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Prosecution Priorities

How to make best use of scarce resources in the criminal justice system

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Contents

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1. Executive Summary

South Africa does not have a system of compulsory prosecution and the opportunity principle applies. This means that the prosecution does have some discretion in making decisions to prosecute. The general principle of the existence of a *prima facie* case, no public interest reasons not to pursue the case, and a reasonable prospect of success, currently is in place to guide such decisions.

This seemingly neutral Prosecution Policy is in practice affected by real-world factors external to the case such as the extent of the workload faced by the prosecution, the varying degrees of difficulty of cases, the extent of measurement of performance through conviction rates, the availability of less onerous methods of resolution of cases, and the unintentional removal of matters from the roll through delay.

Prosecution Policy should recognise that these factors may operate to prefer the prosecution of less impactful cases, resulting in resources not being optimally utilised. In order to address this problem, a number of interventions are proposed.

First, workload data should be analysed to ensure resources are allocated to ensure optimal prosecutor workload at each magisterial district. Second, the way in which an offender is dealt with should take into account the broader context of the community in which the crime has occurred and the available resources of the relevant district. Third, there needs to be an orientation away from a prosecution policy to a case disposition policy, so that all matters brought to the attention of the prosecution are resolved in the most just, appropriate and impactful way possible. Fourth, prioritisation should involve not only the decision to proceed with the matter, but include standards for speedy finalisation of priority matters, based on baseline research. Fifth, there should be re-orientation from crime-type to the offender profile, to ensure that repeat offenders are identified and prioritised for prosecution toward custodial sentences, while first offenders may face lesser interventions. Sixth, any offence with an element of violence should enjoy greater indulgence in terms of further investigation and eventual prosecution. Finally, performance measurement should reflect and support these principles.

Should these be applied in South Africa, it is likely that the scarce resources of the criminal justice system will have greater impact, including on future offending and the future burden on the justice system.

2. Problem Statement

Prosecution is the primary means through which those committing criminal acts, including human rights abuses by state officials, are held to account. In South Africa, the National Prosecuting Authority (NPA) has the power to

institute criminal proceedings on behalf of the state in relation to all criminal acts, and to carry out any necessary functions incidental to instituting criminal proceedings, and is thus the primary enforcer of accountability.[1]

2.1.1. The opportunity principle

However, South Africa does not have a system of universal or mandatory prosecution;[2] nor does it have the means to prosecute all matters. Instead, it operates on the *opportunity principle*, as do most common law countries, as well as France and the Netherlands.[3] This is unlike many civil law countries, which operate on the *legality* principle, in terms of which the prosecutor is in principle required to prosecute *every* case where there is sufficient evidence to sustain a prosecution.

By contrast, in countries of the opportunity principle like South Africa, prosecutors *may exercise discretion* with respect to whether or not to institute criminal proceedings or, when proceedings have been commenced, to decide whether to withdraw specific charges or the entire proceeding. [4]

This means that the prosecution may exercise a discretion not to prosecute cases even where there is sufficient evidence for a prosecution. The exercise of this discretion is open to perceived or actual bias, which may undermine trust in the prosecution. Consequently, international standards recommend that such decisions are informed by *previously articulated policy*.[5]

Thus it is the case that the South African Constitution provides that the NPA must decide which cases to prosecute on the basis of *Prosecution Policy*.[6] In order to demonstrate independence and that the interest of justice are being served, the NPA should be able to demonstrate that its decisions have been taken on the basis of Prosecution Policy. Consequently, the content of Prosecution Policy is of great import.

2.1.2. Prosecution policy

How does current Prosecution Policy guide prosecutions? Simply stated, current NPA Prosecution Policy says, "If there is a *prima facie* case, no public interest reasons not to pursue it, and a reasonable prospect of success, then the case should ordinarily be prosecuted."[7]

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[1] Section 179(1)(2) Constitution of the Republic of South Africa Act 108 of 1996.
[2] Although not expressly stated in the Constitution, section 179(5)(d) refers to the review of decisions to prosecute or not to prosecute, and s179(5)(a) to the formulation of prosecution policy, in terms of which a discretion to prosecute can be inferred.
[3] UNODC 'The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide' (2014) p9.
[4] UNODC 'The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide' (2014) p9.
[5] These international standards include the International Association of Prosecutors (IAP) Standards and the UN Guidelines of the Role of Prosecutors.
[6] This is called the opportunity principle as opposed to the legality principle. In countries where the legality principle applies, all cases that meet the evidentiary requirements must be prosecuted.
[7] National Prosecuting Authority of South Africa, Prosecution Policy (2014).

"Prima facie" is Latin for "at first sight" and in law means there exists a case which is sufficiently strong so that, if no defence is mounted, the accused will be convicted on the evidence available. NPA policy thus provides that the NPA may choose not to prosecute if there is no prima facie case – in essence, that an element of the relevant offence is lacking.

Even if there is a prima facie case, the NPA may choose not prosecute if there exists a public interest reason not to prosecute. In practice, the "public interest" has become widely construed.

While it is uncontroversial that it may not be in the public interest to prosecute children, the very old, the terminally ill, or those who have already suffered as a consequence of their wrong-doing, "public interest" has come to include, for example, those accused of crimes such as theft or shoplifting of small items, or drug crimes, via expansion of the *de minimis* rule (*de minimis non curat lex* means the law does not concern itself with the trivial.)

In addition, "public interest" has become open to interpretation by the prosecution. For example, is it in the public interest to prosecute a political actor, if widespread protest causing harm might result? The determination of what is in the public interest does not always have clear-cut answers, and it is increasingly the case that the NPA may be taking on a quasi-judicial role in making this determination.

NPA policy further provides that in spite of a *prima facie* case, and no public interest reasons not to prosecute, a prosecutor may also choose not to prosecute because the case does not have a reasonable prospect of success. In this scenario, the prosecution anticipates the defence of the accused, and weighs up whether or not the prosecution will be able to prove its case "beyond reasonable doubt". If the chances are not reasonable, the prosecutor may decide not to prosecute. Currently, the very high success rates of cases which *are* prosecuted, indicated by conviction rates of more than 90 percent, suggests that "reasonable prospects" are interpreted as being an almost certainty of conviction.

The latest available version of the NPA Prosecution Policy is dated 27 November 2014, as updated in June 2013. The Policy runs only to 13 pages and is extremely general in nature, focussing on "principles". In general, the tenor of the document when dealing with the issue of the decision whether to prosecute or not, is written in a way which seems to encourage not prosecuting rather than prosecuting. Guidance on other matters in the prosecution process is very limited in nature so as to constitute no guidance at all. Nevertheless, the policy seems relatively neutral – but there a several problems with how the policy plays out in practice.

2.1.3. Problems with opportunity principle and prosecution policy

There are a number of problems with NPA Prosecution Policy as currently conceived and approached. First, it treats a decision on whether to prosecute or not as a simple dichotomy, as if there are no other available decisions in between an outright decision to prosecute and one to not to prosecute (such as withdrawal before enrolment, withdrawal after first appearance on warning, withdrawal after further investigation, diversion, mediation, or seeking a guilty plea on a lesser offence).

Secondly, it treats the decision on whether or not to prosecute a case as if such decisions are taken on the basis of that case alone, and not influenced by the number and nature of other cases with which the prosecution is faced. While this idea that the case stands alone is the legal fiction, the reality is different, as will be seen below.

Thirdly, it ignores the fact that the capacity of the criminal justice system as a whole is limited. Based on data over many years, it seems that the courts have the capacity to process between 300 000 and 400 000 cases to conviction yearly and around 500 000 to some lesser finalisation,[8] while prisons are currently (undesirably) imprisoning around 160 000 people, both remanded and sentenced, although capacity is actually less than 120 000.[9] Thus new enrolments, postponements on remand, cases prosecuted, and custodial sentences should be treated as scarce resources which should be used to best effect, balancing the interests of justice and the prevention of crime. If this is not done, as will be argued below, the perverse outcome is likely to be that less impactful cases are likely to be preferred for prosecution.

External factors not necessarily related to the case at hand, therefore, consciously or unconsciously, in reality impinge on the prosecution decision-making process, including the number of matters referred for prosecution and the number of prosecutors available.

The result is that the current logic as described in Prosecution Policy above is not neutral in application and may in fact have perverse outcomes. This is explained in more detail below. Consequently, it is necessary to bring consciousness to the impact of these factors, and to take them into account explicitly in formulating policy. This is the intention of creating a logic for prosecution priorities – an underlying thinking or reasoning informing prosecutorial decisions.

3. External factors affecting prosecution decisions

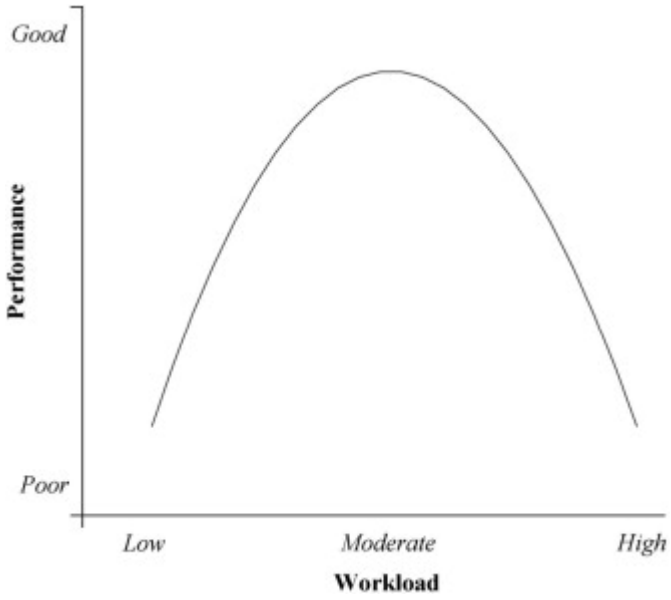
3.1. Workload affects performance and prosecution decisions

In reality, it is highly likely that the workload of prosecutors (which is a function of the number of cases and number of available prosecutors) affects their performance, which includes the extent to which decisions are made to prosecute cases to successful conviction. In general, the relationship between number of cases referred for prosecution and the number of cases successfully taken on for prosecution is likely to follow an upturned U-shape (see Figure 1). The x-axis is the workload, which can be conceived as the number of cases referred to the prosecution per time period (week, month, or year). The y-axis, the outcome, is then the number of successful prosecutions per

[8] Africa Criminal Justice Reform *National Prosecuting Authority: Performance: Fact Sheet* November 2018 available at https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf.
[9] See Judicial Inspectorate for Correction Services *Annual Report* 2012/2013 for a discussion on unnatural death trends in relation to size of the incarcerated population.

time period i.e. more referrals mean more prosecutions, and more successful prosecutions, until the prosecution is overwhelmed with referrals.

Figure 1: The Workload Curve[10]



There is historical evidence supporting this prediction in the South African prosecution context. Historically, some courts or units may have been working at close to optimum or perhaps "overload" end of the prosecution scale, while others are working at the "underload" end of the scale. In 2003, data showed that prosecutors with a higher-than-average burden (more than 350 cases per prosecutor) achieved higher rates of conviction throughput (44 per cent – around 150 successful prosecutions), while those with lower-than-average burdens (under 250 cases per prosecutor) achieved lower rates of conviction throughput (28 per cent – around 70 successful prosecutions).[11]

In other words, cases prosecuted successfully per prosecutor are likely to tend (initially) to increase with increasing caseloads up to a point at which the caseload constitutes a burden in itself, and the prosecution spends an increasing amount of time simply managing cases referred to it. This can occur when case referrals are of poor quality, when there are multiple referrals back for further investigation of a single matter, or when there is simply a high number of crimes, resulting in arrests and referrals to court, but without sufficient quality evidence for a prosecution, or time available for the case to be heard.

At the overload end of the spectrum, where an increasing proportion of time is spent managing referrals (and associated first appearances and bail applications) has the result of reducing the time available for actual prosecutions. This may encourage decisions which are designed to create more time for the prosecution, such as postponements. Postponements slow down prosecutions, so that fewer completed prosecutions are achieved in a given time period, reducing performance. Furthermore, the backlog ultimately created by delay itself creates non-

[10] Reproduced from Seon et. al 'Advanced MMIS towards substantial reduction in human errors in NPP' *Nuclear Engineering and Technology* 45 (2) April 2013 available at 'https://www.researchgate.net/publication/264177899_Advanced_MMIS_toward_substantial_reduction_in_human_errors_in_NPPs' accessed 10 July 2021.

[11] ISS monograph Redpath

productive ongoing burden: cases resolved after 16 postponements have ultimately been more onerous than those resolved after three postponements.

Consequently, the prosecution under overload may be more likely to decline to prosecute: the "workload" becomes the actual caseload taken on by the prosecution: in other words, the prosecution manages its workload by simply declining to prosecute. The prosecution in this scenario tends increasingly to err on the side of choosing not to prosecute, in order for the prosecution to reduce its own workload: by choosing not to prosecute, the prosecution keeps itself outside the overload end of the spectrum. This likely and rational response to overload must be taken into account in developing priorities.

The other end of the workload curve is also relevant. Excessively *low* workload, according to the workload curve, also leads paradoxically to lower outputs than expected, as more time is spent on each case, following the aphorism "the task at hand expands to fill the time available." Low outputs per prosecutor are not necessarily a problem if the quality, complexity and impact of the cases improves; this is unlikely to be the case unless explicitly managed. At very low levels, however, prosecutors may fall out of practice with prosecutions and become less and less confident and practiced in bringing cases.

Unless this is specifically measured and encouraged, and part of explicit policy, choices in favour of impactful cases rather than easily resolvable case are unlikely to occur spontaneously. This is explored in more detail below.

3.2. Less difficult cases may be preferred for prosecution

Cases are not equally onerous. Beyond numbers of cases, in the prosecution context, the logic of "reasonable prospects of success" is designed to result in cases which have relatively *high* prospects for success being chosen over cases which may be slightly less likely to be successful, particularly in the "overload" part of the workload curve.

In other words, less onerous cases may be preferred particularly when workload is high, as choosing fewer cases more likely to succeed is one way to manage workload – and to meet numeric performance targets. Relatively easy cases over the last decade may well comprise so-called "victimless" offences such as drug possession. Consequently, it is not surprising that immediately prior to the Constitutional Court judgement effectively decriminalising the possession of small amounts of marijuana,[12] such cases had come to comprise almost half of all serious crime convictions recorded by the South African Police Service (SAPS) in their Annual Reports.

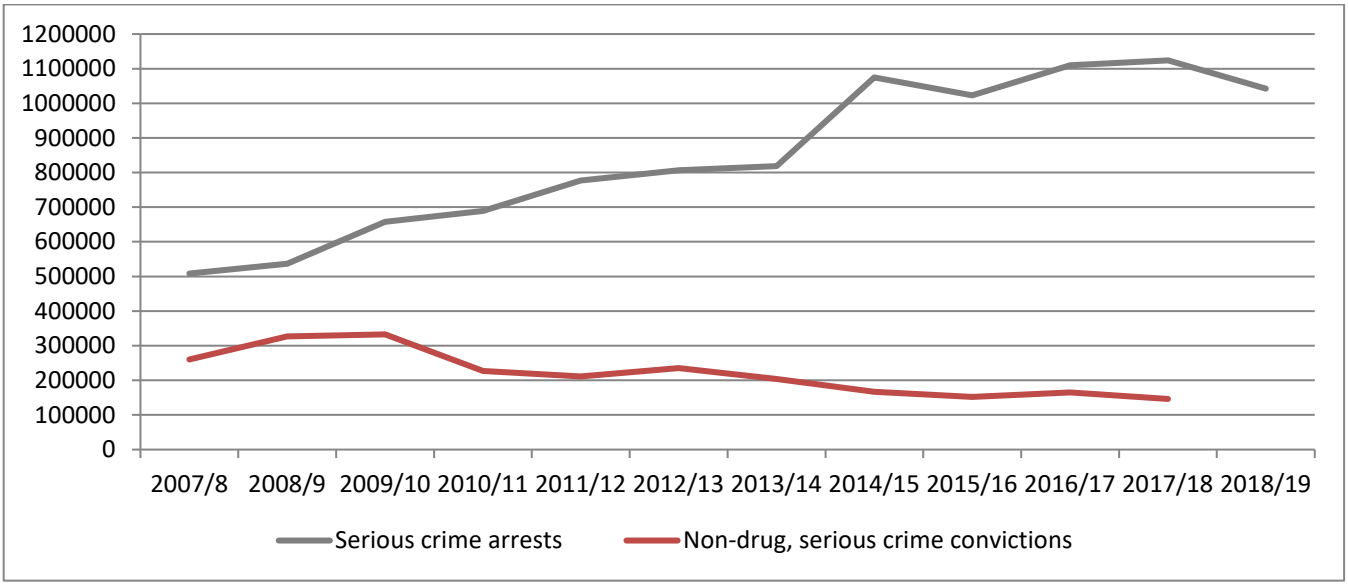
Furthermore, all available indicators suggest that since 2010, the number of verdicts, and more particularly serious crime verdicts, have decreased since 2000, suggesting choices to prosecute less serious matters – even as arrests climbed. By 2018, there were more than 150 000 verdicts related to drug crimes (compared to just under 66 000 in 2006/7), while the number of non-drug serious crime convictions dropped by a third, to under 150 000, from more

[12] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* 2018 (10) BCLR 1220 (CC).

than 300 000 in 2009/10 (See Figure 2 below).[13] Convictions on drug crimes are relatively easy to obtain (in that there is no victim-witness) and a guilty plea is often encouraged. Subsequent to the Constitutional Court judgement, the number of drug-related convictions dropped sharply – but have not yet been made up for in other matters.

The prior trend toward an increased proportion of drug possession convictions were not the result of a reduction in serious crime (murder in particular increased) nor the number of arrests by police (these also increased) (see Figure 2 below for arrests (blue line) and convictions (red line) for serious crime).

Figure 2: Serious crime arrests and convictions (SAPS Annual Reports, Visible Policing Performance & Detective Service Performance)



The problem, succinctly put then, is that it is quite likely that cases selected for prosecution under current policy are not necessarily or even likely to be peopled by accused persons likely to pose the most continuing harm to society, but rather are likely to comprise those who are less successful at evading detection or prosecution. Thus, it is the case that a seemingly neutral prosecution policy may have the result in practice of preferring cases which may not have the most impact on society – in other words, having the result of not being the best use of scarce resources – unless another logic comes into play. The above is one interpretation which may explain some of the trends in South Africa over the period 2010-2021. As indicated above, there was a strong trend toward the prosecution of less serious crime, even as violent crime increased (as indicated by the murder rate) and serious crime arrests by the police increased: South Africa has moved over a decade from a situation where more than half of serious crime arrests were matched by serious crime convictions[14], to one where only 13 percent of serious crime arrests were matched by serious crime convictions, according to data contained in SAPS Annual Reports.

In addition to not being the best use of scarce resources, this has the result of undermining trust in the criminal justice system and minimising the preventative effect of incapacitating those committing more serious crime.

[13] NPA Performance factsheet
[14] Excluding drug-related crime. Data collated from SAPS Annual Reports.

Indeed, the reason minimum sentencing, which was introduced in 1998 (with its associated long sentences and non-parole periods for serious crime) has not resulted in overwhelmed prisons must primarily be because the number of persons convicted and sentenced serious crime qualifying for such sentences, indicated by the number of sentenced admissions to correctional centres, decreased from over 190 000 in 1995/6 to around 80 000 in 2010/11. In the same year (2010/11) in which there were only 80 admissions to correctional centres, the number of case-convictions reported by the NPA was around 300 000, suggesting that around 220 000 of those convictions did not result in custodial sentences, suggesting in turn that the majority of convictions were likely to be in relation to less serious crimes or of non-repeat offenders, who attract non-custodial sentences.

Although data on admissions to correctional centres has not been available since 2011, prison occupancy numbers have remained relatively stable since 2008 at between 150 000 and 160 000, and mass releases have been of non-violent offenders, suggesting the trend toward fewer sentenced admissions may have continued in the last decade.

Consequently, it is argued that there should be ***a logic for prioritisation*** of matters both at the institutional and court level in order to compensate for the trend arising from the application if current policy, which, without further direction, will tend to prioritise less serious, more easily processed, matters, and to tend to encourage the methods of finalisation which involve less work for the prosecution.

The overall trend seemingly preferring apparently less serious matters may partly also be a consequence of performance measurement, which is discussed below.

3.3. Performance measurement encourages less onerous cases

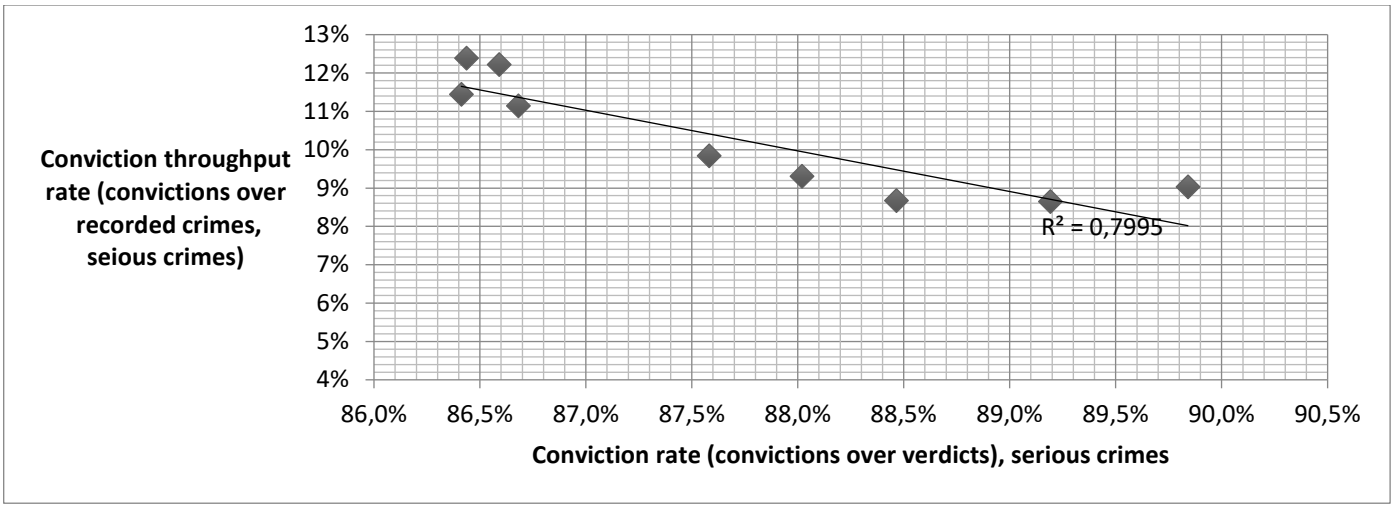
The practice by the NPA of the measurement of performance in terms of the rate of success in cases prosecuted ("the conviction rate"), further incentivises the decision to choose less difficult cases, in order to keep the conviction rate high. Indeed, even as serious crime convictions have declined, the conviction rate has climbed to well over 90 percent.[15] For example, in 2017/18 the NPA Annual Report recorded a 95% conviction rate. This means only 5% of cases finalised with a verdict resulted in a not-guilty verdict. This high rate is largely determined by the 96% conviction rate in the District Courts, which heard 90% of cases in 2017/18. The conviction rate was 81% in the regional courts (9% of cases) and 92% in the High Courts (less than 1% of cases).

The simplest method of maintaining a high conviction rate is to choose to prosecute only the simplest matters. The 80 percent conviction rates suggests that the "prospects for success" standard which was applied in the Regional Courts, which hears more serious matters, was over 80 percent, while in the District Court it was 96 percent. The sexual offences conviction rate in 2019/2020, at 75 percent[16] is closer to a more realistic measure and suggests prosecutors take more risks – and convict in more in cases – with such cases, which have been explicitly prioritised by government and the NPA.

[15] See National Prosecuting Authority of South Africa, Annual Reports 2011/12 – 2019/2020.
[16] National Prosecuting Authority of South Africa, Annual Report 2019/2020, p89.

Unfortunately, the data over time suggests that conviction rates tend to be *negatively correlated* with throughput at the high end of conviction rates; in other words, the failure to pursue cases with slightly lower chances of success is associated with overall lower percentage of cases going through the system: the higher the conviction rate, the lower the total number of convictions as a fraction of reported crime. In other words, at very high rates, higher still conviction rates reduce the extent to which reported crime results in a conviction (see Figure 3 below).

Figure 3: The relationship between conviction throughput rate and conviction rate, serious crimes, South Africa [17]

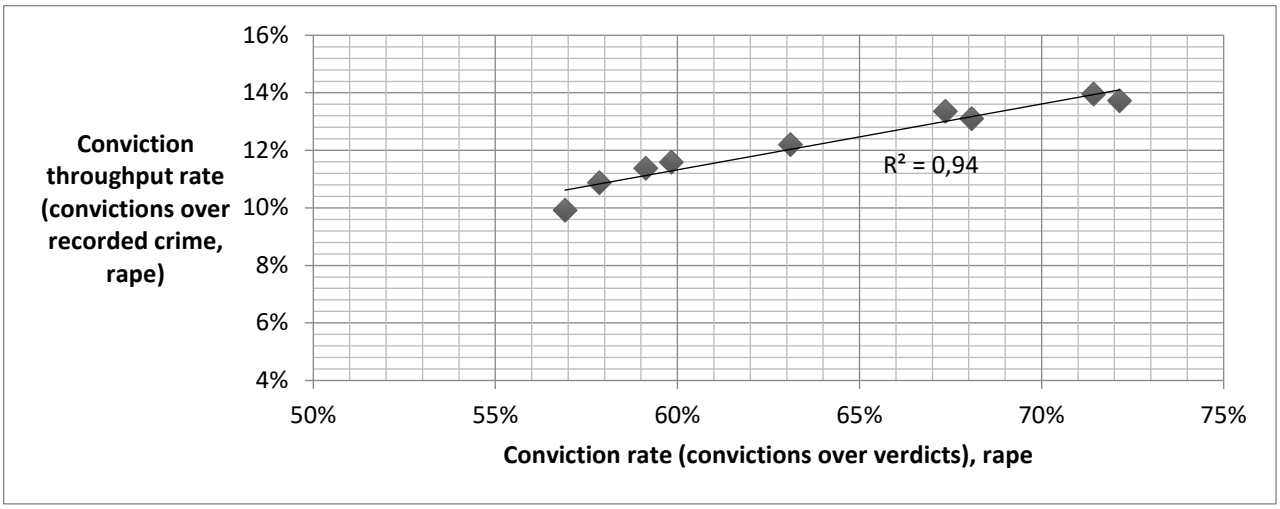


The data over the last ten years suggests that 80 percent of the variation in conviction throughput is determined by the conviction rate – with the latter in turn representing the "prospects for success" standard which was seemingly applied. The conviction throughput is raised by almost 50 percent (or four percentage points, from 8 percent to 12 percent) if the conviction rate is lowered to 86 percent from 89 percent.

The workload curve seems to apply here too, where there is a sweet spot of an optimal conviction rate. This is evidenced by sexual offences matters, which were once at a very low level of 57 percent conviction rate (see Figure 4 below). Unlike other serious crime, improvements in this conviction rate improved throughput also (see Figure 4 below). The improvement in both throughput and conviction rate has occurred over time with increasing investment and prioritisation in sexual offence cases. The conviction rate is however still below 80 percent.

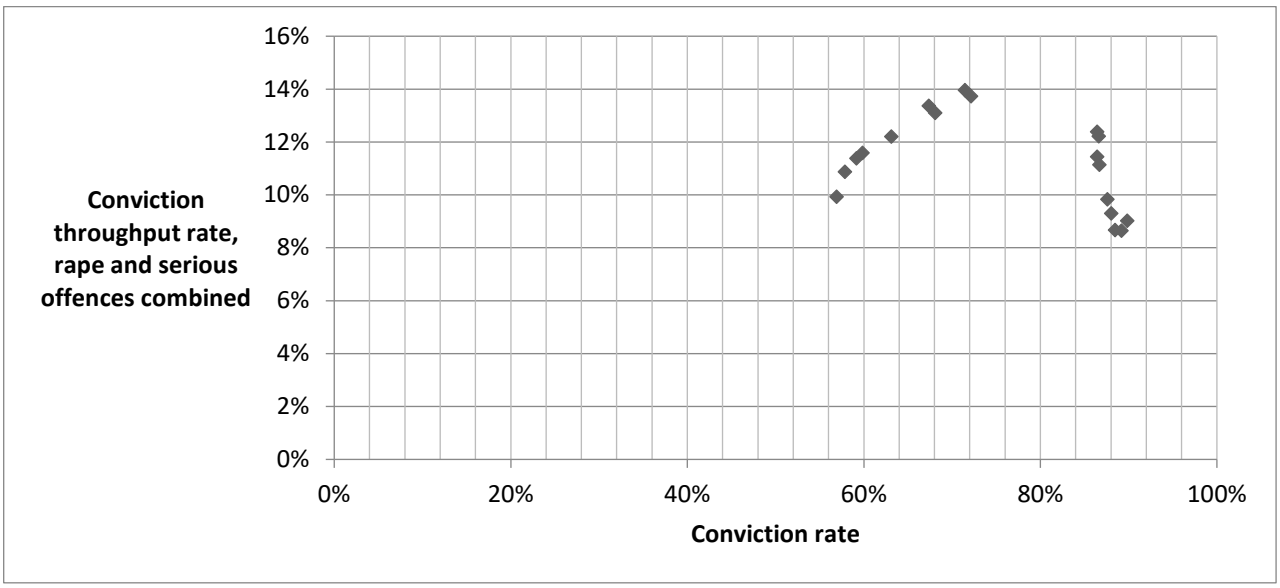
[17] Data from SAPS Annual Reports 2010 to 2020.

Figure 4: The relationship between conviction throughput rate and conviction rate, rape, South Africa



The two graphs combined suggest that optimal level of "reasonable prospects" lies somewhere in the region of 70 to 80 percent (see Figure 5 below).

Figure 5: The relationship between conviction rate and conviction throughput, South Africa



Although conviction rates have recently been omitted from the NPA Annual Reports, it is unclear whether individual prosecutors' performance measurement still include a conviction rate measure – or whether it is more likely the informal pressure of success or failure which is at work. What is also unclear is the extent to which informal and other forms of resolution are combined or weighted in the measure of a prosecutor's performance. Unless performance measurement encourages taking on of more impactful matters, there is unlikely to be a change of practice even if Prosecution Policy changes.

While performance measurement should include a recognition of alternative resolutions, these should be appropriately weighted (at less than a full prosecution), not least because any form of resolution other than a prosecution of an opposed case is likely to be easier to resolve and thus to be preferred by the prosecution. This is discussed below.

3.4. Alternative methods of finalisation may be less onerous than prosecution

Only a minority of matters are disposed of via prosecution. Consequently, the focus on prosecutions over and above other ways in which cases are disposed of – or removed from the roll – ignores the fact that the most important power a prosecutor has is to not prosecute a matter. There is little guidance to prosecutors to ensure consistent and just *disposition* of matters. Less onerous methods of finalising cases available to the prosecution, other than prosecuting the matter, include outright withdrawal, diversion, formal and informal mediation. These may be preferred by the prosecution as they may be less onerous than prosecuting a matter. Outright withdrawal of a matter is self-evidently by far the easiest way of processing a docket. Similarly, informal mediation seems to have few procedural requirements.[18]

The prosecutor may agree to withdrawal after informal mediation. In such an instance there is a case to answer, but the prosecutor seemingly decides that it is in the public interest to carry out informal mediation instead. There is evidence to suggest that this is even occurring in a small but significant number of Regional Court matters (more than 2000 cases in 2018/2019). Matters heard in the Regional Court are relatively serious offences and informal mediation is *prima facie* not a suitable method of disposition for such cases. Consequently, policy and directives should provide clear guidance on the use of such alternatives.

Unfortunately, in addition to explicit choices made by the prosecution, there may also be other methods by which cases are less suitably resolved, through delay and/or negligence. Thus it is not only via an explicit decision not to prosecute or to withdraw after enrolment that cases are removed from the roll. At the end of any particular month the number of outstanding cases on the roll vastly exceeds the number of new cases taken on. Furthermore, the number of explicit finalisations (including via withdrawal) in any month is fewer than the number of new cases in that month. The inevitable result is a growing outstanding roll; the only way this is managed is by matters being removed from the roll in two other ways; where the un-remanded accused loses patience with returning to court, or the court loses patience with the prosecution. This results in either of the following:

1. A warrant of arrest is issued after the accused fails to appear in court. Research conducted a decade ago suggested this is more likely to occur after six to eight postponements.[19] This outcome is arguably the result of the prosecution taking too long to resolve the matter. It is also more likely to occur when the accused is warned to appear (i.e. no bail amount is attached to release before trial).

[18] In terms of Part F of the current Prosecution Directives, the only procedural "musts" are that authorisation must be obtained from the DPP where the offence is a minimum sentence offence, physical domestic violence is involved, where the victims are vulnerable or children, in racially motivated offences, in offences where imprisonment is the likely penalty, and where the accused has committed previous similarly offences. Exactly how the prosecutor is to be sure of the latter two is unclear. The prosecutor must ensure the mediation is "voluntary" – how voluntary is it if an accused is facing prosecution? – and that all parties realise prosecution will not be instituted if the accused complies with the agreement.

[19] Karth V, O'Donovan, M. & Redpath J. *Between a rock and a hard place: bail decisions in three South African courts.* Cape Town: Open Society Foundation for South Africa, 2008.

2. The court strikes the matter from the roll in terms of section 342A of the Criminal Procedure Act. Again, this is more likely to occur when the prosecution has insufficient reasons for delay or there is other reason for the court to lose patience. Depending on whether or not the accused has pleaded, this could amount to an acquittal, or a withdrawal, which requires the intervention of the NDPP to place the matter on the roll again.

Historical data suggests that matters enrolled typically amount to three times the number eventually being resolved by way of verdict per year.[20] Thus enrolments do not necessarily reflect the magnitude of verdicts or convictions, suggesting that matters are removed from the roll either by later withdrawal after enrolment, or by being struck off, or after the accused absconds.

So it is that the SAPS reported in 2018/2019 that of over 60 000 Assault GBH charges in courts, only just over 14 000 resulted in convictions. This suggests that while cases may be enrolled (and not withdrawn before first appearance), there is seldom success in actually proceeding to a conviction. This suggests that there is a failure to amass sufficient evidence to proceed to timeous successful prosecution, and that a significant proportion of cases are withdrawn after enrolment.

The above instances are not technically "finalisations" but in effect reflect the end of the matter in most instances. The logic for prosecution should develop standards for the finalisation of matters in terms of postponements and overall duration time limits, particularly in prioritised cases, to ensure that matters which have been taken on for prosecution are not removed from the roll in this way. Policy, directives and instructions should seek to avoid excessive postponements and rather dispose of the matter expeditiously. It is insufficient for policy simply to state "matters must be resolved expeditiously" but must give clear guidance and guidelines, based on benchmarking research.

Thus it seems the cases most likely to be actually to be prosecuted to conviction will be relatively uncomplicated matters highly likely to result in convictions and reflecting well on the prosecution in terms of the conviction rate, while more difficult matters may sometimes fall away due to delay.

How might a process and logic for prosecution prioritisation prevent this and other problems alluded to above?

4. Proposed process and logic for prosecution prioritisation

South Africa does not have a system of compulsory prosecution. The prosecution does have some discretion, limited by the general principle of the existence of a *prima facie* case, no public interest reasons not to pursue it, and a reasonable prospect of success. However, this seemingly neutral and objective approach does not result in the best

[20] Court data obtained in 2005 for the project *Strengthening Integrity and Capacity of the Courts in South Africa: A Study of Five Surveys and a Court Assessment* for the United Nations Office on Drugs and Crime and the Department of Justice and Constitutional Development (2005).

or most just application of scarce resources, as explained above. How then might policy and directives guide prosecutions toward a more appropriate profile of prosecutions?

First, resources across the country should be allocated to ensure optimal workload, after analysis of workload data. Second, the way in which an offender is dealt with should take into account the broader context of the community in which the crime has occurred and the available resources of the relevant court. This is milder form of Community Policing, with which the NPA is currently experimenting.[21] Third, there needs to be an orientation away from a prosecution policy to a *case disposition policy*. This would seek to ensure that all matters brought to the attention of the prosecution are resolved in the most just, appropriate and impactful way possible, rather than merely being a decision on prosecution. This is in line with the Child Justice Act, which sought to ensure young people in conflict with the law have appropriate interventions; however, the approach would seek to ensure that *all* offender behaviour is addressed in an appropriate way, so that there are consequences of some kind for all criminal behaviour. Fourth, prioritisation should involve not only the decision to proceed with the matter, but include standards for speedy finalisation of priority matters. Fifth, there should be re-orientation from crime-type to the *offender profile*. The shift is to focus on the offender, by ensuring that repeat offenders are ***identified and prioritised*** for prosecution toward custodial sentences, while first offenders could be plea-bargained to suspended sentences, or, in the case of children, diverted formally. Finally, any offence with an element of violence should enjoy greater indulgence in terms of further investigation and eventual prosecution. Performance measurement should reflect and support these principles. All of these elements will be discussed in more detail below.

4.1. Put in place priority systems which prevent inappropriate finalisations

4.1.1 Allocations of prosecutors

Little information is currently available to indicate which geographic areas of the country are currently operating at over- or underload in terms of prosecutor workload. The ideal scenario would be one in which the majority of prosecutors are operating at the optimal level of workload, in terms of the workload curve. A baseline study should be carried out which takes into account both the number and nature of matters referred to prosecutors at courts by the SAPS. Adjustments in personnel allocations should seek to ensure optimal workloads for prosecutors, taking into account any necessary mentoring of junior prosecutors. Prioritised matters should enjoy the attention of more senior prosecutors where possible.

4.1.2 Crime profile and trend prioritisation

This requires of each group of prosecutors serving a magisterial district to understand the crime dynamic of the jurisdiction which they serve. It may be appropriate for an independent unit to carry out this baseline research on behalf of the relevant prosecution; however in the long-term there should be ongoing engagement with crime data

[21] See National Prosecuting Authority of South Africa, Annual Report 2020/21, p16.

by the relevant prosecution themselves. In addition, there should be stakeholder engagement once a year, with the relevant local authorities and other affected parties. For example, it may be that in a farming community stock theft enjoys a far higher priority than it might in town community, particularly if the trends are showing an increase in reports of such crimes or indications of organised or concerted action. The prosecution at the level of magisterial district should be aware of the crime trends in their area and allow this awareness to influence decisions.

Prosecution decisions should take into account not only the reported crime profile of the area concerned, but the trends – more effort should be made to prosecute crimes which appear to be increasing. Every quarter, the crime data from SAPS for the policing areas under the magisterial district in question should be perused. The general trends should inform the priorities. Prosecutors should ensure decisions are based on crimes of concern to the area and trends in those crimes. For example, the data for Cape Town Central suggests a trend toward large increases in common robbery and business robberies. Such increases may often be of an organised nature and should alert the prosecution to this possibility in the matters with which they are faced. This should be done in discussion with the SAPS.

In addition to the quarterly crime data in the public domain, SAPS Crime Intelligence should be prevailed upon to provide detail on other trends of concern in the region, in relation to crimes not usually reported on, such as poaching offences, offences against state infrastructure, and public order offences. Prosecutions should actively seek to address worsening trends.

4.1.3 Alternative intervention options

An audit should be carried out of the available diversion options for both adults and children, including drug programmes, for each magisterial district. Should there be few or none, the NPA should formally bring this to the attention of the relevant departments, including provincial Departments of Social Development and relevant local authorities. Children and first offenders should be priorities for action in favour of formal diversion, rather than outright withdrawal.

For every matter brought to the attention of the prosecution, there should be an appropriate intervention available to address the alleged behaviour of the offender. An outright withdrawal without any intervention should only be considered where the evidence is lacking. In particular, all children in conflict with the law should ideally be assessed.

However, where the evidence is so weak that it appears the alleged offender should not have been arrested at all, this should be brought to the attention of the relevant investigator and Station Commander. Numerous referrals of weak cases slow down prosecutions.

Drug crimes pose a particular conundrum for prosecutors, as this is often a priority for community stakeholders, but it is realistically no longer possible to prosecute for mere possession of small amounts of dagga, and this offence may not be a priority relative to other crimes. Where offenders may be dealers, prosecution may be appropriate. Where they are problematic users, diversion to drug rehabilitation programmes should be preferred. Where they are linked

to other crimes (i.e. they are repeat violent offenders who are also guilty of drug crimes) it may be appropriate to convict on a drug crime where convictions on other crimes are unlikely to be successful.

4.1.4 Case duration standard-setting and prioritisation

Prioritised matters should not only be prioritised in terms of resolutions, but also in terms of speediness to ensure they are neither struck nor result in a warrant of arrest being issued. Further research should be carried out to determine whether 6-8 postponements still applies as a risk level for removal from the roll; protocols with SAPS should be developed to ensure prioritised cases are also prioritised in terms of speed of resolution.

All of the above require research and engagement in order to put in place prosecutions (rather than other dispositions) that can focus on repeat and violent offenders, while other interventions should be preferred for other accused persons.

4.2. Target local priorities and violent and repeat offenders

4.2.1 Duty to prosecute violent crime

Violence has been the Achilles heel of South Africa's democracy. A key principle of prioritisation is that crimes of violence involving infringements of rights or human rights abuses should enjoy particular care and attention in assessment for prosecution or other resolution. The Constitutional Court has indicated that there is likely a **duty** to prosecute crimes where there has been *violation of rights.*[22] This would also include human rights violations such as torture.

This does not imply that the state must pursue doubtful cases merely because the crimes involved infringe on rights such as the right to life or the right to bodily integrity; rather it implies that extra care and attention and involvement should be brought to bear on the investigation and prosecution of such cases; indeed there may be an obligation to assist SAPS in improving the available evidence if it is not initially sufficient for prosecution, or if SAPS has the wrong suspect. There may also be an obligation to refer such cases to specialist prosecutors, or ensure they are allocated to senior prosecutors. Finally, particularly in regard to human rights violations, it may be in the public interest to err on the side of prosecution, in order to allow justice to be seen to be done, even where a conviction is not obtained.

Given that violence affects the rights of others, clear messages should be sent by the criminal justice system to every offender in which violence was associated with the offence. The implication for prioritisation is that if the prosecution is of an offender for an offence involving an element of violence, then "reasonable prospects" should be interpreted more broadly, so that more cases are captured in the prosecution net where violence is involved. In addition, if there are weaknesses in the evidence, the prosecution should apply more effort and care in advising the investigation team on improving the available evidence. Even where insufficient evidence is available for a prosecution, the prosecutor should attempt to ensure that some form of intervention is brought to bear, such as a protection order. No case

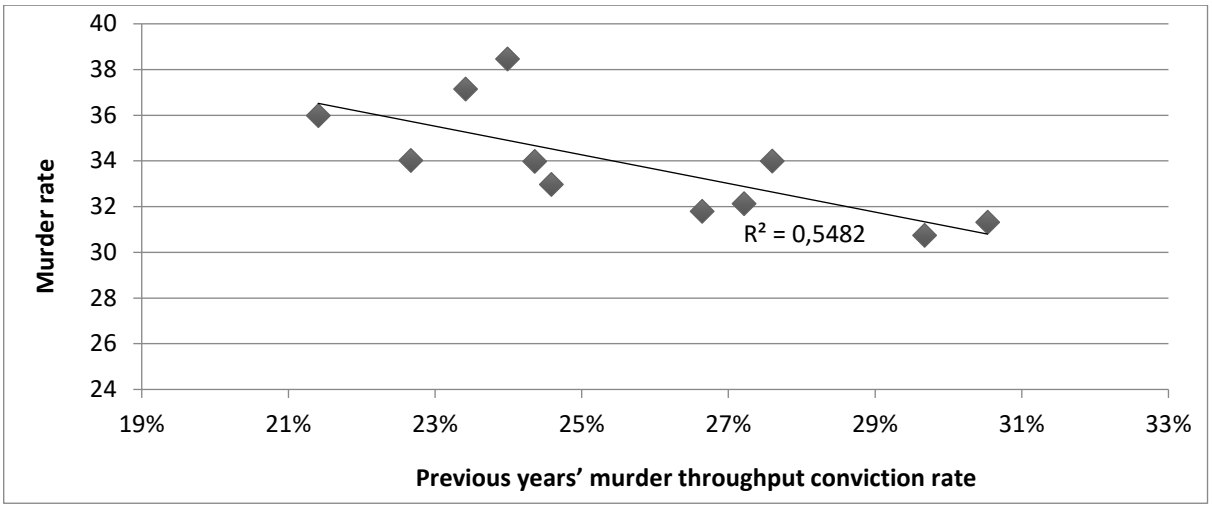
[22] *S v Basson* 2005 (1) SA 171 (CC) paragraphs 31-33.

involving an element of violence should be dismissed without an intervention of some kind being applied i.e. an outright withdrawal should be a rarity.

In the early years of South Africa's democracy, there was some debate as to whether *imprisonment* and its duration had any impact on crime; this arose as a result of the debate around the possible impact of minimum sentencing. The various reports concluded that the certainty of being caught and punished was a greater factor in crime prevention than the duration of imprisonment; duration or the severity of punishment is likely measurably to contribute to crime prevention only in relation to serial offenders. [23]

Over time the evidence has accumulated which seems to suggest that in the South African context, higher throughput in prosecutions of serious violent crime (indicated by the murder throughput conviction rate) is correlated with lower violent crime (indicated by the murder rate) (see Figure 6 below). This is consistent with the proposition that changes in levels of prosecution of serious violent crime have an impact on the incidence of serious violent crime.

Figure 6: Relationship between murder throughput conviction rate and murder rate[24]



4.2.2 Violent crime prevention by prosecuting repeat offenders

This becomes more likely as more evidence affirms the impact of repeat offending. There has been evidence in the South African context of the impact of repeat offending. A 2007 study by Rudolph Zinn using in-depth interviews with 30 convicted house robbers in South Africa found that 20 of the 30 participants collectively reported having been involved in 2051 crimes, of which 741 involved violence or coercion (while only ten denied having been involved in

[23] O' Donovan et a. Impact of Minimum Sentencing in South Africa
[24] Data sourced from Chapters on the performance of the Detective Service, SAPS Annual Reports 2008/2009 -2018/19.

any other crimes).[25] Evidence from other countries suggests that violent offenders are more likely to be repeat offenders.[26]

Muntingh and Gould refer to research by Farrington which found that violent offenders tend to be versatile rather than specialised and thus commit a wide range of offences, and the likelihood of committing a violent offence increases steadily with the total number of offences already committed. In other words, over time more of their total number of offences comprise violence, suggesting that intervention at an early stage (when it becomes clear that a pattern is developing) may break the pattern and prevent future crimes of violence.[27]

Recent research from Case Western University in the USA, in analysing "forgotten" rape kits found that sex offenders so identified were linked to many other crimes of the same and different types, thus highlighting the importance of proper profiling of the offender, rather than simply processing the single case at hand.[28]

What seems clear is that if violent offenders, who are also highly likely to be repeat offenders, could be effectively stopped earlier rather than later in their criminal careers, through successful prosecution which prevents the offender from further offending, this will in turn reduce crime levels, and in turn reduce the load on the criminal justice system.

In the case of children, a properly designed diversion intervention may be preferable; for adults, it appears to be important that the system accurately records the criminal career of offenders the better to determine how they should be processed in every case.

4.2.3 Other practical considerations

Outside of the specialised units, currently prosecutors presented with a docket who must decide on whether to charge an accused or not, have no access to the systems which might provide them with a better picture of the offender who is implicated in the case before them; indeed, even previous convictions are seldom available at first appearance.

Some would argue that this is not a failing, and that decisions on whether to charge or not, whether made at first appearance or through a decision-docket, should be made only on the facts of the case before the prosecutor.

The problem with this approach is firstly as outlined above, is that it in practice results in less serious matters being preferred. Secondly, serial offenders might easily escape the system despite being arrested (again). Another opportunity for the offender's behaviour to be appropriately addressed may therefore be missed, because the full picture of his or her interaction with the criminal justice system is not available at the time the offender is brought

[25] https://issafrica.s3.amazonaws.com/site/uploads/213.pdf
[26] Nicholson et al, ed. 'Repeat Offenders and Career Criminal Programs' in *Forgotten Victims - An Advocate's Anthology*, p215-222 summarised at https://www.ojp.gov/ncjrs/virtual-library/abstracts/repeat-offenders-and-career-criminal-programs-forgotten-victims.
[27] https://issafrica.s3.amazonaws.com/site/uploads/213.pdf
[28] Lovell et. al. 'Offending Histories and Typologies of Suspected Sexual Offenders Identified via Untested Sexual Assault Kits' *Criminal Justice and Behavior*, (2020) 47(4):470-486.

before court. Indeed, it is even unclear whether outstanding warrants of arrest are even necessarily available to the prosecutor at the time of making this decision; generally, this information is only available if the prosecution decides to go ahead and there is a later bail application. Currently, amassing this information and placing it before the prosecution is the responsibility of the SAPS.

In the past paper-based systems and the fingerprint-based SAP 69 meant that such information is not readily available to the prosecution and subject to delays within SAPS. However, with the gradual introduction of the interlinked Electronic Case Management System (ECMS) within the courts, it should become possible for the prosecution at the very least to carry out searches based on names or identity numbers of those appearing before them. Every offender appearing before court should be screened for prior appearances and outstanding warrants of arrest.

In addition, checks should be carried out on whether they have undergone prior diversion or informal mediation – such information should in future be kept by the NPA in an accessible, central database and also be made available to the prosecution.

Currently however, the prosecution does not have access to the databases and information in order to carry out this kind of screening. At the least, the NPA itself should maintain a central database of informal mediations and formal mediations, so that it can be identified whether or not an offender has previously been mediated at any court in the country. Once the ECMS becomes available countrywide, this should also be available for routine screening of each offender.

The implication for prioritisation is that confirmed first offenders can be prioritised for non-prosecution options such as diversion and informal mediation, and even outright withdrawals. In relation to those who are not first offenders, attention can be paid to building an appropriate case for prosecution, if this is lacking, via referral for further investigation. Where appropriate i.e. where the offender is linked to multiple more serious offences, referral to the specialised units may be the appropriate response. Key to a "triage" type exercise would thus be: existing warrants, existing cases or charges, and previous mediation. Any accused with any of these red flags should be prioritised for prosecution.

Currently, specialised units of the NPA do work together with investigators to "build cases" against likely or known offenders in a prosecution-led manner. This is most obvious with the relatively newly established Investigating Directorate (ID) which employs its own investigators, to target the main offenders implicated in state capture. However, there are also other units such as the Specialised Commercial Crime Unit (SCCU), the Sexual Offences and Community Affairs Unit (SOCA) and the Priority Crimes Litigation Unit (PCLU) which may operate in a similar manner in particular instances, using investigators from other agencies.

Even these units will have to engage in prioritisation exercises, as their mandates are broad enough to take on many more cases than they are able to process. Their priorities should be informed primarily by the extent to which offenders appear to be serial or repeat offenders, and the impact of their crimes on society. This may require

checking DNA databases for links to offences. Unfortunately, the failings of this system have been in the press recently. Some of their cases should in turn be referred to them via thorough screening processes carried on by the National Prosecution Service (NPS). In other words, the prioritisation of matters received by the NPS should lead to referrals to the specialised units of the NPS.

5. Conclusion

In South Africa there is a discretion not to prosecute cases even where there is evidence to sustain a prosecution. The fiction that the decision on whether or not to prosecute is taken in isolation, has perverse results. These results include that scarce resources of the criminal justice system are not optimally allocated to address violence and prevent crime, and less serious cases may be preferred over more serious matters.

In order to address this, change is proposed. First, *research* at the level of magisterial district should inform key strategic interventions to optimise prosecution: prosecutors should be optimally allocated for workload, prioritisation should be based on crime trends of the magisterial district concerned, alternative interventions should be identified, and there should be clear limits on timelines, based on prior baseline research.

Second, the approach to each prosecution should not depend only on the facts of the case at hand, but in particular whether the accused is a repeat offender: the presence of existing warrants, cases or charges against the accused, and whether or not they have previously been mediated out of prosecution, or indeed convicted. Any accused with any of these red flags should lead to prioritisation of the matter; if evidence is lacking, further evidence should be pursued.

Third, in relation to crimes of violence, some form of intervention should be compulsory. The decision in relation to each case should be toward the most appropriate intervention to address the behaviour of the accused.

Fourth, where offenders appear to be linked to a broader set of crimes, referral to specialist units of the NPA or to more senior prosecutors should occur.

Fifth, this logic should be contained in policy and guidelines, and also reflected in performance management.

With such a system in place, scarce resources of the criminal justice system could be used to optimal effect.