiry, compile a report and make recommendations. A similar process as set out for National Commissioners is outlined for cases involving Provincial Commissioners. In respect of Provincial Commissioners, the National Commissioner is called upon to establish a board of inquiry consisting of not more than three persons, with a chairperson who has practised for at least 10 years after having qualified as an advocate or an attorney, or who is otherwise suitably qualified in law.

In comparison to the appointment procedures, the removal procedures require the President to act upon the recommendation of a board of inquiry, 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<sup>51</sup> and provides a mechanism that could be instituted in relation to the removal of leaders in other key criminal justice agencies.

Upon completion of its work, the board must submit its recommendations to the President, the National Commissioner and Parliamentary Committees.<sup>52</sup> Based on the report's recommendations, the President may remove the National Commissioner or 'take any other appropriate action'.<sup>53</sup> If the President postpones his decision for a period, he is required to request the same board of inquiry, or a

<sup>50</sup>Helen Suzman Foundation. (2018, December). The Criminal Justice System: Radical reform required to purge political interference. Retrieved from <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.

<sup>51</sup>Section 8(6)(a), SAPS Act.

<sup>52</sup>Section 8(6)(b) SAPS Act.

<sup>53</sup>Section 8(7) SAPS Act.

similar board established for that purpose, to compile a new report and to make a new recommendation.<sup>54</sup>

An example of such inquiry was undertaken in 2012, chaired by Judge Moloï 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 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.<sup>55</sup>

## 2.4 Suggestions to improve criteria and reform the appointment process of the National Commissioner

One commentator suggests criteria for the position of National Police Commissioner or Deputy National Police Commissioner should include that a candidate must<sup>56</sup> be a citizen of South Africa only, with a South African university degree, who has had a distinguished police career and has been employed in a senior management position for at least 15 years. Moreover, such person should 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. The candidate must not have been convicted of a criminal offence, or of having violated the Constitution.

Whether the selection criteria are detailed in advance as above, or left up to be fine-tuned by a selection panel, it is fundamentally important that a competent and independent panel undertakes a thorough assessment of each candidate.

It would seem that the National Development Plan proposition as set out above calls for a mechanism similar to that being used for the recent appointment of the NDPP and, possibly, future 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, which combines both approaches, 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

<sup>54</sup> Public Protector of South Africa (2010). *Against the Rules Too*, Report of the Public Protector in terms of s 182(1) of the Constitution of the Republic of South Africa, 1996 and s 8(1) of the Public Protector Act, 1994 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 (SAPS) relating to the leasing of SAPS accommodation in Durban, 2011.

<sup>55</sup> Montesh, M. (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*, 1(1), 68–89.

<sup>56</sup> *Ibid*, p. 86.



preference, Parliament would vote on the candidates—a 75% majority of the votes would be required for a candidate to be appointed national commissioner. If Parliament does not agree on any of the names put forward, the process would have to start again and the position re-advertised.<sup>57</sup> This suggestion, however, is quite cumbersome, would require constitutional amendments since the appointment would be done by Parliament and not the President, while it could also become highly politicised to secure the necessary votes.

A different panel-based mechanism was proposed to Parliament in 2017 by the Institute of Security Studies (ISS) and Corruption Watch (CW) for the purposes of the appointments of the national police commissioner and 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 a transparent and public participatory process to undertake the following activities:<sup>58</sup>

1. The establishment of a panel of experts who can develop key selection criteria for both leadership positions.
2. Publicly advertising the positions and making the selection criteria known.
3. Shortlisting the best possible candidates and releasing their CVs for public comments and 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 existing criteria 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, 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, to assist the selection panel in compiling a shortlist

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<sup>57</sup> 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.

<sup>58</sup> Ibid, pp. 5–6.

of up to five candidates who meet the minimum criteria.<sup>59</sup> Importantly, the model emphasises the key role of 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 selecting the head of the DCPI (Hawks) (discussed below).

In addition to a selection panel, amendments to SAPS Employment Regulations of 2018 are needed, 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 decisions to be done ‘in consultation with the Minister’<sup>60</sup> 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 on the SAPS, but also on the Hawks and the 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 occupying posts for which they do not have the required competencies, or employees with criminal records. These posts should be filled following a transparent, merit-based and competitive process.<sup>61</sup>

### 3. 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), known as the ‘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).

#### 3.1 Requirements for appointment of National Head, Deputy Head and provincial heads of DPCI

Echoing some of the criteria set out for the NDPP, section 17CA(1) of the SAPS Act states that the Minister, with the concurrence of the Cabinet, has the power to appoint a South African citizen, who is fit and proper, ‘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 DPCI. Such

<sup>59</sup> See s 47(1) of the SAPS Employment Regulations of 2018, and particularly s 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.

<sup>60</sup> *Ibid*, p. 53.

<sup>61</sup> The case was *Sibiya v Minister of Police and Others* (GP) unreported case no 5203/15 (20 February 2015).

appointments are for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.

Similarly, sections 17CA(4) and (6) of the SAPS Act empower the Minister, in consultation with the National Head of the Directorate and with the concurrence of Cabinet, to appoint a Deputy Head and Provincial Heads, respectively, on the same terms as described in section 17CA(1) above. Unlike with the case of appointments within the NPA, these provisions enjoin the Minister to act ‘in consultation with’ the National Head of the DPCI, thus requiring a level of concurrence in the decision-making with the National Head, in addition to the Cabinet.

The courts have had ample opportunity to pronounce on the meaning of the ‘fit and proper’ requirement following the findings 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 at the time, Police 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 a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza’s integrity was called into question.<sup>62</sup> 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.<sup>63</sup>

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 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.<sup>64</sup>

<sup>62</sup> *Helen Suzman Foundation and Freedom Under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68, Para 37, p. 26.

<sup>63</sup> *Ibid*, Para 39, p. 27.

<sup>64</sup> *Helen Suzman Foundation and Freedom under Law v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68, Para 35, p. 25.

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 ordered that these provisions be deleted from the Act.

### 3.2 Process of appointment of the Head of the DPCI, Deputy Head and provincial heads

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. While Cabinet must concur with the Minister's decision, this provision does not delineate how the process of assessment and selection should be undertaken in the first place.

Importantly, however, 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, in line with 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 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 to determine 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.<sup>65</sup>

... 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.<sup>66</sup>

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. The establishment of a selection panel could assist in ensuring that all relevant material evidence is properly considered.

<sup>65</sup> Ibid, Para 36, p. 26.

<sup>66</sup> *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.

### 3.3 Removal process

Section 17DA of the SAPS Act deals with the removal from office of the National Head of the DPCI. Removal on the ground of misconduct, incapacity or incompetence can be undertaken based on a finding by a Committee of the National Assembly and the adoption by the National Assembly of a resolution, supported by a two-thirds majority of its members, calling for that person's removal from office.

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 of the DPCI from office in section 17DA is a threat to his/her job security, whereas the suspension and removal of the Head through a parliamentary process, guarantees job security and provides a level of independence. While a two-thirds majority of National Assembly members is required for removal, the reliance on Parliament could nonetheless result in decisions being carried out according to party or coalition lines rather than based on the merits of the case.

## 4. 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. Since IPID is mandated to investigate police conduct, it is imperative that the institution is 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'.<sup>67</sup> Moreover, in its role as 'watchdog over the police', in order to uphold its credibility and the confidence of the public it is necessary for IPID to 'be not only independent but [...] also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister'.<sup>68</sup>

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.

### 4.1 Requirements for appointment

The only requirement that appears in section 6(1) of the IPID Act is that the person nominated as Executive Director of IPID 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

<sup>67</sup> *McBride v Minister of Police and Another* [2016] ZACC 30, Para 41, p. 23.

<sup>68</sup> *Helen Suzman Foundation in re Robert McBride and the Minister of Police*, Case no. 6175/19 of 21 February 2019.

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 have been described earlier in this chapter.

## 4.2 Power to appoint and process of appointment

Section 6(1) of the IPID Act, 1 of 2011, vests the Minister of Police with the power to nominate a person to be appointed as 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 in 2012. Like in the case of the DPCI and SAPS, the Executive Director has the power to appoint provincial heads of IPID.

The only oversight measure that the Act allows in the process of appointment for the Head of IPID 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. Reliance on parliamentary committees carries the obvious risk that party members would vote to support a particular party position and not necessarily informed by the merits of the candidate. There is also no procedure set out to inform how the Minister of Police is expected to arrive at a nomination to be presented to Parliament (i.e., whether by himself, or based on the recommendations of some form of panel).

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.<sup>69</sup> 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 political actors. An application for leave to appeal to the Supreme Court of Appeal against this court order was rejected on the basis that the Minister's role is limited to making a non-binding recommendation on renewal, which the

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<sup>69</sup> Petersen, T. (2018, September 4). Greater independence for IPID closer as amendment bill approved. News 24. Retrieved from <https://www.polity.org.za/article/greater-independence-for-ipid-closer-as-amendment-bill-approved-2018-09-05> (accessed 21 March 2019).

Portfolio Committee can either reject or confirm as a protection to safeguard IPID's independence. In May 2021, the Constitutional Court was approached for leave to appeal this decision; the matter is pending.<sup>70</sup>

The appointment of the Executive Director subject to the laws governing the public service was challenged in the Constitutional Court as falling short of the independence from political interference required by an entity like IPID, 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. In 2019, the Amendment Bill was approved by the National Assembly and by the National Council of Provinces.<sup>71</sup> The IPID Amendment Act was assented to by the President on 3 June 2020 and contains provisions similar to those governing the removal of the Head of the DPCI. However, such provisions do not extend to the process of nomination and selection of the Head of IPID.

### 4.3 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.<sup>72</sup>

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.<sup>73</sup> 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

<sup>70</sup> Helen Suzman Foundation, (2021). 'HSF Approaches Constitutional Court for Leave to Appeal against order Sanctioning Unlawful IPID Agreement', Press Release, 3 May 2021, available at: <https://hsf.org.za/news/press-releases/press-release-hsf-approaches-constitutional-court-for-leave-to-appeal-against-order-sanctioning-unlawful-ipid-agreement>.

<sup>71</sup> *McBride v Minister of Police and Another* [2016] ZACC 30 Para 39, pp. 22–23 (emphasis added).

<sup>72</sup> Helen Suzman Foundation. (2018, December). The Criminal Justice System: Radical reform required to purge political interference. Retrieved from <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf> 7 March 2019, p. 9.

<sup>73</sup> *McBride v Minister of Police and Another* [2016] ZACC 30, Para 38, p. 22.

being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.<sup>74</sup>

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 did not become law within that period. On 3 June 2020 the President finally assented to the Act, which requires Parliament to have an oversight role in which a two-thirds majority vote is needed in the National Assembly to remove the Executive Director of IPID.<sup>75</sup> However, the IPID Amendment Act does not incorporate changes to recruitment criteria or the process of appointment.

## CONCLUSION

This chapter has provided a detailed breakdown of existing requirements, appointment and removal processes for senior leadership within the NPA, SAPS, DPCI and IPID. In some 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, both real and perceived, 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. To mitigate against this predominant executive power, the chapter has argued for the establishment of selection panels made up of competent, diverse and professional members who have the knowledge and experience to contribute to the making of rational decisions in relation to the selection and recommendation of candidates for appointment, as well as their removal.

Since the focus of this chapter has been on the procedures followed in relation to senior leadership positions, it has not dealt in detail with possible political interference evidenced by the power of the Minister of Justice to appoint Deputy Directors and Acting Directors of Public Prosecutions with very limited say by the NDPP, under whose control and direction such persons must discharge their duties, and of the Minister of Police in relation to senior management appointments in the SAPS. Such analysis should be linked to measures to reform recruitment practices

<sup>74</sup> Petersen, T. (2018, September 4). Greater independence for IPID closer as amendment bill approved. News 24. Retrieved from <https://www.polity.org.za/article/greater-independence-for-ipid-closer-as-amendment-bill-approved-2018-09-05> (accessed 21 March 2019).

<sup>75</sup> National Treasury (2019, March 21). Report to the Minister of Finance: Appointment of Commissioner of the South African Revenue Service, Report of the Selection Panel for Commissioner of SARS. Retrieved from [http://www.treasury.gov.za/comm\\_media/press/2019/2019032701%20Report%20of%20the%20Selection%20Panel%20for%20Commissioner%20of%20SARS.pdf](http://www.treasury.gov.za/comm_media/press/2019/2019032701%20Report%20of%20the%20Selection%20Panel%20for%20Commissioner%20of%20SARS.pdf), 20 March 2020, p. 3.



more broadly, as echoed in Chapter 13 of the National Development Plan, particularly in relation to the blurring of the political administrative divide, accountability and reporting lines, brought about by Ministerial appointments below the level of Director-General.

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## APPENDIX

### Specific Proposals for Appointments and Removals in Key Criminal Justice System Institutions

#### Criteria for selection

The criteria for selection can be defined in broad strokes, with the proviso that the selection mechanism 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. In other words, there needs to be a degree of flexibility for the selection panel/board to adjust criteria based on candidates who have applied. This method was adopted in the selection process for the SARS Commissioner.

Taking into consideration that South African courts and commissions of enquiry 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 candidate selection should include, at a minimum, the following:

- Legal qualifications that entitle the candidate to practice in the Republic, particularly for NPA appointments.
- Being 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 (e.g., criteria for SARS Commissioner).
- Demonstrated ability to uphold the principles in section 195 of the Constitution.

#### 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.

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

To enhance the transparency and integrity of the appointment process, it is proposed that appointments be made from recommended candidates put forward by a selection panel or board. 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 persons representing a broad range of skills, knowledge and stakeholders to be able to assess candidates competently.
2. Panels for the top posts should be appointed by the President/Minister (depending on the post).
3. Panel members should comprise stakeholders derived from professional bodies, academic institutions and 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 a chair (Minister in the case of the NDPP and Deputy NDPP; NDPP as chair in the case of lower-ranking appointments).
  - (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.
4. After applications have been received, the panel should publish the names of candidates so that the public is able to lodge objections.
5. The panel shortlists and holds interviews in public.
6. Panel recommends up to five candidates based on decisions supported by a majority of votes of panel members.

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

1. Establish a board of enquiry made up of a 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.
2. 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 and reasons should be provided.
3. Parliament is then required to pass a resolution on whether or not restoration to office of the person who has been removed, is recommended.

This short policy-oriented book analyses three distinct and key parts of the South African public administration: the system of recruitment and appointment of public servants, high-level appointments within the criminal justice sector, and public procurement. The three chapters argue for feasible and effective reforms within each of these parts of the state.

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“This is a highly impressive, timely, and relevant collection of reviews and proposals.

The chapters are carefully grounded in research, with some original ideas, and well written. The summary of practical proposals for reform at the end of each chapter is constructive, especially given the many challenges faced by the public service. This book is mandatory reading for those seeking to realise the constitutional values of accountability, responsiveness and openness.”

Prof Hugh Corder, University of Cape Town, Faculty of Law

“The building (and the rebuilding) of a capable state is a crucial task in our society. The proposals collected by PARI in this brief book identify several places where it is urgently needed to begin this work. It will be up to all of us – as engaged citizens, political leaders, and hardworking civil servants – to take these ideas forward.”

Ms Pam Yako, Zenande Leadership Consulting, former Director-General, Department of Water Affairs, and former Director-General, Department of Environmental Affairs and Tourism

*“Reforming Public Administration in South Africa: a Path to Professionalisation* delivers an incisive critique of why the progressive aims of building a professional and ethical democratic public service have faltered. With a focus on the corrosive effects of political interference on recruitment, appointments and dismissals, and procurement, the contributors offer a concrete plan for rebuilding the institutional integrity of the South African public service from the inside out.”

Dr Vinothan Naidoo, University of Cape Town, Department of Political Studies

2021

