

Lawyers for the People

The South African Prosecution Service

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Foreword

The many years of colonial rule and apartheid caused untold suffering, hardship and humiliation for the majority of the people in South Africa. But perhaps less clearly understood is the debilitating effect of colonialism and apartheid on our criminal justice system. A large component of the resources allocated to law enforcement was focused on dealing with political activities instead of ordinary lawlessness. Consequently, skills and expertise were inadequately developed over the years to enable the proper investigation and prosecution of crime. The state also sanctioned the use of violence as a legitimate investigative tool. As a result, it was not uncommon for convictions to be obtained based on confessions extracted under duress.

The illegitimacy of the government engendered lawlessness and disrespect for the rule of law among ordinary citizens. People very often felt morally justified to break the law. Police officers and prosecutors lacked any legitimacy in the eyes of the public.

As the National Director of Public Prosecutions assuming office for the first time, I was faced with these and numerous other challenges aptly identified in this study.

In the short period of its existence, the National Prosecuting Authority has done much to ensure that it lives up to its objective of providing 'lawyers for the people'. For the first time in the history of our country, we have a unified national prosecuting authority with a single prosecuting policy. A number of innovative ways to combat crime have been initiated and are proving to be successful. A new career path and salary structure for prosecutors is currently under consideration.

This outstanding contribution by Martin Schönteich is a timely reflection and analysis of the prosecution service in a democratic South Africa. For us to achieve our goal of providing a prompt, vigorous and fearless prosecution service that acts in the public interest, it is important that the National Prosecuting Authority as a whole is critically studied and evaluated by external non-governmental organisations. This enables us to consolidate our achievements and take stock of gaps, with the view of guiding our prosecuting service into this century. It also assists us

in identifying what is important for the growth and stability of the prosecution service, as well as pinpointing future potential threats and opportunities in our quest to become a prosecuting authority that is fully accessible to the people of this country.

I am grateful for this opportunity to make a contribution to such an ambitious and analytic endeavour.

Bulelani Ngcuka
National Director of Public Prosecutions of South Africa

Introduction

'The new National Prosecuting Authority Act gives us a unique opportunity to carve out a new role and vision for ourselves. This new dispensation requires a new breed of prosecutor. We can change institutions, and we can even change the faces, but what is required is a far more fundamental change in our operation. We need prosecutors who see themselves as 'lawyers for the people'.'

Bulelani Ngcuka, national director of public prosecutions, speaking at South Africa's first national public prosecutors' conference, August 1998'

Research rationale

Little research has been done about the South African prosecution service. Other than a few brief journal articles, discussion papers and press articles, nothing has been written about the modern prosecution service in South Africa. This is partly understandable. The police service occupies the visible frontline in the fight against crime and receives most of the attention of the research community and the media, out of all the departments comprising the criminal justice system. Almost everyone has spoken to a police officer or visited a police station. Many people, however, go through life without meeting a prosecutor. Not only are prosecutors hidden away from public view in courtrooms and offices, but they are few in number. In fact, there are more than 40 police officers or almost 20 000 South Africans for every prosecutor in the country.

Yet, the prosecution service is a crucial link in the South African criminal justice system. The best detective service and prison system cannot function properly if those guilty of committing crimes are not prosecuted successfully. The consequences of the prosecution service's failures impact negatively on the police, the prison service and public perceptions about the effectiveness of the criminal justice system. Given its important role, research is needed to evaluate the performance of the prosecution service, identify its weaknesses and develop solutions to the problems inhibiting its effective performance. This study seeks to fulfil this need.

Focus areas

Chapter one of the monograph explores what prosecutors do. The role and responsibilities of the prosecutor at the pretrial, trial and sentencing stage of a criminal case are explained. A description is given of the wide discretion of prosecutors in the execution of their duties. During a normal working day, prosecutors make a variety of decisions. These revolve around, among others, whether to prosecute a suspect on the available evidence, who to charge with what crime in which court, which witnesses to call and what sentence to suggest for a convicted person. The various categories of prosecutors, their functions and position within the prosecution service, and the courts in which they operate, are described.

Chapter two contains relevant historical background to the modern South African prosecution service. Starting in 13th century England when the king's attorney prosecuted certain offenders in the name of the crown, the chapter looks at the evolution of the prosecution service in the Cape under both Dutch and British control, the two Boer republics, its 20th century role in the Union and then in the Republic of South Africa, ending with the establishment of South Africa's first centralised national prosecuting authority in 1998. Emphasis is placed on the historical struggle waged by the prosecution service over the centuries to assert its independence against an interfering executive.

Chapter three looks at the National Prosecuting Authority Act, the legislation governing the prosecution service since mid-1998. Attention is given to the organisational structure of the national prosecuting authority. The powers of the national director of public prosecutions, the head of the prosecuting authority, and the degree of independence inherent in this position are evaluated. The legislative provisions governing investigating directorates, through which formal investigative powers are granted to the prosecuting authority are explained. The political controversy surrounding the promulgation of the National Prosecuting Authority Act and the appointment of the first national director of public prosecutions is briefly discussed.

Chapter four provides information on the role and responsibilities of the office of the national director of public prosecutions. Two of the office's important roles are to guide prosecutors in the execution of their duties and to develop a uniform national prosecuting policy. The contents and significance of the policy manual for the prosecuting authority — which comprises a prosecution policy, policy directives and a code of conduct for prosecutors — are explained.

Chapter five considers the benefits that greater prosecutorial specialisation can bring. Attention is given to the three specialised investigating directorates of organised crime and public safety, serious economic offences and corruption. The directorate of special operations (also known as the Scorpions) has the authority to institute criminal proceedings and carry out any necessary functions incidental to criminal proceedings relating to organised crime or other categories of crime still to be determined. The directorate integrates three traditionally separate functions: intelligence, investigations and prosecutions. Investigators of the directorate work in a prosecution-driven and intelligence-led environment. A number of concerns which have been raised about the Scorpions are examined. Finally, the chapter looks at three important specialised units in the office of the national director: the asset forfeiture unit, the sexual offences and community affairs unit, and the court management unit.

Chapter six provides a comprehensive assessment of the prosecution service's performance. A wide variety of performance indicators are used, including historical data going back half a century, as well as detailed statistics on new performance indicators that have been developed in the last year. Measured over the latter half of the 1990s, the performance of the prosecution service has declined substantially. Measured over the last few months of 1999 and the first half of 2000, some tentative signs are evident that the prosecution service may be performing better on some indicators.

Chapter seven seeks to establish the reasons for the poor performance of the prosecution service. One of the main reasons for the decline in performance has been the departure of large numbers of skilled and experienced prosecutors from the prosecution service. Over a four year period after 1994 the prosecution service lost the equivalent of 2 000 years of work experience through resignations. The reasons for the large number of resignations include poor remuneration, inadequate human resource management, unpleasant working conditions,

transformational problems, lack of administrative support and the poor image of the prosecution service. Other reasons for the low performance levels of the prosecution service have to do with inadequate training for prosecutors, the new post-1994 legal and constitutional environment, and the poor quality of the investigative work of the police's detective service.

Chapter eight suggests a range of innovative solutions to the problems plaguing the prosecution service. The benefits of the proposed solutions are that they can be implemented in the short to medium term, are mostly inexpensive to implement, and are realistic in terms of their practical implementation. The proposals focus on improving the salaries of prosecutors and paying prosecutors according to their skills and levels of responsibility. It is further proposed that the manner in which careers are managed and fostered in the prosecution service should be improved to prompt promising prosecutors to develop challenging and rewarding careers in the service. This will encourage capable prosecutors to remain in the service for longer periods of time. To make the prosecution service more effective, prosecutors should be able to focus most of their time and energies on prosecuting offenders. Non-core functions such as administrative duties should be fulfilled by administrative staff or interns. Certain peripheral and specialised prosecutions should be outsourced to experts and lawyers in the private sector. More use should be made of diversion and plea-bargaining procedures to reduce the number of cases that are tried in the courts. Prosecutors at all levels of the prosecution service should receive ongoing skills training and refresher courses to keep abreast of new legal developments. Finally, it is proposed that the image of the prosecution service must be improved and maintained at a high level to entice the best law graduates and lawyers to apply for positions in the service.

Methodology

Research for this monograph was undertaken between April and December 2000. Interviews were conducted with district and regional court prosecutors and magistrates, senior public prosecutors and state advocates in the Western Cape, the greater Durban area, in northern KwaZulu-Natal and at the Pretoria magistrate's court. Interviews were also conducted with personnel in the office of the national director of public prosecutions, senior members of the investigating directorate: organised crime and public safety, members of the specialised units in the national director's office, lecturing staff at justice college, and senior office bearers of the national union of prosecutors of South Africa and the society of state advocates of South Africa. Discussions were also held with a number of academics and researchers with an interest in and knowledge of the prosecution service.

Extensive use was made of the available, albeit limited, literature on the South African prosecution service. Journal articles, media reports, research documents, transcripts of proceedings of prosecutors' conferences, the prosecution policy and national policy directives from the national director's office, official planning documents of the national prosecuting authority, and internal discussion documents of the office of the national director were used as sources of information.

In a work of this nature, the inevitable choice has to be made between the correct use of terms that may seem biased with regard to gender. For the sake of simplicity, the terms 'he', 'his' and 'him' were extensively but generically used. The intention has not been to exclude any gender from the discourse contained in this monograph.

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During the course of the research, the personnel in the office of the national director of public prosecutions provided sterling assistance, in particular, Ms Marion Sparg and Mr Siphon Ngwema, the chief executive officer and public relations officer respectively, in the office of the national director; advocate Thoko Majokweni of the sexual offences and community affairs unit; and advocates Jan Henning and Marnus Steyn of the court management unit.

The study would not have been possible without the many prosecutors and state advocates who willingly gave of their time and contributed their ideas. This enriched the research project on the prosecution service immensely. My colleagues in the Crime and Justice Programme at the Institute for Security Studies made valuable comments on the conceptualisation of the study, and their assistance is gratefully acknowledged. Crucially, the timely publication of this monograph would not have been possible without the professional advice and capable editing skills of Ms Eunice Reyneke.

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Chapter 1

THE PROSECUTOR:

CINDERELLA IN A BLACK GOWN

The forgotten profession

The South African criminal justice system rests primarily on three pillars: the police, which is responsible for preventing and investigating crime, and apprehending suspected criminals; the prosecution service and the courts, which prosecute, convict and punish the accused who are found guilty of the crimes with which they have been charged; and the prison system, which carries out sentences imposed by the courts and seeks to rehabilitate the convicted criminals in its care.

Much attention is given to the almost 130 000-strong South African Police Service (SAPS). Their successes in cracking a drug-smuggling ring or arresting the kingpin in a vehicle-hijacking racket receive substantial media coverage. Their failures to make a breakthrough in an important case are equally well publicised. Popular films about sexy undercover detectives and courageous police officers single-handedly taking on the criminal underworld in the suburbs of Los Angeles or New York further serve to give the work of the police a particular allure.

In South Africa there is considerable interest in what judges and magistrates do. Sentences handed down by the country's judicial officers are regularly scrutinised by the media, politicians and special interest advocacy groups. During the apartheid years careful attention was paid to the sentences imposed by judicial officers on black accused who were convicted of violent crimes committed against white people. These were then compared to the sentences imposed

for similar offences where the race of the offender and victims was reversed. In the post-apartheid era, judicial officers' sentences are again under scrutiny, this time to expose a different form of discrimination. Judicial officers are often accused of imposing unduly lenient sentences on — or being hesitant to convict — rapists, child molesters and men guilty of domestic violence.

While prison officials mainly operate outside of the public's eye, a plethora of popular films and books abound about prisons and prison life. Robben Island, Pretoria's maximum security C-Max prison, and Cape Town's Pollsmoor prison are household names in South Africa. Most people — albeit it gleaned from novels such as *Papillon*, or the film *Escape from Alcatraz* — have a general idea of what goes on in a prison and what the main purposes are of prison.

Of all the important roleplayers in the criminal justice system, it is the prosecution service that remains an unknown entity among the public. Ask any child what he wants to become one day, and many will say a police officer, some will say a judge, or even a prison warden. Very few will dream of becoming a public prosecutor.

The media, politicians and the public rarely have an opinion about the performance of the prosecution service. The investigative skills of the police are praised or blamed if criminals are convicted or acquitted of the charges against them. Judges are condemned if criminals whose crimes are particularly offensive to public sensibilities are not punished harshly enough. The prison service is denounced when prisoners escape. It is seldom, however, that the work of the prosecution service is commented upon, let alone evaluated.

Yet, the prosecution service is a crucial link in the South African criminal justice system. A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to a request of an accused person for bail, the number of awaiting trial prisoners increases. This causes overcrowding in the country's prisons and makes it difficult for prison wardens to look after sentenced prisoners adequately and to rehabilitate them.

Moreover, if the prosecution service does not operate optimally, many guilty accused are acquitted of the charges against them. This lowers police morale, and fosters public perceptions that crime pays. It also leads to general disillusionment with the ability of the criminal justice system to fight crime effectively.

Role of the prosecutor

Given the crucial role of the prosecution service in the state's fight against crime, it is time to ask what South Africa's 2 500 or so prosecutors do. On the surface, prosecutors have a simple responsibility: to help the police gather evidence, present evidence in court, argue cases and secure convictions. In reality, it is not this simple and straightforward. Prosecutors are burdened daily with a multitude of tasks and responsibilities. According to a policy manual produced by the national prosecuting authority in South Africa:

"the prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time prosecutors represent the community in criminal trials. In this capacity they need to ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner."²

The pretrial stage

A prosecutor is usually alerted of a crime by the police. After a crime is reported to the police, an investigating officer or detective is assigned to the case who proceeds to investigate it. This typically involves taking a written statement from the complainant or crime victim, as well as statements from other witnesses to the crime. If necessary, the investigating officer is assisted by specialist colleagues in collecting any relevant forensic evidence (such as fingerprints or blood samples) with the purpose of either identifying a suspect or collecting evidence against someone who has been identified as a suspect. Once sufficient evidence has been collected against a suspect to make out a credible case against him, the investigating officer presents this information — in the form of a police docket containing all written statements and documents related to the accumulated forensic evidence — to a prosecutor. The prosecutor peruses the docket to establish whether there is sufficient evidence against the alleged suspect(s) to justify a prosecution.

A common alternative to the above scenario is where the police arrest a crime suspect before they had the opportunity to conduct any major investigations. This usually occurs where a criminal is arrested in the act of committing a crime (eg a burglar caught inside the burgled premises, or a drunk driver stopped at a roadblock), or where a serious crime has been committed and there is a risk that the suspect could disappear or tamper with evidence should he not be arrested immediately. Once the police have arrested and charged a suspect, they are obliged to bring the suspect before a court within 48 hours. When an arrested suspect appears in court, the prosecutor dealing with the case is given a police docket, which at this stage usually only contains the statement of the arresting officer. Whenever an arrested accused is brought to court for the first time, the court has to decide whether to release the accused on bail. It is the responsibility of the prosecution to oppose bail and to persuade the court (usually by leading or presenting evidence) why an accused should not be granted bail.³

Whichever of the above two scenarios occurs, once the prosecution is given a police docket on an accused, one of four things must happen:

- The prosecution may ask the investigating officer to investigate the case further. This is a common request, especially in more intricate cases. To convict an accused of the crime(s) with which he has been charged, a prosecutor has to prove that all the elements of the crime are attributed to the accused beyond a reasonable doubt. For example, to convince a court to convict someone of murder, the prosecution has to prove beyond a reasonable doubt that the accused had the intention to kill the victim, that the accused acted unlawfully (ie that he did not, for example, act out of self-defence), and that the accused person's actions were responsible for the death of the victim. On the basis of their legal training and courtroom experience, prosecutors generally know how much evidence they require to warrant the prosecution of a person. If such evidence is absent, it is their responsibility to guide the investigating officers on such cases to complete their investigations in order to fill in any potential gaps in the prosecution's case.
- The prosecution may decide that the evidence contained in the police docket is sufficient to warrant instituting a prosecution against a suspect. The decision to prosecute someone is taken with caution, however. Before the prosecution elects to prosecute a suspect, it must be satisfied that the case against the suspect has been thoroughly investigated and that a conviction is likely. Once an accused is acquitted of a charge leveled against him by the prosecution, such an accused can generally never again be prosecuted for the same

offence even if more evidence should subsequently come to light which would have persuaded a court to convict the accused. The general test used by prosecutors to decide if they should prosecute a suspect is whether "there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution."⁴ This assessment can be a difficult one to make. The prosecution's witnesses are often not as credible or honest in the witness box as they appear from their written statements or in interviews conducted with them by a prosecutor before the trial. Accused may also decline to make a statement to the police with the result that the prosecution is unaware of what defence they may put forward during the course of the trial. The kinds of questions prosecutors ask when deciding whether to institute a prosecution are: How strong is the case for the state? Will the state's evidence be admissible? Will the evidence be reliable? Is the evidence available? How strong is the case for the defence?⁵

- The prosecution may decline to prosecute and instead opt for pretrial diversion or some other non-criminal resolution for the accused. Pretrial diversion frequently happens in the case of juvenile accused who have committed relatively minor offences (and are first offenders), and who admit their wrongdoing. Prosecutors are permitted to decline to prosecute such accused on the condition that the latter, for example, perform community service or make some restitution to their victims. A prosecution may be reinstituted against such accused, however, if they break their part of the bargain by, for example, not completing the full duration of the community service that they committed themselves to. The prosecution may also decline to prosecute a suspect at the request of the complainant or victim. For example, where an accused assaults his drinking companion after a heated argument between them in a bar, the prosecution may decline to prosecute the accused at the request of the 'victim' who reconciled himself with his assailant after they had sobered up. Prosecutors must exercise special care, however, when a crime victim asks that charges are withdrawn in a situation where a victim is in a close relationship with an accused, especially in cases of domestic violence or child abuse.⁶ Prosecutors are also unlikely to decline to prosecute cases where the alleged offence is serious, such as attempted murder. For example, if the above example of a barroom assault had ended with the accused shooting and seriously injuring his victim, it is unlikely that a prosecutor will decline to pursue the case.
- Finally, the prosecution may decline to prosecute without taking any action against a suspect. According to the policy manual of the national prosecuting authority, "there is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice."⁷ In deciding whether to decline to prosecute someone, the prosecution needs to take three broad factors into account: the nature and seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the criminal act, and the relationship between the accused and the victim; the interests of the victim and the broader community; and the circumstances of the offender.⁸ For example, the prosecution is unlikely to prosecute a person who drives recklessly and overturns his car, and is paralysed as a result. No one else is injured, nor is any property other than the driver's car damaged. In such a case the prosecution is likely to argue that, taking into account the driver's injuries, he has been punished enough. The driver is also unlikely to commit the offence of reckless driving again as he cannot drive a vehicle due to his disability, and a court would be hard pressed to identify an appropriate sentence for the driver should he be convicted. Another example of where the prosecution is likely to decline to prosecute is where a vagrant trespasses by

entering a disused warehouse belonging to the state. If a fine is imposed by a court on such an accused, it would not be paid (as the accused is penniless), while sending the accused to prison would not warrant the expense to the state, taking into account the minor nature of the offence.⁹

A former attorney-general of England, Sir Hartley Shawcross, ably summarised the reasons why a prosecutor may decline to institute a prosecution:

"It is the greatest nonsense to think that there must always be a prosecution because a case can be made out and you get a conviction. Sometimes there are reasons of public policy which make it undesirable to do so; perhaps the wrong-doer has already suffered enough; perhaps the prosecution would enable him to represent himself as a martyr or perhaps he is too ill to stand his trial without great risk to his health, even risk to his life. All that kind of thing enters into consideration ... all of them leading to the final question: would a prosecution be in the public interest, including ... the interests of justice."¹⁰

Prosecution authorities in the Anglo-American world enjoy virtually unfettered discretion whether to prosecute a person suspected of criminal conduct or not, and if prosecuted, with which offences and before which court. As a legal scholar has noted:

"this far-reaching power virtually to suspend or dispense with the country's criminal law is not subject to judicial control; such sanctions as there are relate only to the force of public opinion and departmental disciplinary proceedings."¹¹

The discretion of the prosecution in South Africa whether to institute a prosecution or not is called the 'principle of opportunity' in the language of jurisprudence. The principle of opportunity stands in contrast to the 'principle of legality' or the 'principle of compulsory prosecution', common to many European continental legal systems where the prosecution is obliged to institute a prosecution if there is sufficient reason to believe that an offence had been committed. In these systems, the prosecution has no discretion. If the facts are sufficient to lead the prosecution to believe that a crime was committed, a prosecution must be instituted.¹²

The trial stage

Once the police charge a suspect (who consequently becomes an 'accused') and the prosecution decides to institute a prosecution, the case proceeds to trial. Before the trial starts, the prosecution must formulate a formal charge against the accused providing some details on the particulars of the alleged offence.¹³ If requested to do so by the accused or his legal representative, the prosecution has to make most of the information contained in the police docket — such as witness statements and forensic reports — available to them.¹⁴ There is no right of mutual disclosure in South Africa. As a result, the prosecution does not have access to statements or documents held by the defence, and therefore does not know what defence an accused may aver, what witnesses he may call, and what other evidence he may present in his defence, until after the trial has commenced.

A trial starts with the prosecutor putting the charge to the accused. In more serious and intricate cases, the prosecutor may also provide some additional details on the circumstances surrounding the commission of the offence. The accused, and if he is represented with the assistance of his legal representative, then pleads to the charge. If the plea is one of not guilty, the matter proceeds to trial. After pleading not guilty, an accused may indicate the basis of his

defence to the court. However, an accused may also place everything contained in the charge against him in dispute. Alternatively, an accused may elect not to disclose the basis of his defence and remain silent. Whichever of the last two courses of action is chosen by an accused, this places a burden on the prosecution to prove all the elements of the alleged offence against the accused.

The trial then proceeds with the prosecutor presenting evidence. Evidence can be in the form of, for example, documents or photographs, and the testimony of state witnesses. Witnesses typically include the victim (unless it is a murder trial), any other persons who witnessed the offence in progress, the arresting officer and forensic experts. The prosecutor guides the witnesses through their testimony to ensure that they do not omit anything crucial to the state's case in proving the guilt of the accused. After each witness has testified, the accused or his legal representative may cross-examine them. The purpose of cross-examination is to show that a witness is not telling the truth or is mistaken, or that the testimony of a witness is in some other way not credible or reliable (eg that a witness suffering from Parkinson's disease cannot be relied upon to have a trustworthy recollection of the events at the crime scene). Where appropriate, the defence must inform state witnesses of the defence of the accused to give them the opportunity to comment on it. It is often only at this stage of the trial that the prosecution learns of the basis of the accused person's defence.

After the prosecution has presented the state's evidence and called its witnesses, and they have been cross-examined by the defence, the state formally closes its case. Once the state has closed its case, it generally cannot call more witnesses or present new evidence to the court. It is then the turn of the defence to present its evidence and call its witnesses with the aim of showing that the accused is innocent or that the state's allegations are not reasonably possibly true. The prosecution may cross-examine any witness — including the accused — who testifies for the defence.

At the end of this process, the prosecution has the opportunity to address the court and give reasons why the accused should be found guilty. In longer trials, the prosecutor would go through some of the more important evidence given by the state witnesses and argue why their testimony should be believed above that given by the accused and his witnesses. The accused or his legal representative is granted the same opportunity — to persuade the court why the accused should not be convicted. It needs to be borne in mind that the onus is on the prosecution to prove its case — which has to cover all the elements of the offence — beyond a reasonable doubt. If the prosecution fails to do so the court is obliged to acquit the accused. The court does not need to believe an accused person's defence to acquit him. In fact, to be found not guilty, the accused merely has to show that his version of events is 'reasonably possibly true'.

Prosecutors in South Africa work in an adversarial context. This is common in many countries where the Anglo-American legal system of common law predominates. In an adversarial trial, the opposing sides (ie the prosecution and the defence) present evidence, examine witnesses and conduct cross-examinations, each in an effort to produce information beneficial to its side of the case.¹⁵ The judicial officer acts as a moderator or referee, rarely taking part in the questioning unless he feels that important points of law or fact must be enlightened. Nevertheless, prosecutors whose primary function is "to assist the court to arrive at a just verdict, and not simply to secure a conviction at all cost,"¹⁶ must present the facts of a case fairly to a court. "They should disclose information favourable to the defence (even though it may be adverse to the prosecution's case) and, where necessary, assist in putting the version of an unrepresented accused before court."¹⁷ As one attorney-general put it:

"It is not the function of the prosecutor to secure a conviction. His clear and solemn duty is to see that justice is done and that can only be done if you place before the court fairly and fully all the facts, not only those that are against an accused person, but also those which are in his favour."¹⁸

The sentencing stage

After an accused has been convicted, the prosecution may address the court on the kind of sentence the state would like the accused to receive. The accused or his legal representative may do likewise. A judicial officer, who has a wide range of sentencing options to choose from, is not obliged to take heed of the suggestions for sentencing made by either the prosecution or the defence.¹⁹

In cases involving crimes of a serious nature, including violent crimes and sexual offences against women and children, the prosecution is supposed to lead evidence and, where necessary, expert evidence relating to, among others, the impact of the crime on the victim and the community, statistics regarding the frequency and relative seriousness of the offence, and any relevant previous convictions the accused may have.²⁰

Categories of prosecutors

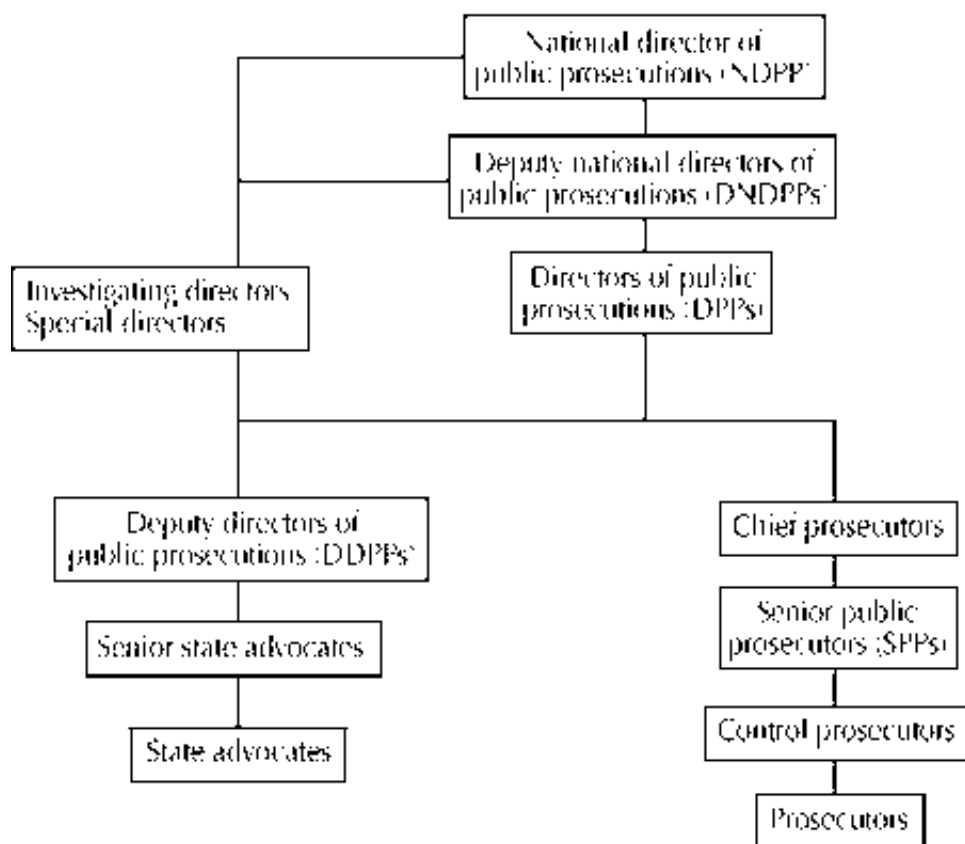
The role of the prosecutor as described above is a generalisation. Space does not permit a detailed catalogue of prosecutorial functions, nor is this necessary for the reader to understand the remainder of this monograph. The courtroom activities of prosecutors have been emphasised as most prosecutors spend the bulk of their time there. It needs to be stressed, however, that prosecutors — especially those in senior positions — spend much of their time on managerial and administrative functions. Prosecutors dealing with serious and intricate cases also spend a considerable amount of time outside court perusing lengthy police dockets, consulting with state witnesses and assisting investigating officers in their investigations. Moreover, since 1998, certain prosecutors have become directly involved in police investigations.

‘Prosecutor’ is a generic title for any person who may represent the state in a court to prosecute those charged with a crime, or to conduct criminal appeals for the state. In South Africa, there are different levels of prosecutors with different powers and functions (diagram 1).

At the head of the national prosecuting authority is the national director of public prosecutions, assisted by up to four deputy national directors of public prosecutions. Below them are a number of directors of public prosecutions whose jurisdiction is restricted to the geographic area where they have been appointed. There is one director of public prosecutions for each of the 10 divisions of the high court of South Africa, and one for the Witwatersrand local division of the high court. Investigating directors are directors of public prosecutions who head an investigating directorate (of which there may not be more than four) whose jurisdiction extends across the whole country. They are subject to the control and directions of the national director of public prosecutions. Special directors are directors of public prosecutions who have certain powers, functions and duties as assigned to them by the president, but subject to the control of the national director of public prosecutions. Directors of public prosecutions, investigating directors and special directors are assisted by deputy directors of public prosecutions, as well as senior and junior state advocates who have a right of appearance in the high court.

Over 95% of all criminal trials take place in the magistrate's courts (also known as the lower courts). There are two types of magistrate's courts: regional and district courts. The former are staffed by regional court prosecutors and regional court magistrates, the latter by district court prosecutors and magistrates. Chief prosecutors manage and oversee clusters of magistrate's courts and report to the director of public prosecutions for their area of responsibility, or to senior staff in the office of the national director of public prosecutions. The prosecutorial staff at larger magistrate's courts are managed by a senior public prosecutor. At busy magistrate's courts, senior public prosecutors may delegate some of their managerial and administrative duties and responsibilities to control prosecutors.

Diagram 1: Categories of prosecutors



Only the most serious crimes such as brutal murders, particularly violent rapes, robbery with aggravating circumstances where someone is seriously injured or killed, and fraud involving large amounts of money are usually prosecuted in the high court. The vast majority of murders, rapes and robberies, and crimes such as attempted murder, child abuse, kidnapping, sexual offences, housebreaking where the intention is not only to trespass, fraud and theft where the loss exceeds R40 000, and car theft are prosecuted in the regional court.²¹ More minor offences such as assault, most forms of theft and fraud, malicious injury to property, most drug-related offences, drunk driving offences, and other driving-related offences are prosecuted in the district court. Unless legislation provides otherwise, regional courts have the jurisdiction to impose a maximum period of imprisonment of 15 years (and a fine of up to R300 000), while district courts have the jurisdiction to impose a maximum period of imprisonment of three years (and a fine of R60 000).²² There is no sentencing limit for the high court.

Chapter 2

THE FIGHT FOR INDEPENDENCE: HISTORY OF THE PROSECUTION SERVICE

English roots

In the English legal tradition — from where the term attorney-general emanates — the position of a prosecutor for the crown is centuries old. During the 13th century, the English monarch began to realise that he had an interest in the prosecution of certain crimes and appointed a 'king's attorney' to prosecute offenders in the name of the crown.²³ The name king's attorney was used to distinguish the monarch's counsel from others, for criminal prosecutions were undertaken by private citizens in those days.²⁴ Edward III employed what was called a 'general attorney', to distinguish the position of the particular occupant of this post from an attorney appointed by the king for specific occasions and specific cases.

Eventually, the title of general attorney changed to attorney-general and the person in this position began to represent the state in all criminal trials. With the emergence of the modern state, and the function of the state to protect all its citizens from criminals, the attorney-general took over the role of prosecuting all those who broke the laws of the state. The name of attorney-general is consequently somewhat misleading. The person occupying such an office is clearly not a general in the military sense of the word, nor is he an attorney (at least not in a South African context where attorneys represent accused in criminal trials).

Early South African history

At the initiative of the Dutch East India Company, which set up a permanent supply station at the Cape in 1652 for its ships travelling between the Netherlands and the East, the Dutch office of a *fiskaal* was imported to the Cape. The fiscal was responsible for conducting prosecutions, as well as investigating crimes and punishing civil servants who were corrupt or neglected to perform their duties.²⁵ The fiscal sat on the council of policy, the governing body at the Cape. Other members of the council of policy were the commander or governor at the Cape, his deputy, the commander of the soldiers at the Cape, and other senior officials. When any transgressions occurred, the members of the council of policy would act as a council of justice that could pass sentence on those it convicted. Whenever free burghers appeared before the council of justice as accused they could be represented on the council by someone of their choice who had to be "one of the oldest and most honest of the free burghers."²⁶

In 1688, the fiscal received the title of *fiskaal* independent and was made directly accountable to the council of seventeen, the directors of the Dutch East India Company.²⁷ While the fiscal sat on the council of policy, he did not have to account for his actions to the council. The governor at the Cape could neither give him orders nor silence him.²⁸ The position of fiscal was consequently a powerful one in the Cape administration:

"The only official whose power approached that of the Governor was the Independent Fiscal, who, in addition to acting as public prosecutor in criminal trials, prevented smuggling, and controlling the police, was in 1688 given vast powers to punish officials for dereliction of duty, including the right to report the Governor to the Council of Seventeen, with whom he corresponded directly."²⁹

Before 1783 the executive and the judiciary at the Cape were synonymous in practice. This made an independent bench impossible and negatively impacted upon the independence and credibility of successive fiscals at the time. When the governor gained the support of his senior officials there was no check on the executive. In 1705, for example, a group of colonists at the Cape drew up a memorandum against official malpractice and smuggled it to Batavia (as the Netherlands were then known). When the Cape governor at the time, W A van der Stel,

discovered the conspiracy, the leaders were arrested and a special commission was established to try the dissenting colonists. The prosecutor was not the independent fiscal, who should have taken charge, but a Stellenbosch landdrost (magistrate) who had organised a counter-memorandum praising Van der Stel. He falsified the record of the interrogation, while imprisonment without bail, threats of banishment and torture were used to get the governor's opponents to retract their allegations:³⁰

"Clearly no force in the constitution was strong enough to uphold justice against the illegal proceedings of the Governor and his clique. Even the Independent Fiscal, whose office was intended as an independent focus of power, was ousted from his proper functions without protest. The Independent Fiscalate did not guarantee that the executive would respect fundamental rights of the individual, such as freedom of speech or freedom from arbitrary arrest, without which justice in cases involving individuals against the state is difficult to achieve. Indeed, a powerful fiscal might become as tyrannical as a powerful governor, as the burghers' complaints against successive fiscals in the late eighteenth century show."³¹

In 1783 the council of seventeen created a new high court of justice. The court — also called the council of justice — had jurisdiction over criminal and civil cases at the Cape. The Batavian council of justice was the final court of appeal in respect of judgements handed down by the Cape council of justice. The members of the Cape council were appointed by the council of policy, subject to the approval of the council of seventeen. The fiscal acted as public prosecutor in criminal cases that harmed the Dutch East India Company and in all other serious criminal cases, unless they had occurred in the countryside outside of Cape Town, when a district official, the landdrost, arrested the criminal and arraigned him before the council, thereby acting as a prosecutor before the council.³²

In addition to his fixed salary, the fiscal had the right to claim a commission on all fines he imposed on offenders to entice him to pursue all law breakers. When fines could not be paid, it was not uncommon for the fiscal to confiscate the property of transgressors of the law. Some fiscals were also entitled to tax agricultural produce that was delivered to foreign ships by the burgher community at the Cape.³³ This rapidly led to an abuse of his position and the fiscal became a despised official among the early settlers at the Cape.³⁴ The settlers named the shrike fiskaal (a shrike or butcher bird is a small bird of prey with a strong hooked and toothed bill with the habit of impaling its prey of small birds and insects on thorns).

In 1795 the British assumed control at the Cape. The administration of justice remained in the hands of the council of justice. The fees and additional earnings that previously formed a large and obscure part of many officials' income were eliminated. Only the fiscal was still entitled to part of the fines imposed by the supreme court. However, the fiscal lost the independence he enjoyed before 1795, and his position was made subordinate to that of the governor at the Cape. His role remained the same: to ensure that the laws of the colony were carried out, that transgressors of the law were punished, and also to act as prosecutor in criminal trials in the council of justice.³⁵

In 1803 the Batavian republic (as the United Netherlands had become known) took possession of the Cape, giving it the status of a Dutch colony. Important changes were undertaken in the colony's administration of justice. Its judicial and executive authority were separated with the former being entrusted to the council of justice, consisting of six members with legal qualifications, a secretary and an attorney-general who replaced the fiscal, and who was no longer entitled to part of the imposed fines.³⁶

In 1806 the British successfully invaded the Cape for a second time. The new British governor at the Cape was granted extensive powers. All legislative and executive powers were vested in him and the council of policy was abolished. The judiciary was subordinate to him in that he could appoint and dismiss all members of the council of justice except the president, and all authority in both criminal and civil courts was vested in him. The office of the fiscal as crown prosecutor was reinstituted. The fiscal held a position in the council of justice and could claim a commission of one-third of all fines imposed.³⁷ The rule of successive governors at the Cape became increasingly autocratic. With the arrival of British settlers in the Cape in 1820 the voices in opposition to the governing structures at the Cape grew in influence. After a commission of inquiry reported on the settler's complaints in the late 1820s, the governor lost his judicial powers, which ensured an independent judiciary at the Cape. The council of justice was replaced by a high court of justice consisting of a chief justice and three judges, all appointed from Britain. The office of the fiscal was replaced by that of attorney-general.³⁸

The two Boer republics initially did not have an office of a chief prosecutor or attorney-general. In the Zuid-Afrikaansche Republiek (ZAR), accused persons were tried by elected officials such as magistrates and members of the legislature. In 1858, the office of the state attorney (staatsprokureur), which was responsible for conducting prosecutions, was established in the ZAR. The state attorney or his representatives were responsible for investigating and prosecuting all crimes committed in the ZAR. In addition to his prosecutorial functions, the state attorney had to provide legal advice to the state, draft legislation, represent the state in civil trials and consider trademark applications.³⁹ The office of the state attorney was independent from executive interference to a large degree.⁴⁰ Thus, a law of 1864 stated explicitly that the right and power to prosecute are vested exclusively in the state attorney who alone is responsible for controlling and managing prosecutions.⁴¹ The state attorney was entitled to decline to prosecute anyone against whom there was insufficient evidence. A decision not to prosecute by the state attorney opened the door for interested parties to institute a private prosecution against suspected wrongdoers.⁴² Interestingly, an accused had a right to claim compensation directly against a prosecutor where the latter failed to appear without good reason on the day of a trial.⁴³ The state attorney or his representatives could conduct preliminary investigations to establish whether there was a case to be made against an accused.⁴⁴ In 1867 clerks of the magistrate's courts were appointed as prosecutors and were responsible for conducting prosecutions in the magisterial districts where they were based.⁴⁵ A decision by the ZAR legislature in 1883 laid down that the position of state attorney could only be filled by a person properly qualified for it who had completed a legal degree.⁴⁶

In the Orange Free State, the right and power to prosecute were also vested in the position of the state attorney. If the state attorney was unable to conduct a prosecution, a clerk of the magistrate's court could do so. Alternatively, the state attorney could appoint any person of his choice to conduct a prosecution on his behalf.⁴⁷ Most prosecutions in the lower courts were conducted by clerks of the magistrate's courts. Minor offences such as brawls, disturbances of the peace and transgressions of municipal by-laws could be prosecuted without the consent of the state attorney by any municipal officer or police constable.⁴⁸ Private prosecutions were generally permitted once the state attorney declined to prosecute a matter. A man also had an unfettered right to institute a private prosecution against anyone who had committed a crime or offence against his wife. The same right was granted to the legal guardians of minors who had fallen victim to the criminal actions of another.⁴⁹

After the second Anglo-Boer War (1899-1902), in the first decade of the 20th century, the four territories that later became the Union of South Africa had attorneys-general who prosecuted

criminals in the name of the English crown. All attorneys-general were members of the colonial cabinets. Having elected politicians fulfilling the role of chief prosecutors is not without its dangers. The decisions of elected attorneys-general — who are accountable to the electorate — whether to prosecute or not could be influenced by their desire to increase their popularity in the eyes of the voting public.

Struggle for independence

At the formation of the Union of South Africa in 1910, the post of minister of justice was created in the national cabinet. In each provincial division of the newly established union-wide supreme court, an attorney-general was appointed with the authority to prosecute.⁵⁰ The attorneys-general prosecuted on behalf of the state, or delegated this authority to others. At the lower level, these delegates were police officers, and in the supreme court, trial advocates in private practice. An attorney-general was responsible for all the prosecutions that took place in his area of jurisdiction, and had control over all the persons who conducted prosecutions on his behalf in this area. The attorneys-general were the final arbiters of who should be prosecuted. They were independent civil servants and no provision existed for ministerial control.

Concern for such wide powers in the hands of public officials who were legally free from ministerial constraint and parliamentary responsibility prompted the government to promulgate legislation in 1926 to give the minister of justice "all powers, authorities and functions to the prosecution of crimes and offences."⁵¹ As a result the attorneys-general lost their independence and their authority to prosecute had to be assigned to them by the minister of justice. Tielman Roos, the justice minister at the time, motivated the government's decision to curtail the independence of attorneys-general as follows:

"The chief reason why it is necessary to put this bill [the 1926 legislation] on the statute book is, in my opinion, that there is no authority whatsoever over, and no responsibility of the Attorney-General. Parliamentary responsibility is completely absent."⁵²

While Roos gave the assurance that the traditional independence of the attorney-general would be respected, two attorneys-general resigned to protest the infringement of their independence.⁵³

The 1926 legislation imposed an intolerable managerial and administrative burden on the minister of justice.⁵⁴ In 1935, the power of prosecution was once again vested in the attorneys-general, but subject to the control of the minister of justice. Thus, while prosecutions were again formally instituted by attorneys-general, the minister was given the power to issue directions to attorneys-general to exercise their powers directly in any specific matter:

"Attorneys-General shall exercise their authority and perform their functions ... subject to the control and directions of the Minister [of Justice] who may, if he thinks it fit, reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function."⁵⁵

The essence of this passage in the 1935 legislation was incorporated into later versions of the Criminal Procedure Act.⁵⁶ The effect of the 1935 legislation, and the subsequent versions contained in the Criminal Procedure Act until the early 1990s, was that there was no formal or substantive separation of powers between an attorney-general and the executive, and that

direct or indirect political influence was possible.⁵⁷

While the minister seldom interfered with the decision of an attorney-general in practice, this provision in the law ensured that the minister had ultimate control over prosecutions.⁵⁸ Attorneys-general and their staff were civil servants and subject to public service laws and regulations. This further impacted upon the independence of these positions as they, as civil servants, were ultimately subjected to ministerial control.⁵⁹

In a 1985 decision, the supreme court expressed its dissatisfaction with the position of attorneys-general: "[The attorney-general] is not an independent officer; unlike the courts he does not exercise his powers free from executive control."⁶⁰ Starting in the mid-1980s, attorneys-general and their staff began to lobby to change their positions from being civil servants and thus to regain some of their lost independence. Legislation passed in 1992 complied with this request. Moreover, the legislation went even further and granted attorneys-general a measure of independence they had not enjoyed since 1926.

Regained independence

In 1992, the Attorney-General Act was promulgated to remove attorneys-general from the control of the public service commission and to entrench the non-interference of the minister of justice.⁶¹ The legislature, however, decided to leave deputy attorneys-general, state advocates and prosecutors under the control of the public service commission.

The memorandum on the Attorney-General Bill (which preceded the act), stated that the community demands that every attorney-general should function independently of any possible interference from the executive and that the purpose of the proposed act would be to "meet the need to place the independence of the Attorney-General beyond any doubt."⁶²

In terms of the Attorney-General Act, the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of ministerial interference.⁶³ The independence of the attorneys-general was further enhanced by measures that removed the reduction of an attorney-general's salary from the hands of the executive,⁶⁴ and secured their security of tenure of office.⁶⁵

The function of the minister of justice was reduced to that of a co-ordinator: 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:

"In terms of the Act attorneys-general enjoyed absolute independence. They were accountable only to parliament and then only in the limited sense that parliament could question them about their annual reports or dismiss them in very exceptional circumstances."⁶⁶

As an attorney-general at the time put it: "The Attorney-General Act of 1992 serves to put [the attorney-general's] independence beyond doubt. This is a wholesome development reconciling freedom and accountability."⁶⁷

In terms of the 1992 law, the authority of an attorney-general was considerable and arguably more extensive than that of the courts. The exercise of an attorney-general's powers was not delimited by laws and all decisions were left to his unfettered discretion. Moreover, unlike the

courts, attorneys-general were not obliged to provide reasons for their decisions with the result that such reasons could not normally be subjected to public scrutiny and debate, as in the case of the courts, in instances where they declined to prosecute. Obviously, in cases where attorneys-general elected to prosecute, a safeguard existed in the form of the courts that could acquit accused persons wrongly prosecuted.

South Africa's new post-1994 ruling party, the African National Congress (ANC), viewed the 1992 act with suspicion. The reasons for this were, among others, the unfettered discretion that the 1992 act afforded attorneys-general and their lack of accountability to parliament. The ANC also regarded the legislation as "an attempt by the old order prosecutors to protect their entrenched positions."⁶⁸ Moreover, the ANC, on ideological grounds, favoured a centralised prosecutorial structure to that which was in essence a federal and decentralised one.

In 1994, the minister of justice at the time, Dullah Omar, set up a national consultative legal forum on the administration of justice to give effect to the government's commitment to the transformation of the legal administration. Speaking at the first meeting of the forum in November 1994, Omar asked to whom the attorney-general was accountable and said that its office had been an instrument of the apartheid state that had applied repressive legislation with vigour and enthusiasm. In 'the dying days of apartheid', the independence of the office of the attorney-general was introduced. This, Omar concluded, was not done so much to guarantee independence, but to entrench the status quo.⁶⁹

1996 constitution

The ANC, which was the majority party in the constitutional assembly (the body which drew up South Africa's 1996 constitution), successfully pushed for the introduction of a section into the 1996 constitution dealing specifically with a prosecuting authority for South Africa. The section contains details on the form that the prosecuting authority would take in the new constitutional order, providing, among others, that:⁷⁰

- A single national prosecuting authority is instituted, structured in terms of an act of parliament. The national prosecuting authority must consist of a national director of public prosecutions as head of the prosecuting authority who is appointed by the president, and directors of public prosecutions and prosecutors.
- The prosecuting authority has the power to institute criminal proceedings on behalf of the state.
- National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- 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 must be observed in the prosecution process.
- The national director must issue policy directives to be observed in the prosecution process, and the national director may intervene in the prosecution process when policy directives are not complied with.
- The national director may review a decision to prosecute or not to prosecute, after consulting the relevant directors of public prosecutions.

- The minister of justice must exercise final responsibility over the prosecuting authority.

The constitutional provision dealing with the prosecuting authority was highly controversial at the time. Its constitutionality was challenged on the grounds that it impeded on the separation of powers between the legislature, executive and judiciary with appropriate checks and balances.⁷¹ The constitutional court rejected this objection, arguing that the prosecuting authority is not part of the judiciary, and that the appointment of the national director of public prosecutions by the president in itself does not contravene the doctrine of the separation of powers.⁷² Moreover, the court noted that the constitutional provision that an act of parliament had to ensure that the prosecuting authority 'exercises its functions without fear, favour or prejudice', was a guarantee of prosecutorial independence.

Chapter 3

BACK TO THE FUTURE:

THE NATIONAL PROSECUTING AUTHORITY ACT

Provisions of the act

The national prosecuting authority

In 1998 parliament passed the National Prosecuting Authority Act to give effect to the constitutional provision dealing with the prosecuting authority and to spell out the details of a new prosecutorial system for the country.⁷³ With the promulgation of the act South Africa's first centralised national prosecuting authority, headed by a national director of public prosecutions with the power to direct prosecutions throughout the country, came into existence.

The national prosecuting authority consists of the office of the national director, and the offices of the prosecuting authority at the high courts.⁷⁴ The office of the national director consists of the national director of public prosecutions (NDPP) who is the head of the office. The national director is assisted by an executive staff component comprising an advisor, a public relations officer and administrative assistants. The office of the national director is served by a corporate services division headed by a chief executive officer (CEO). The corporate services division comprises the following components: human resources, finance, communications, and logistics and administration (diagram 2).⁷⁵

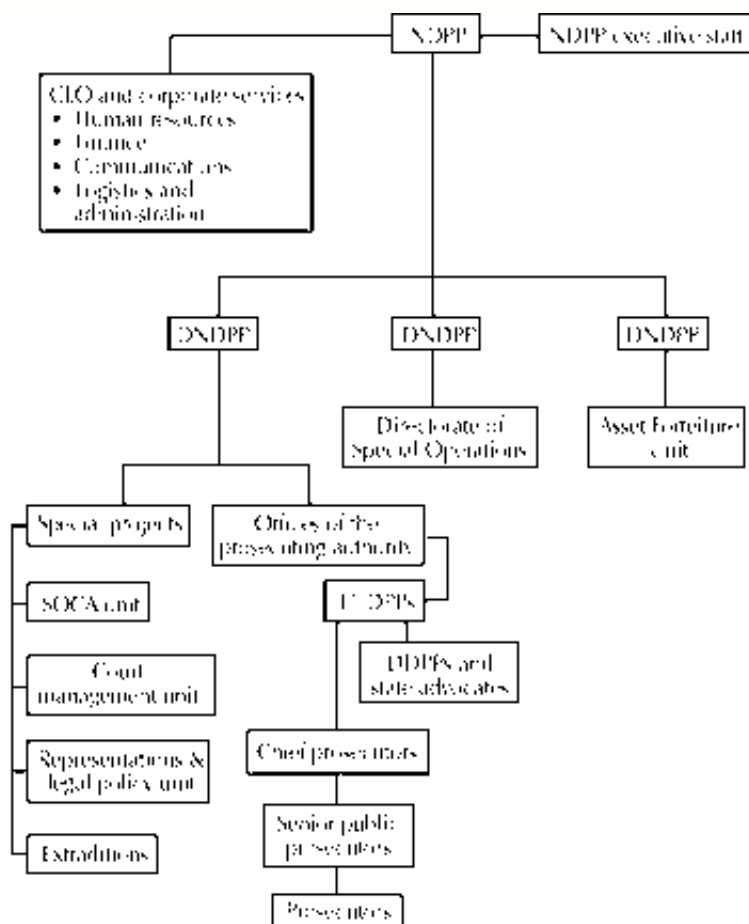
The office of the national director is served by deputy national directors of public prosecutions (DNDPPs). Legislation limits the number of deputy national directors to a maximum of four.⁷⁶ At the discretion of the national director, any of the deputy national directors may exercise or perform any of the powers, duties and functions of the national director.⁷⁷ At the time of writing, three deputy national director posts existed. The responsibilities of the deputy national directors include the following:

- The offices of the prosecuting authority at the seat of each of the 10 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).⁷⁸ Offices are staffed by one or more deputy directors of public prosecutions, state advocates, prosecutors and administrative staff.⁷⁹ 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.⁸⁰ The deputy national director responsible for the offices of the

prosecuting authority also heads 'special projects' in the office of the national director. Special projects consist of the sexual offences and community affairs unit (SOCA unit), the court management unit, a representations and legal policy unit, and a unit dealing with extradition proceedings.

- The directorate of special operations (DSO), also known as the Scorpions reports under a deputy national director. The directorate absorbed the three erstwhile investigating directorates on organised crime and public safety (IDOC), serious economic offences (IDSEO) and corruption. It has taken over the functions of the human rights investigation unit in the prosecuting authority. The unit investigated persons who did not qualify or apply for amnesty in terms of the truth and reconciliation process. The DSO is staffed by investigating directors (directors of public prosecutions with special functions and powers), deputy directors, special investigators, prosecutors, and persons necessary in achieving its objectives.⁸¹
- The asset forfeiture unit (AFU) assists the directorate of special operations and the offices of the prosecuting authority in the use and application of South Africa's asset forfeiture legislation. The head of the unit is a special director. Special directors are directors of public prosecutions who have specific powers, functions and duties assigned to them.⁸² The unit is also staffed by deputy directors of public prosecutions and prosecutors.

Diagram 2: Structure of the national prosecuting authority



Powers of the national director

As head of the prosecuting authority the national director has:

"the authority over the exercising of all powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the constitution, the National Prosecuting Authority Act or any other law."⁸³

The act provides that:

"the national director, shall 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."⁸⁴

The precise meaning of this provision is important. The 'concurrence' of the minister means that the national director requires his approval; expressed differently, the minister can veto policy proposals made by the national director. Conversely, the words 'after consultation' mean that the national director can go ahead and ignore the input of the directors of public prosecutions if he disagrees with it.⁸⁵

The national director may intervene in any prosecution process when policy directives are not complied with,⁸⁶ and 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 whom the national director considers to be relevant.⁸⁷ According to Van Zyl Smit and Steyn, the power to review a decision to prosecute or not to prosecute:

"appears to exist even where policy directives are being followed. It is limited, however, 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."⁸⁸

To assist the national director in exercising these powers, he may conduct any investigation he deems necessary in respect of a prosecution or a prosecution process. The national director may further direct the submission of and receive reports from a director in respect of a case or a prosecution.⁸⁹

Appointments

According to the National Prosecuting Authority Act, and as decreed by the constitution, the president appoints the national director. Moreover, the president — in consultation with the minister of justice and the national director — appoints the directors of public prosecutions and up to four persons as deputy national directors of public prosecutions.⁹⁰ Unlike the directors, deputy national directors have concurrent countrywide prosecutorial jurisdiction. Both the deputy national directors and the directors are subject to the control and directions of the national director.

The president may also appoint — in consultation with the minister of justice and the national director — one or more directors of public prosecutions as 'special directors' to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to them by the president.⁹¹ Prosecutors are appointed on the recommendation of the national director or members of the national prosecuting authority designated by him.⁹²

Terms of office and remuneration

The national director holds office for a non-renewable period of 10 years, or until attaining the age of 65 years. Deputy national directors and directors serve unrestricted terms until the age of 65 years.⁹³ During this period, the grounds are limited on which the national director, his deputies, or directors may be suspended or removed from office. Such suspension or removal can be done by the president only and is subject to ratification by parliament. However, the president is obliged to remove the national director, his deputies or a director from office if requested to do so in an address by both houses of parliament.⁹⁴

The remuneration and terms and conditions of service of the national director, deputy national directors and directors are determined by the president provided that the salary of the national director is at least that of a high court judge.⁹⁵ Deputy directors, state advocates and prosecutors are largely subject to public service rules in relation to their appointment and dismissal. Salaries below director level are determined by the minister of justice after consultation with the national director and the minister of public service and administration, and with the concurrence of the minister of finance.⁹⁶ The effect of these arrangements is that prosecutors are structurally far less independent than their more senior colleagues.⁹⁷

Impartiality and non-interference

A measure designed to deter members of the prosecuting authority from submitting to undue outside influence is a clause in the National Prosecuting Authority Act that obliges members 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."⁹⁸

The act further stipulates that:

"subject to the constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

Any person who contravenes this provision is guilty of an offence.⁹⁹

Investigating directorates

In the past, attorneys-general and their staff generally did not have the authority to investigate crimes. At best, they could monitor and guide police investigations. In fact, the police was not obliged to follow the instructions of an attorney-general or his staff. This changed with the promulgation of the National Prosecuting Authority Act whereby directors of public prosecutions can oblige the police to conduct investigations and obtain statements.¹⁰⁰

Formal investigative powers are granted to the prosecuting authority through the structure of investigating directorates. The head of an investigating directorate — an investigating director — must be a director of public prosecutions. An investigating director and the persons authorised by him, can fill the role of investigator and prosecutor at the same time. Investigating directorates are empowered to have police officers and detectives seconded to them at their request. Investigative directorates — which consist of, among others, prosecutors and police investigators under the guidance of a director of public prosecutions — may conduct investigations and then prosecute on the result of such investigations.

The president may — with the concurrence of the minister of justice and the national director —

establish up to three investigating directorates in the office of the national director. Investigating directorates are established to investigate and prosecute matters which are not dealt with by the directorate of special operations (see section on 'directorate of special operations' below).¹⁰¹ The president — after consultation with the justice minister and the national director — must appoint a director of public prosecutions as the head of every investigating directorate.¹⁰² Investigating directors are subject to the control and directions of the national director.

An investigating director may be 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 person whose services the directorate requires for a particular inquiry.¹⁰³ 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.

Investigating directorates are granted considerable powers for the fulfilment of their mandates. 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 hold an inquiry on the matter. The inquiry may be extended to include any offence which may be connected with the subject of an inquiry.¹⁰⁴ An investigating director may summon any person, who can furnish information on the subject of an inquiry, or who has any document or other object relating to this subject, to appear before him. The summoned person may be questioned under oath by an investigating director (or a person designated by him), and any document or object may be examined or retained by the investigating director.¹⁰⁵ The summoned person may not refuse to answer any question on the ground that the answer could expose him to a criminal charge.¹⁰⁶

On obtaining a warrant from a court, an investigating director or persons designated by him may enter and search premises where anything connected with an inquiry is suspected to be. An investigating director may examine any object found on the premises, and request information regarding the object from the owner or person in charge of the premises. It is a criminal offence for anyone to refuse to supply requested information, or to give false or misleading information. An investigating director may also seize anything on the premises that may have a bearing on the inquiry in question. Under certain circumstances, premises may also be entered and searched without a warrant.¹⁰⁷

An investigating director, or any person authorised by him, for the purposes of a criminal prosecution, may institute an action in any court in the country. They may also prosecute an appeal in any court in the country emanating from criminal proceedings instituted by an investigating director.¹⁰⁸

Prosecutors as investigators

According to English legal tradition inherited by South Africa, prosecutors do not become involved in criminal investigations. The functions and professional duties of prosecutors and detectives have traditionally been separate. The powers of investigation were granted to the police who, at the completion of their investigation, handed their findings in the form of a police docket to a prosecutor. The prosecution did not get directly involved in the combating or investigation of crime except in a reactive sense – looking at the facts of a case after a crime was committed and investigated.

In South Africa, this clear demarcation of functions between prosecutors and investigators began to blur as prosecutors took on a more active

investigative role in the late 1980s. A well-known example of an attorney-general's involvement in the investigation of crimes was the commission of inquiry regarding the prevention of public violence and intimidation (the Goldstone commission), which operated from 1991 to 1994. After it came to light that individual members of the South African Police were willing to testify about illegal police hit-squad activities, the attorney-general of the Transvaal, Jan d'Oliveira, was mandated by the state president to investigate these allegations with the assistance of carefully selected police officers.

In 1994, the minister for safety and security set up an investigation task unit (ITU) to investigate, among others, alleged hit-squad activities within the ranks of the police. The ITU comprised detectives and civilian support staff, and received the support and advice of state advocates seconded from the attorney-general's office in KwaZulu-Natal.¹⁰⁹

During the early 1990s, South Africa experienced an unprecedented growth in organised crime. In response, the South African Police Service set up a number of organised crime units.¹¹⁰ Due to the legally intricate nature of the investigations conducted by the organised crime units, they are often assisted in their investigations by attorneys-general and their staff.¹¹¹ Senior state advocates are often allocated to an organised crime unit from the commencement of their investigations into an organised crime syndicate. Legislation promulgated in 1991 gave senior prosecutors and their staff the power to investigate and prosecute serious economic offences.¹¹² The erstwhile office for serious economic offences in many ways was the forerunner of the investigating directorates established by the National Prosecuting Authority Act.

Controversy surrounding the new act

The legislation that created South Africa's first national prosecuting authority headed by a national director of public prosecutions caused substantial controversy at the time it was debated and eventually passed by parliament.¹¹³

Security of tenure for senior prosecutors

An early draft of the National Prosecuting Authority Bill proposed to restrict the terms of office of both the national director and the directors of public prosecutions to fixed terms determined by the president at the time of their appointment, after which they could be reappointed for one additional term.¹¹⁴ This was a step backward in respect of the security of tenure of the country's most senior prosecutors. The legislation in force at the time — the Attorney-General Act of 1992 — provided that attorneys-general were secure in their position until the age of 65. The parliamentary committee of the general council of the bar of South Africa commented on the draft bill's provision as follows:

"The impression is created that the national director and directors of public prosecutions may be appointed for a period of probation and thereafter, if the ruling party is happy that they are toeing the line, they will be reappointed."¹¹⁵

This contentious provision was eventually removed from the bill. The act as passed by parliament provides for the national director to be appointed for a non-renewable term of 10 years, unless he turns 65 before the expiry of this period. Directors are appointed for life until the age of 65 as was the position with attorneys-general in terms of the 1992 legislation.

Qualifications of national director

The bill initially provided that a person could be appointed as a director of public prosecutions only if such a person had been involved with the application of the law for at least 10 continuous years, possesses expertise suitable for the position, and has the right of appearance in the supreme court (now the high court). Yet, the bill did not contain any requirements regarding the qualification of the national director or his staff. The president of the association of law societies felt that "it would be wholly inappropriate for someone to be appointed to the position [of national director] who did not have the qualification and experience as an Advocate or Attorney."¹¹⁶ The bill was eventually amended to include a provision that both the national director and the directors of public prosecutions must possess legal qualifications that entitle them to practice in all courts in the country.¹¹⁷

Interference by the national director

The bill made provision for the national director to appoint one of his staff members to the offices of the directors of public prosecutions, to enable the national director "to exercise his powers or to carry out his duties" there.¹¹⁸ The society of state advocates of South Africa objected to this, arguing that "the appointment of people whose sole function is apparently to look over the shoulders of Directors will only serve to create an atmosphere of hostility and mistrust."¹¹⁹ The general council of the bar commented that the provision will cause friction between the various directors of public prosecutions and the national director:

"Such a person [the national director's representative] will be seen as a spy and instead of co-operation one can expect that he will meet the resistance from the members of the directors' staff. Members of the directors' staff should not make decisions whilst constantly looking over their shoulders. Moreover such a placement could have the practical effect that the director of public prosecutions is no longer in control of the prosecutions in that particular area but that the staff of the national director, who has been placed in the office of the director, is in fact in control."¹²⁰

Some of the attorneys-general at the time also expressed their disquiet about the bill's provision on the grounds that it could lead to political interference in their work.¹²¹

The provision that the national director can appoint his staff members to the offices of the directors to exercise his powers was eventually dropped from the bill. However, in terms of the present act, the national director's powers to interfere in the decisions of the directors are still substantial. The national director, for example, may intervene in any prosecution process when policy directives are not complied with,¹²² and review a decision to prosecute or not to prosecute after consulting the relevant director.¹²³ The power to review a decision not to prosecute can serve to ensure that prosecutorial independence is not abused. The point has been made, however, that the power to review a decision to prosecute poses a "potential danger that the National Director could prevent a prosecution that would be politically embarrassing."¹²⁴

Concern about political interference

Concerns that a national director of public prosecutions could misuse his power to prevent a prosecution were accentuated by comments made by the minister of justice, Dullah Omar, at the time when the National Prosecuting Authority Bill was discussed in parliament. Upon the return to South Africa

of Allan Boesak, a prominent ANC member, Omar – who was also the Western Cape leader of the ANC at the time – questioned the decision of the Western Cape attorney-general to prosecute Boesak for fraud and theft of Danish aid money. Defending Boesak as having engaged in ‘struggle bookkeeping’, Omar said that “neither the president, the cabinet, nor the minister of justice were asked for their views with regard to the possible prosecution [of Boesak]... and when the attorney-general after his own investigation decided to prosecute, again we had no say in the matter.”¹²⁵ Omar’s statement raised the suspicion that the bill, once promulgated, could be used as a tool by the ruling party to interfere in the prosecution process.

In December 1998, judge van der Walt of the Transvaal provincial division of the high court refused bail to three cadres of the ANC (known as the ‘Eikenhof three’) who were convicted and sentenced in 1994 for the murder of a woman and two children at Eikenhof near Johannesburg. The three brought an appeal on the basis of new evidence that suggested that members of the Pan Africanist Congress (PAC) were responsible for the murders. The state indicated that it would oppose the appeal. Prior to the hearing of the appeal the national director of public prosecutions, Bulelani Ngcuka, instructed the prosecutor of the case to withdraw his opposition to the bail application. Judge van der Walt said that Ngcuka’s decision was “unfortunate, ill-considered, and unwise” in the light of his connection to the ANC.¹²⁶

Appointment of first national director

In July 1998, the president appointed Bulelani Ngcuka as South Africa’s first national director of public prosecutions. Ngcuka was an ANC insider. In 1988, Ngcuka and Dullah Omar formed part of an interim committee to prepare the relaunch of the United Democratic Front in the Western Cape.¹²⁷ At the time of his appointment, Ngcuka was an ANC member of the national council of provinces, a position he had held since 1994 when he was elected to the Senate (as it was then known) to become the ANC’s chief whip. In 1990 he became a member of the ANC’s constitutional committee. He represented the movement at the Codesa negotiations and the multiparty talks in Kempton Park where he served on the working group dealing with the transformation of the judiciary.

The general council of the bar expressed its reservations about Ngcuka’s appointment: “The appointment of Ngcuka underscores our objections to the Bill. It is clear he is a party-political man who could be susceptible to political influence.”¹²⁸ Opposition parties expressed their concern of Ngcuka’s close political affiliations with the ruling party. One opposition party spokesperson on justice stated that “to place the national control of prosecutions in the hands of a committed ANC member will compromise the independence of the judicial process in the eyes of the public.” The spokesperson did add, however, that Ngcuka “is a talented parliamentarian as well as being a very capable lawyer.”¹²⁹ This was the general response of opposition politicians at the time: that Ngcuka’s close ties to the ruling party were a cause for concern, but that he was a hard working and able individual.

Ngcuka sought to allay the concerns about his appointment and vowed that he would not tolerate the political interference he was expecting. “I will tell [the politicians] to back off because I must protect the integrity of my office.”¹³⁰ Ngcuka stressed that his main objective was to improve the effectiveness and efficiency of the prosecution service:

“Prosecutors are lawyers for the people. They represent the victims of crime but they

are seen, particularly in the community that I come from, as representing the past oppressive system. My role will be to legitimise the system."¹³¹

Ngcuka also sought to bolster the morale of prosecutors. Speaking at the first national public prosecutors' conference shortly after his appointment, Ngcuka told the meeting that he found it

"hard to understand how those who represent the perpetrators of crime are held in higher regard than those who defend the interests of the victim of crime. As an organisation the prosecution service ought to be a showcase to the legal profession, providing career opportunities for young and competent lawyers. I intend to commit myself to advocate on your behalf for recognition for the role that prosecutors perform in society."¹³²

Chapter 4

THE NEW ERA:

THE NATIONAL PROSECUTING AUTHORITY

Office of the national director

The establishment of South Africa's first national prosecuting authority was fraught with difficulties. According to the national director of public prosecutions, Bulelani Ngcuka, on the first day he arrived at his new offices:

"there was no furniture, there were no phones, no fax machines or computers. It was a bare office; it had nothing. So before doing anything else, we had to roll up our sleeves and get to work to get the office functional ... When I was appointed, I thought I would be in a position to do some initial planning and conceptualisation about how I would like to see my office take shape but from the day I started, I have been engaged in fire fighting, responding to one crisis after another, leaving me with very little time to stand back and evaluate where we are going."¹³³

The office of the national director took over a prosecution service that was understaffed, underpaid, demoralised and fragmented. The office set itself a number of priorities which required urgent attention:

- It aimed to develop an appropriate structure for the office of the national director. This included determining the kind of administrative support the national office should provide to enhance the effectiveness of the regional offices.
- It prepared to publish a prosecution policy. In terms of legislation the national director was obliged to publish such a policy, which would be applicable to the whole prosecution service, within six months of his appointment.¹³⁴
- It focused on the improvement of the salaries of prosecutors.
- It planned to fill vacancies that existed in most prosecutors' offices in the country, both at a junior prosecutor level, but also at deputy director level.
- It aimed to create an information system that informs the national director's office of the performance of every prosecutor and court in the country according to a set of reliable indicators with which to measure the prosecution service.

- It set up a financial management system that permits the national director's office to decide how resources should be allocated to reach the objectives it has set. (Previously, all expenses relating to the prosecution service fell under the budget of the department of justice.)
- It planned to develop a national communication strategy for the national prosecuting authority. This should serve to improve internal communication within the prosecution service and external communication with the public and the legal profession. As the national director put it at a conference of senior prosecutors: "The present image of the prosecutor as a mean and inaccessible cranky old person, feared even by his family, must change."¹³⁵

To assist the office of the national director to identify its future role and responsibilities, a team of organisational development experts was appointed. The team advised the national director on the organisational, staffing and management requirements for the effective and efficient functioning of his office. The team identified the following roles and functions for the national director and his office:¹³⁶

- **Managerial leadership:** The national director should provide the necessary leadership to the national prosecuting authority by ensuring that all systems and functionaries provide a high quality and efficient service. The national director is accountable for effective service delivery thus contributing towards an effective criminal justice system. The national director must further provide strategic leadership to the directors of public prosecutions.
- **Policy development and implementation:** The national director must manage and drive the policy framework regarding prosecutions to ensure a standard and uniform prosecution policy for the country.
- **Monitoring and evaluation:** The national director needs to monitor and track adherence to the prosecution policy and the effective functioning of the various institutions that make up the national prosecuting authority. Consequently, the national director needs to put in place systems and processes that continually track and evaluate the performance of his staff through an appropriate performance management framework.
- **Complaints management:** The national director's office is responsible for responding to and dealing with complaints received about any behaviour of, or decision by, his staff that brings the national prosecuting authority into disrepute. The national director needs to determine which complaints he will deal with personally, complaints that are to be dealt with by his office, and complaints which should be dealt with at the directors' level.
- **Human resource management and development:** The office of the national director should manage all facets of human resource management and development in the prosecution service. This includes recruitment, remuneration, training, development and other personnel issues. In the short term, the national director must ensure that vacant professional posts in the prosecution service are filled.
- **Authority to intervene:** The national director has the authority to intervene in the decisions of directors whether to prosecute or not to prosecute. The authority of the national director must be made clear and he needs to be involved in the resolution of disputes that may arise between his office and that of a director over a decision whether to prosecute or not.

- Budget controls: The office of the national director should manage the budget of the national prosecuting authority.
- Advocacy: The national director's office needs to enhance the legitimacy and image of the prosecution service. This includes improving the working conditions of prosecutors.
- Research and training: The national director's office is responsible for developing best practices models for the prosecution service through ongoing research and exposure to foreign prosecution systems. The office must also develop training programmes aimed at developing and upgrading the skills and knowledge of prosecutors.
- Delegation of functions and powers: The national director should delegate appropriate responsibilities and powers to the directors of public prosecutions.
- Case load management: The office of the national director should focus on the prosecution of the following types of cases only: cases involving threats against the security of the state, crossborder crimes, extradition cases, and any other priority cases as agreed to with the directors of public prosecutions.

Policy manual for the prosecuting authority

One of the initial challenges for the new national prosecuting authority was to develop a policy framework for the prosecution service that would guide prosecutors in the exercise of prosecutorial discretion. The proper exercise of this discretion requires a balance to be struck between the public interest in the effective enforcement of the criminal law, and the rights of suspects and accused persons to fair process.

The policy manual for the national prosecuting authority was released in October 1999. According to the manual, it is in the public interest to have a uniform prosecution policy, standards and directives which are applicable throughout the country. This should serve to inform the public of the basis upon which prosecutors exercise their discretion and make decisions, and should enhance public confidence in the criminal justice process. The manual recognises the "sometimes conflicting needs for healthy prosecutorial discretion on the one hand, and on the other, the fairness through consistency guidelines can bring."¹³⁷

The policy manual consists of three parts: a prosecution policy, policy directives, and a code of conduct for members of the prosecuting authority. The purpose of these three documents is to guide prosecutors in decision-making, regulate their professional conduct and direct them in certain areas of their work. The foreword to the policy manual points out that the manual should not stifle creativity or cause prosecutors to fear that the exercise of their discretion could be undermined:

"The manual deals with current social issues and gives direction about prevailing concepts of fairness to victims, witnesses and accused persons. These guidelines [contained in the manual] are intended to be flexible enough to accommodate new thinking, changing circumstances and local conditions."¹³⁸

Prosecution policy

The national director is obliged to determine a prosecution policy for the national prosecuting

authority, with the concurrence of the minister of justice and after consulting the directors of public prosecutions.¹³⁹ The first prosecution policy was tabled in parliament in January 1999.

The prosecution policy seeks to promote the exercise of authority by prosecutors, and contribute to the fair and even-handed administration of criminal law by prosecutors. A central purpose of the prosecution policy is to enhance public confidence in the prosecution system. According to the national prosecuting authority's first annual report, it is "important to have a prosecution policy which can be applied uniformly throughout the country and which will reflect what is best for South Africa."¹⁴⁰

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. Moreover, the policy guides 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. This is important as prosecutors have the discretion to make decisions which affect the criminal justice process and the rights of accused persons and victims alike. This discretion can be exercised at different stages of the criminal justice process, such as the discretion:¹⁴¹

- whether or not to institute criminal proceedings against an accused;
- whether or not to withdraw charges or stop the prosecution against an accused;
- whether or not to oppose an application for bail, or to release an accused who is in custody following an arrest;
- with which crimes to charge an accused and in which court the trial should take place;
- whether or not to accept a plea of guilty tendered by an accused; and
- to decide which evidence to present during a trial.

The prosecution policy lays down criteria to assist prosecutors in coming to a decision whether or not to prosecute a suspect or an accused. Clearly, this is an important decision as it may have profound consequences for the victim, witnesses, the accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system. The prosecution policy advises that resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors are advised to assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. If there is no reasonable prospect of a conviction, a prosecution should not be commenced or continued. The test of a 'reasonable prospect' must be applied objectively after careful deliberation to avoid an unjustified prosecution. The policy recognises that it may be difficult for a prosecutor to make a proper assessment whether to prosecute or not — especially when a prosecutor has only the police docket and the information it contains on which to base a proper decision. Prosecutors are advised that, in difficult cases, they should probe deeper than merely relying on the written statements provided by the police, and consult with prospective witnesses to evaluate their credibility. Moreover, the prosecution policy advises prosecutors to take into account a range of factors — listed in the policy — when deciding whether or not to institute a prosecution. These include the strength of the state's case, the admissibility of the state's evidence, the credibility of the state's witnesses, the strength of

the defence's case, and the extent to which the prosecution would be in the public interest.¹⁴²

Prosecutors are admonished to present their cases "fearlessly, vigorously and skillfully."¹⁴³ At the same time, prosecutors must present the facts of a case to a court fairly. The primary function of a prosecutor is to assist the court in coming to a just verdict. As a result, prosecutors must disclose to the court, for example, evidence collected by the police that has been obtained in an illegal manner, or make the court aware of crucial witnesses even though their testimony may be favourable to the accused. In essence, prosecutors must act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of an offence, or the race, national origin, gender, religious beliefs, status, political beliefs or sexual orientation of the victim, witnesses or the accused.¹⁴⁴

The prosecution policy instructs prosecutors to show sensitivity and understanding to victims and witnesses, and to assist them by providing them with protection where necessary. As far as practical and necessary, prosecutors should consult with victims and witnesses before the beginning of a trial. Prosecutors should assist them by providing appropriate and useful information on the trial process, and reasons for postponements, delays and findings of the court.

With regard to 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. Prosecutors should work with other departments and agencies such as the departments of correctional services and welfare, legal organisations, non-governmental organisations and other public institutions to streamline procedures and enhance the quality of its service provided to the criminal justice system.¹⁴⁵

Policy directives

There is a statutory obligation on the national director to issue policy directives that "must be observed in the prosecution process."¹⁴⁶ The first set of policy directives came into operation in November 1999 "to deal with all the professional duties of prosecutors."¹⁴⁷ The policy directives replaced all previous attorneys-general circulars and instructions to prosecutors, as well as department of justice circulars and instructions, which sought to regulate the professional conduct of prosecutors. A director of public prosecutions may issue new circulars with general instructions to prosecutors in his region provided these are not inconsistent with the policy directives of the national director.

The policy directives are intended to regulate processes and procedures that prosecutors apply from the stage when they receive a case docket from the police until an appeal has been finalised. The directives deal with a wide range of issues and topics that prosecutors may encounter during the course of their professional duties. Some of the more pertinent ones are listed below:

- The primary function of a prosecutor is to assist the court to arrive at a just verdict and not simply to secure a conviction at all cost. The notion of a fair trial and the basic principles of the presumption of innocence and the onus resting on the state to prove its case beyond reasonable doubt remain paramount. A prosecutor must give attention not merely to the content of the evidence, but also, in the spirit of the right to a fair trial, to the manner in which it was acquired. Moreover, all parties to criminal proceedings (the victim, witnesses, the police, the accused and legal representatives) have rights, which the prosecutor must

recognise and respect.¹⁴⁸

- Prosecutors must undertake the proper planning of court rolls and prioritisation of cases and make maximum use of the available court time.¹⁴⁹ Prosecutors should set down cases for trial with sufficient time allowed to dispose of the matter without interruptions or further postponements. Long delays in trials, continuous postponements and the piecemeal handling of partly completed cases have the effect that witnesses disappear, forget important parts of their evidence or lose interest in the case. The delays also reflect badly on the dignity and authority of the court and the right of the accused to a fair trial.¹⁵⁰
- A prosecution may be instituted only in cases where there is evidence under oath or affirmation that establishes the elements of an offence and links the identified suspect to it.¹⁵¹
- Prosecutors should oppose the granting of bail to accused who, among others, are charged with serious crimes, are likely to flee and not stand trial, or could interfere with witnesses or tamper with evidence should they be released. However, prosecutors should not oppose bail if the interests of justice do not require the detention of the accused. Prosecutors must continuously reassess the state's attitude to bail in respect of accused in custody awaiting trial. Where an accused has been in custody for longer than three months, prosecutors should specifically raise the issue at each court appearance thereafter and ask the court to record the reasons for the further detention.¹⁵²
- Prosecutors must recognise the interests of witnesses and victims from the start of the investigation through to the finalisation of the case, especially the victims of sexual assault (including rape and indecent assault).¹⁵³
- Prosecutors need to ensure that sufficient facts are placed before the court for it to impose an appropriate sentence. In this regard, prosecutors must ensure that the court is informed of the existence of aggravating circumstances surrounding the commission of an offence and — where an accused is undefended — mitigating factors. Upon conviction, the accused's record of previous convictions must be placed on record unless it is not available and the accused has been convicted of a relatively minor offence.¹⁵⁴
- No member of the prosecuting authority may perform remunerative work outside his employment without authorisation from the national director. No member of the prosecuting authority may request, elicit or accept any gift, donation, treat, favour or sponsorship (other than in a bona fide private capacity) that may compromise, or may be perceived to compromise his professional integrity or that of the profession as a whole.¹⁵

Code of conduct

It is a statutory duty of the national director to frame a code of conduct for the national prosecuting authority in consultation with the minister of justice, the deputy national directors and directors of public prosecutions. The code of conduct must be adhered to by all members of the prosecuting authority.¹⁵⁶ A copy of the code is handed to all prosecutors when they take the oath or make an affirmation prior to commencing their duties as members of the national prosecuting authority. In framing the code of conduct, due account was taken of, among others, the values and principles enshrined in the constitution, the aims to be achieved by the national prosecuting authority as set out in the National Prosecuting Authority Act, and the United Nations guidelines on the role of prosecutors.

The code of conduct acknowledges the crucial role of prosecutors in the administration of criminal justice. It emphasises the essential need for prosecutions to be fair and effective and for prosecutors to act without fear, favour or prejudice. Moreover, it serves to inform the public of what is expected of prosecutors, and is aimed at ensuring public confidence in the integrity of the criminal justice process. "Above all the code requires all prosecutors to respect human dignity and human rights and to perform their professional duties with full recognition of the supremacy of the constitution and the rule of law."¹⁵⁷ The more salient features of the code of conduct include:¹⁵⁸

- Prosecutors should respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the constitution. They should also serve and protect the public interest, and strive to be consistent, independent and impartial.
- The prosecutorial discretion to institute and stop proceedings should be exercised independently in accordance with the prosecution policy, and should be free from undue political and judicial interference.
- Prosecutors should take into consideration the public interest as distinct from partisan interests or concerns. Moreover, they should be sensitive to the needs of victims and do justice between the victim, the accused and the community, according to the law and the dictates of fairness and equity.

In their role as lawyers for the people in adversarial proceedings, prosecutors should perform their duties fearlessly and vigorously. Where authorised to do so by law, prosecutors should participate in the investigation of crime. When exercising authority over the police, prosecutors should do so objectively, impartially and professionally, insisting that the investigating agencies comply with legal precepts and fundamental rights. During both the trial and sentencing phases, the state's case should be advanced purposefully, but not beyond what is permitted by evidence.

- If requested by interested parties, prosecutors should supply reasons for the exercise of prosecutorial discretion, unless the individual rights of persons such as victims, witnesses or accused may be prejudiced, or where it may not be in the public interest to do so.
- Prosecutors should safeguard the rights of unrepresented accused. They should disclose to the accused evidentiary information that is beneficial to his defence, and refrain from using evidence against an accused that is reasonably and reliably believed to have been obtained in legally objectionable circumstances. Moreover, prosecutors are obliged to take the necessary steps to ensure that suitable action is considered against those responsible for using illegal methods in obtaining evidence.

United Nations guidelines

The National Prosecuting Authority Act imposes a duty on the national director to bring the United Nations guidelines on the role of prosecutors to the attention of the directors of public prosecutions and prosecutors, and to promote their respect for the principles it contains.¹⁵⁹ The UN guidelines were 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.¹⁶⁰ They include among their recommendations on the prosecutor's role in criminal proceedings the following:

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 the legality of these investigations (article 11).

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded (article 14).

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law (article 15).

In countries where prosecutors are vested with discretionary 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 (article 17).

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 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 pretrial detention, charge and conviction, as well as the possible adverse effects of imprisonment (article 18).

Chapter 5

FOCUSED AND MULTISKILLED: SPECIALISED DIRECTORATES AND UNITS

Benefits of specialisation

In the past, the vast majority of prosecutors in magistrate's courts were generalists prosecuting a variety of offences during the course of their daily work. It would not be unusual for a prosecutor to prosecute a murder case on one day and an armed robbery or fraud case the next day. The advantage of this system is that individual prosecutors gain some experience in the prosecution of most offences and can easily be shifted from one court to another to prosecute whichever case should be before the court at the time.

However, there is an important disadvantage to such a generalist approach, especially in respect of more intricate crimes that require specialist skills for their successful prosecution. Prosecutors who prosecute a variety of crimes are rarely able to become experts at prosecuting any single crime type. Yet, such expertise is often required where the common law and legislation applicable to certain crimes are constantly changing and prosecutors need to keep up to date with the changing legal and legislative environment. Moreover, the successful prosecution of certain crimes — such as sexual offences — requires finely honed prosecution skills. For example, the skills a prosecutor requires to conduct an empathetic yet enquiring consultation with a rape victim are the product of years of experience working in a sexual offences court and dealing with victims of rape on a daily basis.

A number of the larger court centres have taken cognisance of the benefits of prosecutorial specialisation and have established specialist courts for certain serious crime types such as sexual offences, drug-related crimes and commercial crimes. Moreover, in terms of the prosecution manual, prosecutors are encouraged to specialise in the prosecution of certain offences.¹⁶¹ The establishment of specialised investigating directorates and units as part of the national prosecuting authority takes the process of specialisation one step further with senior prosecutors — and in the case of investigating directorates, also investigators and other experts — devoting their attention, skills and resources to the successful prosecution of certain types of serious crime only.

Investigating directorates

A new powerful crime-fighting tool in the armoury of the national prosecuting authority is the investigating directorate. Legislation allows for the creation of up to three investigating directorates that must be headed by a director of public prosecutions. The directors — known as investigating directors — and their staff have considerable investigative powers at their disposal, including the right to question people under oath, and search and seizure rights (see 'investigating directorates' above). At the time of writing, three investigating directorates had been created, all of which are to be incorporated into the directorate of special operations.¹⁶¹

Traditional investigative techniques, with the police investigating a crime and the prosecution conducting the eventual trial, are no match for sophisticated crime syndicates. Multidisciplinary investigation teams are vital to the successful apprehension and prosecution of crime syndicates and other criminals who commit crimes that are difficult to investigate. Investigating directorates bring together such teams. Generally, an investigating directorate is staffed by a core group of senior prosecutors and detectives. These are assisted, where necessary, by other specialists such as forensic accountants, software engineers, or intelligence operatives.

A further feature distinguishing investigating directorates from those of traditional investigative units is that the former conduct prosecution-driven investigations. That is, the investigations conducted by an investigating directorate are conducted under the continual guidance and assistance of a senior prosecutor. The whole investigation is conducted in a manner that assists the prosecution in securing a conviction against the suspects once the matter goes to trial. Throughout the investigation, the prosecutor allocated to the case contributes his analytical skills, and his assessment of the elements of the offence and the evidence that is available to support the prosecution of the offence being investigated. This serves to reduce the risk of a syndicate leader being acquitted on a technicality or gap in the police investigation — a not uncommon occurrence as organised crime bosses rarely get personally involved in the commission of crimes and can afford the best legal teams with the skills to exploit any weaknesses in the state's case. Generally, prosecutions in respect of offences investigated by an investigating directorate are undertaken by the prosecutor(s) who assisted in the investigation.¹⁶²

Investigating directorate: organised crime and public safety

The investigating directorate: organised crime and public safety (IDOC) was established in late 1998. Speaking on the establishment of IDOC, the minister of justice at the time, Dullah Omar, stated that:

"the directorate will bring together with one line of command, all the different

agencies engaged in the fight against crime. This will go a long way towards ensuring maximum co-operation, and will eliminate competition and in-fighting [among law enforcement agencies]."¹⁶³

IDOC is a prosecution-driven unit, primarily prosecuting its own cases. The broad objectives of IDOC include:¹⁶⁴

- co-ordinating and liaising with other relevant institutions concerned with the investigation and/or prosecution of organised crime;

- ensuring the expeditious conclusion of IDOC investigations through an effective and co-ordinated multi-agency approach;

- allocating specific high-profile cases emanating from projects driven by IDOC to senior and appropriately skilled prosecutors;

- ensuring the proper management and application of crime intelligence in specific projects;

- developing the skills of investigators and prosecutors dealing with organised crime and related issues; and

- instituting civil forfeiture actions against persons who control property that is the unlawful proceeds of crime.

IDOC's head office is situated in Cape Town, and is led by a deputy national director of public prosecutions. The Cape Town office is primarily responsible for investigating and prosecuting cases of organised crime, urban terrorism and gang-related crimes in the Western Cape. IDOC has three sub-directorates that operate in Gauteng (vehicle-hijacking), KwaZulu-Natal (political violence) and the Eastern Cape (taxi-related violence).

The IDOC sub-directorate: vehicle hijacking is situated in the office of the national director, and is headed by a deputy director of public prosecutions. Other personnel at the sub-directorate include senior public prosecutors, investigating officers and intelligence agents. The sub-directorate investigates and prosecutes car-hijacking syndicates and conducts undercover operations against hijacking syndicates. A hallmark of the sub-directorate is that its work is intelligence-driven. Unlike an ordinary police investigation, which begins at the crime scene and scours it for evidence, most of the work of the sub-directorate starts with intelligence agents and informants. The unit infiltrates hijacking syndicates and makes arrests once enough evidence is gathered that will stand up in court and permit a successful prosecution of the criminals involved.¹⁶⁵

The IDOC sub-directorate: political violence is headed by a deputy director of public prosecutions. Its primary objective is to investigate and prosecute serious cases of political violence in KwaZulu-Natal. Upon its inception, the sub-directorate conducted an audit of political violence cases that were already in the court system and those which had not been fully investigated. The sub-directorate also identified defects in previous investigations of political violence cases to assist in the training of detectives who would deal with such cases in future. The initial activities of the sub-directorate were focused on political violence cases in the Richmond area (near Pietermaritzburg) where levels of political violence were particularly high.¹⁶⁶

Concerns about prosecution-led investigations

According to Tom Sherman, a United Nations consultant to the national prosecuting authority and formerly an Australian government solicitor, South Africa is unique as a common law country in combining the functions of prosecution and investigation.

Sherman admits that prosecutors have a vital role to play in the conducting of investigations, but questions whether prosecutors should drive investigations:

“The object of a criminal investigation and a criminal prosecution is not to secure a conviction – it is to serve the interests of justice... The prosecutorial role is a role that is distinctive from the investigative role, and the great contribution that the prosecutor brings to the investigation is a professional detachment and objectivity. Also, prosecutors are not always the best skilled people to conduct operations... Whether prosecutors drive investigations depends largely on the nature of the investigation. A lot of mainstream offences occur which can proceed in the normal way but there will be difficult investigations and serious criminal structures that will require different methods and it may be appropriate to have prosecutor driven investigations.”¹⁶⁷

Investigating directorate: serious economic offences

The investigating directorate: serious economic offences (IDSEO) came about with the promulgation of the National Prosecuting Authority Act in October 1998, replacing its predecessor, the office for serious economic offences (OSEO), which had been in existence since 1991.¹⁶⁸

OSEO was created to address an almost complete collapse of the successful prosecution of economic crime in South Africa. For example, in the former Transvaal, only three successful major prosecutions were finalised in the seven years prior to OSEO's establishment. This was partly because traditional police investigation methods were inadequate to deal with increasingly sophisticated white-collar criminals, and because of a lack of appropriate skills among the country's prosecutors. This was addressed through the establishment of OSEO that provided for the speedy and proper investigation and prosecution of certain serious economic offences, using multidisciplinary investigation teams.¹⁶⁹ OSEO's approach to investigating and prosecuting economic offences was taken over by IDSEO.

IDSEO is headed by a director of public prosecutions and consists of deputy directors, prosecutors, police officials and detectives, accountants employed on a contractual basis and an administrative component. IDSEO has offices in Pretoria and Cape Town. The aims of IDSEO are to combat serious economic offences, to deter offenders, and to contribute towards a more effective criminal justice system through the speedy and proper investigation of serious economic offences, and the expeditious and successful disposal of some of the criminal prosecutions arising from such investigations.¹⁷⁰ In achieving its objective of curbing serious economic crime and deterring offenders, IDSEO attempts to co-ordinate its activities with other persons and institutions involved in the investigation of such offences. In practice, this means co-ordinating the investigative activities of senior police investigators, forensic accountants, reserve bank investigators, customs and revenue inspectors, and others. IDSEO also seeks to

prevent suspects from fleeing the country with their assets and destroying potential evidence.

Investigating directorate: corruption

The directorate was established in February 2000 to investigate and prosecute serious cases of corruption.¹⁷¹ Because of a lack of manpower and resources, the directorate uses IDOC offices and staff to assist it in its investigations.¹⁷² At the time of writing, the activities of the directorate were limited and the directorate was going to merge into the directorate of special operations.

Directorate of special operations

In his address at the opening of parliament in June 1999, president Thabo Mbeki announced that a "special and adequately staffed and equipped investigating unit will be established urgently to deal with all national priority crimes, including police corruption."¹⁷³ According to the minister of justice and constitutional development, Penuell Maduna, such a unit is necessary to address the challenges faced by the criminal justice system. These challenges include corruption among some police officers, the murder of police officers on duty, unsatisfactory standards of investigation resulting in low conviction rates, and the general lack of an efficiently co-ordinated attack on organised and syndicated crime by the investigation, intelligence and prosecution authorities.¹⁷⁴

The directorate of special operations (DSO) — nicknamed the Scorpions — was launched in September 1999 in Guguletu near Cape Town. The directorate's purpose is to combat organised crime, corruption within the criminal justice system, serious economic crimes, and crimes against the state such as terrorism.¹⁷⁵

Legislative framework

In early 2001 the National Prosecuting Authority Amendment Act was promulgated thereby formally establishing the directorate of special operations as an investigating directorate of the national prosecuting authority.¹⁷⁶ Speaking at the national assembly vote on the bill, minister Maduna proclaimed that "the DSO needs to become the plague of organised criminals and terrorists, and inject its venom into the criminal law to paralyse organised crime and terrorism". The DSO will be "loved by the people, feared by the criminals, and respected by its peers," the minister said.¹⁷⁷

The preamble to the bill reiterates the constitutional mandate of the national prosecuting authority to institute criminal proceedings on behalf of the state and to carry out the necessary functions incidental to the process. To do so, the bill proposes that the directorate is established with a limited investigative capacity to prioritise and investigate particularly serious criminal conduct committed in an organised fashion, or other specified offences, with the object of prosecuting such crimes in the most efficient and effective manner. Moreover, the DSO should have the necessary infrastructure and resources to perform these functions.

The aim of the DSO is to:¹⁷⁸

- investigate and carry out any functions incidental to investigations;

- gather, keep and analyse crime information; and

- institute criminal proceedings and carry out any necessary functions incidental to criminal

proceedings relating to offences or any criminal or unlawful activities committed in an organised fashion, or such other offences or categories of offences as determined by the president.¹⁷⁹

The president determines such offences or categories of offences on the recommendation of the minister of justice and constitutional development and the national director of public prosecutions. For example, the DSO investigates and intends prosecuting persons suspected of having committed gross human rights violations who did not qualify for amnesty by the truth and reconciliation commission, or failed to apply for amnesty. The prosecution strategy will be finalised with the completion of the amnesty process in 2001.¹⁸⁰

A specially created ministerial co-ordinating committee, consisting of cabinet members responsible for the criminal justice system, intelligence services and defence determines:¹⁸¹

policy guidelines in respect of the functioning of the DSO;

procedures to co-ordinate the activities of the DSO and other relevant government institutions including, for example, procedures for the transfer of investigations to or from the DSO and such institutions; and

where necessary, the responsibility of the DSO in respect of specific matters, and further procedures to be followed for the referral or assigning of any investigations to the DSO.

The directorate of special operations is an attempt to institutionalise a proactive, multidisciplinary approach to fighting crime.¹⁸² The rationale behind the directorate is the integration of three traditionally separate functions: intelligence, investigations and prosecutions. This will see special investigators, intelligence operatives and specialist prosecutors working together in project teams. Investigators consequently work in a prosecution-driven and intelligence-led environment. Experienced prosecutors will direct investigations to ensure that the DSO's investigations are court directed. Prosecutors working for the DSO will prepare and adduce evidence in the prosecution of offences and crimes investigated by the DSO. According to minister Maduna, steps will be taken to ensure an "appropriate distance" between prosecutors and investigators so that prosecutors can make objective prosecuting decisions and properly discharge their responsibilities as officers of the court. These measures may include, for example, guidelines that a prosecutor who has directed an investigations will not make the decision to prosecute or not to prosecute the case in court.¹⁸³

It is likely — but was uncertain at the time of writing — that the DSO will have an investigations component composed of three sub-components. The first is investigations per se. The second sub-component is technical and operational support, including surveillance, interception and monitoring, high-risk arrest teams, witness protection, and possibly forensic work. The third sub-component is information management, crime trend analysis and target profiling, including the establishment of a central database where the collected information and evidence on all DSO investigations will be stored and collated.¹⁸⁴

The head of the DSO is a deputy national director of public prosecutions who exercises his powers, duties and functions subject to the control and direction of the national director. The head of the DSO is assisted by investigating directors and deputy directors, as well as prosecutors, special investigators, persons in the service of any public or other body who are seconded to the DSO, and any other person whose services are obtained by the DSO.¹⁸⁵ Investigating directors, and any prosecutors designated by a director, have the same extensive

investigative powers as an investigating director of an investigating directorate, including the right to hold inquiries, question people under oath, and search and seizure rights (see 'investigating directorates' above).

Head of the directorate of special operations

The first head of the DSO is deputy national director of public prosecutions Percy Sonn. Sonn practised as an attorney for 12 years, focusing primarily on defending accused against the state. He was admitted as an advocate in 1989 and practised at the Cape Bar for six years. Thereafter he joined the office of the attorney-general of the Western Cape rising to the position of deputy attorney-general. In November 1998, he was appointed to head the investigating directorate: organised crime and public safety (IDOC).¹⁸⁶

A special investigator of the DSO has the same powers as a member of the SAPS, and the powers bestowed upon a peace officer relating to the investigation of offences, the entry and search of premises, the seizure and disposal of articles, the execution of warrants, and the attendance of an accused person at court. The minister of justice and constitutional development, in consultation with the minister for safety and security, may bestow any power on special investigators that relates to the prevention, investigation or combating of any offence or other criminal or unlawful activity.¹⁸⁷

A person may be appointed as a special investigator only after information on the person has been gathered in a screening investigation by the national intelligence agency, and the national director — after evaluating this information — is satisfied that the screened person is not a security risk or may act in any way prejudicial to the objectives of the DSO. From time to time, any special investigator may be subjected to further security screening. A special investigator may be discharged from the DSO should the national director find him to be a security risk or acting in any manner prejudicial to the objectives of the DSO.¹⁸⁸ Special investigators are forbidden to strike, and the DSO's services are designated as 'essential services' in terms of the Labour Relations Act.¹⁸⁹

The remuneration, allowances and other service benefits of special investigators are determined by the minister of justice and constitutional development, in consultation with the national director and with the concurrence of the minister of finance.¹⁹⁰ In respect of special investigators, the DSO will consequently not be bound by public service salary structures and agreements, and will be able to offer better salaries and benefits compared to, for example, the SAPS or the national prosecuting authority.

Minister Maduna has made it clear that the salaries of DSO members will have to be generous:

"To ensure that the DSO succeeds, we have to ensure that the DSO recruits the best and most talented corps of personnel available. Initial entrants will therefore be graduates or highly qualified personnel in a number of technical areas and at senior level. Preference will be given to the recruitment of people with experience and high levels of technical skill. Since the special investigators of the DSO will include chemists, forensic auditors and computer specialists, it would be short-sighted to compare the salaries they will earn to those of ordinary constables in the police service."¹⁹¹

It has been mooted that the structure of the DSO will include an office for internal integrity. This office will be responsible for vetting members of the DSO to ensure that they are able to perform their duties competently, free of corruption and without fear of favour. Such an office would also monitor the overall activities of the DSO to ensure that they are conducted ethically and in compliance with the constitution and other legislation pertaining to their activities.¹⁹²

The national director accounts on the activities of the national prosecuting authority — including those of the DSO — to parliament. The minister of justice and constitutional development exercises final responsibility over the prosecuting authority and, by extension, the DSO. To enable the minister to exercise responsibility over the prosecuting authority, the national director, for example, must furnish the minister with information regarding any case the prosecution authority or the DSO is dealing with.¹⁹³

With regard to the finances of the DSO, the minister of justice and constitutional development must appoint a chief executive officer as the accounting officer of the DSO. The CEO, on the recommendation of the national director and with the concurrence of the minister of finance, may order that the expenses incurred by any person in connection with an investigation are paid from state funds to such a person.¹⁹⁴ Expenditure in connection with the administration and functioning of the DSO is to be defrayed from money allocated by parliament to the department of justice and constitutional development. Expenditure on the DSO in terms of the government's medium term expenditure framework is R150 million for 2000/01, R210 million for 2001/02, R272 million for 2002/03 and R316 million for 2003/04.¹⁹⁵

With the promulgation of the National Prosecuting Authority Amendment Act of 2000, which formally establishes the DSO, all existing investigating directorates are dissolved (ie IDOC, IDSEO and the investigating directorate: corruption) and become part of the DSO. The staff of the former investigating directorates automatically become members of the DSO.¹⁹⁶

Concerns about the Scorpions

Concerns have been raised that the DSO could further debilitate the effectiveness of the SAPS and the morale of its members. As an 'élite unit' which handles 'high-profile' cases, the DSO's existence could be interpreted by members of the specialised police units to mean that they will play second fiddle to the Scorpions in future. This, and the fact that DSO members will receive better salaries and have access to better training and resources are likely to entice more experienced and competent SAPS detectives to seek work with the Scorpions. For example, SAPS inspectors — often with many years' experience — earn a gross salary of approximately R70 000 a year. They can expect, in some cases, to double their salaries with a move to the Scorpions. Salaries start at about R72 000 for a 'junior investigator' with the Scorpions. A senior superintendent in the SAPS can expect to increase his annual salary by about R40 000 to R179 000 by joining the Scorpions as a senior investigator.¹⁹⁷

Safety and security minister, Steve Tshwete, admits that salary discrepancies between Scorpion members and those of the SAPS have caused tensions "in certain circles," and that salary packages in the police needed to be improved.¹⁹⁸ Minister Maduna has defended the relatively high salaries of Scorpion personnel, but has cautioned that disparities between members of the DSO and the SAPS should not be too large as it could demoralise police officers. According to Maduna, remuneration levels in the SAPS should be reviewed.¹⁹⁹

The Scorpion leadership also defends the need for high salaries for Scorpion personnel to

attract the best people for the job. A stringent vetting procedure ensures that only candidates with good qualifications and the right physical and mental attributes are considered for employment by the DSO. For example, out of an initial 6 000 applicants who responded to a nationwide advertising campaign for Scorpion positions, 400 made it onto the shortlist, and 50 were selected.²⁰⁰ New recruits must have at least one university degree in a specified field of study (eg the natural sciences, law, psychology or computer science); pass a physical and psychological evaluation and examination; undergo psychometric testing, drug testing and polygraph testing; have no previous convictions; show demonstrable support for democratic values and ideals; be under the age of 34 years; and must be South African citizens.²⁰¹

While the Scorpions will not be a large unit — it is envisaged that it will have a full staff complement of 2 000 members by mid-2003 — it could draw sufficient experienced personnel from the police's specialised units and specialist prosecutors from around the country that it could negatively affect the investigation and prosecution of 'normal' crimes which do not fall within the Scorpions' field of operation. However, it is these 'normal' crimes that fuel the fear of crime among ordinary South Africans. Most people are more worried about the mugger or rapist lurking around the next street corner than a sophisticated crime syndicate flaunting South Africa's foreign exchange regulations.

The national director of public prosecutions, Bulelani Ngcuka, disputes these fears as unfounded arguing that the Scorpions will indirectly address even the ordinary crimes plaguing the country:

"The very existence of the Scorpions is going to free the police to concentrate on sorting out the problems of ordinary citizens. Because, if the SAPS have the time and are not swamped as they are now, all it takes is one cop to go around to Mrs So-and-so's home, take a statement, go next door and find that the stuff that's been taken from her washing line is right there."²⁰²

The fact that the Scorpions could be responsible for investigating cases of police corruption is unlikely to endear them to many ordinary police officers. Allegations of police corruption will bring better paid and resourced Scorpion members snooping around police stations. While honest police officers should not object to such investigations in principle, most police members will not look kindly on outsiders meddling in their or their colleagues' affairs, irrespective of the motive.

After the Scorpions' launch in September 1999, and until its formal establishment with the promulgation of the National Prosecuting Authority Amendment Act in early 2001, the DSO operated with staff borrowed from other departments and services. Most of these staff came from the police, especially the specialised units in the SAPS. Thus, while the DSO did not have a formal legal existence, and was staffed largely by members of the police service, it claimed credit for the investigation and solving of a number of high-profile crimes.²⁰³ This has already caused tension between members of the police and the fledgling Scorpions.²⁰⁴ If not managed properly this tension between the country's only two national law enforcement agencies could increase, especially if the creation of the Scorpions is seen as a vote of no confidence in the police by the country's political leadership.²⁰⁵

A further area of potential conflict between the police and the Scorpions is the procedure by which investigations are allocated to the Scorpions and the manner in which this is done. In terms of the National Prosecuting Authority Amendment Act, offences committed in an organised fashion, or offences determined by the president on the recommendation of the

minister of justice and constitutional development and the national director, will be dealt with by the DSO. If not handled carefully tensions could arise between the police and the Scorpions if a perception is created among police officers that the Scorpions are allocated the most interesting and high-profile cases so that the latter receives all the glory and praise from the media and the politicians who influence the budgets that the two organisations receive.²⁰⁶

The Scorpions have sought to allay the police's concerns by arguing that the DSO will be responsible for investigating and prosecuting serious crimes related to organised crime, crimes against the state, economic crime, corruption in the criminal justice system, and individual high-profile cases only. The Scorpions will deal with about 10% of these serious crimes, while the SAPS will be responsible for the remaining 90%. The criteria to be used in deciding whether a crime will be dealt with by the Scorpions will be the crime's high level of seriousness and impact, the level of violence used in the commission of the crime, the degree of organisation of the perpetrators of the crime that would require an integrated multidisciplinary approach by the state, and the high profile of the crime.²⁰⁷ According to the National Prosecuting Authority Amendment Act, no investigations by the DSO may derogate from "any power or duty that relates to the prevention, combating or investigation of any offences and which is bestowed upon the SAPS in terms of any law."²⁰⁸ Addressing the parliament's justice portfolio committee on the desirability of legislation to formalise the existence of the DSO, the national director argued that the aim of the Scorpions should be to complement the SAPS and not to compete with it.²⁰⁹

Specialised units in the national director's office

Asset forfeiture unit

Attacking criminals through their assets

To appreciate the functions and responsibilities of the asset forfeiture unit, it is necessary to understand why asset forfeiture came about, and what the different forms are of asset forfeiture. Historically, law enforcement agencies have combated criminal activity by starting with a police investigation. Such an investigation commenced after a crime had occurred and had as its purpose the collection of incriminating evidence. Such evidence was then used by the state to persuade a court that the accused persons were guilty 'beyond reasonable doubt' of the offences with which they were charged. If the state succeeded in doing so, the court would convict the accused and punish them.

Organised crime in South Africa

Organised crime tends to grow rapidly in periods of political transition and violence, when state resources are concentrated in certain areas only and gaps emerge where organised criminal groups may operate.²¹⁰ Inadequate border controls, a good transport infrastructure, markets for and sources of contraband such as endangered species products and cannabis (dagga), a good banking system, and a supply of trained recruits have contributed to the growth of organised crime in South Africa.²¹¹

In 1997, the SAPS identified 192 organised crime syndicates comprising 1 903 primary suspects operating in South Africa.²¹² The majority of these syndicates specialised in drug-trafficking (96 syndicates), vehicle-related crimes (83 syndicates) and commercial crime (60 syndicates). At least 32 of

the 192 known organised crime syndicates in South Africa were operating internationally, while the criminal activities of 150 of these syndicates were restricted to countries in sub-Saharan Africa.²¹³

The number of crime syndicates, however, is not in itself necessarily a good measure of the threat they pose to a country. One or two well-developed criminal operations can pose a greater danger than many small operations working in opposition to one another. "The relative fragmentation of organised crime in South Africa suggests that there is a 'window period' in which appropriate interventions can make a substantial difference."²¹⁴

With the growth and increased sophistication of organised criminal groups, law enforcement agencies argue that the traditional approach in fighting crime is inadequate when combating organised crime effectively. Organised crime revolves around money and power. The criminals who are involved in organised crime are motivated primarily by financial considerations (and not revenge, hate or lust as is often the case with 'ordinary' criminals). Consequently, if the state is to combat organised crime successfully, it must pursue the assets belonging to organised criminal groups and the proceeds such groups generate from engaging in illegal activity. This is done through 'asset forfeiture' where the state or its law enforcement agencies investigate the assets surrounding the crimes committed by organised criminal groups and confiscates them. Asset forfeiture therefore targets assets rather than individual criminals (as is the case with the traditional law enforcement approach). There are two forms of asset forfeiture: criminal asset forfeiture and civil asset forfeiture.

Criminal asset forfeiture

Criminal asset forfeiture is not new to South African law. The Criminal Procedure Act of 1977 allows the courts, after convicting an accused of an offence, to forfeit property to the state that was used to commit an offence or to facilitate its commission.²¹⁵ The Drugs and Drug Trafficking Act of 1992 obliges the courts to forfeit to the state certain property used by persons convicted of drug-related crimes in the commission of those crimes.²¹⁶ The Proceeds of Crime Act of 1996 provided for the recovery of the proceeds of crime. A court could enquire, after the conviction of an accused person, into any benefit that the accused may have derived from the offence of which he had been convicted. If such a benefit was found to exist, the court could make an order confiscating the proceeds of the offence from the accused.

The Prevention of Organised Crime Act of 1998 allows the proceeds of crime to be forfeited to the state through a civil action after the accused has been convicted.²¹⁷ It works like a normal civil action where the state obtains a financial judgement against a convicted accused for the amount of the benefit of the crime (for example, the money defrauded or the value of the cars stolen). The judgement can be executed against any assets of the accused. There is no need for the state to show that the forfeited assets are the proceeds of crime or otherwise tainted through the commission of an offence. Forfeitable property is property held by the accused plus the value of any 'affected gifts' made by the accused. An affected gift is one made in the seven years preceding the prosecution, or which was originally received by the accused in connection with unlawful activities. According to the national director of public prosecutions, criminal asset forfeiture represents a 'scorched earth' approach to fighting crime, whereby the state deprives criminals of their freedom and their property — leaving them with nothing.²¹⁸

Civil asset forfeiture

The second and more drastic form of asset forfeiture is civil asset forfeiture. Civil forfeiture allows the state to confiscate the property of suspected criminals through a civil action against the property without the suspected criminal being convicted in a criminal trial, or there even being a criminal case.²¹⁹ On application by the national director, the high court must make an order forfeiting property to the state that the court, on a balance of probabilities, finds to be 'an instrumentality' of a crime, or is the 'proceeds of unlawful activities'. The validity of such an order is not affected by the outcome of criminal proceedings. That is, a suspected criminal can be acquitted in a criminal court, where the state has to prove its case beyond a reasonable doubt (a higher burden of proof than a 'balance of probabilities'), and still have his property forfeited to the state through a civil forfeiture action.

Proponents of civil asset forfeiture argue that it is a drastic but necessary weapon to hurt organised crime bosses against whom there is usually insufficient evidence to lead to their conviction in a criminal court. According to the director of the asset forfeiture unit:

"the heads of syndicates are seldom directly involved in crime, and it is notoriously difficult to convict them of any offence. Usually their foot soldiers are convicted, but they seldom own any of the assets. With civil forfeiture the state can take the assets and at least hurt the syndicate heads financially, even if they cannot be convicted of an offence. It helps to deter crime by making it less profitable."²²⁰

Before making an application for the forfeiture of property, the national director will usually apply to the high court for a 'preservation of property order' prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with the property targeted for forfeiture. To obtain a preservation of property order, the state must persuade the court that there are reasonable grounds to believe that the property is the proceeds of crime or an instrument of crime.

The state can approach civil asset forfeiture from two angles. First, the state can seek to prove that certain assets are the 'proceeds of crime'. This enables the state to get past the front companies set up by organised crime syndicates to hide the true owners of the assets. For example, where a suspected criminal registers his mansion in his second cousin's name the state can argue that the house is the proceeds of crime irrespective of who the owner is. Second, the state can seek to show that the assets in question are the 'instrumentality of crime'. This is a very broad concept and can include assets peripherally involved in a crime. For example, a motor vehicle used by bank robbers to escape from the scene of a crime, or a hotel used (with the owner's knowledge) as a meeting place for drug dealers to sell their wares to drug users.

Concerns about civil asset forfeiture

In the United States, the Racketeer Influenced Corrupt Organizations Act of 1970 (or RICO act) is generally associated with asset forfeiture. Civil forfeiture has a bad reputation in the US.²²¹ Until recently, officials could seize property without notice, upon an ex parte application (without hearing the defendant's case) of probable cause that the property was 'involved' in a crime. 'Probable cause' could be based on nothing more than hearsay, innuendo, or the oral evidence of a party with interests adverse to the property owner.²²² Moreover, the US law did not provide for an innocent owner defence. That is, even innocent people (who were unaware of how their property was being misused) could lose their property if it was, for

example, an instrumentality of an offence. For example, the US Supreme Court upheld the forfeiture of a car used by a man to solicit a prostitute even though he owned the vehicle jointly with his wife who was clearly innocent. In another case, the house of an elderly couple was forfeited to the state because their grandson had secretly used the telephone in the house to phone a local drug dealer to place an order for some illegal drugs.

Because of abuses of civil forfeiture laws in the US, reforms were undertaken to place a greater burden on the state to show that the property seized was derived from crime, and to provide for an innocent owner defence.²²³ South Africa's civil forfeiture legislation already incorporates these reforms. For example, in South Africa's case, the state has to show, on a balance of probabilities, that the property to be forfeited is an instrumentality of an offence or the proceeds of unlawful activities.²²⁴ In the US, before the reforms, the burden was on the owner of the property to prove a negative, that is, that the property is not the proceeds of crime or the instrumentality of an offence. Moreover, the South African legislation incorporates an innocent owner defence. To utilise the defence, the owner of the property to be forfeited has to show on a balance of probabilities that he acquired the property legally and neither knew nor had reasonable grounds to suspect that the property was the proceeds of crime or the instrumentality of an offence.

A further criticism of asset forfeiture in the US is that proceeds from forfeitures go to the US justice department's forfeiture fund, and local law enforcement agencies involved in the confiscation of assets. This has tended to induce police officers and prosecutors to concentrate on crimes such as drug-dealing, which often occurs on valuable property, at the expense of other pressing crime problems such as murder and rape. In South Africa, the proceeds of successful forfeiture actions are paid into a criminal asset recovery fund to be used to render financial assistance to law enforcement agencies and victims of crime.

Notwithstanding the safeguards contained in the South African civil asset forfeiture legislation, a number of South African organisations representing the legal profession and civil society organisations have voiced their concerns about the civil asset forfeiture provisions contained in the Prevention of Organised Crime Act.²²⁵

The asset forfeiture unit

One of the reasons why asset forfeiture was slow in getting off the ground in the United States was that ordinary prosecutors and investigators had difficulty in applying new and complicated forfeiture legislation. Forfeiture involves complex new civil law about which most police officers and prosecutors know very little. International experience has shown that asset forfeiture legislation is implemented poorly because the police and prosecutors tend to focus their activities on achieving convictions. In the US, it was only when Congress voted a special budget to employ forfeiture specialists in each of the US Attorneys' offices that civil asset forfeiture legislation was used effectively.

Based on international experience, the national director set up a specialist unit — the asset forfeiture unit (AFU) - in May 1999 to ensure that South Africa's new forfeiture legislation is used effectively. The AFU has been created to serve as a dedicated unit to build up the necessary expertise to deal with the complexities of forfeiture and of which performance is measured solely in terms of forfeiture. The AFU has adopted a multidisciplinary approach and is staffed by criminal and civil lawyers, financial investigators and accountants.

The AFU intends placing forfeiture specialists in all the provincial offices of the directors of public prosecutions. These specialists will work side-by-side with prosecutors to assist the latter with forfeiture-related work. In this way, expertise on forfeiture will be fostered throughout the prosecution service. This will serve to ensure that forfeiture becomes an integral part of normal law enforcement work in South Africa. According to its director, the AFU will:

"encourage people to become involved in asset forfeiture to ensure that there are some specialists in each of the major cities who can work with the police and prosecutors there. This is the way to broaden the use of forfeiture and make it more and more part of what prosecutors should be doing in their normal course of work."²²⁶

The fledgling AFU was warned by international law enforcement experts to expect much litigation from rich and powerful criminals desperate to hang on to their ill-gotten gains, and who can afford to employ the best legal counsel to exploit any possible weakness or gap in the forfeiture law. Initially, the AFU experienced difficulties in the courts on the issue of whether the forfeiture law should apply retrospectively (ie whether the law covered assets accrued before the Prevention of Organised Crime Act was promulgated). This led to the AFU losing three of its first six cases.²²⁷ However, the unit has performed well overall. By February 2001, the unit had been successful in 49 of its 56 cases, and seized assets with a value in excess of R200 million.²²⁸ However, only one case involving R145 000 had made it through the complete legal process with the money being paid into the criminal assets recovery fund. By law, money generated through the forfeiture of assets go to a criminal assets recovery fund to be used to render financial assistance to law enforcement agencies to combat organised crime, money-laundering, criminal gang activity and crime in general, and to assist victims of crime.²²⁹ As the head of the AFU puts it: "One of the nice things about forfeiture law is being able to take the criminals' money and use it to fight them again afterwards."²³⁰

The AFU set a number of priorities for 2000/2001, its second year of operation:²³¹

It aims to take the initial 'seizure' actions — where the assets of suspected criminals were merely frozen — to the next stage in the legal process where they are forfeited to the state. This will permit the proceeds to be paid into the criminal assets recovery fund.

It plans to initiate some 100 forfeiture cases and target some of the major crime figures and syndicates who are on the 'most wanted' list of the national director.

It will fight test cases in the courts to obtain greater clarity on the courts' position on civil asset forfeiture. This will permit the AFU to engage some of the best legal brains to assist and develop the country's prosecutors on the issue of forfeiture.

It will broaden the focus and use of forfeiture. With this in mind the AFU has opened sub-offices in Cape Town and Durban. Further offices are planned for the larger centres in South Africa.

International experience has shown that it takes time for a criminal justice system to adopt and employ new laws successfully. This is especially the case with organised crime where investigators work in teams, and investigations are lengthy and intricate. The AFU expects to battle its way through the courts for the first two to five years of its operation. Based on the US experience, where asset forfeiture cases have gone to the supreme court eleven times during

the past 10 years, it takes time before the courts accept civil asset forfeiture as a legitimate law enforcement tool. Today, asset forfeiture is frequently used as a weapon in the fight against organised crime in the US. For example, during 1999, assets to the value of over US \$500 million were seized in the US.

Sexual offences and community affairs unit

Aims of the unit

The sexual offences and community affairs unit (SOCA unit) was established in September 1999. The unit aims to reduce levels of violence against women and children, and minimise the secondary victimisation many victims of sexual offences experience in their dealings with the criminal justice system. The unit is part of the ongoing efforts of the national prosecuting authority to improve the service provided by prosecutors for victims of sexual offences and domestic violence.

The objectives of the SOCA unit are to:²³²

- reduce the incidence of sexual offences and secondary victimisation of victims of sexual crimes;

- adopt a victim-centred approach to prosecution;

- develop specialist prosecutors to deal with sexual offences;

- establish specialist sexual offences courts, and develop the expertise of sexual offences prosecutors who do not fall under the jurisdiction of a sexual offences court;

- co-ordinate the management of offences against women and children; and

- determine policy and set minimum standards for the service provided by the criminal justice system to women and children as victims of sexual offences.

The unit seeks to influence the development of legislation, government policy and procedures to cater for the protection of women and children. The unit also assists the government to comply with relevant international conventions of which South Africa is a signatory. These include the Convention on the Rights of the Child, and the Convention for the Eradication of all forms of Discrimination against Women.²³³

Abused women neglected by state?

A nationwide survey on various forms of abuse committed against women was conducted in mid-2000. The aim of the survey was to understand women's experiences of violence, and to determine their perception of services rendered by the state to female victims of violence. The survey focused on women's experiences of physical, emotional and sexual abuse over a five-year period preceding the survey.²³⁴

Women who participated in the survey reported similar experiences of abuse irrespective of where they lived. Service provisions for abused women, however, differ for those who live in rural, urban or metropolitan areas. With

regard to their experiences with the police, women in the metropolitan areas generally reported lower levels of satisfaction than abused women who sought help from the police in rural areas or those living in townships and suburbs.

Overall, virtually all (92%) women felt that the abuse they were subjected to constituted a crime. Yet, 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%). 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.

Multidisciplinary and victim-centred

According to the policy manual of the national prosecuting authority, it is:

"of paramount importance that prosecutors recognise the interests of victims of sexual assault (including rape and indecent assault) from the start of the investigation through to the finalisation of the case. The physical, emotional and psychological wellbeing of the victim must be given precedence. A victim-centred approach will create an environment in which sexual assault victims report incidents of sexual assault more frequently, and contribute to the reduction of secondary victimisation."²³⁵

As part of its victim-centred approach, the SOCA unit played a leading role in setting up the country's first 'one-stop' centre for rape victims in June 2000. The Thuthuzela rape care centre at the C F Jooste hospital in Cape Town is a multidisciplinary centre where all roleplayers necessary for a successful rape investigation and prosecution are situated who can provide a rape victim with an 'integrated service strategy'.²³⁶ When a complainant reports a rape, the police or medical services immediately take her to the centre where she is met by a trained co-ordinator. A prosecutor, investigating officer and doctor are then called out to the centre. In this way, the doctor can perform a medical examination of the complainant and collect any relevant forensic evidence. Immediately thereafter, the investigating officer can take a detailed statement from the complainant and follow any leads she provides to further the criminal investigation. The prosecutor at the centre works with the investigating officer to guide the investigation, and decides when there is sufficient evidence to proceed with a prosecution. The prosecutor meets with the complainant at least two weeks prior to the trial to consult with her. Throughout this process, and until after the completion of the trial, the complainant receives guidance and support from a trained counsellor.

The Thuthuzela rape care centre has brought together a number of important roleplayers to assist victims of sexual offences. The director of the SOCA unit intends to incorporate the services of other specialists in future one-stop centres to provide an even better and more comprehensive service to victims:

"My vision of a multi-disciplinary [one-stop] centre is one that has all the roleplayers and no less. We must have forensic nurses, doctors, psychiatrists, psychologists, social workers, intermediaries [for child victims], victim support services, lay counsellors, and community prosecutors available on a full-time 24 hour basis, and a magistrate and interpreter on an on-call basis 24 hours a day. Indeed if we adopt a victim-centred and court directed approach we cannot have less."²³⁷

A centre such as the Thuthuzela rape care centre can assist rape victims in a number of ways. First, by placing all the necessary roleplayers under one roof, victims are spared the inconvenience and discomfort of having to travel from the police station to the district surgeon shortly after having suffered the trauma of their rape. Second, victims are assisted by people who are trained experts able to assist rape victims, and investigate rape and other sexual offences. Third, victims can make a statement to an investigating officer — under the guidance of a prosecutor — within hours of being brought to the centre, thus ensuring that victims' initial statements are taken while the facts are still fresh in their memories. Fourth, the investigating officer and prosecutor whom victims meet at the centre are generally allocated to their case until the investigation is finalised and the perpetrator is prosecuted. This assists all three parties in building up levels of trust and permits the prosecutor to become acquainted with the details of the case and the complainant before the trial. Finally, victims have almost immediate access to counselling services to assist them until the finalisation of their trials.

The Thuthuzela rape care centre is a pilot project to demonstrate that the use of a centrally-based, multidisciplinary team approach to the investigation and prosecution of rape can improve the treatment of victims, streamline and speed up investigations and prosecutions, and provide reliable information about rape and the criminal justice system's response to the community. The purpose of the project is not to eliminate or even reduce rape cases dramatically, but rather to inspire confidence in the criminal justice system among victims, the community and the personnel working at the centre. The project also seeks to complement and promote the efforts of community structures, including rape advocacy and counselling groups, to play a more active role in the criminal justice process.²³⁸

A 'one-stop' centre can achieve its objectives only if all the roleplayers work together and co-operate. For most areas of the country where rape victims do not have access to such centres, this kind of co-operation needs to be enhanced. This is crucial in the case of rape as it is technically one of the more difficult crimes to prosecute successfully. The police use forensic evidence and district surgeons' reports to build up their case. The prosecution usually relies on the evidence of a single witness who is also the complainant. The forensic evidence available to the prosecution to support its case has to be acquired in a procedurally correct manner, has to be uncontaminated, and has to be presented to the court according to arduous laws of evidence. A successful rape prosecution therefore requires the co-operation of at least three government departments: health (the district surgeon), safety and security, and justice. It is consequently encouraging that the policy manual of the national prosecuting authority emphasises that the investigation and prosecution of sexual assault cases can be enhanced by a co-ordinated, multidisciplinary approach. Moreover, it indicates that specialist prosecutors are required in sexual assault cases who should be selected on the basis of their experience, temperament and ability to relate to victims of sexual assault.²³⁹

Training

As the successful prosecution of sexual offences requires considerable expertise and skills, the SOCA unit has sought to improve the training of prosecutors dealing with such crimes. As the successful prosecution of sexual offences requires the co-operation of a number of different roleplayers and departments, the unit has endeavoured to provide joint training courses for those dealing with victims of sexual crimes. Training courses are designed to emphasise the importance of interagency co-operation in the investigation and prosecution of sexual offences, and to encourage co-operation between different roleplayers. The training also seeks to encourage prosecutors to become more involved in the investigation of sexual offences.²⁴⁰

The SOCA unit developed a basic two-week training course on investigation and prosecution techniques, the presentation of evidence, and trial advocacy skills in sexual offences. The course is presented to a mixture of roleplayers including prosecutors and police investigators. The training emphasises the importance of forensic evidence in prosecuting sexual offences. The belief, common in the past, that a case succeeds or fails on the credibility of the victim who is often the only witness, is being refuted as improved technology allows forensic evidence to play an increasingly important role in the prosecution of sexual offences. The unit identified the poor standard of reports prepared by district surgeons on victims of sexual offences as a weakness in the ability of the state to prosecute sexual offenders successfully.²⁴¹ The unit's training course devotes a training session exclusively to district surgeons, emphasising the importance of forensic evidence in corroborating the evidence of a single witness. District surgeons are also instructed on what evidence to look out for when examining victims of sexual offences and how to give evidence in court.²⁴²

The SOCA unit found a dire shortage of basic skills among prosecutors. As rape and other sexual offences are difficult crimes to prosecute this lack of skills can result in trials being lost unnecessarily. In conjunction with the justice college of the department of justice, the unit saw to it that prosecutors are trained in the basics of prosecuting sexual offences such as how to interview traumatised victims (especially child victims), cross-examination techniques, and the presentation of forensic evidence, for example, DNA evidence.

Specialist courts

Specialist sexual offences courts that prosecute sexual offences only, allow prosecutors who work in these courts to become experts on the law as it applies to sexual offences, and in the prosecution of sex offenders. In-depth training is planned for such prosecutors by technical experts on sexual offences. Sexual offences courts usually have special facilities such as private waiting rooms and closed-circuit television (so that child witnesses can testify via an intermediary and do not have to face the accused in the formal setting of a courtroom) to assist victims and make the prosecution process more comfortable for them.

Sexual offences courts are not new. The first such court was set up in 1993 in Cape Town. A further six similar specialised courts have since been established, with some only dealing with sexual offences against children.²⁴³ The SOCA unit, in conjunction with the department of justice, is planning to increase the number of sexual offences courts around the country to 20. Decisions about the location of the new courts are based on the number of rapes reported to the police. In places where children's courts already exist, courts will be extended to deal with adult victims of sexual offences as well. In establishing new sexual offences courts, the SOCA unit intends to draw on the best practices from the existing courts.

An evaluation of the country's first sexual offences court in Wynberg (Cape Town) in 1997 found that the specialised court was a step in the right direction.²⁴⁴ However, some problems with the court were identified, including:

The sexual offences court is an administrative response to sexual offences that does not necessarily address the procedural problems in the criminal justice system faced by victims.

Victims are not always provided with pretrial consultations and assistance, making their courtroom experience unnecessarily traumatic.

There are no procedural guidelines for the officials working at the sexual offences court so that victims do not always receive consistent and reliable service.

In cases where victims are asked to wait in a private waiting room, they often feel isolated because they wait alone for lengthy periods of time, sometimes without an explanation of what is happening in the courtroom. This can cause further trauma to the victim.

Information-driven approach

The SOCA unit has adopted an information driven approach to assist it in setting priorities and developing new initiatives. Through a national forum of public prosecutors on sexual offences, experienced sexual offences prosecutors from the various (provincial) directors' offices come together on an irregular basis to discuss issues of common concern and to co-ordinate activities around sexual offences. The forum is an opportunity for sexual offences prosecutors from different regions to inform the SOCA unit of the unique circumstances and problems in their areas.²⁴⁵ Moreover, the unit collects statistical information on the incidence of sexual offences and domestic violence in the jurisdictions of the various directors of public prosecutions.²⁴⁶ This assists the unit in identifying areas where the prevalence of these crimes is particularly high and where the conviction rate is unusually low. On the basis of this information, the unit can ascertain which areas require more sexual offences prosecutors or even specialised sexual offences courts, and where prosecutors require additional training in the prosecution of sexual offences.

The SOCA unit has an interest in promoting preventive strategies in respect of sexual offences. The unit plans to establish an extensive database on sexual offences. This would provide the unit with accurate statistical information on, among others, where and at what time of the day sexual offences are the most prevalent. Properly analysed, the information contained in such a database would also permit the unit to establish whether there is, for example, any correlation between poverty, unemployment or the availability of recreational facilities for young men, and the prevalence of sexual offences in a community. Such information would assist the unit in identifying potential risk areas for sexual offences and to respond through preventive strategies in conjunction with the police.²⁴⁷ The SOCA unit is also striving to establish a databank containing information on convicted sex offenders. Such information would include personal details such as convicted offenders' ages and addresses, the crimes they have been convicted of, their photographs, and possibly also particulars of their DNA. This would assist law enforcement agencies in locating and identifying suspects, and prosecuting repeat offenders.²⁴⁸

New sexual offences legislation

In 1999 the South African law commission published a discussion paper on sexual offences, including a draft Sexual Offences Bill to consolidate and amend the laws relating to sexual offences.²⁴⁹ In terms of South Africa's common law, rape is committed only when a man has intentional unlawful sexual intercourse with a woman without her consent. Non-consensual anal or oral penetration does not constitute rape in common law, although it can constitute indecent assault. The commission proposes the repeal of the common law offence of rape and its replacement with a new gender-neutral statutory offence. The commission proposes that sexual penetration should be unlawful per se when it occurs under coercive circumstances. Moreover, sexual penetration should be defined broadly to include the penetration 'to

any extent whatsoever' by any object or part of the body of one person into the vagina, anus, or mouth of another person.

To obtain a conviction in terms of the current common law definition of rape, the prosecution must prove beyond a reasonable doubt the fact that the complainant or raped woman did not consent to sexual intercourse. Controversially, the commission recommends that the absence of consent to sexual intercourse should not be an element of the offence of rape. While the accused would be able to raise consent to sexual intercourse as justification for his unlawful conduct, the onus of proof would be on the accused to show that such consent did in fact exist.

Court management unit

Before the establishment of the national prosecuting authority, no performance management framework existed to govern and monitor the work of prosecutors. There was no objective way of rewarding a job well done or dealing with those who failed to perform. The court management unit was established to develop a performance management framework for the prosecution service and to assist the national director in improving the efficiency and effectiveness of the prosecution service.

The unit can manage the courts only if there are sufficient, competent and motivated prosecutors at each office in the country. To achieve this, the unit undertook a number of projects that fall within the human resources area during its first 18 months of operation. With time, such activities will be taken over by the national prosecuting authority's human resources division to allow the court management unit to focus on its line function: the improvement of service delivery by prosecutors working in the country's courts. Since its inception the court management unit has developed a number of structures and initiatives to assist it in achieving its objectives.

Court management statistics and database

Since April 1999 for the magistrate's courts, and from September 1999 for the high court, the court management unit has collected detailed statistics on the performance of the prosecution service in every court in the country. National statistics and information on individual courts are collected on performance indicators such as the number of hours courts are in session; the number of cases that are outstanding on the courts' rolls; and the number of cases that have been finalised and how they have been finalised (ie withdrawn, removed from court roll, or cases ending in the conviction or acquittal of the accused).

Such detailed statistics are a useful management tool and allow the national prosecuting authority to identify areas where there are too few courts or prosecutors in relation to the number of cases that are presented to the prosecution service. The statistics have also permitted the national director to enter into a performance agreement with prosecutors linking salary increases to agreed upon performance targets. In May 2000, individualised performance targets were set for each court in the country. Since then the focus has been on the performance of individual courts. Courts that are performing poorly are closely monitored and chief prosecutors who are in charge of such courts must report back to the court management unit on a monthly basis on progress made in respect of such courts.²⁵⁰ In the past no reliable national database existed of prosecutors' particulars such as their experience levels, academic qualifications and levels of training. The court management unit has developed a national

database that will contain particulars which are collected through personal interviews with prosecutors.

The court management unit has compiled a workload evaluation report in respect of each prosecutors' office in the country. Read together with the court management statistics, this permits the unit to identify courts where new prosecutors' posts need to be created, where the outstanding court rolls are unusually high but the available prosecutors are performing well under the circumstances, or where posts can be abolished due to a lack of work.

Training

In the past newly graduated law students were appointed to the prosecution service and expected to prosecute without any practical training. This lack of training was mitigated by an informal system of training conducted by magistrates who would subtly guide new and inexperienced prosecutors in the right direction whenever mistakes were made. Notwithstanding this informal training system, most prosecutors learned by trial and error and made many mistakes. Since the late 1990s, a strict separation between prosecutors and judicial officers has been imposed and the informal training process has largely fallen away. Prosecutors could previously attend training courses at the justice college in Pretoria. However, such training was usually only available to prosecutors who had been working in the courts for six to 12 months by which time many mistakes had been made because of a lack of practical training and experience. Moreover, most of the prosecutors who were stationed in the erstwhile TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) received no training at the justice college.²⁵¹ The position of untrained prosecutors in these areas is often exacerbated by the fact that most of the courts in the old TBVC areas are too small to have a senior public prosecutor who could mentor his inexperienced junior staff.²⁵²

To address the gaps that exist in the training of prosecutors, the court management unit, in conjunction with the justice college, devised new training courses. The courses emphasise the teaching of basic court skills instead of theoretical legal principles. The justice college presents four different courses to accommodate prosecutors with varying levels of skill and experience:²⁵³

Basic training course for candidate prosecutors who are appointed on a six-month contract basis: These are six-month courses divided into one month theoretical classroom training at the justice college, and five months of on-the-job training inside a functioning courtroom. For the on-the-job training, groups of 10 prosecutors are sent to different court centres in the country where each group is tutored by an experienced prosecutor. 'Job shadowing' forms an important part of the training. A group of three or four prosecutors are placed in a court, under the tutorship of an experienced prosecutor in the particular court. The trainees assist the prosecutor in the day-to-day running of the court, do the postponements and draw up the charge sheets. In this way the trainee prosecutors become familiar with the functions and responsibilities of a prosecutor in a court. At the same time the trainees receive lessons on the presentation of a case, the evidentiary requirements relating to various offences, the rules relating to court proceedings, and court etiquette. Prosecutors who fail either the theoretical or practical part of their training are not employed on a permanent basis by the national prosecuting authority.²⁵⁴

Professional development training: This consist of one-week refresher courses for prosecutors who have some prosecuting experience. Two such courses are held for up to 40 prosecutors in every province per year. Chief prosecutors in the various provinces select the prosecutors who attend the training courses and suggest what material should

be covered in each course. Professional development training courses typically cover aspects of criminal procedure, the law of evidence, general principles of criminal law, specific offences, and human rights training.

Specialist training: These are courses that are held irregularly for experienced specialist prosecutors. Such courses are generally conducted by senior staff from the specialist units and investigating directorates in the national director's office. Specialist training typically covers civil asset forfeiture legislation, money-laundering offences and sexual offences.

Advanced prosecutor training: These are one-week courses for prosecutors with more than two years' experience. These courses are an advanced version of the professional development training course and also focus on specific aspects of the law and criminal procedure.

The court management unit, in conjunction with the justice college, is planning to provide training to permanently employed prosecutors who never received any training — mainly those stationed in the erstwhile TBVC states.²⁵⁵ The idea is to employ some 12 experienced prosecutors as tutors who will be based in the larger rural centres of the country. From these centres, the tutors will travel to outlying courts and identify prosecutors who are in need of training.²⁵⁶ Such prosecutors then receive on-the-job training, after which they would be eligible to receive professional development training.

Disciplinary matters

In the past, disciplinary enquiries in respect of prosecutors were generally handled by the department of justice and senior magistrates. There was often a long delay in the holding of such enquiries and, by the beginning of 2000, there were 72 prosecutors in the country who were under suspension or investigation. At the time the court management unit became involved in the holding of disciplinary enquiries and managed to finalise 15 long outstanding matters by June 2000.²⁵⁷ The unit also began to train senior prosecutors to deal with disciplinary enquiries, and prepared a labour law manual to inform prosecutors of their rights and obligations.

Chapter 6

WHAT'S THE SCORE?

ASSESSING THE PROSECUTION SERVICE

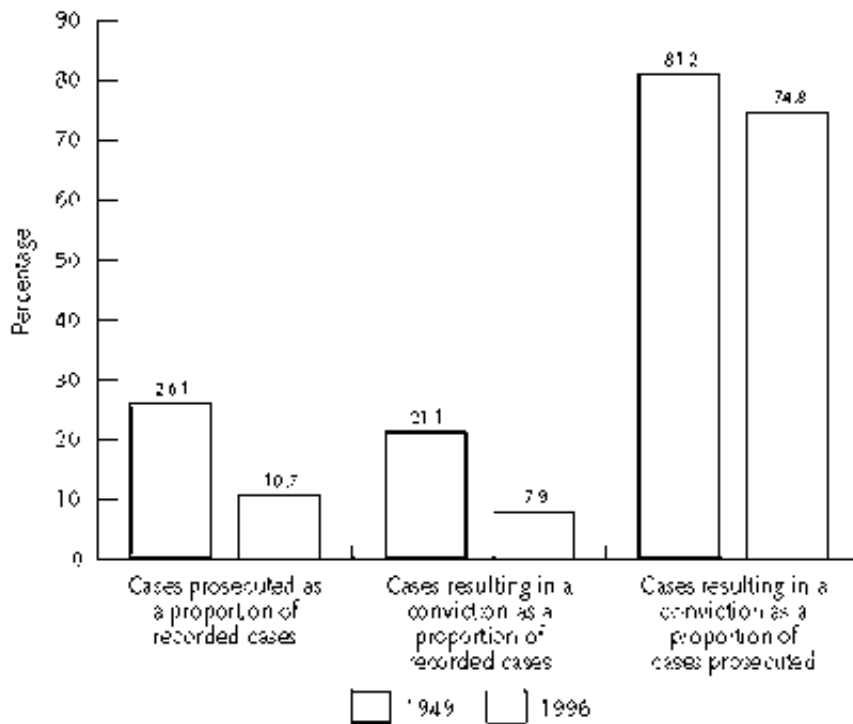
Changing nature of crimes prosecuted²⁵⁸

In 1949, some 1 397 000 crimes were recorded by the South African Police (SAP). These resulted in 363 903 prosecutions and 295 329 convictions.²⁵⁹ Put another way as a proportion of recorded crimes 26% of cases were prosecuted and 21% ended in a conviction of the perpetrators. Of the just under 364 000 cases prosecuted, 81% resulted in a conviction.

In 1996, some 2 733 363 crimes were recorded by the South African Police Service. This figure is not strictly comparable with that of 1949, however. In 1949 crimes which would be considered petty today and go largely unreported (and would not be prosecuted), such as drunkenness or disturbance of the peace, made up a high proportion of the offences recorded. Moreover, apartheid-related crimes prevalent in 1949, no longer exist.²⁶⁰ Nevertheless, of the recorded crimes in 1996, some 291 842 resulted in a prosecution, and 218 394 in a conviction.²⁶¹ Thus, as a proportion of recorded crimes, 10.7% of cases were prosecuted and 7.9% ended in a conviction of the perpetrators. Three-quarters (74.8%) of the cases prosecuted resulted in a

conviction, (graph 1).

Graph 1: Proportion of cases prosecuted and those resulting in a conviction, 1949 vs 1996



While the average criminal, whose actions were reported to the police, stood a one in four chance of being prosecuted in 1949, his odds improved to one in 10 in 1996. The same criminal stood a one in five chance of being convicted in 1949. In 1996 his chance of being found guilty by a court had dropped to almost one in thirteen. A cause of declining prosecution and conviction rates is to be found in the 1970s. During this decade, the state increasingly prosecuted people suspected of having committed violent and property crimes, while the easy-to-solve petty offences were no longer deemed serious enough to warrant a prosecution.

There has been a marked change in the nature of the crimes reported and prosecuted over the last 50 years. For statistical purposes, Statistics South Africa categorised crimes into one of the following six classes:

Class A: crimes against 'government authority and good order'. These are crimes such as treason, terrorism, public violence, firearm-related crimes, escaping from lawful custody, perjury, and infringements of the income tax laws.

Class B: crimes against 'communal life', such as rape, indecent assault, drug-related offences, cruelty to and neglect of children, prostitution, and bigamy.

Class C: 'personal relations' crimes, such as murder, culpable homicide, assault, defamation and kidnapping.

Class D: property crimes, such as robbery, burglary, theft, fraud, arson and malicious injury to property.

Class E: 'economic affairs' crimes, primarily statutory crimes related to the Companies

Act, and the illegal possession of and trafficking in gold and precious stones.

Class F: 'social affairs' crimes, including serious road traffic offences, such as driving while under the influence of alcohol, and reckless or negligent driving.

The number of prosecutions of crimes against 'government authority and good order' and 'communal life', as a proportion of the total number of prosecutions, more than halved between 1949 and 1995/96. The number of prosecutions of property-related crimes as a proportion of all prosecutions increased significantly from 27% in 1949 to 48% in 1995/96.

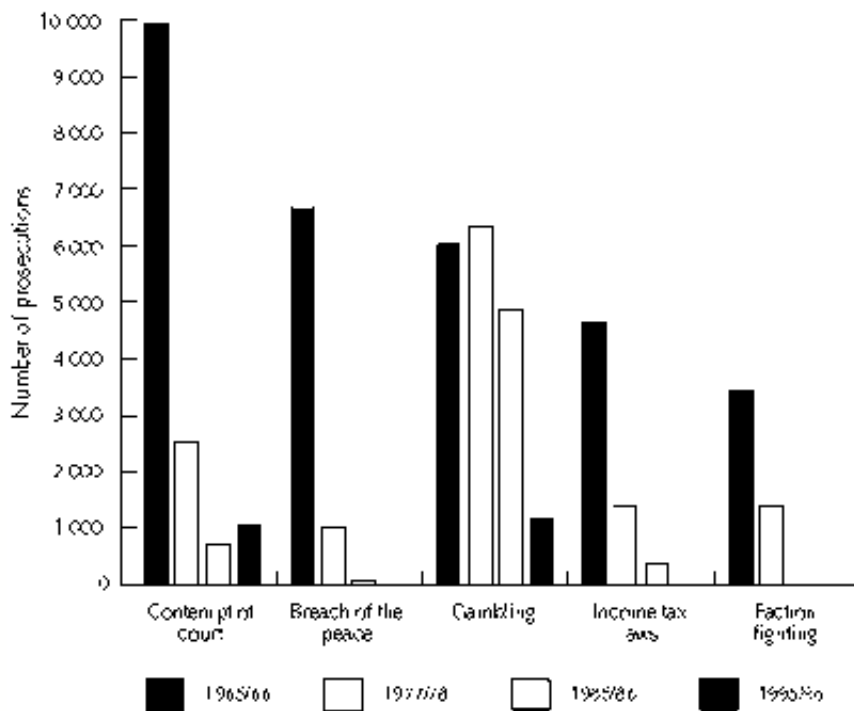
In 1949, crimes against 'communal life' comprised the largest proportion of all crime categories prosecuted. In the late 1970s, the number of 'communal life' crimes prosecuted as a proportion of other crime categories shifted to third place, with property and 'personal relations' crimes shifting to first and second place respectively (table 1).

Table 1: Number of prosecutions, by class of offence, 1949-1995/96						
	1949	1959	1969/70	1979/80	1989/90	1995/96
Class A	39 531	41 573	38 694	19 961	18 126	13 538
	-11%	-8%	-6%	-4%	-4%	-5%
Class B	120 317	138 635	185 590	55 382	64 035	34 905
	-33%	-29%	-31%	-12%	-14%	-12%
Class C	85 904	121 481	156 759	153 344	124 498	78 015
	-24%	-25%	-25%	-32%	-27%	-27%
Class D	99 540	139 981	153 691	217 587	209 747	141 516
	-27%	-28%	-25%	-46%	-47%	-48%
Class E	1 165	1 714	932	934	1 141	1 121
	0%	0%	0%	0%	0%	0%
Class F	17 446	48 313	80 602	30 184	37 359	33 657
	-5%	-10%	-13%	-6%	-8%	-8%

A reason for the shift in the number of prosecutions between crime categories has been a change in public morals and values (as reflected in the crimes being prosecuted), and police priorities over the last 50 years. There were, for example, 78 635 prosecutions for 'drunkenness' in 1965/66. These prosecutions for drunkenness comprised 15% of all prosecutions (or 58% of all 'class B' prosecutions), during 1965/66. After the mid-1970s prosecutions for drunkenness were no longer considered serious enough to be officially recorded.

Other offences that have shown a marked decline in their prosecution rates include 'contempt of court and defeating the end of justice', 'breach of the peace and riotous behaviour', gambling, the infringement of income tax laws, and faction fighting (graph 2).

Graph 2: Number of prosecutions, selected offences, 1965/66 - 1999/96



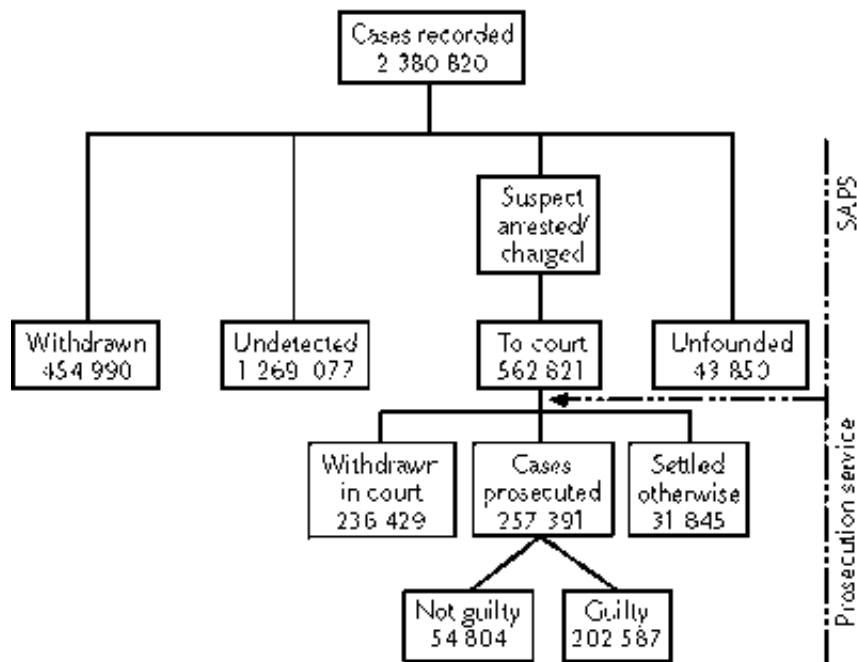
The shift in the relative prevalence of certain offence types partly explains the decline in the number of convictions and prosecutions as a proportion of recorded cases. Petty offences such as drunkenness, breach of the peace, and gambling (especially of the street side variety prevalent in South Africa in the 1960s and 1970s), were generally uncovered by the police themselves. Consequently, the prosecution of such cases was facilitated by a ready availability of reliable and competent witnesses for the prosecution. Moreover, persons charged with relatively petty offences tend to plead guilty to the charge against them (as the punishment is likely to be lenient), or pay an admission of guilt fine. For example, in 1965/66 some 95% of persons charged with drunkenness, and 92% charged with gambling, were convicted.

Property crimes, by comparison, are more difficult crimes to solve and prosecute successfully. Usually, no witness is present when, for example, a theft or housebreaking occurs, so that the police have to rely on circumstantial or forensic evidence to build up a convincing case. Persons charged with property-related crimes (except if the property involved is of a relatively low value, as is generally the case in shoplifting cases), are also less inclined to admit to the charge against them as a conviction can lead to a stiff fine and even imprisonment.

Stages in the criminal justice process

Since 1996, the crime information analysis centre (CIAC) of the SAPS has published detailed statistics covering the various stages through which a criminal case passes on its journey through the criminal justice system. The statistics provide a bird's eye view of this process from the time a criminal case is recorded by the police, to when it is finalised with the conviction or acquittal of the person accused of committing the crime (diagram 3).

Diagram 3: Flowchart of number of criminal cases processed in 1999



In 1999, some 2 380 820 crimes were recorded by the police.²⁶² Of these, 562 821 were sent to court, where 257 391 cases were prosecuted resulting in 202 587 convictions.²⁶³ Properly analysed, the statistics enable an evaluation of the criminal justice system's ability to investigate and prosecute crimes successfully. The categories of statistics, and an explanation of their meaning, follow below.²⁶⁴

Recorded cases

Recorded cases are the number of complaints or crimes recorded by the police. It includes crimes not reported by the public, but uncovered by the police themselves, such as cases of drunk-driving detected at a police roadblock.

Withdrawn cases

Where a suspect has not been charged, the reported case against him may be closed or 'withdrawn' by the police themselves, or by a public prosecutor. This frequently occurs where the victim or complainant requests the police or the prosecutor to withdraw the case. For example, in a case where the complainant is assaulted by his friend after both of them got drunk and started arguing, the complainant may ask the police not to pursue their investigation of an assault charge against his friend as they reconciled and sorted out their differences after they sobered up. A case may also be withdrawn by the prosecution service if there is insufficient evidence to warrant a prosecution.²⁶⁵

Undetected cases

There are two types of undetected cases. The first is where the suspect is unknown, and there is insufficient evidence to enable the police to identify the suspect. A typical example is where a person snatches a handbag from a woman's arm as he runs past her in a crowded street. The woman is unable to get a glimpse of the suspect's face, and can give only a vague description of the suspect to the police. The second type of undetected case is where the suspect is known and a warrant for his arrest has been issued, but his whereabouts are unknown, and he has not been charged.

Unfounded cases

Cases are registered as 'unfounded' where no evidence exists that a crime has actually been committed, or it is established that the suspected crime never occurred. For example, a farmer reports a case of stocktheft, but subsequently finds his livestock which had gone astray. Or, person X reports that person Y stole his money. It then transpires that X lent Y the money as part of a business deal. What was initially a theft case, and therefore a criminal matter, becomes a civil dispute over a breach of contract.

Cases to court

Cases are marked 'to court' only after a suspect has been formally charged (and in the case of a serious offence, arrested) by the police. In essence, cases are sent 'to court' only if there is fairly substantial evidence against a suspect to warrant him being charged with an offence. Once a person has been charged, his case can be finalised through the office of the prosecution service only. That is, the case against a person who has been formally charged with a crime may be withdrawn by the prosecution service only. The police may not do so.

Cases withdrawn in court

Cases may be 'withdrawn in court' by the prosecution service only. This happens after the accused has been charged, but before he pleads to the charge. There are a variety of reasons why the prosecution service may withdraw the charge against an accused. For example, the complainant in a case may approach the prosecution with the request that they no longer proceed with the prosecution. Where the case involves a petty offence such as trespassing, or where the complainant is the spouse of the accused, the prosecution will often comply with such a request, and withdraw the charge.²⁶⁶ In more serious cases, the prosecution is reluctant to do so.

A further common reason for the withdrawal of charges against an accused is where the court (ie a magistrate or judge) refuses to grant the prosecution any further postponements in respect of a case on the court roll. The constitution grants every accused the right to have their trial begin without any unreasonable delay.²⁶⁷ Suspects are often charged before all the investigations pertaining to their case have been completed by the police. This happens in serious cases where an accused is arrested at the scene of a crime or shortly after a crime is committed. While the accused will be brought before a court within 48 hours, the police often require weeks and even months to complete all their investigations.²⁶⁸

A multiple shooting incident in a busy shopping centre, for example, may involve dozens of witnesses, the collection and analysis of ballistic and fingerprint-related evidence (if it is unclear who was shot by whom with which gun), and evidence from the state pathologist to show which bullet from which gun killed the deceased. Unless the prosecution is certain of all the relevant facts of the case, it is unable to formulate an intelligible charge sheet to which an accused has to plead.

Courts will grant postponements to the prosecution, to allow the police to finalise its investigations, for a reasonable time only. Especially in less serious cases, lengthy and frequent postponements are rarely granted. For example, prosecutors require a blood-alcohol analysis report from the department of health's forensic chemical laboratories to prosecute persons charged with driving while under the influence of alcohol successfully. It takes about six to 12 weeks for such a report to be finalised, and the courts are generally prepared to postpone

drunk-driving cases for such a length of time. However over busier periods, such as around Christmas time, when there are numerous police roadblocks and the number of people charged with drunk-driving increases, the finalisation of such reports can take up to three months. Most courts are unlikely to postpone drunk-driving cases for such a long time.

Once a court refuses a further postponement in a case, the prosecution has two choices. Firstly, the prosecution can withdraw the case against the accused. As the accused has not pleaded to the charge, such a withdrawal does not amount to an acquittal, and the prosecution can reinstate the same charge at a later date once all the investigations have been completed.²⁶⁹

Secondly, the prosecution can formally put the charge to the accused. The court will then ask the accused to plead to the charge. However, once an accused has pleaded to a charge, it cannot be withdrawn. Should the prosecution realise that it has insufficient evidence to secure a conviction, after the accused has pleaded to the charge, it can only stop the prosecution in respect of that charge. In such an event, the court will acquit the accused.²⁷⁰ The prosecution is then unable to charge the accused again in respect of the same offence.

Consequently, in instances where a court refuses to postpone a case, the prosecution is likely to withdraw the charge against the accused. By doing so, the prosecution can reinstate the charge against the accused at a later date when it is satisfied that it has sufficient evidence against him. Once a case is reinstated against an accused, it is again registered under the 'to court' section (see above). It is likely, therefore, that some cases involving the same crimes and accused are registered under this category more than once.

Cases settled otherwise

Cases 'settled otherwise' are primarily cases that have been sent 'to court' (see above), but where the accused has failed to attend court on the date he has been officially instructed to do so either by the police or the court. As a result, a warrant for the arrest of the accused is issued by the court. Once the accused is found and rearrested, his case is again registered under 'to court'.

At any stage of criminal proceedings, a court may make a finding that an accused is not capable of understanding the court proceedings by reason of mental illness. The court may declare such an accused a state president's patient, who is then indefinitely detained in a mental hospital or a prison, and his case is marked as 'settled otherwise'.²⁷¹ Accused who are declared state president's patients after they have pleaded to their charge, are not entitled to be acquitted or convicted of the charge against them. If a court declares an accused a state president's patient after he has been convicted of the offence charged, but before sentence is passed, the court shall set the conviction aside. Should a finding be made at a later date that the mental condition of the accused has improved, and that he is capable of understanding the court proceedings, the accused may be prosecuted and tried for the original offence. When this occurs, the case is again registered under 'to court' (see above).

Not guilty

This category refers to cases where the courts acquit the accused of the offences for which they were prosecuted. As is the case with 'recorded cases' (see above), this category represents the number of cases ending in an acquittal, and not the number of accused who are acquitted. Thus, if one suspect is prosecuted for committing two separate offences, and he is acquitted of both of them, then each offence is registered separately under its crime category. However,

should two persons be prosecuted for committing the same offence (eg murdering the same person, or raping the same woman), and both of them are acquitted, then this is registered as one acquittal.

Guilty

This category represents cases where the courts convict the accused of the offences for which they were prosecuted. As with the 'not guilty' category, the number of cases resulting in a conviction are registered, and not the number of accused who have been convicted. The category also includes cases where the accused pay admission of guilt fines which have been set by the prosecution service. This can be done for relatively minor offences only, such as common assault, malicious injury to property, negligent driving, and the negligent loss of a firearm.²⁷²

Measuring the performance of the prosecution

Difficulties of performance measurement

It is difficult to identify and develop reliable and fair performance indicators for the criminal justice system. It is generally accepted that the purpose of the criminal justice system is to combat, prevent and reduce crime. The performance of the criminal justice system in accomplishing this purpose is influenced by a variety of factors — such as prevailing social values, unemployment levels and the proportion of young men in a population — over which it has no control. It is even more difficult to identify accurate and equitable performance indicators for one part of the criminal justice system, such as the prosecution service. The performance of the prosecution service is influenced by outside factors over which it or the criminal justice system has little or no control such as, for example, the willingness of members of the public to testify in court. The performance of the prosecution service is also influenced by the other parts of the criminal justice system of which it forms a vital part.

For example, a widely used performance measurement for a prosecution service is the number of cases that result in a conviction as a proportion of cases prosecuted. However, the strength of the prosecution's case and its ability to secure a conviction depend not only on the skills of the prosecutor, but also the proficiency with which the case is investigated by the detective service, the reliability and honesty of the state witnesses, and the ability of the accused to lie and bamboozle the court into believing in his innocence. A prosecutor has only limited control over such factors. However, a good and diligent prosecutor will exploit the limited control that he has and — to use the present example — guide and assist the detective in the investigation of the case, consult with his witnesses thoroughly, and cross-examine the accused with such skill that his credibility becomes tarnished. The number of convictions as a proportion of prosecuted cases thus remain a reliable performance measurement tool for the prosecution service provided the above limitations are taken into account.

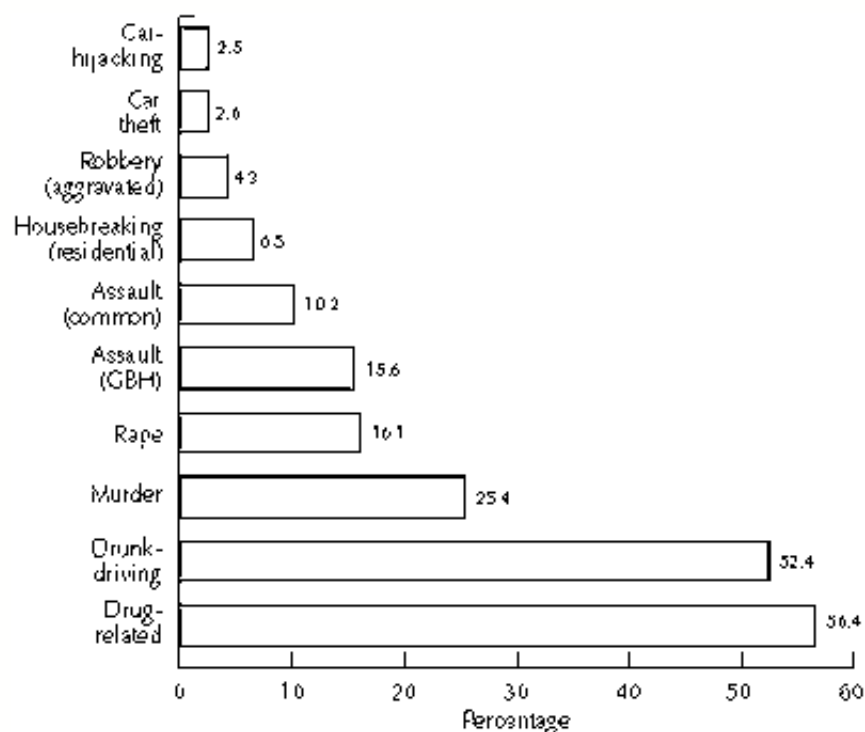
Evaluating the South African prosecution service is further complicated by a dearth of comprehensive prosecution-related long-term performance indicators. The department of justice, which was responsible for the country's prosecutors until mid-1998, never collected reliable countrywide statistics on the prosecution service. As a result, the unsatisfactory situation arose whereby other organisations, outside of the justice department and the prosecution service, collected prosecution-related data. Between 1949 and 1995/96, it was Statistics South Africa (formerly the central statistical service, department of statistics and bureau of statistics) and, after 1996, the crime information analysis centre of the SAPS that collected this

information. The prosecution service started collecting and analysing prosecution-related statistics only in April 1999 through the national prosecuting authority's court management unit.

Cases prosecuted

The number of cases where the prosecution service institutes a prosecution as a proportion of the number of recorded cases is low.²⁷³ 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 under 3% for car theft and car-hijacking. However, for crimes heavily dependent 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%, (graph 3).

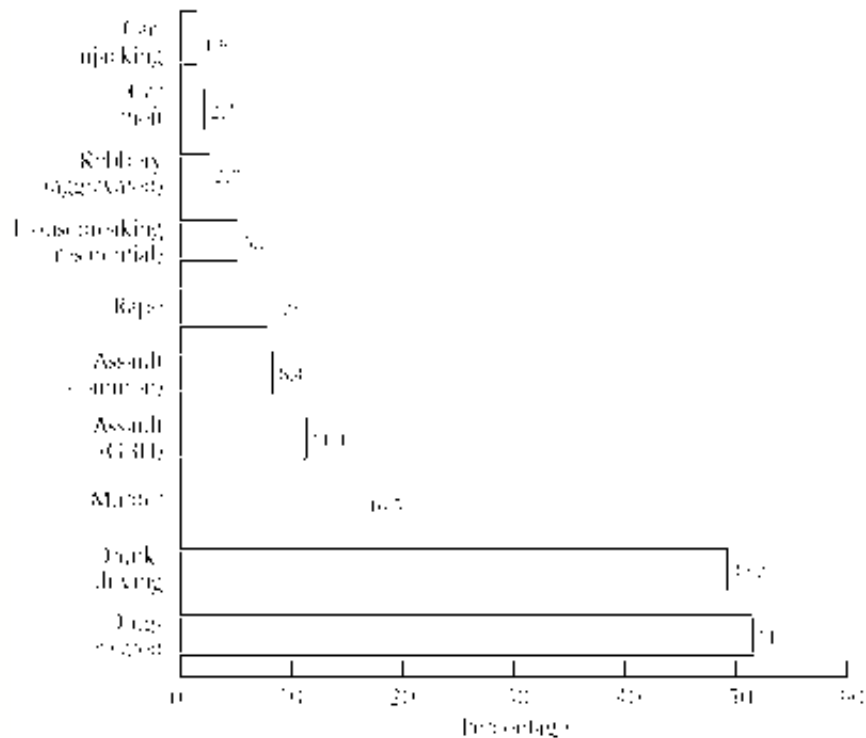
Graph 3: Cases prosecuted as a proportion of recorded cases, 1999



Successful prosecutions

The number of cases resulting in a conviction as a proportion of the number of recorded cases is very 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 (graph 4). On average, therefore, only one out of every six recorded murders end in the conviction of the perpetrator. For rape the comparable ratio is about one out of 13, for car-hijacking one out of 63.

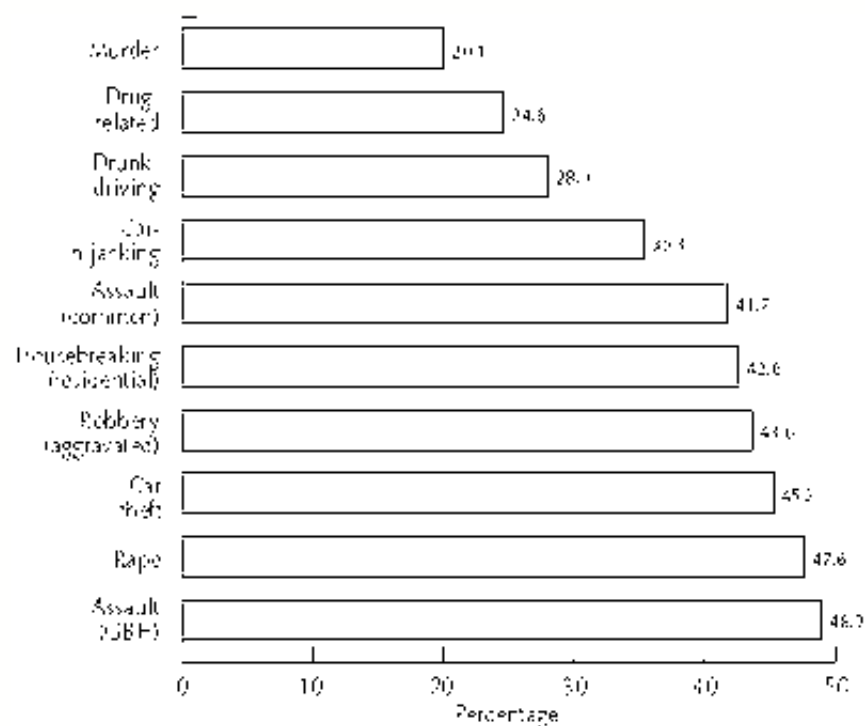
Graph 4: Cases resulting in a conviction as a proportion of recorded cases, 1999



Cases withdrawn in court

A high number of cases are withdrawn in court. This is not surprising in cases where the victim and the offender are known, or even related, to each other (and where the victim may decline to testify against the accused), and in cases where the trial may be unreasonably delayed due to outstanding investigations (eg a district surgeon's report). Thus, as a proportion of the number of cases sent to court by the police, about 48% of rape and serious assault cases were withdrawn in court in 1999 (graph 5).

Graph 5: Cases withdrawn in court as a proportion of cases sent to court, 1999



Of concern, however, is the fact that over 40% of all residential housebreaking, serious robbery and car theft cases that were sent to court in 1999, were withdrawn by the prosecution service. For these crimes, it is unlikely that the victims are the reason for the high number of withdrawals. The more likely reasons are inordinate delays in the investigation of these crimes, and the failure of witnesses to testify in court. The latter may be because witnesses are intimidated from attending court by the criminals they are supposed to testify against. Many burglaries, robberies and car thefts are committed by crime syndicates whose members would not hesitate to intimidate those who may testify against them. Moreover, some witnesses may have no faith in the criminal justice system, and elect not to testify for this reason.²⁷⁴

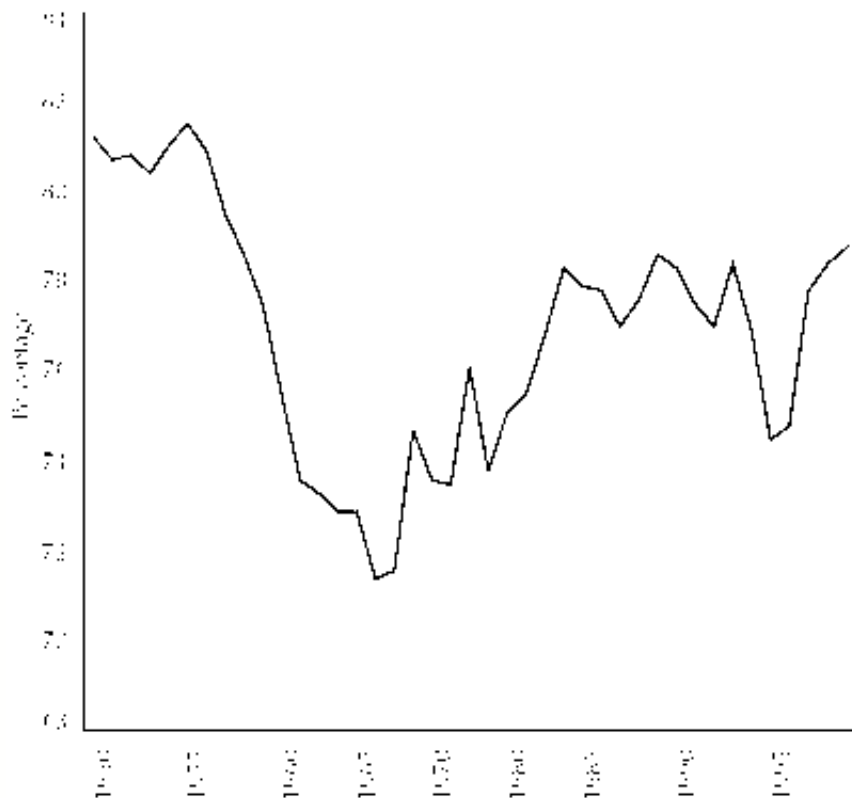
Between 1996 and 1999, the number of cases resulting in a conviction as a proportion of all cases sent to court dropped from 39.2% in 1996 to 36% in 1999. The proportion of cases resulting in a not guilty finding by the courts dropped from 11.4% in 1996 to 9.7% in 1999. The proportion of cases withdrawn in court increased significantly from 33.8% in 1996 to 42% in 1999 — an increase of 24% (table 2).

Table 2: Cases processed by the prosecution service, 1996-1999				
	1996	1997	1998	1999
Unprocessed	44 754	37 506	33 809	37 153
	-8.50%	-7.10%	-6.50%	-6.60%
Guilty	207 203	204 937	203 071	202 587
	-39.20%	-38.90%	-38.80%	-36.00%
Not guilty	60 491	58 113	56 074	54 807
	-11.40%	-11.00%	10.7%)	-9.70%
Settled otherwise	38 123	38 715	29 855	31 845
	-7.20%	-7.40%	-5.70%	-5.70%
Withdrawn in court	178 705	188 102	201 316	236 429
	-33.80%	-35.70%	-38.40%	-42.00%
Total	529 276	527 373	524 125	562 821
	-100.00%	-100.00%	-100.00%	-100.00%

Conviction rate

Once the prosecution service decides to institute a prosecution, its success rate is high. On average, of all crimes that are prosecuted, some three-quarters result in a conviction of the accused person. During the last five decades, the proportion of cases prosecuted successfully (ie those resulting in a conviction) has been consistently high — between 71% and 82% (graph 6).²⁷⁵

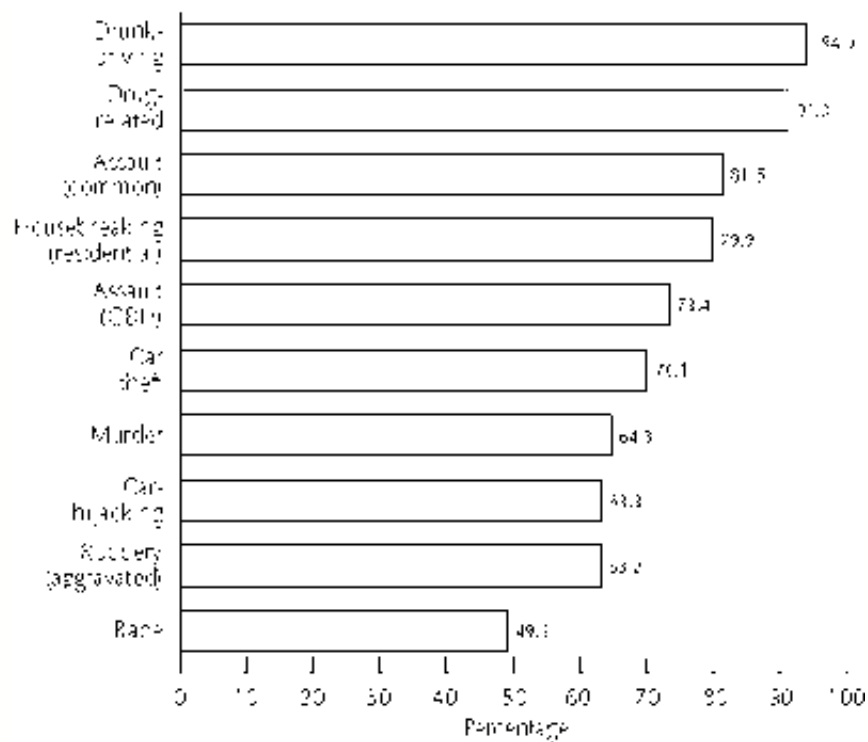
Graph 6: Convictions as a proportion of cases prosecuted, 1949 - 1999 (excluding 1970/71 - 1976/77



There is consequently an above average chance that accused persons will be punished for their crimes once they have made the journey through most of the criminal justice system, and the prosecution service decides to prosecute them. This is not surprising as the prosecution service elects which cases to prosecute. Cases are usually prosecuted only where there is a reasonable prospect of obtaining a conviction, that is, cases where the evidence is substantially in favour of the prosecution's case. Unlike the police which has to investigate all the cases reported to it, the prosecution service accepts cases only if they have been investigated fully, and there is a case to be made against an accused.

There is considerable variation in the conviction rate between crime types, however. During 1999 some 80% of residential housebreaking and common assault prosecutions, and 70% of car theft prosecutions, resulted in a conviction. Below the average were car-hijacking, murder, robbery with aggravating circumstances (all between 60% and 65%) and rape (49.3%). Conviction rates are highest for crimes where police officers are more likely to be the prosecution's main witnesses. Thus, for drug-related crimes and drunk-driving offences the conviction rate was over 90%, (graph 7).

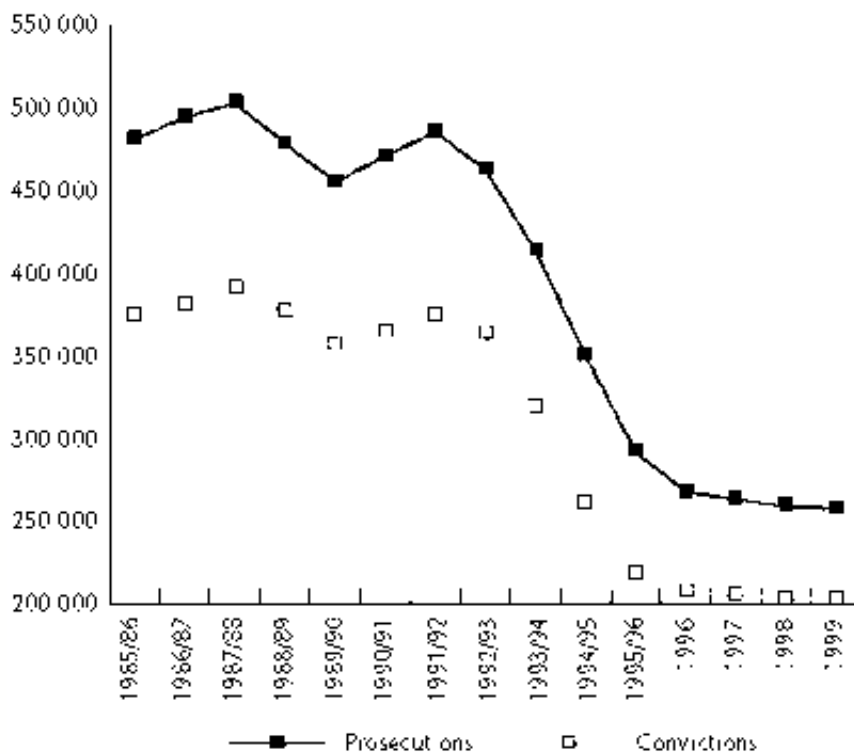
Graph 7: Cases resulting in a conviction as a proportion of cases prosecuted, 1999



Declining number of prosecutions and convictions

Despite the relative success of the prosecution service, its weak performance lies in the fact that it is taking on fewer and fewer cases. While the number of crimes recorded have increased considerably over the last decade, the number of cases taken on by the prosecution service have declined over the same period. In 1985/86, some 480 600 prosecutions and 373 980 convictions took place. This decreased to 291 840 prosecutions and 218 390 convictions in 1995/96,²⁷⁶ and 257 390 prosecutions and 202 590 convictions in 1999 (graph 8). Since 1991/92, the number of cases taken on by the prosecution service have declined consistently from one year to the next. Moreover fewer people were prosecuted in 1999 than in 1949, or in any of the intervening years.

Graph 8: Number of prosecutions and convictions, 1985/86 - 1999



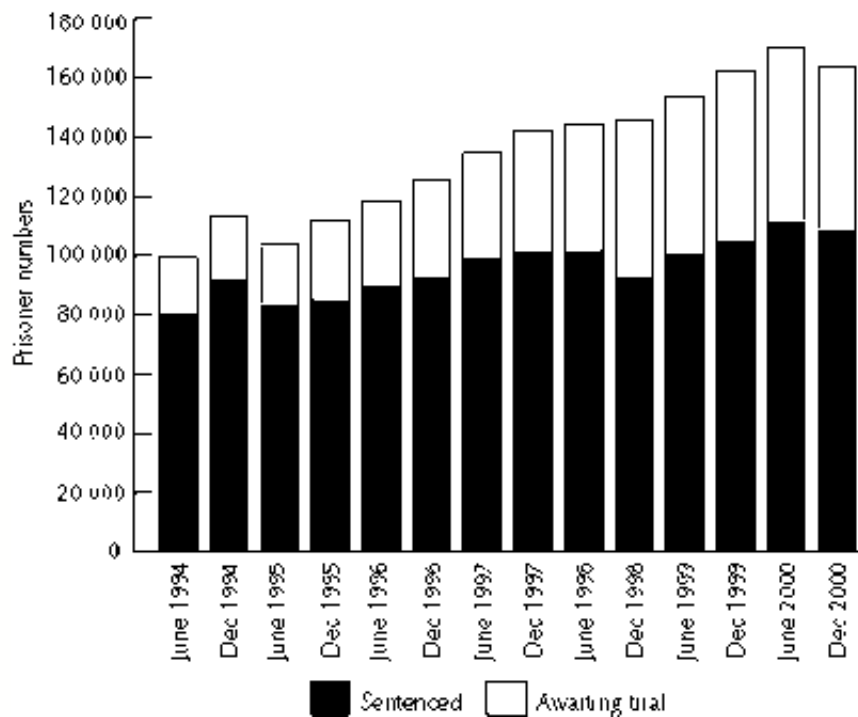
The declining number of prosecutions and convictions is disconcerting in light of the fact that the number of serious crimes, as recorded by the SAPS, increased by 307 000 between 1994 and 1999.²⁷⁷ While reliable countrywide statistics for the number of recorded crimes are not available for the pre-1994 period, the number of serious crimes recorded by the erstwhile South African Police increased significantly from the late 1980s onwards.²⁷⁸

Increasing number of awaiting trial prisoners

Some accused are incarcerated while they await the commencement and/or the outcome of their trial. This is because the courts refused to grant them bail, or because bail has been set at an amount which the accused cannot afford. There are a number of factors that determine the length of time an accused spends in prison awaiting trial. The speed with which the police finalise the investigation, the length of the trial, and the number of postponements the accused requests during the trial are all factors that increase the awaiting trial period of an accused and over which the prosecution has little or no control. However, in most cases, there are delays in the finalisation of trials because the courts' rolls are too full or badly managed, something over which the prosecution has some influence. Changing levels of awaiting trial prisoner numbers are consequently a further measurement of the prosecution service's efficiency and performance.

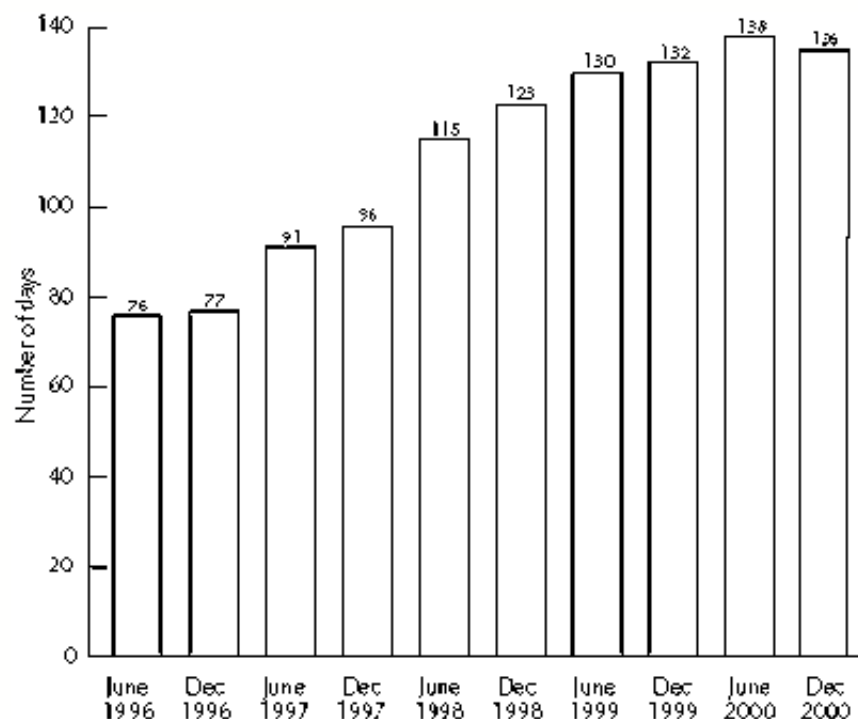
The number of awaiting trial prisoners increased from 19 571 in June 1994 to 55 558 in December 2000 — a massive increase of 184%. Over the same period, the number of sentenced prisoners increased from 79 987 to 107 988 — an increase of 35% (graph 9).

Graph 9: Changes in prisoner numbers, 1994 - 2000



Moreover, the average length of time awaiting trial prisoners remain incarcerated until the finalisation of their trials rose considerably between mid-1996 and 2000. In June 1996, the average awaiting trial prisoner spent 76 days in custody, by December 2000, this had increased to 136 custody days (graph 10). Delays in the processing of cases involving awaiting trial prisoners place a considerable financial burden on the department of correctional services. A prisoner costs the department some R80 a day. Multiplied over an average of 138 custody days this comes to R11 000 per average awaiting trial prisoner.

Graph 10: Average period awaiting trial prisoners incarcerated, 1996 - 2000

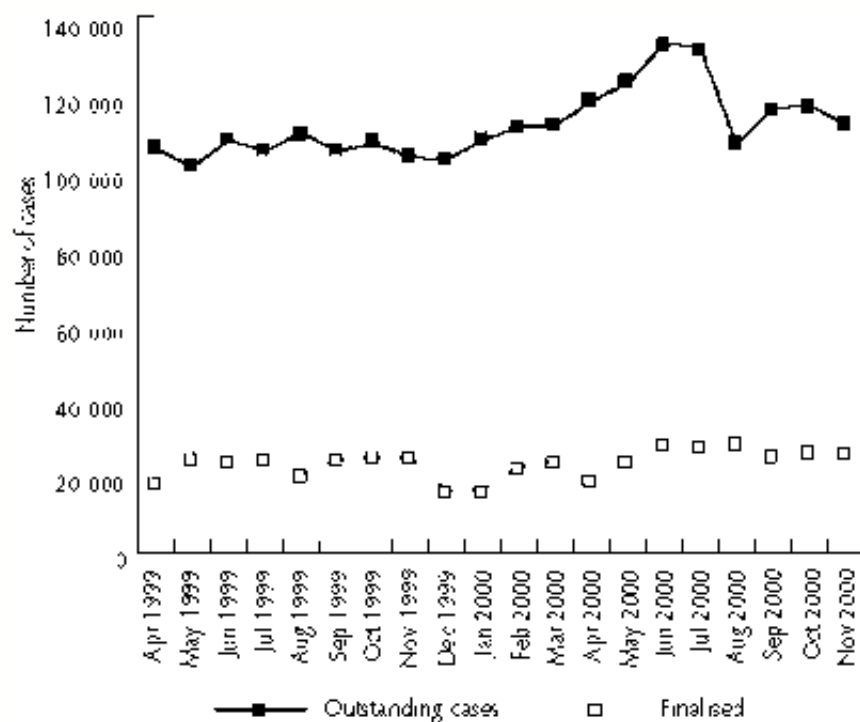


Since April 1999 for the magistrate's courts, and since September 1999 for the high courts, the court management unit has collected detailed national statistics on a variety of performance indicators for the prosecution service (see section on court management unit above).²⁷⁹ At the time of writing, statistics for the magistrate's courts were available for a 20-month period only (April 1999 to November 2000). This is too short a period to enable a reliable identification of performance trends. Nevertheless, the figures presented below provide a good indication of the magnitude of the case backlog faced by the prosecution service and the major reasons why the available court time is not used adequately.

Outstanding and finalised cases

Between April 1999 and November 2000, the country's district courts finalised an average of 23 700 cases a month, but had an average of 111 760 cases per month outstanding on the courts' rolls (ie cases that had not been finalised and still had to be dealt with). To put it another way, the average district court finalised an average of 29 cases per month over the 20-month period, while an average of 134 cases per month were outstanding. Over the 20-month period, the number of cases finalised per month increased and slightly fewer cases were outstanding in November 2000 compared to April 1999. During August 2000 the number of outstanding cases declined significantly (graph 11). This may be because of an initiative started in mid-2000 by the national prosecuting authority to encourage prosecutors to withdraw cases that were flawed in some way and not ready to proceed to a successful prosecution.²⁸⁰

Graph 11: Outstanding and finalised district court cases, April 1999 - November 2000



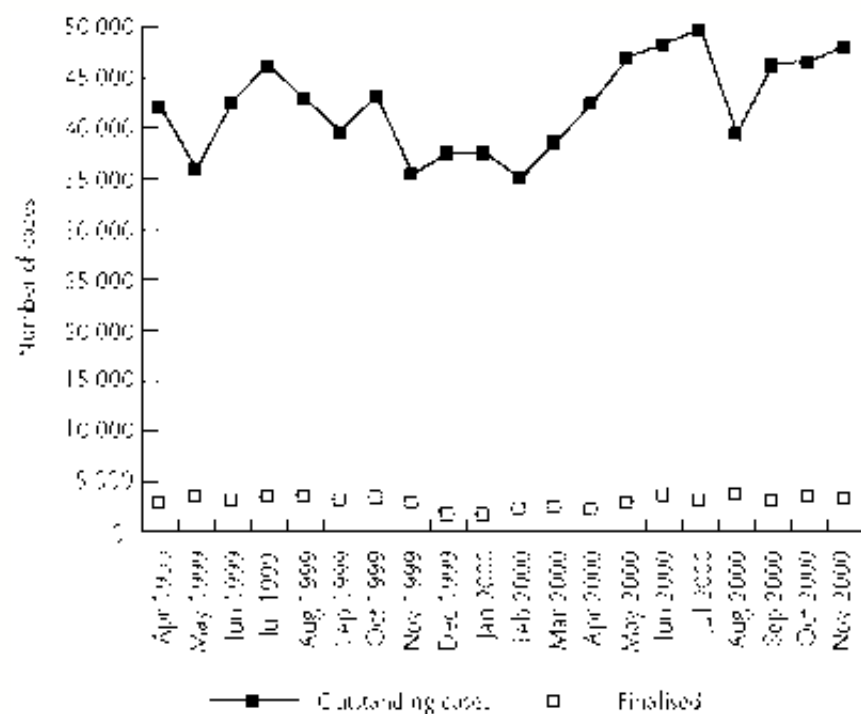
As part of a salary-related performance agreement between prosecutors and the national director in January 2000, it was agreed that district courts would strive to finalise an average of 40 cases per month.²⁸¹ By November 2000 the average district court was finalising 29 cases a month, or 11 cases per month below target.

District courts deal mainly with relatively minor offences such as shoplifting, assault, malicious damage to property and driving-related offences. The prosecution of such offences usually involves only one or two state witnesses. Moreover, it is not uncommon for accused persons to

plead guilty to such minor offences. An average district court should consequently be able to finalise two to three cases a day. With an average of 20 working days per month this would translate to 40 to 60 finalised cases per court per month.

Between April 1999 and November 2000, the country's regional courts finalised an average of 3 040 cases a month, but had an average of 42 300 cases per month outstanding on the courts' rolls. The number of cases finalised per average regional court per month was nine cases over the 20-month period, while an average of 137 cases per month were outstanding. As was the case with the district courts, the actual number of cases finalised per month by the regional courts increased over the 20-month period, but the number of new cases coming in increased at a greater rate. As a result, more cases were outstanding on the regional courts' rolls in November 2000 than in April 1999 (graph 12). As part of the performance agreement noted above, regional courts should finalise an average of 15 cases per month.²⁸² By June 2000, the average regional court was finalising 10 cases a month, some five cases per month below target.

Graph 12: Outstanding and finalised regional court cases, April 1999 - November 2000



Regional courts deal with serious crimes such as murder, rape and fraud involving large amounts of money. Trials in the regional courts typically involve a number of state witnesses and the presentation of non-oral evidence such as blood samples and district surgeons' reports. As a result, regional court trials tend to take longer than those in the district courts. Regional court prosecutors need more time to prepare and consult with their witnesses than their district court counterparts. It is consequently not surprising that the average number of cases finalised per regional court per month is lower than that of the district courts. It is disturbing, however, that the average number of outstanding cases per regional court is almost the same as that in the district courts. Given the slower rate at which the regional courts are able to finalise cases, it will take these courts much longer to reduce the backlog of cases. In October 2000, the national director of public prosecutions lamented the fact that the lower courts were processing cases at an unacceptably low rate. The national director pointed out that, even if any further intake of work was frozen, it would probably take the courts up to two years to dispose of existing

Use of court hours

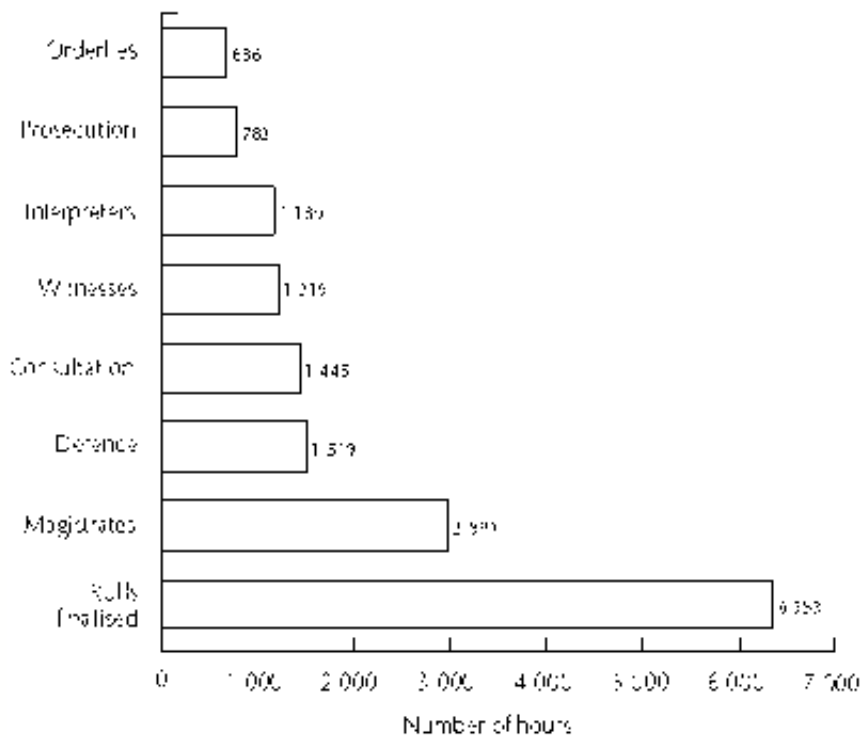
Theoretically a court should be in session for up to six hours during a normal working day.²⁸⁴ For a variety of reasons, this is practically almost impossible. For example, a typical court may be unable to start on time because witnesses do not arrive on time, prisoners are brought to court late, or because the prosecutor or the defence lawyer have to consult with their witnesses. Moreover, trials often finish earlier than expected or cannot proceed at all on the day they were supposed to, with the result that courts finish their work before closing time and adjourn early for the day.

Countrywide statistics on the average number of hours district and regional courts were in session between April 1999 and November 2000 show that these courts were generally in session for less than four hours a day. The figures imply that the average magistrate's court sat idle between two and 2.5 hours per day over this period (equivalent to between 33% and 40% of available court time). Only after February 2000 did the district courts sit for just over four hours per day.

A January 2000 performance agreement between the national director and prosecutors committed district court prosecutors to increase their average court hours to four hours a day, and regional court prosecutors to an average of 4:15 hours a day. In November 2000 district courts were sitting an average of 4:01 hours a day (one minute over the national target), and regional courts an average of 3:49 hours (26 minutes under the agreed upon target).

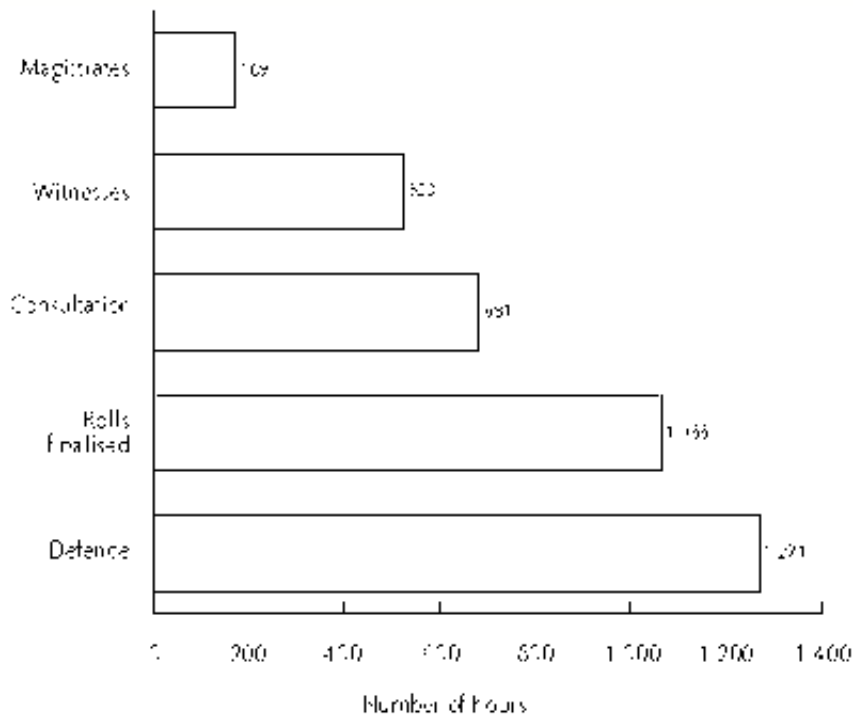
Figures for May 2000 shed some light on why so many court hours are lost. In the district courts, the most common reason why court time was not utilised fully was that the courts' rolls were finalised. That is, during May 2000, some 6 353 hours of potential court time were lost nationally because courts had completed their work for the day before closing time (graph 13). There are a number of possible reasons for this. For example, prosecutors (who are responsible for managing the rolls of the courts they work in) manage the courts' rolls badly; witnesses who should have come to court fail to do so with the result that trials planned for the day cannot proceed; or, accused ask for a postponement of their trials because they want to obtain a new attorney or because they are feeling ill. Other common reasons for lost court hours in the district courts were that magistrates were not available at the time the prosecution and defence were ready to proceed (2 990 hours lost), because the accused or his legal representative was not ready to proceed at the allotted time (1 519 hours lost), because the prosecution had to consult with witnesses during court time (1 445 hours lost), or because witnesses failed to arrive at court on time (1 219 hours lost).²⁸⁵

Graph 13: Reasons for lost district court hours, May 2000



In the regional courts the most common reason why court time was not utilised fully was that the accused or their legal representatives were not ready to proceed at the allotted time or were late arriving at court. During May 2000, some 1 271 hours were lost because of this (graph 14). This was followed by the courts' rolls being finalised (1 066 hours), the prosecution consulting with state witnesses during court time (681 hours), witnesses arriving late at court or not at all (523 hours), and magistrates not being ready to proceed when asked to do so by the prosecution (169 hours).

Graph 14: Reasons for lost regional court hours, May 2000

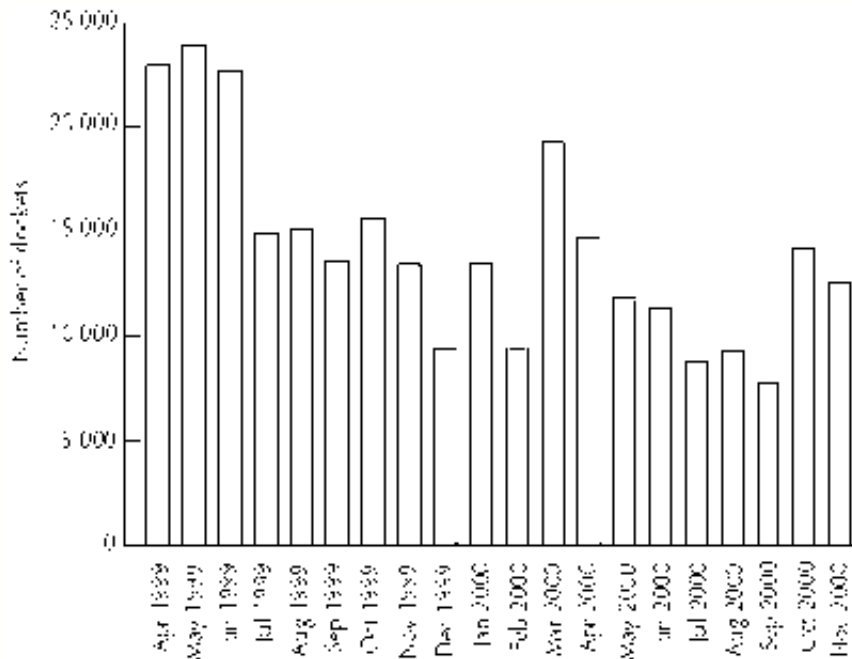


Outstanding decision dockets

After a crime is reported, the police open a docket in which the written statement of the person reporting the crime (usually the victim) is filed. The investigating officer of the case then typically proceeds to collect statements from witnesses to the crime, as well as from the suspect if his whereabouts are known. After the investigating officer has collected what he believes to be all the available and relevant information to the case and filed this in the docket, the docket is sent to the local prosecutors' office. The prosecution service treats such a docket as a 'decision docket'. This means that they carefully peruse the information in the docket to determine whether it contains sufficient evidence against the suspect(s) to warrant a prosecution. If there is insufficient evidence, the prosecutor who studied the docket will either decide to decline to prosecute in that matter or instruct the investigating officer to conduct further investigations to build up a stronger case against the suspect(s). It is the duty of the prosecutor to specify which further investigations are required.

The number of outstanding decision dockets is a measure of the prosecution service's efficiency. In the 20 months from April 1999 to November 2000 the number of outstanding decision dockets almost halved from 22 974 in April 1999 to 12 578 in November 2000 (graph 15).

Graph 15: Outstanding decision dockets, April 1999 - November 2000



Chapter 7

PROVIDING ANSWERS:

REASONS FOR THE PROSECUTIONS' POOR PERFORMANCE

Loss of experienced personnel

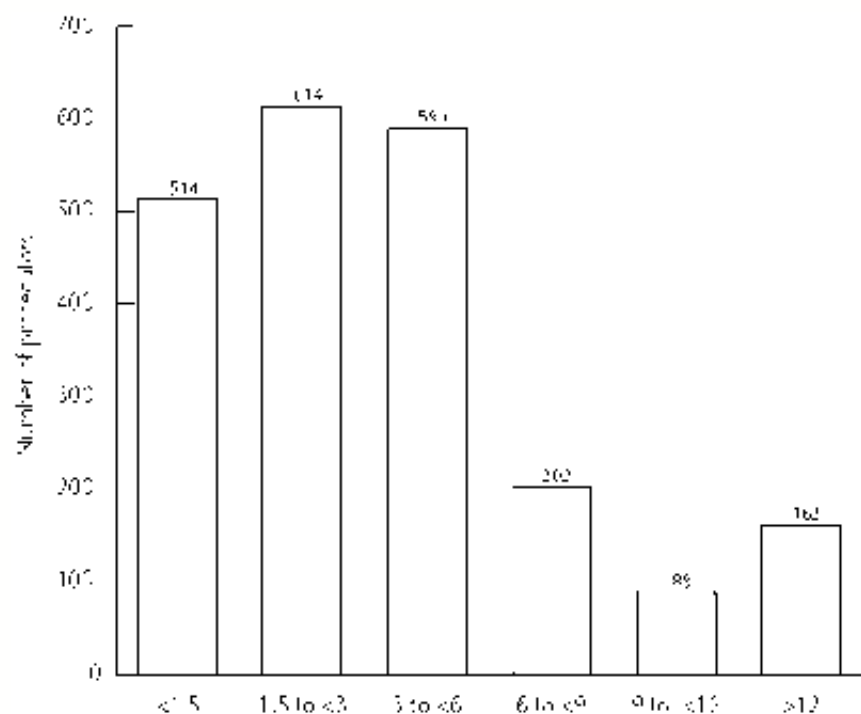
Between January 1994 and December 1997, some 630 prosecutors resigned. Between them they had the equivalent of more than 2 000 years of work experience as prosecutors.²⁸⁶ In the office of the attorney-general of the Western Cape and in the magistrate's courts situated in the greater Johannesburg region, almost a quarter of the professional staff resigned in 1997.²⁸⁷ While prosecutors who left the prosecution service were replaced, and the absolute number of

prosecutors employed has consistently increased, the high personnel turnover has meant a decline in the experience level of the average prosecutor. In 1998 a Pretoria high court judge criticised the department of justice for appointing "inexperienced and incompetent" personnel, and said urgent attention should be given to improving salaries of prosecutors. Mr Justice de Villiers ordered the director-general of justice to report to the court why inexperienced persons had been appointed in posts of the office of the Witwatersrand attorney-general.²⁸⁸

In 1996, for the area falling under the jurisdiction of the attorney-general of the then Transvaal, the average period of experience for district court prosecutors was 1.6 years. For regional court prosecutors it was 2.2 years.²⁸⁹ In 1997 the average experience level of all magistrate's court level prosecutors was 3.5 years. Experience levels varied from province to province, however. In the Western Cape it was a mere six months.²⁹⁰

Salaries of prosecutors in non-managerial positions and junior state advocates are linked to their experience levels. It is consequently possible roughly to determine the average experience levels of such prosecutors on the basis of their salary levels. In October 2000, some 2 171 prosecutors below the rank of senior public prosecutor (SPP), and junior state advocates were employed by the department of justice. Of these, just under a quarter (24%) had been prosecuting for less than 18 months, and just over a quarter (28%) had worked as prosecutors for between 18 and 36 months. Almost four-fifths (79%) had prosecuted for 6 years or less (graph 16).

Graph 16: Average experience level of prosecutors (below SPP rank) and junior state advocates, October 2000



The graph indicates an approximation of years of experience levels only. Prosecutors who have worked in other relevant public service posts such as state legal advisers or clerks of the court, or those who have previous relevant private sector work experience in the legal profession, are appointed at higher salary ranks than those coming directly from university. It is therefore likely that the number of years prosecutors and junior state advocates have worked as prosecutors and state advocates is lower than what is indicated in the graph.

A rapid turnover of staff impairs the professional capacity of the prosecution service. Prosecuting is a practically oriented profession. It requires the ability to apply legal theory to the actual cases before court, to sum up the demeanour and expression of witnesses quickly and correctly, and to present various forms of evidence and witnesses in such a manner to the court to build up a convincing and coherent case. Many of these skills cannot easily be taught and are acquired and perfected through practice and experience. A rapid staff turnover therefore undermines the professional capacity of the prosecution service. Moreover, many experienced prosecutors who leave the prosecution service join the private sector to specialise in criminal law defending clients against their erstwhile colleagues, some of whom remained behind because of their inability to obtain employment in the private sector.

The high staff turnover also "undermines the professionalisation of the office", impeding the potential benefits of long-term organisation and the effective allocation of resources.²⁹¹ As long ago as 1981, the Hoexter commission of inquiry into the structure and functioning of the courts stressed the need for the department of justice to retain its skilled and trained personnel, and warned that the lack of experience among prosecutors was cause for great despondency.²⁹²

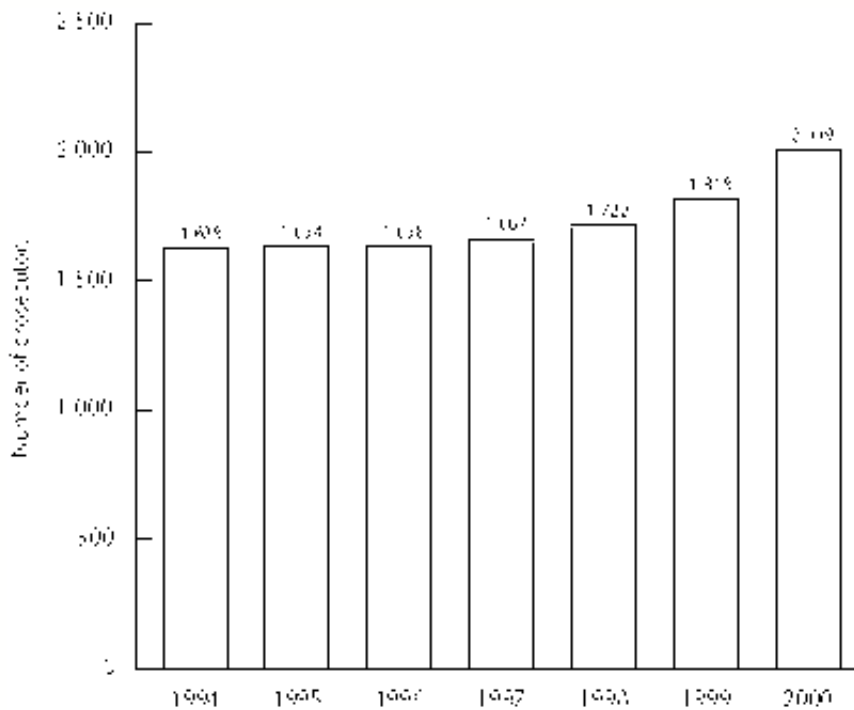
"With an inexperienced prosecutor the chances are strong that the State case — whose preparation may have involved a lengthy police investigation — will be scuttled: more especially should the accused be represented by a seasoned attorney or advocate."²⁹³

The rapid outflow of experienced prosecutorial staff in the mid-1990s was exacerbated by long delays in the filing of vacancies. Especially at senior level, posts were often left vacant for months before being filled.

While the size of the prosecution service slowly expanded over the years, the number of new prosecutor posts created were not in proportion to the rise in the crime rate.²⁹⁴ For example, the number of district and regional court prosecutors falling under the jurisdiction of the then attorney-general of the Witwatersrand local division, which included the crime-prone areas of greater Johannesburg, increased from 227 in 1993, to 230 in 1997: an increase of only 1.3% over four years.²⁹⁵ In mid-1997, the minister of justice at the time, Dullah Omar, told parliament that, "according to scientifically determined norms," there was a shortage of 35 senior public prosecutor and 407 public prosecutor posts. At the time there were approximately 1 600 legally qualified graduates on the department of justice's central waiting list who had applied to be appointed as prosecutors. These could not be filed "due to a shortage of funds", Omar said.²⁹⁶ In October 2000 the national director of public prosecutions, Bulelani Ngcuka, revealed that there were 180 000 outstanding criminal cases in the country's courts, and that it would take the existing number of prosecutors two years to deal with the backlog of cases, excluding any new cases. To deal with the outstanding cases, a further 230 prosecutors had to be appointed, Ngcuka said.²⁹⁷

As a result of the lack of staff — especially senior and experienced prosecutors — the prosecution service is unable to deal effectively with all the cases referred to it by the police. Between 1987 and the end of 1999 the number of prosecutors increased from 1 019 to 1 819, or by 79% (graph 17).²⁹⁸ Over the same period the number of many serious crimes recorded by the police more than doubled. Serious assault rose by 112%, murder by 143%, rape by 182%, and robbery by 265%.²⁹⁹ In 1987 there was, on average, one prosecutor for every 45 recorded robberies. By 1999 there was one prosecutor for every 95 recorded robberies.

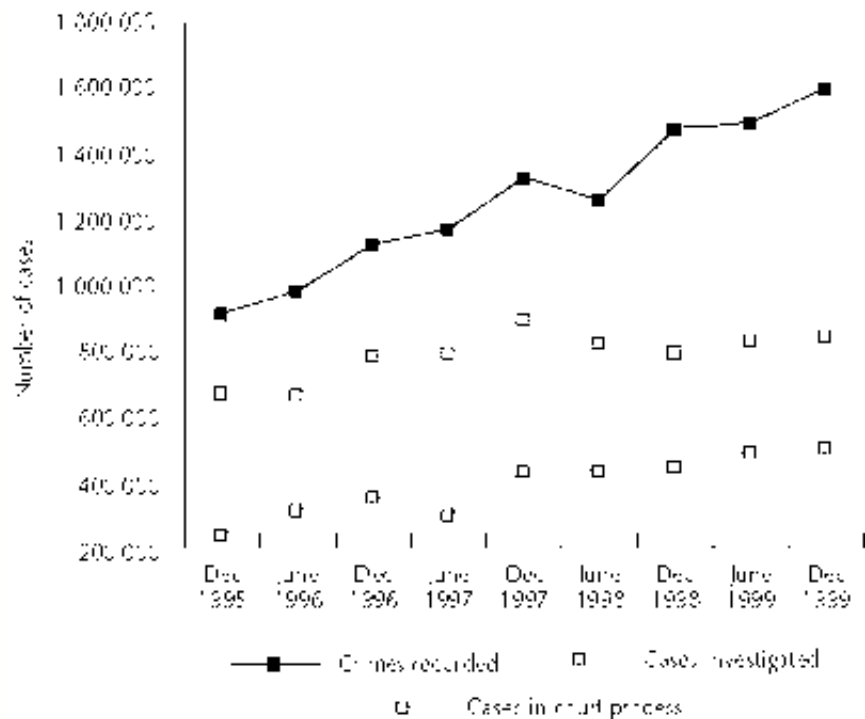
Graph 17: Public prosecutors employed by the department of justice, 1994 - 2000



The figures in this graph refer only to prosecutors who represent the state in the prosecution of offences in the magistrate's courts, where over 95% of all criminal trials take place. 300 Senior public prosecutors, state advocates, chief prosecutors, and directors and deputy directors of public prosecutions are excluded. In October 2000, there were 114 senior public prosecutors and 32 chief prosecutors on the payroll of the department of justice. Senior public prosecutors have managerial and administrative duties and appear in court only rarely; chief prosecutors never appear in court and primarily perform an administrative role. Moreover, in October 2000, there were 370 state advocates representing the state in the various divisions of the high court.

Between the end of 1995 and 1999, the number of crimes recorded by the SAPS increased considerably. Over the same period, the number of cases investigated by the police also increased, albeit to a lesser extent because of an increase in the number of cases which were withdrawn and closed as undetected over this period. Significant, however, is the substantial increase in the number of investigated cases in the court process which more than doubled between December 1995 and December 1999 (graph 18). This is not because of an increase in the number of cases which were sent to court by the police (as the number of cases investigated did not increase by much over this period), but mainly because of an increase in the length of time the prosecution service and the courts took to finalise cases that came their way.

Graph 18: Criminal cases recorded, investigated and in court process, 1995 - 1999



Little research has been undertaken to identify the reasons why the prosecution service experiences such a high turnover of professional staff.³⁰¹ It is, however, possible to identify a number of interrelated reasons which follow below.

Poor pay

Less than private sector

Salaries of prosecutors³⁰² were described as a "national disgrace" by the 1997 interim Hoexter commission report.³⁰³ In early 2001 a beginner prosecutor with a minimum qualification of a three-year legal degree or diploma, earned a gross salary of R58 849 per annum — excluding pension and medical aid benefits and an optional housing allowance.³⁰⁴ Generally, after a three-year period of service, the salary increases to R96 046 per year; and after a further three years of service to R115 227 per year. With a gross salary of under R115 000 after six years of service, most law graduates with good grades do not even consider the prosecution service, while many of the better prosecutors resign as their skills are better rewarded in the private sector.³⁰⁵ It is only after a decade of service that a prosecutor's salary gets close to R150 000 per year (table 3).³⁰⁶

Table 3: Prosecutors' salaries by years of service and rank

Years of service/rank	Salary range
0-18 months	R58 849 – R68 197
19 months – 3 years	R73 303 – R81 779
4-6 years/state advocate	R96 046 – R109 119
7-9 years/state advocate	R115 227 – R123 785
10-12 years/state advocate	R143 822 – R161 162
>12 years/state advocate	R167 780 – R190 279
SPP/senior state advocate	R201 933 – R224 696
Chief prosecutor	R229 545 – R249 081
DDPP	R264 411 – R292 402
DPP	R343 728

DNDPP	R365 211
NDPP	R429 657

The highest salary level a prosecutor can attain is R190 279 per year. There are, for example, a number of prosecutors with 20 or more years of service who have reached the highest salary level and have remained at their salary level for years. Prosecutors can advance beyond this salary ceiling only by being promoted to a senior public prosecutor (SPP) or chief prosecutor position. Such positions are limited, however. In October 2000, there were 114 senior public prosecutors and 32 chief prosecutors in the country. Moreover, many prosecutors do not want to occupy these posts as senior and chief prosecutors primarily fulfil a managerial and administrative function and rarely appear in court. Persons who have prosecuted for 10 or 15 years often have no desire to become office-based managers dealing with day-to-day managerial and administrative problems. Many good prosecutors are also not necessarily good managers and have no managerial training. It would consequently be neither in their nor in the prosecution service's interest for them to swap the courtroom for an office.

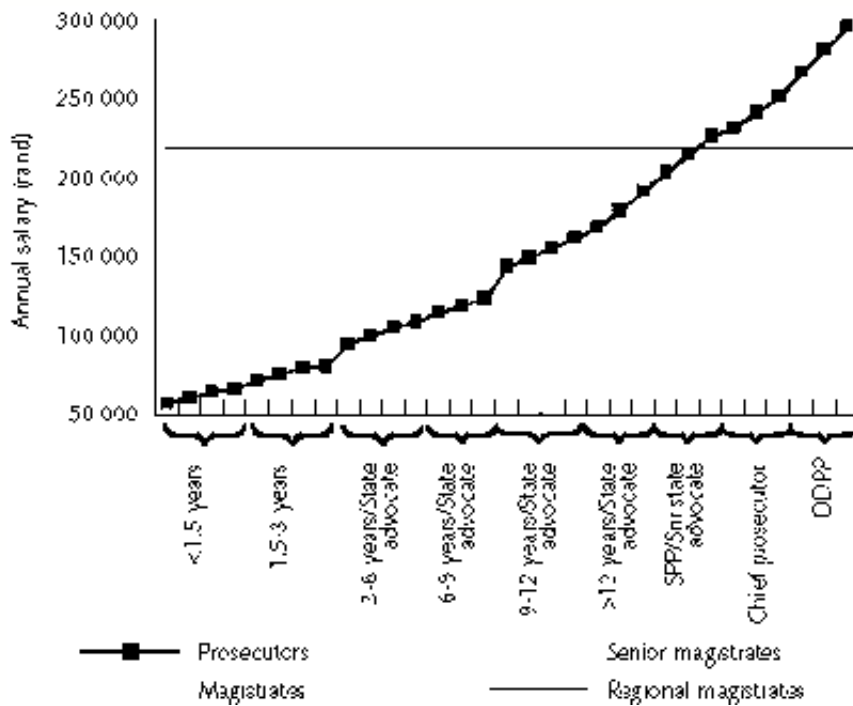
Junior state advocates who prosecute serious crimes in the high court are employed at a starting salary of R96 046 per year and can hope to progress to an annual salary of R190 279. Upon promotion to senior state advocate rank, salary levels increase to between R201 933 and R229 545 a year, depending on seniority and experience. Senior state advocates prosecute the most serious and intricate crimes such as fraud involving hundreds of millions of rand, serial murderers and rapists, and the criminal activities of large organised crime syndicates. By general public service standards, senior state advocates earn a good salary. However, compared to their private sector peers, their salaries are low. A good senior counsel defending a leader of a crime syndicate can realistically expect to earn upwards of R10 000 a day. A senior state advocate's salary can improve only through promotion to the level of a deputy director of public prosecutions (DDPP). DDPP posts are limited (there are between 30 and 40 in the country), and much of their time is spent on administrative and managerial work.

Salary levels for posts above DDPP level are set by statute. The salary of the national director of public prosecutions (NDPP) may not be less than that of a judge of the high court, set at R429 657 per year at the time of writing, and is determined by the president.³⁰⁷ The salary of a deputy national director of public prosecutions (DNDPP) may not be less than 85% of that of the NDPP, and a director of public prosecutions (DPP) may not earn less than 80% of the national director.

Less than magistrates

Adding to prosecutors' unhappiness is a widening salary gap between prosecutors and magistrates. In 1995 magistrates were removed from the public service co-ordinating bargaining council with the result that the magistrate's profession can negotiate its salaries directly with the justice department. The widening salary gap caused tensions between prosecutors and magistrates, and provided experienced prosecutors with a strong financial incentive to apply for magistrate's positions. For example, in mid-1997, the starting salary of a magistrate was R65 300 a year, while a beginner prosecutor earned R40 800 a year (63% of the starting salary of a magistrate).³⁰⁸ By July 1999, the starting salary of a magistrate had jumped to R179 304 a year, while a beginner prosecutor earned R55 257 a year, or less than a third of the salary of a magistrate (graph 19). The national union of prosecutors points out that the difference between the annual salary of a prosecutor with 10 years' experience and that of a magistrate with one year, amounts to about R40 000 less for the prosecutor.³⁰⁹

Graph 19: Salary scales of prosecutors and magistrates



The salaries of prosecutors eventually level out with those of magistrates whose salaries are fixed irrespective of their length of service. However, prosecutors, other than senior state advocates and those in management positions such as senior public prosecutors and chief prosecutors, need more than 12 years of service before they are eligible for the same salary level as that of a newly appointed magistrate. In October 2000, only 21 out of 2 171 prosecutors (or 1%) were earning about the same as magistrates. As a result of the enormous salary discrepancies between most prosecutors and magistrates many able prosecutors seek to become magistrates after acquiring a few years of prosecutorial experience. For example, during the first eight months of 2000, some 52 new magistrates were appointed by the department of justice, of which 48 came from the ranks of prosecutors.³¹⁰ According to prosecutors' unions, 800 of 1 200 applications received for the magistrates' posts came from prosecutors.³¹¹

Prosecutors argue that there should be salary parity between themselves and magistrates. This argument is based on a number of grounds.³¹² First, the minimum educational or legal qualifications required of prosecutors and magistrates are the same. Second, prosecutors and magistrates have similar burdens of responsibility, albeit in different areas of the criminal justice process. Magistrates are responsible for weighing up the evidence presented to them and deciding whether an accused should be convicted or acquitted of the charge against him. Should an accused be convicted, magistrates are responsible for handing down an appropriate sentence. Prosecutors have to make equally important decisions, only one step earlier in the process. Prosecutors have to weigh up the evidence available to them in the police docket and decide whether or not to prosecute a suspect. Should they elect to prosecute, prosecutors have to decide what crime(s) an accused should stand trial for and in which court the accused should be tried.

Third, the daily work routine of prosecutors is more onerous and physically taxing than that of magistrates. 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. Prosecutors, in addition to perusing and

evaluating the information contained in police dockets and formulating charges against accused (which also requires an up-to-date knowledge of legislative developments), have to guide and assist investigating officers in their investigations, consult with state witnesses, present evidence in court, cross-examine accused and defence witnesses, and assist the court in coming to a proper sentencing decision in the event that an accused is convicted. Prosecutors also have to deal with a number of managerial and administrative duties such as managing their court rolls and providing defence lawyers with information contained in the police docket on request.³¹³ Many prosecutors take work home with them as they do not have enough time during their working day to prepare the cases they have adequately to present in court. For example, during 1998, prosecutors falling under the jurisdiction of the director of public prosecutions of the Eastern Cape performed a combined total of 25 752 hours of overtime.³¹⁴

Simmering salary saga

The salary situation of prosecutors has been aggravated by numerous rounds of unsatisfactory salary negotiations and unmet promises of improved salaries by the department of justice. In mid-1996 many prosecutors and members of the society of state advocates of South Africa embarked on a nationwide work-to-rule campaign, marking the first time that a significant number of prosecutors and state advocates participated in any kind of industrial action. The dispute was precipitated by the department of justice's decision to grant magistrates considerably higher salary increases than those of prosecutors or state advocates. The national union of prosecutors of South Africa claimed that the director-general of the department of justice at the time, Jasper Noëth, had given an assurance that "a disparity between the salaries of the prosecutorial component and those of magistrates will never be created."³¹⁵

Prosecutors at busy courts need to work between two to four hours of overtime per day to prepare properly for the next court day.³¹⁶ In terms of the work-to-rule campaign, prosecutors and state advocates worked strictly according to official working hours, refusing to do any overtime. Prosecutors devoted the first few hours of their working day to prepare cases for court — something they normally did after hours at home. As a result, most courts started late and trials were not finalised as anticipated. For example, at the Johannesburg magistrate's court, an estimated 60 court hours per day were lost because of the campaign.³¹⁷ The campaign ended after three weeks, after justice minister, Dullah Omar, promised several measures to improve the position of prosecutors, including paying prosecutors for performed overtime.

In July 1997 prosecutors were disappointed when they received a salary increase of only 7.5%. According to a statement released by the society of state advocates, this was "a simple case of too little, too late."³¹⁸ Countrywide, prosecutors marched and petitioned all attorneys-general to "officially and publicly support the principle that there should be parity between the salaries of magistrates and prosecutors and state advocates, as is the case everywhere else in the world."³¹⁹ Prosecutors also delivered a memorandum containing their grievances to parliament. The director of parliamentary services, who accepted the memorandum, said justice minister Omar was "aware of the prosecutors' problems, and that plans to address them were already under way."³²⁰ Omar himself responded angrily to the complaints and questioned prosecutors' loyalty"

To me it is a question of loyalty and commitment to justice which is at stake. Whilst salaries is important, it is often a smokescreen. During the apartheid years the same prosecutors worked themselves to death out of loyalty to apartheid."³²¹

Omar's comment led a Johannesburg prosecutor to lay a charge of *crimen injuria* (violation of

dignity) against the minister, claiming that the comment had "impaired" his dignity and damaged his "credibility in the eyes of the public."³²²

In January 1998 the department of justice suspended overtime payments to prosecutors as the department's overtime budget had been depleted. Many prosecutors and state advocates responded by refusing to perform further overtime without payment. Five trade unions representing department of justice employees declared a dispute with the department, which was referred for arbitration. Western Cape attorney-general, Frank Kahn, articulated his staff's unhappiness, arguing that the overtime payments had acted as a substitute for lack of salary increases. According to a newspaper report, Omar reacted sharply to this: "I can understand Kahn's feelings. He is an appointment of the old apartheid regime and was the head of the prosecutorial services in the apartheid years," Omar was reported as saying.³²³ After prosecutors went on a go-slow, Omar agreed to reinstate the payment of overtime for up to 40 hours per prosecutor a month.

By November 1998 the justice department had once more depleted its overtime budget and overtime payments were again discontinued. Prosecutors were placated by department assurances that they would receive salary increases before Christmas. However, the promised increase was not forthcoming by the time prosecutors received their December salary cheques.³²⁴ In response, many prosecutors went on a one-day illegal strike after a strike ballot had been circulated among them, bringing many courts around the country to a halt.³²⁵ (Prosecutors are legally prohibited from striking as they perform an 'essential service' in terms of labour legislation. Requests by prosecutors that their profession should be reclassified to allow them to perform only a minimal service in the event of a serious labour dispute have been rejected by the justice minister.³²⁶)

At the end of December 1998 the justice ministry unilaterally announced a 6% salary increase for prosecutors and state advocates, backdated to July 1998. Prosecutors were disappointed as the ministry had created the impression that they would receive increases of around 30% to achieve salary parity with magistrates. The newly appointed national director of public prosecutions, Bulelani Ngcuka, also scoffed at the increase, saying it was insufficient: "Prosecutors are entitled to more and they deserve it. I am bitterly disappointed."³²⁷ The situation was exacerbated when the justice department gave the state advocates' salary increase to state attorneys by mistake, as a result of a computer error.³²⁸ Prosecutors embarked on a new work-to-rule campaign, lasting some two months, which ended only when justice minister Omar guaranteed prosecutors that he would "make every effort" to provide them with interim financial relief.³²⁹

In March 1999 the government and unions representing prosecutors agreed to a performance-linked salary deal.³³⁰ The office of the national director of public prosecutions called the deal historic. "Never has any union signed an agreement with the government that has been performance linked."³³¹ According to Ngcuka:

"it took a lot of ground work and motivation to get the prosecutors to suspend their distrust of the government, as well as the distrust from the government of prosecutors, who as we all know were once the persecutors of the very people who constitute the new government. Getting both sides to agree was a tall order."³³²

In terms of the agreement, prosecutors received a 6% increase backdated to December 1998, in addition to their normal increases as part of an annual 6% increase for the public service from July 1999. Moreover, the agreement provided for a further 3% increase in September 1999

(also backdated to December 1998) provided the following performance targets were met:³³³

reducing the number of awaiting trial prisoners who were granted bail of less than R1 000 by 10%;

reducing the length of time between the first court appearance and the finalisation of the case for awaiting trial prisoners with bail of less than R1 000 to three months;

increasing the average daily time courts are in session to 4.5 hours;

reducing the number of outstanding dockets and inquest reports;

reducing the number of cases on the courts' rolls; and

increasing the number of cases finalised with a verdict.

By May 1999 prosecutors had not received the 6% salary increase agreed upon in March, and prosecutors' unions made an application to the high court to force the government to "immediately and correctly implement previously negotiated salary increases."³³⁴ The justice department blamed the delay on the fact that funds for salary increases for prosecutors came from the budget for the improvement of conditions of service that was administered by the department of public service and administration (DPSA). The DPSA deputy director-general, in turn, blamed the delay on "red tape and the complexity of the agreement."³³⁵ Tempers were further raised when the new justice and constitutional affairs minister, Penuell Maduna, conceded that the justice department had little chance of retaining highly skilled personnel who could earn more money in the private sector. "I don't think there is much, if anything, we can do about it. The department had asked for a R3.5bn budget but had only been given R2.7bn," Maduna said.³³⁶

The salary saga took a further turn for the worse when there was a delay in the payment of the 3% increase, which prosecutors should have received in September (as they had met most of the agreed upon performance targets). By the beginning of December, this increase had not been paid with the justice ministry promising payment "before Christmas" — a promise that was largely kept with only a few prosecutors receiving their increases early in the new year.³³⁸

In May 2000 the unions representing prosecutors formally proposed that all prosecutors' salaries should be linked to the salary of the national director (which, by statute, may not be less than that of a high court judge).³³⁹ In terms of the proposal, a beginner prosecutor, for example, would earn 15% of the national director's salary, or R64 450 per year. This would be equivalent to an increase of about 17% in the annual gross salary of a beginner prosecutor.

In October 2000 salary negotiations between unions representing prosecutors and the justice department once again reached breaking point. The suggestion by prosecutors that their salaries should be linked to that of the national director was rejected. Instead the government offered an across-the-board increase of between 6% and 6.5%. After reaching a deadlock on salary negotiations, a number of prosecutors throughout the country embarked on a go-slow resulting in delays in the hearing of trials. The national director reacted angrily threatening disciplinary action against prosecutors participating in the go-slow that could lead to the suspension and even dismissal of transgressing prosecutors.

"If it means we have to start from scratch in order to build a disciplined core of

prosecutors, so be it. We cannot be threatened, and cannot have this country's democratic system held to ransom by anybody. No one is above the law, including prosecutors," Ngcuka said.³³⁹

At the end of October, Ngcuka indicated that he supported the call by prosecutors for better pay, but that the government's salary offer would be put into effect unilaterally: "What we have received from state expenditure is only enough for us to offer 6.5% to new prosecutors and 6% to higher ranking prosecutors. We just don't have the money to be able to offer prosecutors better pay." According to Ngcuka, the national prosecuting authority had proposed a new salary structure for prosecutors. "We need to sit down and discuss that together with the unions, and we should be in a position at the beginning of next year to implement that structure," Ngcuka said.³⁴⁰ Staff bodies representing the majority of prosecutors and state advocates responded to the salary announcement by declaring a labour dispute with the department of justice to be referred for conciliation.

Prosecutors were also aggrieved by the fact that no money was allegedly available to increase their pay by more than 6.5% while members of parliament had voted salary increases for themselves of between 7% and 15.5% backdated to April 2000, according to an announcement made at the end of October.³⁴¹ A trade union federation commented: "The government accepts the principles that elected leaders should earn as much as their peers in business, but it asks public servants to accept wage restraints."³⁴² The 6% to 6.5% increase came into effect in December 2000. However, due to a bureaucratic blunder, some prosecutors were not paid while others had their increase calculated on old and lower salary scales. The fault lay with the regional offices of the department of justice and the mistake was rectified. However, as a result of the mistake some prosecutors were paid their increases only in January 2001.³⁴³

Matters were further aggravated when prosecutors were not paid performance bonuses at the end of 2000. In October the national director had sent a letter to prosecutors' offices saying that he would seek to pay every prosecutor a once-off R1 000 performance bonus at the end of 2000. When the bonus was not forthcoming the national union of prosecutors was besieged by unhappy prosecutors who had expected the bonus before Christmas. Enquiries by the union with the department of justice revealed that the intended bonus had not been budgeted for and that the national director had not received the necessary authorisation from the department for such an expenditure. In retrospect the department's reason for refusing to finance the performance bonus is surprising. The department expects to underspend on its 2000/01 budget by about R47 million — about 16 times the cost of paying the performance bonus to every prosecutor in the country.³⁴⁴

Poor human resources management

An inherent characteristic of the prosecution service is that ambitious and competent prosecutors have only limited promotional opportunities and challenging career paths available to them. In the smaller centres with one or two district courts, prosecutors remain in their positions unless they are prepared to move house or commute over long distances to the nearest regional court.³⁴⁵

In the larger centres the best prosecutors are generally promoted to the level of senior prosecutors. The courtroom skills of good prosecutors, however, are wasted in such a position. Senior prosecutors rarely, if ever, appear in court. Their primary function is largely a managerial and administrative one. Most good prosecutors elect to become senior prosecutors for the better salary offered by the position, and not because they enjoy the work of a senior prosecutor more

than trial work.

In the high court, junior state advocates can be promoted to senior state advocates who, in turn, can strive to become deputy directors of public prosecutions or even a director of public prosecutions. The last two positions are limited and often involve more managerial and administrative work than the conducting of trials.

For the majority of prosecutors, the potential for professional advancement is limited. Moreover, better skills and greater responsibility are often not rewarded. There is, for example, no difference in salary between district and regional court prosecutors even though the latter prosecute considerably more serious offences compared to the former.

Difficult working conditions

Many prosecutors work in old dilapidated offices, often under unsafe conditions.³⁴⁶ At one of the country's busiest courts, the Johannesburg magistrate's court, prosecutors share offices and telephones. As a result, prosecutors often consult with their witnesses outside the courtroom, sometimes in front of the family of the accused or his lawyer.³⁴⁷ At the Newcastle magistrate's court, five district court prosecutors share one large office.³⁴⁸ In the mornings before the courts go into session, prosecutors consult with investigating officers and witnesses, and have to answer telephones which ring incessantly. This raises stress levels and prevents prosecutors from concentrating on the contents of the dockets they have to read. In one township court, 18 prosecutors share three desks and three telephone lines.³⁴⁹ At other centres, limited space has forced prosecutors to share offices in ageing prefabricated buildings that are uncomfortably hot in the summer months. During hard rains, water leaks through the dilapidated roofs onto files and dockets.³⁵⁰ Many prosecutors cannot use the phones in their offices to make direct calls to cellular phones. This can often be done only from a central phone at their office or by getting permission from a senior staff member first. Investigating officers spend much of their time away from their offices. Prosecutors who urgently need to contact an investigating officer on his cellular phone have to go through a cumbersome and time-consuming routine to do so.

Conditions are exacerbated by a lack of security at many courts, and a general concern among many prosecutors who live in crime-ridden areas about their own and their families' security.³⁵¹ In 1996 the attorney-general for the Witwatersrand local division reported that the area around the Johannesburg high court was a "dirty and dangerous environment, and the dangers have increased. A number of our staff members have been attacked and robbed in the immediate vicinity of the court building."³⁵² In 1999 an Orlando (Soweto) prosecutor narrowly escaped death when a suspect in an armed robbery and rape case opened fire on him just outside the court hitting him in the knee. While he was recuperating in hospital, he and his family felt unsafe with unknown persons calling the hospital to ask which ward he was in. Another prosecutor at the same court was hijacked at gunpoint by suspects in a case he was dealing with. They freed him, but he withdrew charges against them out of fear.³⁵³ At other centres, prosecutors' offices are routinely broken into and personal items and valuables stolen. In 2000 the spokesperson for the minister of justice and constitutional development claimed that members of the Western Cape-based movement, PAGAD (People Against Gangsterism and Drugs) had used the slogan 'one prosecutor, one bullet', an adaptation of the more well-known racist slogan 'one settler, one bullet'.³⁵⁴

For prosecutors living in townships, where many crime suspects reside, and where policing resources are thinly spread and private security services non-existent, threats against them are not uncommon. They risk being attacked by thugs who regard them as sympathisers with the

former regime. Says the national director of public prosecutions:

"Because of the notoriety the South African police gained during apartheid rule, prosecutors are also treated with scorn. And now the criminals seem to have switched from intimidating witnesses and police investigators to prosecutors. That's a fatal blow to our justice system."³⁵⁵

Transformational problems

The process of transforming the department of justice was fraught with difficulties. The post-1994 unified department of justice inherited prosecutors from the old South African department of justice where most prosecutors were white, and the justice departments of the four nominally independent black homelands where the majority of prosecutors were black. Prosecutors steeped in the values of the old authoritarian order had to be convinced of the intrinsic values of the new democratic dispensation and a constitutionally enshrined bill of rights, which often appeared to grant more rights to crime suspects than to victims. The justice department spent millions of rands on human rights books and materials as part of a human rights training programme for prosecutors and other department officials.³⁵⁶ Much of this was accomplished while the justice department, like other government departments, was subjected to tight fiscal discipline.

A shortcoming of the justice department's transformation agenda was its affirmative action policy. The policy, as it applied to prosecutors and state advocates, was badly managed and poorly marketed to those it affects most detrimentally: white and male prosecutors who often have the skills and experience that the department needs most during times of financial constraint. With the rapid turnover of staff, the skills of experienced prosecutors are at a premium. Only experienced and skilled prosecutors can adequately cope with the extra work flooding into the understaffed courts, and mentor the growing number of inexperienced prosecutors.

In the 1994-98 period, a large number of prosecutorial posts were left vacant for long periods. In late 1997, for example, there were more than 150 vacancies among prosecutors and state advocates, and a waiting list of 1 600 law graduates who wanted to fill these positions. In the office of the attorney-general of the Witwatersrand local division, the staff complement during 1997 was 58% below the norm. The lack of professional staff caused the attorney-general, Andre de Vries, to write in his annual report that "we no longer have crisis management, we only manage crises."³⁵⁷

One reason for the slow filling of vacant posts was the department's desire to fill the posts in compliance with its affirmative action policy, preferring to leave posts vacant rather than occupy them with qualified white candidates.³⁵⁸ The 1997 annual report by the attorney-general of the Northern Cape bemoans the fact that the only post of deputy attorney-general had been left vacant for more than two years:

"Keeping the deputy post vacant for so long had an extremely adverse impact on the efficiency of the office, has seriously affected the morale at the office, and has without a doubt been one of the reasons for the spate of resignations by state advocates. Laudable as the ideal of representivity may be, the way the appointment of the deputy had been handled by the authorities has done irreparable harm to this office and cannot be justified."³⁵⁹

In his 1997 annual report, the attorney-general of the Witwatersrand local division complained

that with affirmative action policies in place:

"if no one of the correct population or gender group is found suitable the post is left vacant and persons of merit of any other group are overlooked. Even prosecutors who supported the present government before 1994 are now becoming disillusioned and are leaving. The drain on the prosecution is severe and under the strain large cracks are opening; we are in danger of becoming a haven for the unemployed and unemployable."³⁶⁰

During this time a number of experienced and senior white, male prosecutors and state advocates resigned on the basis that they felt they had no future in the department.³⁶¹

White concerns about their promotional prospects intensified in a well-publicised case where 16 white, male state attorneys with experience ranging from four to 21 years were excluded from consideration for appointment to 30 senior posts advertised by the justice department. Yet, a black woman with only one year's experience in the state attorney's office and limited experience of the law elsewhere was appointed as a deputy state attorney. The overlooked applicants took the matter to the Pretoria high court. The justice ministry contended that the discrimination was justified by two provisions in the 1993 constitution (both of which are found, in modified form, in the 1996 text). The first said that the public service should be made more representative of the population. The second authorised affirmative action.

The judge hearing the case was not convinced that the discrimination was justified on either basis. He argued that the constitution envisaged not only a more representative public service, but also an efficient one. Thus, it was only if white and black applicants were equally experienced that preference could be given to the latter in order to promote representivity without sacrificing efficiency. In addition, affirmative action measures were required not to go beyond what was 'adequate'. They further had to take into account not only the concerns of their beneficiaries, but also the rights of others and the interests of society as a whole. According to the judge, the evidence indicated that affirmative action had been applied "without any discernible rationale", and "in fact amounted to the exclusion of the applicants on the basis of their race." Unfair discrimination had thus occurred, and the white and male applicants had been unfairly discriminated against by the justice minister and his department, the judge held.³⁶²

Justice minister Omar responded by saying that he would appeal against the court's judgement, and that he had acted slowly in implementing affirmative action policy and had given white officials the assurance that they would not lose their jobs. "But I made a mistake. I should not have protected [the white officials]. I should not have gone out of my way for them," Omar said. The society of state advocates replied that it would be unconstitutional for the minister "to fire civil servants with white skins — it's not a feather in his cap that he has not done this, but it's worrying that he regards it as such."³⁶³

Matters improved when the country's first national director of public prosecutions was appointed in mid-1998. Positions that had been vacant for some time were rapidly filled and a number of white and male prosecutors were promoted to senior positions.³⁶⁴ However, Ngcuka remains committed to a forceful affirmative action policy that may do little to allay white fears. Speaking to a group of senior prosecutors from around the country in early 1999, Ngcuka commented:

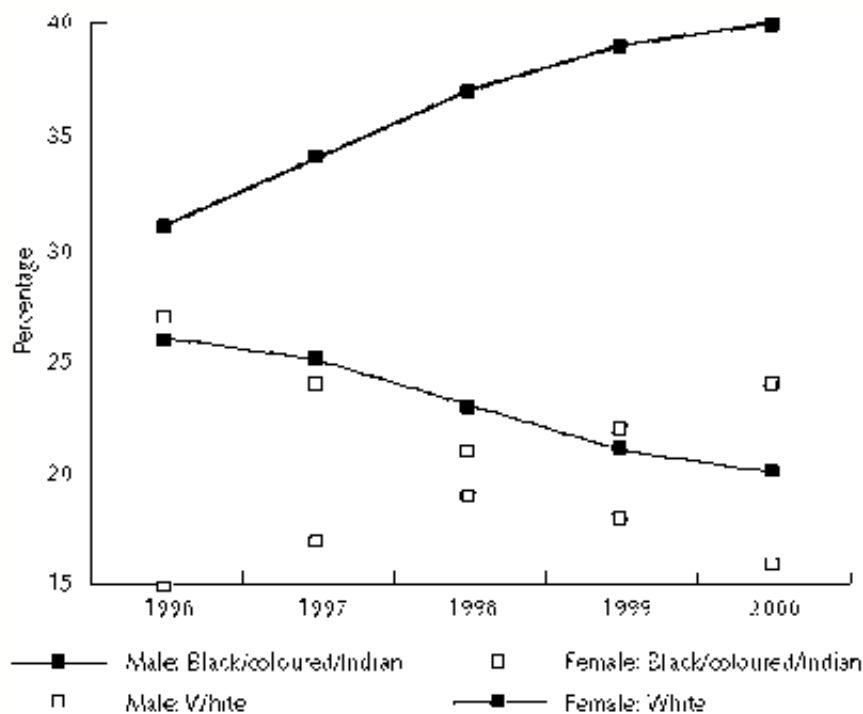
"If I look around this room it is obvious to me that we still have a long way to go before we more closely reflect the demographics in this country ... Not only will we require vigorous affirmative action policy to achieve this but we will also need each

and every person in this room to be committed to such a policy. What it means is that when vacancies open up, the people in this room will do their best to find black people with potential to fill those vacancies."³⁶⁵

Ngcuka's commitment to representivity in the prosecution service, however, is tempered by his desire to retain skilled staff. He concedes that he "would have liked some of the appointments to key positions in the prosecution service to have been black. But we do not have the people. There has to be a balance between skills and representativeness."³⁶⁶

Between 1996 and 2000, the number of white prosecutors and senior prosecutors as a proportion of all prosecutors and senior prosecutors dropped from 53% to 36%, while the proportion of white, male prosecutors dropped from 27% to 16%. Over the same period, the proportion of black, coloured and Indian prosecutors and senior prosecutors increased from 47% to 64%. The proportion of female prosecutors and senior prosecutors increased only marginally over this period from 41% to 44% (graph 20).³⁶⁷

Graph 20: Changes in the racial and gender composition of prosecutors and senior prosecutors, 1996 - 2000



Lack of support

Prosecutors are burdened by a lack of resources limiting their ability to work as effectively as their private sector counterparts. Many prosecutors do not have effective access to even basic information technology equipment. There are prosecutors' offices around the country without facsimile or photocopying machines.³⁶⁸ Many prosecutors do not have access to decided court cases on CD-ROM and up-to-date law journals, giving defence attorneys who do a decided advantage.³⁶⁹ In 1999 a number of prosecutors' offices were supplied with computers and modems. However, many prosecutors have not been trained in the use of computers. As a result, many computers remain unused and are slowly ageing and collecting dust.

No electronic database for the storage of fingerprints of convicted criminals exists. If prosecutors want to ascertain whether an accused or a suspect has any previous convictions, the South

African criminal record bureau manually has to check its archives, which contain a few million fingerprints. On average, it takes six to eight weeks for a set of fingerprints to be checked in this manner.

Prosecutors' offices do not have the capacity to share relevant information between them. If a suspect is released on bail in magisterial district A, and then is suspected of having committed another offence in magisterial district B, the prosecutors' office in the latter district will be unaware that the accused is already out on bail in the former district.

Prosecutors receive little administrative and clerical support. Most prosecutors have to write their own letters, phone witnesses, arrange appointments with investigating officers and witnesses, fax letters and documents, and maintain registers of documents, files and police dockets. Prosecutors also spend lots of time photocopying parts of police dockets on request of the defence.

Poor image

Historically, during the earlier part of the 20th century, prosecutors in the magistrate's courts were normally drawn from the ranks of clerks who were authorised by the local magistrate to act as prosecutors. In the smaller centres, local police officers were frequently used to conduct prosecutions on behalf of the state.

During the last quarter of the 20th century, the status of prosecutors improved. Prosecutors had to have a university level legal qualification to prosecute, and police officers were used only in the deep rural areas to conduct minor trials or postponements. However, until the late 1990s, a senior magistrate had administrative control over the court where he was stationed. Consequently, prosecutors — especially at the smaller centres without senior prosecutors — were in practice in a subservient position to magistrates. The effect of this is expressed in a funny but poignant story about a senior magistrate who took a government savings campaign to heart in the late 1970s. The magistrate came to the conclusion that the staff at the court that he had to administer were using too much toilet paper. Concerned about this the magistrate confiscated all the toilet paper and locked it in a cupboard in his office. Whenever a prosecutor, a magistrate or a clerk needed toilet paper, they had to approach him to be issued with toilet paper: four pieces for a prosecutor and six pieces for a magistrate. When he was criticised about this, he remarked that "if a prosecutor needed more, he could always come back."³⁷⁰ Generally, prosecutors had to approach the senior magistrate to seek permission to take leave, obtain a transfer to another court, or to attend a training course. Even small day-to-day functions such as sending a fax, making a long-distance telephone call, or procuring new stationery could be undertaken only with the permission of a magistrate.

As both the administration and budgets of courts were controlled by magistrates, limited office space and office furniture were usually distributed to the benefit of magistrates and the concomitant disadvantage of prosecutors. In the busy larger court centres where office space is at a premium, it is common to find two or three prosecutors sharing a poorly furnished office, while junior magistrates have their own carpeted offices. Such disparities are also present in the allocation of parking spaces or the preference typists give to the submitted hand-written work of magistrates and prosecutors. While this may seem frivolous to the outsider, in the structured and hierarchical world of the civil service, the preferential treatment given to magistrates over prosecutors served to place the latter in a psychologically subservient position to the former.

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 magistrates' profession could negotiate considerable salary increases directly with the justice department. The widening salary gap between magistrates and prosecutors further served to diminish the stature of the latter.

Inadequate training

A university law course does not sufficiently prepare a graduate for the rigours of prosecuting. Most law courses concentrate on civil law and give relatively little attention to criminal law and procedure, and the law of evidence. A university degree also concentrates on theory rather than the practical application of the law and courtroom procedure, both important aspects of prosecuting.

The Pretoria-based justice college has traditionally offered functional training courses for prosecutors. Prosecutors' courses typically ran for six weeks: the first four weeks comprised classroom tuition; during the last two weeks, students prosecuted in the district courts under the supervision of college lecturers. While useful, two-thirds of the course comprised classroom-based lectures which, in essence, rehashed what prosecutors had already been taught at university. Most of the lectures were also too theoretical, teaching prosecutors little about the day-to-day practicalities they needed to know to enable them to prosecute with confidence.³⁷¹

Moreover, prosecutors were permitted to attend training courses only after they had prosecuted for six to 12 months. By then, novice prosecutors had made many unnecessary mistakes that could have been avoided if the training had been offered to prosecutors before they actually entered a courtroom to prosecute. The courses were not compulsory and many prosecutors did not attend them.³⁷² A three-week advanced course was offered to prosecutors who had already attended the initial prosecutors' course and subsequently acquired at least two more years of prosecuting experience. Again, this course was not compulsory. Moreover, some prosecutors were prevented from attending prosecutors' courses as training budgets were limited and administered by senior magistrates at the courts where prosecutors were stationed. If a magistrate used the annual training budget on, for example, magistrate's training, prosecutors were effectively prevented from attending training courses at the justice college.³⁷³ Some prosecutors — especially those working at busy courts — were not sent away for training at the justice college as this would have necessitated the closing of the court they were working in. This would have caused havoc with their court's roll and created an unmanageable backlog of cases in their courts.³⁷⁴

Some of the bigger centres had a specialist training prosecutor who trained and assisted new prosecutors and provided them with information on important new legal developments. Prosecutors in the smaller centres did not benefit from such support structures. As they also did not have access to law libraries and most law journals, they experienced considerable difficulties in keeping abreast of changing legal developments. Often novice prosecutors were placed in small single-prosecutor courts where they could not seek the guidance of a more experienced prosecutor.³⁷⁵ In these cases, prosecutors usually relied on the advice of the magistrate they were working with. However, this served to undermine the independence of prosecutors as they relied on magistrates to teach them the practicalities of prosecuting. Moreover, with the greater separation between magistrates and prosecutors through the establishment of the national prosecuting authority in 1998, many magistrates stopped mentoring junior prosecutors.

The training of prosecutors improved after the establishment of the national prosecuting

authority. All candidate prosecutors are obliged to attend and pass a six-month basic training course before being permanently appointed as prosecutors. The basic training course comprises a one-month theoretical course at the justice college and 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. Generally, 10 new prosecutors are allocated to each trainer for the five month period permitting considerable individual face-to-face interaction between the trainee prosecutors and their tutor.³⁷⁶

New legal environment

Legal presumptions

South Africa's post-1994 constitutional dispensation guarantees the right of every accused person to be presumed innocent.³⁷⁷ Thus, in any criminal trial, the onus is on the prosecution to prove its case beyond a reasonable doubt. South African common law has long recognised this right. However, before 1994, a number of laws were placed on the statute books 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 offences that they had to rebut by proof on a balance of probabilities to be acquitted of the charges against them. The effect of such presumptions is 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 exists about guilt, results in a conviction of the accused. After 1994 the constitutional court declared a number of these presumptions invalid and unconstitutional:

The Criminal Procedure Act of 1977 provides that a free and voluntary confession by an accused is admissible in evidence against such an accused. Where such a confession is made to a magistrate and reduced to writing, the confession is "presumed, unless the contrary is proved, to have been freely and voluntarily made" by the accused.³⁷⁸ An accused who made an involuntary confession to a magistrate consequently bore the onus of proving that his confession was not made freely and voluntarily. In 1995 the constitutional court ruled that this provision of the Criminal Procedure Act violated the right of every accused person to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.³⁷⁹

The constitutional court's ruling has had a profound effect on the work of the prosecution service — especially regional court prosecutors. Regional courts deal with serious cases and it is common for investigating officers to take suspects, who want to make a confession, to a magistrate. Since the constitutional court's ruling, many defence lawyers argue that their clients' confessions were not made freely and voluntarily. This necessitates the holding of a trial-within-a-trial whereby the prosecution has to prove that any confession before a magistrate was made without duress. This can be a time-consuming task as it involves the calling and cross-examination of witnesses.

The Drugs and Drug Trafficking Act of 1992 provides that, if an accused is found in possession of more than 115 grams of cannabis (dagga), it is presumed that he was dealing in cannabis and will be convicted of the offence of dealing unless he can show on a balance of probabilities that he was not dealing in cannabis.³⁸⁰ In 1995 the constitutional court held that this section was unconstitutional as it infringed on the right of an accused to be presumed innocent.³⁸¹ The Drugs and Drug Trafficking Act also provides that, where an accused is found in possession of any quantity of an undesirable dependence producing substance, "it shall be presumed, until the contrary is proved, that the accused dealt in

such substance."³⁸² In 1995 the constitutional court also ruled this provision of the act unconstitutional because it offended against the accused's constitutional right to silence and the presumption of innocence.³⁸³ Another provision of the Drugs and Drug Trafficking Act holds that "it shall be presumed, until the contrary is proved, that the accused was found in possession of any drug" if such a drug was found in the immediate vicinity of the accused.³⁸⁴ In 1998 the constitutional court declared this provision inconsistent with the constitutional right to be presumed innocent.³⁸⁵

The rulings of the constitutional court have made the prosecution of certain drug-related offences more difficult, especially where the prosecutor handling the case lacks experience and good cross-examination skills. For example, before the constitutional court's ruling, it was relatively easy to convict an accused of possession of drugs even if he discarded the drugs by throwing them into a bush near where he was standing. The onus was on the accused to prove on a balance of probabilities that he had not been in possession of the drugs. Since the constitutional court's ruling, the prosecution must prove beyond a reasonable doubt that the accused actually possessed the drugs. It is extremely difficult to obtain a conviction against an accused for possession of drugs unless the prosecution has a witness who saw the accused throwing the drugs into the bush or the police took fingerprint samples of the packet in which the drugs were wrapped. Only a skilled and experienced prosecutor may be in a position to coax the accused to concede that the drugs belonged to him through a rigorous and lengthy cross-examination process. However, this is time-consuming and possible only if the accused is willing to testify. An accused may not be cross-examined if he does not testify during his trial.

In terms of the Arms and Ammunition Act of 1969, in any prosecution for being illegally in possession of a firearm, whenever it is proved that the firearm was on or in any premises, including any building, room or vehicle, any person who was on, in, or present at or occupying such premises at the time "shall be presumed to have been in possession of the firearm at the time, until the contrary is proved."³⁸⁶ In 1996 the constitutional court declared this provision of the Arms and Ammunitions Act unconstitutional on the ground that it breaches the right to be presumed innocent until proven guilty.³⁸⁷

The constitutional court's ruling has made it almost impossible to prosecute suspects successfully who are found near illegal firearms under suspicious circumstances. This could be where an unlicensed AK-47 (Kalashnikov) rifle is found on the floor of a bus with a dozen passengers who all claim they are unaware of how the firearm got there, or an unlicensed pistol found hidden in a hostel room occupied by four people who all insist on being ignorant of the firearm's presence. In both cases the prosecution service has little hope of convicting anyone of possessing an illegal firearm unless the police had the foresight of taking fingerprint samples from the firearm under investigation and matching these with an occupant of the bus or hostel room.³⁸⁸

Until May 2000, the General Law Amendment Act determined that a person who received or acquired stolen goods (other than at a public sale) had to show that he reasonably believed that the stolen goods in his possession were legitimate.³⁸⁹ Where an accused was unable to dispel this onus of proof, he could be convicted of the statutory offence of receiving stolen property with the knowledge that it was stolen. The constitutional court upheld a ruling of the Witwatersrand local division of the high court declaring the reverse onus provision contained in the law unconstitutional.³⁹⁰ While the ruling has made it more difficult for the prosecution to obtain a conviction, the high court argued that the law remained a powerful crime-fighting tool. Under the revised law, the prosecution does not

have to prove that the accused knew the goods in his possession were stolen, but only the absence of a reasonably held belief that the goods are legitimate.³⁹¹ While the court has a valid argument, it is nevertheless not an easy task for an inexperienced prosecutor with limited cross-examination skills to prove beyond a reasonable doubt that an accused lacked a reasonably held belief that the goods in his possession were legitimate.

Limited use of reverse onus possible?

The constitutional court has held that legislation that reverses the onus of proof, and thereby relieves the prosecution of the burden of proving an essential element of an offence, offends against the right to a fair trial. Such legislation is generally unconstitutional and can be saved only by the limitations clause in the bill of rights. According to the limitations clause, a constitutionally enshrined right, such as the right to be presumed innocent, may be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society taking into account such factors as the nature of the right, the importance of the purpose of the limitation on the right, and the relation between the limitation and its purpose.³⁹²

The constitutional court, for example, has upheld a reverse onus in a challenge to the National Road Traffic Act of 1989. The act provides that, for the purpose of proving a driving offence in terms of the act or the common law, it is presumed, until the contrary is proved, that such a vehicle was driven by the owner.³⁹³ The court held that the presumption was triggered only when criminal conduct had been proved and that it was rational to presume that owners of vehicles drive them, or are aware of who is driving them. It was not unfair to ask a driver to prove to the court that someone else was driving the vehicle.

According to a 1997 amendment to the Criminal Procedure Act, an accused charged with certain serious violent crimes must be detained awaiting trial, unless he “adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit the release of the accused.”³⁹⁴ This obliges the accused to relinquish his right to silence in order to get bail, potentially providing the prosecution with evidence against him. In a 1999 ruling, the constitutional court upheld the provision on the basis that the limitation on the right of an accused, charged with serious violent offences, to be released on bail is reasonable and justifiable in terms of the constitution’s limitations clause, taking into account the high levels of serious violent crime in the country. The court also argued that it was not dealing with a reverse onus that carries the risk of conviction despite the existence of a reasonable doubt, as the law applied to the provision of bail only.³⁹⁵

As a means of circumventing constitutional court rulings against the reversal of the onus in criminal matters, legal drafters use civil remedies to combat crime, as with the civil asset forfeiture provisions in the Prevention of Organised Crime Act of 1998 (see section on the asset forfeiture unit above).³⁹⁶ Alternatively, legal drafters seek to change the elements of the offence, as with a proposed change to the definition of rape. According to the common law definition of rape, the state must prove beyond a reasonable doubt that the complainant did not consent to sexual intercourse. A 1999 South African law commission discussion paper on sexual offences proposes that the absence of consent to sexual intercourse should not be an element of the offence of rape. While the accused would be able to raise consent to sexual intercourse as justification for his unlawful conduct, the

onus of proof would be on the accused to show that such consent was in fact given.³⁹⁷

There has been a subtle but noticeable trend among some legal practitioners to place the constitutional rights enjoyed by accused persons into perspective and place more emphasis on the public's right to be protected from criminals. Writing in the journal of the South African Bar in 1998, judge Kees van Dijkhorst of the Transvaal provincial division of the high court called on the courts to "stop bending over backwards to accommodate the accused." He went on to propose the re-examining of the accused person's right to silence as this right was detrimental to the proper administration of justice.³⁹⁸ In 1999 the judge president of the Transvaal, Bernard Ngoepe, suggested that some aspects of the constitution may have to be reconsidered:

"People are beginning to argue that the constitution is too criminal-friendly. They say they have seen people who, despite strong evidence against them, were acquitted on mere technicalities ... If, and I say if, it is the fault of the constitution that criminals escape arrest and conviction, then it must be revisited."³⁹⁹

The office of the national director of public prosecutions has proposed legislative changes to compel accused persons to disclose the basis of their defence, rather than the prosecution alone being forced to divulge its case. According to a spokesperson for the national director's office, "[c]riminals are getting away with murder. The system has to be fair; unlike now where it is heavily weighted in favour of the accused."⁴⁰⁰

Bail legislation

A 1997 amendment to the Criminal Procedure Act significantly altered the law as it applied to the granting or denial of bail to accused persons.⁴⁰¹ The amendment came into effect in August 1998 and places an onus on persons accused of serious violent crimes to show why they should be released on bail. 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.

The 1997 amendment to the bail law has placed additional responsibilities on prosecutors and generally increased the number and length of time of formal bail applications taking place in the country's courts. The impact of the amendment has been felt especially strongly in the regional courts where few formal bail applications were heard in the past. Since the 1997 amendment came into effect, bail applications in respect of accused charged with serious violent offences must be heard in the regional court unless exceptional circumstances dictate otherwise.⁴⁰²

Juvenile accused

A 1996 amendment to the Correctional Services Act radically altered the manner in which unconvicted young persons could be detained awaiting trial.⁴⁰³ According to the amendment, children under the age of 14 may not be detained in a prison or police cell for more than 24

hours after being arrested, but must be placed in the care of their parent or guardian or in a place of safety.

Children between the ages of 14 and 18 years may not be detained in a prison or police cell for more than 48 hours, unless a judicial officer has reason to believe that the child's detention is necessary and in the interests of justice and the security of the public, and no secure place of safety is available within a reasonable distance of the court for the detention of the child. However, children aged between 14 and 18 years must be detained in a prison if they are accused of having committed a serious violent crime which would warrant such detention. Under such circumstances, children detained in prison need to be brought before the court every 14 days for the court to reconsider its detention order. For a court to make a finding that a child should be detained in prison, the prosecution must present oral evidence on the risk of the child 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.⁴⁰⁴

The new law significantly increased the workload of prosecutors for a variety of reasons. First, cases involving child offenders are often postponed to give the investigating officer enough time to locate their parents or guardians so that such children may be placed into their care. Every postponement uses court time as the case docket has to be procured, the accused child physically brought before court, and the prosecution must address the court to advance reasons why a postponement is sought. Under certain circumstances, the prosecution also has to call the investigating officer to give evidence to the effect that the accused child's parents or guardians are untraceable. Second, where children are sent to prison awaiting trial, they have to appear in court at 14-day intervals, a process which further takes up the time of the court and the prosecution.

Third, with age being a crucial determinant of whether an accused child is sent to prison or to a place of safety (or home with his parents), most adult accused with youthful looks claim to be under the age of 18 years. The prosecution then has to send such accused to the local district surgeon so that an age assessment can be performed. Should the accused dispute the district surgeon's assessment, the prosecution has to lead the evidence of the district surgeon to convince the court of the correct age of the accused. As a disproportionately large number of accused are in the age group 18 to 20 years, prosecutors devote much time and effort on persuading judicial officers of the correct ages of accused persons.⁴⁰⁵

Fourth, many awaiting trial children escape from the places of safety to which they have been allocated, or abscond from the care of parents or guardians. Young accused are more likely to commit crimes in groups (such as burglary, assault, robbery and shoplifting) compared to their adult counterparts. It is not unusual for the police to arrest a group of four or five children who are all suspects in the same investigation. If even one accused from such a group disappears, the whole case usually has to be postponed until the accused is found and rearrested, by which time another accused from the same case may have disappeared. Moreover, if even one of the accused from such a group is detained in a prison, the case can be postponed for only 14 days at a time. On each postponement day, the accused, their lawyer(s), and the parents or guardians of any children who have been released into their care have to appear in court to enable the judicial officer to postpone the case correctly. The case is usually postponed every time any one of these people fail to appear in court on the allocated day.

Seven months for a guilty plea

Below follows the timeline of an actual case that is symptomatic of the various

factors that may delay the finalisation of a straightforward case involving a child. In this case, a 16-year old male was charged with housebreaking:

13.12.1999:	First court appearance. The case is remanded for the accused child's guardian to be notified of the arrest of the accused and for the guardian to appear in court to assist the accused.
28.12.1999:	Guardian is not found, and the case is remanded again for the guardian to appear in court.
14.01.2000:	Guardian is still not found, and the case is once more remanded for the guardian
28.01.2000:	Guardian attends court. The case is remanded for a public defender to be allocated to the accused and for the public defender to attend court.
30.03.2000:	Public defender attends court, and the case is remanded for the accused to plead to the charge and for the witnesses to be subpoenaed for the trial
06.04.2000:	The police docket fails to arrive at court on the trial date. The case is remanded to establish whether the docket still exists (ie that it has not been lost or stolen), and for it to be given to the prosecutor.
25.04.2000:	The docket is found and arrives at court. The case is remanded for the accused to plead to the charge and for the witnesses to be subpoenaed again for the trial.
05.05.2000:	The legal representative of the accused (the public defender) withdraws from the case. The case is remanded for the accused to obtain a new legal representative.
17.06.2000:	The accused appears at court without a legal representative, but informs the court that he wants to plead guilty to the charge against him. The charge is put to the accused and he pleads guilty and is convicted by the court. The case is remanded to permit the accused to be interviewed by a probation officer who is instructed by the court to compile a report on the accused and suggest an appropriate sentence.
30.06.2000:	The probation officer's report is not finalised and the case is remanded for the report.
10.07.2000:	The probation officer's report is still not finalised and the case is remanded again for the report.
24.07.2000	The probation officer's report is submitted to the court and the accused is sentenced to two years imprisonment at a juvenile detention centre.

Right to information

In the past, the information contained in a police docket was considered privileged information which the prosecution did not have to reveal to the defence. This changed in 1995 when the constitutional court ruled that the 'blanket rule' prohibiting an accused from obtaining access to the police docket was too wide and infringed on an accused person's right to a fair trial.⁴⁰⁶

The ruling had far-reaching implications for the prosecution. On a practical level, prosecutors are burdened with obtaining dockets from the police and photocopying large parts of the contents of a docket to make this information available to the defence. This is a time-consuming task that cannot always readily be given to clerks as some parts of police dockets — such as the names of police informants — remain privileged information. In intricate and serious cases, prosecutors devote considerable time perusing dockets and deciding what information to make available to the defence. Dockets are also often misplaced, lost or even stolen. For example, it is estimated that 350 dockets disappeared in Gauteng alone during 1999.⁴⁰⁷ Cases are often

postponed to enable investigating officers to locate them. This causes delays in the court process and burdens prosecutors with additional work.

Some accused — especially professional criminals and those working in the organised crime milieu — misuse their right to access information contained in the police docket. Such criminals familiarise themselves with the prosecution's case in order to fabricate a defence that can exploit any weaknesses in the police's investigations. Moreover, unscrupulous criminals use witness statements to identify witnesses who may testify against them and then see to it that such witnesses are intimidated not to testify, or to testify so badly that the prosecution's case is fatally weakened.

With access to the written statements of state witnesses, defence lawyers can exploit any inconsistencies between the oral testimony made by a witness in court and the statement the witness gave to a police officer weeks and even months before the trial. In fact, a 1999 report compiled for the national director of public prosecutions revealed that, for high court cases, an average of 520 days pass between a case's first appearance in court and the day the case is finalised.⁴⁰⁸ No accurate figures are available for the lower courts, but the delay is likely to be in the region of three to 12 months.

The 1995 constitutional court ruling permitting the defence in a criminal trial to have access to most witness statements enables good defence lawyers to find inconsistencies in the testimony of even the most honest witnesses. This is because witnesses cannot remember everything they observed at the crime scene months before, or because their written statements contain some inconsistencies with their actual observations. This is exacerbated by the fact that most civilian witnesses have not been inside a courtroom before. Such witnesses are often intimidated by boisterous and aggressive cross-examining defence lawyers who can make potentially good and truthful witnesses seem uncertain and contradictory in the witness box. Experienced prosecutors are usually able to rectify any inconsistencies in statements by their witnesses by carefully guiding them through their testimony. However, as has been pointed out above, the average experience level of prosecutors is low. Defence lawyers also take up large amounts of precious court time cross-examining state witnesses on trivial and minor inconsistencies between their written statements and their oral testimony in court with the hope of confusing such witnesses and thereby inflicting a fatal blow on their credibility.

Most witnesses make an oral statement to a police officer shortly after they observed the commission of a crime, or were a victim of crime themselves. At this time, most people are traumatised by what they saw — especially in cases of serious violent crimes. As a result, many witnesses give incomplete statements or leave out crucial aspects of what they observed. Moreover, many police officers are notoriously bad statement takers and have great difficulty writing down a coherent and logical statement from a witness. This is exacerbated by the fact that the police officer taking the statement is often not proficient in the language in which the statement is given.

In a courtroom environment, the correct interpretation of a word or a phrase can mean the difference between an acquittal and a conviction. In a multilingual country such as South Africa, confusion can easily arise in cases where the home languages of the witness, the police officer who writes down the witness statement, and the prosecutor are different. The importance of good and precise communication between the different roleplayers in a criminal prosecution, and a competent and experienced prosecutor, is highlighted by the proceedings in an actual rape trial. The complainant in the trial was a conservative young woman whose home language was not English. She was forced to perform oral sex on the accused before she was raped by

him. In her written statement — which was in English — it was clear that her assailant forced her into performing oral sex on him. The prosecutor in the case did not have the time to speak to her before she gave her evidence. When he called her to the witness stand to testify against the accused, she made no mention of the oral sex because, as she revealed later, she was embarrassed to talk about it in the open courtroom. She also did not think this was an important aspect of the state's case, as the main charge against the accused was one of rape only. According to the prosecutor of the case, there was a real danger that he could have lost the case if the complainant left out such an important aspect of her written statement. The experienced lawyer defending the accused would have undoubtedly raised this, and claimed that the complainant was fabricating her version of events. His client's defence was that he had gone out with the complainant for some time, that they had consensual sex on the day in question, and that she was charging him with rape out of malice for breaking their relationship.

Frustrated, the prosecutor sought to prod his witness into testifying about what happened to her prior to her rape. At the risk of being reprimanded by the magistrate for asking a leading question, the prosecutor asked her directly whether she had engaged in oral sex with the accused on the day she was raped. She vehemently denied this. The prosecutor asked her the question in some other ways, but always received the same response. Eventually out of desperation, and sensing that his witness seemed confused by his questioning, he asked her whether she had ever before engaged in oral sex. She responded shyly by saying that she had done so on the odd occasion, but then only with her close girlfriends. It was only then that it occurred to the prosecutor that his witness did not know the true meaning of oral sex. She thought that it meant talking intimately about sex, not performing an actual sexual act. Realising this, the prosecutor managed to salvage his case by explaining to his witness what he meant by oral sex. He then asked her to tell the court whether she had ever engaged in such an act. Having finally understood the meaning of the question, she told the court what happened on the day of her rape.

Quality of police work

The success of a prosecution is largely determined by the way a crime is investigated by the police. A poorly investigated case where no statements are taken from potentially corroborating witnesses, incomplete or inaccurate statements are taken, or where evidence is obtained in an illegal manner, is likely to result in the acquittal of a guilty accused. Even a good prosecutor — let alone an inexperienced one — will find it difficult to salvage a case where crucial aspects of its investigation are flawed. An experienced prosecutor will detect such flaws in most instances before a badly investigated case goes to court for trial. However, even under such circumstances, it is time-consuming for a prosecutor consistently to have to double-check the investigations of the police.

Since 1994 prosecutors have become increasingly reliant on properly investigated cases. The bill of rights guarantees every accused the right to a fair trial with the result that laws that used to place an onus on accused to disprove certain allegations against them have largely been declared unconstitutional (see 'legal presumptions' above). The courts have also become more reluctant to accept evidence that is obtained under suspicious or unlawful circumstances.

Many prosecutors argue that the general quality of the police's detective work declined in the post-1994 period.⁴⁰⁹ This was partly to be expected. Before 1994 the South African Police (SAP) used authoritarian policing methods and tough law enforcement strategies to combat crime. Frequently using a 'confession-driven' approach to solving crimes, many SAP detectives were more concerned about getting crime suspects convicted than upholding the law and conducting

investigations in a legally correct manner.⁴¹⁰ Moreover, by the late 1980s and early 1990s, much of the operational focus of the SAP shifted from combating crime to repressing political opponents of the government.

After 1994 the newly formed SAPS was burdened by the amalgamation of the old SAP and a number of homeland police forces, and by having to adapt to a new constitutional order based on the rule of law. A liberal bill of rights granting constitutionally entrenched protection to those accused of having committed a crime requires that the police investigate all crimes in a procedurally and legally correct manner. Moreover, because of poor pay, transformational problems, a dangerous working environment and tempting employment opportunities in the burgeoning private security industry, many experienced detectives left the SAPS.⁴¹¹ The departure of experienced personnel and the consequent decline in the experience level of the average detective detrimentally affect the operational effectiveness of the courts and the prosecution service. As one senior official at the Johannesburg magistrate's court comments:

"Inexperienced investigators don't always know what they should investigate and they're not getting the guidance that they should. That means court cases take longer and there are many postponements instead of one. And when it takes longer and longer to go to trial, witnesses disappear and the investigating officer sometimes changes."⁴¹²

At the end of 1999, the outgoing national commissioner of police, George Fivaz, conceded that close to a quarter of SAPS members were 'functionally illiterate'.⁴¹³ Almost 35 000 police officers have a grade 10 (standard 8) qualification or lower.⁴¹⁴ The low educational levels of many police officers make it difficult, and even impossible, for them to write down complaints, fill out dockets, give articulate testimony in court, or fulfil any but the most basic policing duties. In the post-1994 era, such deficiencies have contributed towards the decline in the performance of the prosecution service.

Flawed investigations lead to acquittals

In 1999 an accused charged with assault, robbery and murder was acquitted in the Cape Town high court because of discrepancies between the testimony given by the various police witnesses, and unsatisfactory evidence given by a key police officer in the case. Rejecting the evidence handed to the court by the police, the judge, Dennis Davis, said it was unfortunate that during the apartheid era, police had relied almost exclusively on confessions to obtain convictions. They generally ignored other forms of detective work which could have produced suitable evidence for court. The old approach could not continue because the constitution demanded a form of policing that took the accused's right to a fair trial into account. In his judgement, judge Davis said:

"There is a need for a major campaign to ensure that the police move away from confessional policing and towards investigative techniques which are congruent with civilised and efficient standards of policing as required by the constitution ... If the courts were to accept improperly obtained statements they would encourage policemen to resort to vicious and evil practices. Due process is essential to the wellbeing of society."⁴¹⁵

A man charged with the possession of explosives, including grenades (and with possible links to PAGAD) was acquitted in the Cape Town magistrate's court in mid-1999 because of procedural deficiencies in the police's

investigation of the case. The trial magistrate said the police had unlawfully searched the house of the accused without the necessary search warrant – which they could easily have obtained. The search without a warrant had been “blatantly unconstitutional ... and was typical of the state of our country’s criminal investigation system,” the magistrate said.⁴¹⁶

Snowball effect

Many of the problems besetting the South African prosecution service are not new. The remuneration of prosecutors has never been very good, human resources management in the service has always been poor, and the practical training received by prosecutors has been inadequate for some time. Moreover, some of the problems are not unique to the South African prosecution service and exist in one form or another in many prosecutors’ departments throughout the world.

However, taken together, the reasons listed above to explain the poor performance of the prosecution service have undoubtedly had a major debilitating effect on prosecutors’ performance. The reason for the fairly dramatic decline in the performance of the South African prosecution service in the 1990s has not been the existence of one or two problems only, but the conglomeration of all the factors discussed above. It is this combination of problems occurring more or less concurrently, coupled with consistently rising levels of crime, that severely undermined the ability of the prosecution service to function effectively.

For example, the departure of experienced personnel has plagued the prosecution service for some time. However, prosecutors tended to stay in their posts for longer periods before resigning in the past. The scale of resignations — approximately every third prosecutor resigned over a five-year period in the mid-1990s — was larger than anything previously experienced by the modern South African prosecution service. In the past, therefore, new and inexperienced prosecutors had a better chance of receiving enough assistance and guidance from their more experienced colleagues (and magistrates) to enable them to become proficient prosecutors without any formal prosecutorial training.

With the large-scale resignations in the mid-1990s, new prosecutors often have difficulties finding a sufficiently experienced colleague to provide them with reliable advice or assistance when they are faced with an unexpected problem in their daily work. Obviously most larger court centres have experienced prosecutors. However, because of the substantial workload, the small number of experienced prosecutors are frequently stretched to capacity, dealing with their own cases and other managerial responsibilities. Because of the stricter separation of the magistracy from the prosecutorial profession, most magistrates are loath to assist inexperienced prosecutors to the extent that they did in the past.

Today’s new prosecutors are also faced with a bigger workload, a tougher legislative environment, and generally poor investigative work by police detectives. In the past, new prosecutors remained in the district courts for some time, prosecuting relatively minor crimes such as traffic offences and shoplifting where they could afford to learn from their mistakes. The acquittal of a driver guilty of ignoring a stop street or a shoplifter who stole a shirt is unfortunate, but unlikely to have any significant impact on public safety or the administration of justice in the country. Because of a lack of experienced personnel relatively inexperienced prosecutors are currently more rapidly promoted than what was the case in the past. It is, for example, not unusual for a prosecutor with 12 to 18 months experience to work in a regional court, handling

murder, rape and armed robbery cases. The acquittal of persons guilty of these serious crimes invariably impacts on the public's confidence in the criminal justice system and public safety generally.

Once the number of resignations and workload levels reach a certain point, the decline in the performance of the prosecution service can quickly snowball out of control. For example, compared to a more experienced colleague, an inexperienced prosecutor invariably requires more time to prepare and finalise a trial. The larger the proportion of inexperienced prosecutors at a busy court centre, the longer trials take to be finalised and the greater the backlog of cases that builds up. The greater the backlog of cases, the more cases are placed on a court's roll with the result that many cases are not finalised on their allotted days. Prosecutors consequently spend increasing amounts of time postponing incomplete cases and placating witnesses and crime victims frustrated about the delays in the court process, instead of prosecuting and finalising trials. As a result, even fewer cases are completed and the backlog in the number of incomplete trials increases further. Moreover, the longer the delay in the completion of a trial, the greater the likelihood that witnesses forget important aspects of their testimony or that accused abscond. This causes further delays as prosecutors have to spend more time interviewing witnesses and reacquainting them with their written statements, and the police on tracing and arresting absconded accused. As this process intensifies, prosecutors spend less time on prosecuting criminals, and increasing quantities of energy on dealing with postponements and irate witnesses. This invariably has a frustrating and stressful effect on prosecutors, enticing those with sufficient skills and experience to seek employment elsewhere. Consequently, the proportion of inexperienced prosecutors rises even further, exacerbating the vicious spiral that causes the prosecution service to become increasingly ineffective and demoralised.

Chapter 8

MISSION POSSIBLE:

IMPROVING THE PROSECUTION'S PERFORMANCE

Doing the possible

It should be clear by now that the performance of the South African criminal justice system as a whole can be substantially enhanced only if the effectiveness of the prosecution service is also improved. As long as the prosecution service functions poorly, crime will continue to pay for the unscrupulous as a large proportion of criminals are acquitted, or not even prosecuted, of the crimes they commit. This negatively affects public faith in the prosecution service, the courts and the whole criminal justice system. One of the more serious consequences of the public's disillusionment with the ability of the state to punish those guilty of committing crimes is rising sympathy and even support for vigilantism and crime victims taking the law into their own hands.⁴¹⁷

A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to accused persons' request for bail, the number of awaiting trial prisoners who are housed in the jails of the department of correctional services increase to unmanageable levels. If prosecutors fail to convict many of the guilty accused who have been tracked down and apprehended through much effort by the police and its detective service, police morale is lowered and precious police resources are wasted. Given the central role of the prosecution service in the criminal justice process it is crucial that it functions both efficiently and effectively

to enable the whole system to operate smoothly.

The good news is that it is possible to improve the effectiveness of the prosecution service substantially. There are a number of reasons for this. First, compared to the other core criminal justice departments, the prosecution service is small. The SAPS employs approximately 125 000 people (of which 105 000 are police officers), and the department of correctional services employs some 30 000 prison warders. The South African prosecution service, by comparison, is made up of just under 2 500 prosecutors and state advocates.⁴¹⁸ Personnel-related and transformational problems should therefore be more manageable and quicker to address in the prosecution service than in the police or prison service.

Second, unlike virtually all other government departments, the prosecution service is staffed exclusively by university graduates. All prosecutors possess at least a B Juris degree, with many holding a Bachelor of Laws (LLB) degree. The prosecution service is consequently staffed by 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.

Third, the national prosecuting authority has identified most of the weaknesses and problems that impinge on the ability of the prosecution service to function effectively. Little time and few resources consequently need to be expended on identifying such weaknesses and problems. There is also general unanimity among the staff in the office of the national director of public prosecutions, and prosecutors working in courts throughout the country, about what the major obstacles are that need to be removed to rectify the situation in the prosecution service. There is thus no need for drawn-out internal debates and discussions about identifying the problems that are besetting the prosecution service.

Fourth, the creation of a new national structure in terms of the national prosecuting authority under the leadership of a national director in mid-1998 has given prosecutors a significant political voice. The national director initially also managed to boost the morale of prosecutors. It is crucial, however, that the new structure is able to deliver and boost the performance of the prosecution service without undue delay lest prosecutors lose faith in the ability of the national prosecuting authority to make a difference.

Improved and diversified remuneration

Better salaries are affordable

There is little doubt that one of the primary reasons underlying the high staff turnover in the prosecution service — and the resulting low experience and performance levels of prosecutors — are the inadequate salaries paid to prosecutors. A careful analysis of the national budget and the government's expenditure priorities reveals that a substantial salary increase for prosecutors is affordable.

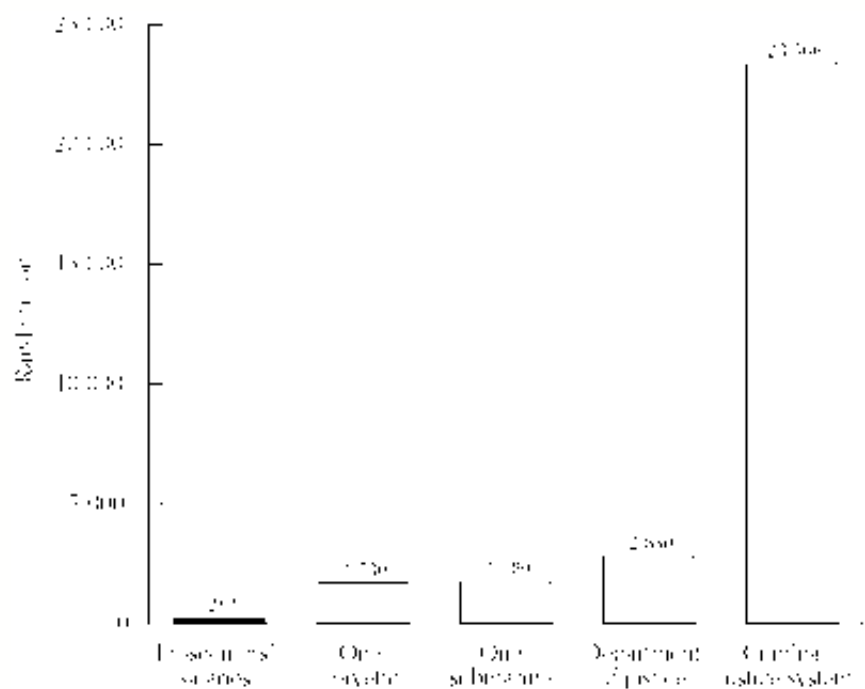
In mid-2000, the annual salary bill for the country's prosecutors was R252 million.⁴¹⁹ Over the 2000/2001 financial year (including a salary increase backdated to July 2000), the national salary bill for prosecutors is estimated at approximately R263 million.⁴²⁰ The claim by the state treasury and the department of justice that a substantial salary increase for prosecutors is unaffordable, is not supported by the facts. In the 2000/2001 budget year, the total annual salary bill for prosecutors amounted to about 10% of the justice department's budget, and about 1% of the money spent on the three core departments of the criminal justice system (safety and security, justice and correctional services). Prosecutors' salaries amounted to only 0.0001% (or

a ten-thousandth) of state expenditure for the 2000/2001 budget year.

During times of slow economic growth and limited state resources, the finance minister has the unenviable task of distributing a limited budget to needy government departments. The money spent on the prosecution service has to come from somewhere. Every additional rand spent on prosecutors means one rand less for someone or something else. It is not being suggested that fewer houses are built for the poor or that less money is spent on education to enable the government to boost the salaries of prosecutors. It can be argued cogently, however, that crime is of foremost concern to all South Africans. There is also little doubt that the safety of South Africans, the viability of South Africa as an investment and tourist destination, and even the stability of the state (considering the prevalence of organised crime, urban terrorism and vigilantism) are threatened by persistently high levels of serious and violent crime. Given the importance of reducing crime in South Africa, state expenditure on issues less important than an effective prosecution service needs to be lowered.

South Africa faces no discernible military or naval threat in the foreseeable future. Yet, in terms of a cabinet decision made in late 1998, South Africa will procure defence force equipment to the value of at least R30 billion over the next few years.⁴²¹ In terms of the procurement package, South Africa will purchase, among others, three submarines and four corvettes. The purchase price of either one submarine or one corvette is equal to almost seven times the annual salary bill for all the prosecutors in the country (graph 21).⁴²² In other words, the savings that would result from the purchase of either one submarine or one corvette less would allow the state treasury to finance a doubling of prosecutors' salaries for a three-year period.

Graph 21: Expenditure on prosecutors' salaries compared to other selected budget items, 2000/2001



All prosecutors below the level of director are public servants whose salaries are determined by the justice minister after consultation with the national director of public prosecutions and the minister of public service and administration, and with the concurrence of the minister of finance.⁴²³ It is argued that it is difficult for the state to provide prosecutors with substantial salary increases without granting such increases to all other public servants of similar rank. There are

a number of arguments to be made for treating prosecutors differently in terms of salaries and conditions of service, compared to public servants generally. First, the reduction of crime is one of the most important goals of the vast majority of South Africans, and the prosecution service plays a crucial role in the state's fight against crime. There is little doubt that low salaries are one of the main reasons for the large number of resignations of prosecutors that directly affect the effectiveness of the prosecution service. Second, the formal qualifications and skills of prosecutors are directly transferable to the legal profession in the private sector, and the services of good prosecutors are in demand by law firms. This cannot be said for most other public servants. The skills and qualifications of prison warders, soldiers, diplomats, or even teachers cannot be transferred to the private sector as easily, nor is there as great a demand for their services in the economy. Third, prosecutors' salaries are low compared to that of their private sector peers. This is not the case with most other public servants. For example, most private security officers do not earn better salaries than police officers, and only teachers working at the best private schools receive substantially better remuneration packages than their public sector counterparts. Finally, the constitutional provision that the prosecuting authority "exercises its functions without fear, favour or prejudice" implies that there should be some separation between the country's executive and the prosecuting authority. Such a separation would be underscored by removing the prosecution service from the public service as was done with the magistrates' profession in 1995. Moreover, the salaries of the national director, deputy national directors and directors are linked to that of a high court judge. There seems to be no logical reason why the salaries of all prosecutors should not be linked in this manner.

Reward competence

The existing salary structure for prosecutors rewards loyalty over competence and ability. The longer a person works as a prosecutor, the higher his salary tends to be. In theory there is some merit in such a system as it seeks to encourage prosecutors to remain in the prosecution service, thereby retaining their accumulated experience and knowledge. In practice, however, the best prosecutors are not always those who have been in the system the longest. Moreover, good prosecutors, whose skills are in high demand in the private sector, are generally unlikely to stay in the prosecution service to benefit from the higher salaries offered by the system to those who remain long enough.

A district court prosecutor with 10 years' experience earns more than twice as much as a specialist regional court prosecutor with two years' experience. The responsibilities of a district court prosecutor are limited, however. A district court deals with relatively minor offences and can impose a maximum period of three years' imprisonment only. A specialist regional court prosecutor, by contrast, is likely to work in a court dealing with serious and difficult to prosecute offences such as car-hijacking, fraud involving large sums of money, or sexual offences committed against children. An accused convicted by a regional court can generally be sentenced to a period of imprisonment of up to 15 years. Because of the different sentencing jurisdictions of the two courts, it is also the case that specialist regional court prosecutors are often opposed by first-rate lawyers while accused in the district courts tend to be defended by junior attorneys. Good regional court prosecutors are thus on a par with — if not better than — the best criminal trial lawyers from the private sector.

In the above example, the reason why the former prosecutor works in a district court after 10 years of service is either because he works in a small town or rural area where there is no regional court, or because he lacks the skills and ambition to prosecute at a regional court level. To have been promoted to a specialist court after two years of service, the regional court

prosecutor is likely to be skilled and competent. While the prosecution service would benefit more from retaining the skills of the regional court prosecutor than his district court colleague, it is the latter who is paid more. The regional court prosecutor is relatively poorly paid within the prosecution service, and his ability and skills are in greater demand by the legal profession in the private sector. The prosecution service is consequently more likely to lose the services of the regional court prosecutor than those of his district court colleague.

Since mid-1999 the court management unit of the national prosecuting authority can track the performance of individual courts. The unit also has a database of all prosecutors in the country, their experience levels and academic qualifications. The unit has proposed the development of a 'personal performance management system' to establish personalised job descriptions for every prosecutor in the country.⁴²⁵ Performance targets could then be set for individual prosecutors on the basis of, among others, their qualifications, skills, workload, experience levels and access to administrative and clerical support. Performance targets would have to be determined and negotiated between individual prosecutors and their seniors. This will inform prosecutors of what is expected of them, and put them in a position where they can elect to achieve or even exceed their agreed upon performance targets. Promotions and bonuses could then be linked to prosecutors meeting, or ideally exceeding objectively verifiable performance targets that are selected in an equitable and transparent manner.

Private sector subsidisation

Innovative solutions are required to enable the state to generate additional funds for the prosecution service. One such solution, which has been proposed by a South African company, is the purchase of court buildings by private sector companies.⁴²⁴ Selling existing infrastructure would generate revenue for the state. This could be used to boost prosecutors' salaries or provide them with additional resources such as computers, or it could be invested to generate a continuous income for the state.

A private company purchasing a court building would rent it to the state for the latter's use. Moreover, court buildings in townships and other underdeveloped areas could be given a multipurpose function. For example, attached to a court building could be a bank's automatic teller machine (ATM), pension payout points, and water and electricity pay points. This provides a benefit to both the provider of the service and the consumer. An ATM connected to a court building is less likely to be stolen or vandalised, while the user of the service will be better protected, as many court buildings are guarded on a 24-hour basis.

The idea is not limited to financial services. Newspapers, groceries and other goods required on a daily basis, could be sold at a venue connected to a court. Other services such as doctors' rooms and attorneys' offices could be attached as well. Eventually, courts could form the centre of a retail node for the area where they are situated. The providers of the services, such as banks, newspaper sellers, Eskom and the post office, would pay a fee or rent to be able to operate on the property of a court. The income generated from these ancillary non-court services could be used to subsidise the court. This private sector subsidisation would allow the private operator to rent the court building to the state at a low cost.

In conjunction with prosecutors and their unions and staff associations, the court management

unit should place a weighting on a variety of performance-related variables that could influence salary levels. For example, in addition to the current one variable that links salaries to experience levels, variables measuring prosecutors' work output, and the type of court they are working in should also determine the level of remuneration they receive. Variables of which the attainment is of greater benefit to the prosecution service and the criminal justice system as a whole, such as prosecution and conviction rates, should carry more weight than variables of which the attainment is of limited benefit to the system, such as the neatness of a prosecutor's office. In this way, prosecutors will be motivated to perform well at aspects of their work that can make the greatest impact on the state's fight against crime.

Regional salary variations

Because of its limited resources it is unlikely that the state will ever be in a position to match the remuneration of all state prosecutors to that of their private sector peers. Given this limitation, what should be done to enable the prosecution service to retain the skills of the best prosecutors?

First, there should be a correlation between prosecutors' remuneration and their skills and responsibilities. Generally, regional court prosecutors should be better paid than their district court counterparts. Applying the same principle, good specialist prosecutors who deal with, for example, intricate fraud prosecutions involving millions of rand or serious cases of child abuse, should earn more than prosecutors who deal with car theft or housebreaking cases.

Second, prosecutors working in the larger urban areas should earn more than those working in smaller towns and in rural areas. There are a number of reasons why such a system is not as unfair as it may appear, and would reduce the number of good prosecutors who leave the prosecution service to take up offers of employment in the private sector:

Urban courts tend to be busier than courts in smaller towns and rural areas. The number of cases and decision dockets an urban prosecutor deals with in an average month is higher than in less populated parts of the country. Generally, large cities also produce a greater variety of serious crimes than smaller towns and villages. For example, computer-related fraud, cash-in-transit heists, crimes involving organised crime syndicates, and car-hijacking cases are more prevalent in the large urban centres compared to more rural areas. Moreover, as cities generate more wealth and employment opportunities for the legal profession than rural areas, the best defence lawyers tend to be located there. Prosecutors working in the large urban centres are consequently frequently opposed by skilled defence lawyers, especially in respect of accused who are involved in the organised crime milieu — which is more prevalent in urban areas. This is less the case in more rural areas where crime suspects have less money and fewer good defence lawyers to choose from. Urban prosecutors thus have to develop levels of expertise often not required of their small town and rural colleagues.

Because cities generate greater economic activity and crime, they contain more lawyers and law firms. City lawyers earn more than their small town and rural counterparts. The salary differentials between prosecutors and defence lawyers are highest in the metropolitan areas. Urban prosecutors consequently have more opportunities of obtaining not only employment in the private sector, but also of substantially improving their salaries should they do so.

The cost of living is higher in the larger cities compared to smaller towns and villages.

Property prices, rentals, transport expenses and insurance costs are considerably higher in the cities. Difficult to quantify quality-of-life costs also tend to be higher in the larger cities. For example, a prosecutor working at the Johannesburg magistrate's court is likely to live in an affordable suburb or township some 30 to 50 kilometres away. Such a prosecutor will spend, on average, one to two hours per day travelling to and from work. If the prosecutor is using his own vehicle, he will have to contend with parking expenses, wear and tear on his vehicle, substantial petrol costs and high vehicle insurance costs applied in the Johannesburg area. By comparison, a prosecutor working at the Springbok magistrate's court in the Northern Cape is unlikely to live more than a five to 10 minutes drive away from his place of work. The Springbok prosecutor not only saves a lot of money on lower transport and living expenses, but has some five to 10 hours (about the equivalent of a working day) more free time per week.

Prosecutors working in a small town or village generally are more esteemed and respected members of the community than their city colleagues. In a small town, a prosecutor is part of a small university educated élite whose stature is further emboldened by the fact that he would have spent some years in the city to attend a university to obtain a law degree. The earnings of a prosecutor working in a small town are high in relation to the those of the community in general. A prosecutor working in a small rural town in the Northern Cape is likely to be among the top 5% of earners in his community. A city prosecutor, however, is just one of many university educated people in his community with a fairly ordinary income for a white-collar worker. In the northern suburbs of Johannesburg most executive secretaries earn more than prosecutors with less than six or so years of experience.

Rural and small town courts are frequently single prosecutor courts (there are 149 such courts in the country). In such courts, a prosecutor's court day ends once the trials for the day are finalised. At regular intervals — a day every week or fortnight — the magistrate at such a court deals with civil trials. On such days, the prosecutor does not appear in court. The prosecutor at a court with only one courtroom spends more time out of court compared to his urban colleagues. Out-of-court work is less stressful and provides a prosecutor with time to peruse police dockets and prepare for forthcoming trials. District court prosecutors in busy urban courts rarely have this luxury. Once their court's trials are completed for the day, they assist their colleagues by taking on trials that other busier courts are unable to finalise on that day.

A prosecutor at a small rural court quickly gets to know the individual police officers and detectives. Such a prosecutor is able to build up a good and often personal relationship with many of the police officers who bring cases to court and who testify in court. In the investigation of serious and complicated cases, the prosecutor can provide his input and guidance to the police on a sustained basis, thereby ensuring that the investigations meet all the legal requirements to enable their successful prosecution. In a small town or village, a prosecutor can also assist and guide those police investigators in his district who lack the skills or knowledge to investigate cases properly. A prosecutor working in a small court consequently has the advantage of knowing which police officer's investigations he can rely on and whose work does not need to be double-checked for possible mistakes. A prosecutor at a busy urban court deals with a much larger number of police officers and is frequently confronted with police dockets containing investigations conducted by officers he does not know. Such a prosecutor has to spend a greater proportion of his time checking the work of investigating officers whose dockets he has to use for the purposes of prosecutions.

In a small town or village, where there are only a small number of police officers, it is a relative easy and fast process to trace a lost police docket, or for a prosecutor to obtain a docket from the police station. In a large urban court, lost dockets are not easily traced and it can take a day or more for a prosecutor to obtain a docket from one of the many police stations serving the court he works in. In a small town, police officers often do not have to travel far, for example, to confirm the address of an accused in a bail application, to find the guardians of a juvenile accused, or to verify an unexpected alibi of an accused. In a large urban centre, where travelling times are longer and the anonymity of the city permits an accused to live at an address where he is unknown even to his neighbours, it often takes the police longer to accomplish such tasks. This can contribute towards delays in the court process at urban court centres.

It is not suggested that prosecutors at small rural courts have an easy working life. Rural courts are usually far away from the closest prison. As a result, trials and bail applications are often delayed as court staff have to wait for prisoners to be transported to court. In villages where there is only one court, the lone prosecutor has no one to turn to for advice or assistance, other than picking up the telephone and consulting his senior. Such a prosecutor is also obliged to fulfil all the functions of a prosecutor from discussing traffic fines with members of the public and negotiating maintenance payments with defaulters, to conducting trials and inquest enquiries. For these reasons, it is often difficult for the prosecuting authority to fill vacancies in small rural courts.

Nevertheless it should be clear from the factors above that prosecutors in the larger cities should generally be paid more than their rural counterparts, because prosecutors in the large metropolitan centres tend to have a larger workload and higher cost of living expenses. Moreover, in the urban centres, there is a bigger private sector market demand for good prosecutors. The lower the salaries of prosecutors, the greater the likelihood that the best will leave the prosecution service to join a law firm or go into private practice. Both in the interest of an equitable remuneration regime and an effective prosecution service, regional salary differentials should be introduced. Great care will need to be taken, however, in implementing such a diversified salary system lest it creates undue tensions between urban and rural prosecutors. Any such changes in the salary regime will have to be negotiated with prosecutors' unions and based on objectively verifiable criteria.

No broken promises

Social scientist, J C Davies, in an article entitled 'Towards a theory of revolution', argues that the cause of revolution and social unrest can be traced to a psychological factor: the relative deprivation subjectively felt by a given population group:⁴²⁶

"Revolutions are most likely to occur when a prolonged period of objective economic and social development is followed by a short period of sharp reversal. People then subjectively fear that ground gained with great effort will be quite lost. Their mood becomes revolutionary."⁴²⁷

In the period of sharp reversal, a sudden and in many cases intolerable gap comes about when people begin to realise that their expectations will no longer be fulfilled. In other words, there is an increasing discrepancy between what 'is' and what in the people's minds 'ought' to be in the period of reversal. Essentially, Davies expounds a 'J-Curve' theory as an explanation of revolution. "Revolutions need both a period of rising expectations and a succeeding period in

which they are frustrated." ⁴²⁸

It is not being suggested that South African prosecutors are budding revolutionaries. Interviews with prosecutors, however, do suggest that the morale of prosecutors is at its lowest at the point where promises of salary increases are reneged on. This is because promises and even intimations of salary improvements bring about a period of 'rising expectations' among prosecutors. When such expectations are frustrated, feelings of anger and dissatisfaction set in, leading to go-slow campaigns, wild-cat strikes, lower levels of productivity and the resignation of prosecutors from the prosecution service. This partly explains the high number of resignations after 1994. In the post-1994 period, especially with the creation of the national prosecuting authority, prosecutors were convinced that their salary demands would be given the necessary attention by the government for the first time. When this did not come about, prosecutors' disillusionment was greater than it would have been if their expectations had not been raised in the first place.

To prevent, or at least limit periods of disillusionment and anger, it is crucial that official pronouncements about salary increases and better service conditions for prosecutors are made with the utmost care. It would be better for government officials to avoid making any promises, or give any assurances about improving salaries if there is even the slightest likelihood that such promises and assurances cannot be met. Once made, all promises should be met down to the last detail. If, for example, a promise is made to increase salaries by 10% 'before Christmas', then an increase of 9.5% on 25 December is not acceptable. Promises need to be kept or else not made at all.

Career management

Young ambitious graduates want to be able to develop their careers in an ongoing manner. This is difficult in the public service where top positions are limited and promotions are determined as much by seniority and length of service as by skills and ability. This is also the case in the prosecution service. By law, there is only one national director and four deputy national directors of public prosecutions. If the incumbents of these offices only retire in 10 years' time, then even the most skilled and ambitious director of public prosecutions will have to exercise patience should he want to be promoted to one of these positions. Given these limitations, what can be done to provide law graduates with a rewarding career in the prosecution service?

There should be enough different positions within the prosecution service to provide prosecutors with a wide range of promotional opportunities and areas of specialisation. Much has been achieved in this regard since the establishment of the national prosecuting authority. The ranks of chief prosecutor, deputy national director and national director have been established. Specialised positions, such as those of investigating director and special director, have also been created. Specialised units, such as the asset forfeiture unit or the sexual offences and community affairs unit, have been set up. Compared to the position before 1998, prosecutors have a wider choice of career paths and more areas of specialisation in which to develop and hone their particular skills. More needs to be done, however.

In the private sector, employees develop their careers by learning new skills and taking on more responsibilities. Employees are enticed to develop their careers through financial incentives and the greater prestige more demanding and responsible positions bring. Similar principles should apply in the prosecution service. Prosecutors who take on more work and greater responsibilities should not only earn more, but should also be rewarded in other ways to enhance the prestige of their more demanding positions. District court prosecutors who become

regional court prosecutors, normal prosecutors who become control prosecutors, or general prosecutors who become specialist prosecutors for difficult to prosecute offences, should be rewarded financially with higher salaries. Other enticements and rewards should be offered to prosecutors who progress in this way. For example, as far as practical, every specialist fraud prosecutor should have a laptop computer with the necessary software to be able to access documents, relevant court decisions and statutes quickly during the course of a trial. A fraud prosecutor should also be entitled to attend appropriate training courses and seminars to develop and enhance his skills and remain up-to-date with the latest methods and techniques of fraud syndicates.

Because incentives not only reward but also entice, care will have to be taken that prosecutors are not accepted for positions for which they lack the skills and experience. Promotions must never occur automatically. Promotions should be granted only to those prosecutors who have the ability and aptitude to excel in the positions they have applied for. Once promoted, prosecutors will have to meet certain minimum performance targets. Should prosecutors fail to perform adequately, it must be possible to demote them back to the position they were in before their promotion. Such a hard-line approach will serve to enhance the status of responsible and specialised positions in the prosecution service. It will be common knowledge that such positions are occupied by the best prosecutors. This will provide ambitious young prosecutors with a career goal to work towards, while the incumbents of such positions remain motivated by the benefits of these positions.

More emphasis needs to be placed on career development and human resource planning in the prosecution service. After a person has worked as a prosecutor for a year and has a good grasp of what the work of a prosecutor entails, he should be assisted by a professional human resources specialist to identify his interests, strengths and weaknesses. Such a prosecutor should receive the necessary assistance and guidance in planning a medium to long-term career path in the prosecution service. Once this has been accomplished, assistance in the form of training courses and professional development training should be provided to assist all prosecutors in advancing their envisioned careers within the service. This will enable the prosecution service to develop better prosecutors, boost morale among its professional staff, and retain the services of its good and ambitious prosecutors.

Presently, long-serving prosecutors can advance beyond a certain salary ceiling only if they successfully apply for senior positions, such as that of senior public prosecutor or chief prosecutor. Many senior positions in the prosecution service primarily revolve around office-based managerial and administrative functions. A chief prosecutor, for example, never appears in court to prosecute a case, while a senior public prosecutor does so only very rarely. The litigation and courtroom skills of many experienced prosecutors are lost once they are promoted to senior positions where they have to focus their energies on office-based work. Prosecutors generally acquit themselves well in court because they enjoy prosecuting. The adage that people are good at what they enjoy doing is valid for prosecutors. Yet, for prosecutors to advance their careers and improve their salaries, the system obliges them to sacrifice that part of their work at which they excel. This is demoralising for the prosecutors concerned and undermines the effectiveness of the prosecution service. This is exacerbated by the fact that many good prosecutors are not good managers or administrators. This is not surprising as prosecutors are trained in the law and rarely have any management training or qualifications. Senior managerial and administrative positions in the prosecution service should be filled by people with the necessary training and qualifications. This would release many able and experienced prosecutors from their desk-bound positions and permit them to do what they are good at: prosecute offenders. It is crucial, however, that the relatively low salary ceilings for

court-based prosecutors are abolished. There is no logical reason why, for example, a good and experienced specialist fraud prosecutor dealing with cases involving millions of rand should not be able to earn as much, and more, as a senior public prosecutor or even a chief prosecutor.

Humdrum duties of a deputy director

A deputy director of public prosecutions earns a gross salary of between R264 410 and R292 402 per year, depending on the level of experience. An average deputy director is likely to have between 10 and 20 years of prosecutorial experience, much of it prosecuting serious cases in the high court. A deputy director reports directly to a director of public prosecutions. It is consequently the second highest ranking position in the office of the national prosecuting authority for a particular seat of the high court. A 1999 study of the offices of the directors of public prosecutions revealed the extent to which a deputy director at one of the offices was responsible for administrative duties.⁴²⁹ The duties of this particular deputy director included:

checking the telephone register on a monthly basis, that is, checking that trunk calls were made for official purposes and, if not, that the costs were recovered from callers personally;

authorising orders for items such as stationery and furniture;

authorising payment requests;

checking the furniture register monthly, ie checking that the furniture appearing in the register is in fact present and that the furniture is in the office to which it has been allocated;

checking the fax register monthly – for the same reason as checking the telephone register;

checking the overtime register on a monthly basis;

checking circulars of the director of public prosecutions to ensure that these have been compiled and sent to the various prosecutors' offices in the region;

checking the confidential correspondence register;

checking the register of important keys; and

preparing the monthly budget and expenditure reconciliation.

Reducing the workload

Saving time and money

From the available evidence it is clear that there are too few prosecutors to deal effectively with the work that comes their way. The solution is to appoint more prosecutors. This is an

expensive solution and one that will make a difference in the medium to long term only. Newly appointed prosecutors lack the experience and practical skills to prosecute serious offences effectively during the first few years of their appointment.

The proposals that follow below, if implemented correctly, can reduce the workload of prosecutors in the short and long term. Some of the proposals have the added advantage of specifically seeking to reduce the amount of time prosecutors spend on activities that are peripheral to their primary function. It is the core function of the prosecution service to guide the police in their investigations and prosecute guilty accused successfully. Much of the time and energy of prosecutors are consumed by administrative and clerical matters, and dealing with petty offenders who often do not need to be tried, convicted and punished by a formal court process. These activities not only detract prosecutors from their core functions, but have a demoralising effect as prosecutors join the prosecution service to prosecute offenders and not to become administrators and bureaucrats.

Diversion

Diversion is the channelling of prima facie cases from the formal criminal justice system on certain conditions to extrajudicial programmes, at the discretion of the prosecution.⁴³⁰ Two important factors emerge from this definition. First, there must be a prima facie case. That is, should the case not be diverted and proceed through the normal criminal justice process, it is likely to result in a conviction. Second, diversion is not limited to the preconviction stage. Diversion includes any action taken at any stage in the criminal justice process that takes a case out of the conventional process of charge, plea, trial, conviction and sentence. In practice, the vast majority of cases are diverted at the pretrial stage.⁴³¹

Diversion is based on the premise that the formal criminal justice system with its familiar steps of arrest, trial, conviction and sentence is not the only recourse to criminal justice. There are other ways in which to treat offenders and their victims, which will serve them and society in a more constructive manner.⁴³² One of these ways is diversion that, among others, aims to make offenders accountable for their actions, identify underlying problems motivating offending behaviour, provide educational and rehabilitative programmes to the benefit of all parties concerned, and reduce the caseload of the formal justice system.

Diversion programmes reduce the number of cases processed by the formal court system. The effectiveness of a good diversion programme is demonstrated by a drug court in the US city of Miami in Florida. Between June 1989 and March 1993, approximately 4 500 accused (representing nearly 20% of all persons arrested in the county and charged with drug offences) entered Miami's diversion and treatment programme. Among accused who successfully completed the programme, only 11% were arrested again in the year following their participation.⁴³³

Diversion programmes have been in existence in a number of countries for decades and operate with great success.⁴³⁴ In South Africa, the first formalised diversion programmes for child offenders were initiated by non-governmental organisations (NGOs) in the early 1990s. Diversion in South Africa is still in its early stages, and while diversion is identified as a component of a number of the government's criminal justice policy proposals,⁴³⁵ there exists no legislation or regulations to govern a uniform diversion policy for the country. Given the benefits of diversion, properly structured diversion programmes should be implemented in most parts of South Africa for cases such as:

child offenders who commit relatively minor crimes;

young adults and students who shoplift or break into a house or a car in a thoughtless moment of recklessness or as part of a juvenile dare and whose future could be permanently impaired by a criminal record; and

adults guilty of certain victimless crimes such as drug and driving-related offences.

Diversion programmes reduce the workload of the courts and the prosecution service, especially in respect of minor and less serious offences. This permits the prosecution service to focus more of its energies on the prosecution of serious crimes and career criminals.

The costing of the draft Child Justice Bill disclosed that diversion programmes for child offenders should cost less than the traditional and formal court-centred approach of dealing with young offenders.⁴³⁶ The formal court process is labour intensive and expensive. A magistrate's court is staffed by a judicial officer, a prosecutor, an interpreter, and one or two court orderlies on a full-time basis. The work of the court is further supported by a clerk of the court, management and administrative personnel at the court, legal aid officials, security officials at the court, and police and prison personnel who guard accused at the court and transport them to and from the court. Other indirect expenses include department of justice personnel and officials at the office of the director of public prosecutions of the region who are responsible for their staff at the court. They must ensure the smooth running of the state's bureaucracy: that salaries are paid, pension payments invested, medical aid claims reimbursed, and records kept of, for example, bail monies and fines paid at the court. Finally, the court generates expenses pertaining to the upkeep of the court building, the insurance of its contents and other miscellaneous expenses such as water and electricity payments and the cost of the property on which the court is situated. It is realistic to assume that every court hour costs the state thousands of rand in direct and indirect expenses. Such expenses are the same irrespective of the issue the court is dealing with. A murder or robbery trial is likely to cost the state as much per court hour as a trial dealing with a shoplifter or a person charged with urinating in public. Given the state's limited financial resources, it would be prudent to divert as many of the latter type of offences away from the formal and expensive court system to allow the courts to concentrate on serious crimes.

It is likely that South Africa's vibrant civil society and NGO sector can successfully provide certain diversion programme services, thereby reducing the costs of such programmes to the state. Innovative approaches to diversion can also contribute to cost savings. For example, a child offender in a diversion programme entailing compulsory school attendance could have his adherence to the programme verified by his teacher, instead of a state official specifically employed to perform such a function. In this way, no extra personnel needs to be employed to monitor the offender's compliance with the programme.

In South Africa the national institute for crime prevention and the rehabilitation of offenders (NICRO) has been the primary provider of formal diversion programmes for child offenders. For example, a total of 6 600 cases were dealt with by NICRO between September 1997 and August 1998.⁴³⁷ While no enabling legislation is in place, the diversion programmes offered by NICRO are widely accepted and have been implemented in practice in many urban areas of the country. However, because of an absence of clear guidelines, inconsistencies exist in the kinds of cases considered for diversion.

Such inconsistencies and the lack of clear guidelines in respect of child offenders can be

addressed, according to a South African law commission report and a draft bill on child justice, released in July 2000.⁴³⁸ The report envisages a cohesive child justice system that strives at all times to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions. The proposed system aims to ensure that children (ie persons under the age of 18), accused of less serious offences, are afforded the opportunity through diversion to be held accountable outside of the criminal justice system. The implementation of the proposed Child Justice Bill would not involve the establishment of new courts nor, for the most part, the employment of additional personnel. It is estimated that the state would save R200 million per year once a comprehensive child justice system, as provided for in the bill, is operational.⁴³⁹ The proposed child justice system would substantially reduce the amount of energy and time spent by the criminal courts, generally, and prosecutors, specifically, in dealing with child offenders.

The draft Child Justice Bill describes the purposes of diversion as:

encouraging child offenders to be accountable for the harm caused by them;

providing an opportunity for victims to express their views, encouraging restitution, and promoting reconciliation; and

reintegrating child offenders into their families and communities, preventing stigmatisation and preventing child offenders from acquiring a criminal record.

The draft bill sets out a list of diversion options on three levels.⁴⁴⁰ Level one includes simple agreements that can take the form of an order, including requirements such as supervision and guidance, compulsory school attendance or refraining from frequenting a particular place. Apology and restitution of items to a victim are also options included in level one. Level two diversions include payment of compensation to victims or charities, or community service.

Pretrial community service

NICRO's pretrial community service programme is a diversionary option that allows an offender to serve a certain amount of hours at a non-profit organisation in his free time without payment. Charges are withdrawn on condition that the service is completed within a given time at a minimum number of hours per month. According to NICRO, the pretrial service programme is a success with over 95% of participants complying with their service contracts.⁴⁴¹ The programme was started in the early 1990s at the request of senior prosecutors. They were concerned about the many cases where prosecution was not the best option, but wanted the offender to be held accountable and take responsibility for the crime. Cases complying with any of the following criteria can be considered for pretrial community service:

The offence is fairly minor.

The accused admits to committing the offence and shows remorse.

It is not in the best interest of the offender, the victim or society that the offender is convicted.

The accused is a first offender.

The community service serves some purpose of reparation.

Restorative justice options such as referral to a family group conference or victim-offender mediation are also included in level two.⁴⁴² Level three diversion options include referral to programmes that have a limited or periodic residential requirement (such as camps or a specialised centre), and community service for up to 12 months. Where a child is no longer attending school, he may be referred to a full-time vocational or educational programme for up to six months.

Arbitration and mediation

Arbitration and mediation precede the creation of organised judicial systems. More than 2 500 years ago, societies developed informal mechanisms, much like arbitration and mediation, to resolve disputes.⁴⁴³ Many of the criminal cases heard in the lower courts today focus on factual rather than legal disputes. Such cases require a minimal application of the law. These cases, however, are filling the court rolls beyond capacity.

Arbitration is a substitute for a court trial. It involves a hearing and an enforceable decision, but the process takes place outside the court system, thus avoiding many of the delays, expenses and stresses associated with litigation. Arbitration is usually quicker than litigation. It is also more convenient as hearings are set up at a mutually acceptable time and place. The selected arbitrator can be an expert on the offence in question, for instance domestic violence or reckless driving, which aids in shortening the presentations of the parties and in producing a sensible result.⁴⁴⁴

Mediation seeks to provide a way of resolving disputes without recourse to the vagaries of the courts, allowing both parties to retain control and to voice their grievances under the supervision of a mediator. The mediator makes no decisions and any resolution is reached by mutual agreement of the two parties. In practice, mediation may vary considerably from operating as a direct alternative to adjudication, through court-based schemes taking referrals from the courts prior to sentencing, to meetings between victims and offenders already in custody.⁴⁴⁵

In the US, arbitration and mediation are used to reduce caseloads in the criminal courts. Such alternatives have the advantage over the formal court system that the needs of victims are adequately addressed. The following analysis, which looks at the position of victims of crime in the formal state-run US legal system, is equally applicable to South Africa:

"Victims [of crime] feel abused and betrayed by the system when the conviction does not reflect the nature of the acts committed, and the penalty is disproportionately small in relation to the suffering and hardships that have resulted. In addition, victims and other witnesses are expected to attend repeated court hearings where they are taken for granted or ignored entirely. They are rarely informed of continuances or informal dispositions that make their presence unnecessary. They must endure the anxiety of waiting for hours upon end, often in the same room with, or even seated beside the person against whom they have been called to testify. They are expected to assume the financial hardship that the loss of their time entails, a hardship that can sometimes exceed the punishment that results for the defendant if he is convicted. In a very real sense, the victim and witnesses of crime become the victims of the criminal justice system itself."⁴⁴⁶

In Rochester, New York, a programme has been in operation since 1973 whereby less serious criminal charges are referred for arbitration. In terms of the Rochester programme, minor criminal charges are converted into civil actions that are submitted by the parties to the

arbitration. The rationale for the project is not only that the courts are relieved of a host of private minor complaints, but that the disputes themselves are resolved in a more effective and positive way.⁴⁴⁷ The first enquiry is about the nature of the offence and the relationship between the parties. The programme is available only to parties who know each other, such as husband and wife, landlord and tenant, neighbours, or employer and employee. The complaint must be over conduct that is of a minor criminal nature. Once this has been established by the court complaint clerk, the complainant is advised of the arbitration option. Only if the complainant, the local senior prosecutor and the accused person agree to opt for arbitration does the process proceed. If the accused person does not wish to proceed, the charge is prosecuted in the normal manner.

The arbitrator's primary aim is to mediate the dispute and work out a consent agreement. Lacking successful mediation, the arbitrator has the authority to render his decision. The award can include civil damages and injunctive relief, but not an assessment of criminal penalties.⁴⁴⁸ A part of the consent agreement concentrates on the needs of the victim and compensation by the accused person. Criminal courts often ignore the needs of individual victims. Fines go to the state, and punishment is determined, among others, by the need to protect society as a whole. Arbitration programmes recognise the importance of the interests of the victim in the criminal justice process.

Time-consuming and expense-incurring matters are diverted from state-funded courts through arbitration and mediation programmes.⁴⁴⁹ While court imposed punishments lead to a high reoffender rate, the solutions provided by arbitration and mediation tend to prevent a recurrence of the criminal act. Such programmes reduce the level of tension between the participants by helping them to resolve their disputes, and by "creating a sense of satisfaction through the provision of meaningful and expeditious relief for the injuries suffered."⁴⁵⁰ The goal of the state need not always be to determine and allocate fault to any single person. Arbitration and mediation programmes approach antisocial behaviour with this in mind. They emphasise the personal responsibility of each party, rather than the narrow assessment of legal fault. As a result, "mediation produces more durable results more economically and expeditiously than the current criminal justice system."⁴⁵¹

Arbitration and mediation could be used more widely in the South African justice system. This would assist the victims of crime, the courts and even accused persons who often have to wait for months and even years for the finalisation of their trials. The high cost of criminal litigation and the lack of capacity in the state-run criminal justice system also speak for an arbitration programme for criminal offences in South Africa. According to NICRO, arbitration "would be in the best interests of justice and those affected by crime that a situation of judicial pluralism evolves, giving individuals more than one recourse to justice in order that their specific needs are addressed."⁴⁵²

If an arbitration/mediation programme is implemented in South Africa, cost-savings to the state should result. "Although the establishment of a mediator's office obviously has cost implications, these costs should be outweighed by cost-savings from staff reductions and smaller prison populations."⁴⁵³ A 1992 pilot victim-offender mediation programme, undertaken by the Cape Town branch of NICRO, found that cases handled by such a programme are less expensive to the state than when they are processed through the normal criminal courts.⁴⁵⁴ Arbitration and mediation centres should not be staffed by prosecutors or judicial officers. The staff should come from the ranks of attorneys (as is the case with the successful small claims court system), community organisations, and even senior law students. There should be no need for the state to employ additional personnel on a permanent basis.

Community dispute resolution

A 1999 South African law commission discussion paper has recommended that community-based dispute resolution structures,⁴⁵⁵ normally known as 'community courts', should be recognised and supported by law as they serve a useful purpose in meeting the needs of the majority of South Africans for accessible justice.⁴⁵⁶ The commission suggests that community dispute resolution structures could be called 'community forums' in future and they should not be considered to be courts but dispute resolution and peacemaking structures that provide justice for local communities.

According to the commission, community forums have the benefit of being able to follow procedures based on resolving conflict through problem-solving. They can mediate, reconcile and arbitrate with the objective of solving a problem. They can make orders of restitution, compensation, or order community tasks to be performed by the offender and even refer matters for advice or hand the issue over to another body. The commission warns, however, that it is crucial that attendance at any community forum should be voluntary, both in terms of the inception of each attempt to resolve a dispute, as well as for the duration of the dispute resolution process. That is, at no stage should one of the parties be able to compel another to attend or to continue with any conciliation process.⁴⁵⁷ Decisions of a community forum should be binding on the parties only if they have agreed beforehand to be bound by such decisions. The commission recommends that, in legislation governing community forums, care must be taken to ensure that community forums remain informal and flexible in their procedures, inexpensive in their operation, and responsive to the needs of the communities where they operate.⁴⁵⁸

Outsourcing prosecutions

Benefits of outsourcing

Philip Fixler and Robert Poole of the Reason Foundation — an American research and educational organisation — point out that an "essential ingredient in a privatisation analysis is an understanding of the possible forms of privatisation."⁴⁵⁹ The classic form of public service (and the common assumption for all criminal justice functions) has the state providing the funding via taxes, and producing the services directly, through state employees. Fixler and Poole hold that private mechanisms may be used in either or both of these areas. If the state retains responsibility for funding a service, but hires the provider of the service in the open marketplace, a form of private sector involvement results that is known as 'outsourcing' or 'contracting out'. There are numerous benefits to the state and its criminal justice system in outsourcing some of its functions and services to the private sector.⁴⁶⁰

In 'Justice without the state', Bruce Benson, an economist from Florida State University, says the following about the public service in the US (which applies equally to South Africa):

"The organizational inflexibility inherent in the civil service system prevents management from disciplining inefficient employees unless their behaviour is extreme. Lateral movements to adjust manpower needs in the face of changing demands are virtually impossible, as is hiring at any but the lowest grades. Such dysfunctional qualities of civil service systems commonly reflect employee pressure which tends to emphasize continuity and seniority over competence as qualifications for higher-level positions, and by employee unions which emphasize the traditional union goals of more pay, less work, and job security."⁴⁶¹

A private contractor's need to remain competitive and generate a profit is an incentive to limit waste and maximise productivity — pressures that do not exist in the public service.⁴⁶² Cost-savings arise because private profit-seeking entrepreneurs want to attract and keep customers in the face of competitive alternatives. After all, any unnecessary costs cut into profits and create an opportunity that other entrepreneurs can exploit by offering a better contract when renewal occurs.

The incentives of public bureaucrats are very different from those of private producers. Private entrepreneurs' desires for expanding power are limited in competitive markets because they must compete for the attention of the customer with other firms offering similar goods or services. Government departments must also compete, but they compete with other government departments, generally with very different functions, for a share of the overall government budget. The difference is significant. Because other firms offer alternative price/quality combinations, customers have choices among a number of similar products. Thus, competitive firms must produce something the customers are willing to buy at a price that customers are willing to pay.

Private firms must persuade customers to buy their products rather than the product of the competition by offering a price/quality mix that consumers find to be equal to or better than the price/quality mix offered by someone else. In other words, consumers can do some comparison shopping, thereby gaining information about the actual costs of producing the good and the quality characteristics that are associated with it. There is then a strong incentive for entrepreneurs to look for ways to produce more efficiently, driving down costs and prices, and to develop new and better products in order to increase quality. It is the incentive created by competition that leads entrepreneurs systematically to develop new technologies that reduce costs while increasing both the quantity and quality of output.

In outsourcing contracts to private contractors, the state can set down and specify minimum standards. Without outsourcing, where the state has a monopoly over the provision of all services, this rarely happens. For example, the public police is expected to uphold certain standards. If this does not occur, the state is not in a position to go to a different service provider. At best, the president can fire the responsible minister, and hope that his successor will provide a better performance. In practice, this hardly ever occurs, and the public has to wait for the next election to demonstrate its dissatisfaction.

Professor Charles Logan of the University of Connecticut, a specialist in crime and justice matters, argues that contracting out increases accountability as governments are more willing to monitor and control contractors than themselves:

"Contractors — just as their governmental counterparts — are accountable to the law, to governmental supervisors, and ultimately, to the voting public through the political system. In addition, they are accountable, through a competitive market, to certain forces not faced by government agencies. They are answerable to insurers, investors, stockholders, and competitors. As a mechanism of accountability and control, the force of market competition is unmatched."⁴⁶³

Technical cases

In South Africa most prosecutors enter their profession directly from law school. The typical academic qualification of a prosecutor is a bachelor degree in the social sciences, followed by a law degree. Prosecutors have little or no training in subjects such as forensic accounting or

computer science. As a result, computer-related fraud and intricate commercial crimes are often not prosecuted, or prosecuted unsuccessfully, because of the lack of technical knowledge among prosecutors.

Such specialised prosecutions should be outsourced to the private sector.⁴⁶⁴ Bruce Benson argues that there are advantages in specialisation, and the use of specialised personnel:

"One reason that the private sector might be expected to do well what the government criminal justice system does badly is that consumers generally have narrowly focused concerns. Thus, when they pay a private firm to alleviate those concerns, they can hire someone with expertise. When resources specialize in their area of comparative advantage, economic efficiency is enhanced. More is produced with the same resources, or fewer resources are needed to produce the same level of output."⁴⁶⁵

In many parts of the world, private security agencies engage in specialised investigative activity. According to Les Johnston, author of 'The rebirth of private policing', this is partly because of the "inability of police organizations (and the law itself) to keep up with the sophisticated techniques of those engaged in large-scale fraud."⁴⁶⁶ The investigation of commercial crime by private investigators and forensic accountants has taken place for some time in South Africa. Many forensic accounting firms have become "privatised commercial branches of the police comprised largely of ex-SAPS detectives."⁴⁶⁷

The SAPS commercial branch and the investigating directorate: serious economic offences have outsourced investigative work on occasion to accountants in the private sector. Such accountants, in conjunction with police detectives, investigate crimes and collect the evidence required by the prosecution service. There is no reason why this could not be extended to the actual prosecution of certain crimes. There are many law firms in South Africa that specialise in commercial crime. They have qualified and experienced personnel to handle intricate fraud cases. While outsourcing such prosecutions to the private sector may be an additional expense to the state in the short-term, the long-term benefits of an increase in the number of successful convictions would be considerable. White-collar crime has reached alarming proportions in South Africa. Through the effective combating of such crime, the economy as a whole would benefit. Moreover, diverting selected cases to the private sector will permit state prosecutors to concentrate their efforts on other priority crimes.

Companies are loath to wait long periods for the finalisation of fraud cases involving their employees. Numerous, drawn-out court appearances cause bad publicity and are costly as staff members have to spend time at court to testify. The loss for such companies is especially harsh if the prosecution is unsuccessful. Firms that are prepared to spend large sums of money on private investigators to track down a fraud suspect among their employees, may be willing to pay for an experienced and competent commercial lawyer to conduct the criminal prosecution of their cases as well — in particular if they were assured of a speedier finalisation of the trial and a greater chance of obtaining a conviction.⁴⁶⁸ Commercial insurance policies could even be adapted to cover the additional costs of a private prosecutor.

At the opening of the first specialised commercial crime courts at the end of 1999, the minister of justice and constitutional development, Penuell Maduna, announced that private counsel will prosecute some cases at these courts on behalf of the state.⁴⁶⁹ Funds to pay for such private counsel, who are paid at market-related rates, are donated by the private sector. Donations are deposited into the trust of the arbitration foundation of South Africa and administered by

Business Against Crime.⁴⁷⁰ In this way, funders are unable to influence the national prosecuting authority's decision whom to prosecute and the order in which fraud suspects are prosecuted. The danger that the most generous funders could receive preferential treatment from the prosecuting authority is thereby avoided.⁴⁷¹

Seasonal cases

Certain crimes have a seasonal prevalence. Over the Christmas/New Year period, there is an upsurge in drunk-driving, shoplifting, assault and domestic violence cases. These are normally not complicated cases to prosecute. Because of their sheer number, however, and the fact that many prosecutors go on leave over the Christmas period, a congestion of cases builds up at the beginning of each year. In the busier urban courts, it can take months to process such cases. The solution is not to employ more prosecutors on a full-time basis, as there would then be a surplus of prosecutors for the remainder of the year. Rather, the prosecution of such cases should be outsourced to articulated clerks and junior attorneys in the private sector.⁴⁷² This would assist the state to deal cost-effectively with the annual bottleneck of cases.

Peripheral matters

Larger magistrate's courts assign one or more prosecutors to deal with maintenance inquiries, inquest proceedings and traffic contraventions.⁴⁷³ The state is wasting a scarce and costly human resource by using qualified prosecutors to perform what are in essence non-legal functions.

A maintenance prosecutor spends little time in court. The bulk of his time is spent mediating between estranged parents, in an attempt to come to an out-of-court settlement on the amount of maintenance the non-custodial parent is to pay to the custodial parent for the support of his children. This requires a factual assessment of the expenses incurred by the custodial parent who looks after the children, and of the incomes of the two parents. Thereafter, each parent's contribution is calculated using a standard formula. A prosecutor's legal training and courtroom skills are wasted on such a function, which could be outsourced to a person with good interpersonal and mediation skills, and some knowledge of accounting and psychology. Only in instances where mediation fails should the matter be referred to a prosecutor for courtroom settlement.

As with maintenance, inquest prosecutors spend little time inside a courtroom. Their main function is to obtain a plethora of certified statements, reports and forensic documents that together form a chain of evidence, from the deceased's time of death to the time his body is given to an undertaker for burial. On the basis of these documents, a judicial officer makes a finding in chambers. It is only on the rarest of occasions that a formal inquest is held in court. The compilation of inquest dockets could be outsourced to persons skilled in forensic medicine and recordkeeping. Only if a formal inquest has to be held, should the matter be referred to a prosecutor.

A traffic prosecutor spends a large portion of his time dealing with written and oral representations from members of the public who admit to contravening a traffic regulation, but request a fine reduction. Traffic matters that go to court usually revolve around one or two factual disputes, such as whether a robot was red or green, or whether a vehicle came to a complete stop at a stop street. Prosecutors' knowledge is wasted in the processing and prosecution of such trivial cases. Such matters should be handled by senior officials from the various traffic departments. As traffic departments receive the income from traffic fines, it is fair

that they finance the cost of such prosecutions.⁴⁷⁴ At the time of writing, a few municipalities had introduced, or were considering the introduction of specialist traffic or municipal courts to deal with the prosecution of traffic violations and city by-laws. In some areas, these courts will be staffed by traffic officers with prosecutorial training.⁴⁷⁵

Certain other functions that are performed by the state for the benefit of the prosecution service can also be considered for outsourcing to the private sector.⁴⁷⁶ One example is the analysis of blood alcohol levels from blood samples of people suspected of driving while under the influence of alcohol. This work is performed at only three places in the country: the department of health's forensic chemical laboratories in Cape Town, Johannesburg and Pretoria. Insufficient staff and outdated equipment hamper the work of these laboratories. It takes six to 12 weeks for an analysis report to be finalised to be used as evidence in a trial.

Such a delay costs the state — and the prosecution service — money. A person accused of driving while under the influence will appear in court within days of being charged. On his first court appearance, the accused person's case will be postponed pending receipt of the blood-alcohol analysis report. Judicial officers are reluctant to postpone a court hearing for long periods as the constitution grants accused the right to a speedy trial. A court hearing is usually postponed for about six weeks for the completion of the blood-alcohol analysis report. If personnel at the forensic laboratories take leave, or the police conduct drunk-driving 'blitzes' that result in numerous arrests, the laboratories are unable to cope with the additional work. Over the Christmas/New Year period, a shortage of staff at the laboratories coincides with an increase in the number of persons arrested for drunk-driving, exacerbating the situation. As a result, blood-alcohol analyses are delayed. Court cases originally postponed for six weeks have to be postponed once more. The accused must take time off work again to attend the postponement of his case (usually with his attorney). Valuable court time, as well as the time of the prosecutor, magistrate and the investigating officer on the case is taken up merely to postpone the matter for another few weeks for the blood-alcohol report.

If this service were to be outsourced to the private sector, everybody would benefit. The financial costs to the state would be reduced as private sector laboratories operate in a competitive environment. As the workload increases over the December period, the state could outsource additional work to private laboratories on a contract basis. This would reduce court delays, saving the state further expense. The economy in general would also benefit, as employed accused would not have to take time off work to attend the postponement of their cases. Moreover, this work could be outsourced to laboratories situated in the region where the blood was drawn to limit transport costs. This would also save time and reduce the risk of evidence transported over long distances being lost or contaminated. Blood samples collected at a road block in Durban or Bloemfontein would no longer have to be transported to Johannesburg for analysis.

Another example of a service peripheral to the prosecution service that could be outsourced to the private sector is the guarding and provision of security at courts. Most guards are currently employed on a full-time basis by the department of justice with complete public service benefits, such as generous leave provisions, medical aid and pension benefits. Such guards are busiest in the morning when witnesses, accused and members of the public enter court buildings. As cases are adjourned and finalised during the course of a day, the amount of human traffic entering and leaving court buildings drops considerably.

Outsourcing such guarding functions would be cost-effective for the justice department, which could channel any resultant savings into the prosecution service. Guarding contracts with

private security companies could specify that a greater number of guards would be on duty during the busier morning periods than in the afternoon. This would improve safety at the courts. The state would pay only for the number of 'guarding hours' it procures. Moreover, high-profile court cases often attract large numbers of spectators and protestors. An outsourcing contract could specify that court management would be supplied with additional guards at short notice for a day. This is impossible under the present system, where court guards are employed on a full-time basis, and any additional security services are provided by the over-extended SAPS, which is called upon to assist courts on busy days.

Private prosecutions

Legislation makes provision for private prosecutions.⁴⁷⁷ They may occur only if a director of public prosecutions certifies that he declines to prosecute a case at the instance of the state.⁴⁷⁸ Moreover, private prosecutions are possible only in a limited number of circumstances, specified by statute. 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" can institute a private prosecution.⁴⁷⁹ Companies and legal persons cannot do so.

There are a number of statutory safeguards to prevent persons misusing the limited right to institute a private prosecution. A private prosecutor must deposit a fixed sum of money with the court, and an amount the court may determine, as security for the costs that the accused person may incur in respect of his defence on a charge brought by a private prosecutor.⁴⁸⁰ Where a private prosecutor fails to prosecute a charge against an accused person without undue delay, these sums of money are forfeited to the state.⁴⁸¹

In a private prosecution, the accused person cannot be arrested, and may be brought to court only by way of a summons.⁴⁸² A court may set aside a private prosecution that is irregular, vexatious or constitutes an abuse of the court process. Where the court is of the opinion that a private prosecution was unfounded and vexatious, it must award to the accused person, at his request, such costs and expenses as the court deems fit.⁴⁸³ Where an accused person is acquitted, the court may order the private prosecutor to pay to the accused person the whole or part of his costs and expenses incurred in connection with the prosecution.⁴⁸⁴

There is much to be said for private prosecution.⁴⁸⁵ Victims of crime have a right to a fair hearing of their grievance. In certain situations, this right can best be upheld through the use of private prosecution. Tim Valentine, an American legal practitioner, says:

"The employment of private prosecution is in some cases and in some jurisdictions the only way for victims of crime to get justice. If you hire an attorney and he allows your case to be continued into oblivion (or into the trash can) without putting up a spirited fight in open court, or if he otherwise fails to perform adequately, he can be subject to disciplinary action by the grievance committee of the bar association."⁴⁸⁶

Public prosecutors' offices often do not have the personnel, time and resources to peruse the police dockets presented to them adequately. Prosecutors also do not always have the time to confer with the state's witnesses or crime victims prior to a trial. According to Bruce Benson:

"Public prosecutors supposedly represent victims, but they clearly do not do so. For one thing, there are far too many victims for the limited number of prosecutors to effectively represent, and for another, the incentives of prosecutors do not encourage high levels of concern for individual victims. Thus, to the despair of many

victims, prosecutors dismiss many of the crimes that caused their suffering, presumably to handle the large number of accused criminals that pass through the system."⁴⁸⁷

The argument that private prosecution favours the wealthy, who can afford the cost of a private prosecutor, is misconstrued.⁴⁸⁸ Private prosecutions do not damage the rights of poorer victims of crime who have to rely on the public prosecution system. Private prosecutions reduce the workload of public prosecutors, allowing them to concentrate their limited resources on cases where, among others, poor people have been victimised by crime. Moreover, concerned citizens, victims' rights groups (such as rape crisis centres) and NGOs can assist indigent crime victims to obtain the services of a private prosecutor.

Many large companies would be prepared to use private prosecutors to prosecute people who defraud them. Many such fraud cases are intricate and exact a lot of time and effort from prosecutors. Using private prosecutors to deal with them would allow public prosecutors to get on with prosecuting other serious crimes, such as murder and rape. The law would need to be amended to permit companies and legal persons to institute private prosecutions.

The law should also be amended to make it easier for private persons to institute private prosecutions. In terms of the present system, victims of crime may proceed with a private prosecution only after a director of public prosecutions declines to prosecute the case in question. Crime victims are therefore left with no real choice. Should a director of public prosecutions decline to prosecute, it is likely that there is insufficient evidence to warrant a prosecution. Under such circumstances, a private prosecution is likely to be rejected by the courts. If a victim should have a strong case, and there is substantial evidence against an accused person, a director of public prosecutions will not decline to prosecute. The victim then has to rely on the slow moving state-run justice system for redress. The law should be changed to permit private prosecutions that are not conditional upon a director of public prosecution's decision not to prosecute. The decision whether to institute a private prosecution should be left to the victim of a crime — the person who has the most to lose from a bungled prosecution.

There would be a number of benefits from such a change in the law. By instituting private prosecutions, crime victims improve their chances of obtaining a speedy conviction against an accused person. The accused person benefits as his trial is finalised more rapidly than would otherwise be the case. Frequent delays in criminal trials place considerable financial and emotional strains on accused persons and their families, even if the trials end in their acquittal. Finally, private prosecutions alleviate some of the pressures on the state-run prosecution system, as state prosecutors will be able to devote more time to other cases they have to deal with.

Private prosecutions still used

Although modern societies generally entrust the enforcement of criminal law to public prosecutors, most crimes in pre-modern societies were prosecuted privately. In classical Athens, 9th-century Germany, and England before the 19th century, there were no public prosecutors for most crimes. Instead, the victim or a relative initiated and litigated the cases.⁴⁸⁹ Today, some 3% of criminal prosecutions in England are done by victims or their employed attorneys. Public prosecutors in Germany enjoy a monopoly on the right to prosecute, with two exceptions. First, there is a class of minor offences, such as domestic trespass, that can be prosecuted by victims. Second, a

crime victim can demand that a public prosecutor pursue a case, and if this is refused, the victim can appeal to the state appellate court. The court can order the prosecutor to bring charges. Under such circumstances, the victim can join the prosecution as a 'supplementary prosecutor' to ensure that the state prosecutor does an adequate job in presenting the case.⁴⁹⁰

Interns for prosecutors

Prosecutors spend much of their time performing routine administrative and clerical tasks because of a lack of support staff. This includes filling in exhibit request forms, drawing up charge sheets, photocopying statements, finding relevant case law, and telephoning witnesses to arrange court appearance times. For example, during 1997, prosecutors at the Cape Town magistrate's court spent almost 3 000 hours preparing copies of dockets for defence counsel.⁴⁹¹

Many senior law students would welcome the opportunity to do an internship at a magistrate's court during vacation time. Law students would be prepared to do a voluntary internship free of charge if the system were well-structured, and the interns were afforded the opportunity to learn. Apart from gaining valuable practical experience about the operation of a criminal court, it would also enhance their curricula vitae, and assist them in making valuable personal contacts in the legal profession. Prosecutors with families tend to go on leave during the summer and winter school holidays. During these times, most prosecutors' offices are particularly understaffed. As school holidays overlap with university vacations, student interns would be available at times when their services would be needed the most.

At the Cape Town magistrate's court, law graduates with the desire of becoming prosecutors are appointed as interns on a voluntary basis for a period of one or two months.⁴⁹² The interns are allocated to an experienced prosecutor from whom they can learn the practicalities of prosecuting through observation and by asking questions. The interns assist the prosecutors with tasks such as making photocopies, taking witnesses through their written statements and phoning investigating officers for dockets. After their internship, the interns are evaluated. If they performed well and have an acceptable rudimentary knowledge of prosecuting and the procedure in a court, they are considered for appointment. This enables senior prosecutors to screen applicants much better compared to simply reading their CVs and conducting an interview with them for an hour or so. Moreover, interns get a good idea of what would be required of them should they join the prosecuting profession. This permits potential applicants to make a considered decision whether to apply for a permanent position with the prosecution service.

Plea-bargaining

Plea-bargaining is a negotiation between the prosecution and an accused (or his legal representative) in which the accused agrees to plead guilty to a criminal charge in exchange for concessions by the prosecution. The accused waives the right to a trial, losing any chance of an acquittal, but avoids conviction on a more serious charge or receives an undertaking by the prosecution not to propose a harsh sentence for the accused. The prosecution, on the other hand, is not required to go through a long and costly trial. Issues negotiated in plea-bargaining include a reduction of the charge, a specific recommendation for sentence, or an agreement by the prosecution not to oppose a request for a suspended sentence.⁴⁹³

Plea-bargaining is a process whereby the prosecution and the defence make concessions

through negotiations to reach an agreement regarding the disposal of the case. In practice, successful plea-bargaining occurs where the prosecution, for example, withdraws certain charges for a plea of guilty to other charges, or where the prosecution accepts a plea to a lesser charge (eg exceeding the speed limit or negligent driving instead of reckless driving). The main objective of plea-bargaining is to limit the extent of the sentence of the accused by negotiating an agreement on the reduction of the number of charges or the seriousness of the charges.

In the US, the federal rules of criminal procedure give statutory effect to the practice of plea-bargaining on condition that any agreement is disclosed in open court and can be rejected by the trial judge. Over 90% of all criminal cases in the US are disposed of through guilty pleas. A substantial number are the result of plea-bargaining.⁴⁹⁴ In the US, plea-bargaining is regarded as an important element of the criminal justice system. Without it the administration of justice would be at risk of breaking down because of the substantial increase in trials that would overburden the courts.

The US supreme court has accepted plea-bargaining as an essential and desirable part of the criminal justice process.⁴⁹⁵ The court has held that plea-bargaining:

- leads to the prompt finalisation of most criminal cases;

- avoids much of the corrosive impact of enforced idleness during pretrial incarceration for those who are imprisoned awaiting trial; and

- protects the public from accused who are prone to continue criminal conduct while on pretrial release.

By shortening the time between charge and sentence, plea-bargaining enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

There are a number of arguments against plea-bargaining.⁴⁹⁶ First, plea-bargaining circumvents the usual standards of due process and proof applied to determine guilt. Second, it undermines the ideals of justice as prosecutors determine their offers to the accused by weighing their chances of success at trial, rather than an impartial finding on the facts by a court. Third, an accused may be induced to plead guilty for fear of harsher punishment, should he attempt to contest the charges levied against him. Fourth, guilty accused may not be punished fully, or may escape with lenient sentences. The last two objections imply that plea-bargaining could result in the crime to which an accused pleads guilty not being a true reflection of the criminal act(s) he committed.

To overcome the potential pitfalls of plea-bargaining, the law reform commission of Canada recommended that the procedure should be regulated by means of legislation that contains detailed guidelines and directives which must be complied with before a plea-bargaining agreement can be accepted:⁴⁹⁷

- No accused may be improperly induced to conclude a plea agreement.

- If the accused has legal representation, the prosecutor must negotiate with the legal representative.

- If the accused is not represented, the prosecutor must comply with specific rules such as informing the accused of the advantages of legal representation.

All persons and accused must receive equal treatment.

Plea bargains must accurately reflect the criminal behaviour of the accused, and facts must not be distorted or evidence withheld from the court.

The victim must be consulted in the conclusion of the plea-bargaining agreement.

The contents of the plea-bargaining agreement must be disclosed in open court and the court must satisfy itself that the accused was not improperly influenced.

The judicial officer may accept or reject an agreement, and must reject it if there is reason to believe that the accused was induced improperly or that the agreement does not reflect the criminal behaviour which can be proved.

A plea of guilty may be withdrawn if there was improper inducement.

While no formal system of plea-bargaining exists in South Africa, there is no doubt that an informal system of plea-bargaining and negotiations is widespread in the country's courts.⁴⁹⁸ The prosecution, at any stage before trial, may accept such reduced pleas as it thinks fit. Even at the actual trial, the accused may plead guilty to a (lesser) competent charge. If he does so and the prosecution accepts the plea, the court has no power to refuse to accept the plea and proceed with the original charge.⁴⁹⁹ The high court has held that forms of plea-bargaining have become accepted practice between defence representatives and prosecutors over the years, and that an acknowledgement that plea-bargaining is an integral part of the process of criminal justice in South Africa would be to face the truth.⁵⁰⁰

An amendment to the Criminal Procedure Act — which had not been put into operation at the time of writing — will enhance the prosecution's ability to engage in plea-bargaining.⁵⁰¹ The amendment provides that the prosecution, at any time before judgement and upon written receipt of a written admission made by the accused in respect of the charge brought against him, may reconsider the case. The prosecution may suspend the court proceedings and place the accused, with his agreement, under correctional supervision on such conditions and for such a period as they agree on.

A formal system of plea-bargaining in South Africa would assist the prosecution service in the quick finalisation of many cases, enabling it to allocate scarce resources more effectively elsewhere. That is, a number of plea agreements may save the prosecution sufficient time and resources to allow the successful prosecution of other more serious offenders. The national director of public prosecutions, Bulelani Ngcuka, points out: "Plea bargaining can lead to a redistribution of prosecution resources to handle priorities, to free an overburdened judiciary and to create new efficiencies in the entire justice system."⁵⁰²

Weapon against crime bosses

Plea-bargaining gives prosecutors a powerful weapon in the fight against organised crime syndicates.⁵⁰³ The successful prosecution of syndicate leaders is often reliant on a senior syndicate member turning state witness to testify against his former boss. Presently, the inducement that the prosecution can offer to such potential witnesses is indemnity from

prosecution, provided their evidence is satisfactory and they answer all questions frankly and honestly.⁵⁰⁵ Once they have received indemnity, such witnesses cannot be prosecuted, and they walk away from the trial without being convicted and sentenced of anything even though they may be guilty of serious crimes themselves. With a plea-bargaining system, the prosecution can still offer an inducement to testify: a lesser sentence in exchange for testifying against the ringleaders. However, such erstwhile accomplices to the syndicate bosses could still be charged and convicted of something, thereby ensuring that they receive some punishment for their actions.

An examination of the practice of informal plea negotiations in South African courts comes to the following finding:

"A balanced plea agreement can move minor cases out of the system to make room for more important trials serving efficiency goals. Likewise, a creative plea agreement can mandate a rehabilitative programme for the accused, and establish a restorative justice plan to compensate a victim."⁵⁰⁴

In addition to the advantages of plea-bargaining pointed out by the US supreme court, a formal system of plea-bargaining in South Africa would also further the aims of the criminal justice system because swift and certain punishment serves the ends both of general deterrence and the rehabilitation of the individual accused. Successful plea-bargaining avoids the necessity of a public trial and may protect the victim of a crime against the trauma of cross-examination.

A successful South African plea-bargaining system will have to guard against a number of potential pitfalls. In a divided society such as South Africa, it is crucial that a plea-bargaining system is applied equally to everyone, lest the system loses credibility and tarnishes the image of the whole justice system. Plea-bargaining negotiations should leave no room for individual prosecutors to make more or less generous offers depending on the race, ethnicity, nationality, gender or other group-based attributes of the accused.⁵⁰⁶ Clear guidelines and rules are necessary to prohibit prosecutors from discriminating against individual accused in the plea-bargaining process without needlessly limiting the flexibility required by prosecutors to negotiate effectively during the plea-bargaining process.

There is a risk that seasoned and overbearing defence lawyers could persuade and even browbeat inexperienced, badly trained or unmotivated prosecutors into accepting unfair plea-bargaining agreements that are to the advantage of their clients. An inexperienced prosecutor, for example, may accept a guilty plea of common assault, even though there is sufficient evidence to secure a conviction on a charge of assault with the intent to commit grievous bodily harm, because he is concerned about losing the case on either charge as the senior counsel who is representing the accused is a talented litigator. Prosecutors who are overworked or unmotivated may accept guilty pleas on lesser charges to lighten their caseload or to go home early. This would be unfair to the victims of crime, the police who spent substantial resources to collect enough incriminating evidence against the accused to convict them of the crimes they actually committed, and society in general, who pays taxes to enable the criminal justice system to punish accused for their criminal deeds.⁵⁰⁷ The South African law commission suggests a useful general rule for plea-bargaining: the offence to which the accused is willing to plead guilty should realistically reflect his criminal conduct, and the sentence that the prosecution agrees to accept should be justifiable on recognised principles of punishment.⁵⁰⁸

To prevent prosecutors from accepting guilty pleas on unnecessarily lenient charges, they must receive sufficient training and support to give them the confidence and determination to reject plea-bargaining offers that are not in the interests of justice. It may be prudent to limit the discretion of prosecutors to enter into plea-bargaining agreements until they have reached a certain level of experience and training, and have shown themselves to be responsible and confident in the execution of their duties. Care will also have to be taken to guard against unscrupulous accused or defence lawyers corrupting prosecutors into agreeing to accept plea-bargaining agreements that are to the advantage of the accused. This underlines the importance of paying prosecutors good salaries so that the temptation to engage in corrupt behaviour that prosecutors may face, is limited.

In South Africa, many accused have limited formal education and financial means, and do not speak the same home language as the prosecutor. For plea-bargaining to work and become an acceptable part of the judicial process, it is important that unscrupulous or aggressive prosecutors do not press unrepresented accused into accepting plea-bargaining offers with which they do not agree and which are not in their interest. It is equally important that unrepresented accused are aware of all the implications of entering into a plea-bargaining agreement and understand what they are letting themselves in for. As a safeguard against such possible abuses it is advisable that the judicial officer should be informed when a plea-bargaining negotiation is in progress, and if an agreement has been reached before the accused is asked to plead to the charge(s). The judicial officer should have to satisfy himself that the accused has understood the agreement and that it was entered into voluntarily and without improper or undue influence. Should the judicial officer feel that the accused agreed to plead guilty to offences for which he was not likely to be convicted, or that the accused's right to silence and a fair trial had been compromised, the judicial officer should have the power to enter a plea of not guilty on behalf of the accused.

In a discussion paper released in late 2000, the South African law commission proposes that sentence agreements — where an accused agrees with the prosecution to plead guilty provided an agreed sentence is imposed — should be legalised and regulated.⁵⁰⁹ The commission proposes that a sentence agreement should be binding on both the accused and the prosecution, but not on the court. That is, once an agreement is reached and the accused pleads guilty, the sentence agreement is disclosed to the court. The court, before convicting the accused, must question the accused to ascertain whether the accused understood his rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. This enables the court to assess whether the agreed sentence is appropriate. If the court is of the view that it would have imposed a lesser sentence than the agreed sentence, it may find the accused guilty, but impose the lesser sentence. Should the court reject the agreement, the accused is given a choice. He may abide by his plea to be sentenced. Alternatively, the accused can withdraw his plea and the matter has to begin afresh before another judicial officer.

Clerical and administrative assistance

Prosecutors are unable to cope with the high volume of serious crime cases they have to deal with. The long-term solution is to employ more prosecutors. A cheaper short-term solution is to maximise the productivity of existing prosecutors. Prosecutors are an expensive and valuable resource for the prosecution service. They are university graduates and are the only people who are entitled to prosecute cases in the country's courts. It is their core function to prosecute cases: that is what they have been educated (and sometimes trained) to do and that is what they joined the prosecution service for. It is reasonable to assume that prosecutors enjoy a

relative advantage when it comes to prosecuting. That is, prosecutors are likely to be better at prosecuting than at other functions they perform, and they are likely to be better prosecutors than other court functionaries. Prosecutors are therefore at their most productive when they exclusively perform the functions and duties of a prosecutor. The greater the number of non-prosecutorial functions they perform, the less productive they are likely to be, and the more their skills are wasted.

Prosecutors perform a variety of clerical and administrative functions. For example, during 1997 alone, prosecutors at the Cape Town magistrate's court spent almost 3 000 hours photocopying documents.⁵¹⁰ Some experienced prosecutors perform no direct prosecutorial functions and spend their working days on a variety of managerial and administrative tasks. It is estimated that there are in the region of 700 desk-bound prosecutors and magistrates working at the department of justice's head office. Most of them were promoted to 'management status' because that was the only way for them to further their careers in the justice department.⁵¹¹

More clerks, administrative assistants and professional managers need to be employed to take the burden of performing non-prosecutorial functions away from prosecutors. Clerks and administrators are likely to be better at performing clerical and administrative functions than prosecutors who have no formal training in such fields. This will permit both prosecutors (who will have been relieved of most non-prosecutorial functions) and their support staff to work more efficiently and effectively than what is presently the case. More people will have to be employed by the justice department to make this a reality. However, for the criminal justice system as a whole, cost-savings should result as courts operate more effectively and the large backlog of cases which are creating a bottleneck for the whole criminal justice process will be reduced. For example, the department of correctional services saves approximately R1 million for every month that the trials of 400 awaiting trial prisoners are finalised earlier.⁵¹²

Training for excellence

Training and skills development needs to play a more prominent role in the development of prosecutors. The legal environment where prosecutors operate changes constantly as new legislation is promulgated or old statutes amended, and the high court hands down new interpretations of the common law. Forms of crime and the ways in which criminals operate and try to hide their criminal activities evolve all the time. For example, many forms of environmental crime, Internet-based fraud, or money-laundering techniques did not exist a decade ago. To stay abreast of such new developments, prosecutors must be continuously retrained and taught new skills. Training and professional development should be an ongoing process for all prosecutors, and needs to be given greater emphasis by the national prosecuting authority and senior prosecutors responsible for individual courts throughout the country.

Greater emphasis also needs to be placed on the practical training needs of inexperienced and beginner prosecutors. Much has been done in this regard over the last few years with the introduction of six-month compulsory training courses for new prosecutors. Given the large reservoir of skills and knowledge that exists among the older and more experienced prosecutors, a mentoring programme should be considered for newer and less experienced prosecutors covering their first few years as prosecutors.

Mentoring can be defined as "the deliberate pairing of a more skilled or experienced person with a lesser skilled or experienced one, with the agreed upon goal of having the lesser skilled person grow and develop specific competencies."⁵¹³ Mentoring can significantly benefit individuals and organisations. For individuals in their early careers, mentoring can reduce the

shock of a new work environment and help prepare them for their new responsibilities and duties. For individuals at mid-career and beyond, being mentors can help them to meet generative needs and attain confirmation by passing on wisdom and experience. From an organisation's perspective, mentoring has significant benefits as well. While reducing the shock of entry for newcomers and facilitating preparation for advancement, mentor relationships provide a socialising forum for the organisation. New employees learn the ropes of the organisation and are less likely to leave because of confusion and frustration. These developmental relationships help the organisation to nurture good talent, pass on central values and practices and reduce turnover in the early career years. In settings where affirmative action is an important objective, mentoring can counteract the disadvantages of not being a member of a dominant group and give historically disadvantaged group members important coaching, modelling and career counselling opportunities.⁵¹⁴

Training programmes for prosecutors need to adopt more of a multidisciplinary approach. That is, standard prosecutors' training courses should include sections on the work of the police's detective service and specialised units and how the prosecution service should interact with them. The work of prosecutors can be enhanced if they have a good rudimentary knowledge of, for example, how the police take witness statements, collect fingerprints from a crime scene, or go about investigating a murder case. This would improve the ability of prosecutors to guide police detectives in the investigation of intricate cases. Prosecutors would also be in a better position to present technical evidence on the investigation of a case confidently to a court. A joint national crime prevention strategy (NCPS) pilot training programme for prosecutors, detectives and prison officials has been evaluated as an 'unqualified success'.⁵¹⁵ More such joint training programmes are necessary and should be incorporated into courses for all new prosecutors and into refresher courses for more experienced prosecutors and detectives.

The volume of cases flowing into and out of the lower courts — especially in the district courts — is very high. Lower court prosecutors could work more effectively if they had some rudimentary court and case flow management skills.⁵¹⁶ These are skills such as the ability to identify the status of a docket quickly and accurately in order to determine how long the eventual trial of a case will take, the ability to manage a court diary, and the ability to decide in a logical manner in which order a day's cases, postponements and bail applications should be dealt with given the needs and availability of witnesses, investigating officers, prison personnel and defence lawyers. The more effectively prosecutors manage their cases and courts, the more time they should have to prosecute cases. The justice college has identified this as a skills gap among prosecutors. There is, however, no uniform court and case management procedure in the country and individual courts are managed in different ways.⁵¹⁷ This makes it impossible for the college to present comprehensive court and case management lectures to prosecutors who work in courts throughout the country. A uniform management system and a manual based on such a system need to be developed for all courts and prosecutors' offices to overcome this problem and to provide the justice college with a national syllabus on which to train prosecutors.

Imagebuilding

There are a number of reasons why the image prosecutors have of themselves, and the public have of prosecutors, is poor.⁵¹⁸ With the low experience level of the average prosecutor, many are outsmarted and outmanoeuvred by experienced and confident defence lawyers. Moreover, because of large workloads, many prosecutors come to court badly prepared and have insufficient time to engage properly with their witnesses and investigating officers. Because of resource constraints, many prosecutors work in cramped and dirty offices with no support personnel and little technological support. Finally, with low salaries, many junior prosecutors are

poorly dressed and drive in old cars compared to their private sector peers who represent accused in criminal trials.

These examples may appear petty, and some of them are. However, because they have not been addressed, these issues have collectively had a profound impact on the image of the prosecution service. This deters good graduates from becoming prosecutors, and demoralises and lowers the productivity and work ethic of prosecutors.

To improve the image of the prosecution service in the long run, the proposals contained in this chapter should be adopted and implemented. This will take time and cost money. There are, however, a number of inexpensive actions that could be undertaken in the short term to boost the image of the prosecution service significantly. First, prosecutors who are consistently unable to meet their agreed upon performance targets, or who are indolent, undisciplined when it comes to their work, or corrupt, need to be dismissed from the prosecution service. Second, only applicants who meet realistic but exacting performance levels should be permanently employed by the prosecution service. Third, where necessary, prosecutors' offices should be renovated. In principle, prosecutors should be entitled to the same kind and quality of furniture as magistrates. There should ideally be nothing to distinguish the office of a prosecutor from that of a judicial officer. Finally, the prosecution service should sell itself and its professional staff at every opportunity with vigour and determination. Senior prosecutors need to be encouraged to give the occasional lecture on criminal law and procedure at their local university, or to speak to senior high school vocational guidance classes on the prosecuting profession. Senior prosecutors should also participate in radio programmes and volunteer interviews with their local print media to publicise any successes of their staff and inform the public about the crucial role of the prosecution service in the fight against crime.

Chapter 9

CONCLUSION

The South African criminal justice system is in a crisis. It is estimated that, out of every 1 000 crimes that are committed in South Africa, only 50 result in the successful prosecution of the perpetrators.⁵¹⁹ The number of recorded crimes increased considerably over the last decade, while the number of cases taken on by the prosecution service declined substantially over this period. On a range of other performance indicators — such as recorded levels of violent crime, case backlogs in the courts, the size of the incarcerated awaiting trial population, and the public's confidence in the ability of the state to combat crime effectively — the criminal justice system is performing poorly.

The government has responded to the crisis in a variety of ways. New policy visions have been developed for the core departments comprising the criminal justice system. Numerous pieces of legislation have been placed on the statute books to enable the state to fight new forms of crime more effectively and combat old forms with greater rigour. New structures and institutions have been created to give teeth to the government's commitment to transform the criminal justice system and to make it more effective in the fight against crime. However, given the ambitious nature of some of the policy visions, the complex features of much of the new crime-fighting legislation, the sheer size of the police service and the magnitude of the crime problem, it will take some time before the criminal justice system can extricate itself from the crisis it is in.

The police service employs over 100 000 police officers who rely on their equipment — from vehicles and radios to bulletproof vests — to perform their work properly. The department of correctional services employs 30 000 prison warders and is dependent upon the integrity of its

prisons to operate optimally and prevent escapes. These two components of the criminal justice system are too large and reliant upon equipment and expensive buildings to be able to respond to the present crisis in a rapid and flexible manner.

There is, however, one important component of the criminal justice system that can respond positively to the crisis in the short to medium term: the prosecution service. The prosecution service is in the fortunate position of having identified most of the impediments preventing it from operating in an effective and efficient manner. No time needs to be wasted to pinpoint the major obstacles that have to be overcome for the prosecution service to perform optimally.

The prosecution service is small and relies almost exclusively on the intellectual capacity of its staff to fulfil its mandate. With the right mix of centralised control and regional autonomy, the prosecution service is in a good position to boost the performance of its 2 500 graduate prosecutors rapidly, thereby removing a crucial bottleneck in the criminal justice process.

Many recent developments in the prosecution service are steps in the right direction. The directorate of special operations with its multidisciplinary prosecution-driven approach to investigations, the specialised units in the office of the national director, the development of new positions within the service to enhance the career choices of prosecutors, the tentative outsourcing of selected prosecutions, and the comprehensive practice-oriented training courses for new prosecutors are all positive developments to improve the performance of the prosecution service.

Many problems remain, however. Inadequate remuneration has decimated the number of experienced and talented prosecutors. The prosecution service's professional staff is its most valuable asset, and one which is extremely difficult to replace if experience and skill levels are to be maintained at acceptable levels. It is consequently puzzling that prosecutors' salaries are not given the attention they deserve. The national budget can afford to increase prosecutors' salaries substantially. While this may be unfair to other public servants, it is warranted given the crucial and unique role the prosecution service plays in the fight against crime. The issue of better remuneration for prosecutors is too important to be ignored or even postponed because of bureaucratic wrangling and inflexible public service wage-bargaining structures.

Once prosecutors' salaries have been improved, most of the other problems besetting the prosecution service can be addressed at reasonable cost to the state. However, some of the problems require innovative solutions. Mentoring programmes for new prosecutors, internships in the prosecution service for law graduates, outsourcing prosecutions and performance-based salary scales — to mention just a few proposals contained in this study — are fairly novel ideas for the conservative and bureaucratic world of the public service.

The fight against crime and the role of the prosecution service in this fight are too important to permit the dismissal of good, yet seemingly unorthodox solutions. With political commitment, the public's desire to combat crime and the dedication of prosecutors throughout the country, the prosecution service can fulfil its potential of becoming the linchpin of the state's war against crime.

Notes

1. Taken from a paper by the same name by J H Hugo, *Codicillus* 12(2), October 1971, pp 25

2. *National Prosecuting Authority of South Africa Policy Manual*, October 1999, Pretoria, p A.2.
3. In terms of section 35(1)(f) of the *Constitution of the Republic of South Africa Act no 108 of 1996*, "everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit." Section 60 of the *Criminal Procedure Act no 51 of 1977*, as amended, lists the grounds on which a court may refuse to grant bail to an accused. In terms of part 10 (pp B.20 — B.21) of the national prosecuting authority's policy manual, prosecutors have been instructed to oppose bail in respect of certain offences such as public violence where the violence is a manifestation of taxi or gang wars, culpable homicide arising from domestic violence, housebreaking accompanied by the commission of an offence other than trespassing, or vehicle-hijacking.
4. This is the test prosecutors are supposed to use when deciding whether to institute a prosecution against a suspect. See *National Prosecuting Authority of South Africa Policy Manual*, op cit, p A.3.
5. Ibid, p A.4.
6. Ibid, p B.8.
7. Ibid, p. A.5.
8. Ibid, pp A.5-A.6.
9. See also P Yutar, The office of the Attorney-General in South Africa, *South African Journal of Criminal Law and Criminology* 1, 1977, pp 136-138, for an example of a case where a previous attorney-general declined to institute a prosecution even though it was clear from the facts that crimes had been committed.
10. F G Richings, The prosecutor's discretion: A plea for circumspection, *South African Journal of Criminal Law and Criminology* 1, 1977, p 145.
11. Ibid, p 143.
12. Hugo, op cit, p 25. In Italy, for example, the constitutionally entrenched rule concerning mandatory prosecution limits prosecution discretion so tightly that failure to prosecute is itself ground for prosecution. See D Nelken, Understanding criminal justice comparatively, in M Maguire, R Morgan & R Reiner (eds), *The Oxford handbook of criminology*, Clarendon Press, Oxford, 1997, pp 565-571.
13. *Criminal Procedure Act no 51 of 1977*, as amended, section 84(1).
14. As set out in *Shabalala and Others v Attorney-General Transvaal and Another* 1995 (2) SACR 761 (CC), the prosecution may oppose access to documents contained in the police docket (or part of a docket) where there is a real risk that the identity of an informer may be disclosed; state secrets may be revealed; state witnesses may be intimidated; the proper ends of justice may be impeded; policing methods and investigative techniques may be disclosed; or confidential co-operation between various police forces may be

revealed.

15. In contrast to the adversarial system is the 'inquisitorial system', typical of countries that base their legal systems on civil or Roman law. Under the inquisitorial system, the pretrial hearing to establish a possible formal charge is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favourable or detrimental to either the prosecution or the defence. At the trial, the judge, once more, assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the docket. Neither the prosecution nor the defence has the right to cross-examine.
16. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p B.4.
17. Ibid, p A.9.
18. Yutar, op cit, p 139.
19. For a discussion of the more commonly used sentencing options see M Schönteich, *Sentencing in South Africa: Public perception and the judicial process*, ISS Paper 43, Institute for Security Studies, Pretoria, November 1999, pp 13-17.
20. *National Prosecuting Authority of South Africa Policy Manual*, op cit, pp B.61-B.62.
21. Ibid, pp B.22-B.25.
22. *Magistrate's Courts Act* no 32 of 1944, as amended, section 92(1), read with GN R1411, *Government Gazette* 19435, 30 October 1998.
23. The first king's attorney was Lawrence del Brok, who held office from 1247 to 1267. See Yutar, op cit, p 135 (note 1).
24. L Johnston, *The rebirth of private policing*, Routledge, London, 1992, pp 9-12. B L Benson, *To serve and protect: Privatization and community in criminal justice*, New York University Press, New York, 1998, pp 94-113.
25. The first fiscal at the Cape to be trained in law was Meester Pieter de Neijn who came to the Cape in 1672. Though his predecessors had the standard legal literature of those days at their disposal, none of them had any legal training.
26. C F J Muller (ed), *500 years: A history of South Africa*, Academica, Pretoria, 1981, p 63.
27. F Welsh, *A history of South Africa*, Harper Collins, London, 1998, p 53. The first independent fiscal was Meester C J Simons.
28. Muller, op cit, p 64.
29. M Wilson & L Thompson (eds), *The Oxford history of South Africa: South Africa to 1870*, Oxford University Press, London, 1969, p 217.
30. L Fouché (ed), *The diary of Adam Tas*, Longmans, Green and Co, London, 1914, pp 221-243.

31. Wilson & Thompson, op cit, p 222.
32. Ibid, pp 220-223.
33. C Beyers, *Die Kaapse Patriotte 1779-1791*, Juta & Kie, Johannesburg, 1929, pp 15-16.
34. Ibid, pp 132-139.
35. H J van Aswegen, *Geskiedenis van Suid-Afrika tot 1854*, Academica, Pretoria, 1989, p 164.
36. Muller, op cit, p 111.
37. Van Aswegen, op cit, p 184.
38. Ibid.
39. H Kuipers & C de Bruijn Prince, *Staats-almanak voor de Zuid-Afrikaansche Republiek 1898*, Staatsdrukkerij, Pretoria, 1897, p 54.
40. C Heyns & P Coetser, Die ontstaan en ontwikkeling van die amp van die prokureur-generaal van Transvaal, *Nuntius* 16, November 1986, p 61.
41. Ordonnantie no 5-1864, paragraph 12, as contained in *De locale wetten der Zuid Afrikaansche Republiek 1849-1885*, J F Celliers (publisher), Pretoria, 1887, p 273.
42. Ibid, paragraph 17, p 274.
43. Wet no 1, section 9, 1874, Regelende de manier van procederen in crimineels saken voor de gerechtshoven van landdrosten en heemraden in de Zuid-Afrikaansche Republiek, as contained in *De locale wetten der Zuid Afrikaansche Republiek 1849-1885*, op cit, p 558.
44. *Ordonnantie* no 5-1864, paragraph 46, op cit, p 280.
45. Gouvernements kennisgewing no 70 of 1867, as contained in *De locale wetten der Zuid Afrikaansche Republiek 1849-1885*, op cit, p 302.
46. Wet no 11, section 570, 1883, volksraadbesluit of 4 July 1883, as contained in *De locale wetten der Zuid Afrikaansche Republiek 1849-1885*, ibid, p 1216.
47. *Ordonnantie* no 4-1856, ordonnantie wijzigende de manier van procederen in crimineele zaken in den Oranjevrijstaat, paragraph 3 and 4, as contained in *Ordonnantie boek van den Oranjevrijstaat 1854-1877*, Bloemfontein.
48. Ibid, paragraph 71.
49. Ibid, paragraph 12.
50. *South Africa Act of 1909*, section 139. See also section 7 of the *Criminal Procedure Act* no 31 of 1917.
51. *Criminal and Magistrate's Courts Procedure (Amendment) Act* no 39 of 1926, section 1(3).

52. Heyns & Coetser, op cit, p 63.
53. Charles de Villiers (Transvaal) and E W Douglas (Eastern Cape).
54. P M Bekker, National or super attorney-general: Political subjectivity or judicial objectivity?, *Consultus* 8(1), April 1995, p 27.
55. *General Law Amendment Act* no 46 of 1935, as amended, section 7(4).
56. *Criminal Procedure Act* no 56 of 1955, section 5(3), and *Criminal Procedure Act* no 51 of 1977, section 3(5).
57. J A d'Oliveira, The office of the attorney-general, *Nuntius* 23, December 1993, p 70.
58. According to two previous attorneys-general, they never experienced any real interference from the ministers of justice at the time. See Yutar, op cit, p 136; and d'Oliveira, ibid.
59. D van Zyl Smit & E Steyn, Prosecuting authority in the new South Africa, paper prepared for workshop of experts on the review of criminal justice in Northern Ireland, Belfast, 9 June 1999, p 4.
60. *S v Ramgobin and Others* (SA) 1985 (3) 587 (N) 589.
61. *The Attorney-General Act* no 92 of 1992 came into operation on 31 December 1992.
62. *Attorney-General Bill* 69-92 (GA).
63. *The Attorney-General Act* of 1992 repealed section 3(5) of the *Criminal Procedure Act* no 51 of 1977 whereby the minister of justice could reverse any decision arrived at by an attorney-general.
64. According to section (1) of the *Attorney-General Act* no 92 of 1992, the president determined the salary of attorneys-general, provided that the salary payable to a particular attorney-general "shall not be reduced except by an Act of Parliament."
65. In terms of section 4 of the *Attorney-General Act* no 92 of 1992, an attorney-general needed to vacate his office only on reaching the age of 65 years (unless the president extended this for a maximum of two years). Moreover, an attorney-general could be suspended and removed from office, by the president or on request of both houses of parliament in the same session, only on the grounds of misconduct, on account of continued ill-health, or on account of incapacity to carry out his duties of office efficiently. In the instance where the president suspended an attorney-general, both houses of parliament could overrule the president's decision.
66. Van Zyl Smit & Steyn, op cit, p 5.
67. D'Oliveira, op cit, p 71.
68. Van Zyl Smit & Steyn, op cit, p 5.
69. Omar plaas vraagteken oor 'PG's van apartheid', *Die Burger*, 14 November 1994.

70. *Constitution of the Republic of South Africa Act* no 108 of 1996, section 179.
71. Z B du Toit, Groot agterdog heers oor die 'super-prokureur-generaal', *Rapport*, 9 February 1997.
72. See *Ex parte chairperson of the Constitutional Assembly, in recertification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).
73. *National Prosecuting Authority Act* no 32 of 1998. Most of the act came into operation on 16 October 1998.
74. *Ibid*, section 3.
75. Information on the structure of the national prosecuting authority was obtained from Marion Sparg, chief executive officer in the office of the national director (12 June 2000), and Sipho Ngwema, public relations officer in the office of the national director (31 October 2000).
76. *National Prosecuting Authority Act* no 32 of 1998, as amended, section 11(1).
77. *Ibid*, section 23.
78. The directors of public prosecutions are appointed by the president after consultation with the minister of justice and the national director of public prosecutions. See *ibid*, section 13(1)(a).
79. *Ibid*, section 6(2).
80. *Ibid*, section 24(1)(b).
81. *Ibid*, section 7(4)(a), as amended.
82. *Ibid*, section 13(1)(c).
83. *Ibid*, section 22(1).
84. *Ibid*, section 21(1).
85. Van Zyl Smit & Steyn, *op cit*, p 9.
86. *National Prosecuting Authority Act* no 32 of 1998, section 22(2)(b).
87. *Ibid*, section 22(2)(c).
88. Van Zyl Smit & Steyn, *op cit*, p 9.
89. *National Prosecuting Authority Act* no 32 of 1998, section 22(4)(a).
90. *Ibid*, sections 11(1) and 13(1).
91. *Ibid*, section 13(1)(c).

92. Ibid, section 16(1).
93. The president may, under certain circumstances, extend the terms of office of a national director and deputy national directors who have reached the age of 65 years for up to two years. See *ibid*, section 12(4).
94. Ibid, sections 12(6) and (7), and 14(3).
95. Ibid, section 17(1). Moreover, the salary of a deputy national director may not be less than 85% of the salary of the national director, while the salary of a director may not be less than 80% of the salary of the national director.
96. Ibid, sections 18 and 19.
97. Van Zyl Smit & Steyn, *op cit*, p 9. The salary payable to a deputy director or a prosecutor may, however, only be reduced by an act of parliament. See *ibid*, section 18(6).
98. Ibid, section 32(1)(a).
99. Ibid, sections 32(1)(b) and 41(1).
100. Ibid, section 24(4)(c).
101. Ibid, section 7(1A), as amended.
102. Ibid, section 13(1)(b).
103. Ibid, section 7(4).
104. Ibid, section 28(1).
105. Ibid, section 28(6).
106. Ibid, section 28(8)(a). The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court does apply, however, in relation to such a summoned person. Moreover, the answers such a person gives — with a few minor exceptions — may not be admissible against him in any criminal proceedings.
107. Ibid, section 29.
108. Ibid, section 24(2).
109. See South Africa — *The criminal justice system and the protection of human rights: The role of the prosecution service*, Amnesty International, AFR 53/01/98, February 1998, pp 9-13.
110. M Schönteich, How organised is the state's response to organised crime?, *African Security Review* 8(2), 1999, p 9.
111. For example, traps and undercover operations are useful tools for police officers investigating the activities of organised crime syndicates. In terms of section 252A(4) of the *Criminal Procedure Act* no 51 of 1977 as amended, an attorney-general (now a

director of public prosecutions) may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any police officer to obtain his written approval in order to set a trap or engage in an undercover operation at any place within his area of jurisdiction, and in connection therewith comply with his instructions.

112. *Investigation of Serious Economic Offences Act* no 117 of 1991.
113. For a summary of the main objections to the draft *National Prosecuting Authority Bill* see M Schönteich, National boss for attorneys general, *Fast Facts* 3/97, March 1997, p 5. The Democratic Party, Inkatha Freedom Party and National Party voted against the passing of the *National Prosecuting Authority Bill* in the national assembly, while the African National Congress, Pan Africanist Congress and the African Christian Democratic Party supported it. See Opposition parties' no to new 'super A-G' Bill, *The Citizen*, 10 June 1998.
114. *National Prosecuting Authority Bill*, clauses 6(1) and 10(1).
115. Memorandum on behalf of the parliamentary committee of the general council of the bar of South Africa regarding the *National Prosecuting Authority Bill* 1997, 13 December 1996, p 5.
116. A M J Pinnock, president of the association of law societies of the RSA, letter to the minister of justice, Dullah Omar, 29 November 1996.
117. *National Prosecuting Authority Act* no 32 of 1998, section 9(1)(a).
118. *National Prosecuting Authority Bill*, clause 3(5).
119. Draft comment by the society of state advocates on the proposed *National Prosecuting Authority Bill*, nd, p 3.
120. Memorandum on behalf of the parliamentary committee of the general council of the bar of South Africa regarding the *National Prosecuting Authority Bill* 1997, 13 December 1996, pp 3-4.
121. E Ferreira, Ons sal nie pionne word, sê Frank Kahn oor plan vir super-PG, *Die Burger*, 10 December 1994.
122. *National Prosecuting Authority Act*, section 22(2)(b).
123. Ibid, section 22(2)(c).
124. J Sarkin & S Cowen, The draft National Prosecuting Authority Bill: A critique, *South African Criminal Journal* 10(1), 1997, p 70.
125. Statement by Dullah Omar, chairperson, African National Congress, Western Cape, 6 March 1997.
126. SAIRR, *South Africa survey 1999/2000*, South African Institute of Race Relations, Johannesburg, 1999, p 341. See also W Hlongwa & S ka'Nkosi, Judge blasts 'ANC' super AG, *Mail & Guardian*, 11 December 1998; Politics subverts justice system, *The Citizen*, 14 December 1998.

127. M Cato, ANC captures the judiciary, *Finance Week*, 23-29 July 1998, p 34.
128. H Barrell & M Soggott, Nice guy, but can he do the job?, *Mail & Guardian*, 17 June 1998.
129. D Gibson, The independence of the judiciary compromised?, press release, 16 July 1998.
130. T Lamberti, New legal chief vows to fight off politicians, *Business Day*, 17 July 1998.
131. A Koopman, Super AG promises fairness and unity, *Cape Argus*, 29 July 1998.
132. B Ngcuka, speech read at the national prosecutors' conference, Somerset West, August 1998.
133. B Ngcuka, Implementing the vision, values and ethos of a new prosecution service, transcript of speech contained in *Report of the proceedings: Social context and strategic planning workshop*, Winterton, 18-22 January 1999, p 25.
134. *National Prosecuting Authority Act*, section 21(2).
135. Ngcuka, 1999, op cit, p 27.
136. Draft preliminary report to the national director of public prosecutions on the establishment of the national office and other related issues, 1998, pp 7-10. The report is also known as the Ramaite report after the leader of the team of consultants, Robinson Ramaite.
137. *National Prosecuting Authority of South Africa Policy Manual*, op cit, foreword.
138. Ibid.
139. *National Prosecuting Authority Act*, section 21(1)(a).
140. *Inaugural Annual Report 98/99*, National Prosecuting Authority of South Africa, Pretoria, p 6.
141. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p A.2.
142. Ibid, pp A.4-A.6.
143. Ibid, p A.9.
144. Ibid, p A.2.
145. Ibid, p A.11.
146. *National Prosecuting Authority Act*, section 21(1)(b).
147. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p B.1.
148. Ibid, p B.4.
149. Ibid, p B.72.

150. Ibid, p B.4.
151. Ibid, p B.6.
152. Ibid, pp B.16 — B.21.
153. Ibid, pp B.28 and B.50.
154. Ibid, pp B.61 and B.63.
155. Ibid, p B.121.
156. *National Prosecuting Authority Act*, section 22(6)(a).
157. *National Prosecuting Authority of South Africa Policy Manual*, op cit, Preamble to the code of conduct for members of the national prosecuting authority, p C.1.
158. Ibid, pp C.2-C.4.
159. *National Prosecuting Authority Act*, section 22(4)(f).
160. The *United Nations guidelines on the role of prosecutors* were adopted by consensus by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7 September 1990.
161. S Ngwema, public relations officer in the office of the national director of public prosecutions, Interview, Pretoria, 30 October 2000.
162. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p B.115.
163. D Omar, Press statement on the establishment of an Investigating Directorate on Organised Crime and Public Safety, 17 September 1998.
164. *Inaugural Annual Report 98/99*, National Prosecuting Authority of South Africa, op cit, p 6.
165. J Steinberg, Anti-hijacking unit gets tested next week, *Business Day*, 23 July 1999.
166. *Inaugural Annual Report 98/99*, National Prosecuting Authority of South Africa, op cit, p 7.
167. T Sherman, Issues facing management of the prosecution, transcript of a speech contained in *Report of the proceedings: Empowering prosecutors for effective and responsive prosecutions in the new millennium*, East London, 9-12 November 1999, pp 22-23.
168. The office for serious economic offences was established by section 2 of the *Investigation of Serious Economic Offences Act* no 117 of 1991.
169. P Atkinson, The Office for Serious Economic Offences (OSEO) of South Africa, *ISSUP Bulletin* 3/97, pp 1-2.

170. *Inaugural Annual Report 98/99*, National Prosecuting Authority of South Africa, op cit, pp 49-50.
171. *Government Gazette* 417(20997), 24 March 2000.
172. *Report: International anti-corruption expert round table*, Pretoria, 31 May — 2 June 2000, p 28.
173. T Mbeki, address at the opening of parliament, Cape Town, 25 June 1999.
174. P M Maduna, minister of justice and constitutional development, snap debate on the Directorate of Special Operations, National Assembly, Cape Town, 11 November 1999.
175. Special priority crimes investigation agency established, press release issued by the ministry of justice and constitutional development, 8 July 1999.
176. National Prosecuting Authority Amendment Bill, B39B-2000. The *National Prosecuting Authority Act*, no 61 of 2000 came into operation in January 2001.
177. P M Maduna, minister of justice and constitutional development, speaking at the national assembly vote on the *National Prosecuting Authority Amendment Bill* B39B-2000, Cape Town, 31 October 2000.
178. *National Prosecuting Authority Act*, section 7(1)(a), as amended.
179. Offences, or criminal or unlawful activities committed in an 'organised fashion' include the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intent, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.
180. P Pigou, Let the prosecutions begin ..., *Mail & Guardian*, 3 November 2000.
181. *National Prosecuting Authority Act*, section 31(1), as amended. The president may also designate any other cabinet member to the committee from time to time. The committee is chaired by the minister of justice and constitutional development.
182. W Hofmeyr, Combating organised crime: The challenges of implementing new legislation, paper read at a regional seminar on combating organised crime in the SADC region, Pretoria, 27 February 2001.
183. Maduna, 11 November 1999, op cit.
184. C MacAdam, deputy director of public prosecutions, KwaZulu-Natal, paper delivered at the 2000 annual KwaZulu-Natal conference of the Security Association of South Africa, Durban, 7 June 2000.
185. *National Prosecuting Authority Act*, section 7(3) and 7(4), as amended.
186. A M Omar, minister of justice, Press release on the establishment of an Investigating Directorate on Organised Crime and Public Safety, 17 September 1998.

187. *National Prosecuting Authority Act*, section 30(3), amended.
188. *National Prosecuting Authority Act*, section 19B, as amended.
189. *National Prosecuting Authority Act*, section 19C, as amended.
190. Ibid, section 19C(1), as amended.
191. Maduna, 11 November 1999, op cit.
192. Ibid.
193. *National Prosecuting Authority Act*, section 33(2).
194. Ibid, section 36(5).
195. *Estimate of national expenditure 2001*, national treasury, RP 30/2001, Pretoria, p 466.
196. *National Prosecuting Authority Act*, section 43A, as amended.
197. Policemen upset over Scorpions' higher pay, *Pretoria News*, 26 October 2000.
198. SAPS-Scorpions pay gap to be cut, Tshwete says, *The Star*, 1 November 2000.
199. Maduna, 31 October 2000, op cit.
200. T Lamberti, For justice, and the pay is not bad, *Business Day*, 8 December 1999.
201. R Richards, head: investigations and training, directorate of special operations, speaking at the 2000 annual national conference of the Security Association of South Africa, Midrand, 12 October 2000.
202. J Carlin, Dynamic duo putting sting into Scorpions, *The Sunday Independent*, 7 May 2000.
203. See, for example, J Heard & C Paton, Scorpions take centre stage, *Sunday Times*, 12 December 1999; P Kirk, Police feel the Scorpions' sting, *Mail & Guardian*, 23 June 2000; T Lamberti, Scorpions crack down on scheme, *Business Day*, 13 July 2000; B van Hees, Scorpions move in, *The Citizen*, 31 July 2000; SAPS left the Scorpions without their sting, *Pretoria News*, 19 January 2001.
204. A High, Police and Scorpions fight for bus-attack glory, *Sunday Times*, 20 August 2000.
205. As has been argued, for example, by one analyst. See, E Pelser, Scorpions bill may be structure over substance, *Business Day*, 8 August 2000.
206. Conflict between the SAPS and the Scorpions has already received some media attention. See, for example, H Ludski, It's turf war: As South Africa's crime wave grows, police chief Selebi and Scorpions' head Ngcuka fight over territory, *Sunday Times*, 9 April 2000; J Rademeyer, Scorpions, police wrangle over arrests, *Pretoria News*, 9 November 2000; and SAPS, Scorpions in dog fight: Row over whether police will oppose bail of six cops involved in controversial training video, *Pretoria News*, 15 November 2000.
207. P Sonn, Scorpions, transcript of a speech contained in *Report of the proceedings*:

208. *National Prosecuting Authority Act*, section 26(2), as amended.
209. Scorpions meant to 'support' SAPS, *Business Day*, 7 September 2000.
210. M Shaw, *Organised crime in post-apartheid South Africa*, ISS Paper 28, Institute for Security Studies, Halfway House, January 1998, p 1.
211. CIMC, The incidence of serious crime between 1 January and 31 December 1997, *Quarterly report 1/98*, Crime Information Management Centre, SAPS, Pretoria, 27 March 1998, p 25.
212. The SAPS defines a crime syndicate as: "An organised group of people sharing membership of a structure which, by means of unlawful activities and conspiracy, is engaged in illegally obtaining, receiving and supplying goods and services. Such a conspiracy violates the law to enrich or empower those involved and utilises a division of labour and planning to achieve its goals."
213. CIMC, The incidence of serious crime: January to March 1997, *Quarterly Report 2/97*, Crime Information Management Centre, SAPS, Pretoria, 13 June 1997, pp 23-46.
214. Shaw, 1998, op cit, p 2.
215. Section 35(1) of the *Criminal Procedure Act* no 51 of 1977 determines in part as follows: "A court which convicts an accused of any offence may declare ... any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or ... if the conviction is in respect of a serious offence listed in the Act, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question ... and which was seized under the provisions of this Act, forfeited to the state."
216. According to section 25(1) of the *Drugs and Drug Trafficking Act* no 140 of 1992, whenever any person is convicted of an offence under the Act, the court convicting him shall declare any drug or property by means of which the offence was committed, or any vehicle, vessel, aircraft, container or other article which was used for the purpose of or in connection with the commission of the offence, forfeited to the state.
217. *Prevention of Organised Crime Act* no 121 of 1998, chapter 5.
218. BWebb, Ngcuka warns criminals they have everything to lose, *Pretoria News*, 1 March 2001.
219. Ibid, chapter 6.
220. W Hofmeyr, The importance of asset forfeiture in the war against crime, presentation, Institute for Security Studies, Pretoria, 11 May 2000.
221. See, for example, FEAR (Forfeiture Endangers American Rights), <www.fear.org> , or T G Reed, American forfeiture law: Property owners meet the prosecutor, *Policy Analysis* 179, 29 September 1992.

222. J Redpath, Notes on forfeiture: an international perspective, with emphasis on civil asset forfeiture, seminar paper, Institute for Security Studies, Pretoria, 11 May 2000.
223. In June 1999, the US House of Representatives passed the *Civil Asset Forfeiture Reform Bill*; a compromise version was passed by the Senate in March 2000.
224. For example, forensic evidence that cash notes to the value of R140 000 were physically tainted with illegal drugs, has in one instance satisfied the burden of proof.
225. For example, the National Association of Democratic Lawyers, the South African Institute of Race Relations and the Human Rights Committee of South Africa. See, for example, M Schönteich, Beware of the company you keep, *Fast Facts* 6/98, June 1998, p 7.
226. W Hofmeyr, Asset forfeiture, transcript of a speech contained in *Report of the proceedings: Empowering prosecutors for effective and responsive prosecutions in the new millennium*, op cit, p 78.
227. *The National Director of Public Prosecutions v W Basson*, High Court of South Africa (Transvaal Provincial Division), Case No 22421/99; *The National Director of Public Prosecutions v Gavin Gerald Carolus*, High Court of South Africa (Cape of Good Hope Provincial Division), Case No 3348/99; *The National Director of Public Prosecutions v Pieter Johannes Meyer*, High Court of South Africa (Durban and Coast Local Division), Case No 6441/99. The state appealed in the Carolus case but lost the appeal: *The National Director of Public Prosecutions v Gavin Gerald Carolus*, Supreme Court of Appeal of South Africa, Case No 162/99.
228. W Hofmeyr, The challenge of implementing new legislation: Asset forfeiture in the war against crime, paper read at a regional seminar on combating organised crime in the SADC region, Pretoria, 27 February 2001.
229. *Prevention of Organised Crime Act*, chapter 7.
230. Hofmeyr, Asset forfeiture, op cit, p 79.
231. Hofmeyr, The importance of asset forfeiture in the war against crime, op cit.
232. *National Prosecuting Authority of South Africa mid term report*, op cit, p 35.
233. *Domestic & Sex Crimes* 1(1), June 2000, p 2.
234. S Rasool, Violence against women survey: Summary of main findings, *Nedbank ISS Crime Index* 4(4), July-August 2000, pp 26-28.
235. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p B.50.
236. T Majokweni, director of the Sexual Offences and Community Affairs Unit, Interview, Pretoria, 25 July 2000. At the time of the interview, another three 'one-stop' centres were planned for Durban, Johannesburg and Soweto.
237. T Majokweni, Dealing with rape: An inter-sectoral approach, *Domestic & Sex Crimes* 1(1), June 2000, p 4.

238. V Francis, *A rape investigation in the Western Cape: Building community-driven strategies to strengthen the investigation and prosecution of rape*, Bureau of Justice Assistance, Cape Town, March 2000, pp 23-24.
239. *National Prosecuting Authority of South Africa Policy Manual*, op cit, p B.50.
240. Majokweni, Interview, op cit.
241. Majokweni, Offences against women and children, transcript of a speech contained in *Report of the proceedings: Empowering prosecutors for effective and responsive prosecutions in the new millennium*, op cit, p 82.
242. Majokweni, Interview, op cit.
243. S Rasool, Sexual offences courts: Do more courts mean better justice?, *Nedbank ISS Crime Index 4(2)*, March-April 2000, p 11.
244. S Stanton, M Lochrenberg & V Mukasa, *Improved justice for survivors of sexual violence? Adult survivors' experiences of the Wynberg Sexual Offences Court and associated services*, Cape Town, 1997. See also, C Smith, Rape courts are no use on their own, *Mail & Guardian*, 17 March 2000.
245. Majokweni, Interview, op cit.
246. *National Prosecuting Authority of South Africa mid term report*, op cit, p 38.
247. Majokweni, 1999, op cit, pp 83-84.
248. Ibid, p 84.
249. SALC, *Sexual offences: the substantive law*, Discussion paper 85, project 107, South African Law Commission, Pretoria, August 1999.
250. *National Prosecuting Authority of South Africa mid term report*, op cit, p 8.
251. TBVC states were the nominally independent black homelands of Transkei, Bophuthatswana, Venda and Ciskei.
252. H Scheepers, head: prosecutorial training, Justice College, Interview, Pretoria, 16 August 2000.
253. C van der Riet, head: Justice College, Interview, Pretoria, 16 August 2000.
254. J Henning, special director: court management unit, national prosecuting authority, Interview, Pretoria, 2 August 2000.
255. In June 2000, the court management unit identified 349 prosecutors who urgently required training in order to function effectively in their positions.
256. Van der Riet, op cit.
257. *National Prosecuting Authority of South Africa mid term report*, op cit, p 7.

258. Much of the information contained in this chapter has been taken and updated from M Schönteich, *Assessing the crime fighters: The ability of the criminal justice system to solve and prosecute crime*, ISS Paper 40, Institute for Security Studies, Pretoria September 1999.
259. *Statistics of offences and of penal institutions*, 1949 to 1962, Special Report 272, Republic of South Africa Bureau of Statistics, Pretoria, 1964.
260. For example, pass law-related offences, or the offence of 'possession of firearm and ammunition by non-White'.
261. *Crimes: prosecutions and convictions with regard to certain offences*, CSS Report 00-11-01 (1995/96), Central Statistical Service, Pretoria, 1998. (After 1962, annual prosecution and conviction figures were no longer compiled by calendar year, but cover the period from 1 July to 30 June. At the time of writing, the 1995/96 period was the latest for which prosecution and conviction figures were available from the Central Statistical Service.)
262. This includes the 30 most serious and prevalent offences only. Minor offences such as trespassing, urinating in public and traffic offences are excluded.
263. Crime in South Africa for the period January to December 1999. Fax from Captain M J Krügel, Crime Information Analysis Centre, Pretoria, 20 August 2000.
264. For a technical description of these categories see *South African Police Service standing order* no 392, 22 September 1995. For a more general description see J J Claasen, Conviction rates, Crime Information Analysis Centre, SAPS Detective Service: Head Office, February 1999.
265. *Criminal Procedure Act* no 51 of 1977, section 6(a), as amended.
266. In terms of section 195 of the *Criminal Procedure Act* no 51 of 1977, the state may not compel one spouse to give evidence against the other for the prosecution in criminal proceedings in respect of a range of offences listed in the act (including any offence committed against the person of either of them, such as assault).
267. *Constitution of the Republic of South Africa Act* no 108 of 1996, section 35(3)(d).
268. Most detectives are investigating upwards of 50 cases at any one time. See M Shaw, *South Africa: Crime in transition*, ISS Paper 17, Institute for Security Studies, Halfway House, March 1997, p 4.
269. *Criminal Procedure Act* no 51 of 1977, section 6(a), as amended.
270. See *ibid*, section 6(b).
271. See *ibid*, section 77.
272. *Ibid*, section 57(1)(a).
273. Caution needs to be exercised when comparing the annual number of cases recorded with the annual number of cases prosecuted and convicted. Cases recorded during one year

are often prosecuted during the following year. For example, the investigation of a complicated murder case recorded in December 1998 may only be finalised in mid-1999. The prosecution of the case may occur only in late-1999. There was no dramatic change in the number of crimes recorded from one year to the next between 1996 and 1999, however. Cases prosecuted (and those ending in a successful prosecution) as a proportion of reported cases also did not change much between 1996 and 1999. As a result, the proportion of prosecutions and convictions resulting from actual cases recorded during a given time would not vary much from the proportions calculated in this monograph. This is confirmed by a study which tracked the outcome of some 15 500 randomly selected individual cases recorded by the police in eight police areas. The outcome of each case was checked on average more than two years after the crime was recorded by the police. The study analysed three violent crime types: murder, rape and robbery with aggravating circumstances. The study found that 5.7% of the sampled violent crime cases resulted in a conviction two years after the crimes were recorded by the police (while 4.4% had not been finalised). See R Paschke, *Report on rate of conviction and other outcomes in eight South Africa police areas*, South African Law Commission, Pretoria, 2000.

274. A 1996 survey of people on the Cape Flats (outside Cape Town) found that most disapproved of and were dissatisfied with the performance of the SAPS and the courts. Overall, perceptions of the police and the courts were worse among those who had been victimised. Moreover, perceptions of the police and the courts were the most negative among those who had laid a charge and had contact with the police and the courts. See, C Africa et al, *Crime and community action: Pagad and the Cape Flats, 1996-1997*, POS Reports 4, June 1998, Idasa, Cape Town, p 11.
275. The Department of Statistics did not release figures for the number of cases prosecuted for the years 1970/71 to 1976/77. It is consequently impossible to calculate the proportion of cases which were prosecuted successfully during these years. Statistics South Africa discontinued the release of prosecution and conviction statistics after its 1995/96 report. All figures used for the period after 1995/96 come from the SAPS's Crime Information Analysis Centre (CIAC) which releases statistics by calendar year. For methodological reasons, the pre and post-1995/96 statistics are not always strictly comparable. Statistics South Africa included petty offences (such as trespassing or gambling) in its reports, while the CIAC's reports cover the 30 most serious and prevalent offences only. When analysing South African crime statistics over time, it is important to remember that the 'independent' homelands were excluded from official South African crime statistics. Thus, crimes reported to police stations in the Transkei after October 1976, Bophuthatswana after December 1977, Venda after September 1979, and Ciskei after December 1981, are not included in this monograph. The 'independent' homelands were reincorporated into the rest of the country in 1994. See M Schönteich, Crime increase partly a statistical quirk, *Fast Facts* 3/99, March 1999, p 2.
276. 1995/96 is the latest period for which figures are available from Statistics South Africa.
277. CIAC, *The incidence of serious crime in South Africa between January and December 1999*, Semester report 1/2000, Crime Information Analysis Centre, SAPS, Pretoria, 2000.
278. SAIRR, *South Africa survey 1996/1997*, South African Institute of Race Relations, Johannesburg, 1997, pp 65-68. See also M Shaw, *Partners in crime? Crime, political transition and changing forms of policing control*, Research report 39, Centre for Policy

279. Unless otherwise indicated, the performance-related statistics used in this section are taken from a document entitled *National statistics* (undated) compiled by the Court Management Unit of the national prosecuting authority, and information supplied by Advocate Marnus Steyn of the Court Management Unit.
280. M Steyn, Court Management Unit, national prosecuting authority, Interview, Pretoria, 23 October 2000.
281. *National Prosecuting Authority of South Africa mid-term report*, 2000, p 8.
282. Ibid.
283. Z Venter, Ngcuka blasts justice 'prima donnas', *Pretoria News*, 23 October 2000. See also D Ball, Race to clear 10-year case backlog in Umtata, *Sunday Independent*, 19 March 2000.
284. That is from 9h00 to 11h00; 11h15 to 13h00, and 13h45 to 16h00.
285. It needs to be borne in mind that individual prosecutors throughout the country were responsible for keeping a record of statistics on hours lost in their courts. This methodology lends itself to potential bias as some prosecutors would have hesitated to blame themselves for lost court hours.
286. J J Swart, president of the National Union of Prosecutors of South Africa, Telephonic interview, 7 April 1997, and *Hansard* [NA:Q] 6, 16 April 1998, column 874. In 1995 there was a 40% turnover of prosecutors at the Johannesburg magistrate's court; see P Naidoo, Justice chaos: Advocates start work-to-rule campaign, *Cape Argus*, 14 July 1996. At the Durban magistrate's court, about one-third of the prosecutors had resigned in the 18 months between the beginning of 1995 and June 1996; see L Seeliger, Durban's courts in crisis, *The Natal Mercury*, 20 June 1996.
287. F W Kahn, *1997 annual report submitted by the attorney-general of the Cape of Good Hope in terms of section 5(6)(a) of the Attorney-General Act no 92 of 1992*, Cape Town, p 15; A P de Vries, *Year report: Office of the attorney-general Witwatersrand Local Division*, 1 January 1997 — 31 December 1997, Johannesburg, p 30.
288. I de Lange, 'Bungling' Justice officials panned, *The Citizen*, 9 April 1998.
289. R Meintjes, chairperson for the Society of State Advocates, Telephonic interview, 2 April 1997. In June 1996, the average experience of district court prosecutors at the Durban magistrate's court was approximately one year. On average, they had to deal with up to 15 cases in court a day. This included liaising with half a dozen legal representatives and attending to up to 20 witnesses, policemen and the public. See Seeliger, op cit.
290. *Hansard* [NA:Q] 9, 20 August 1997, column 2173.
291. L Fernandez, Profile of a vague figure: The South African public prosecutor, *South African Law Journal* 110(1), 1993, p 117.
292. Hoexter Commission of Enquiry, *Second Interim Report* RP 35/1981.

293. Ibid, p 2.
294. According to Mr Rudi Krause, a spokesperson for the prosecutors at the Johannesburg magistrate's court, an average prosecutor in the regional court has to deal with about 10 cases per day, while maintenance court prosecutors have to study between 40 and 50 files daily for their preparations. In contrast, attorneys are bound by the law society to prepare for one trial per day only; see *Sowetan*, 23 July 1996. The deputy minister of justice, Dr Manto Tshabalala-Msimang, referring specifically to traffic courts, said that there was "immense pressure on the courts caused by the high levels of crime ... Our courts are not coping", she said; see *The Argus*, 24 July 1996.
295. A P de Vries, *Year report: Office of the attorney-general Witwatersrand Local Division*, 1 January 1997 — 31 December 1997, Johannesburg, p 30.
296. M Schönteich, Lack of conviction: Prosecution's poor performance, *Nedcor ISS Crime Index* 3(2), March-April 1999, pp 5-8. See also J Malala, Waiting to implode: Justice department vacancies remain open for up to 12 months, *Financial Mail*, 23 May 1997, pp 42-43.
297. G Chuenyane, Prosecutors struggle with load, *Sowetan*, 12 October 2000.
298. Schönteich, 1999, op cit, pp 5-8. *Department of Justice annual report*, 1998/1999, p 2.
299. SAIRR, 1997, op cit, pp 65-66; CIAC, Semester report 1/2000, op cit.
300. The figures in graph 17, as supplied by the department of justice, do not indicate the number of prosecutors employed at the same time of each of the years for which figures are given. The figures are applicable to the following months: May 1994, December 1995, June 1996, November 1997, September 1998, December 1999 and October 2000.
301. The only research found is a study conducted by an undergraduate student from Twente University in the Netherlands: A Aanstoot, *Redenen voor het vertrek van Officiëren van Justitie uit de Zuidafrikaanse staatsdienst*, Potchefstroom, January 1998.
302. Salary figures used in this section were accurate at the time of writing in February 2001.
303. Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court (the Hoexter commission), *First Interim Report*, 7 March 1997, volume 1, chapter 6, p 67.
304. The total salary package of a beginner prosecutor earning a gross salary of R58 849, including medical aid and pension benefits, is approximately R95 000 per annum.
305. See *The graduate: Newsletter of the HSRC register of graduates* 1999, 1999, pp 12-17.
306. Prosecutors and junior state advocates are generally promoted to a higher salary rank after every three years of service (except prosecutors on the two lowest ranks where promotion to the next rank should occur every 18 months). However, prosecutors who have performed exceptionally well in their work are 'preferentially promotable' after being in a salary rank for two years only. Prosecutors can also be 'promoted out of turn' after being in a salary rank for two-and-a-half years.

307. *National Prosecuting Authority Act*, section 17(1)(a).
308. D Granger, AGs quit over poor pay, *Cape Times*, 3 July 1996.
309. Prosecutors to get increases before Xmas, SAPA, 9 December 1999.
310. S Meyer, senior public prosecutor, Court Management Unit, national prosecuting authority, Interview, Pretoria, 23 October 2000.
311. T Lamberti, Prosecutors take pay row to Maduna, *Business Day*, 1 August 2000.
312. M van der Merwe, regional court prosecutor and president of the National Union of Prosecutors of South Africa, Interview, Pretoria, 21 April 2000. The Society of State Advocates of South Africa suggests that, once experience levels are taken into account, prosecutors deserve higher salaries than magistrates, given the formers' responsibilities and workload.
313. For more detailed information on prosecutors' main duties and functions see *National Prosecuting Authority of South Africa Policy Manual*, op cit, p A.2.
314. *Inaugural Annual Report 98/99*, National Prosecuting Authority of South Africa, op cit, p 22.
315. Petition by the National Union of Prosecutors of South Africa to attorneys-general, July 1997, paragraph A.1.
316. J J Swart, president of the National Union of Prosecutors of South Africa, letter to the author, 5 May 1997.
317. Naidoo, op cit, 14 July 1996.
318. Advocates question govt's crime stance, *The Citizen*, 27 June 1997.
319. Petition by the National Union of Prosecutors of South Africa, op cit, paragraph D.
320. E Gootman, Prosecutors protest over pay, *Cape Times*, 11 July 1997.
321. A M Omar, press statement, Cape Town, 21 August 1997.
322. T Lamberti, Ban adds to growing pressure on employees, *Business Day*, 3 November 1998.
323. Omar, Kahn at odds over overtime, *Business Day*, 19 January 1998.
324. S Lieberum, Prosecutors' sentence: bleak Xmas, *The Citizen*, 11 December 1998.
325. T Lamberti, Ngcuka apologises for delay of salary increases, *Business Day*, 15 December 1998.
326. Van der Merwe, Interview, op cit.

327. S Bothma, Ngcuka scoffs at prosecutors' rise, *Business Day*, 23 December 1998.
328. T Lamberti, Omar to oppose urgent interdict by prosecutors, *Business Day*, 20 January 1999.
329. T Lamberti, CCMA to hear prosecutors' case, *Business Day*, 26 January 1999.
330. The main organisations and unions representing prosecutors and state advocates in salary negotiations are the National Union of Prosecutors of South Africa (NUPSA), the Society of State Advocates of South Africa (a registered trade union), the Public Servants' Association (PSA), the National Union of Public Service and Allied Workers (NUPSAW), and the National Education, Health and Allied Workers' Union (NEHAWU).
331. C Powers, Prosecutors agree to 'historic' salary deal, *The Star*, 1 April 1999.
332. B Ngcuka, Winning the war against crime, presentation to the Enterprise Forum, Sandton, 30 September 1999.
333. Public Service Co-ordinating Bargaining Council resolution, 31 March 1999, Pretoria, paragraph 4.1.
334. K Liebenberg, Court officials win increase battle, *The Citizen*, 27 May 1999.
335. T Lamberti, Prosecutors, government set to end dispute today, *Business Day*, 8 June 1999.
336. Govt 'cannot compete', *Sowetan*, 28 June 1999.
337. Prosecutors to get increases before Xmas, op cit.
338. Meintjes, Telephonic interview, op cit.
339. E Momberg, Go-slow: officials risk jobs, *The Citizen*, 20 October 2000.
340. No money for big pay rise, says SA's top prosecutor, *Business Day*, 30 October 2000.
341. R Brand, Anger as president's men get extra 15.5%, *The Star*, 17 October 2000.
342. MPs' increases a slap in the face — Cosatu, SAPA, 23 October 2000.
343. H Bakker, Senior Public Prosecutor, Port Elizabeth magistrate's court, telephonic interview, 23 February 2001.
344. *Estimates of national expenditure 2001*, National Treasury, Pretoria, RP 30/2001, p 459.
345. In the small northern KwaZulu-Natal town of Utrecht, for example, the lone district court prosecutor has been prosecuting for 14 years, but cannot advance beyond her district court position unless she is prepared to commute to Newcastle where the nearest regional courts are situated.
346. *The Sunday Independent*, 25 May 1997; Beeld, 5 June 1996. See also, A P de Vries, *Office of the Attorney-General Witwatersrand Local Division, annual report 1 January 1996 — 31 December 1996*, Johannesburg, pp 2-4.

347. J Perlman, With scant help, justice tries to keep a stern face amid a fog of crime, *Sunday Independent*, 25 May 1997. See also J A d'Oliveira, *Attorney-general: Transvaal report, 1 January 1997 to 31 December 1997*, Pretoria, paragraphs 7.6 and 12.3(f); M T van der Merwe, *Office of the attorney-general: Free State report, 1 January 1997 — 31 December 1997*, Bloemfontein, pp 3-4.
348. Observations of the author, 23 May 2000.
349. J Perlman, Prosecutors losing patience with justice ministry's hollow promises, *Sunday Independent*, 3 August 1997.
350. This was, for example, the case for many years at the Pinetown district court prosecutors' offices until 1999 when a new courtbuilding was completed (observations of the author). This is also the case at the Madadeni magistrate's court where the courts and offices are housed in what used to be an agricultural school (observations of the author, 24 March 2000).
351. See, for example, J Goko, Police to get tough on court security, *The Citizen*, 21 August 1997; I de Lange, Maduna anger at lax security in High Court, *The Citizen*, 11 February 2000; Move to protect court men, *The Citizen*, 16 May 2000.
352. A P de Vries, *Year report: Office of the attorney-general, Witwatersrand local division, 1 January 1996 — 31 December 1996*, Johannesburg, paragraph 1.2.2.
353. J Ncube, Courtrooms of fear, *Sowetan*, 15 February 1999.
354. P Setsetse, spokesman for the minister of justice and constitutional development, as reported on Radio Jacaranda, 8h00 news, 11 September 2000.
355. Ncube, Courtrooms of fear, op cit.
356. C Sawyer, Face of justice transformed, *Cape Argus*, 6 August 1997.
357. A P de Vries, *Year report: Office of the attorney-general Witwatersrand Local Division, 1 January 1997 — 31 December 1997*, Johannesburg, paragraph 2.1.3.
358. M Schönteich, Justice delayed ..., *Fast Facts* 8/97, August 1997, p 1.
359. C F du Plessis, *Report by the attorney-general of the Northern Cape to the minister of justice in terms of section 5(6) of the Attorney-General Act, No. 92 of 1992, for the year 1997*, Kimberley, February 1998, p 3.
360. De Vries, 1997, op cit, paragraph 2.1.4.
361. R Morris, Justice reels under exodus of lawyers, *Cape Times*, 18 August 1998.
362. A Jeffery, Presuming guilt and rewriting the law, *Fast Facts* 7/97, July 1997, p 2.
363. D Cavernelis, Lawyers clash on Omar's view of justice, *Cape Argus*, 9 July 1997.
364. A Bauer, senior state advocate and Western Cape chairman of the National Union of Prosecutors of South Africa, Interview, Cape Town, 29 March 2000; J Henning, director of

the national prosecuting authority's court management unit, Interview, Pretoria, 2 August 2000.

365. B Ngcuka, 1999, op cit, p 25.
366. W Hartley, Ngcuka outlines strategy to combat bombings, *Business Day*, 13 September 2000.
367. J J Noëth, director-general of justice, fax to the author, 25 November 1998; *Department of justice annual report, 1998/1999*, op cit, p 2; P Soggot & L Stack, *Closing the gap between policy and implementation in South Africa: The justice sector, draft report*, Centre for Policy Studies, Johannesburg, February 2001, p 89.
368. F van Zyl, Northern Province chairman of the National Union of Prosecutors of South Africa, Interview, Pretoria, 17 February 2000.
369. M Schönteich, The story of a good law, its bad application, and the ugly results: A policy briefing and analysis of the South African bail law (Act 75 of 1995), and its inadequate application due to an ineffective criminal justice system, *Spotlight* 1/97, July 1997, p 28.
370. Story recounted by Advocate Jan Henning, director of the court management unit of the national prosecuting authority. See J Henning, Organisational processes and systems, transcript of speech contained in *Report of the proceedings: Social context and strategic planning workshop*, op cit, pp 37-38.
371. M Dyson, Senior Public Prosecutor: training, Durban magistrate's court, Interview, Durban, 6 June 2000.
372. For example, in 1996, only 135 of the 210 prosecutors falling under the jurisdiction of the attorney-general of the Cape of Good Hope had attended the basic prosecutors' course. See F W Kahn, *1997 annual report submitted by the attorney-general of the Cape of Good Hope in terms of section 5(6)(a) of the Attorney-General Act no. 92 of 1992*, Cape Town, p 8.
373. Henning, Interview, op cit.
374. Van der Merwe, Interview, op cit.
375. In mid-2000, some 149 out of 936 district courts in the country were single-prosecutor courts.
376. Van Riet, Interview, op cit.
377. *Constitution of the Republic of South Africa Act* no 108 of 1996, section 35(3)(h).
378. *Criminal Procedure Act* no 51 of 1977, section 217(1)(b)(ii), as amended.
379. *S V Zuma and Others* 1995 (2) SA 642 (CC).
380. *Drugs and Drug Trafficking Act* no 140 of 1992, section 21(1)(a)(i).
381. *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

382. *Drugs and Drug Trafficking Act* no 140 of 1992, section 21(1)(a)(iii).
383. *S v Julies* 1996 (4) SA 313 (CC).
384. *Drugs and Drug Trafficking Act* no 140 of 1992, section 20.
385. *Mello and Another v The State* 1998 (3) SA 712 (CC).
386. *Arms and Ammunition Act* no 75 of 1969, section 40(1), as amended.
387. *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC).
388. Dyson, Interview, op cit.
389. *General Law Amendment Act* no 62 of 1955, section 37(1), as amended.
390. *S v Manamela and Another* 2000 (3) BCLR 49 (CC).
391. J Steinberg, Onus of proof rests with the state, *Business Day*, 2 August 1999.
392. *Constitution of the Republic of South Africa Act* no 108 of 1996, section 36(1) .
393. *Road Traffic Act* no 29 of 1989, section 130, which is now contained in the *National Road Traffic Act* no 93 of 1996, section 73(1).
394. *Criminal Procedure Act* no 51 of 1977, section 60(11)(a), as amended by Act no 85 of 1997.
395. *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).
396. A Fulton, Presumption of guilt replacing presumption of innocence, *Fast Facts* 12/99, December 1999, pp 3-5.
397. SALC, *Sexual offences: the substantive law*, op cit.
398. C Rickard, Court urged to stand firm against accused, *Sunday Times*, 15 November 1998.
399. C Rickard, Constitution is no holy cow, says top judge, *Sunday Times*, 22 August 1999.
400. F-N Moya, Legal brains differ over forced-disclosure plan, *The Star*, 1 July 1999; see also D Delport, Fight to give prosecution more clout, *Sunday Tribune*, 10 May 1998.
401. *Criminal Procedure Act* no 51 of 1977, sections 58-60, as amended by Act no 85 of 1997.
402. Ibid, section 50(6)(c), as amended.
403. *Correctional Services Act* no 8 of 1959, section 29, as amended by the *Correctional Services Amendment Act* no 14 of 1996.
404. Ibid, section 29(5A), as amended.
405. See M Schönteich, The dangers of youth? Linking offenders, victims and age, *Nedcor ISS Crime Index* 3(5), September-October 1999, pp 22-28.

406. *Shabalala v Attorney-General of the Transvaal* 1995(2) SACR 761 (CC).
407. N Nxusani, Dockets vanish: More than 350 case files destroyed or lost in a year, *Sowetan*, 27 March 2000.
408. K Ashken et al, *Baseline data collection in DPP offices: Report of multi-disciplinary team July-August 1999*, Pretoria, 23 August 1999.
409. The majority (approximately 75%) of the prosecutors interviewed by the author for the purposes of this monograph expressed the view that the quality of the police's detective work declined after 1994. According to most respondents, the decline in work quality is especially marked among general detectives, and less so among detectives working in specialised detective units such as the murder and robbery unit.
410. See A Altbeker, *Solving crime: The state of the SAPS detective service*, ISS Monograph 31, Institute for Security Studies, Halfway House, November 1998, p 49, where the point is made that a confession-driven investigative approach did not dominate all SAP detective units. Many units — especially those dealing with less serious crimes — relied less on confessions and complied more closely with the law.
411. L Stack, *Pivot of the new order: The South African judiciary and the political consequences of judicial malfunctioning*, Centre for Policy Studies, Johannesburg, August 1997, pp 11-12.
412. Police may arrest plenty of people but they don't get to court, prosecutors say, *Sunday Independent*, 25 May 1997.
413. A Hadland, Many cops 'illiterate', *Natal Mercury*, 24 September 1999.
414. S V Tshwete, minister for safety and security, written reply to parliamentary question, 10 March 2000, question 309, (National Assembly).
415. C Rickard, Bad police work to blame for acquittals, *Sunday Times*, 7 February 1999.
416. B van Hees, Criminal investigation blasted, *The Citizen*, 10 June 1999.
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469. P Maduna, minister of justice and constitutional development, speaking at the launch of the specialised commercial crime courts, Pretoria, 15 November 1999.
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477. *Criminal Procedure Act* no 51 of 1977, sections 7-17, as amended.
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