



For attention: Hon. Ms Shahidabibi Shaikh, MP

Email: NPAAmendBill29B-2023@parliament.gov.za

26 January 2024

Dear Ms Shaikh

Submission on the National Prosecuting Authority Amendment Bill

We attach our written submission in response to the invitation for comments on the National Prosecuting Authority Amendment Bill.

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Naseema Fakir', written over a light blue horizontal line.

Naseema Fakir

Acting Director

Acting Executive Director: Naseema Fakir
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Patrons: Prof. Thuli Madonsela • Lord Robin Renwick

1. Introduction

- 1.1. While the Helen Suzman Foundation ("HSF") welcomes the Investigating Directorate Against Corruption ("Directorate") as a permanent structure within the National Prosecuting Authority ("NPA"), we submit here that if the Directorate is to function effectively, then the NPA itself must be reformed.
- 1.2. In respect of such reforms, HSF submits, in summary, that:
 - 1.2.1. the President's power to appoint the National Director of Public Prosecutions ("NDPP"), Deputy National Directors of Public Prosecutions ("DNDPP") and Directors of Public Prosecution ("DPP") be shared with Parliament and the Minister of Justice ("Minister");
 - 1.2.2. in particular, the NDPP, DNDPPs and DPPs should be appointed by the Portfolio Committee on Justice and Correctional Services ("Committee") in consultation with the Minister and the President, after a panel of suitably qualified persons that is convened in consultation with all the aforementioned stakeholders, suggests a candidate(s);
 - 1.2.3. while giving the Committee and the Minister a critical role in appointing the NDPP may require amending section 179(1)(a) of the Constitution, this does not prevent the President from involving them as a matter of practice in appointing the NDPP – and the process for appointing DNDPPs and DPPs can be altered by amending the National Prosecuting Act No. 32 of 1998 ("NPA Act"); and
 - 1.2.4. Parliament should be given a more central role in suspending and removing the NDPP, DNDPPs and DPPs than currently provided for in section 12(6) of the NPA Act.
- 1.3. Lastly, HSF submits that the Directorate should be protected from dissolution by a bare majority vote in Parliament, to ensure that it does not suffer the same fate as its ostensible predecessor, the Scorpions.
- 1.4. HSF made these submissions to the National Assembly last year but the version of the Bill before the NCOP remains absent of the proposals we raise above.

2. Appointing the NDPP, DNDPPs and DPPs

- 2.1. The President has sweeping powers to appoint the NPA's top leadership. He appoints the NDPP on his own – NDPPs and DPPs after consulting with the Minister but he may choose candidates even if the Minister opposes them.¹
- 2.2. Centralising appointment power in the office of the President to such an extent has long been criticised as disposing the NPA to undue political influence.²
- 2.3. This criticism applies equally to the Directorate because the Bill envisages its head to be a DPP, which means that he/she too will be the product of an appointment process almost wholly controlled by the President.
- 2.4. Given the crucial role that the NDPP, DNDPPs and DPPs – and the Directorate's head in particular – play in carrying out the NPA's mandate, it is essential that the process for their appointment be designed to reduce the risk of undue political influence; and to give the public confidence that the most suitable candidates are chosen.
- 2.5. The appointment process that HSF suggests at para 1.2.2 above does just that.
 - 2.5.1. Giving Parliament, Cabinet *and* the President a critical role in appointing the NDPP, DNDPPs and DPPs reduces the risk that one center of political power holds sway over the NPA's top leadership – without exempting the appointment process from political oversight altogether.
 - 2.5.2. Requiring a panel of suitably qualified persons to assist the Committee, Minister and President in their search for the NDPP, DNDPPs and DPPs gives the public confidence that appointees are drawn from pools of qualified candidates.
- 2.6. While Parliament will need to amend section 179(1)(a) of the Constitution to formally change the process for appointing the NDPP, nothing prevents the President from involving other stakeholders as members of a suitably qualified panel that supports his appointment process.

¹ See sections 10, 11 and 13 of the NPA Act.

² Public Affairs Research Institute Report 'Appointments and Removals in Key Criminal Justice System Institutions April 2020 at p 10; and Lukas Muntingh and Jean Redpath 'Recommendations for Reform of the National Prosecuting Authority', August 2020 at p 1.

- 2.7. The President did this when he appointed current NDPP, Shamila Batohi – although he did not involve stakeholders from Parliament.³ However, section 179(1)(a) certainly does not *prevent* the President from seeking the views of Parliament or the Minister as panel members in the appointment process for future NDPPs.
- 2.8. Further, section 179(7) of the Constitution allows ordinary legislation to govern the process for appointing DNDPPs and DPPs. As such, nothing prevents Parliament from designing the appointment process we suggest at para 1.2.2 for DNDPPs and DPPs by amending the NPA Act – especially since the Directorate's head will be a DPP.

3. Removing the NDPP, DNDPP's and DPP's

- 3.1. Since it is not governed by the Constitution, the current process for suspending and removing the NDPP, DNDPPs and DPPs can be changed by amending the NPA Act.
- 3.2. Section 12(6)(a) of the NPA Act allows the President to unilaterally suspend the NDPP, DNDPPs and DPPs – and then unilaterally remove them if an investigation reveals misconduct, ill-health, incapacity or that they are no longer fit and proper persons.
- 3.3. While section 12(6)(c) and (d) allow Parliament to reverse the decision to remove the NDPP, DNDPPs and DPPs, the specter of unilateral suspension and removal lying first with the President leaves the NPA open to undue influence from the executive.
- 3.4. In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*, the Constitutional Court expressly left open whether such unilateral suspension powers are constitutional in respect of the NDPP.⁴
- 3.5. In *McBride v Minister of Police*, however, the Constitutional Court declared unconstitutional powers of suspension exercised unilaterally by the Minister of Police in respect of the

³ Public Affairs Research Institute Report 'Appointments and Removals in Key Criminal Justice System Institutions April 2020 at p 13.

⁴ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 at para 48.

Independent Police Investigative Directorate's ("IPID") Executive Director.⁵ This was because section 206(6) of the Constitution expressly requires that IPID be independent.⁶

- 3.6. HSF submits that the requirement imposed by section 179(4) of the Constitution that "national legislation must ensure that the prosecuting authority exercises its functions *without fear, favour or prejudice*"⁷ is as demanding of the NPA's institutional independence from the executive as section 206(6) of the Constitution is for IPID.
- 3.7. As such, the NPA Act should be amended to mirror section 6A of the Independent Police Investigative Directorate Act No. 1 of 2011, which gives Parliament the leading role in holding accountable IPID's Executive Director.⁸
- 3.8. It does so by providing that the Minister of Police only be able to suspend IPID's Executive Director once the relevant parliamentary committee has begun an investigation into their continued fitness for office – and that IPID's Executive Director can only be removed after a resolution of the National Assembly demands so.
- 3.9. The same role should be given to the Portfolio Committee on Justice and Correctional Services before the President is able to suspend the NDPP, DNDPPs and DPPs – and to the National Assembly as a whole, before he can remove them.

4. The Directorate Should not Suffer the Same Fate as the Scorpions.

- 4.1. Many commentators have described the Directorate as a version of the erstwhile Scorpions, who in their day were an effective corruption fighting unit.
- 4.2. The Scorpions were ultimately dismantled by politicians afraid that its ire would be turned on them.

⁵ *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) ("*McBride*") para 43.

⁶ *Ibid* para 37.

⁷ Emphasis added.

⁸ At the time of writing, section 6A of the Independent Police Investigative Directorate Act No. 1 of 2011 has not been proclaimed into effect, but its substance still governs the suspension and removal of IPID's Executive Director as a result of the Constitutional Court's order in *McBride*.

- 4.3. To prevent a repeat of this dark episode in South Africa's history, the Directorate should be protected from a bare Parliamentary majority by requiring that its dissolution should garner a two-thirds majority.

5. Conclusion

- 5.1. HSF welcomes the Directorate as a permanent structure within the NPA.
- 5.2. However, we have submitted that the Directorate will fall short of being an effective corruption-fighting institution, as long as the NPA's top leadership remains appointed, suspended and removed through powers highly concentrated in the executive – and as long as the Directorate can be dissolved by a bare parliamentary majority.