The South African Prosecution Service: Linchpin of the South African Criminal Justice System?

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Abstract

The prosecution service is a key role player in the criminal justice system. Its effectiveness and efficiency directly reflect on the performance and service of the whole criminal justice system. The South African prosecution service in its current shape is relatively young. Constitutional and legislative provisions supplemented by various policy papers have established a framework that in principle allows for an effective and efficient function of the prosecution service in the South African criminal justice system. However, the actual performance of the prosecution service is insufficient, as this thesis suggests. Reasons for the current underperformance can be identified and are strongly linked to the transitional development of the South African prosecution service. In order to increase the performance of the prosecution service and the service of the criminal justice system this thesis explores the challenges facing the prosecution service and that have to be addressed immediately.

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The South African Prosecution Service: Linchpin of the South African Criminal Justice System?

I. Introduction

South Africa is still afflicted with high levels of crime.[1] A recently submitted report of the African Peer Review Mechanism (APRM) lists what it sees as the 15 key threats to the stability of South Africa's democracy.[2] Apart from threats such as unemployment, poverty and the huge gap between rich and poor, the high levels of crime, especially violent crime and crimes against women and children, are highlighted. The South African government is 'urged' to make the fight against crime its 'top priority'.[3] Despite all the efforts the South African government has undertaken in the last decade, it seems that new ideas and approaches are required and existing measure have to be intensified. Although combating crime is a national task that requires the exertion of all institutions and members of the South African society, such as state departments and agencies, non-governmental organisations and the civil society, it poses the question whether the South African criminal justice system is effectively and efficiently addressing crime. The high crime levels place an immense burden on the South African criminal justice system and every single role player in it.

In South Africa, just as in most countries of the world, the criminal justice system is based on three major pillars: the police, the prosecution service and the courts, and the prison system.[4] The prosecution service – as part of the second pillar – has a huge importance for the successful operation of the criminal justice system. Even proper and sound investigation by the police, for example, will not lead to a conviction when the prosecution fails to present the evidence properly at court. The prison system also relies heavily on

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[1] Recent developments in South Africa's crime statistics are discussed by Louw, A. 'South Africa: The 2005/06 Official Crime Statistics in Context' (2006) *ISS Today*, available at: http://www.issafrica.org/static/templates/tmpl_html.php?node_id=1789&link_id=14, accessed: 04.01.2007.

[2] Burger, J. 'Fight Crime, Africa tells South Africa – Brendan Boyle, *Sunday Times*, 3 December 2006' (2006) *ISS Today*, available at: http://www.issafrica.org/index.php?link_id=14&slink_id=3942&link_type=12&slink_type=12&tmpl_id=3, accessed: 04.01.2007.

[3] Ibid.

[4] Schönteich, M. 'Lawyers for the people: The South African Prosecution Service' (2001) *ISS Monograph* No 53, Pretoria: Institute for Security Studies, p. 15.

prosecutorial work. On the one hand, only successful convictions will get criminals in the care of the correctional service.[5] On the other hand, a too strict prosecution policy can easily overfill the prisons and turn prison conditions to the worse.

High workloads within criminal justice systems are not a particular South African problem, although the pressure might be here – compared to other countries – higher. It seems to be a general feature of modern criminal justice systems that the prosecution service gains more importance, especially in relieving justice systems from their overload.[6] In South Africa where resources in the criminal justice system are quite limited this aspect is of particular importance.

The aim of this thesis is therefore to explore whether the South African prosecution service is currently able to cope with the high pressure it is facing and, based on that, to identify its future challenges.

In order to achieve this aim the thesis, firstly, analyses how the prosecution service has evolved and is shaped by the South African Constitution[7] and the National Prosecuting Authority Act[8] in its organisation and work. It is also considered how these provisions are supplemented by prosecution and state policy papers.

Secondly, the thesis assesses with regard to several indicators the performance of the prosecution service. Thirdly, with regard to the transitional development reasons for the currently achieved performance are identified.

Finally, based on the findings of this thesis the major challenges facing the South African prosecution service in improving its performance and the service of the criminal justice system are determined and discussed.

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[5] Of course, the final decision whether a person will be convicted or not rests with the courts.
[6] Discussed in the European context by Jehle, J.-M. and Wade, M. (eds.) *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe* (2006) Berlin, Heidelberg: Springer.
[7] Constitution of the Republic of South Africa, 1996, hereinafter referred to as the South African Constitution.
[8] National Prosecuting Authority Act No 32 of 1998, hereinafter referred to as the National Prosecuting Authority Act.

II. Historic evolution of the South African Prosecution Service

The South African prosecution service in its current form – shaped by the South African Constitution and the National Prosecuting Authority Act – is relatively young. The historical evolution of the South African prosecution service can be traced back to the arrival of the first Europeans at the Cape.[9] Issues surrounding the introduction of a single national prosecuting authority and accompanying constitutional and legislative provisions might only be comprehensible against the backdrop of the more recent history of the prosecution service. For example, the degree of independence the prosecution service enjoys today cannot be measured entirely without taking previous arrangements into account.

At the beginning of the 20th century – after the second Anglo-Boer War (1899-1902) the four territories that later became the Union of South Africa had attorneys-general who prosecuted criminals in the name of the English Crown.[10] As elected members of the colonial cabinets they were directly accountable to the electorate and therefore there was the obvious risk that their work would be influenced by their desire to be re-elected.[11]

In 1910, when the Union of South Africa was formed, the post of Minister of Justice was created in the national cabinet.[12] In each provincial division of the newly established union-wide Supreme Court, an attorney-general was appointed with the authority to prosecute.[13] Each attorney-general prosecuted on behalf of the state or delegated his authority – at the lower level – to police officers and – in the Supreme Court – to trial advocates in private practice.[14] The attorneys-general were independent civil servants, responsible for all prosecutions that took place in their area of jurisdiction and legally free from ministerial constraint and parliamentary responsibility.[15]

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[9] Schönteich, M. 'Court Room Warriors for Justice: History of the South African Prosecution Service' (2002) *Journal for Contemporary History* Vol. 27, Issue 3, 82-104, p. 82; Schönteich *op cit* (note 4), p. 27.
[10] Van Zyl Smit, D. and Steyn, E. 'Prosecuting Authority in the New South Africa' *Centre for the Independence of Judges and Lawyers Yearbook* 2000 Vol. VIII, 137-155, p. 138.
[11] Ibid.
[12] South Africa Act 1909, section 139.
[13] South Africa Act 1909, section 139; Criminal Procedure Act No 31 of 1917, section 7.
[14] Van Zyl Smit, Steyn *op cit* (note 10), pp. 138 f.
[15] Ibid, p. 139.

Concern about the far reaching powers of the attorneys-general and their independence and freedom from political control led to an amendment of the Criminal Procedure Act in 1926.[16] A previous dispute between the Minister of Justice and an attorney-general who refused to prosecute in a particular matter as the Minister had instructed him had been the final catalyst.[17] The amended Act gave the Minister of Justice 'all powers, authorities and functions relating to the prosecution of crimes and offences.'[18] As a result the attorneys-general lost all their independence; their authority to prosecute had to be assigned to them by the Minister of Justice.[19] With this provision it was sought to guarantee parliamentary responsibility for prosecutorial decisions.[20]

Two attorneys-general resigned to protest against this legislation.[21] Additionally, after some time the 1926 legislation proved that it had imposed a very high managerial and administrative burden on the Minister of Justice.[22] Therefore, in 1935, the power of prosecution was relocated to the attorneys-general, but subject to the control of the Minister of Justice.[23] The Minister was entitled to issue directions to attorneys-general to exercise their powers directly in any specific matter and reverse any decision arrived by an attorney-general.[24] These provisions remained in their essence valid until the early 1990s[25] with the result that until that time there was no formal or substantive separation of powers between an attorney-general and the executive. Direct and indirect political influence was possible.[26] Moreover, attorneys-general and their staff were civil servants which impacted also negatively on their independence, as this subjected them to ultimate ministerial control.[27]

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[16] Schönteich *op cit* (note 4), pp. 31 f.
[17] Van Zyl Smit, Steyn *op cit* (note 10), p. 139.
[18] Criminal and Magistrate's Court Procedure (amendment) Act No 39 of 1926, section 1(3).
[19] Schönteich *op cit* (note 4), p. 32.
[20] Van Zyl Smit, Steyn *op cit* (note 10), p. 140.
[21] Schönteich *op cit* (note 4), p. 32.
[22] Bekker, P. M. 'National or Super Attorney-General: Political Subjectivity or Juridical Objectivity?' (1995) *Consultus* Vol. 8, Issue 1, 27-31, p. 27.
[23] Schönteich *op cit* (note 4), p. 32.
[24] General Law Amendment Act No 46 of 1935, section 1 repealed the 1926 amendment of section 7 of the Criminal Procedure Act No 31 of 1917.
[25] Criminal Procedure Act No 56 of 1955, section 5(3); Criminal Procedure Act No 51 of 1977, section 3(5).
[26] D'Oliveira, J. A. 'The office of the Attorney-General' (1993) *Nuntius* Vol. 23, 70 f, p. 70.
[27] Van Zyl Smit, Steyn *op cit* (note 10), p. 141.

Although anecdotal evidence suggests that ministerial interference hardly ever happened, the legal provisions allowing it were strongly criticised.[28]

In 1992, legislation was passed that complied with the critique and removed attorneys-general from the control of the Public Service Commission and entrenched the non-interference of the Minister of Justice.[29] The authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free from ministerial interference.[30] Guaranteed remuneration[31] and security of tenure of office[32] enhanced the independence of the attorneys-general. The function of the Minister of Justice was reduced to that of a coordinator:

> 'to ensure that the reports of the attorneys-general were submitted to Parliament. At most he could request an attorney-general to furnish him with a report and to provide reasons regarding the handling of particular cases.'[33]

The Attorney-General Act No 92 of 1992 strengthened the authority of the provincial prosecutors and made the attorney-general in each province independent of the executive.

> 'They were accountable only to Parliament and then only in the limited sense that Parliament could question them about their annual reports.'[34]

South Africa's new ruling party, the African National Congress (ANC) viewed this Act with suspicion, as an attempt by the old regime to protect the entrenched position of the incumbent attorneys-general.[35] Some of the attorneys-general played a significant role in the aggressive prosecutions of political cases during the apartheid era.[36] Therefore the 1996 Constitution

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[28] Critique mentioned, for example, in: D'Oliveira *op cit* (note 26), p. 70; Schönteich *op cit* (note 4), p. 33.
[29] Attorney-General Act No 92 of 1992.
[30] The Attorney-General Act No 92 of 1992 repealed section 3(5) of the Criminal Procedure Act 51 of 1977 whereby the Minister of Justice could reverse any decision arrived at by an attorney-general.
[31] The salary of an attorney-general should not longer be reduced by the hands of the executive, only an act of parliament could do so (Attorney-General Act No of 1992, section 3(1)(b)).
[32] Attorney-General Act No 92 of 1992, section 4.
[33] Van Zyl Smit, Steyn *op cit* (note 10), p. 142; compare Attorney-General Act No 92 of 1992, section 5(5).
[34] Van Zyl Smit, Steyn *op cit* (note 10), p. 142.
[35] Ibid, p. 143.
[36] Stone, Christopher, America, Cheslan, Braid, Michelle India and the Staff of the Bureau of Justice Assistance and the Vera Institute of Justice *Prosecutors in the Frontline: Increasing the Effectiveness of Criminal Justice in South Africa* (2003), p. 8.

ended the brief period of autonomy by a firm integration of the prosecution service with the rest of the criminal justice system.

III. Constitutional and legislative framework

The prosecution service in its current form is shaped by the South African Constitution and the National Prosecuting Authority Act.

1. The South African Constitution

The South African Constitution deals in terms of section 179 specifically with the prosecuting authority for South Africa. Important features are:

The introduction of a single national prosecuting authority in South Africa, structured in terms of an Act of Parliament.[37] The National Prosecuting Authority is headed by a national director of public prosecutions who is appointed by the President and consists furthermore of directors of public prosecutions and prosecutors.[38] The prosecuting authority has the power to institute criminal proceedings on behalf of the state.[39] National legislation has to ensure that the prosecuting authority exercises its functions 'without fear, favour or prejudice.'[40]

The National Director must determine, with the concurrence of the Minister of Justice, and after consultation with the Directors of Public Prosecutions, prosecution policy that has to be observed in the prosecuting process.[41] Additionally, the National Director has to issue policy directives to be observed in the prosecution process,[42] and has the right to intervene in the prosecution process when policy directives are not complied with.[43] Finally, the National Director is entitled to review a decision to prosecute or not to prosecute, after

[37] Section 179(1).
[38] Section 179(1)(a), (b).
[39] Section 179(2).
[40] Section 179(4).
[41] Section 179(5)(a).
[42] Section 179(5)(b).
[43] Section 179(5)(c).

consulting with the relevant directors of public prosecutions.[44] The Minister of Justice must exercise final responsibility over the prosecuting authority.[45]

2. Issues surrounding the constitutional provisions

The constitutional provision dealing with the prosecuting authority was highly controversial and its constitutionality was challenged immediately.[46] The newly established Constitutional Court had been empowered by the 1993 interim Constitution[47] to test whether the 'final' Constitution complied with constitutional principles. These principles had been added as a schedule[48] to the interim Constitution and - in accordance with a majority rule – had to be met by the final Constitution.[49] It was argued that section 179 infringed the principle of separation of powers between the legislature, executive and judiciary.[50] The objection was based primarily on the fact that in terms of section 179(1) the National Director of Public Prosecutions is appointed by the President as head of the national executive.[51]

The Constitutional Court rejected this objection and held that the prosecuting authority was not part of the judiciary and that Constitutional Principle VI had no application to it.[52] In any event the appointment of the National Director of Prosecutions by the President did not in itself contravene the doctrine of the separations of powers. Moreover, the court noted that section 179(4), which provided that an Act of Parliament had to ensure that the prosecuting authority 'exercises its functions without fear, favour or prejudice,' was a constitutional guarantee of prosecutorial independence.[53]

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[44] Section 179(5)(d).
[45] Section 179(6).
[46] Van Zyl Smit, Steyn *op cit* (note 10), p. 144.
[47] Interim Constitution of the Republic of South Africa Act No 200 of 1993, hereinafter referred to as the interim Constitution.
[48] Schedule 4.
[49] Van Zyl Smit, Steyn *op cit* (note 10), p. 144.
[50] Schedule 4, Constitutional Principle VI:

> 'There shall be a separation of powers between the legislative, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.'

[51] *Ex parte Chairperson of the Constitutional Assembly, in re certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), at 818 para 141.
[52] Ibid.
[53] Ibid, at 819 para 146.

3. The National Prosecuting Authority Act

Section 179 of the South African Constitution requires that national legislation stipulates the details of the new prosecutorial system for South Africa. In 1998 Parliament fulfilled this constitutional requirement and passed the National Prosecuting Authority Act.

The Act determines the structure and composition of the new established centralised National Prosecuting Authority (NPA).[54] Furthermore, it provides for the appointment, remuneration and conditions of service of the NPA members[55] and determines their powers, duties and functions.[56] While section 7 provides for investigating directorates, the powers, duties and functions relating to them are determined in chapter five. Chapter six of the NPA Act deals with general provisions, such as the impartiality of prosecutors, the Minister's final responsibility over the prosecuting authority and the accountability of the NPA to Parliament, including the duty of annual submitted reports. Chapter six also includes provisions regarding expenditure and administrative staff of the NPA, and other regulations, such as the non liability of prosecutors who performed in good faith under the Act.

The last chapter of the NPA Act deals with transitional arrangements following the Act, such as the application of the Act to prosecutors who had already been appointed under the previous legislation or to criminal proceedings which had been instituted before the commencement of the NPA Act.

In 2001 the National Prosecuting Authority Act was amended[57] and the Directorate of Special Operations (DSO) was formally[58] established as an investigating directorate of the NPA.

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[54] Chapter 2.
[55] Chapter 3.
[56] Chapter 4.
[57] The National Prosecuting Authority Amendment Act No 61 of 2000 came into operation in January 2001.
[58] The Directorate of Special Operations – colloquially referred to as the Scorpions – was launched in September 1999 in Guguletu near Cape Town (Redpath, J. 'The Scorpions – Analysing the Directorate of Special Operations' (2004) *ISS Monograph* No 96, Pretoria: Institute for Security Studies, p. 12).

a) Structure of the NPA

The NPA consists of the office of a national director, and the offices of the prosecuting authority at the high courts.[59] The office of the National Director consists of the National Director of Public Prosecutions (NDPP) who is the head of the office[60] and up to four deputy national directors of public prosecution (DNDPPs).[61] At the discretion of the National Director, any of the Deputy National Directors may exercise or perform any of the powers, duties and functions of the National Director.[62] Currently there are deputy national director posts in existence for the following NPA components:

aa) National Prosecution Service (NPS)

The offices of the National Prosecution Service at the seat of each of the nine divisions of the high court in South Africa and the Witwatersrand local division of the high court fall under the control of a deputy national director. Every office is headed by a director of public prosecutions (DPP) or deputy director of public prosecutions (DDPP).[63] Offices are staffed by one or more deputy directors of public prosecutions, state advocates, prosecutors and administrative staff.[64] The head of the office supervises, directs and co-ordinates the work and activities of all deputy directors, state advocates, chief prosecutors and prosecutors attached to the office.[65]

bb) Directorate of Special Operations (DSO)

The Directorate of Special Operations has the aim to investigate and carry out any functions incidental to investigations; to gather, keep and analyse crime information; and to institute criminal proceedings and carry out any necessary functions incidental to criminal proceedings relating to offences or any

[59] NPA Act, section 3.
[60] Ibid, section 5(2)(a).
[61] Ibid, section 5(2)(b); NPA Act No 32 of 1998, as amended, section 11(1).
[62] Ibid, section 23.
[63] Ibid, section 13(1)(a): Directors of public prosecutions are appointed by the President after consultation with the Minister of Justice and the National Director of Public Prosecutions.
[64] Ibid, section 6(2).
[65] Ibid, section 24(1)(b).

criminal or unlawful activities committed in an organised fashion, or such other offences or categories of offences as determined by the President.[66]

The head of the Directorate of Special Operations is also a deputy national director.[67] The directorate is staffed by investigating directors, deputy directors, special investigators, prosecutors, and persons necessary in achieving its objectives.[68]

cc) Asset Forfeiture Unit (AFU)

The Asset Forfeiture Unit implements the asset forfeiture provisions in Chapters five and six of the Prevention of Organised Crime Act No 121 of 1998 (POCA).[69] The head of the unit is again a deputy national director.

dd) National Special Services Division (NSSD)

The head of the National Special Services Division is also a deputy national director. The division comprises the Priority Crimes Litigation Unit (PCLU), the Specialised Commercial Crime Unit (SCCU), the Sexual Offences and Community Affairs (SOCA) Unit and the Witness Protection Unit (WPU).[70] Every unit is headed by a special director. Special directors are directors of public prosecutions who have specific powers, functions and duties assigned to them.[71]

ee) Corporate Service (CS) Division

The Corporate Services Division provides the NPA and its several components with a wide range of administrative, managerial and support services.[72] For example, the Corporate Services Division has developed a strategy for the NPA

[66] Ibid, section 7(1)(a), as amended.
[67] Ibid, section 7(3)(a), as amended.
[68] Ibid, section 7(4)(a), as amended.
[69] National Prosecuting Authority of South Africa *Annual Report 2005/2006* (2006), p. 28; hereinafter referred to as the NPA Annual Report 2005/06.
[70] NPA Annual Report 2005/06, p. 60.
[71] NPA Act, section 13(1)(c).
[72] NPA Annual Report 2005/06, pp. 7 ff, 54 ff.

and its components covering the years till 2020 with regard to governance, delivery and resourcing.[73]

b) Single provisions of the NPA Act

aa) Powers of the National Director

The National Director of Public Prosecutions has complete authority over all prosecutions and members of the prosecution service.[74] He must,

> 'with the concurrence of the Minister of Justice, and after consulting the directors of public prosecutions, determine prosecuting policy and issue policy directives which must be observed in the prosecution process.'[75]

In the literature[76] it is argued that the precise wording of this provision is important. The 'concurrence' of the Minister means that the National Director requires his approval, in other words the Minister can veto policy proposals made by the National Director.[77] Conversely, 'after consultation' means that the National Director can go ahead and ignore the input of the Directors of Public Prosecutions if he disagrees with it.[78]

The National Director also has the power to intervene in any prosecution process when policy directives are not complied with.[79] Closely connected to this is his power to review a decision to prosecute or not to prosecute, after consulting the relevant director of public prosecutions, and after hearing representations from the accused person, the complainant and any other person deemed relevant.[80] Although this latter power appears to exist even where policy directives are being followed, it is limited to review decisions on whether to prosecute or not and would not include a direct intervention in the way a case is presented in court, for example.[81]

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[73] NPA Annual Report 2005/06, p. 11 (Strategy 2020).
[74] Ibid, section 22(1).
[75] Ibid, section 21(1).
[76] Van Zyl Smit, Steyn *op cit* (note 10), pp. 147, 148; Schönteich *op cit* (note 4), p. 39.
[77] Ibid.
[78] Ibid.
[79] NPA Act, section 22(2)(b).
[80] Ibid, section 22(2)(c).
[81] Van Zyl Smit, Steyn *op cit* (note 10), p. 148.

bb) Appointments

The National Director of Public Prosecutions is appointed by the President only.[82] Deputy national directors of public prosecutions, directors of public prosecutions and 'special directors' are also appointed by the President, but in consultation with the Minister of Justice and the National Director.[83]

Prosecutors are appointed on the recommendation of the National Director or members of the National Prosecuting Authority designated by him.[84]

cc) Terms of office and remuneration

The National Director is appointed for a non-renewable period of ten years.[85] Deputy national directors and directors of public prosecution serve unrestricted terms until the age of 65 years.[86] The grounds on which the National Director, his deputies or directors may be suspended or removed from office are limited and any such decision of the President must be ratified by Parliament.[87] The President must remove the National Director, his deputies or a director from office if requested to do so by both Houses of Parliament.[88]

The remuneration and terms of conditions of service of the National Director, his deputies and directors are determined by the President provided that the salary of the National Director is at least that of a high court judge.[89]

Deputy Directors and other prosecutors below that rank are largely subject to public service rules in relation to their appointment and dismissal.[90] Their salaries are determined by the Minister of Justice after consultation with the National Director and the Minister of Public Services and Administration, and with the concurrence of the Minister of Finance.[91] It is argued that the effect of

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[82] NPA Act, section 10 (as decreed in section 179(1)(a) of the South African Constitution).
[83] Ibid, section 11(1), as amended, and section 13(1)(a), (c).
[84] Ibid, section 16(1).
[85] The term of office will be shorter, if the National Director turns 65 before the end of his term, NPA Act, section 12(1).
[86] Ibid, sections 12(2), 14(1).
[87] Ibid, sections 12(6), 14(3).
[88] Ibid, sections 12(7), 14(3).
[89] Ibid, section 17(1)(a); the salary of a deputy national director may not be less than 85% of that of the National Director, the salary of a director may not be less than 80% of the salary of the National Director (Ibid, section 17(1)(a), (b)).
[90] Ibid, section 19.
[91] Ibid, section 18.

these arrangements is that prosecutors are structurally far less independent than their more senior colleagues.[92]

dd) Impartiality and non-interference

According to section 32(1)(a) of the National Prosecuting Authority Act, members of the NPA are obliged to

> 'serve impartially and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.'

This provision is designed to deter NPA members from submitting to undue outside influence.[93] Conversely, section 32(1)(b) stipulates that, subject to the Constitution and the Act, no organ or member of the state or any other person shall interfere with, hinder or obstruct the Prosecuting Authority. Contravention of this provision is an offence.[94]

ee) Investigating directorates

Before the promulgation of the National Prosecuting Act, prosecutors did not have the authority to investigate crimes.[95] At best, they could monitor and guide police investigation, but the police were not obliged to follow their instructions.[96] Under the new Act directors of public prosecutions can oblige the police to conduct investigations and obtain statements.[97] Moreover, formal investigative powers are granted to the Prosecuting Authority through the structure of investigating directorates.

The President may – on recommendation of the Minister of Justice and the National Director and after submission to Parliament – establish – apart from the Directorate of Special Operations – not more than two additional investigating directorates in the office of the National Director.[98] Every

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[92] Van Zyl Smit, Steyn *op cit* (note 10), p. 147.
[93] Schönteich *op cit* (note 4), p. 41.
[94] NPA Act, section 41(1).
[95] Schönteich *op cit* (note 4), p. 41.
[96] Ibid.
[97] NPA Act, section 24(4)(c).
[98] Ibid, sections 7(1A), (2), as amended.

investigating directorate is headed by a director of public prosecutions[99] who is – after consultation with the Minister of Justice and the National Director – appointed by the President.[100] Investigating directors are subjected to the control and directions of the National Director.[101] Investigating directors are assisted by deputy directors of public prosecutions, prosecutors, civil servants or employees of any public or other body seconded to the investigating directorate and any other person whose services are obtained by the head of the investigating directorate.[102] This permits investigating directorates to be staffed with a multidisciplinary team of people who can contribute their skills in fulfilling the mandate of the directorate.[103]

Investigating directorates may conduct investigations and then prosecute on the result of such investigations. For this purpose investigating directorates are granted considerable powers.[104] If an investigating director has reason to suspect that a specified offence has been or is being committed, or that an attempt is being made to commit such an offence, he may conduct an investigation on the matter in question.[105] The investigation can be extended to include any offence which may be connected with the subject of an investigation.[106] An investigating director can summon any person, who is believed to be able to furnish information on the subject of the investigation, or has any document or other object relating to this subject, to appear before him.[107] Summoned persons can be questioned under oath by an investigating director or a person designated by him; documents and other objects can be examined or retained.[108] Summoned persons are not entitled to refuse to answer any question upon the ground that the answer could expose them to a criminal charge.[109]

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[99] Ibid, section 7(3)(b), as amended.
[100] Ibid, section 13(1)(b).
[101] Ibid, section 7(3)(b), as amended; section 20(3).
[102] Ibid, section 7(4)(a) as amended.
[103] Schönteich *op cit* (note 4), p. 42.
[104] NPA Act, Chapter 5, as amended: Powers, duties and functions relating to investigation directorates (sections 26-31).
[105] Ibid, section 28(1)(a), as amended.
[106] Ibid, section 28(1)(c), as amended.
[107] Ibid, section 28(6)(a), as amended.
[108] Ibid, section 28(6)(b), as amended.
[109] Ibid, section 28(8)(a). The given answers are generally not admissible against the summoned person in any criminal proceeding (ibid, section 28(8)(b)).

An investigating director or persons designated by him are entitled to enter and search premises where anything connected with an investigation is suspected to be.[110] Any object found in the premise can be examined, and information regarding this object can be requested from the owner or person in charge of the premises.[111] Anyone who refuses to supply requested information, give false or misleading information or hinders investigations is guilty of an offence.[112] Anything on or in the premise, that might have a bearing on the investigation can be seized.[113]

Investigating directors, or personnel authorized by them, have countrywide jurisdiction, including appeals emanating from criminal proceedings instituted by an investigating director.[114]

4. Further legislation relevant to prosecutorial work

Further legislation, such as the Criminal Procedure Act No 51 of 1977, the Witness Protection Act No 112 of 1998, the Prevention of Organised Crime Act No 121 of 1998, the Promotion to Access of Information Act No 2 of 2000, the Domestic Violence Act No 116 of 1998 and the Prevention and Combating of Corrupt Activities Act No 12 of 2004 include provisions relevant to prosecutorial work.

5. Evaluation of the legislative framework

The adoption of the National Prosecuting Authority Act has changed the legal surrounding for prosecutors significantly. But the question is whether the provisions of the Act enable and empower the prosecution service to fulfil its crucial role and function in the South African criminal justice system effectively. Moreover, it is important to determine whether the Act makes sufficient provisions in terms of accountability of the prosecuting authority on the one hand and its independence on the other hand.

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[110] Ibid, section 29(1). In accordance with section 29(4) a warrant from a court is required to perform such rights. Section 29(10) makes an exception to this rule for certain cases.
[111] Ibid, section 29(1)(b).
[112] Ibid, section 29(12).
[113] Ibid, section 29(1)(a).
[114] Ibid, section 24(2).

Combating crime is rather a national than a provincial task.[115] A centralised prosecuting authority allows for a better coordination of all role-players in the criminal justice system. Moreover, the National Prosecuting Authority Act takes developments on a national level into account that have already commenced before its promulgation, such as the operation of investigating directorates which are now integrated into the National Prosecuting Authority.[116]

In the literature[117] it is argued that the publication of the National Prosecuting Policy[118] and the obligation of the National Director to submit annual reports to Parliament are potentially appropriate elements to facilitate openness and accountability. Nevertheless, in the case of the annual report, for example, much depends on what the report contains and on how critically it is scrutinised by Parliament.

Political accountability is guaranteed, because the Minister of Justice must exercise final responsibility over the Prosecuting Authority. He has to answer to Parliament and through it to the public for the operations of the Prosecuting Authority.[119]

Although accountability to a democratically elected body is an important principle, its concrete implementation may be restricted in the light of the fact that it can negatively impact on prosecutorial independence. It is argued[120] that some aspects of the newly established prosecutorial system militate against independence. One of these is the mode of appointment of the National Director. When the NPA Act was being drafted it was argued[121] that the National Director, although formally appointed by the President as required by the Constitution, should be selected by the Judicial Service Commission, which would then submit a proposal to the President. Such a provision in the National

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[115] The National Crime Prevention Strategy takes this insight into account.
[116] The Office for Serious Economic Offences had already been operating before the promulgation of the NPA Act (Van Zyl Smit, Steyn *op cit* (note 10), p. 149).
[117] Van Zyl Smit, Steyn *op cit* (note 10), pp. 149 f.
[118] National Prosecuting Authority of South Africa *Prosecution Policy* (Revision Date: 1 Dec 2005).
[119] Van Zyl Smit, Steyn *op cit* (note 10), p. 150.
[120] Ibid, p. 151.
[121] Sarkin, J. and Cowen, S. 'The draft National Prosecuting Bill 1997: A critique' (1997) *South African Journal of Criminal Justice* Vol. 10, Issue 1, 64-74, pp. 66 f.

Prosecuting Authority Act would have isolated the appointee more effectively from intervention by the legislature.[122]

In the field of policy formation the independence of the National Director is small.[123] However, this might be justifiable in the light of the particular South African situation. In the literature[124] it is argued that the adoption of the opportunity principle in prosecution creates such a wide discretion for prosecutors that it necessitates policy on when to prosecute. While the impact of such policy is quite substantial it has to be subjected to some degree of political control.[125] This is particularly true in South Africa where crime control is a major political issue, resources in the criminal justice system are limited and where politicians are responsible for ensuring that these resources are deployed efficiently and in compliance with a strategy that carries the approval of the electorate.[126]

Notwithstanding this, the issue of prosecutorial independence in individual cases is of concern. A decision whether or not to prosecute can have profound consequences for victims, witnesses, accused and their families.[127] Legislation provides for prosecutorial independence by stipulating that every member of the Prosecuting Authority shall perform his powers, duties and functions in good faith and without fear, favour or prejudice. But, at the same time, all prosecutors are largely subordinated to the National Director. His power to intervene in individual cases if policy is not followed or to 'review' specific decisions to prosecute or not to prosecute bears the risk of undermining the independence of the Prosecuting Authority if he himself is not sufficiently independent.[128] The facts that he is a political appointment and his very close relationship with the Minister of Justice in the policy sphere have a potentially negative impact on the National Director's independence in individual cases.

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[122] Although being a former senior ANC member, Bulelani Ngucka, the first NDPP, resisted political influence throughout his term of office.
[123] See above, III.3.b)aa).
[124] Van Zyl Smit, Steyn *op cit* (note 10), pp. 151 f.
[125] Ibid, p. 152.
[126] Ibid.
[127] National Prosecuting Authority of South Africa *op cit* (note 118), section 4(a).
[128] Van Zyl Smit, Steyn *op cit* (note 10), p. 153.

Only the fact that it is relatively difficult to remove him from his office might contribute to his independence.[129]

Formal independence does not guarantee fairness any more than its absence suggests partiality. Guarantees, it is argued,[130] can exist elsewhere, for example in judicial review. Moreover, traditional legal mechanisms for constraining the unfair exercise of prosecutorial discretion remain in place. Prosecutors under the new Act are delictually liable for malicious prosecutions just as their predecessors were.[131] Although the institution of a private prosecution[132] is a complex and potentially expensive procedure, it must be, nevertheless, recognized as a safeguard against unbridled prosecutorial discretion.[133]

IV. Policy documents and United Nations Guidelines

Apart from the South African Constitution and the National Prosecuting Authority Act, policy documents and the United Nations Guidelines on the Role of Prosecutors are of importance for the National Prosecuting Authority and its prosecutors.

1. Prosecution Policy

As discussed above,[134] the National Director is obliged to determine a prosecution policy for the National Prosecuting Authority. The first prosecution policy was tabled in Parliament in 1999 and has been revised in 2005.[135]

The prosecution policy is a product of consultations of prosecutors, criminal justice organisations, government departments, academic institutions and

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[129] Ibid.
[130] Ibid, pp. 153 f.
[131] Van Zyl Smit, Steyn *op cit* (note 10), pp. 154 f., note 46 therein citing court decisions.
[132] Sections 7-18 of the Criminal Procedure Act 51 of 1977 provide the option of a private prosecution for persons with 'substantial and peculiar interest' in a matter, who believe that, notwithstanding an official decision not to prosecute on behalf of the state, they could bring a successful criminal prosecution (section 7(1)(a)).
[133] Van Zyl Smit, Steyn *op cit* (note 10), p. 155.
[134] III.3.b)aa).
[135] Stipulations have been included with regard to the prosecution of persons who were refused or failed to apply for amnesty in terms of the Truth and Reconciliation Commission process (National Prosecuting Authority of South Africa *op cit* (note 118), pp.1-8). The PCLU deals with such prosecutions.

community organisations.[136] It seeks to promote the exercise of authority by prosecutors, and to contribute to the 'fair and even-handed administration' of criminal law by prosecutors.[137] Efficient prosecutorial work shall enhance public confidence in the criminal justice system.[138]

The prosecution policy sets out 'with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.'[139] Moreover, the policy seeks to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties in order to make the prosecution process 'more fair, transparent, consistent and predictable.'[140]

The primary function of a prosecutor is to assist the court in coming to a just verdict.[141] Furthermore, prosecutors represent the community in criminal trials and have to ensure that the interests of victims and witnesses are promoted.[142]

Prosecutors have discretion at different stages of the criminal justice process. They have, for example, the discretion whether or not to institute criminal proceedings against an accused, whether or not to withdraw charges or stop the prosecution against an accused, or whether or not to oppose and application of bail, or to release an accused who is in custody following an arrest.[143] Furthermore, prosecutors have the discretion to decide with which crimes an accused is charged and in which court the trial should take place, whether or not to accept a plea of guilty tendered by an accused, which evidence to present during trail and at the sentencing stage, and whether or not to appeal or seek review of proceedings.[144]

When exercising their discretion prosecutors must act impartially and in good faith.[145] They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence, or the race, national

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[136] National Prosecuting Authority of South Africa *op cit* (note 118), preface.
[137] Ibid.
[138] Ibid.
[139] Ibid, section 2.
[140] Ibid.
[141] Ibid, section 3.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Ibid.

origin, gender, religious beliefs, status, political beliefs or sexual orientation of the victim, witnesses or the accused.[146]

The prosecution policy lists criteria to assist prosecutors in coming to a decision whether or not to prosecute.[147] The policy emphasises the importance of this decision as it may have profound consequences on the victim, witness, the accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.[148] Prosecutors are advised not to waste resources by pursuing inappropriate cases, but to focus on those cases worthy of prosecution.[149] Therefore prosecutors should only institute criminal proceedings against an accused, where there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.[150] The test of a 'reasonable prospect' must be applied objectively after careful deliberation to avoid an unjustified prosecution.[151] Where it is difficult to make a proper assessment whether to prosecute or not, the prosecutor should probe deeper than merely relying on the contents of the police docket and written statements provided by the police. Consultation with prospective witnesses to evaluate their credibility and an accurate consideration of the accused's version is recommended.[152] Moreover, the prosecution policy lists a range of factors prosecutors should take into account when deciding whether of not to institute a prosecution:[153] the strength of the state's case, the admissibility of the state's evidence, the credibility of the state's witness, the strength of the defence's case, and the extent to which the prosecution would be in the public interest.[154]

The prosecution policy advises prosecutors also on how to review a case with special regard to the stopping of proceedings and restarting of prosecutions.[155] Furthermore, criteria are given on how to determine the appropriate forum of

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[146] Ibid.
[147] Ibid, section 4(a).
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid, section 4(b), (c).
[154] When considering whether or not a prosecution would be the public interest, prosecutors should pay special attention to the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender (ibid, section 4(c)).
[155] Ibid, section 5.

trial, on the selection of the appropriate charge(s) and on the acceptance of defence offers of guilty plea.[156]

The prosecution policy pays particular attention to the role of prosecutors in the trial process.[157] Prosecutors are admonished to present their cases 'fearlessly, vigorously and skilfully.' At the same time, prosecutors must present the facts of a case to a court fairly.[158] This includes the disclosure of information favourable to the defence even though it may be adverse to the prosecution case.[159] Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary and with information on the trail process.[160]

Concerning the investigation and prosecution of crime, the policy states that the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.[161] Prosecutors should work together with other departments and agencies

> 'such as the departments of Correctional Services and Welfare, lawyer's organizations, non-governmental organisations and other public institutions in order to streamline procedures and enhance the quality of the service provided.'[162]

Apart from the prosecution policy, policy directives[163] with respect to specific issues, such as diversion, and a code of conduct[164] make further stipulations with regard to prosecutorial work.

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[156] Ibid, section 6.
[157] Ibid, section 7.
[158] Ibid.
[159] Ibid, this provision in the prosecution policy reflects the decision in *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) which will be discussed below, VIII.5.
[160] Ibid.
[161] Ibid, section 8.
[162] Ibid.
[163] Required by section 21(1) of the NPA Act.
[164] The Code of Conduct for Members of the National Prosecuting Authority, printed in: Du Toit, E., De Jager, F. J., Paizes, A., St Quintin Skeen, A. and Van der Merwe, S. *Commentary on the Criminal Procedure Act* (Service 35, 2006), Cape Town: Juta, Prosecuting – pp. 53-55. The Code of Conduct is required by section 22(6)(a) of the NPA Act and includes further stipulations with regard to professionalism, independence, and impartiality of prosecutors and their role in administrative justice and co-operation with other role players.

2. United Nations Guidelines on the Role of Prosecutors

The National Prosecuting Authority Act imposes a duty on the National Director to bring the *United Nations Guidelines on the Role of Prosecutors*[165] to the attention of the directors of public prosecutions and prosecutors, and to promote their respect for and compliance with the principles it contains.[166] The UN Guidelines have been formulated to assist member states in their task of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings within the framework of the states' national legislation and practice.[167]

The guidelines contain recommendations with regard to the qualification, selection and training of prosecutors,[168] their status and conditions of service,[169] and their freedom of expression and association.[170] Furthermore, recommendations are made regarding the role of prosecutors in criminal proceedings.[171] The Constitutional Court has stressed that section 13(b) of the guidelines is of particular importance for South African prosecutors:

> '"In the performance of their duties, prosecutors shall:
> (a) …
> (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrelevant of whether they are to the advantage or disadvantage of the suspect; …"'[172]

The guidelines also suggest that prosecutors shall perform an active role in criminal proceedings, including the institution of prosecutions and, where authorised by law or consistent with local practice, in the investigation of crime, and supervision over legality of these investigations.[173]

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[165] *United Nations Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, hereinafter referred to as the UN Guidelines.
[166] NPA Act, section 22(4)(f).
[167] UN Guidelines, preamble.
[168] Ibid, sections 1, 2.
[169] Ibid, sections 3-7.
[170] Ibid, sections 8, 9.
[171] Ibid, sections 10-16.
[172] *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC), at 1012A-C; in the context of bail applications this means that prosecutors are under a general duty to place before the court any information relevant to the refusal or grant of bail and might reasonably hold liable for negligently failing to fulfil that duty (Ibid, at 1020C-E).
[173] UN Guidelines, section 11; this issue will be explored further below, IX.5b).

Concerning discretionary functions of public prosecutors it is recommended that in countries where prosecutors are vested with such functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.[174] As discussed,[175] the NPA prosecution policy guides South African prosecutors in this respect.

With regard to alternatives to prosecution it is recommended that in accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings, or diverting criminal cases from the formal criminal justice system, with full respect for the rights of the suspects and victims. For this purpose, states should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, charge and conviction, as well as the possible adverse effects of imprisonment.[176]

Finally the UN Guidelines make recommendations with regard to the relations of prosecutors to other government agencies or institutions,[177] and disciplinary proceedings.[178]

3. Criminal justice policy papers

a) National Crime Prevention Strategy

The National Crime Prevention Strategy (NCPS) was adopted in 1996 and is the South African government's blueprint for dealing with crime. It seeks to establish a comprehensive policy framework which addresses crime 'in a co-ordinated and focused manner' and which 'draws on the resources of all government agencies, as well as civil society.'[179] With regard to the criminal

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[174] Ibid, section 17.
[175] IV.1.
[176] UN Guidelines, sections 18, 19; these issues will be dealt with below, IX.4.b).
[177] Ibid, section 20.
[178] Ibid, sections 21-24.
[179] Departments of Correctional Services, Defence, Intelligence, Justice, Safety & Security and Welfare, *National Crime Prevention Strategy* (22 May 1996), Summary, p. 3.

justice process[180] the NCPS sets out nine national programmes with underlying 'key aims.'[181]

One of the 'national programmes' of the NCPS addresses directly the prosecutorial sector.[182] It requires a prosecutorial policy, which places emphasis on priority crimes, ensures that the needs of special interest groups are met and improves the linkages between prosecutors and the police.[183] As discussed above[184] the current prosecution policy advises prosecutors to take in their decision whether or not to prosecute – amongst other criteria – the public interest into account. Priority crimes can be considered here.[185] Moreover, prosecutors are urged to give special attention to the effective and speedy disposal of cases identified as priority matters.[186] The current policy admonishes prosecutors to assist victims[187] and witnesses and to co-operate with the police closely and efficiently, as well as with other state departments and agencies.

The NCPS also demands an increased use of diversion programmes for petty offenders and juveniles.[188] In the context of juvenile and petty offenders the prosecution policy advises prosecutors to prove whether 'non-criminal alternatives to prosecution' are more appropriate.[189] Such alternatives include diversion.

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[180] One of the four pillars of the NCPS; the other pillars are: community values & education, environmental design and trans-national crime (ibid, p. 8).
[181] Ibid, p. 9, the aims are:

> '- To increase the efficiency and effectiveness of the criminal justice system as a deterrent to crime and as a source of relief and support to victims.
> - To improve the access of disempowered groups to the criminal justice process, including women, children and victims in general.
> - To focus resources of the criminal justice process focused on priority crimes.
> - To forge inter departmental integration of policy and management, in the interest of co-ordinated planning, coherent action and the effective use of resources.
> - To improve service delivered by the criminal justice process to victims through, through increasing accessibility to victims and sensitivity to their needs.'

[182] National programme 1.4: prosecutorial policy, ibid p. 11.
[183] Ibid.
[184] IV.1.
[185] National Prosecuting Authority of South Africa *op cit* (note 118), section 4(c) where, for example, the effect of the committed offence on public order and morale, its economic impact or its effect on the peace of mind and the sense of security of the public are listed as criteria of decision.
[186] Ibid, section 7.
[187] Victim support and protection is required explicitly under national programme 1.9: victim empowerment programme, NCPS Summary, p. 13.
[188] National programme 1.6: diversion programme, NCPS Summary (note 179) p. 12.
[189] National Prosecuting Authority of South Africa *op cit* (note 118), section 4(c).

b) Integrated Justice System

The Integrated Justice System (IJS) is a result of the NCPS and seeks to 'increase the efficiency and effectiveness of the entire criminal justice process by increasing the probability of successful investigation, prosecution, punishment for priority crimes and rehabilitation of offenders.'[190] With regard to limited resources duplication of programmes and service shall be avoided by all means. A second version of the IJS was published in 2003.[191]

In accordance with the IJS several programmes and services have been introduced.[192] For example, a criminal justice review commission was installed to check whether current programmes and services in the criminal justice system are feasible and how they can be improved and aligned with international best practice.[193] A victim empowerment programme, for example, has located a 66 court preparation officials under the umbrella of the NPA who assist victims and prepare them for court proceedings.[194] Specialized commercial crime, sexual offences and environmental courts have been introduced in some parts of the country.[195] Some 46 case-flow management centres, an e-justice programme and a court process project have been established to improve the service delivery of the court and to assist the courts in the management of caseloads.[196]

c) Strategies of other state departments and agencies

As long as the Integrated Justice System is not completely implemented, the National Prosecution Authority also has to take the strategies of other departments and agencies, such as the South African Police Service (SAPS)[197] or the Department of Correctional Services into consideration.

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[190] http://www.info.gov.za/aboutgovt/justice/system.htm, accessed: 05.01.2007.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] http://www.info.gov.za/aboutgovt/justice/system.htm, accessed: 05.01.2007; environmental courts have been established at Hermanus and Port Elizabeth.
[196] Ibid.
[197] http://www.saps.gov.za/saps_profile/strategic_framework/strategic_plan/2004_2007/direction.htm, accessed: 05.01.2007.

V. Transitional starting point of the NPA

Apart from the constitutional and legislative changes it is also important to understand the situation of the prosecution service in the transitional process.[198]

At the end of the apartheid regime the whole criminal justice system was in a bad shape.[199] A large part of the resources allocated to law enforcement was focused on political activities instead of ordinary crimes. As a result, skills and expertise concerning proper investigation and prosecution of crime was underdeveloped.[200] Furthermore, the state allowed the use of violence as an investigation tool. It was not uncommon that convictions were based on confessions extracted under duress.[201] The illegitimacy of the government produced lawlessness and disrespect for the rule of law at least among the black part of the population. Often people felt morally justified to break the law and police and prosecutors lacked legitimacy in the eyes of the majority of the people.[202]

Therefore, the newly introduced National Prosecuting Authority was asked to regain the faith and trust of the majority of the population in the fact that the criminal justice system was now only delivering justice and was no longer the instrument of the oppressing minority.[203] Moreover, the prosecution service tried to create a new image. In this context the prosecutors are often referred to as being 'lawyers for the people.'

VI. Intermediate result

The constitutional and legislative framework in place, just as the policy papers enable the prosecution service to operate effectively. The question is whether this is reflected by the actual performance of the prosecution service.

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[198] Ngcuka, Bulelani 'Foreword' in: Schönteich, M. 'Lawyers for the people: The South African Prosecution Service', (2001) *ISS Monograph* No 53, Pretoria: Institute for Security Studies, 7-8, p. 7.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.

VII. Assessment of the prosecuting performance

In order to analyse whether the prosecution service is fulfilling its role and function in the criminal justice system efficiently and effectively and in order to determine the challenges it is facing, it is necessary to asses its current performance.

It is somewhat difficult to measure the performance of the prosecution service reliable and fairly.[204] The work of the prosecution service – as part of the whole criminal justice system – is influenced by a variety of factors, such as prevailing social values, unemployment levels or the demographic composition of a population,[205] over which it has no control. Moreover, the work of the prosecution service is linked closely to the performance of other role players in the criminal justice system. For example, a performance indicator for the prosecution service is the length of time it takes to finalize a case in court. But the finalization is not only reliant on the skills of the prosecutor; it also depends on a proper and sound investigation by the police service. A prosecutor has generally[206] only limited control over the actions of the investigating officer of a case. But even when a good prosecutor who exploits his limited control and guides the detective in the investigation of a case, much still depends on the calibre of work delivered. Nevertheless, the case processing rate remains a useful performance measurement for the prosecution service provided that the described limitations are taken into account.

1. Cases prosecuted

The number of cases where the prosecution service institutes a prosecution as a proportion of the number of recorded cases is low. In 1999 it was 25.4% for murder, about 16% for rape and for assault with the intent to commit grievous bodily harm, 10.2% for common assault, 6.5% for residential housebreaking, 4.3% for robbery with aggravating circumstances, and fewer than 3% for car

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[204] Schönteich *op cit* (note 4), p. 95 f.

[205] Crime is generally committed by young males between the ages of 14 and 25 years; in South Africa over 53% of the population are under 24 years (Compare: Masuku, S. and Meapa, T. 'City Safety – Neslon Mandela Metro Muncipality's Crime Reduction Strategy' (2004) *ISS Monograph* No 103, Pretoria: Institute for Security Studies, p. 25, available at: http://www.iss.co.za/index.php?link_id=3&slink_id=368&link_type=12&slink_type=12&tmpl_id=3, accessed: 07.01.2007).

[206] In the case of the investigating directorates, this is different.

theft and car hijacking.[207] For crimes that depend on police action for their detection, the proportion of cases prosecuted was much higher; for drunk-driving and drug-related offences it was over 50%.[208]

2. Successful prosecutions

The number of cases resulting in a conviction as a proportion of the number of recorded cases is also low. In 1999 it ranged from just over 50% for drug-related offences, to 16.5% for murder, 7.9% for rape, and 1.6% for car-hijacking.[209]

3. Cases withdrawn in court

There are several reasons that can lead to the withdrawal of a case in court. For example, a victim knows the offender or is related to him and declines therefore to testify against him. Sometimes an expert's report is required in a particular matter and may delay the trial until it is furnished. Consequently, there will be always a certain percentage of cases withdrawn in court. But a relatively high withdrawal rate is nevertheless an indicator for the fact that cases are referred to the court, even though they were not proper investigated and checked by the prosecutors.

In 2005/2006 there were 1,075,581 new cases taken on by the prosecution service of which 311,087 were withdrawn, this is a quota of 29%.[210] The number of cases withdrawn in court has decreased in the last three financial years from 414,211 in 2002/03 to 311,087 in 2005/06.[211] This was a reduction of 24.9% over that period. Although this is a positive development, it has to been seen in the light of the past, where the proportion of cases withdrawn in court increased significantly. In 1996, 34% of the cases referred to court were withdrawn, thereafter withdrawals increased as follows: 36% in 1997, 38% in

[207] Schönteich *op cit* (note 4), p. 96 f.
[208] Ibid.
[209] Ibid, p. 97.
[210] NPA Annual Report 05/06, p. 19.
[211] Ibid.

1998, 42% in 1999, and 46% in 2000.[212] Against this background it seems that the prosecution service now screens with more accuracy which cases it takes on.

4. Conviction Rate

Once the prosecution service decides to institute a prosecution, its success rate is high. In 2005/2006 the overall conviction rate (all courts together) was 85.7 % which related to a conviction rate of 87% in the high courts, 71% in the regional courts and 87% in the district courts.[213] But this is not a new development. During the last five decades the proportion of cases prosecuted successfully has been consistently high – between 71 % and 82%.[214] Moreover, it is not surprising that accused persons will be convicted once they have made their journey through most of the criminal justice system, and the prosecution service decides to prosecute them. The reason for this lies with the fact that cases are usually prosecuted only where there is a reasonable prospect of obtaining a conviction, which means cases where the evidence is substantially in favour of the prosecution's case.[215] Over the period from 2002/03 to 2005/06 the number of new cases taken on by the prosecution service has decreased by 4% from 1,117,879 to 1,074,581.[216]

5. Number of awaiting trial prisoners

Awaiting trial prisoners are unsentenced prisoners, who are awaiting the commencement and/or the conclusion of their trials in court. This is because the courts refused to grant them bail, or because they cannot afford the amount of bail that has been set by the courts.[217] The length of time they spend in prison awaiting trial depends on factors, such as the speed of police investigation, the length of the trial and the number of postponements the

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[212] Schönteich, M. 'Tough Choices: Prioritising Criminal Justice Policies' (2002) *ISS Paper 56,* available at: http://www.iss.co.za/index.php?link_id=3&slink_id=621&link_type=12&slink_type=12&tmpl_id=3, accessed: 08.01.2007, Figure 4.
[213] NPA Annual Report 05/06, pp. 19, 22, 24;
[214] Schönteich *op cit* (note 4), p. 101, graph 6.
[215] Compare: Prosecution Policy (note 118), section 4(a) as discussed above (IV.1.).
[216] NPA Annual Report 05/06, p. 19.
[217] Schönteich *op cit* (note 4), p. 103.

accused requests during the trial.[218] Over these factors the prosecution service has little or no control. But in many cases the finalisation of trials is delayed because the courts' rolls are too full or badly managed.[219] This is something over which the prosecution service has some influence. Changing levels of awaiting trial prisoner numbers are therefore another measurement of the efficiency and performance of the prosecution service.[220]

At the end of 2005, 46,327 (29%) of the total 157,402 South African prisoners were unsentenced. This was a decrease by some 5000 awaiting trial prisoners, compared to the 51,538 unsentenced prisoners at the end of March 2005.[221] This development has to be seen again in the light of the past. From June 1994 to December 2000 the number of awaiting trial prisoners increased from 19,517 to 55,558, which relates to 184%.[222] Over the same period the number of sentenced prisoners increased only from 79,987 to 107,998, which relates to 35%.[223]

Additionally, the average length of time awaiting trial prisoners remain incarcerated until the finalisation of their trials rose considerably from 76 days in 1996 to 139 days in 2002.[224] While a prisoner costs the Department of Correctional Services R 113.99 per day,[225] the financial burden that the average awaiting trial detainee places on the department and the criminal justice system is around R 15,840. At the end of 2005, 42% of all awaiting trial prisoners were held for more than three month, 11,565 for more than 6 month and 1,433 for more than two years [226] This is problematic, as section 35(3)(d) of the

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[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Judicial Inspectorate of Prisons *Annual Report for the period 1 April 2005 to 31 March 2006*, pp. 4, 13.
[222] Schönteich *op cit* (note 4), p. 103. The huge increase of awaiting trial prisoners between 1994 and 2000 was mainly caused by the introduction of more stringent bail laws. This will be discussed further below, VIII.5.
[223] Ibid. Concerning sentenced prisoners it has to be taken into account that the Criminal Law Amendment Act No 105 of 1997 'makes life sentence or very long terms of imprisonment mandatory for a long list of common law crimes, unless substantial and compelling circumstances justifying a departure are found.' 'The effect of this law is only beginning to be felt as it applies only to offences committed after May 1998 and the delay in trying such cases is considerable' (Van Zyl Smit, D., Steyn, E. *The South African Prison System* (2006), 1-25, p. 7).
[224] Schönteich *op cit* (note 212), Figure 5.
[225] http://www.rjc.co.za/rjinsa_statistics.htm, accessed: 14.02.2007.
[226] Judicial Inspectorate of Prisons *op cit* (note 221), pp. 13f, 29.

Constitution guarantees the right of every accused to have their trial begin and conclude without unreasonable delay.

6. Finalised and outstanding cases

In 2005/06 a total of 414,282 cases were finalised in the South African courts. 37,422 of these cases were finalised through diversion.[227] Diversion is defined 'as the channelling of prima facie cases away from the criminal justice system with or without conditions'[228] at the discretion of the prosecution.[229] The use of diversion has increased from 2002/03 (14,808) to 2005/06 (37,422) by 152.7%.[230] This is a very positive development as diversion has a lot of benefits, such as saving resources of the criminal justice system (court hours etc) and avoiding stigmatising effects of the trial on the accused person. But if one considers that the NPS finalised a total of 414,282 cases in the same period, it seems to be necessary to explore whether the use of diversion could not be increased.[231]

A matter of concern is the fact that 198,990 cases were outstanding in 2005/06. Despite a decrease compared to 2004/05 (206,005) by 3.4%, there was an overall increase by 5.5% over the period from 2002/03 (188,691) to 2005/06.[232]

The NPS has set targets for case cycle times. The target for the regional courts was that 78% of the cases should not be older than 6 month, for district courts it was that 90% of the cases should not be older than 6 month.[233] The backlog of cases is defined as the number of cases that exceed their cycle time.[234]

At the end of March 2006, a total of 36,915 cases (19% of the outstanding court roll of 197,404 cases) were older than six month. This was an increase in the backlog of cases by 10% from the total of 33,595 at the end of March 2005.[235]

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[227] NPA Annual Report 05/06, p. 19.
[228] Badenhorst, C. and Conradie, H. 'Diversion: the Present Position and Proposed Future Provisions' (2004) *Acta Criminologica* Vol. 17, Issue 2, 115-130, p. 115.
[229] Schönteich *op cit* (note 4), p. 165.
[230] NPA Annual Report 05/06, p. 19.
[231] This will be done bellow, IX.4.b).
[232] NPA Annual Report 05/06, p. 19.
[233] Ibid, p. 20.
[234] Ibid, p. 23.
[235] Ibid.

The NPA Annual Report 05/06 lists several factors that contributed to the increased backlog.[236] According to the report the case cycle times increased because accused persons did not attended court proceedings, courts issued a growing number of warrants, adequate court facilities were lacking, some role players in the criminal justice system were unavailable, or investigations were incomplete. This enumeration reveals a lot about the current state of affairs in the South African criminal justice system. But there a two more factors listed that fall more directly within the sphere of responsibility of the prosecution service. The increased backlog resulted also from a lack of commitment to a proper implementation of the case flow management principles and a vacancy rate of 10% in the prosecution service. The report admits that the current personnel are already so inundated with heavy workloads that it could not compensate for the vacant posts.

In this context it is also remarkable that in 2005/06 only 1,432 cases were finalised by the 'additional and Saturday courts'.[237] Over the period from 2002/03 to 2005/06 the number of cases finalised by such courts decreased by 95.2%.[238]

7. Plea and sentence agreements

In 2005/06 plea and sentence agreements were reached in 2,164 offences.[239] With regard to the main crime categories plea and sentence agreements were achieved in 1,202 cases. This is an increase compared to the 703 cases of the previous year.[240] Plea and sentence agreements shorten the length of trials and reduce the workload of courts. Therefore the use of these instruments has to be embraced and should be increased. If one considers that the NPS finalised a total of 414,282 cases in the same period, it seems necessary to explore why currently plea and sentence agreements are reached only in such a small number of cases.[241] The increase from 2004/05 to 2005/06 indicates that there is considerable room for improvement.

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[236] Ibid, pp. 23 f.
[237] These courts were introduced to tackle the high backlog of cases.
[238] NPA Annual Report 05/06, p. 19.
[239] Ibid, p. 27.
[240] Ibid.
[241] This will be done below, IX.4.c).

8. Use of court hours

Prosecutors are responsible for managing the rolls of the courts they are working in.[242] Even though unused court time can result from a variety of reasons, such as the absence of witnesses or successful postponement petitions of the accused, it also indicates whether court rolls were planned accurately and efficiently. During 2005/2006 the average high court sat for 3h19, the average regional court for 4h02, and the average district court for 4h08.[243] The courts are working below their potential capacity. In theory, courts are open six hours a day (from 9h00 to 11h00, from 11h15 to 13h00; and from 13h45 to 16h00).[244] Although six-hour-court-days are impossible to achieve in practice, there is considerable room for many courts that sit for even shorter periods than the present overall average of around four hours. This has also been realised by the NPS, which set the targets concerning court hours for the high courts at 4h00 (actual time 2005/06 was 17% below target), [245] for the regional courts at 4h30 (actual time in 2005/06 was 10 % below target) and for the district courts at 4h45 (actual time in 2005/06 was 13% below target).[246]

The insufficient use of court hours at the district court level is somewhat qualified by the fact that the time spent on alternative measures to reduce trial cases is not covered by these statistics.[247] Furthermore, the NPA Annual Report argues that a considerable increase in the court hours on the district level is only then likely to happen, when the ratio of two prosecutors per court is accomplished.[248]

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[242] As discussed above (IV.3.b)), prosecutors are assisted in some parts of the country in the management of courts' rolls.
[243] NPA Annual Report 05/06, p. 23, 25, 26.
[244] Schönteich *op cit* (note 4), p. 108 note 284.
[245] Court time spent on appeals, reviews and bail applications is not included in the calculation of actual hours spent in court (NPA Annual Report 05/06, p.23).
[246] NPA Annual Report 05/06, p. 21.
[247] Ibid, p. 25.
[248] Ibid.

VIII. Transitional development of the South African prosecution service: Analysing the reasons for the achieved performance

With regard to the eight indicators discussed above, the assessment of the prosecuting performance is two-folded. On the one hand improvements can be seen in the slight decrease of the number of cases withdrawn in court and the slight decrease of the number of awaiting trial prisoners. Nevertheless these improvements are qualified by the huge increases of both numbers in the past[249] and as far as awaiting trial prisoners are concerned, by the fact that the average length of time those prisoners remain detained rose considerably. The relatively high conviction rates of the courts are also positive, although the number of cases taken on by the prosecution has decreased. Furthermore, the increased use of diversion and of plea and sentence agreements is another positive development, although there seems to be considerable room for improvement.

On the other hand, some of the indicators suggest that the performance of the prosecution service is insufficient. The ratio of cases prosecuted and of cases successfully prosecuted to the number of reported crimes is very low. Moreover, the huge number of outstanding cases and the increased backlog of cases are alarming. The insufficient use of court hours is a further matter of concern.

The question is what are the reasons for the current underperformance of the South African prosecution service?

This part of the thesis tries to identify which problems have existed and still exist in the prosecutorial sector and which responses and countermeasures have been taken so far to address them.

Since the early 1990s the South African literature on the prosecution service has identified problems within the prosecutorial sector that negatively impact on its performance.[250]

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[249] As discussed above, VII.3. and 5.

[250] For example: Fernandez, L 'The Pathological Malaise within the Criminal Justice System: Why the courts are not seen to be delivering' (2000) *Law, Democracy and Development*, Vol. 4, Issue 2, p. 199-208; Fernandez, L. 'Profile of a Vague Figure: The South African public prosecutor' (1993) *South African Law Journal*, Vol. 10, Issue 1, 115-126; Schönteich *op cit* (note 4) and *op cit* (note 212).

1. High personnel turnover

A main reason that is given for the insufficient performance of the prosecution service is a steady loss of experienced personnel.[251]

In the mid-1990s about 630 experienced prosecutors resigned from their office.[252] Most of them had started their career under the apartheid regime and felt swamped with the transitional process.[253] Although these prosecutors were replaced and the absolute number of prosecutors employed has consistently increased the result of this high personnel turnover was a great loss of experience in the prosecution service.[254] In the literature[255] it is estimated that more than 2,000 years of work experience were extracted out of the prosecution service.

Even if this massive wave of resignation had a somewhat exceptional character, a dominant feature of the South African prosecution services is the high turnover amongst its personnel in general.[256] In 2005/06 the overall turnover rate within the NPA was 20.1%.[257] Among permanent prosecutors it was 15%, among senior managers it was 10.3%.[258] The main reasons why staff was leaving the NPA were in 94% of the cases resignation and the expiring of contracts. Retirement and other reasons amounted only to 6%.[259]

The personnel turnover within the prosecution service results in a low level of experience of the average prosecutor. In October 2000, some 2,171 prosecutors below the rank of senior public prosecutors, and junior state advocates were employed by the Department of Justice.[260] 24% of them had been prosecuting for less than 18 months, and another 28% had worked as prosecutors for

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[251] Fernandez *op cit* (note 250), p. 116 f; Schönteich *op cit* (note 4), p. 113; Schönteich, M. 'The South African Prosecution Service' in: Steinberg, J. (ed.) (2001) *Crime Wave - The South African Underworld and its Foes*, Johannesburg: Witwatersrand University Press, 156-174, p. 171.
[252] Fernandez, L. and Nerlich, V. 'Die Entwicklung der Strafjustiz in Südafrika' (2005) *Zeitschrift für die gesamte Srafrechtswissenschaft* Vol. 117, Issue 4, 966-985, p. 977.
[253] Ibid.
[254] Ibid.
[255] Schönteich *op cit* (note 4), p. 113.
[256] Fernandez *op cit* (note 250), p. 116 f; Schönteich *op cit* (note 4), p. 113; Schönteich *op cit* (note 251), p. 171.
[257] NPA Annual Report 05/06, pp. 68 f.
[258] Ibid, p. 69.
[259] Ibid, p. 70.
[260] Schönteich *op cit* (note 4), p. 113 f.

between 18 and 36 month. 79% of all prosecutors had been in office for six years or less.[261]

A low experience level has debilitating effects on most professions, but especially if they are practically orientated, as prosecuting is. Prosecuting requires a whole range of practical skills. For example, the ability to apply legal theory to actual cases before the court or to present witnesses and evidence in a manner that builds a convincing case is acquired and perfected through practice and experience and cannot easily be taught.[262] Moreover, the high staff fluctuation negatively impacts on long term strategic planning and organisation within the NPA.[263]

Reasons for the high turnover of personnel can be identified:

a) Poor remuneration

A reason for leaving the prosecution service was and is the relatively poor salary.[264] Although the salary of prosecutors has increased based on the performance as the NPS reports,[265] it must be critically questioned whether the conclusion drawn by the NPS is true that now only a few prosecutors leave the service because of insufficient pay.

There are some aspects that militate against this conclusion. Compared to the private sector the salary of prosecutors is quite low.[266] Moreover, prosecutors earn considerably less than magistrates. In 2006, the starting salary of a magistrate increased to R 289,167 (+ R 72,292 motor vehicle allowance)[267] *per annum*, while a beginner prosecutor earned R 79,944.[268] This was less than a third[269] of the salary of a magistrate. Finally, prosecutors often had to wait

[261] Ibid.
[262] Ibid, p. 114.
[263] Fernandez *op cit* (note 250), p. 116.
[264] Schönteich *op cit* (note 4), pp. 118 f.
[265] National Prosecuting Authority, *Annual Report of the National Prosecuting Authority for the Year ended 31 March 2003*, p. 10; hereinafter referred to as the NPA Annual Report 2003.
[266] Schönteich *op cit* (note 4), p. 118.
[267] Salaries, Allowances and Benefits of Magistrates in terms of section 12 of the Magistrates Act 1993 (Act No 90 of 1993), GG 29247 of 22 September 2006.
[268] Determination of Salaries of Prosecutors under section 18(1) of the National Prosecuting Authority Act, 1998, GNR 1435 GG 27086 of 10 December 2004.
[269] Where magistrates were granted a motor vehicle allowance, it was less than a fourth.

considerably times to get their merit awards paid due to budgetary constraints.[270]

The Annual Report 2005/06 of the NPA[271] lists meticulously – with regard to critical occupations – the performance rewards that have been paid in 2005/06. In sum, 955 members (24.6%) of the NPA received an average performance reward of R 17,663. A 'recruit to retire' programme has been started by the corporate service of the NPA, which seeks to retain prosecutors in the service with several measures, such as 1% pay progressions.[272] This might be a first step to retain experienced personnel, but leaving the prosecution service for a job in the private sector or for becoming a magistrate is still a financial improvement that even passionate prosecutors can hardly resist.

b) Career prospects and human resource management

Limited promotional opportunities and challenging career paths are identified as a further reason for prosecutors to resign.[273]

The introduction of performance based salaries is regarded as the basis for the new career paths for prosecutors.[274] Moreover, a Human Resources and Development Centre has been established within the Corporate Service Division that seeks to address the issue.[275] But nevertheless in the current promotion system the best prosecutors are generally promoted to the level of senior or chief prosecutors. Senior prosecutors only rarely appear in court and have primarily administrative and managerial duties; chief prosecutors have only office-based administrative and managerial duties.[276] In both cases the valuable courtroom skills of experienced prosecutors get lost.

A performance based salary should, for example, distinguish between prosecuting on the district or on the regional court level. The latter requires better skills and is accompanied with greater responsibility.[277] A specialisation,

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[270] This was admitted in the NPA Annual Report 2003, p. 10.
[271] Table 7.3, p. 97 f.
[272] NPA Annual Report 05/06, p. 53.
[273] Schönteich *op cit* (note 4), p. 126 and *op cit* (note 251), p. 169.
[274] NPA Annual Report 2003, p. 10.
[275] NPA Annual Report 05/06, p. 53.
[276] Schönteich *op cit* (note 4), pp. 126, 163.
[277] Ibid, p. 127.

for example, in sexual offences should be rewarded. How far these suggestions are covered by the new salary structure is not clear.

c) Workload and high stress level

Further reason for prosecutors to leave the service, it is argued, are the workloads and stress levels they encounter.[278]

Apart from onerous caseloads prosecutors are burdened with a wide range of duties. For example, prosecutors have to prepare every trial, are responsible for the court's roll (structuring the court day) and present the cases at court. The stress level of prosecutors is increased by the fact that their preparation for the court appearance is consistently interrupted by investigating officers who need to brief them on cases they are working on.[279] At the same time prosecutors also need to consult with witnesses who are going to testify in one of the following trials.[280] Additionally prosecutors have to phone for dockets which they need for court that day but which have not been left at the local detectives' office.[281] Furthermore prosecutors have to make sure that their court's orderlies are bringing the correct awaiting trial prisoners from the court's holding cells to the correct courtroom at the right time.[282] The already high workload of prosecutors is increased by the fact that they have to substitute colleagues who are on leave and vacant posts that have not been filled. Often prosecutors have to take work home with them as they have not been able to finish it during the working day.[283]

Compared to this picture of high workloads and high stress levels the tasks and duties of a magistrate seem to be more moderate:

> 'Magistrates are primarily concerned with listening to the evidence that is presented to them in court, keeping up-to-date with relevant legislation and case law, and formulating reasons for their judgements and sentencing decisions.'[284]

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[278] Fernandez *op cit* (note 250), p. 205; Schönteich *op cit* (note 4), pp. 127 f. and *op cit* (note 251) pp. 171 f.
[279] Schönteich *op cit* (note 251), p. 172
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Schönteich *op cit* (note 4), p. 121.
[284] Ibid, p. 120.

Moreover, the fact that the role of the judicial officer is in South Africa, just as in common law systems, more contained than in civil law systems, such as Germany contributes to this impression. Therefore, many prosecutors consider becoming a magistrate as a work reduction which is additionally much better paid.[285] A job in a private company might also be considered as less stress full and better paid. However, some encouragement should result for prosecutors from the fact that the overtime payment that was stopped in the late 1990s is now being re-instituted.[286]

The NPA has realised that prosecutors should focus on their core functions. Administrative staff was employed to assist prosecutors and relieve them from administrative duties.[287] Workshops are held and practical guides are issued to assist prosecutors in case flow management.[288]

d) Issues of representivity

A further reason for especially white male prosecutors to resign was and is their smaller chance of promotion within the prosecution service.[289]

Just as in all other South African state departments and agencies, one of the key transformational objectives of the NPA has been to address the issue of representivity. Between 1996 and 2000 the number of white prosecutors and senior prosecutors dropped from 53% to 36% while the number of blacks increased from 47% to 64%.[290] In 2005/06 only 13% (521 out of 3,884) of the whole NPA staff where white males, while in the top management over a third (52 out of 142) were white males.[291] Therefore promotional opportunities are limited for white male prosecutors, as the representivity in the higher ranks is

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[285] Ibid.
[286] NPA Annual Report 05/06, Tables 1.3, 1.4, p. 63.
[287] NPA Annual Report 05/06, Table 2.3, pp. 65 f gives an indication of NPA staff responsible for administrative assistance; for example, in 2005/06 there were 220 general legal administrators and related professionals and 118 other administrators employed by the NPA.
[288] NPA Annual Report 05/06, p. 21.
[289] Schönteich *op cit* (note 4), pp. 128 ff.
[290] Lue-Dugmore, M. 'South Africa – An examination of institutional models and mechanisms responsible for: the administration of justice and policing, the promotion of accountability and oversight; and a review of transformation strategies and initiatives developed in relation to the administration of justice and safety and security' *Occasional Paper Series 2003*, Institute of Criminology – University of Cape Town, p. 35.
[291] NPA Annual Report, p. 73, table 6.2.

not achieved yet.[292] But the NPA's commitment to representivity in the prosecution service is tempered by the desire to keep skilled staff. A balance between skills and representativness is pursued.[293]

e) Poor image

Another reason for prosecutors to resign from their office might be the fact that their image is still relatively poor.[294] A poor image of prosecutors may result to some extent from their situation prior to the introduction of the NPA in 1998. For example, it was only as recently as 1979 that prosecutors were recognized as a professional group.[295] Before that prosecutors were formally classed as legal assistants and were generally recruited from the ranks of junior clerical assistants.[296] After serving only for a transitional period they were often promoted to serve on the magisterial bench.[297] Although prosecutors were professionally under the control of an attorney general, in practice magistrates had administrative control over them as regards promotions, leave and transfers.[298] This did not only negatively impact on the prosecutorial independence; it often resulted in a subservient position of prosecutors to magistrates.[299] Prosecutors, for example, had to approach the senior magistrate for permission to make long distance phone calls. Magistrates were also favoured concerning office space and office equipment, parking facilities etc.[300] After 1995 these 'unofficial disparities' were exacerbated

> 'by the fact that magistrates were removed from the public service co-ordinating bargaining council with the result that the magistrate's profession could negotiate considerable salary increases directly with the [J]ustice [D]epartment. The widening salary gap between magistrates and prosecutors further served to diminish the stature of the latter.'[301]

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[292] The promotional opportunities for white female prosecutors are better, as women are generally still underrepresented in top management positions. In 2005/06 only 27.46% (39 out of 142) of top management positions were occupied by females (NPA Annual Report 2005/06, p. 73, table 6.2).
[293] Ngcuka, B. (2000) cited in: Schönteich *op cit* (note a), p. 131.
[294] Fernandez *op cit* (note 250), pp. 118 f; Schönteich *op cit* (note 4), pp. 132 f.
[295] Fernandez *op cit* (note 250), p. 119.
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Schönteich *op cit* (note 4), p. 133.
[300] Ibid.
[301] Ibid.

Further aspects negatively affected the image of prosecutors. Not all prosecutors had legal qualifications.[302] In some rural areas police officers, whose public image was/is generally poor, assumed the role of prosecutors.[303] Moreover, there was only a small degree of organisation of prosecutors in their public appearance and no participation in wider public debates such as on access to justice or the protection of human rights.[304]

With the introduction of the NPA many of the aspects that contributed to the negative image of prosecutors were dispelled. However, the image of prosecutors still suffers from pre-1998 arrangements. Moreover, the low experience level of the average prosecutor may result in some cases in unprofessional court appearance and insufficient performance which then negatively reflect on the image of the prosecution service as a whole.

2. Shortage of prosecutors

The loss of experience in the prosecution service with its several reasons is an essential factor of the insufficient performance of the prosecution service. Another aspect that disturbs the prosecuting performance is the shortage of prosecutors. The high workload of prosecutors can reduce the quality of their work and increase the risk of wrong decisions. The high workload is aggravated by the fact that there are not enough prosecutors in charge. In this context the high vacancy rate of 23.6% is a matter of concern.[305] Especially the fact that in most district courts there is still only one prosecutor assigned to is negatively impacting on the prosecutorial performance.[306] The NPS has employed '32 senior public prosecutors whose only function is to visit areas where there are problems in order to assist existing prosecutors at court.'[307] But this measure is just a temporary effect. Therefore the NPA has to fill its vacancies, especially in its core institution – the prosecution service.

[302] Fernandez *op cit* (note 250), p. 120.
[303] Ibid.
[304] Ibid, p. 121.
[305] NPA Annual Report 05/06, Table 2.3, p. 66.
[306] NPA Annual Report 05/06, p. 25.
[307] NPA Annual Report 05/06, p. 9.

3. Support and equipment

The prosecuting performance is also negatively affected if prosecutors do not receive the necessary support in their work.

In the literature it was argued that the office equipment of prosecutors was insufficient in terms of (cell-) phones, fax and copy machines, legal commentaries, and computers with access to online court decisions and law journals.[308] The Annual Report 2003 of the NPA still mentioned this aspect as a challenge.[309] Moreover, it was argued in the literature that prosecutors received too little administrative and clerical support and that the communication and the transfer of information and data between the entities of the NPA and with other role players in the criminal justice system were underdeveloped.[310]

In the Annual Report 2005/06 of the NPA several measures are mentioned that aim to improve the situation of prosecutors in this regard. Under the auspices of the Corporate Services Division several service centres have been established. The Finance and Procurement Service is responsible, for example, for providing prosecutors with vehicles and computer hardware.[311] The Information Management service, for example, has handled, scanned, indexed and filed documents, invoices and files and trained document practitioners and other staff working with documents in the NPA.[312] Moreover, this service entity provides a call centre and telecommunication offices.[313] The Research and Policy Information Service, for instance, provides prosecutors with library and information services, such as a monthly Juta Law Report content update or training in the use of legal online data bases (LexisNexus, Juta).[314]

All these service are a considerable support for prosecutors, provided that they are accessible to all of them.

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[308] Schönteich *op cit* (note 4), pp. 131 f.
[309] NPA Annual Report 2003, p. 9.
[310] Schönteich *op cit* (note 4), pp. 131 f..
[311] NPA Annual Report 05/06, p. 56.
[312] NPA Annual Report 05/06, p. 57.
[313] Ibid.
[314] Ibid, p. 58.

4. Training

A further aspect that challenges the NPA is the training of prosecutors.[315]

After the establishment of the National Prosecuting Authority, the training of aspirant prosecutors has considerably improved. Previously applicants were appointed and started immediately to work and had to learn by trial and error.[316] After a while, sometime after more than a year, they where offered six-week-training courses at the Pretoria-based Justice College.[317] In the literature[318] this was identified as a huge problem, as the scope of university law courses is more theoretical and important aspects of prosecuting, such as the practical application of law and court room procedure are secondary.

Since the late 1990s aspirant prosecutors are obliged to attend and pass a six month training course before being permanently appointed as prosecutors.[319] A one-month theoretical course at the Justice College is followed by a five-month practical course that includes on-the-job training inside a courtroom where new prosecutors are trained and assisted by an experienced training prosecutor.[320] It is aspired to keep the ratio of new prosecutors to trainers low in order to allow for personal interaction between the trainee prosecutors and their tutor.[321] This relatively new training of aspirants is an important step to increase the performance of the prosecution service.

Permanent prosecutors are offered advanced training courses with regard to special matters, such as sexual offences.[322] The Human Resource Management and Development Entity of the Corporate Service Division has compiled training and development plans for prosecutors. Due to budgetary constraints they could only be implemented at a level of 35%.[323] Because experience is lacking among prosecutors, training in general and with regard to specialisation

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[315] NPA Annual Report 2003, p. 9; Fernandez *op cit* (note 250), p. 203 and *op cit* (note 250), pp. 123 ff; Schönteich *op cit* (note 4), p. 134.
[316] Schönteich *op cit* (note 4), p. 85.
[317] Fernandez *op cit* (note 250), pp. 123 f.
[318] Schönteich *op cit* (note 4), p. 134 and *op cit* (note 251), p. 167.
[319] NPA Annual Report 2003, p. 9.
[320] Schönteich *op cit* (note 4), p. 135.
[321] Ibid.
[322] NPA Annual Report 05/06, p. 44 and p. 28.
[323] NPA Annual Report 05/06, p. 55 and p. 28; an additional third (842 prosecutors) were trained in '*ad hoc* training interventions' of the Justice College (Ibid, p. 28).

is important. Therefore the NPA should undertake all efforts to train all of its permanent prosecutors.

5. Changes in the legal environment

Changes in the legal environment have impacted on prosecutorial work in the way that they made it more onerous and difficult.[324]

The South African Constitution guarantees every accused the right to fair trial, including the right to be presumed innocent until proven guilty, to remain silent and not to testify during the proceeding.[325] Consequently, in any criminal trial, 'the onus is on the prosecution to prove its case beyond reasonable doubt.'[326] Although this right had also long been recognised by South African common law,[327] before 1994 several legal provisions were in force that

> 'sought to assist the state in the prosecution of certain offences. These laws created presumptions in the state's favour by placing an onus on persons accused of certain crimes that they had to rebut by proof on a balance of probabilities to be aquitted of the charges against them. The effect of such presumptions was to impose a "reverse onus" on an accused to disprove an essential element of the criminal charge against him. Failure to do so, even where reasonable doubt existed about guilt, resulted in a conviction of the accused.'[328]

After 1994 the Constitutional Court declared several of these presumptions invalid and unconstitutional.[329] For example, the Drugs and Drug Trafficking Act No 140 of 1992 provides that, if an accused is found in the possession of more than 115 grams of dagga (cannabis), it is presumed that he was dealing in cannabis and he will be convicted unless he can prove the contrary.[330] The Constitutional Court held that this section infringed the right of an accused to be presumed innocent and was therefore unconstitutional.[331]

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[324] Schönteich *op cit* (note 4), pp. 135 ff and *op cit* (note 251), pp. 162 f.
[325] Section 35(3)(h) of the South Africa Constitution; the right was also guaranteed under section 25(3)(c) of the interim Constitution.
[326] Schönteich *op cit* (note 4), p. 135.
[327] Ibid.
[328] Ibid.
[329] For example: *S v Zuma and Others* 1995 (2) SA 642 (CC); *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 288 (CC); *S v Julies* 1996 (4) SA 313 (CC); *Mello and Another v The State* 1998 (3) SA 712 (CC); *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC); *S v Manamela and Another* 2000 (3) BCLR 49 (CC).
[330] Drugs and Drug Trafficking Act No 140 of 1992, section 21(1)(a)(i).
[331] *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC).

The abolition of legal presumptions affected furthermore the Criminal Procedure Act No 51 of 1977,[332] the Arms and Ammunition Act No 75 of 1969[333] and the General Law Amendment Act No 62 of 1955[334] concerning the possession of stolen goods.[335]

Another crucial field of legislative changes is the law as it is applied to the granting and denial of bail to accused person. In 1995 section 60 of the Criminal Procedure Act No 55 of 1977[336] was amended to 'fit the constitutional norm in section 25(2)(d) of the interim Constitution'[337] which guaranteed every person arrested for alleged commission of an offence the right to be released from detention with or without bail, unless the interest of justice required otherwise. In the amendment 'legislature did not set out a closed list of instances defining "interest of justice" but left the list open-ended to leave room for judicial interpretation.'[338] The 1996 final Constitution tightened the right to bail to some extent. Where the interim Constitution recognised a right to be released *unless* the interest of justice required otherwise, section 35(1)(f) of the final Constitution referred to the right to be released from detention *if* the interest of justice permit.[339]

In 1997 the law of bail applications was amended again.[340] The rape and murder of a six-year old girl had been the final catalyst and had strengthened the belief of the South African public that 'the right to bail was to blame for the perceived increase in crime.'[341] It was argued that 'courts failed to protect innocent victims, by granting bail to hardened criminals to readily.'[342] As a legislative response the Criminal Procedure Second Amendment Act No 85 of 1997 was enacted, which restricted the discretion of judges and magistrates to

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[332] Criminal Procedure Act No 51 of 1977, section 217(1)(b)(ii).
[333] Arms and Ammunition Act No 75 of 1969, section 40(1), as amended.
[334] General Law Amendment Act No 62 of 1955, section 37(1), as amended.
[335] Schönteich *op cit* (note 4), pp. 135-138.
[336] Hereinafter referred to as the Criminal Procedure Act.
[337] Sarkin, J., Steyn, E., Van Zyl Smit, D. and Paschke, R. 'The Constitutional Court's Bail Decision: Individual Liberty in Crisis? – *S v Dlamini*' (2000) *South African Journal on Human Rights* Vol. 16, Issue 2, 292-312, p. 296.
[338] Ibid.
[339] Ibid, p. 297.
[340] Criminal Procedure Second Amendment Act No 85 of 1997.
[341] Sarkin et al *op cit* (note 337), p. 297.
[342] Ibid.

grant bail in certain categories of offences.[343] In the literature[344] it is argued that as a further result of this legislation additional responsibilities were placed on the prosecutor. For example, by section 60(11)(a) of the Criminal Procedure Act, as amended, which 'places an onus of persons accused of serious violent crime to show why they should be released on bail.' It is argued in this respect, that

> 'to prevent an accused from dispelling the onus, the prosecution has to cross-examine the accused. This is done with the purpose of showing that the reasons advanced by the accused to be released on bail are not sufficient in terms of the law to persuade the court to grant bail. To oppose bail successfully, the prosecution is also obliged in most cases to call witnesses to show that the averments of the accused are false. For example, the prosecution would call the investigating officer of the case to testify that, contrary to what the accused claims, the accused has no fixed abode and is likely to flee should he be released on bail.'[345]

Moreover, it is argued, that the 1997 amendment to the bail law has generally increased the number and length of time of formal bail applications in South Africa's courts.[346]

Post 1994 legislation also affected the manner in which unconvicted young persons could be detained whilst awaiting trial. The South African Constitution provides that children, that is, persons under the age of 18 years,[347] should not be detained 'except as a measure of last resort.'[348] Section 29 of the Correctional Service Act No 8 of 1959 theoretically allowed 'that juveniles as young as seven years of age, the minimum age of criminal capacity, could be held in prison.'[349] In 1995, section 29 was therefore amended 'to make it as

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[343] Section 4(f) of the Criminal Procedure Second Amendment Act No 85 of 1997 introduced section 60(11)(a) of the Criminal Procedure Act which stipulates with regard to certain serious offences that

> 'the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.'

In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) the constitutional validity of this section was confirmed.

[344] Schönteich *op cit* (note 4), p. 140.

[345] Ibid.

[346] Ibid.

[347] Constitution of the Republic of South Africa, 1996, section 28(3).

[348] Ibid, section 28(1)(g).

[349] Van Zyl Smit, Steyn *op cit* (note 223), p. 13.

difficult as possible to detain children either in prison or in police cells.'[350] But the newly amended law did not include any alternative arrangements for dealing with juveniles suspected of having committed serious offences - this resulted in 'a major public outcry.'[351] Therefore section 29 was again amended,[352] and reintroduced, with some modifications, the possibility of pre-trial detention for juveniles.[353] But these 'modifications' increased the workload of prosecutors significantly.[354] For example, children aged between 14 and 18 must be kept in prisons and not in places of safety if they are accused of having committed serious offences.[355] But once detained the court has to reconsider its detention order every 14 days.[356] For this purpose the prosecution must present oral evidence on the risk of the child of absconding, the risk the child could pose to other children awaiting trial in a place of safety, and the disposition of the accused child to commit offences.[357]

In 1995 the Constitutional Court ruled that police dockets were not only privileged information to the prosecution and that an accused person's right of fair trial[358] incorporated the right of getting access to information in the dockets.[359] The court held that

> '[o]rdinarily an accused person should be entitled to have access to the documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purpose of a fair trial.'[360]

The right to fair trial includes access to the statements of witnesses and to information that are 'relevant in order to enable an accused person properly to exercise that right.'[361] The State may resist a claim by the accused to any

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[350] Ibid.
[351] Ibid.
[352] Correctional Services Amendment Act No 14 of 1996.
[353] Van Zyl Smit, Steyn *op cit* (note 223), p. 13.
[354] Schönteich *op cit* (note 4), pp. 140 f.
[355] Correctional Services Act No 8 of 1959, section 29(5)(a), as amended by the Correctional Services Amendment Act No 14 of 1996.
[356] Ibid.
[357] Ibid, section 29(5A), as amended.
[358] Section 25(3) of the interim Constitution; section 35(3) of the Constitution.
[359] *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC).
[360] Ibid, at 790e-f.
[361] Ibid, at 790f-g.

particular document in the police docket on the grounds that it is not justified for the purpose of a fair trial or on the ground that the State

> 'has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there is a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.'[362]

In the literature[363] it is argued that this ruling has made prosecutorial work more onerous and difficult. For example, it is argued that as a consequence of the ruling prosecutors spend now considerable time on photocopying parts of the dockets on request of the defence.[364] This time-consuming task cannot always be delegated to clerks, because prosecutors often have to decide what information can be given to the defence and what remains privileged.[365] Moreover, it is argued that the ruling opened the possibility of misuse to accused persons and their defence, for instance in influencing a witness not to testify, or in trying to produce inconsistencies between the oral testimony of the witness in court and the statement the witness gave to the police.[366]

With regard to the changes in the legal environment it can be concluded that although most of the changes seem to be more than justified against the backdrop of the human rights spirit of the South African Constitution, they have made prosecutorial work more onerous and difficult.

6. Police work

A successful prosecution depends considerably on a proper investigation of the police. If, for example, no, incomplete or inaccurate statements are taken from potentially corroborating witnesses or where evidence is obtained in an illegal manner, the likeliness that a guilty accused is acquitted arises. Although a good prosecutor may identify flawed investigation before a case goes to court the fact that he often needs to double-check the police investigation is time-

[362] Ibid, at 790h-j.
[363] Steytler, N. 'Making South African criminal procedure more inquisitorial' (2001) *Law, Democracy & Development*, Vol.5, Issue 1, 1-30, p. 8.; Schönteich *op cit* (note 4), p. 143.
[364] Schönteich *op cit* (note 4), p. 143.
[365] Ibid.
[366] Ibid.

consuming. Moreover, since most legal presumptions have been abolished[367] prosecutors have become increasingly reliant on sound and proper investigations.[368]

In the literature it is argued that several developments in the post-1994 period negatively affected the quality of police work.[369] The newly formed South African Police Service (SAPS) was challenged, for instance, by the integration of the several homeland police forces into its new organisational structure and by the human rights spirit of the new Constitution.[370] The Bill of Rights, for example, guarantees the accused's right to fair trail[371] which demands that investigations are undertaken in a procedurally and legally correct manner. In the pre-1994 era this right had not always been adhered to.[372] Moreover, the SAPS lost a considerable number of experienced officers because of poor pay, transformational problems, increased dangerous working conditions, and lucrative offers in the private security sector.[373]

Apart from the internal problems of the SAPS, which have to be addressed by the SAPS itself, it is worth considering whether a closer co-operation between prosecutors and the police as required, for example, under the NCPS[374] and the prosecution policy[375] is sufficient enough to increase the efficiency and effectiveness of the criminal justice system. The success of the prosecution-led-investigation-approach in the DSO and the investigating directorates poses the question, whether this approach should not be extended to the whole relation between prosecutors and the police and stipulated accordingly.[376]

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[367] As discussed above, VIII.5.
[368] Schönteich *op cit* (note 4), p. 146.
[369] Ibid, pp. 146 f.
[370] Ibid, p. 146.
[371] Section 35(3) of the South African Constitution.
[372] Schönteich *op cit* (note 4), p. 146.
[373] Ibid.
[374] NCPS Summary (note 179), National programme 1.4: prosecutorial policy, ibid p. 11.
[375] Prosecution Policy (note 118), section 8.
[376] This will be discussed below, IX.5.b).

IX. Challenges facing the South African Prosecution Service

The National Prosecuting Authority has recognised most of the problems in the prosecutorial sector and has taken measures to address them accordingly. The fact that overtime work of prosecutors is now rewarded again and that the salary of prosecutors is now somewhat connected to their performance is a positive signal. The employment of administrative staff and the various services offered by the Corporate Services Division allow prosecutors to focus more on their core functions. The introduction of obligatory training courses for aspirant prosecutors is a very positive reform.

But despite all these steps the performance of the prosecutorial sector is still not efficient enough. Therefore the essential question is: What else has to be changed in the prosecutorial sector in order to increase its performance and to make the fight of South African criminals more successful?

In the literature[377] several reasons are mentioned why reforms in the prosecutorial sector should be easier to execute than in other sectors of the criminal justice system. For example, the prosecution service is compared to other criminal justice departments, relatively small. While the South African Police Service employs around 125,000 people and some 30,000 people work within the Department of Correctional Services, there are less than 2,500 prosecutors and state advocates in the prosecution service.[378] Therefore, it is argued, that 'personnel-related and transformational problems should be more manageable and quicker to address in the prosecution service' than in the police or the correctional services.[379] Moreover, the prosecution service is staffed predominantly with academically qualified personnel, who have the attributes of university graduates: 'a high level of theoretical training, the ability to learn and work independently, discipline, and above-average levels of intelligence.'[380] Finally, the introduction of the NPA has given prosecutors a more significant political voice.[381]

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[377] Schönteich *op cit* (note 4), pp. 151 f.
[378] Ibid.
[379] Ibid.
[380] Ibid, p. 152.
[381] Ibid.

1. Better and diversified salaries

The high turnover within the prosecution services will not stop as long as people with the same legal qualification as prosecutors earn up to three times more than prosecutors. Although South Africa is still a developing country with limited financial resources, in the literature[382] there are several reasons given why even significant increases of prosecutors' salaries are affordable. For example, while no discernible military or naval threat exist, the huge amount of money spent for defence force equipment could be reduced in order to increase the salary of prosecutors.[383]

In the literature it is also argued that the objection that prosecutors as public servants can only receive salary increases if they were granted to all other public servants of similar rank can be refuted.[384] Significant salary increases would be a crucial contribution to keep experienced prosecutors in the service which would increase the prosecuting performance. An effective and efficient prosecutorial sector serves specific[385] and general[386] deterrent purposes and contributes therefore to a reduction of crime – a goal that is prioritised by the vast majority if South Africans. Additionally, the salary of prosecutors is low compared to their private sector peers, where skills of experienced prosecutors are highly in demand.[387] This is different to most other public servants.

Moreover, it is not comprehensible, why the salary of magistrates exceeds that of prosecutors more than thrice. The minimum educational or legal qualification required for prosecutors and magistrates are the same.[388] The responsibility of the two professions is more or less the same; the workload of prosecutors might be higher.[389] In Germany, just as in most other continental law systems, the salaries of prosecutors and judges are exactly the same.[390] In some respect prosecutors have even fewer duties compared to prosecutors in

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[382] Schönteich *op cit* (note 4), pp. 152-155.
[383] Ibid, p. 153.
[384] Ibid.
[385] It ensures that the guilty accused is actually convicted.
[386] The existence of a functioning (efficient and effective) criminal justice system deters potential criminals.
[387] Schönteich *op cit* (note 4), p. 154.
[388] Ibid, p. 120.
[389] As discussed above, VIII.1.c).
[390] Bundesbesoldungsgesetz, § 37(1) and Anlage IV, printed in Satorius, *Verfassungs- und Verwaltungsgesetze – Textsammlung* (2005), Munich: Beck.

South Africa. The management of the court's roll is, for example, in Germany allocated to the judge of the prevailing court.

In the literature[391] it is also suggested that in order to receive additional funds that court buildings could be sold to private sector companies which then rent them back to the state. In the short term this would create additional funds, but in the long term it is generally cheaper to be the owner than to be the leaseholder. Therefore this proposal has its risks.

The new performance based salary concept of the NPA is a first step in order to reward ambition and competence of prosecutors. To be a significant contribution this concept should include performance targets for each prosecutor taking his qualifications, skills, workload, experience etc into account, as well as the types of crimes he is prosecuting, for example serious economic offences. The remuneration should be in accordance with these targets. Additionally remuneration should be granted with regard to regional differences.[392] Prosecutors working in cities have, for example, higher living costs than prosecutors in rural areas. At the same time tempting lucrative job offers in the private sector are predominant in city areas.

2. Career management

With the introduction of the NPA new ranks such as senior and chief prosecutor, deputy national director and national director have been established.[393] Moreover, specialised positions, such as those of investigating director or special director, have been created; specialised units, such as the Asset Forfeiture Unit or the Specialised Commercial Crimes Unit, have been introduced. Therefore, it can be argued that now a wider choice of career paths is available for prosecutors than prior to 1998.[394] But as mentioned above[395] a central problem has remained unchanged, promotions and substantial salary increases are generally combined with office-based managerial and administrative functions. Valuable litigation and court room skills get lost.

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[391] Schönteich *op cit* (note 4), p. 155.
[392] Ibid, p. 157.
[393] Ibid, p. 162.
[394] Ibid.
[395] VIII.1.b).

Therefore career options should be created with regard to the specialisation of prosecutors, for example in juvenile delinquency or intricate fraud cases. Moreover, regional prosecutors should be rewarded financially with higher salaries than district prosecutors. This would offer promotion that is not equated with managerial duties and takes higher skills and greater reasonability into account.

Additionally it is suggested in the literature that promotions should not occur automatically, but only with regard to the aptitude of the applicant. [396] It is also suggested that promotions should include the possibility of demotion if the promoted fails in his position.[397] While the first suggestion rewards support, the latter seems to be too harsh. Demotion should be limited to exceptional cases and softer alternatives, such as salary reductions, could be considered instead.

The new established Human Resource Management and Development Service within the Corporate Service Division has evaluated 99% of the jobs in the NPA.[398] Combined with the new performance based salary structure career path in the way as sketched above, should be created.[399]

3. Improved training

The above described career paths of specialisation require training courses for prosecutors who envision those careers. The legal environment in which prosecutors work changes, new jurisprudence influences their work.[400] The forms of crime and the techniques of criminals, such as computer-based fraud, change. New medical and forensic methods appear and open new ways of combating crime. Special attention should be given to the cooperation with the police, to sharpen prosecutors' minds for police work and possible

[396] Schönteich *op cit* (note 4), p. 163.
[397] Ibid.
[398] NPA Annual Report 05/06, p. 55.
[399] In order to increase the attractiveness of the prosecution service as an employer for new and permanent prosecutors, the image of the prosecution service needs also to be enhanced. In this regard it is suggested, for example, that 'the prosecution service should sell itself and its professional staff at every opportunity with vigour and determination.' (Compare: Schönteich *op cit* (note 4), p. 191)
[400] Schönteich *op cit* (note 4), p. 188.

investigation mistakes.[401] This would, for example, help to identify mistakes in advance and could avoid that such mistakes cause serious problems during the trial. Additionally prosecutors need knowledge of how to handle the huge amount of cases that is flowing in.[402] This would allow, for example, an assessment of how long trial will last and how the court diary consequently should be structured. Finally different working areas require different skills. A juvenile prosecutor, for instance, also needs some educational knowledge and social skills. Training courses have to take all these aspects into account and have to be offered on a regular basis. The fact that at the moment only 35% of prosecutors receive training[403] means, that even were such courses are in place only a third of prosecutors can benefit from them.[404]

4. Reducing the workload of prosecutors

In order to increase the performance of the prosecution service it is important to reduce the workload of prosecutors. Several measures can be identified in this respect.

a) More prosecutors, administrative assistance

The fact that in 2005/06 more than 20% of posts within the NPA were vacant is a matter of concern that directly effects on the prosecuting performance. Vacant posts have to be filled immediately. Thereafter, it can be determined whether additional prosecutors and staff have to be employed. Although both measures require financial means, budgetary constraints should not retard them. In this context the same argument applies that supports the increase of prosecutorial remuneration:[405] an efficient and effective prosecutorial sector is a cornerstone in South Africa's fight against crime. It requires therefore financial priority.

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[401] Ibid; Fernandez *op cit* (note 250), p. 203.
[402] Schönteich *op cit* (note 4), p. 188.
[403] Discussed above, VIII.4.
[404] NPA Annual Report 2005/06, p. 28 gives an indication of some courses that were offered with regard to specialisation, such as training in child law.
[405] Discussed above, IX.1.a).

As a further measure, it should be critically scrutinised where administrative and clerical support can be increased, in order to relieve prosecutors from as many administrative duties as possible. This will allow prosecutors to spend their valuable time on their core function, prosecuting. In the literature it is also suggested that internships of senior law students during vacation time should be used to a greater extent.[406] This idea rewards support as law students can profit from the practical insights augmenting their theoretical lectures and may become potential recruits for the prosecution service. But it is questionable whether prosecutors are considerably disburdened when such students carry out some routine administrative duties.

b) Diversion

Diversion is an instrument that can help to reduce prosecutorial workload and relieve the criminal justice system from its overload. As mentioned above[407] diversion is defined 'as the channelling of prima facie cases away from the criminal justice system with or without conditions.' Such conditions can vary from cautions or referrals to the welfare system, to participation in particular programmes, or reparation and restitution.[408] Diversion can take place at different stages of the criminal justice process: prior to arrest, charge, plea, trail or sentencing.[409]

Although not stipulated in South African law,[410] diversion is used in the country. Diversion programmes have been offered in South Africa since the early 1990s, for example, by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO).[411] Domestic research indicates that the participation in such programmes positively affect recidivism rates. It was found, for example, that among 468 NICRO juvenile diversion clients country wide, only 6.7% re-offended within the first 12 month following their

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[406] Schönteich *op cit* (note 4), p. 181.
[407] VII.6.
[408] Badenhorst, Conradie *op cit* (note 228), p. 115.
[409] Ibid.
[410] The Child Justice Bill 49 of 2002 which provides for the use of diversion with regard to individuals younger than 18 has not been adopted yet, compare: Pinnock, D. 'Child justice delayed is child justice denied' *Mail and Guardian* September 29 to October 5 2006, p. 25.
[411] Wood, C. 'Diversion in South Africa – A review of policy and practice, 1990-2003' *ISS Paper 79* October 2003, Institute for Security Studies, p 1; on page 2 the different programmes of NICRO are listed.

participation in a diversion programme.[412] Further benefits are entailed in the use of diversion: Stigmatising effects of court proceedings, especially on juvenile offenders, are avoided. A swift and individualized response contributes rehabilitation.[413] Moreover, diversion programmes ease the reintegration of offenders in their social environment, especially where diversion programmes comprise restorative justice elements, such as family group conferences and there like.[414] Finally and particularly important in the context of this analysis, diversion reduces the workload of the courts and prosecutors as diversion is less time consuming than a whole trial[415] and spares financial resources, because expensive[416] and valuable court time is saved.

Despite the positive effects diversion entails, it must not be overlooked that its area of application is somewhat limited. Diversion requires generally a *prima facie* case – a case that is likely to result in a conviction when not diverted.[417] Moreover, diversion is limited to certain kinds of offenders, predominantly first time offenders, and to certain kinds of offences, minor or less serious in kind.[418]

In the literature[419] it is argued that in the absence of legal provisions diversion is not always considered where it seems to be appropriate. A diversion case audit was conducted by the NPA and revealed that between 1999 and 2000 some 10,000 children had been diverted in South Africa.[420] While in some regions diversion had not been practiced at all, in city areas the use of diversion

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[412] Sloth-Nielsen, J. and Muntingh, L.M. 'Juvenile Justice Review, 1998' (1999) *South African Journal of Criminal Justice* Vol. 12, Issue 1, 65-80, pp. 77, 79.
[413] Meier, B.-D., Rössner, D. and Schöch, H. *Jugendstrafrecht* (2003), Munich: Beck, p. 160.
[414] All these mentioned benefits of diversion contribute to the low recidivism rate.
[415] Once a prosecutor has decided to divert a case, it will be dealt with by other role players, such as NGOs, which provide appropriate programmes.
[416] The provision of the infrastructure and personnel of the courts is quite expensive, compare Schönteich *op cit* (note 4), pp. 166 f.
[417] Schönteich *op cit* (note 4), p. 165.
[418] The typical NICRO diversion programme participant is male, between 15 and 17 years of age, a first offender charged with a property offence, resides with his parents and is in his 2nd or 3rd year of secondary schooling; compare: Sloth-Nielsen, Muntingh *op cit* (note 412), pp. 77, 79.
[419] Badenhorst, Conradie *op cit* (note 228), p. 115.
[420] Findings reported in: Mukwevho, H. 'The role of the prosecutors in enabling diversion' (2001) *Article 40* Vol. 3, No. 3, p. 2.

was quite considerable.[421] Among the various reasons that contributed this finding a lack of awareness of the existing programmes among prosecutors and a lack of training for prosecutors on diversion were identified.[422] As a result of these findings, it was proposed to offer training for prosecutors across the country and to revise the policy directives in place.[423]

In the absence of legal provision the decision whether or not to divert a case rests almost exclusively with the prosecutor.[424] The NDPP has issued 'Policy Directives on Diversion' that set out criteria and a procedure for the use of diversion.[425] Accordingly prosecutors should not consider diversion in cases where an offender is charged with serious offences, such as rape, murder and robbery with aggravating circumstances. Recidivists who have been already subjected to diversion are generally excluded from diversion.[426] In order to be subjected to diversion, an offender should have a fixed address, should have accepted responsibility for his actions, should be prepared to participate in the diversion programme, and should, when he is a minor, be between the ages of 12 to 18 and with a parent or guardian who is prepared to take responsibility for his attendance.[427]

If a candidate meats the criteria mentioned above, the prosecutor subjects him – on the recommendation of a probation officer who has screened the candidate and after informing the candidate (or his parents in the case of a juvenile) about the procedure – to a diversion programme.[428] When the diversion programme is completed the social worker submits a report to the prosecutor. If the offender has cooperated and benefited from the programme, his case is withdrawn. If not, the criminal trial proceeds.[429]

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[421] Ibid; the fact that diversion is applied unevenly is particularly a matter of concern as everyone in conflict with the law should be treated alike.
[422] Ibid.
[423] Ibid.
[424] The decision whether or not to prosecute is subject only to limited judicial review as the discussion of *M v The Senior Public Prosecutor, Randburg and Another* (WLD) Case no 3284/00, unreported, by Sloth-Nielsen, J. 'Challenging the decision not to divert' (2000) *Article 40* Vol. 4, No. 2, pp. 1-3 indicates.
[425] Collopy, A. et al *Handy Hints Manual for Prosecutors. Policy Directives* (2001), Pretoria: NDPP, B12 as discussed in Badenhorst, Conradie *op cit* (note 228), pp. 116 ff.
[426] Badenhorst, Conradie *op cit* (note 228), pp. 116 f.
[427] Ibid, p. 117.
[428] Ibid.
[429] Ibid.

At the sentencing stage of a criminal trial, the court can impose a suspended sentence and make the participation of a specific programme one of the conditions of the suspension. If the offender fails to comply with that condition, the prosecutor can apply to the court to put the suspended sentence into practice.[430]

A register is required in terms of the policy directive listing candidates, reasons for the decisions whether or not to divert and how the case was finally resolved.[431]

In the literature the current policy directives have been criticised.[432] It is argued that the selection criteria for suitable candidates are to narrow. Juveniles without parents or guardians willing or able to take responsibility as required and offenders without a fixed address are excluded.[433] Moreover, the requirement that a candidate has to acknowledge accountability for his offence(s) before being considered for diversion is likely to infringe his constitutional rights.[434] That would be true when the offender's acknowledgement is used against him in the case that diversion has failed and the criminal trial ensues.[435] The mentioned critic rewards unrestricted support.

The challenge for the prosecution service with regard to diversion can be formulated as follows: Country-wide prosecutors have to be made aware of the fact that diversion is a possible response to criminal behaviour and trained accordingly. Diversion should be used in all deserving cases as its use is supported by the several benefits discussed above. In this context the NPA should explore whether the relatively narrow selection criteria could not be widened and which further aspects of the directives deserve revision.

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[430] Ibid, pp. 117, 118.
[431] Ibid, p. 118.
[432] Badenhorst, Conradie *op cit* (note 228), pp. 116 ff.
[433] Ibid, p. 117.
[434] Everyone who is arrested for allegedly committing an offence has the right to remain silent (section 35(1)a. of the South African Constitution), every accused person has the right to fair trial, including the rights to be presumed innocent, to remain silent and not to testify during proceedings (section 35(3)h. of the South African Constitution).
[435] Badenhorst, Conradie *op cit* (note 228), p. 117.

c) Plea and sentence agreements

In the context of measures and instruments that help to reduce the workload of prosecutors and the courts, the use of plea and sentence agreements is a further option that has to be considered.

The procedure that results in a plea agreement is commonly known as plea bargaining and can be defined 'as a negotiation between the prosecution and an accused … in which the accused agrees to plead guilty to a criminal charge in exchange for concessions by the prosecution.'[436] While the accused relinquishes his right to go to trial and loses any chance of an acquittal, he avoids 'conviction on a more serious charge or receives an undertaking by the prosecution not to propose a harsh sentence for the accused'.[437] The prosecution, in contrast, is not forced to go through a long and costly trial with all of its attendant evidentiary risks.[438]

'Informal' plea bargaining has already taken place in South African courts before section 105A of the Criminal Procedure Act[439] was introduced.[440] Section 105A has codified most aspects of the informal practice and has additionally introduced some innovations.[441] Unlike the traditional model, section 105A also allows for agreements between the prosecution and the defence with regard to the sentence that should be imposed.[442] A prosecutor who is authorised in writing by the National Director of Public Prosecutions and a legally represented accused may negotiate and enter into an agreement before the trial commences.[443] Agreements can be reached in respect of-

> '(i) a plea of guilty by the accused of the offence charged or to an offence of which he or she may be convicted on the charge; and
> (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty-
>
> (aa) a just sentence to be imposed by the court; or
> (bb) the postponement of the passing of sentences in terms of section 297(1)(a); or

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[436] Ibid.
[437] Ibid.
[438] Bekker, P. M., Geldenhuys, T., Joubert, J.J., Swanepoel, J. P., Terblanche, S. S., van der Merwe, , S. E. *Criminal Procedure Handbook* 7th edit. (2005) Cape Town: Juta, p. 206.
[439] Criminal Procedure Act No 51 of 1977, as amended by section 2 of the Criminal Procedure Second Amendment Act No 62 of 2001.
[440] Bekker et al *op cit* (note 438), pp. 206 f; Du Toit et al *op cit* (note 164), p. 15-6.
[441] Bekker et al *op cit* (note 438), p. 207.
[442] Criminal Procedure Act No 51 of 1977, as amended, section 105A(1)(a)(ii)(aa),
[443] Criminal Procedure Act No 51 of 1977, as amended, section 105A(1)(a).

> (cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and
> (dd) if applicable, an award for compensation as contemplated in section 300.'[444]

The executive summary of the South African Law Reform Commission's (SALRC) fourth interim report on the 'simplification of criminal procedure' states with the regard to the advantages of introducing plea and sentence agreements to South African law:

> 'A system which formalises plea agreements and which makes the outcome of the case more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty. Protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure. The practice of plea negotiation in South Africa could therefore make an important contribution to the acceleration of the process.'[445]

In the literature the use of plea and sentence agreements is not without controversy.[446] Concerns are uttered, for example, that plea and sentence agreements may result in lenient sentences for the accused and that this is likely to undermine the deterrent effect of criminal sanctions and the perception of the criminal justice system as a whole.[447] Although these concerns have a point, the fact that the South African criminal justice system is currently so heavily overloaded makes it unavoidable to utilise plea and sentence agreements as expedient and efficient instruments to deal with criminal cases. Moreover, it can be argued that the long time it takes currently to finalise trials and the huge backlog of cases even stronger undermine the perception of the criminal justice system and its deterrent effect.

The introduction of section 105A seems to have positively impacted on the level of the specialised commercial crime courts. Here it is reported for the period of 2003/04 that in more than 60% of their cases the accused person entered into a plea and sentence agreement and considerable sentences had

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[444] Ibid.
[445] South African Law Reform Commission *Fourth Interim Report – Project 73 – Simplification of Criminal Procedure (Sentence Agreements)* May 2001, Pretoria: SALRC, executive summary section 6.
[446] De Villiers, W. 'Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?' (2004) De Jure Vol. 37, Issue 2, 244-255, p. 251.
[447] Ibid.

been imposed.[448] On the level of the NPS the picture is completely different. In 2005/06 in only 1,202 cases plea and sentence agreements have been achieved,[449] while the NPS finalised a total of 414,282 cases in the same period.[450] One might argue that the high use of plea and sentence agreements in the specialised commercial crime courts results predominantly from the 'special' conditions under which these courts work. Such courts are staffed with prosecutors trained and specialised in commercial crimes. Moreover, commercial crime cases are more open to plea and sentence agreements as their investigation is intricate, evidence often hard to obtain and accused are normally well represented. Nevertheless, the little use of plea and sentence agreements on the NPS level is of concern as the pressure on courts' rolls is here particularly high and plea and sentence agreements should be used to address this pressure.

In the literature it is argued that some of the provisions of section 105A limit the advantages of plea and sentence agreements considerably.[451] For example, agreements under section 105A are only open to legally represented accused.[452] In this context it is argued that 'in the light of Legal Aid Board's policy of not assisting accused persons with minor offences such as common assault' indigent accused will only enter into plea and sentence agreements where they are charged with more serious offence.[453] This is regrettable as 'minor offences' constitute a considerable part of the courts' rolls.

Only prosecutors who have been authorised by the NDPP are allowed to enter into plea and sentence agreements.[454] This, it is said, constitutes a problem in small branch courts where 'ordinary' prosecutors find only a small number of authorised prosecutors,[455] if any, in place that they can approach for permission.[456]

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[448] National Prosecuting Authority of South Africa *Annual Report 2003/04*, p. 15 as cited in: Watney, M. 'Judicial Scrutiny of plea and sentence agreements' Tydskrif vir die Suid-Afrkaanse Reg, 2006, Issue 1, 224-230, p. 224.
[449] Annual Report 05/06, p. 27.
[450] Ibid, p. 19.
[451] Van der Want, M. And Gault, C. 'Why plea bargaining may not produce the desired results' (2005) *Without Prejudice* Vol. 5, Issue 4, 20-22, p. 21.
[452] Criminal Procedure Act No 51 of 1977, as amended, section 105A(1)(a).
[453] Van der Want, Gault *op cit* (note 451), p. 21.
[454] Criminal Procedure Act No 51 of 1977, as amended, section 105A(1)(a).
[455] According to Van der Want, Gault *op cit* (note 451), p. 21 the NDPP has authorised directors, deputy directors, many chief and some senior prosecutors. (Initially only 'the director

Another critic holds that the complex procedure established under section 105A neglects to some extent the realities in South African courts:

> 'In the view of the perception that dockets are frequently not available when cases come before court, the charge sheets have not been drawn up at the third or fourth appearance for plea and trial, prosecutors do not read the dockets before the hearings and so forth, it is fair to say that the system will be hard pressed to cope with the added burden of negotiating section 105A agreements…'[457]

The question is which conclusion can be drawn from the finding that section 105A apparently does not have the desired impact with regard to one of its presumed advantages – to reduce the pressure on courts' rolls. It is argued that 'if the prosecution were competent and trustworthy, more prosecutors could be entrusted to enter into section 105A agreements.'[458] This relates directly to one of the above mentioned central problem within the prosecution service, the lack of qualified and experienced prosecutors especially in the lower ranks.[459] It is also argued that in a criminal justice system where 'competent and trustworthy' prosecutors are in place plea *and* sentence agreements could be concluded informally, as such prosecutors and the presiding officer 'will ensure that justice prevails when such agreements are made.'[460]

Currently, South Africa is in not in such a situation. But the procedure laid down in the various subsection of 105A must only be followed where an agreement is concerned that relates to the plea as well as the sentence.[461] Where only a plea agreement is concerned, section 105A is not applicable, but 'the "ordinary" rules of traditional plea bargaining and prosecutorial acceptance of pleas.'[462]

Another question is whether the 'traditional' from of plea bargaining remains a coequal option. That is because the willingness of an accused to engage in a

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of public prosecutions and certain prosecutors in respect of the high court, regional court and district court in the city which is the seat of the high division concerned' had been authorised by the NDPP, compare: *Directives issued by the NDPP on 14 March 2002* as printed in: Du Toit et al *Commentary on the Criminal Procedure Act* (Service 35, 2006), Cape Town: Juta, 15-24 to 15-26, p. 15-26.

[456] Van der Want, Gault *op cit* (note 451), p. 21.

[457] De Villiers *op cit* (note 446), p. 255.

[458] Ibid, p. 254.

[459] See above, VIII.1.

[460] De Villiers *op cit* (note 446), p. 254 f; De Villiers mentions Canada, as an example where informal agreements are successfully allowed.

[461] Du Toit et al *op cit* (note 164), p. 15-6.

[462] Ibid, pp. 15-6 f.

negotiation in the traditional way might be limited where a further option is available that at least gives him some sort of security on the imposed sentence.[463]

The challenge for the prosecution service in terms of plea and sentence agreements can be formulated as follows: Prosecutors have to be trained in the use of the demanding provisions of section 105A. While remembering the 'special' situation of the specialised commercial crime courts, their considerable numbers in the use of plea and sentence agreements indicate the potential for the 'ordinary' prosecutorial level. If prosecutors are better trained and 'trustworthy' the NDPP might authorise more prosecutors to enter in plea and sentence agreements. Finally, it should be considered whether the limitation of section 105A that only legally represented accused may enter plea and sentence agreements should not be repealed or at least restricted to serious crimes where long sentences are to be expected.[464] Under section 105A(6) the court is obliged to satisfy himself of the guilt of the accused on the facts and in law. Section 105A(7) requires that the court has to satisfy himself that the sentence agreement is just. These two requirements seem to be sufficient safeguards against misuse of plea and sentence agreements to the prejudice of unrepresented accused.

d) Outsourcing

As a further measure to reduce prosecutorial workload it is suggested in the literature to outsource functions and duties that not necessarily have to remain in the prosecution service.[465] The National Prosecuting Authority Act opens this possibility.[466]

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[463] The final decision whether the sentence agreed upon will be imposed, also rests under section 105A with the court, section 105A(8), (9).

[464] De Villiers *op cit* (note 446), p. 254 argues that the requirement under section 105A that an accused has to be legally represented contravenes an accused's right to remain unrepresented (to waive his right to counsel).

[465] Schönteich, M., Minnaar, A., Mistry, D., Goyer, K.C. 'Private Muscle – Outsourcing the Provisions of Criminal Justice Services' (2004) *ISS Monograph* No 93, Pretoria: Institute for Security Studies, Chapter 5; Schönteich *op cit* (note 4), pp. 172 ff.

[466] NPA Act, section 38(1), as amended:

> 'The National Director my in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the state, engage, under agreement in writing, persons having suitable qualifications and experiences to perform service in specific cases.'

The idea of outsourcing prosecutorial functions and duties is based on the general philosophy that underlies the contracting out of state services and public-private partnership arrangements. It is presumed that the delivery of service through state entities has generally some shortcomings, while outsourcing such services to the private sector entails benefits.[467] Such benefits can comprise lower costs, higher service quality and a more flexible and innovative service provision.[468] It is argued, for example, that private contractors are not bound by public service labour regulations. This, it is said, allows for a more flexible personnel management which positively impacts on their ability to respond to new challenges.[469] It is also argued that private service providers are normally subjected to competition for winning customers, which is likely to result in innovation, better quality and cost reductions.[470] A further argument, for example, holds that the state can set down minimum standards in an outsourcing contract and change the contractor if he fails to comply with this standard - an option that does not exist when the service remains in a state department.[471]

Although some of the presumed benefits of privatization are controversial[472] and concerns are uttered against privatisation,[473] it is submitted that in certain cases and with appropriate safeguards outsourcing might be an appropriate instrument to tackle problems existing in state departments and their provision of service.

With regard to the outsourcing of prosecutorial functions and duties several suggestion are made. For example, it is argued that cases such as computer related fraud cases, complex commercial crimes or environmental offences could be contracted out to the private sector – to law firms specialised in the

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In terms of section 38(3), the consultation of the Minister is dispensable. Section 38(4) states that '"services" include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be.'

[467] Schönteich et al *op cit* (note 465), pp. 17 ff.; Schönteich *op cit* (note 4), p. 172.

[468] Schönteich et al *op cit* (note 465), p. 17.

[469] Ibid.

[470] Ibid, p. 18.

[471] Ibid, p. 19.

[472] For example, it is questioned whether outsourcing automatically leads to cost reductions. This is, for example, because some services, such as the rehabilitation of offenders are complicated, if at all, to compare (Schönteich et al *op cit* (note 465), p. 18).

[473] Concerns with regard to privatisation comprise, for example, security risks, accountability problems or the provision of unequal service; compare: Schönteich et al *op cit* (note 465), pp. 20 ff.

prevailing field.[474] Such cases, it is said, require special knowledge, such as adequate knowledge of forensic accounting, computer science or natural sciences in order to be prosecuted successfully.[475] The suggestion has a point as such knowledge is normally acquired through experience – a feature that is currently lacking in the system.[476]

The NPA's policy in this respect is two folded. The Specialised Commercial Crime Unit (SCCU) has already made use 'of private legal counsel' to successfully prosecute particularly difficult and complicated commercial crimes tried at the specialised commercial crime courts and to allow 'the transfer of skills from private counsel to state advocates.'[477] The money for such outsourcing is acquired from a trust fund which is supplied with money donated by the private sector, especially banks and other financial institutions.[478]

Apart from this use of private sector elements, the NPA's approach with regard to complex cases that require special knowledge and abilities is specialisation. For example, four dedicated Tax Units have been introduced 'to manage and oversee the prosecution of all tax related cases.'[479]

It is also suggested in the literature that the temporary increases of incoming cases should be responded by outsourcing them to 'articled clerks and junior attorneys in the private sector.'[480] Such temporary increase, for example, may result from the fact that 'certain crimes have a seasonal prevalence', such as an increase 'of drunk-driving, shoplifting, assault and domestic violence cases' over the festive season between Christmas and new year.[481] A temporary increase may also result from extended crime combating operations of the South African police service.[482]

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[474] Schönteich et al *op cit* (note 465), p. 62.
[475] Ibid.
[476] Discussed above, VIII.1.
[477] Schönteich et al *op cit* (note 465), p. 63.
[478] Ibid.
[479] NPA Annual Report 2005/06, p. 18; the units are based on a 'mutual cooperation between NPA and South African Revenue Service (SARS) to enhance State's capacity to prosecute criminal activity and collect State revenue.'
[480] Schönteich et al *op cit* (note 465), p. 64.
[481] Ibid.
[482] Ibid.

This suggestion is less convincing as the same but probably cheaper effect might be achieved be installing ad hoc courts such as the additional and Saturday courts already known to South Africa.

Nevertheless, the example of the SCCU demonstrates that there is potential in the outsourcing of special aspects of prosecutorial work. The challenge of the prosecution service with regard to outsourcing can therefore be formulated as to explore what further options exist which are suitable for contracting them out to the private sector.

e) Private prosecution

In the literature it is suggested that private prosecutions should be utilised as an instrument to reduce prosecutorial workload.[483]

In South Africa the use of private prosecution is limited by various provisions of the Criminal Procedure Act. First, section 7 of the Criminal Procedure Act limits the circle of potential private prosecutors. In essence, only a private person who 'proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the said offence' may institute and conduct a private prosecution. While section 8 of the Criminal Procedure Act opens the institution of private prosecution for public bodies on certain conditions, there is no such provision for companies and legal persons.[484]

A further limitation is that private prosecutions may only be instituted and conducted where a director of public prosecutions[485] has declined a prosecution.[486] Finally, the Criminal Procedure Act includes safeguards in order to prevent persons from misusing the right to institute private prosecutions.[487] But at the same time these provisions might prevent potential private prosecutors from instituting and conducting a prosecution. For example, a private prosecutor has to deposit money with the court as a security

[483] Schönteich et al *op cit* (note 465), pp. 64 ff.; Schönteich *op cit* (note 4), p. 178.
[484] The subsection (1)(a)-(d) of section 7 list potential private prosecutors, but companies and legal persons are not mentioned.
[485] The attorney-general mentioned in section 7 is to be construed as a director of public prosecutions in terms of section 45 of NPA Act.
[486] Criminal Procedure Act No 51 of 1977, sections 7(1)(a), as amended.
[487] Schönteich et al *op cit* (note 465), p. 66.

for costs the accused person might have in respect of his defence against the charge brought forward by the private prosecutor.[488] 'Where a private prosecutor fails to prosecute a charge against an accused without undue delay' the money is 'forfeited to the state.'[489] In a private prosecution, the accused can 'be brought before court only by way of summons;'[490] he cannot be arrested.[491] Where an accused is acquitted, the court 'may order the private prosecutor to pay to such accused the … costs and expenses incurred in connection with the prosecution ….' Finally, where 'a court is of the opinion that a private prosecution was unfounded and vexatious,' it has to award to the accused, at his request, 'such costs and expenses incurred in connection with the prosecution, as it may deem fit.'[492]

The legal provisions sketched above image the traditional view of the individual's right to institute a private prosecution as a

> '"safety valve", so to speak, in the machinery of law. It is also to some extent in indirect method of controlling corruption or incompetence in the state's prosecutorial services.'[493]

But the system of private prosecution cannot only be justified in terms of society's interest in increased law enforcement. It is also justified in the individual's interest in vindication of personal grievances as it allows for victim participation in the criminal justice system.[494]

Notwithstanding any accused's right of protection against unfounded and malicious private prosecution, the current legislation could be amended to allow for a greater use of private prosecutions.

For example, it is argued that companies which spend a considerable amount of money on private investigators to track down frauds among their employees might be more than willing to pay also for an experienced and competent commercial lawyer to prosecute their cases.[495] This example has a point especially if one considers that it is quite likely that cases would be finalised

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[488] Criminal Procedure Act 51 of 1977, section 9(1), as amended.
[489] Ibid, subsection (3).
[490] Criminal Procedure Act 51 of 1977, section 12(1).
[491] Du Toit et al *op cit* (note 164), p. 1-9.
[492] Criminal Procedure Act No 51 of 1977, section 16(2).
[493] Bekker et al *op cit* (note 438), p. 65,
[494] Ibid.
[495] Schönteich et al *op cit* (note 465), p. 68.

quicker and the chances of obtaining convictions are higher. Negative publicity and costs resulting companies from absent employee testifying at lengthy trials would be kept short.[496] Through an amendment of the current legislation such companies and legal persons could be permitted to institute private prosecutions.

In a divided society such as South Africa one might argue with some reason that such allowance for private prosecution might favour the wealthy. But just as aptly explored in the literature[497] private prosecutions reduce prosecutorial workload and allow prosecutors to engage with other cases, including cases in which indigent people have been victimised. Additionally, access to private prosecution for such people could be granted through NGOs etc.[498]

A further shortcoming of the current system of private prosecutions is identified in the provision that victims of a crime are only allowed to proceed with a private prosecution after a director of public prosecution has declined to prosecute a case.[499] Here it is argued that the decision whether to institute a prosecution could be left to the victim, as the victim is the person 'who arguable has the most to lose from a bungled prosecution.'[500]

To make private prosecutions more accessible in the sketched way could result in several advantages:

> 'By instituting private prosecutions, crime victims improve their chances of obtaining a speedy conviction against an accused person. Accused persons benefit as their trials are finalised more rapidly than would otherwise be the case. Frequently delays in criminal justice trials place considerable financial and emotional strains on accused persons and their families, even if the trials end in their acquittal. Finally, private prosecutions would alleviate some of the pressures on the state-run prosecution system, as state prosecutors should be able to devote more time to other cases they deal with.'[501]

Therefore it can be concluded with regard to the use of private prosecution that the prosecution service should envisage the benefits of this instrument and lobby for legislative changes.

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[496] Ibid.
[497] Ibid, p. 67.
[498] Ibid.
[499] Ibid, p. 68.
[500] Ibid.
[501] Schönteich et al *op cit* (note 465), p. 68.

5. Making the South African criminal procedure more inquisitorial with regard to the role and function of the prosecution service

Apart from the several measures that could be introduced and/or intensified to reduce prosecutorial workload and to address the overload of the criminal justice system, it might be worthy to explore whether inquisitorial features of criminal procedure could enhance prosecutorial work in South Africa.

a) Adversarial and inquisitorial models of criminal justice

It is submitted that

> '[t]he most fundamental differences between systems of criminal law and procedure … can be characterised on a rough dimension of *inquisitorial* and *adversarial systems.*'[502]

While the adversarial system is traditionally linked to the Anglo-American common law system, the inquisitorial system is linked to the continental European civil law system.[503] In practice there are no two pure systems in existence, but hybrids which are predominantly adversarial or inquisitorial in nature.[504] South Africa follows the Anglo-American adversarial system although some amendments to existing legislation on criminal procedure were inquisitorial in nature.[505]

The central issue of a trial conducted in the inquisitorial manner differs from that of a trial conducted in the adversarial manner:

> 'In an adversarial trial the central determination is whether the prosecution can prove the accused's guilt beyond reasonable doubt. If the prosecution fails to meet this burden, whether because of negligence or simply a lack of evidence, the state looses its case. The presiding officer plays a passive role.'[506]

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[502] Van Koppen, P. J. and Penrod, S. D. (eds.) *Adversarial versus Inquisitorial Justice – Psychological Perspectives on Criminal Justice Systems* (2003), New York: Kluwer Academic/ Plenum Publishers, p. 2.
[503] Steytler *op cit* (note 363), p. 2.
[504] South African Law Reform Commission *Discussion Paper 102 – Project 107 – Sexual Offences* (2002), Pretoria: SALRC, Chapter 12, p. 1.
[505] Ibid, p. 5; Roodt, C. 'A Historical Perspective on the Accusatory and Inquisitorial Systems' (2004) *Fundamina: A Journal of Legal History,* Vol. 10, 137-158, p. 156; Roodt mentions in Fn 112 the following sections as inquisitorial in nature: sections 60(3), 112, 115(2)(b), 121, 123, 153, 167, 170A, 186, 209, 342A of the Criminal Procedure Act.
[506] SALRC *op cit* (note 504), p. 2.

> 'In an inquisitorial trial within the civil law systems, the judge plays a much more active role. The judge, rather than the parties, is responsible for developing the evidence, calling or questioning witnesses himself or herself. In a minority of civil law jurisdictions this may include access to the *dossier* compiled prior to trial. By its nature this includes written statements (so that the judge is not confined to oral evidence led in court).'[507]

Briefly stated, the features of the adversarial model comprise a public trial (with discretion to hold *in camera* hearings), oral proceedings, a passive presiding officer, a cross-examination of witnesses by opposing parties, a police run investigation, a strict system of evidence, competency requirements for witnesses, parties that are responsible for the presentation of evidence in support of their respective cases, a contest between the parties, and a subordination of the search for the truth to either constitutional rights or rights established by common law.[508]

Under the inquisitorial model there is also a public trial (with discretion to hold *in camera* hearings) and an oral proceeding but the model differs from the adversarial one as it comprises an examining presiding officer, questioning of witnesses by that presiding officer, a prosecutor (or judicial) run investigation, a free system of evidence, no competency requirements for witnesses, the duty of all officials to search for the truth and evidence that is in support of and against the accused, and an inquiry to establish the truth.[509]

In the current context two aspects are of particular interest:

b) Investigating stage - prosecution led investigation

The quality of police investigation has been identified as one of the factors that negatively impact on prosecutorial performance.[510] In the literature it is argued that

> 'the Achilles heel of the South African criminal justice system has been its inability to reliably prepare cases for trial.'[511]

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[507] Ibid, p. 2, 3.
[508] Ibid, p. 4, 5.
[509] Ibid, p. 5.
[510] See above, VIII.6.
[511] Stone et al *op cit* (note 36), p. 32.

It has further been analysed that the key to successful investigation and case presentation is a close collaboration between the victim,[512] the investigating officer and the prosecutor.[513] In essence this means that insufficient investigation of cases cannot only be blamed on the police. It is also a result of inadequate prosecutorial guidance. This insight is reflected in the NCPS[514] as well as in the Prosecution Policy.[515] Although both policy papers require collaboration between the police and prosecutors, it seems that in the light of the huge backlog of cases and the high numbers of cases withdrawn in court, present arrangement are not sufficient enough to address these problems adequately.

In inquisitorial systems the prosecution service is traditionally considered to have a controlling role in the investigating stage.[516] In some countries, such as Germany and the Netherlands, the prosecution service is legally the 'ruler' of the investigating stage.[517] In Germany, the police are – as far as the prosecution of crime is concerned – functionally subservient to the prosecution service and in this function obliged to follow any order issued by the prosecution service.[518] In many continental European systems there is at least a factual influence of the prosecution service at the investigation stage with regard to serious and moderate serious cases. Only minor offences are solely dealt with by the police.[519] The influence of the prosecution service at the investigation stage is 'regarded necessary because it is concerned with the gathering of evidence to be used before court.'[520] The prosecution service's role is 'to ensure that necessary rules are stuck to and the evidence gathered in such a way to be of maximum use to the court.'[521]

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[512] The importance of victim participation is discussed further below, IX.6.
[513] Stone et al *op cit* (note 36), p. 32.
[514] NCPS Summary (note 179), National programme 1.4: prosecutorial policy, ibid p. 11.
[515] Prosecution Policy (note 118), section 8.
[516] Wade, M. 'The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in: Jehle, J.-M. and Wade, M. (eds.) *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe* (2006), Berlin, Heidelberg: Springer, 27-126, p. 40.
[517] Ibid; in Germany this is stipulated in sections 160 ff of the German Criminal Procedure Code (Strafprozessordnung) in: Schönfelder, H., *Deutsche Gesetze – Textsammlung* (2005), Munich: Beck, section 90.
[518] Section 152(1) of the German Court Constitution Code (Gerichtsverfassungsgesetz) in: Schönfelder, H., *Deutsche Gesetze – Textsammlung* (2005), Munich: Beck, section 95.
[519] Wade *op cit* (note 516), p. 43.
[520] Ibid, p. 41.
[521] Ibid.

In England and Wales the prosecution service has no competence at the investigation stage, there is

> 'no factual involvement and the police [are] in charge of all investigations. The prosecution service will receive a file once the police decide it is ready to be handed over. The … [prosecution service] can naturally request further investigative action at that point. Where the police turn to the … [prosecution service] for advice during an investigation, there will be some factual … [prosecution service] involvement; but this is still reported to be the exception rather than the rule.'[522]

In South Africa – just as in England and Wales and in other adversarial systems – the powers of the police and prosecution were traditionally strictly separated. As discussed above,[523] the NPA Act has changed these arrangements to some extent. Directors of public prosecutions can now oblige the police to conduct investigations and obtain statements. But normally the police investigate on their own initiative.[524] The police then submit a docket (file, dossier) to the prosecutor who, in his exercise of discretion to prosecute, examines the witnesses' statements and the evidence contained in the docket.[525] At this (late) stage the prosecutor may also direct and control the investigation by giving instructions to the investigating police officer; scientific analyses or further statements of witnesses can be requested.[526] But the prosecutor does not participate in any investigative work.[527] Formal investigating powers are granted to the Prosecuting Authority only through the structure of investigating directorates[528] which means that effective 'prosecution led investigation' might only be possible under the shelter of these directorates.

Although the investigating directorates have to handle the most intricate cases, their performance is quite impressive. For example, the Specialised Commercial Crimes Unit has achieved a conviction rate of around 95% over

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[522] Ibid, p. 43.
[523] III.3.b)ee).
[524] Bekker et al *op cit* (note 438), p. 56.
[525] Ibid.
[526] Ibid.
[527] Ibid. Stone et al *op cit* (note 36), p. 35 report that 'in a few of the new, coordinated Court Centres' the police 'now bring dockets to court two days in advance.' This strongly suggests that this is the clear exception and cases are normally brought to court just before the trial commences. Prosecutors are then not able to check the docket properly. This bears the risk that evidentiary problems etc are only discovered within the proceeding and may result in withdrawals and postponements of cases.
[528] Discussed above, III.3.b)ee).

the last years,[529] the Directorate of Special Operations over the same period considerably over 80%.[530] Although remembering the somewhat special circumstance these directorates work in,[531] the use of prosecution led investigation can be identified as one major key to their success.

The question that rises is why the provisions for prosecution led investigation should not be extended to

> 'the provincial DPP's offices and the daily prosecution of cases in the District and Regional Courts … where 95 percent of the cases are handled … [and] the attrition rate of cases is embarrassing [?]'[532]

The main concern uttered against 'prosecution led investigation' is that a prosecutor who becomes intimately involved in an investigation could become ethically compromised.[533] It is argued that the

> 'separation between officials who investigate crime and those who decide to prosecute is an important one. It promotes objectivity and provides the criminal justice system with a process in terms of which the result of a police investigation can (to some extent) be evaluated independently before the grave step of instituting a prosecution is taken.'[534]

In the case of the investigating directorates practical ways have been suggested and are followed to avoid that prosecutors involved in prosecution led investigation become ethically compromised:

> 'Integration or closer co-operation between the investigator and prosecutor should not be equated with role confusion. The distinction between the role of the investigator and prosecutor should not become blurred. The investigator is still the best person to perform the function of collecting the evidence. The prosecutor can review, advice and direct the investigator, however all the time mindful of the fact that he or she remains an officer of the court with certain ethical obligations. It is important that the prosecutor maintain a healthy distance from the actual gathering of evidence in order to ensure that these ethical obligations are not compromised. The prosecutor is there to guide the investigation not to do the job of the investigator. The prosecutor has at

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[529] NPA Annual Report 2005/06, p. 45.
[530] Ibid, p. 34.
[531] For example, prosecutors are generally specialised and experienced in their work. On the one hand these units focus on intricate high profile crimes, but may, on the other hand choose only cases where the success in form of convictions is very likely.
[532] Stone et al *op cit* (note 36), p. 33.
[533] Redpath, J. 'The Scorpions – Analysing the Directorate of Special Operations' (2004) *ISS Monograph No 96*, Pretoria: Institute for Security Studies, p. 63.
[534] Bekker et al *op cit* (note 438), p. 56; similar, Du Toit et al *op cit* (note 164), p. 1-4I.

> all times be wary not to end up as a fact witness. There may well be cases where a prosecutor has become so steeped in the investigation that he should not prosecute that particular criminal case. By and large this situation can be avoided and care should be taken to do so. Failure to do so will result in the prosecutor being called as a witness and therefore precluded from conducting the prosecution, which defeats the purpose behind assigning the prosecutor the case from the onset.'[535]

It is not comprehensible, why these arguments should not apply in the relation between prosecutors and investigating officers outside the shelter of investigating directorates. Moreover, in the continental European systems, where the prosecutor is by nature more an inquirer than a party, legislative safeguards are in place, which guarantee his objectivity.[536] Similar arrangements exist in South Africa;[537] legislation could therefore be adopted accordingly.

It is submitted that prosecution led investigation should be extended to become the underlying principle of the relation between police and prosecution service. It should be stipulated accordingly.

c) A more inquisitorial role of the presiding officer – 'assisting' the prosecution

The central idea of this thesis is that the effectiveness and efficiency of criminal justice system largely depends on a well functioning prosecution service. This is particularly true in an adversarial system such as South Africa that is by nature 'party-driven.' Prosecutors are burdened with numerous duties and a high workload.[538] Moreover, most South African prosecutors lack experience.[539] In this context it might by worthy to explore whether the role of

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[535] Ngcuka, B. *Prosecution-lead Investigation: A practical overview*, presented at 2nd World Conference on Modern Criminal Investigation, Organised Crime and Humane Rights, Durban South Africa 5 December 2001, p. 13 as cited in: Redpath, J. 'The Scorpions – Analysing the Directorate of Special Operations' (2004) *ISS Monograph No 96*, Pretoria: Institute for Security Studies, p. 64, 65.

[536] In Germany, the prosecutor is by legislation obliged to investigate the complete circumstances of the case, which includes not only incriminating but also exculpatory facts (section 160(2) of the German Criminal Procedure Code). Infringement of this duty is a punishable offence under section 339 of the German Penal Code (Strafgesetzbuch, in: Schönfelder, H. *Deutsche Gesetze – Textsammlung* (2005), Munich: Beck, section 85.

[537] As discussed above (III.5.), prosecutors are delictually liable for malicious prosecutions.

[538] Discussed above, VIII.1.c)

[539] Discussed above, VIII.1.

the presiding officer should become more inquisitorial, especially when it comes to 'assisting' the prosecution.

As mentioned above[540] inquisitorial aspects already exist in South African criminal procedure law. For example, the presiding officer has the power to question witnesses. Furthermore, section 167 of the Criminal Procedure Act empowers the court to 'examine any person other than the accused who has been subpoenaed to attend such proceedings or who is in attendance of such proceedings,' and to recall any witnesses who have testified. The court is obliged to do so if it appears 'essential to the just decision of the case', and commits an irregularity if it fails to do so.[541] Section 186 of the Criminal Procedure Act, in turn, 'imposes a similar power and duty with regard to the calling of witnesses.'[542]

Although judicial officers have 'well-recognised' inquisitorial powers of questioning and calling witnesses,[543] the question has been raised whether these powers 'should be expanded to ensure better truth finding' and 'to enable the court to compensate for inadequate effort and skill on the part of the litigants.'[544]

With regard to assisting an undefended accused, it is 'accepted that the judicial officer may be more interventionist, questioning state witnesses in order to establish the truth.'[545] In *S v Mosoinyane*[546] the court approved that

> '"Participation in the testing of the State evidence does not *per se* compromise the court's impartiality. To the contrary, by remaining aloof where the accused is unable to test the State evidence, the judicial officer would actually be siding with the prosecution by letting the latter draw an unfair advantage from the accused in … cross-examination."'[547]

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[540] IX.5.a).
[541] *S v Mayiya* 1997 (3) BCLR 386 (C) at 395C.
[542] South African Law Reform Commission *Discussion Paper 96 – Project 73 – Simplification of Criminal Procedure (A more Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials),* June 2001, Pretoria: SALRC, p. 18.
[543] Steytler *op cit* (note 363), p. 21.
[544] SALRC *op cit* (note 542), p. 113 (7.1).
[545] Steytler *op cit* (note 363), p. 21.
[546] *S v Mosoinyane* 1998 (1) SACR 583 (T).
[547] *S v Mosoinyane* 1998 (1) SACR 583 (T) at 595A-C.

Judicial intervention in form of calling witnesses that may be of assistance to the defence can be justified by the same reason.[548]

aa) 'Assisting' the prosecution

A more complicated question is whether a judicial officer may intervene even where it may be to the prejudice of the defence. The issue was raised in *S v Manicum*,[549] where the magistrate was confronted with a prosecutor who was either unwilling or unable to cross-examine the accused on his conflicting statements. The Court of appeal stated with regard to the situation of the magistrate:

> 'He was aware of the legal duties imposed on a judicial officer. He knew he could not enter the arena and cross-examine the appellant. He knew he could not assume the role of prosecutor and endeavour to establish that the appellant's version fell to be rejected. He did ask a few questions. Theses were not leading questions and they were not designed to discredit the accused.'[550]

The question in this context is 'whether the court should have been so restricted in its intervention, which allowed a possible guilty person to walk free.'[551] The question posed involves to issues: the first issue is that a court may not perform the function of the prosecution and, the second that the court may create the impression of partiality.[552]

bb) A court may not perform the function of the prosecution

Judicial intervention to the prejudice of the defence is not *per se* irregular.[553] In *S v Gerbers*[554] the Supreme Court of Appeal approved a previous dictum in *R v*

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[548] Steytler *op cit* (note 363), p. 22.
[549] *S v Manicum* 1998 (2) SACR 400 (N).
[550] Ibid, at 404B-C.
[551] SALRC *op cit* (note 542), p. 37, (5.7); The Court of appeal in *S v Manicum* allowed the appeal and set the conviction and sentence aside, after the accused had been convicted by the court of first instance. Although cross-examination had not been conducted, the court of first instance convicted the accused because his version was highly improbable while the state's case was the more probable. This decision was held to be wrong by the Court of appeal. (*S v Manicum* 1998 (2) SACR 400 (N), at 404D-E).
[552] SALRC *op cit* (note 542), p. 37 (5.8 ff), p. 40 (5.17 ff).
[553] Steytler *op cit* (note 363), p. 22.
[554] *S v Gerbers* 1997 (2) SACR 601 (SCA) at 606E.

Hepworth[555] which held that the discretion and power in terms of section 247 (now section 186 of the Criminal Procedure Act) could be exercised in favour either of the accused or the state, provided that this happened for the purpose of doing justice as between the prosecution and the accused. With regard to the questioning of an accused the Supreme Court of Appeal[556] stated that a court is allowed to ask an accused questions even if the accused might find it difficult to answer them 'without doing damage to his case' and that this does not justify the perception of partiality. The same applies to questions that show that a witness was giving false evidence or was unconvincing.[557]

However, *S v Manicum* clearly states that the judicial officer may not assume the role of the prosecution.[558] This raises the question how the courts legitimate truth-finding role can be distinguished from performing an unacceptable prosecutorial function.[559]

Some indication on how to draw this distinction can be found in case law.[560] For example, it was held that the purpose of section 186 of the Criminal Procedure Act is not to place the presiding officer in the position of the prosecutor by calling witnesses from the outset in order to prove the allegations contained in the charge sheet.[561] On the other hand, the court may call for evidence which has been omitted by mistake or is necessary in order to rectify some technical deficiency.[562]

Steytler suggests in his analysis of case law in the current context the following distinction:

> 'Where there is no evidence against an accused, an interventionist judicial officer would be playing the role of the prosecutor. Where it is apparent that there is no case for the accused to meet, the court must order a discharge. Where a reasonable suspicion has been established, but falling short of a *prima facie* case, it should be acceptable for the court to call a witness who may easily fill in the missing link. The court may thus perform a supplementary or complementary role to that of the

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[555] *R v Hepworth* 1928 AD 265 at 278.
[556] *S v Gerbers* 1997 (2) SACR 601 (SCA) at 608H-J.
[557] *S v Van Dyk* 1998 (2) SACR 362 (W) at 379A.
[558] *S v Manicum* 1998 (2) SACR 400 (N), at 404B-C.
[559] SALRC *op cit* (note 542), p. 38 (5.11).
[560] Steytler *op cit* (note 363), p. 23.
[561] *S v Jada* 1985 (2) SA 182 (E) at 184G.
[562] *R v Hepworth* 1928 AD 265 at 277.

> prosecution in the interest of justice. Where there is no supplement, intervention would be wrong.'[563]

This suggestion rewards support as it allows for judicial intervention, but limits this intervention at the same time. Nevertheless, in cases where it is impossible to distinguish that easily as outlined by Steytler it might be difficult to determine what the 'supplementary or complementary role' of the judicial officer concretely is.[564]

cc) The court may create the impression of partiality

The South African Constitution requires that the judicial officer must act impartial.[565] Moreover, it is established law that the conduct of a presiding officer must not create the impression that he is biased in favour of the prosecution.[566] As searching for the truth should not *per se* be equated with bias, the question is 'how perceived bias is established.'[567]

The issue of bias is particularly raised 'when it come to the judicial questioning of witnesses, because such intervention lends itself more easily to charges of bias.'[568] The perception of partiality is not justified merely because the questions of the presiding officer are prejudicial to the accused.[569] Moreover, the length of questioning alone is a relatively neutral factor.[570] Important is the manner in which the questioning takes place:

> 'It goes without saying that objectively legitimate questions may be put so belligerently or intimidatingly or repetitively or confusingly as to amount to judicial harassment and therefore an irregularity'[571]

Judicial questioning must not amount to cross-examination[572] and has to be open-minded.[573] Dismissive attitudes towards a witness, reflected, for instance,

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[563] Steytler *op cit* (note 363), p. 23.
[564] This is admitted by Steytler *op cit* (note 363) at p. 23.
[565] Section 9 guarantees every individual the right to equality before the law and equal protection of the law. Section 34 enshrines everyone's right to have justicialbe disputes settled by a court, or where appropriate, another independent and *impartial* tribunal or forum. Section 35(3) guarantees every accused's right to fair trial. Bekker et al *op cit* (note 438), p. 194.
[566] *S v Gerbers* 1997 (2) SACR 601 (SCA) at 603C-D; Steytler *op cit* (note 363), p. 24.
[567] Steytler *op cit* (note 363), p. 24.
[568] Steytler *op cit* (note 363), p. 25.
[569] *S v Gerbers* 1997 (2) SACR 601 (SCA) at 608H-I.
[570] Ibid, at 608G-H.
[571] Ibid, at 608H.

in adverse comments on witness's evidence, may be a legitimate part of cross-examination, but are illegitimate in judicial questioning.[574]

Steytler concludes that 'the tension between truth-finding and perceptions of bias will always be there, but that should not preclude the court from performing its truth finding duty.'[575] In *S v Gerbers* the Supreme Court of Appeal recognised this 'potential' tension and stated:

> '…it remains incumbent upon all judicial officers to consistently bear in mind that their *bona fide* efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.'[576]

dd) Assuring truth-finding interventions of the courts

The discussion of the issues that are raised when judicial officers 'assist' the prosecution clearly indicates that the courts have in terms of sections 167 and 186 of the Criminal Procedure Act inquisitorial powers to intervene, even where it is to the prejudice of the defence. The question is how it can be assured that these powers are actually applied where it is necessary – where a more truth-finding role is required to compensate the potential lack of effort and skill among the litigants.

In the literature it has been suggested that legislative guidelines could help to implement a greater truth-finding role within the present legislative framework.[577] Such guidelines, it is argued, would address the risk that judicial officers 'steeped in an adversarial culture' may not change their habits that easily.[578] Moreover, 'guided' judicial intervention would be more protected against complaints of partisan behaviour.[579]

Although guidelines might help to increase clarity in the way powers in terms of sections 167 and 186 of the Criminal Procedure Act are applied, it must not

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[572] *S v Matthys* 1999 (1) SACR 117(C) at 120F-J.
[573] *S v Rall* 1982 (1) SA 828 (A) at 832A.
[574] *S v Aspeling* 1998 (1) SACR 561 (C) at 569.
[575] Steytler *op cit* (note 363), p. 25.
[576] *S v Gerbers* 1997 (2) SACR 601 (SCA) at 607B-C.
[577] Steytler *op cit* (note 363), p. 26.
[578] Ibid, p. 26, 27.
[579] Ibid, p. 27.

be overlooked that the application of these powers finally depends upon the qualification and skills of the particular judge.[580] Therefore, it seems to be more important to train new and current judicial officers in a more truth-finding role that guarantees necessary intervention on the one hand and impartiality and fairness on the other hand.[581]

It is also suggested that the police docket should be placed in the hands of the judicial officer in order to assure that the powers in terms of sections 167 and 186 are exercised more effectively.[582]

The SALRC argues that since the decision in *Shabalala v the Attorney-General*[583] which required the prosecution to disclose to the defence, in advance of the trial, in principle all material information in the docket that

> '[t]here is no good reason why that material should not equally be available to the judicial officer. If it is made available to the judicial officer, it enables him or her to make an informed decision as to what evidence is available to the prosecution; the extent to which witnesses materially depart from previous statements; and the extent to which the power to call witnesses might usefully be exercised. There can be no prejudice to either the prosecution or the defence if the judicial officer is in the position of such information.'[584]

Placing the complete docket or (at least) the material that has to be disclosed by the prosecution in the hands of the judicial officer does not mean that the information therein becomes automatically admissible in evidence.[585] Facts still have to be proved in accordance with the rules of evidence.[586] The risk that a judicial officer might be influenced by information that is not capable of being proved, would not be a new one. Even under current legal arrangements, it is not unusual that information comes to the knowledge of the judicial officer, from which he has to 'disabuse the mind in reaching a conclusion.'[587] The SALRC argues that the safeguard that ensures that this is done lies in the requirement that reasons must be given for factual conclusions.[588] Moreover, it

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[580] SALRC *op cit* (note 542), p. 115 (7.5).
[581] This is also suggested by Steytler *op cit* (note 363), p. 27.
[582] Steytler *op cit* (note 363), p. 27.
[583] *Shabalala and Others v the Attorney-General and Another* 1995 (2) SACR 761 (C); the decision has been discussed above, VIII.5.
[584] SALRC *op cit* (note 542), p. 116 (7.10).
[585] SALRC *op cit* (note 542), p. 116 (7.11); Steytler *op cit* (note 363), p. 28.
[586] Ibid.
[587] Ibid; Steytler gives the example of a confession which is held to be inadmissible.
[588] SALRC *op cit* (note 542), p. 116 (7.11).

is argued that having access to information as proposed would place the judicial officer in no different position compared to that in which he would be once the prosecution has opened its case fully, as it is permitted to do by section 167 of the Criminal Procedure Act.[589]

With regard to a more inquisitorial role of the judicial officer in order to 'assist' the prosecution, it can be concluded that the discussion of case law strongly suggests that powers to do so already exist. As mentioned, the crucial point is that these powers might not always be applied where necessary. In order to assure truth finding interventions of the judicial officer, several suggestions are made in the literature. Guidelines with regard to the exertion of the powers in terms of sections 167 and 186 of the Criminal Procedure Act and specific training of judicial officers in a more truth-finding role that guarantees necessary intervention on the one hand and impartiality and fairness on the other hand are two convincing suggestions. Additionally, the arguments put forward in the literature to place the police docket in the hands of the judicial officer in order to assure that the powers in terms of sections 167 and 186 are exercised more effectively are convincing and reward support.

6. Access to justice for Victims

The promotion of access to justice for interested parties is an issue which comprises many different aspects.[590] For the purpose of this thesis it will be explored how prosecutorial work and performance depends on the access to justice of victims of sexual offences and which consequences this dependency has for the prosecution service.

Access to justice and fair treatment of victims of crime is required under the *United Nations Declaration of Basic Principles of Justice for Victims of Crime*

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[589] Ibid.

[590] General: Cappelletti; M. 'Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform' (1992) *South African Law Journal* Vol. 109, Issue 1, 22-39; in the South African context: AfriMAP and Open Society Foundation for South Africa *South Africa – Justice Sector and the Rule of Law* (2005) Newlands: Open Society Foundation for South Africa, pp. 108 ff; with regard to the prosecution service: Combrinck, H. 'Access to Justice and the prosecutorial authority: a contradiction in terms?' (1996) *Journal for Judicial Science* Vol. 21, Issue 2, 123-131.

and Abuse of Power[591] and under the South African Constitution.[592] Accordingly the South African Department of Justice and Constitutional Development has issued a *Service Charter for Victims of Crime*[593] and accompanying *Minimum Standards on Services for Victims of Crime*.[594] In the context of this framework it is apparent that the prosecution service has a responsibility to promote the access of victims to criminal justice. For example, the Victims Charter grants the right to assistance for victims which comprises that

> 'The prosecutor will ensure that special measures are employed in relation to sexual offences, domestic violence and child support or maintenance matters and that, where available, such cases are heard in specialised courts.'[595]

But apart from the obligation under the Victims Charter to provide service for victims, the prosecution service and the other role players in the criminal justice system have a particular own motivation to promote access to justice for victims. Victims are characterised as the 'gate keepers' of the criminal justice system, which means that the role players in the criminal justice system can often only become active where victims report their victimisation to the police.[596] Moreover, a successful prosecution of a sexual offence perpetrator often requires that the necessary evidence, such as DNA of the perpetrator, is collected and that the victim testifies in court.

In mid-2000 a nationwide survey on various forms of abuse committed against women was conducted.[597] The aim of the survey was to understand women's experiences of violence, and to determine their perception of services rendered

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[591] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the General Assembly resolution 40/34 of 29 November 1985, par 4-7.
[592] For example, section 32 enshrines the right to have access to information, section 35 the right to have access to courts.
[593] Hereinafter referred to as the Victims Charter.
[594] Gender Directorate, Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* and *Minimum Standards on Services for Victims of Crime* (2005) Pretoria*;* the Charter was adopted in accordance with section 234 of the South African Constitution.
[595] Victims Charter, p. 3, para 5 - the right to assistance.
[596] Meier, B.-D. *Kriminologie* (2003), Munich: Beck, p. 218; this is particularly true in the case of sexual offences as they would remain mostly unknown unless victims inform the police.
[597] Rasool, S. 'Violence against Women Survey: Summary of Main Findings' Nedbank ISS Crime Index Vol. 4, No. 4, July-August 2000, available at: http://www.issafrica.org/PUBS/CRIMEINDEX/00VOL4NO4/Survey.html, accessed: 01.02.2007.

by the state to female victims of violence.[598] The Survey focused on women's experiences of physical, emotional and sexual abuse over a five-year period preceding the survey.[599]

The survey revealed among other findings that most abused women sought help from their family (60% after their most serious incident of abuse), followed by the police (47%), counsellors (46%), medical persons (42%), district surgeons (24%) and legal persons (11%).[600] Only 3%, or 17 out of 565 abused women who sought help during the five-year period, ended up in court to testify against their abuser.[601]

What these figures illustrate is, first, that only less than a half of all abused women find their way to the police. Secondly, even if an abused woman has reported her victimisation it is very unlikely that she will testify in court. Given these two findings, it is corollary that the probability of being convicted is relatively small for a sexual offender.[602]

a) Sexual Offences and Community Affairs (SOCA) Unit

The response of the National Prosecuting Authority to alarming findings such as the one described, is the SOCA Unit.[603] The purpose of this unit is primarily 'to deal with the victimisation of women and children.'[604] Therefore the unit co-ordinates the establishment of specialised sexual offences courts and formulates policy with regard to the prosecution of sexual offences.[605] Furthermore, the unit develops and implements community awareness programmes and strategies to integrate non-governmental organisation in the prevention and containment of sexual offences.[606] The Unit sees its approach as

[598] Ibid.
[599] Ibid.
[600] Ibid, Figure 3.
[601] Ibid, comment to Figure 3.
[602] This undermines the deterrent effect of the criminal justice system.
[603] The Unit was established through a Presidential proclamation in 1999 under section 13(1)(c) of the NPA Act (NPA Annual Report 2005/06, p. 41).
[604] NPA Annual Report 2005/06, p. 41.
[605] Ibid.
[606] Ibid, p. 42.

being more holistic than the 'traditional' perception of the prosecution service 'as simply reacting to crime by prosecuting arrested (alleged) offenders.'[607]

The strategic objectives of the SOCA Unit comprise, among others, an improvement of conviction rates in cases of violence against women and children, the systematic reduction of secondary victimisation within the criminal justice system, and an increase in the diversion of child offenders from the criminal justice process.[608]

b) Thuthuzela Care Centres

In the context of the access to justice of victims of sexual offences the Thuthuzela Care Centres[609] are of particular importance.

Thuthuzela Care Centres are 'one-stop facilities that have been introduced as a critical part of South Africa's anti-rape strategy' in order to 'reduce secondary trauma for victims, improve conviction rates and reduce the lead time for finalising cases.'[610] The Thuthuzela project is led by the SOCA Unit, in partnership with various donors including Vodacom, Kelloggs Foundation, Bhp Billiton and UNICEF.[611] Centres are in operation in public hospitals situated in communities where the incidence of rape is particularly high.[612] They are also linked to sexual offences courts, which are staffed by prosecutors, social workers, investigating officers, magistrates, health professionals and police, and located in close proximity to the centres.[613] The centres are managed by an inter-departmental team comprising Justice, Health, Education, Treasury, Correctional Services, Safety and Security, Local

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[607] Ibid.
[608] Ibid.
[609] Currently there are 10 Thuthuzela Care Centres operating in the following Provinces: Gauteng (3), Western Cape (1), Eastern Cape (2), KwaZulu-Natal (2), Northern Cape (1) and North West (1), Compare: *Thuthuzela Care Centres: The Country's Anti-Rape Strategy improve Perpetrator Conviction Rates*, available at: http://www.npa.gov.za/ReadContent407.aspx, accessed: 01.02.2007.
[610] *Thuthuzela Care Centres: The Country's Anti-Rape Strategy improve Perpetrator Conviction Rates*, available at: http://www.npa.gov.za/ReadContent407.aspx, accessed: 01.02.2007.
[611] Ibid.
[612] Ibid.
[613] Ibid; ideally sexual offences courts have special facilities, such as separate waiting rooms for victims.

Government, Home Affairs, Social Development and designated civil society organisations.[614]

The service offered by the centres to rape victims is described as follows:

> 'When reporting, the rape victim is removed from crowds and intimidating environments, such as at the police station, to a more victim-friendly environment before being transported by ambulance to the Thuthuzela one stop centre at the hospital.
>
> Enroute, she receives comfort and crisis counselling from a trained ambulance volunteer and once at the centre, she is ushered a quiet, private space, welcomed by the site-coordinator and a doctor immediately summoned to conduct a medical examination. Information on the procedures to be performed is then provided and the patient signs a consent form for medical examination and blood specimens.'[615]

After the medical examination the victim

> 'is offered the opportunity to take a bath or shower and to change into soft, clean clothes to help cushion bruised feelings from the incident. After that, the investigating officer on call at the centre takes the victim's statement.
>
> Thereafter, she receives appropriate medication and is given a follow-up date for further medical treatment, before being transported home.'[616]

The benefits of this service are apparent. As it avoids by all means secondary victimisation, it encourages victims to approach the Thuthuzela Centres and report their victimisation. The fact that all necessary role players are available at one location, assures that all necessary steps for a successful prosecution of the crime are taken, such as examining the victim and securing DNA evidence and taking the victims statement closely after the crime has been committed.

Moreover, the victim may consult with a 'specialist prosecutor' before the case goes to court.[617] A 'victim assistant officer' prepares the victim for the appearance at court; a case manager updates the victim on the trial process and explains the outcome of the trial.[618] Efforts are also undertaken to make the described service more applicable to child victims of sexual offences.[619] All

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[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.
[618] Ibid.
[619] Ibid.

these measures are important steps to increase the benefits of the service offered at the Thuthuzela Care Centres with regard to the service for victims and the successful prosecution of sexual offenders.

c) Impact of the SOCA Unit and Thuthuzela Care Centres

During the last four years the number of specialised sexual offences courts has increased from 22 to 67.[620] The average conviction rate in these courts has also increased during the same period from 64% to 70%.[621] Where Thuthuzela Care Centres are involved the average conviction rate lies with remarkable 80%; in Wynberg, where the sexual offences court is linked to a well established Care Centre, the conviction rate is 95%.[622] These figures clearly demonstrate the success of the SOCA Unit and the Thuthuzela project. The success is confirmed by the fact that at the same time more cases have been reported to the police and prosecuted.[623]

With regard to victims of sexual offences the challenge for the prosecution service can be formulated as to increase the number of specialised sexual offences courts and Thuthuzela Care Centres.

In the context of sexual offences it is argued that the efforts of creating a specialisation for prosecutors in sexual offences should be continued and intensified.[624] At the moment special training for prosecutors dealing with sexual offences is offered by the SOCA Unit.[625] But several obstacles have been identified that hinder the necessary establishment of specialised sexual offences prosecutors.[626] For example, prosecutors working in sexual offences courts are not assigned to a specialised office, but fall under the authority of the

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[620] NPA Annual Report 2005/06, p. 43.
[621] Ibid.
[622] Ibid.
[623] *Thuthuzela Care Centres: The Country's Anti-Rape Strategy improve Perpetrator Conviction Rates*, available at: http://www.npa.gov.za/ReadContent407.aspx, accessed: 01.02.2007.
[624] Müller, K.D. and van der Merwe, I.A. 'The sexual offences prosecutor: a new specialisation?' (2004) *Journal for Juridical Science* Vol. 29, Issue 1, 135-151.
[625] NPA Annual Report 2005/06, p. 44.
[626] Müller, Van der Merwe *op cit* (note 624), p.150.

NPA and operate therefore in the courts only on a rotational basis.[627] Where they are permanently assigned to sexual offences courts, they are promoted to fast to the position of control and senior prosecutors.[628] Finally, it is argued that currently prosecutors are not properly screened for ensuring that they have the necessary abilities to perform in sexual offences courts.[629]

The problems identified resemble to some extent the problems in the prosecution service already discussed.[630] In order to keep experienced prosecutors in the courts the above[631] suggested measures are necessary to be implemented. In this regard the above given arguments apply as well.

7. Witness protection

Witnesses are, just as victims,[632] central to the effective investigation and prosecution of crimes. Where witnesses are intimidated or threatened, they might refuse to testify and, in the worst case, guilty offenders have to be acquitted.

On an international level witness protection is required by Article 24 of the *United Nations Convention against Transnational Organized Crime*[633] In South Africa the Witness Protection Act No 122 of 1998[634] provides for witness protection and stipulates the procedure in this regard. The responsibility for witness protections rests with the Witness Protection Unit (WPU) located in the NPA. The purpose of the WPU is to

> 'provide protection and support services to vulnerable and intimidated witnesses and related persons in serious crimes in judicial proceedings so that they are able to provide essential evidence without fear or harm

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[627] Ibid.
[628] Ibid.
[629] Ibid.
[630] VIII.1.
[631] IX.1.a), b).
[632] The author is aware of the fact that victims have also a witness function in the investigation and prosecution of crimes.
[633] United Nations, *United Nations Convention against Transnational Organized Crime,* 2000, Article 24 par 1 requires that every signatory to

> 'take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other person close to them.'

[634] Hereinafter referred to as the Witness Protection Act.

> to them or their families on terms of the Witness Protection Act 112 of 1998.'[635]

The main strategic objectives of the WPU for this purpose are to ensure good governance in the WPU in order to provide appropriate services, to contribute to crime prevention and community justice, and to develop and enhance the WPU capability.[636] The operating model of the WPU caters for 7 days a week and 24 hours a day operations.[637]

In 2005/06 there were 220 witnesses and 268 family members of witnesses under the protection of the WPU.[638] None of these people was harmed while being protected by the WPU.[639] In the cases where protected witnesses testified the average conviction rate was 95%.[640]

Putting these figures in context reveals two aspects. First, in the period of the last four years the number of witnesses protected by the WPU has considerably decreased by over 40%.[641] The reason provided for this reduction is that budgetary constraints had the effect that posts had to be cut.[642] Secondly, in the cases where the evidence of the 220 witnesses under protection was utilised 383 life-term sentences were imposed, which was an increase in the period of the last four years by over 400%.[643] The conclusion can be drawn that although the number of witnesses protected has decreased, the impact of the evidence provided by them has considerably increased. The high conviction of 95% underlines that witness protection pays.

In terms of the Witness Protection Act protection may be granted to witnesses only if their testimony relates to cases involving serious offences, such as treason, sedition, murder, rape, robbery with aggravating circumstances and robbery involving the taking of a motor vehicle, kidnapping and drugs

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[635] NPA Annual Report 2005/06, p. 51.
[636] Ibid, p. 51, 52.
[637] http://www.npa.gov.za/ReadContent390.aspx, accessed 02.02.2007.
[638] NPA Annual Report 2005/06, p. 51.
[639] Ibid.
[640] Ibid.
[641] Ibid; in 2002/03 375 witnesses had been protected.
[642] Ibid.
[643] Ibid.

trafficking, arms smuggling and fraud.[644] Although the Director of Witness Protection has the discretion to grant protection to witnesses in respect of any other offence if he is of the opinion that the safety of the witness warrants it,[645] the circle of potential protected witnesses is somewhat restricted. The restriction can be justified as witness protection is expensive and the limited financial resources of the WPU have to be focused on the most important cases.

But witness protection is not the only service that is required to secure that witnesses are going to testify.[646] If one considers that every year more than a million cases[647] are heard in South African courts than it becomes apparent that the witness protection programmes offered to 220 witnesses are only a very small contribution to ensure that witnesses are going to testify, as they can only cover high profile cases. A recently conducted survey indicates that the needs of witnesses go far beyond the service offered by protection programmes.[648]

Although most witnesses (60%) felt intimidated by other people, such as the defendant or his lawyer, over a quarter of witnesses felt intimidated by the court environment and process, especially giving evidence and undergoing cross-examination.[649] Only one third of witnesses who felt intimidated reported that to officials (mainly detectives and prosecutors) and only half of this third felt that officials dealt with this issue appropriately.[650]

As a result of these findings it is argued in the literature that more attention must be given to support witnesses when they give evidence before court.[651] This requires training of court personnel and especially prosecutors to sharpen their sensibility for intimidating situations in the court process and to provide

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[644] Schedule attached to the Witness Protection Act 112 of 1998.
[645] Minnaar, A. 'Witness Protection Programmes – Some Lessons from the South African Experience' (2002) *Acta Criminologica* Vol. 15, Issue 3, 118-133, p. 123.
[646] Bruce, D. 'Danger, Threat of just Fear – Witness intimidation in three Gauteng courts' *SA Crime Quarterly* No 13 September 2005, 23-28.
[647] Ibid, p. 23.
[648] The CSVR witness satisfaction study was carried out in late 2003, covering 450 witnesses at three regional magistrates' courts Gauteng. A high proportion of violent and other serious crimes are dealt with by South African courts are heard in the regional magistrates' courts. Courts with a relatively high turnover of cases, one in Johannesburg, one in Soweto, and one in a black residential area on the East Rand, were selected for the study (Bruce *op cit* (note 646), p. 23, 24).
[649] Bruce *op cit* (note 646), p. 24 table 2, p. 26 table 3.
[650] Ibid, p. 26.
[651] Ibid, p. 28.

them with the knowledge how to assist witnesses in these situations. Moreover, it is suggested that detectives and prosecutors should, in consultation with the witnesses, consistently evaluate cases in order to identify whether there is a danger of harm, or other intimidation, to the witness, and assess what steps are appropriate to protect the witness.[652] Although this means further responsibilities for prosecutors, the outcome – a successful prosecution of an offender – should be worth it. Witness support requires that

> 'feelings of fear, and the concrete dangers facing many witnesses, need to be dealt with alongside the problems of frustration at remands and long hours spent waiting at court, the quality of facilities for witnesses, improved information, and a range of other service deliver issues.'[653]

The challenge for the prosecution service can therefore be formulated as to consider that the needs of witnesses go beyond the service provided by witness protection programmes and to provide service for witnesses in the described way.

[652] Ibid; one currently used measure to protect witnesses is to refuse bail where there is the risk that the accused may harm or interfere with the witness (Ibid).
[653] Ibid, p. 28.

X. Conclusion

The prosecutions service is a key role player in the criminal justice system. Its effectiveness and efficiency reflects on the performance and service of the whole criminal justice system.

Although prosecutorial power has a long tradition in South Africa it was only as recently as 1998 that the current prosecution service was established. The constitutional and legislative provisions supplemented by the various policy papers have established a framework that in principle allows for an effective and efficient function of the prosecution service in the criminal justice system.

Although the performance of the prosecution is with regard to some performance indicators improving, it is still insufficient. Several reasons can be identified that negatively impact on the prosecutorial performance. The NPA is aware of most of these problems. The current Annual Report strongly indicates that considerable measures have been taken to address the existing problems. The prosecution service is just as the whole South African society in a process of transformation. This is the main reason for the insufficient performance of the South African prosecution service. The measures taken need their time to show impact. For example, the recruitment of new prosecutors will only then positively influence the performance of the prosecution service when they have passed the aspirant trainings courses and gained experience in their work and remain in the prosecution service.

But as the discussion of the challenges of the prosecution service indicates there is still a lot to do in order to boost prosecutorial performance. Further challenges of the prosecution services have been identified that improve the performance of the prosecution service but especially the service of the criminal justice system as a whole. That is the access to justice for victims and witnesses.

Concerning the question whether the prosecution service is the linchpin of the criminal justice system the answer is therefore two folded:

On the one hand, the performance of the prosecution service has improved over the last years and progress can be seen. But, on the other hand, the prosecution

service is still not effective and efficient enough to cope with the high workload it is facing. Therefore it can be concluded that by nature the prosecution service has the potential to perform as the linchpin of the South African criminal justice system, but is currently still on its way to obtain this function.

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