Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa
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Chapter 4

Prosecutorial disposal of criminal cases in South Africa

4.1 Background

The authority to institute and to conduct prosecutions in respect of offences vests in the national prosecuting authority (NPA) and is exercised on behalf of the State. The National Prosecuting Authority Act 32 of 1998 empowers the prosecuting authority to institute, conduct and discontinue prosecutions. This Act was passed in 1998 to give effect to the constitutional obligation that national legislation must be enacted to arrange for the workings of the prosecuting authority. The Act creates, for the first time, a centralised national prosecuting authority, headed by the national director of public prosecutions (NDPP). The NPA consists of the office of the national director and the offices of the prosecuting authority at the various High Courts. Each office is headed by a director of public prosecutions (DPP) and is staffed by one or more deputy directors, state advocates and prosecutors, the latter divided into chief prosecutors, senior prosecutors and public prosecutors. The prosecuting authority is a hierarchical structure with the national director at its head and with levels of authority all the way down to the individual prosecutors in the lower courts who are responsible for their actions to their immediate superior. 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.

Discretionary non-prosecution by the prosecutor

South Africa does not have a principle of compulsory prosecution, but if a prima facie case can be presented against the accused, and there are no other compelling reasons not to prosecute, the prosecutor has a duty to institute criminal action. See, however, the judgment of Uijs, AJ in the

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466 For a discussion of the evolvement of the prosecution authority through colonial and apartheid history to the present, see I Fernandez, The National Director of Public Prosecutions in South Africa: Independent Boss or Party Politician? Speculum Jusir 2007-1, p. 129.

467 Section 179(2) Constitution.

468 Section 20 National Prosecuting Authority Act 32 of 1998.

469 In respect of the position prior to this Act, see PM Bekker, National or Super Attorney-General: political subjectivity or juridical objectivity, Consultus, April 1995, p. 27.

470 Prior to this Act each province had its own Attorney-General who acted independently of each other. There was no central authority regarding public prosecutions.

471 Section 22(1) National Prosecuting Authority Act, 32 of 1998.

472 The Prosecution Policy issued by the NDPP prescribes (para 4(c)) that prosecution should normally follow if there is sufficient evidence to provide a reasonable prospect of a conviction, unless public interest demands otherwise. (own emphasis). Also J Redpath, Failing to prosecute? Assessing the state of the National Prosecuting Authority of South Africa, ISS monograph 186, 2012. See also ME Bennun, The Mushwana report and prosecution policy, SACJ 2005, p. 279, for a discussion of the interpretation of “prima facie”.

North Western Dense Concrete case\(^{473}\) where he finds that the Directors of Public Prosecution remain possessed of a discretion and remain clothed with the authority to decline to prosecute an accused person, even when a prima facie case can be made out against that person. This is confirmed by para 4(c) of the Prosecution Policy which states:

“There is no rule in law which states that all provable cases brought to the attention of the Prosecuting Authority must be prosecuted. Any rule to the contrary would be unduly harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice”.

Labuschagne\(^{474}\) in his discussion of the discretionary powers of the prosecutor quotes an anonymous American source\(^{475}\) who says:

“The prosecutor is an integral part of the judicial process with discretionary powers comparable to those of a judge. Prosecutors have more control over life, liberty, and reputation that any other person. Prosecutorial decisions range from those affecting a preliminary investigation and issuance of an arrest warrant to those involving the presentation of evidence during trial and recommendation at final sentencing.”

The same can be said of the South African prosecutor who has always been dominus litis, clothed with the discretion to institute or to discontinue prosecution.\(^{476}\) A previous South African attorney-general said that: “We don’t take decisions lightly because once you institute a prosecution against a person, even though he may subsequently be acquitted, you have done that person irreparable harm”.\(^{477}\) Hugo\(^{478}\) indicates that this discretion involves quite a lot of elements: Firstly there is the factual evaluation of the matter, usually one-sided since the suspect’s version is seldom fully before him and the facts are still untested by cross-examination. Then there is the legal evaluation to determine whether the facts make out some offence. Working on the assumption that the prosecutor has a fairly wide discretion not to prosecute in appropriate cases, the prosecutor will have to apply, apart from the merely mechanical knowledge of the rules of criminal law, evidence, criminal procedure and related topics, also a deep insight into the policies underlying legal concepts such as nullum crimen sine lege, the fault requirement, the penal

\(^{473}\) North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C).

\(^{474}\) JMT Labuschagne Deliktuele aanspreeklikheid van die staat vir foute van die prokureur-generaal THRHR 1997 – 60, p. 25.


\(^{476}\) S v Moshoeshoe 2007 (1) SACR 38 (T).


\(^{478}\) JH Hugo, The prosecutor: Cinderella in a black gown, Codicillus 1971-12-2, p. 25.
theories and, lastly but certainly not least, the presumptive innocence of the suspect until the contrary is proven. Hugo argues that, without such insight on the part of the prosecutors, a legal system cannot afford the luxury of allowing them a discretion.

In South Africa there is no case-screening procedure similar to the grand jury in the USA or the juge d’instruction in France. The South African prosecutor has always had the discretion to refrain from prosecution in circumstances where the public interest demanded it. The court will not easily interfere with the prerogative in regard to prosecutions but can interfere, and has done so in some instances, where prosecution is wrong, unjust and prejudicial to the interests of the accused and/or society. South African courts will, however, only interdict / bar the prosecuting authority from prosecuting a case that it has decided to prosecute, or compel (by way of mandamus) the prosecutor to prosecute a case it has already decided not to prosecute, in highly exceptional circumstances and when significant prejudice to justice will result. Later in this chapter, where I discuss control mechanisms over the prosecutor’s exercise of discretion, I will get back to this issue. The discretion to institute criminal proceedings is, however, no carte blanche to charge anyone with anything at will. The problem with discretion, however, is that someone ultimately has to exercise it. This begs the question whether it should be a subjective or objective determination. Du Toit (et al) also illuminates two fundamental principles of criminal justice which govern the exercise of discretion by the prosecutor. Discriminatory prosecution, where the decision to prosecute is based on unjustified distinctions between people in the same circumstances, is in conflict with the Constitutional right of equal protection before the law and therefore unacceptable. Equally unacceptable will be the practice of authorities knowingly allowing a pattern of contravention of a criminal norm to develop and then, unexpectedly and without prior warning, enforcing such norm. He argues that such an approach does not promote legal certainty, offends the principles of legality, is unfair to citizens and undermines the deterrent function of the criminal law.

Criteria for refusing to prosecute or to discontinue prosecution

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479 S v F 1989 1 SA 460 (Z) where the Zimbabwe High Court not only harshly criticised the decision to prosecute a 10 year old child, but also set aside the conviction and sentence imposed by the magistrates court.

480 Nhlabathi v Adjunk Prokureur-Generaal, Transvaal 1978 (3) SA 620 (T).

481 The Rhodesian Appellate Division case of R v Maguire1969 (4) SA 191 (R, AD) at 192 – 193 illustrates this point: “In some circumstances a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of de minimis non curat lex whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored”.

482 E Du Toit, Commentary on the Criminal Procedure Act, Loose-leaf, 1-4N.
Non-prosecution as result of lack of evidence

There must be a reasonable prospect of successful prosecution (that is, realistic prospect for obtaining a conviction at the conclusion of the trial) before a prosecutor will decide to bring charges against an accused in court. If there is not sufficient admissible evidence available to secure a conviction, prosecution should not follow. Usually the prosecutor determines whether a prima facie case can be established against the suspect. If not, prosecution would cease.

Non-prosecution in public interest

The prosecutor may also refuse prosecution even if there is a reasonable prospect of successful prosecution if “public interests” demand it. A number of different factors may play a role to determine whether the prosecution will be against public interest:

- *de minimis non curat lex* – this “rule” applies in matters of such trivial nature that criminal prosecution and trial is deemed to be inappropriate. The effect of this “rule” is that, where an accused commits an act which is unlawful but the degree in which he contravenes the law is minimal (of a trifling nature), the court will not convict him of the crime but bring out a verdict of not-guilty. In some cases it has succeeded as a defence whilst in others it was rejected as a defence, but taken into account as a ground for mitigation of sentence. Whether it will be regarded as a defence or not will depend on the circumstances of each case. The prosecution is expected to anticipate the classification of the seriousness of the case by the court and refrain from prosecution where appropriate.

- the advanced age or very young age of the accused

- the antiquated nature of the offence

- the tragic personal circumstances of an accused

- where a plea-bargain has been struck between the State and the accused

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484 DS de Villiers, Nolle Prosequi van ’n prima facie-saak beoordeel teen die lig van die onafhanklikheid en vervolgingsdiskresie van die staatsaanklaer, *TSAR* 2006 – 1, p. 173.

485 See JMT Labuschagne, De minimus non curat lex as strafregtelike verweer in ’n regstaat: Opmerkinge oor strafsinvolheid en die groeiende rasionele dimensie van geregtigheid, *THRHR* 2003, p. 455 for an in-depth analysis of the origin and application of the de minimis-rule in South African criminal law.

486 S v Kgogong 1980 (3) SA 600 (A).

487 S v Nedzamba 1993 (1) SACR 673 (V).

488 S v Steenkamp 1973 (2) SA 221 (NC) – the accused was charged and convicted in the magistrates court of an antiquated piece of Cape of Good Hope statute dating from 1856 and 1873 – “diensverlating”. On review the Supreme Court quashed the conviction and sentence.

489 FG Richings, The Prosecutor’s Discretion: A Plea for Circumspection, *SACC* 1977, p. 143 – the (unnecessary) prosecution of a father for reckless driving which resulted in the death of his young children.

490 North Western Dense Concrete v Director of Public Prosecutions 1999 (2) SACR 669 (C).
• any circumstance where the consequence of a prosecution will be out of all proportions with the gravity of the offence committed.491

In addition to these common law criteria, the Prosecution Policy specifies492 that the prosecutor should have regard to all relevant factors, including:

• 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 act and the relationship between the accused and the victim etc. The prevalence of the offence, its economic impact and the likely sentence of the court are further aspects which are taken into account.

• the interests of the victim and the broader community. Aspects which play a role here are things like the attitude of the victim towards prosecution, the need for individual or general deterrence, public confidence in the justice system as well as prosecution priorities such as likely length and expense of a trial etc.

• the circumstances of the offender. Previous convictions, personal circumstances, repentance, restitution and co-operation with the authorities are some of the factors regarded under this topic.

The policy document goes on to indicate that it is important that the prosecution process is seen to be transparent and that justice is seen to be done.493 Joubert (et al) correctly points out that discretionary prosecution is no license for discriminatory prosecution494 meaning that the exercise of discretion must not lead to discrimination. The Criminal Procedure Act also provides495 for the withdrawal of charges against an accused that is granted immunity from prosecution on condition that he gives satisfactory evidence in another matter as state-witness. Labuschagne496 describes this as another form of “consensual” criminal justice. This is a formalised form of withdrawal of a case on the specific condition that the person gives good/satisfactory evidence in another trial against another accused.

Decision not to prosecute made by the police?

The South African Police force is an independent department separate from the prosecuting authority and resorts under the control of the Minister of Safety and Security. Their function, amongst others, is to maintain law and order and to investigate crime. This investigation can be

492 Prosecution Policy A.5.
495 Sec 204 of the Criminal Procedure Act, 51 of 1977.
496 JMT Labuschagne, Konsensusuele strafregpleging: Opmerkinge oor die spanningsveld tussen regstaalheid en doelmatigheid, SACJ 1995, p. 166.
out of their own initiative, for example as result of a complaint received, or it may be on instructions from the prosecuting authority. Although, in theory, the police are required to submit all completed investigations to the prosecuting authority, in practice they would not submit dockets of extremely trivial matters, or cases where there is insufficient evidence to the prosecutor for consideration. However, where there is doubt as to the feasibility and desirability of prosecution, the police must submit the docket to the prosecutor who must make the decision to prosecute or not. The prosecutor may also direct further investigation by giving specific instructions to the investigating official. Police waiver, as it is known in Dutch law, has not yet developed in South Africa.

4.2 Existing alternatives to prosecution available to the prosecutor

Withdrawal and stopping of prosecution are not normally categorized as “alternative disposal” by the prosecutor, but they are indeed “case-ending decisions” which are within the authority of the prosecutor to make.

Withdrawal of a charge / case

A prosecutor may withdraw a charge at any time before the accused has pleaded to the charge. The accused is, in these circumstances, not entitled to a verdict of an acquittal in respect of that charge. He can be charged again with the same charge at a later stage. The prosecutor’s withdrawal of a case, or a decision not to continue with criminal investigation, can sometimes lead to a private prosecution. The court cannot, however, compel the prosecutor to continue with a specific prosecution. Normally the withdrawal is without any conditions attached. The South Africa Law Commission contends that nothing currently prevents a prosecutor from withdrawing a case conditionally (e.g. upon the performance of some condition – like repair of damage caused or satisfactory testimony against someone else). But he indicates that where such conditional withdrawing or stopping has taken place, it can be regarded as isolated incidents since no policy on conditional withdrawals was previously known.

Stopping of prosecution

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497 Not all crimes reported to the police are always investigated. Sometimes charges of theft or vehicle accidents are only reported to give the victim a case-number for purposes of an insurance claim.
500 Section 6(a) of the Criminal Procedure Act.
501 Private prosecution is discussed later in this chapter.
The stopping of prosecution covers any action whereby a prosecutor takes a case out of the hands of the court.\textsuperscript{503} It may take place before or after the accused has pleaded, but before conviction.\textsuperscript{504} If prosecution is stopped after the accused has pleaded, the court must acquit him in respect of that charge. This is regarded as an acquittal on the merits for the purpose of a plea of autrefois acquit. A pertinent and considered decision by the prosecutor is required\textsuperscript{505} and the intention (of stopping prosecution) must be explicitly evident.\textsuperscript{506} The consent of the Director of Public Prosecutions is a requirement for the stopping of a prosecution and the court must determine whether such consent has been given before the prosecution can validly be stopped.\textsuperscript{507} If, however, consent was never obtained, and the court allowed the prosecution to be stopped and announced an acquittal, reasons of fairness would make the court reluctant to allow re-opening of the case.\textsuperscript{508} There is a close similarity between the formal process of stopping the prosecution and the closing of the state case because of insufficient evidence. In the latter it will not amount to a stopping of the proceedings, although the outcome may be the same, namely the acquittal of the accused.\textsuperscript{509} Acceptance of a plea to a lesser (or included) offence is neither a withdrawal nor a stopping of a prosecution. It is an act whereby the prosecutor limits the proceedings to the offence to which the accused has pleaded guilty.\textsuperscript{510}

**Admission of guilt fine**\textsuperscript{511}

An accused who is charged with a less serious offence and who is prepared to admit guilt can be given the opportunity to avoid having to appear in court. This is done by paying an admission of guilt fine in respect of the relevant charge. The Criminal Procedure Act provides that such an admission can be made without appearing in court, or even after already having appeared. When the summons or notice to appear is issued the relevant official (prosecutor, clerk of the court or peace officer) indicates on the document that the accused may admit his guilt (by signing the document and returning it to court or police station) and paying the stipulated fine. An accused who has already appeared in court and who has not pleaded to the charges yet may also be afforded the chance to admit

\textsuperscript{503} S v Mkuzangewe 1987 (3) SA 248 (O).
\textsuperscript{504} Section 6(b) of the Criminal Procedure Act.
\textsuperscript{505} “Pertinente en oorwoë” besluit – S v Mkuzangewe 1987 (3) SA 248 (O).
\textsuperscript{506} S v E 1995 (2) SACR 547 (A).
\textsuperscript{507} S v Van Niekerk 1985 (4) SA 550 (B) See further S v Magayela 2004 (1) SACR 5 (T) and contra S v Gouws 2008 (2) SACR 640 (T) where the court said that the question whether consent was obtained or not is an internal disciplinary matter and should not influence the acquittal of the accused.
\textsuperscript{508} S v Teele 1979 (4) SA 610 (B) – similar to the Dutch ‘vertrouensbeginsel’.
\textsuperscript{509} S v Magayela 2004 (1) SACR 5 (T) – as discussed by M Cowling, Recent Cases: Criminal Procedure, SACJ 2004- 17, p. 108.
\textsuperscript{510} S v Mkuzangewe 1987 (3) SA 248 (O); S v Van Biljon 1964 (2) SA 426 (T).
\textsuperscript{511} Section 57 and 57A Criminal Procedure Act, 51 of 1977.
guilt and pay a fine to have the matter finalized.\textsuperscript{512} The prosecutor (or clerk of the court authorized by the prosecutor) exercises the discretion to make such endorsement and fix the fine if they, on reasonable grounds, believe that the court will not impose a fine exceeding a certain amount.\textsuperscript{513} It may only be done where there is a case of sufficient strength against the accused.\textsuperscript{514} Nowhere is it prescribed for what offences the admission of guilt fine may be offered, but the offence must be such that, if the case were to go to court, the fine that would probably be imposed by the court on conviction may not exceed the amount of R 10 000,00.\textsuperscript{515} A variety of less serious statutory offences as well as some common-law offences\textsuperscript{516} such as theft, assault etc, can therefore be disposed of effectively by these means. A prosecutor is allowed to reduce the fine on good cause shown, usually after receiving written or oral representations from the accused.

The effect of this procedure is that an accused that pays the stipulated amount before the prescribed date is deemed to admit his guilt to the charge contained in the summons or notice. The clerk of the court must enter the essentials of the summons or notice in the criminal record book for admissions of guilt. The accused shall then be deemed to have been convicted, and sentenced, by the court in respect of the offence in question. The magistrate at the particular court must examine the documents after the fine has been paid and may set aside a conviction and sentence reached in this manner if it is not in accordance with justice or if the fine\textsuperscript{517} is not adequate. If the magistrate cancels the admission of guilt fine, the prosecutor can then continue with the charge normally.

**Compounding of certain minor offences**

Section 341 of the Criminal Procedure Act creates a further method of disposal in that certain municipal offences and motor vehicle offences can be finalised by way of payment of an amount of money as a fine. The offences for which it applies are listed in schedule 3 to the Act and involve the contravention of bye-laws and regulations as well as certain offences relating to motor vehicles. The money is paid to the local authority and is deemed to be a fine. The process is also scrutinised by a magistrate who must make sure that the amount specified in the notification does not exceed the amount determined for that specific offence by the magistrate.

\textsuperscript{512} This second procedure is only available since 1996.
\textsuperscript{513} Determined by the Minister from time to time by notice in the Government Gazette. This was recently increased to R 10 000 (G Notice No R62 – 30 January 2013) Until 2013 it was R5 000 (since February 2003) and before that R 1 500.
\textsuperscript{514} S v Eusuf 1949 (1) SA 656 (N).
\textsuperscript{515} The procedure in terms of section 57 should not be used with regard to offences listed in Schedule 3 of the Criminal Procedure Act since section 341 specifically provides for the compounding of these offences.
\textsuperscript{516} See however the cases of S v Van Wyk 2000 (1) SACR 590 (T) and S v Price 2001 (1) SACR 110 (C) where the court criticised the use of Sec 57 with regard to common law offences.
\textsuperscript{517} This procedure only allows for a fine as punishment. It may not also include a suspension or endorsement of a license or a forfeiture order.
for the district. This procedure is an administrative procedure which only becomes relevant to the criminal procedure upon failure to pay, when a summons may be issued.

Conversion of trial for purposes of treatment\textsuperscript{518}

At the trial of a person who appears to have serious addiction problems\textsuperscript{519}, the presiding officer may, with the consent of the prosecutor\textsuperscript{520}, stop the trial and order that an enquiry be held to determine if the person is indeed in need of rehabilitative treatment. This procedure cannot apply where punishment of imprisonment would be compulsory if the offender were convicted at the trial\textsuperscript{521}. The referral to an enquiry may be done before or after conviction, and if the person is subsequently detained in a treatment center, the proceedings at the trial shall be null and void. The referral must, however, be done before the charges are withdrawn, because the referral can only take place during a trial, and once charges have been withdrawn, there is no trial any longer\textsuperscript{522}.

Juvenile Justice

One of the most important developments in juvenile justice in South Africa in the last two decades has been the increasing preference shown for diverting young offenders away from criminal courts and into appropriate alternative programs\textsuperscript{523}. The principle of diversion for child offenders was already widely practiced in South Africa even before the implementation of the Child Justice Act\textsuperscript{524}. Sloth-Nielson\textsuperscript{525} indicates that diversion in juvenile justice in South Africa commenced with the creation of the non-governmental organisation, NICRO\textsuperscript{526}, in the early 1990s and their development of life-skills programs for young offenders. With time the range of programs increased and also their availability. Individual presiding officers and prosecutors developed their own diversion options, which included the performance of community service, apologies to victims, restitution of property, formal or informal warnings etc. Since there was little/limited legislative framework for diversion, it mostly took place within the framework of prosecutorial discretion and was implemented in a

\begin{itemize}
  \item \textsuperscript{518} Section 255 Criminal Procedure Act, 51 of 1977.
  \item \textsuperscript{519} Described in sec. 21(1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992.
  \item \textsuperscript{520} after consultation with a probation officer in terms of the Probation Service Act 116 of 1991.
  \item \textsuperscript{522} In re Vorster 1997 (1) SACR 269 (EC).
  \item \textsuperscript{523} J Sloth-Nielson, Reviewing the prosecutorial decision not to divert – case discussion of M v The Senior Public Prosecutor, Randburg, \textit{De Jure}2001- 34-1, p. 194.
  \item \textsuperscript{524} Act 75 of 2008 in force since 1 April 2010. Also Directives in terms of section 97(4) of the Child Justice Act 75 of 2008 issued by the National Director of Public Prosecutions.
  \item \textsuperscript{525} J Sloth-Nielson: Child Justice and Law Reform, in CJ Davel (ed) Introduction to Child Law in South Africa, Cape Town: Juta Publishers, 2000
  \item \textsuperscript{526} National Institute for Crime Prevention and the Reintegration of Offenders.
\end{itemize}
selective and disjointed manner. Diversion guidelines were developed by some provincial Directors of Public Prosecutions to give some guidance to prosecutors regarding decisions to refer cases for diversion. Later on diversion received the attention of various studies and policy papers, and also featured centrally in the investigation by the South African Law Commission which led to the subsequent adoption of the Child Justice Act.

**Child Justice Act**

This act ushers in a new era for juvenile justice, creating a separate criminal justice and procedural system for child offenders in accordance with the values underpinning the Constitution and the international obligations of the Republic of South Africa. A specific and detailed legislative framework is created for the diversion of criminal prosecution against children. The Act provides a flexible approach to dealing with children in trouble with the law and centralises diversion as an option for children in the criminal justice system, incorporating the values of ubuntu in its provisions and expanding and entrenching the principles of restorative justice. The Act applies to all criminal offences, but divides them into three schedules, depending on their seriousness: Schedule 1 contains the least serious offences and Schedule 3 the most serious offences.

**Pre-trial Assessment**

Every child who is alleged to have committed an offence must be assessed by probation officers, (who are qualified social workers), as soon as possible (and prior to the preliminary enquiry). The assessment must be thorough and deal, amongst other things, with the individual circumstances of the child. The report must also specifically deal with the prospects of diversion. The probation officer must, after assessment, submit the assessment report to the prosecutor. The report must make recommendations regarding

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528 See for example S v Z en vier ander sake 1999 (1) SACR 427 (E) where the court quoted with approval the contents of a circular “Juvenile Offenders: Diversion Programmes” from the Director of Public Prosecutions (Eastern Cape).

529 Children are defined as all persons under the age of 18 years of age, but the CJA also includes procedures regarding offenders who were under 18 when the offence took place, but is sentenced only at a later stage.

530 S v Gani 2012 (2) SACR 468 (GSJ).

531 The assessment is vital for purposes of coming to an informed decision, not only regarding possible diversion, but also pre-trial detention, criminal capacity, whether the child may be child in need of care etc.
the prospects of diversion including the type of diversion program;
whether the child can be released pending the outcome (if under arrest);
whether the matter should be transferred to a children’s court.

The prosecutor may dispense of the requirement of an assessment if it is in the best interest of the child and the charge relates to a minor offence. This should be the exception.

**Preliminary inquiry**

The second phase is a preliminary inquiry presided over by an inquiry magistrate. The preliminary inquiry takes place prior to the charge and plea stage but within 48 hours of arrest (or the alternative to arrest). This is an informal procedure and may be held in a court or any other suitable place. The assessment report (and recommendations) is dealt with as well as any other documents or information that may be relevant. The child (and other appropriate family) is encouraged to participate. One purpose of this inquiry is to establish whether the matter can be diverted before plea and to identify a suitable diversion option. At the start of the preliminary inquiry the magistrate must explain the purposes of the inquiry to the child, inform him of the nature of the allegations against him, inform him of his rights and explain the procedures that will follow. Information regarding a previous diversion or previous conviction of the child may be submitted. The child, parents, legal representative and prosecutor may question the probation officer or any other person giving evidence at the preliminary inquiry. If the child acknowledges responsibility for the offence and if the prosecutor agrees, the court can make an order of diversion. If the child does not acknowledge responsibility for the offence, no further questions regarding that offence may be put to the child. No information furnished at an inquiry may be used against the child in any subsequent court proceedings. Essentially the outcome of the preliminary inquiry is either that a diversion order is made, or that the matter is referred to the child justice court for plea and trial. If the child is in detention, the inquiry magistrate must determine the conditions of release.

**Diversion of prosecution**

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532 “Acknowledge responsibility” means to acknowledges responsibility for an offence without a formal admission of guilt.

533 Prosecutors are responsible for the ultimate decision whether to divert or not. If the prosecutor declines to divert, the inquiry magistrate must refer the matter to the child justice court.

534 See also the detailed discussion of the various diversion options and the stages in which it can be applied in JJ Joubert (ed), Criminal Procedure Handbook, 9thed, Cape Town: Juta Publishers, 2009.
Diversion may be used as a means to prevent children being exposed to the adverse effects of the formal justice system and may occur at three distinct stages of the process:

In the first instance, in the case of a minor offence, the prosecutor may divert the matter before the preliminary investigation in which case the prosecutor must still bring the matter before a magistrate in chambers who, in the presence of the child, makes such diversion order an order of court.

The second opportunity arises during the preliminary investigation where the prosecutor indicates that the matter may be diverted, in which case the inquiry magistrate makes such a diversion order.

The third opportunity is at the trial in the child justice court itself where the prosecutor can decide to divert the case up till the moment the prosecution closes its case. Once again the magistrate makes the diversion order.\(^{535}\)

If the prosecutor has decided not to divert, or if for whatever reason no diversion has taken place, prosecution will follow in a child justice court where the child must appear for plea and trial. Normal trial procedure will then follow. If, however, at any stage the child acknowledges or intends to acknowledge responsibility for the alleged offence, the court may make an order for diversion if the prosecutor indicates that the matter may be diverted (own emphasis). The proceedings are then postponed, pending the child’s compliance with the diversion order. When the probation officer informs the court that the child has successfully complied with the diversion order, the court must make an order to stop the proceedings.

Diversion may only be considered if:
- There is a voluntarily acknowledgment of responsibility by the child;
- The child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility;
- There is sufficient evidence to prosecute (existence of a *prima facie* case);
- The child and his or her parents, or an appropriate adult, consent to diversion and the diversion option;
- For schedule 2 and 3 offences the prosecutor must have been properly authorised.

If all of these circumstances exist, diversion has to be considered. Diversion may only be considered in the case of schedule 3 offences if exceptional

\(^{535}\) The option of diversion can be considered at any time during the trial. S v MK 2012 (2) SACR 533 (SG).
circumstances exist.\(^5\)\(^3\)\(^6\) The fact that diversion is considered obviously does not mean that it has to be applied. In this regard the prosecutor still maintains the final say.

The Act is the first time that diversion has formally been regulated in the criminal justice system. The objectives of diversion are to:\(^5\)\(^3\)\(^7\)

1. deal with a child outside the criminal justice system in appropriate cases;
2. encourage the child to be accountable for the harm caused by him;
3. meet the particular needs of the individual child;
4. promote the reintegration of the child into his or her family and community;
5. provide an opportunity to those affected by the harm to express their views on its impact on them;
6. encourage the rendering to the victim of some symbolic benefit as compensation;
7. promote reconciliation between the child and the person or the community harmed;
8. prevent stigmatising the child and the adverse consequences flowing from being subjected to the criminal justice system;
9. reduce the potential for re-offending;
10. prevent the child from having a criminal record (except in the case of schedule 3 offences);
11. promote the dignity and well-being of the child, and the development of his sense of self-worth and ability to contribute to society.

**Diversion options**

Level I options apply to Schedule 1 offences and consist of a variety of informal orders or formal interventions and programs. This may include a (written or oral) apology, formal caution, placement under supervision and guidance orders,\(^5\)\(^3\)\(^8\) reporting orders,\(^5\)\(^3\)\(^9\) compulsory school attendance orders,\(^5\)\(^4\)\(^0\) family time orders,\(^5\)\(^4\)\(^1\) peer association orders,\(^5\)\(^4\)\(^2\) good behaviour

\(^5\)\(^3\)\(^7\) Section 51.
\(^5\)\(^3\)\(^8\) An order placing the child under the supervision and guidance of a mentor or peer in order to monitor and guide the child’s behaviour.
\(^5\)\(^3\)\(^9\) An order requiring the child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child’s behaviour.
\(^5\)\(^4\)\(^0\) An order requiring the child to attend school every day for a specified period of time, the attendance being monitored.
\(^5\)\(^4\)\(^1\) An order requiring the child to spend a specified number of hours with his or her family.
\(^5\)\(^4\)\(^2\) An order requiring the child to associate with persons who can contribute to the child’s positive behaviour.
orders, an order prohibiting the child from visiting specified places. It also entails referral to counseling or therapy, attendance of vocational, educational or therapeutic programs, symbolic restitution, community service and payment of compensation.

Level II options apply to Schedule 2 and Schedule 3 offences and include the level 1 options, but are supplemented with more intensive interventions like temporary residence for purposes of vocational, educational or therapeutic programs and placement under supervision of a probation officer.

**Obtaining the view of victims/police and additional authorisation**

Before the prosecutor decides on diversion the view of victims and the investigation officer should be obtained. This is important because the victim/person affected’s right to redress by way of private prosecution is extinguished once diversion has been ordered. For schedule 1 offences the view must be obtained if reasonable possible. In the case of the more serious offences (schedule 2 and 3) it must be obtained and considered. The prosecutor is, however, not bound by these views. Furthermore, for schedule 2 offences the prosecutor must also obtain the authorisation of the Senior Public Prosecutor and in the event of diversion of a schedule 3 offence, the written authority of the relevant Director of Public Prosecutions.

**Diversion for serious offences**

Diversion will only be considered for schedule 3 offences upon written authorisation of the Director of Public Prosecutions and if exceptional circumstances exist. Such exceptional circumstances include:

- particular youthfulness;
- particular low developmental level of a child;
- presence of particular hardship, vulnerability or handicap (e.g. where the child heads a household);
- victim prefers diversion to trial as he/she does not want to testify in court;
- compelling mitigating circumstances such as diminished responsibility;
- undue influence exerted on the child to commit the offence;
- witnesses for the prosecution are fragile and/or unwilling to testify;
- to proceed would be potentially damaging to a child witness/victim.

**Minimum standards applicable to diversion**

An order requiring a child to abide with an agreement made between the child and his or her family to comply with certain standards of behaviour.
In order to maximise consistent application as well as compliance with the Constitution, section 55 sets forth a series of minimum standards applicable to all aspects of diversion. These include the principle of proportionality, the assurance that diversion programs must be appropriate to the age and maturity of the child, must not interfere with the child’s schooling, may not be exploitative, harmful or hazardous and must promote the dignity and well-being of the child. Diversion programs must also include a restorative justice element which aims at healing relationships, including the relationship with the victim. Service providers, as well as the diversion programs they provide, must be accredited by the Department of Social Development.\footnote{C Badenhorst, Second Year of the Child Justice Act’s Implementation: Dwindling Numbers, Child Justice Alliance, 2012. A total of 191 diversion programs and 55 diversion service providers have been accredited. Government Gazette No. 34960 dated 23 January 2012.}

**Monitoring compliance with diversion orders**

A probation officer, or other suitable person, monitors the child’s compliance with the diversion order. Upon successful completion a report is submitted to the prosecutor. No prosecution may now be instituted on the same facts. If the child fails to comply, the matter is reported to the magistrate, (in writing) who can issue a summons or warrant of arrest for the child to bring him before court. When the child appears in court an inquiry is held as to why the child failed to comply with the diversion order. If the failure was due to the child’s fault the prosecutor may decide to proceed with prosecution of the matter, or otherwise to decide on another diversion option which is more onerous than the original diversion order.

**Diversion as sentencing option**

If no diversion took place prior to the court convicting a child of an offence, the sentence passed by the court must still comply with the Act. A range of custodial and non-custodial sentences are prescribed which include

- Community-based sentences including the diversion options;
- Restorative justice sentences (family group conferences, victim-offender mediation) the result of which may be confirmed or altered by the court.

In this case, however, the child is actually convicted of the offence, although the sentence imposed is similar to the consequence of diversion.

**Keeping of Records and Confidentiality**

The Director-General: Social Development must establish and maintain a register of children in respect of whom a diversion order is made.\footnote{Section 60 prescribes the details which must be recorded in the register.} Previous diversions may have a bearing on (later) decisions to divert. The
record is accessible only for (criminal justice) officials, as well as for purposes of research. The record of diversion of a child is automatically expunged when the child reaches the age of 21 years, unless the child has been convicted of any other offence before that date, or has failed to comply with the diversion order in question.

**Conclusion**

The Child Justice Act firmly entrenched diversion of prosecution (and restorative justice) as a means of dealing with children in trouble with the law. Stout and Wood\(^5\) evaluated the success of a specific diversion program in the Western Cape aimed at children accused of sex offences (SAYStOP\(^6\)) and argue that government, at both national and provincial level, will need to demonstrate their commitment to such programs in order for it to be feasible in the long run. Without government taking co-responsibility, many diversion programs will ultimately not produce on its promises. Sloth-Nielsen & Munting\(^7\) indicate that, already as early as 1998 (before the Act), the use of diversion for children charged with less serious offences had increased due to growing acceptance by prosecutors of this process. Research has also shown that the recidivism rate for diversion also appears to be very low.\(^8\) The Act produces a cohesive child justice-system that strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions. At the same time it provides for the criminal prosecution of children who are accused of serious or violent offences, as well as those who repeatedly commit offences. The system also allows for the secure containment of children who are assessed to be a danger to the community.

4.3 **Plea-bargaining: is there any similarity to prosecutorial disposal?**

Plea-bargaining is an international phenomenon,\(^9\) at least in countries that adhere to the accusatorial trial system and is considered by some writers to be a form of diversionary proceeding, in effect bypassing the normal trial.\(^10\) Many of the arguments both in favour of, as well as criticising plea-bargaining are also relevant to other forms of prosecutorial disposal of cases. The South African criminal procedure provides for an

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\(^{6}\) South African Young Sex Offenders Project.


\(^{8}\) Follow-up studies of children who had attended NICRO programmes indicate that as little as 6.7% recidivism occurs within the first year.

\(^{9}\) NM Isakow & D Van Zyl Smit, Negotiated justice and the legal context, De Rebus April 1985, p. 173 refer to a number of international sources discussing plea-bargaining in the USA, Britain, Scotland etc. See also the sources referred to in chapter 1 as well as chapter 3.

expedient method of dealing with confessing offenders – the so-called “guilty plea”.\textsuperscript{552} In conjunction with the guilty-plea there has also, for many years, existed an informal practice of plea-bargaining\textsuperscript{553} between the accused and the State with regard to the acceptance by the latter of a plea of guilty, usually on a “lesser” charge and the recommendation of a mutually acceptable sentence to the court. The Court was never (formally) part of this agreement or bound by it. A legislative amendment of the Criminal Procedure Act now provides for a legislative basis for formal plea-bargaining that, although the presiding officer is still not a party to, binds the court in sentencing.\textsuperscript{554}

The concept of plea-bargaining

Plea-bargaining, also called plea-negotiations or plea-discussions, is the process where the prosecution makes certain concessions (either with regard to the charge or sentence) in return for the accused pleading guilty to a charge (often a “lesser” or included offence). Issues negotiated in a typical plea-bargain would include the reduction of a charge (or the number of charges), a specific recommendation regarding sentence, or an agreement that the prosecutor would not oppose a request for a specific sentence by the defence. In practice it entails that the accused voluntarily relinquishes the right to a trial (and the procedural protection it entails) and the chance of a possible acquittal, in exchange for a reduction in charge and/or sentence or other favourable condition. The purpose of plea agreements is usually to try to secure a more lenient sentence, but the plea agreement may also be the result of elaborate discussions and involve other outcomes, like the accused’s willingness to co-operate in the prosecution of others, or the undertaking from the prosecutor that others will not also be implicated.\textsuperscript{555}

Plea-bargaining in South Africa\textsuperscript{556}

\textsuperscript{552} Section 112 of the Criminal Procedure Act, Act 51 of 197.


\textsuperscript{554} Section 105A Criminal Procedure Act, Act 51 of 1977. This procedure is not confined to certain offences or certain courts only. The judicial officer does not participate in the negotiations and can refuse to accept the plea-agreement if (s)he is not convinced of the guilt of the accused. The court may also refuse to accept the suggested sentence if the court is not satisfied that it would amount to a “just” sentence. In that case the parties can withdraw from the agreement and a trial de novo commences before another judicial officer.

\textsuperscript{555} North Western Concrete CC and another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C).

\textsuperscript{556} For a detailed list of South African articles dealing with plea-bargaining, see the judgment of North Western Concrete CC and another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C) at 674h-j where Acting Judge Uijs discusses the practice of informal plea-bargaining in some detail.
Whereas there may have been some doubt about the acceptability of this method in South African criminal justice, this was put beyond doubt by the court in the *North Western Concrete* case\(^{557}\) where the judge said:

“Plea-bargaining is a means of achieving a settlement of the *lis* between the State and the accused and is as much entrenched, accepted and acceptable a part of South African law as are negotiations aimed at achieving a settlement of the dispute between private citizens in a civil dispute.”

One should distinguish between formal and informal plea-bargaining.\(^{558}\)

**Formal plea-and-sentence agreements**

After a thorough investigation, the Law Commission recommended that the Criminal Procedure Act be amended to provide for formal plea-and-sentence agreements. This recommendation was subsequently followed and has led to introduction of sec 105A: Formal Plea-and-sentence Agreements.\(^{559}\) Section 105A provides for formal, written plea-and-sentence agreements. Either the prosecutor, or the defence, may initiate the process. What is important is that this procedure provides for plea-and-sentence bargaining. Such agreements between the accused and prosecutor are not only possible with regard to the charges which the accused will plead guilty to, but may also extend to the sentence that has been agreed upon. Section 105A can only apply when the accused is legally represented, the prosecutor is authorized by the Director of Public Prosecutions to conclude such agreements, and the plea is concluded before the trial commences. There is not limit with regard to the type of offence, courts or offenders who may make use of this procedure. The presiding officer may not participate in the negotiations, but ultimate judicial approval of the agreement is essential. The prosecutor must consult with the investigating officer\(^{560}\) and where reasonable, with the complainant/victim who may make representations regarding the proposed agreement.\(^{561}\) The prosecutor is, however, not bound by these representations. An agreement shall not provide for an award for compensation unless the complainant requests it in writing. The prosecutor must inform the complainant about this possibility.\(^{562}\) Payment of compensation, or the rendering of some specific benefit or service in lieu of compensation for damage or pecuniary loss,

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\(^{557}\) North Western Concrete CC and another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C).

\(^{558}\) For a detailed distinction between the two, see MB Rodgers, The development and operation of negotiated justice in the South African criminal justice system, *SACJ* 2010-2, p. 239.

\(^{559}\) Introduced by the Criminal Procedure Second Amendment Act 62 of 2001. See also Directives issued by the National Director of Public Prosecutions on 14 March 2002.

\(^{560}\) If the investigating officer is not available, there must be consultation with the relevant branch or unit commander and the reason(s) for the non-availability must be recorded.

\(^{561}\) In the case of homicide the relatives/next of kin of the deceased must be consulted.

\(^{562}\) Regulation 15, NPA Directives on Section 105A 1/8/2-1/02 dated 14 March 2002.
shall only be done when the agreed sentence is a postponed or a suspended sentence and the payment of compensation or the rendering of the benefit or service is imposed as a condition of the postponement or suspension of the sentence.\textsuperscript{563}

Formalities of the agreement\textsuperscript{564}

If an agreement is reached it must be in writing and must contain the following information:

- A statement that the accused has been informed of his right to be presumed innocent until proven guilty, to remain silent and not to testify, and not to be compelled to give self-incriminating evidence and that the agreement was entered into freely and voluntarily;
- The terms of the agreement, the substantial facts of the offence and other facts relevant to sentencing and other admissions made by the accused;
- If an interpreter was used in the process, it must contain a certificate that the contents of the agreement accurately reflect the negotiations.

The document must be signed by the prosecutor as well as the accused and his legal representative. The parties may agree on any permissible sentence, including custodial sentences, suspended or postponed sentences, as well as an award of compensation to the victim. The agreement may not, however, bind the court with regard to its power or duty to make a specific order or to conduct a specific inquiry (e.g., whether a person is fit to possess a firearm). The agreement must specifically mention the fact that the accused has been made aware of this fact.

Procedure in court

In court, when the accused is called upon to plead, the prosecutor informs the court that an agreement has been reached. The court will then first scrutinize the agreement to check that the formalities have been complied with. If the court is satisfied that the formal requirements have been met, the accused is asked to plead to the charges put to him and the contents of the agreement is disclosed in court. Two stages of evaluation take place: First the court considers the plea, and thereafter considers the proposed sentence. If the presiding officer is satisfied of the accused’s guilt and that he entered into the agreement voluntarily, he continues to scrutinize the agreed sentence. If not, the court enters a plea of not-guilty and the trial starts \textit{de novo} before another presiding officer. Once the court is satisfied with the guilt, it must consider the suitability of the agreed sentence. The court may hear evidence, statements on behalf of both defence and

\textsuperscript{563} Regulation 16, NPA Directives on Section 105A 1/8/2-1/02 dated 14 March 2002.

\textsuperscript{564} Because the process is a “fundamental departure from the adversarial system” the various steps in the process are peremptory and strict compliance is required. S v Solomons 2005 (2) SACR 432 (C).
prosecution or may direct questions at both in considering the proposed sentence, which questions may include details of any previous conviction. If the court agrees with the sentence, it convicts the accused and sentences him according to the agreement. If the court deems the agreed sentence to be unjust it must inform the parties and indicate what it regards a just sentence would be. The court can only interfere with the sentence if it is of the opinion that it is not “just” or appropriate – and not if it isn’t the sentence that it would have rather imposed. At this stage the accused and prosecutor can decide to abide by the agreement with regard to the charge and plea only and can lead evidence and present arguments regarding sentence. In this case the court retains its discretion regarding sentence. The parties, or one of them, may also decide to withdraw from the agreement, in which case a trial de novo will be necessary before another presiding officer. In this case the agreement is totally null and void and no reference may be made to it. In the event of a trial de novo the prosecutor may now proceed on any charge. Once an agreement has been rejected or withdrawn, the parties may not enter into another formal plea-and-sentence agreement in respect to the same facts. They may, however, follow the procedure of “informal” plea-bargain.

The prosecuting authority must keep comprehensive records and statistics relating to plea-and-sentence agreements, and the National Director of Public Prosecutions must submit these to parliament once a year. The directives in terms of section 105A stipulate that negotiations are not to be finalized unless the accused’s criminal record has been obtained, and where the accused does have previous convictions, the prosecutor must refer the matter to their superior for instructions. In cases involving multiple accused, prosecutors should be cautious to enter into agreements with some and not all of them. Only prosecutors who are authorised in writing by the National Director of Public Prosecutions may negotiate plea-and-sentence agreements, so it is clear that this discretion can only be entertained by prosecutors who have reached a certain level of experience or training and have shown themselves responsible and confident in the execution of their duty.

Informal plea-bargaining

566 although the accused may waive this right, in which case the matter proceeds before the same judicial officer.
567 Section 105A(11)(b)(iv).
568 Section 105A(12).
Informal agreements about pleas are still not regulated and will probably not become extinct as result of Sec 105A. The restrictions of sec 105A and the fact that the agreement must be in writing, which can be time-consuming, will mean that it will not become the standard method of pleas of guilty. The so-called informal plea agreements follow the normal procedure for a plea of guilty. Once an agreement has been reached between the state and the accused, the case is brought before court where the charge is put to the accused who then offers a plea of guilty. The procedure of section 112 of the Criminal Procedure Act then entails the presiding officer questioning the accused to determine the voluntariness of the plea as well as the facts upon which it is based. If the accused pleads guilty to a lesser charge, the state will be asked whether they accept the plea. The accused can then only be convicted on the less serious offence to which the state has accepted the plea. Informal plea-negotiations cannot bind the court with regard to sentence. The negotiations/discussions may be extended, but often it simply involves either the defence counsel indicating that his client is prepared to "plea to a lesser charge", or the prosecutor suggesting that he will accept such plea.

Consequences of a plea-agreement

The North Western Dense Concrete case indicated that, where a charge against a person had been withdrawn as result of a plea-negotiation with the state, the state may be prevented to institute action against the accused again, but that does not preclude an affected party to apply for a certificate *nolle prosequi* and to institute a private prosecution. On the facts of the case there were multiple accused. One of them agreed to plead guilty (in the plea-agreement) on condition that the charges against the others be withdrawn. Obviously the one who pleaded guilty is now safe from private prosecution, but the others are at risk. It is uncertain what the court’s position will be if during the private prosecution the state applies to intervene and take over the proceedings in terms of sec. 13 of the Criminal Procedure Act.

Advantages of plea-bargaining

Why do accused opt for this method? The plea of guilty is usually regarded as indicative of the accused’s remorse and not wanting to “waste the court’s time” any further. This is, obviously, not always the case, and the plea may often be more the result of a rational acceptance that there is no realistic

570 Unlike Germany where the Constitutional Court recently approved the (new) sentence agreement legislation (Gesetz zur Regelung der Verständigung im Strafverfahren) but also ruled that any informal agreements not in terms of this act will not be allowed. 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 of 19.03.2013.

571 North Western Concrete CC and another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C). See also Van Eeden v Director of Public Prosecutions, Cape of Good Hope 2005 (2) (SA) 22 where the court ordered a permanent stay of prosecutions after a (informal) plea agreement had been concluded.
chance of acquittal. On the other hand, there may be numerous reasons, apart from the expected sentencing leniency, why an accused would prefer to plead guilty to a certain charge and get the trial over and done with, even if he believes himself not to be guilty. It may be financial reasons, or the desire to avoid the publicity of a full trial, or the consequences of a conviction to a particular charge (being declared unfit to hold a fire-arm license, losing his driver’s license etc.). Guilty pleas are usually disposed of faster which can be a factor to consider for an accused held in custody without bail or with limited financial means. Since the introduction of the plea-and-sentence agreements, the accused can also have certainty regarding the sentence. If the court doesn’t accept the agreed sentence, the accused has the right to withdraw from the agreement and take his chances in a trial. An accused can also agree to plead guilty and then to act as state-witness in another case/investigation.\textsuperscript{572} The prosecutor will usually recommend a lighter sentence once his trial gets to sentencing. This in fact boils down to a “plea-agreement” after conviction.

It is not only the accused that benefits from plea-bargaining. Advantages for the prosecutor and administration of justice include:

- an assured conviction;
- avoiding the possible trauma for the victim to give testimony;
- cost and time saving by quicker disposal of the case-roll which helps to eliminate the congestion of the courts.

The formal plea-and-sentence agreements in terms of sec 105A have an added dimension in that the views of the victim/complainant must be considered by the prosecutor. They get a measure of participation which may be empowering to victims and it also reduces some of the complaints of the “secrecy” in which the negotiations are cloaked.\textsuperscript{573} “Secondary victimisation” is prevented since they are not required to testify (and be cross-examined).

\textbf{The role of the defence lawyer}

It is only natural that the accused will rely heavily on the advice they receive from their legal counsel. The accused is often particularly vulnerable at the pre-trial stage of proceedings with the strain of the trial, the possibility of conviction, the uncertainty concerning sentence. In these circumstances it may be quite feasible that the accused may accept the objective, learned and calculated opinion of his counsel without too much thought. This places a great responsibility on defence lawyers.\textsuperscript{574}

\textsuperscript{572} This is often used to deal with complex multi-offender cases.
\textsuperscript{574} S v Taylor 2006 (1) SACR 51 (C). See also WP de Villiers, Ineffective assistance by counsel during plea negotiations: an agreement lost. \textit{THRHR} 2006-69, p. 484.
4.4 Other alternatives not presently recognised / formalised

Administrative Adjudication of Road Traffic Offences Act (AARTO)\textsuperscript{575}

South Africa took a big step in the direction of alternative disposal of traffic offences with the introduction of the AARTO. This Act was already approved by Parliament in 1998 and has come into force (as a pilot) in the metropolitan areas of Tshwane (Pretoria) from July 2008 and Johannesburg from November 2008. At the time it was envisaged that the operation would be rolled out in the entire country soon thereafter, but as yet no official date for the national roll-out of the AARTO has been announced. The Act introduces a new administrative process of adjudicating certain road traffic violations. Its objectives are to:\textsuperscript{576}

- encourage compliance with road traffic laws and promote road safety;
- encourage the payment of penalties imposed;
- establish procedures for effective and expeditious adjudication of infringements;
- alleviate the burden on courts to try offenders for infringements;
- penalise drivers (for infringements) through the imposition of demerit points leading to the suspension or cancellation of driving licenses/professional driving permits/operators cards;
- reward good driving behaviours by reducing demerit points where they have been incurred if no further infringements occur within specified periods;
- establish an agency to support law enforcement and/or the judicial authorities and to undertake the administrative adjudication process.

Traffic violations are now categorised as either:\textsuperscript{577}

- a traffic offence – which are serious violations of the law which (still) leads to prosecution and conviction and the imposition of a sentence in accordance with the Criminal Procedure Act;
- a minor infringement and;
- a major infringement.

The latter two categories are dealt with in terms of the new AARTO procedures which do not lead to criminal prosecution but to the issuing of Infringement Notices (IN) and administrative adjudication. More than 2000 charge codes are included in the AARTO charge book of which little more than 100 constitute offences which are still dealt with through the criminal process. A substantial number of run of the mill infringements are

\begin{footnotesize}
\footnote{\textsuperscript{575} Act 45 of 1998. There has also been three subsequent amendments in 1999, 2000 and 2002.}
\footnote{\textsuperscript{576} Section 2 AARTO.}
\footnote{\textsuperscript{577} In terms of the National Road Traffic Act 93 of 1996. If a person is alleged to have committed an offence and an infringement arising out of the same set of facts, both matters must be dealt with in terms of the Criminal Procedure Act. Section 23 AARTO.}
\end{footnotesize}
thus removed from the criminal circuit. The payment of a fine for an infringement is also not regarded as previous conviction.

**Issuing of an Infringement Notice**\(^{578}\) (IN)

Upon witnessing an infringement, a traffic officer will issue an IN. Initially these will be written by hand but electronic notices, generated by portable computers, are envisaged. These notices are handed to the driver. In the case of camera infringements, for example for exceeding the speed limit or ignoring traffic signals, the IN will be generated electronically and served on the infringer by registered mail.\(^{579}\)

**Options upon receipt of an IN**

The alleged infringer has several choices that must be made within 32 days after having received the notice. He can:

- pay the fine and qualify for a 50% discount;
- make arrangements to pay the fine in monthly instalments\(^{580}\) (no discount applicable);
- give information about who the driver of the vehicle was at the time of the infringement;\(^{581}\)
- make representations\(^{582}\) to the Agency (to try prove his innocence\(^{583}\));
- elect to be tried in court.\(^{584}\)

If the alleged infringer fails to exercise any of the options within 32 days, he will first receive a Courtesy Letter by registered mail reminding him to choose an option within an additional 32 days. No discount on the fine will

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\(^{578}\) Section 17 AARTO.

\(^{579}\) Any document (in terms of AARTO) which is sent by registered mail is deemed to have been delivered 10 days after the posting, regardless whether it was collected or not – section 30(2) AARTO.

\(^{580}\) If payments are to be made in instalments, the agency must investigate the credit worthiness of the infringer, and inform him of the monthly payments and the period of payment. If the application is not granted, the full payment must be made within 32 days.

\(^{581}\) Once information about the driver of the vehicle is supplied, the first IN is cancelled and a second IN is issued to the driver. If there is no reply after 32 days, the original IN is reinstated against the owner of the vehicle.

\(^{582}\) Representations can only be made with regard to minor infringements. It is submitted on a prescribed form by way of a sworn statement/affirmation indicating reasonable grounds why the infringer should not be held liable for the penalty. Representations are dealt with by an independent Representations Officer (RO). Section 18 AARTO.

\(^{583}\) Penalties may not be reduced by the RO. Representations may only be allowed if reasonable grounds are found, or rejected in the absence of such grounds. The RO may conduct an independent investigation to verify facts. If the representations are rejected, the infringer must be notified by registered mail and must pay the fine and administrative costs, or may elect to be tried in court, only if this is recommended by the RO - Section 18(7)(c) AARTO.

\(^{584}\) The infringer must notify the agency of his intention to follow the court procedure. The IN will now be cancelled and a summons to appear in court will be issued and posted by registered mail. Representations may now be made to the public prosecutor who may, however, still decline to prosecute, in which case the matter is finalised. If the infringer fails to appear in court, an Enforcement Order will be issued.
now apply. An additional fee for the letter is added to the amount that must be paid and the infringer is informed that failure to comply will result in an Enforcement Order.

Enforcement Order\(^{585}\) (EO)

If there is still no response after the second 32 day period, an Enforcement Order will be served/sent by registered mail. The EO demands payment within yet another 32 days (again with additional administrative costs added). No other option is available except immediate payment of the fine. An Enforcement Order may be revoked on good grounds shown to the issuing authority.

Warrant for execution\(^{586}\)

If there is still no payment in full, a Warrant will be issued and sent to the Sheriff for immediate execution. The execution can take any of the following formats:
- seizing and selling of movable property of the infringer to satisfy all fines, fees and costs;
- seizing and defacing of the driving license/professional driving permit of the infringer;
- removing and defacing the license disc of the motor vehicle(s) of which the infringer is the owner;
- immobilising such vehicle(s);
- reporting the infringer to a credit bureau.

The AARTO infringements are therefore no longer criminal offences and once a warrant of execution has been issued, the fines are in fact viewed as debt and must be collected accordingly. Unpaid Enforcement Orders are registered in a national contraventions register. AARTO stipulates that no driving licence/professional driving permit or vehicle license disc will be issued to an infringer, or in respect of a motor vehicle which is registered in the name of the infringer, until full payment has been made in terms of an Enforcement Order reflected in the contraventions register.

Payment

A whole host of possible methods of payment is available, ranging from direct payments to any Post Office, via an ATM or electronic bank transfer, by way of a postal order or bank guaranteed cheque sent by registered mail or by courier service etc.

Allocation of Demerit Points\(^{587}\)

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\(^{585}\) Section 20 AARTO.

\(^{586}\) Section 21 AARTO.

\(^{587}\) Section 24 AARTO.
The pilot projects do not apply the demerit points and it will only become applicable upon full roll-out of the Act. Demerit points are attached to certain infringements as well as all offences, depending on the seriousness thereof.\textsuperscript{588} The demerit points are incurred on the date when the fine for the infringement is paid, or the infringer is convicted of the offence in court. Demerit points which have been incurred are reduced on the basis that one point is cancelled for every three months without any further infringements. Once the demerit points that a person has incurred exceeds a total of twelve, the person will be (temporarily) disqualified from driving a motor vehicle. Such person must immediately hand in any driving licence/professional driving permit, and may not apply for a driving license/professional driving permit during the disqualification period. Driving a vehicle during the disqualification period is an offense which is dealt with in terms of the Criminal Procedure Act. Upon expiry of the disqualification period, the licence/permit is returned. When a person is disqualified from driving for a third time (as a result of demerit points), the license/permit is cancelled and destroyed. Upon expiry of the disqualification period, the person must reapply for a license/permit to be issued afresh. Where the transgressing vehicle (e.g. unlicensed, license disc not displayed etc) is registered in the name of a juristic person, the driver (if identified) gets demerit points, but not the juristic person. In that case the fine amount is tripled.

\textbf{Responsibility for enforcement.}

The Act creates two agencies with responsibilities regarding the Act. The Road Traffic Management Corporation is tasked with the management of the Act whereas the Road Traffic Infringement Agency is responsible for the enforcement of the Act as well as the adjudication. An evaluation of this new procedure follows in chapter 5.

\textbf{Decriminalisation in other legislation}

Except for the application of AARTO, very little is happening in South Africa regarding decriminalisation, with the exception maybe of new regulatory framework created under the new Companies Act\textsuperscript{589} and a system of administrative fines and penalties in terms of the Competition Act 98 of 1998. Decriminalisation does not seem to be high on the legislative agenda at this time.

\textsuperscript{588} The prescribed fine amounts and demerit points (if applicable) are contained in a separate Schedule – section 29 AARTO.

\textsuperscript{589} New administrative bodies(Companies and Intellectual Property Commission, Takeover Regulation Panel, Companies Tribunal, Financial Reporting Standards Council) are established to regulate aspects under the Act (Companies Act 71 of 2008) and enforcement by means of criminal sanctions are no longer applied.
Informal alternatives using mediation, arbitration or negotiations\textsuperscript{590}

Through the years a number of informal disposal/diversion programs have seen the light, often relying on some form of mediation\textsuperscript{591}, arbitration\textsuperscript{592} or negotiations between the parties involved. The initiative to refer the matter may come from the magistrate, prosecutor, accused or NGOs active in this field. The trial is usually postponed to allow the separate process to attempt to resolve the matter. Usually the “negotiations” are led by the prosecutor, the police, a probation officer or independent third party (usually from a NGO). When the negotiations indeed result in an acceptable “settlement”, the settlement may be incorporated in a written agreement/contract which may be made an order of the court, or the criminal case is indeed withdrawn conditional to the agreement being fulfilled. These programs have been very useful and effective with regard to certain types of offences such as lesser assault, theft, stock theft, malicious damage to property, shop-lifting etc. It appears that cases which involve relatives or neighbours and where the complainant and accused have a continuing relationship which suggests deeper issues between them than a single criminal act, can be particularly suitable for mediation or arbitration.\textsuperscript{593} Serious matters, and matters where either of the parties is not prepared for the dispute to be resolved in this manner are referred to court for trial. The screening of cases for possible alternative disposal is therefore very important in determining its possible success.

Palmer\textsuperscript{594} calls for the establishment of an independent mediator’s office as an integral part of the institutionalized court structure with the aim to resolve criminal disputes in a non-adversarial manner. He envisages the mediator as independent from both the prosecuting authority and judiciary. It is evident that, notwithstanding many studies and suggestions over a number of years, there is as yet nothing concrete by way of legislation introducing mediation or arbitration as established ways of dealing with criminal matters.

\textsuperscript{590} For more detail regarding some of these projects/programs see: GH van Rooyen, Blessed are the peacemakers: victim-offender mediation in the criminal justice system – a practical example, SACJ 1999-12, p. 62, R Palmer, Justice in whose interest? A proposal for institutionalised mediation in the criminal justice system, SACJ 1997-10, p. 33; D Scott-Mcnab & MS Kahn, Mediation and arbitration as forms of dispute settlement in the South African criminal law, SACC 1982-9, p. 106.
\textsuperscript{591} Palmer defines mediation as a process in which the (criminal court) mediator attempts to assist disputing parties to arrive at an agreed solution. Whilst the mediator controls the process of mediation, the parties themselves determines the outcome.
\textsuperscript{592} Palmer defines arbitration as a process involving a third party hearing the respective cases and then making a decision which is final and binding on the parties.
\textsuperscript{593} R Palmer, Justice in whose interests? A proposal for institutionalised mediation in the criminal justice system, SACJ1997 -10, p. 33.
\textsuperscript{594} R Palmer, Justice in whose interests? A proposal for institutionalised mediation in the criminal justice system, SACJ1997 -10, p. 33.
Restorative Justice

South Africa has not escaped the current preoccupation with restorative justice that is also seen elsewhere. Restorative Justice has its roots in a number of indigenous cultures across the world. The United Nations’ definition of restorative justice is:

“Any process in which the victim and offender, and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of the facilitator”.

Sachs succinctly stated “the key elements of restorative justice have been identified as encounter (dialogue between parties), reparation (repairing the harm that has been done), reintegration (into the community) and participation (less formal encounter that allows other people to also participate)”. Restorative justice attempts to repair the damage, re-establish dignity and re-integrate those who were harmed or alienated by the offence. It is based on the assumption that within society a certain balance and respect exist which can be harmed by crime. The purpose of the justice system is then to restore the balance and to heal the relationships. It is not so much about punishment, but about healing wounds caused by crime and repairing the relationships that have broken down. It enables all the parties to the crime (victim, offender and affected members of the community) to be directly involved in responding to it with the state and legal professionals playing the role of facilitators.

Restorative justice differs from main-stream criminal justice in several ways. Crime is not simply defined as law breaking, but emphasis is placed on the harm it causes to victims, communities and even the criminals themselves. More parties are involved in the resolution of the problem. The success of the process is measured in whether the harm is repaired (or prevented) rather than any punishment meted out to the offender. The traditional criminal justice sanctions of restitution and community

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595 This is indeed not a new concept in the reaction to crime, but a recent return to traditional responses to crime which is community based and has the reparation of harm as central element. Nesser argues that restorative justice is an echo of traditional African legal systems and procedures. JJ Nesser, Restorative Justice as reaction to crime: development and conceptualization, CRISA 2000(1).


597 Dikoko v Mokhatla 2006 SA 235 (CC).

598 M Umbreit, Avoiding the Marginalization and McDonaldizarion of Victim-Offender mediation: a case study in moving towards the mainstream” in G Bazemore & L Walgrave (eds.) Restorative Juvenile Justice: repairing the harm of youth crime, 1999.


600 Payment of a sum of money by the offender to the victim to compensate for the financial losses caused by the crime.
service⁶⁰¹ are used to restore the balance. Some suggest that restorative efforts should, in principle, be applicable to all cases where traditional criminal law can be applied, in the case of serious offences as well as for relatively minor ones.⁶⁰² International standards for community–based justice have been developed inter alia by the Council of Europe Recommendation of the Simplification of Criminal Justice⁶⁰³ and United Nations Declaration on the Basic Principles of Justice for Victims of crime and abuse of Power.⁶⁰⁴ Both these documents give new recognition to the position of victims of crime and the importance of restitution for the harm suffered. The United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters (2002)⁶⁰⁵ establishes common principles on the use of restorative justice programs in criminal matters.

Restorative justice methods/programs

A principle central to all restorative justice methods is direct participation by both victim and offender (and others if need be), in the process. The meeting or confrontation is an essential element in repairing the damaged relations between the offender, his victims and members of the affected community. This meeting can take on a variety of formats, but all demand voluntary participation by all the parties taking part in the process. Some examples of restorative justice methods are:

- Family (or community) Group Conferencing (FGC);
- Victim-offender mediation;
- Peacemaking (or sentencing) Circles.

Development of restorative justice

The concept of restorative justice is not new to (some) South Africans and has in fact been part of African society and justice for centuries. Schärf illustrates that community courts in South African township applying popular justice, and their rural counterparts, makgotla and chief’s courts, applying indigenous law, focus far more on the relationship between the contestants and what the conduct has done to that relationship than on

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⁶⁰¹ Work performed by the offender for the benefit of the community without compensation. In a restorative set-up the service to be rendered could be aimed specifically at repairing the harm caused by the offending conduct.

⁶⁰² S Gutwirth & P de Hert, Grondslagtheoretische variaties op de grens tussen het strafrecht en het burgerlijk recht. In De wegving van ‘t Hart – Idealen, waarden en taken van het strafrecht, Kluwer: Deventer 2002 p. 166. They argue that the South African Truth and Reconciliation Commission activities are examples where restorative justice was applied to large-scale, violent crime.

⁶⁰³ Adopted by the Committee of Ministers on 17 September 1987.

⁶⁰⁴ Adopted by Resolution A/RES/40/34 General Assembly 1985.

⁶⁰⁵ The so-called Vienna declaration.
questions of guilt or innocence. The Child Justice Act (discussed earlier in this chapter) and draft New Sentencing Bill, proposed by the South African Law Reform Commission, both have restorative justice as element. From the literature it is also apparent that there are a number of restorative justice projects and initiatives throughout the country. It seems as if restorative justice, or elements thereof, has begun to make inroads into South African Law.

Restorative justice could possibly be used for most, if not all, types of crime and as either an alternative to trial (as diversion option), as mitigating factor, or as alternative sentencing option. Apart from the central position restorative justice plays in the child justice dispensation, it appears as if the greatest impact it has so far had in South Africa, is with regard to alternative sentencing. In *S v Maluleke* the High Court explicitly applied restorative justice principles in reaching an appropriate sentence on a charge of murder. The court imposed a suspended sentence (of 8 years imprisonment) conditionally upon the accused, apologizing (according to appropriate indigenous culture) to the mother of the deceased. Since this first application, quite a few other judgments (including from the Supreme Court of Appeal as well as the Constitutional Court) at least referred to restorative judgment, if not specifically applying it. Bertelsmann J (in *S v Maluleke*) acknowledged that restorative justice properly considered and applied may make a significant contribution in reconciling the victim and offender, combating recidivism and assisting in the ultimate reintegration of offenders into society. For a wider, or more consistent application of restorative justice, a multi-sectoral approach, like the one suggested in the Restorative Justice Policy Framework, would be required.

**National Policy Framework for Restorative Justice (2011)**

This document describes the agreement in the Justice Crime Prevention and Security Cluster to promote restorative justice throughout the cluster and contains a statement on the roles and responsibilities of the various departments in the cluster: *my emphasis*

- Department of Correctional Services - provides processes and programs in correctional facilities and for people under correctional supervision post-sentence level;

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607 NICRO Victim-Offender Mediation and Family- Group-Conferences, Restorative Justice Initiative Victim-Offender Conference Project, Community Peace Programme Peace Committees, Hatfield Community Court Project etc.


609 2008 (1) SACCESS9 (T). See also JC Bekker & A van der Merwe, Indigenous legal systems and sentencing: *S v Maluleke 2008 1 SACC 49 (T), De Jure 2009, p. 239
• Department of Justice and Constitutional Development - coordinates the implementation of restorative justice and promotes the use of restorative justice to presiding officers;
• Department of Social Development – provides processes and programs at pre-trial and sentencing level;
• South African Police Service - oversees conflicts resolutions by Community Policing Forums;
• National Prosecuting Authority - develops guidelines and directives for diversion of cases to restorative justice and promotes the application of restorative justice in sentencing proceedings where appropriate;
• Department of Basic Education - educates children in dispute resolution skills.

The African concept of Ubuntu\textsuperscript{610} and community justice.

The concept of ubuntu is not easy to define and it would certainly not do justice to simply translate it into English in abstract.\textsuperscript{611} A brief attempt to translate/interpret will have to suffice:

“Ubuntu, (an isiZulu word), is a lifestyle or unifying world-view (or philosophy) of African societies based on respect and understanding between individuals. Ubuntu has been translated as “humaneness”, and is derived from the expression: umuntu ngumuntu ngabantu [a person is a person because of other people/a person can only be a person through others]. It envelopes values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.\textsuperscript{612}

The concept ubuntu is an expansive notion; its social value depends on the purpose for which it is sought to be applied. It can be a basis for morality but is not merely a social ideology. It should rather be seen as “the potential of being human” that articulates a basic respect and compassion for others. Ubuntu is not a criminal justice term, or even a legal term for that matter, but it is a determining factor in the information of perceptions that influence social conduct in a society.

\textsuperscript{610} This residual African social and legal value of societal equilibrium has remarkable similarities with contemporary thoughts on the role of criminal law. Social (and societal) equilibrium stresses the crucial importance of the procedure of compensation to redress the injustice and harm caused by the offence.
\textsuperscript{611} F Mnyongani, Dis-linking Ubuntu: towards an unique South African jurisprudence. Obiter 2010- 13, p.134.
\textsuperscript{612} Mokgoro J in S v Makwanyane 1995 (3) SA 391 (CC) at 308.
Ubuntu no doubt has admirable social values as consequence.\textsuperscript{613} The question is what influence this has, or should have on South African Criminal Justice? The inclusion of ubuntu in the post amble\textsuperscript{614} of the (interim) Constitution indicates that notion of ubuntu is an integral part on the new value system, which has been established by the constitutional framework. The Constitutional Court (in the abolition of the death penalty) Makuwanyane case also aligned itself with the ubuntu values, indicating that ubuntu was the source of communal values in the African setting. The traditional values of ubuntu undeniably have an enormous potential for influencing the development of new South African law and jurisprudence.\textsuperscript{615}

The problem with fitting ubuntu into the legal system is that it is not a rule or even a principle but more in the nature of a value or representing a way of life.\textsuperscript{616} In court cases it has been referred to as a “constitutional value”,\textsuperscript{617} as a “godly value”\textsuperscript{618} or a “healthy communitarian tradition”.\textsuperscript{619} Hefty claims indeed! Bennet suggests that it could be functioning as a meta-norm to correct injustices resulting from the application of abstract rules of law, similar to the English-law doctrine of equity.\textsuperscript{620}

### 4.5 South African Law Reform Commission Investigations

The challenges to the criminal justice system in the democratic South Africa have been the focus of a number of in-depth investigations by the South African Law Reform Commission\textsuperscript{621} during the last 25 years. A comprehensive investigation into simplifying the criminal procedure\textsuperscript{622} indicated a number of short-comings which brought the image of the administration of justice into disrepute. This rather broad and general investigation has been broken down into some further specific investigations and has resulted in a number of documents which are

\begin{itemize}
  \item 614 “The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding, but not for vengeance, a need for reparation but not for retaliation, an need for ubuntu but not for victimisation”.
  \item 615 JY Mokgoro, Ubuntu and the law in South Africa, \textit{PER/PELJ} 1998-1.
  \item 617 Joseph v City of Johannesburg 2010 (4) SA 55 (CC).
  \item 618 Badenhorst v Badenhorst 2005 JOL 13583 (C).
  \item 619 Bhe v Magistrate, Khayelitsha 2005 BCLR 1 (CC).
  \item 621 Previously South African Law Commission – a Statutory body chaired by a judge of the High Court who investigates aspects of law reform usually on request of the Minister of Justice.
  \item 622 Simplification of the criminal procedure – project 73.
\end{itemize}
relevant to some extent or the other to this study. Amongst the shortcomings identified\textsuperscript{623} were:

- the criminal courts are overloaded with cases that may be described as administrative offences, while such cases really belong in a different forum;\textsuperscript{624}
- many witnesses are unwilling to attend court because they have reached a settlement of some kind with the accused.

Some of the specific recommendations of the Commission have already been implemented, such as increasing the maximum limit for admission of guilt fines from R 1 500 to R 5 000 (and since 2013 to R 10 000), and the introduction of formal plea-and-sentence agreements. A separate investigation was also launched into Out-of-Court settlement of criminal cases.

Another major theme of the Commission relevant for this study dealt with all aspects of sentencing. The commission identifies that there is an apparent lack of a comprehensive body of sentencing law in South Africa. Some statutory crimes prescribe the sentence allowed upon conviction, but in the case of common law crimes the type or severity of punishment is not prescribed. The commission made the statement that South African courts have often been criticised for adopting an intuitive approach to sentencing – the perception being that (especially in magistrates’ courts), sentences are passed on an unscientific basis.\textsuperscript{625} The sentencing discretion is the source of inconsistency and disparity in sentencing practices, there is a clear absence of a systematic approach to sentencing, as well sentencing policy and sentencing guidelines. This lack of consistency regarding sentencing is a result of the fact that sentences are individualised and tailored to meet the needs of a specific case.\textsuperscript{626} A sub-investigation dealt with the possible introduction of a new sentencing framework\textsuperscript{627} and suggested new legislation in the form of a Sentencing Framework Act.\textsuperscript{628} The commission recognised that sentencing is inherently controversial. There is also the increasing recognition that community sentences\textsuperscript{629} form part of an African tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment. Amongst its recommendations, the commission suggests the introduction of new sentencing options namely:

\begin{itemize}
\item \textsuperscript{623}Interim Report on the Simplification of the Criminal Procedure (August 1995.)
\item \textsuperscript{624}This has resulted in the AARTO legislation regarding (minor) traffic-offences.
\item \textsuperscript{625}Issue Paper11, p. 20.
\item \textsuperscript{626}SS Terblanche, Sentencing guidelines for South Africa: lessons from elsewhere, \textit{SALJ} 2003-120, p. 858. He states that the sentencing guidelines (requierebeleid) of the Dutch O.M. has led to greater consistency in sentencing country wide.
\item \textsuperscript{628}For a discussion of some of the short-comings of the proposed Act, see Bill Dixon: From cafeteria to à la carte: The Law Commission’s new sentencing framework, \textit{SACJ} (2001) p. 168.
\item \textsuperscript{629}Of which reparation and service to others are prominent components.
\end{itemize}
• community penalties which should provide for both correctional supervision as well as community service (without house detention);
• reparation (which covers both restitution and compensation).

An investigation which is very relevant for the purposes of this study is the investigation into Out-of-Court Settlement of Criminal cases.

The Law Commission investigation into out-of-court settlements of criminal cases.

The term “diversion” has not been used in the South African criminal justice context until fairly recently. Diversion initiatives as such have been practiced in South African criminal justice since the early 1990s. Especially from 1996 onwards there has been a substantial growth in the number or children referred to diversion programs. Diversion, a possible effect of out-of-court settlement, has now become part and parcel of Juvenile Justice. After the Law Commission’s completion of the investigation into plea-bargaining it was felt that a separate investigation should be conducted concerning out-of-court settlement of criminal cases. The aim of the investigation was to determine whether there is a need to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way that this can be achieved in the South African context. First a background study was done by Professor Hans-Jörg Albrecht on out-of-court settlements in Europe. Next a discussion paper with certain suggestions by the Commission was released requesting responses from interested parties. After receiving feedback the Commission completed a report together with specific proposals for reform which was submitted to the Minister of Justice in August 2002. In considering whether diversion procedures ought to be introduced or formalised in our Criminal justice system, the commission first evaluated some of the advantages and disadvantages of diversion.

Advantages

The advantages examined by the Commission can be divided into:

630 The aspect of compensation or restitution can also form part of a plea-and-sentence agreement in terms of s 105A.
631 Diversion procedures in Germany, Denmark, England and Wales, France, Belgium, Italy, The Netherlands, Portugal, Spain, Austria, Switzerland and Poland is discussed. In addition to this study, the Commission also refers to diversion procedures in Australia and the United States of America as well as the recommendations of the Council of Europe regarding simplification and diversion (discussed earlier in this chapter).
632 The Commission expressed its disappointment with the responses from prosecutors, although the Prosecuting Authority participated directly in the deliberations and the development of the proposal through an official of the Office of the National Director of Public Prosecutions being co-opted onto the project committee.
Advantages that benefit the State/victim:
- the saving of precious court time and costs, since cases can be finalised without going to court and without the time-consuming task of settling factual disputes. This means more cases can be dealt with more rapidly, thereby improving people’s perceptions of the administration of justice;
- the opportunity for restorative justice as an outcome;\(^{634}\)
- victims can be protected from publicity, and from having to be subjected to cross-examination, yet benefit from compensation or restitution.

Advantages that benefit the accused:
- the accused has certainty regarding the outcome of the case, provided that the conditions of the agreement are complied with;
- the quicker conclusion of the matter can also save him time and money;
- the accused does not end up with a record of previous convictions, a factor which often prompts people to dispute a criminal charge.

Disadvantages

The main disadvantages of out-of-court settlements are:
- the public may view private settlements with suspicion, which may negatively impact on the image of the administration of justice. However, the criminal justice system simply does not have the capacity to conduct a full, open trial for each offence committed. Also, secrecy can sometimes be preferable, for example in the interests of the victim of crime;
- the lack of judicial control over out-of-court settlements is seen by some as another disadvantage. There are various ways in which defence lawyers and prosecutors can improperly influence an accused person to make the required admission or to consent to the conditions of the out-of-court settlements. This is, however, not something peculiar to out-of-court settlements;
- the decision to enter into out-of-court settlements and the nature of the conditions can be based on irrelevant factors, such as the personality of the prosecutor and legal representative, which could lead to the unequal treatment of accused persons. However, the exercise of a discretion by the prosecutor is an integral part of the criminal justice system as it currently stands. If applied correctly, out-of-court settlements could become an instrument furthering the effective administration of justice.

Findings

\(^{634}\) The commission however cautions that expectations in this regard should be tempered by the experience in other jurisdiction which employ out-of-court procedures and where such conditions are rarely used.
The Law Commission firstly recognised that out-of-court settlement is part of an international trend based on two considerations, namely to increase cost-efficiency through simplified and streamlined procedures and to deal with mass crime outside of the traditional process so that the courts can have more time to deal adequately with increasingly complex cases. The commission examined discretionary prosecution in South Africa, emphasising the fact that unconditional discontinuation of prosecution has been in place for many years and need not be discussed again. It indicates, however, that the criteria which have traditionally been used to determine whether discontinuation of prosecution would be appropriate can be useful when considering out-of-court settlements. The commission also contends that out-of-court settlements and similar diversionary procedures, are by no means foreign to South African law, and indicates that it is well known in the structures that drive processes of informal community dispute resolution and in indigenous African customary courts (as this study has indicated regarding restorative justice and Ubuntu).

Next, out-of-court settlement and similar diversionary procedures available in South African legislation were examined by the Commission. It concluded that the only provision in the Criminal Procedure Act that can truly be termed an out-of-court settlement is contained in section 6(1)(c) of the Criminal Procedure Act, which section has never come into operation. The committee also evaluated the application of section 57 (plea of guilty and payment of a fine without appearance in court).

**Conclusion**

The commission concludes that, from comparative research, it is clear that a very wide range of out-of-court settlements is provided for in different countries, for crimes of widely different severity, with a wide range of conditions. With regard to the situation in South Africa, the commission found that that there is a definite need for legislation which will formalise out-of-court settlements. This view was supported, almost without exception, by the persons and institutions who commented on the Discussion Paper. A number of respondents remarked that similar procedures are already being practiced informally in their jurisdictions, proving that it is viable. The commission reiterated that the legislative framework should not be too rigid but should still allow flexibility and the exercise of individual discretion by the prosecutor.

The commission also took into consideration the reality of a currently huge backlog of criminal cases in courts. A properly devised and implemented system of out-of-court settlements may go a long way to alleviate some of the backlog.

**4.6 Prosecution Policy – provisions for Adult Diversion**
Introduction

Variations in the administration of criminal justice can occur within a single jurisdiction and are caused by the exercise of discretionary authority in individual cases. Prosecutors in South Africa are clothed with substantial discretion at several key steps in the process, which result in case-by-case diversity in the application of criminal justice. The Prosecution Policy issued by the NPA tries to achieve uniformity in the exercise of discretion through the introduction of prosecution policy, policy directives and guidelines which are binding on all prosecutors. The Prosecution Policy also stipulates that South African prosecutors are bound to follow the provisions of the United Nations Guidelines on the Role of Prosecutors. The National Prosecuting Authority Act stipulates that the national director shall, with the concurrence of the minister of justice, and after consulting the directors of public prosecution, determine prosecuting policy and issue policy directives which must be observed in the prosecution process. The policy manual for the prosecuting authority was tabled in parliament in January 1999 and released in October of that year. It consists of three parts: prosecution policy, policy directives and a code of conduct for members of the prosecuting authority. In the new paradigm the prosecutor still has discretion, but the discretion is now (supposedly) tempered by constitutional restraints of equality, uniformity, respect of dignity, and must be exercised in accordance with the published policy. The first of these directives came into operation in November 1999. In addition to national directives, a provincial director of public prosecutions may issue circulars with general instructions to prosecutors in their jurisdiction, provided that it is not inconsistent with the directives of the national director.

Prosecution Policy and Diversion

Part 7 of the Policy Directives of the NPA indicates that, although diversion is primarily employed in the case of juvenile offenders, other diversion programs (for adult offenders) are also in operation like victim-offender mediation programs and the performance of community service as alternatives to prosecution. The directive indicates that:

- diversion is not deemed to be appropriate where the charge is murder, robbery with aggravating circumstances, rape or a similarly serious offence;

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636 Section 22(4)(f) of the National Prosecuting Authority Act, Act 32 of 1998.
637 Section 22(2)(a) of the National Prosecuting Authority Act, Act 32 of 1998.
638 The Code of Conduct is mandated by section 22(6) of the Act.
• offenders with a criminal record and persons to whom the opportunity has been granted previously should only be included in diversion programs in exceptional circumstances;
• the prosecutor has a discretion to determine whether or not an offender qualifies for the program but factors like having a fixed address, acknowledging liability and preparedness to participate in the diversion program should serve as guidelines;
• a screening by a probation officer is required, who advises the prosecutor on the suitability of the (possible) candidate. The prosecutor is not bound by the recommendations of the probation officer;
• participation is voluntary and the offender must be made aware that the case will not be withdrawn should the offender not meet all the requirements;
• after the offender has completed the diversion program, a social worker must submit a report to the prosecutor. If it is clear that the offender has cooperated and benefited from the program, the matter is withdrawn. If not, the prosecution is to proceed;
• if a diversion program was not followed, and at the sentencing stage of the trial it appears that the accused is a suitable candidate for a program, the court can impose a suspended sentence with participation in the program as one of the conditions of suspension. If the offender does not successfully complete the program, the prosecutor must apply, in the normal manner, for the suspended sentence to be put into operation;
• a register must be kept regarding all offenders screened for diversion programs. The reason for the decision to divert or not must be recorded, as well as the way in which the matter was eventually disposed of.

The policy directives also stipulate that, whilst the establishment of diversion programs is primarily the responsibility of the Department of Welfare, prosecutors should take some initiative in this regard. One can thus assume that out-of-court settlement of criminal trials could in future become more frequent or more structured.

4.7 Control mechanisms over prosecutorial decisions

The discretionary power of the prosecutor is not (usually) subject to judicial control with the exception of administrative review in limited instances. As long as the prosecuting authority remains within the legal limits of its powers, the courts will not interfere in the manner in which they exercised their discretion.\textsuperscript{639} This can obliviously lead to abuse. As Devenish\textsuperscript{640} points out, judges are required to give reasons for their judgments, their logic and competence are exposed in public, scrutinised and criticised by colleagues.

\textsuperscript{639} Interference with a bona fide decision by the prosecuting authority was regarded as irregular. S v Dubayi 1976 (3) SA 110 (T).
\textsuperscript{640} G Devenish, Equality before the law, the constitutional and legal background of the office of the attorney-general, De Rebus April 1979, p. 189.
and academics, their judgments are subject to appeal to other judges. Prosecutors, on the other hand, have the responsibility of deciding matters according to their own discretion. They are not obliged to furnish reasons for decisions, nor are their decisions subject to appeal. Du Toit (et al)\textsuperscript{641} indicates that the fact that the prosecutor is \textit{dominus litis} should not be over-exaggerated and that it simply means that the prosecutor can do what is legally permissible to set criminal proceedings in motion by determining which charges to bring in which court and when. Apart from the personal integrity of the prosecuting authority,\textsuperscript{642} the following control mechanisms are currently in place to curb the exercise of discretion.

**Objection against prosecution by an accused**

South African criminal procedure does not have a statutory mechanism whereby the accused can object (in court) against the proposed prosecution against him. The courts have at times expressed their disapproval with a decision to prosecute, but will only interfere with \textit{bona fide} prosecution decisions when “significant prejudice” will result from the decision to prosecute. The courts can bar prosecution or interdict the prosecutor from further prosecution, but this is a radical and far-reaching step and will probably only be granted when it is clear that the accused has suffered irreparable trial prejudice.\textsuperscript{643} The court would much rather grant other appropriate and less radical remedies, which could include damages after an acquittal resulting from the prejudice suffered by the accused. Other alternatives available to courts are to impose a lenient sentence upon conviction, or to strike the matter off the role.

**Applying to court for an indefinite stay of prosecution**

In the \textit{Sanderson case}\textsuperscript{644} the accused sought to bar the prosecution because of the lengthy time-delay in proceeding with the case and argued that this is contra the right to a speedy trial guaranteed in the Constitution. The Constitutional Court left the back door open for a permanent stay of proceedings in appropriate, but very limited, circumstances. The court, however, indicated that it will be factors regarding prejudice that will decide such a matter, and not the relative strength of the case against the accused only, or the desirability of the prosecution. The Court said that, granting a permanent stay of prosecution:

\footnotesize{\textsuperscript{641} E du Toit, Commentary on the Criminal Procedure Act, loose-leaf, Cape Town: Juta Publishers, 1987 at 1-4K. \\
\textsuperscript{642} DW Morkel & JMT Labuschagne, Die diskresie van die prokureur-generaal,SACJ 1980-4, p. 160. See also the criticism by AS Mathews & B van Niekerk, Eulogizing the Attorney-General – A Qualified Dissent, \textit{SALJ} 1972, p. 292 where they questioned the tendency to present the attorney-general as a kind of protector of the accused and his rights [attributed to James, JP in \textit{S v Hassim & others} 1972 (1) SA 200 (N)]. \\
\textsuperscript{643} Sanderson v Attorney-General, Eastern Cape 1997 (12) BCLR 1675 (CC). \\
\textsuperscript{644} Sanderson v Attorney-General, Eastern Cape 1997 (12) BCLR 1675 (CC).}
“is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching….. That will seldom be warranted in the absence of significant prejudice to the accused”.

The relevant criterion, even in cases not involving unreasonable delay, seems to be “significant prejudice”646 which cannot be remedied by another, appropriate order.647 Another relevant factor is whether the stay of proceedings is the only remedy available to the accused. In North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)648 there was a (informal) plea-agreement between the State and the accused that the State would refrain from prosecuting the applicant. When a third party later applied for a certificate nolle prosequi in order to institute a private prosecution, the State subsequently attempted to renege on its offer and reinstated charges against the applicant. The applicant sought an order to stay the proceedings. The court held that the parties had indeed concluded a valid and enforceable plea-agreement in terms of which the prosecution against the applicant would not continue. The court accordingly found that the respondent had to be held to that agreement. Since there was no other remedy available to an accused in such circumstances, the court granted the application for a permanent stay of prosecution. Acting Judge Uijs used arguments which are similar to the “vertrouensbeginsel” in Dutch law – once the prosecutor has given an undertaking in terms of a plea-negotiation to act in a certain way, he can be held to it.

Another example of a successful application for a permanent stay of prosecution is found in Director of Public Prosecutions v Regional Magistrate, Durban.649 The basis for the application was the extremely long delay between the commissioning of the offence and the arrest and prosecution of the accused, which caused prejudice to the accused and resulted in an unfair trial. The court reiterated the principle that, once a matter is in the hands of the prosecuting authority, a complainant or a witness or indeed an accused, has no right to intervene or interfere in the decision of the Director of Public Prosecutions as to whether or not to prosecute, or for what offence or what the form of the trial should be.

Court imposing a lenient sentence

The court can impose a lenient sentence in circumstances where the court is of the opinion that the prosecution is unwarranted, or acquit the accused

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645 At p. 1691 para [38]
647 McCarthy v Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA).
648 2001 (1) SACR 674 (C).
649 2001 (2) SACR 463 (N) at 469C.
in the case of a trivial charge. The leniency offered by the court can be a clear indication to the State that the prosecution was inappropriate.

**Striking off the roll**

The court can strike a matter off the roll if it considers the procedure adopted by the prosecutor to be unfair. This means that the court declines to proceed with the matter, but the accused is not acquitted of the charge. Whenever the unsoundness is removed, prosecution could in principle continue. Section 342A of the Criminal Procedure Act specifically deals with unreasonable delays in trials. One of the orders that the court is competent to make if it appears that a delay is unreasonable and could cause substantial prejudice (to any party to the trial) is, where the accused has not yet pleaded, to strike the case off the roll, in which case prosecution may not be resumed or instituted *de novo* without the written instruction of the director of public prosecutions.

**Objection by victim / affected party**

Can a victim of crime object against the decision by the prosecutor not to institute prosecution in a particular matter? The court will not likely compel the prosecutor to institute, or continue with, prosecution against a suspect. Neither can the courts compel the prosecution to decide within a specific period whether it intends prosecuting a matter, but the court may refuse the State further postponements of the case. Refusal of the prosecutor to institute or proceed with prosecution in a particular matter cannot be overruled by the court. The court can, therefore, not compel a prosecutor to prosecute a particular matter. The aggrieved party can, under certain circumstances, institute a private prosecution, or can make use of the hierarchical structure of the Prosecuting Authority to make representations with a view of changing the decision not to prosecute.

The prosecutor remains *dominus litis* until the charge has been put, a plea has been formally tendered and duly entered (and accepted by the State if it involves a plea to a charge other than the main charge). When the prosecutor accepts a guilty plea the *lis* between State and accused terminates. The court can, therefore, also not prevent a prosecutor from accepting a (lesser) plea.

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650 S v Kgogong 1980 (3) SA 600 (A).
651 See also the discussion in Du Toit (ed), Commentary on the Criminal Procedure Act, loose-leaf, Cape Town: Juta Publishers, 1987.
652 S v Khoza 1989 (3) SA 60 (T) – the court struck the matter off the roll because the prosecutor had failed to bring all the charges relating to the set of facts in one consolidated case.
653 Inserted by section 13 of Act 86 of 1996.
654 Section 342A(3)(c) of the Criminal Procedure Act, 51 of 1977.
655 Wronsky v Prokureur-Generaal 1971 (3) SA 292 (SWA).
656 Gillingham v Attorney-General 1909 TS 572; R v Sikumba 1955 (3) SA 125 (OK).
657 S v Nqubane 1985 (3) SA 677 (A).
Administrative review

The discretion exercised by the prosecutor is in the nature of a quasi-judicial administrative discretion, since the prosecutor is required to apply his mind to the matter.\(^{658}\) The court can intervene where the prosecutor’s discretion is exercised improperly.\(^{659}\) The discretion is also subject to judicial review on administrative law grounds,\(^{660}\) like:

- the fact that the prosecutor never applied his mind;
- the existence of *mala fides* or ulterior motive on the side of the prosecutor, or
- where the prosecutor exceeded his power; or
- delegated a function which he himself should have performed.\(^{661}\)

The Promotion of Administrative Justice Act\(^{662}\) (PAJA) specifically excludes a decision to institute or continue a prosecution from the definition of “administrative action” in that Act.\(^{663}\) The effect of this is that it relieves prosecutors of the specific duties of following the procedures of section 3 of the Act.\(^{664}\) The right to be given reasons for an administrative action, as provided for in section 5 of the Act, would also not apply to prosecutorial decisions. This exclusion is a policy choice made by Parliament when enacting the PAJA.\(^{665}\) It does not, however, place prosecution decisions completely beyond administrative review, but simply means it is not reviewable under this particular act. In the recent case of *Democratic Alliance v The Acting National Director of Public Prosecutions*,\(^{666}\) the Supreme Court of Appeal declares that “in the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional precepts”. It cannot be disputed that the NPA exercises public power. A decision to discontinue a prosecution is therefore subject to a rule of law review.\(^{667}\)


\(^{659}\) *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order* 1994 (1) SA 387 (C).

\(^{660}\) *Mitchell v Attorney-General, Natal* 1992 (2) SACR 68 (N).

\(^{661}\) *S v Julius* 1983 (2) SA 442 (C).

\(^{662}\) *Act 3 of 2000.*

\(^{663}\) Section 1(b)(ff) Act 3 of 2000.

\(^{664}\) *inter alia* giving adequate notice of the proposed administrative action, giving interested parties reasonable opportunity to make representations, to appear in person and to present and dispute information etc.


\(^{666}\) *Democratic Alliance v The Acting National Director of Public Prosecutions* 2012 (3) SA486 (SCA).

\(^{667}\) This specific case was brought by the official opposition in Parliament for the court to review the NPA decision not to continue with prosecution against Jacob Zuma. Not only did the SCA hold that (the exercise of public power to make) prosecution decisions is not above the law, it also found that a political party participating in parliament would have locus standi to bring such application in the public interest.
Hierarchical control of the Prosecuting Authority

Intervention by the National Director

The national director may intervene in any prosecution process when policy directives are not complied with and may review any decision to prosecute or not to prosecute, after consulting the relevant director of public prosecutions, and after taking representations from the accused person, the complainant and any other person whom the national director considers to be relevant. The national director, with a view to exercising his powers (of intervention and review) may –

(i) investigate any matter regarding any prosecution or prosecution decision, process, directives, directions or guidelines by any director or prosecutor;

(ii) request a report or interim reports in respect of any specific matter.

The national director also maintains close liaison with his deputies, the directors, the prosecutors, the legal professions and legal institutions, in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the prosecuting authority.

Intervention by provincial Directors or senior prosecutors

Directors must supervise, direct and co-ordinate the work of the prosecutors that falls under their authority. A Director cannot have knowledge of all criminal cases occurring within his/her jurisdiction. Directors will generally control and direct decisions taken by prosecutors through the issue of internal circulars and guidelines. A rule of practice exists in terms of which an accused, (or his legal representative, can make written representations to the Director of Public Prosecutions or even the local public prosecutor to decline prosecution. The normal practice for a person aggrieved with a decision by a prosecutor, whether accused or complainant, is to submit written representations to the Director of Public Prosecutions (for the Provincial Division), or to the senior public prosecutor to whom the prosecutor reports. The request is normally for the official to reconsider the decision taken on the basis that the person who made the decision did not exercise his/her mind properly in the matter. The superior will then call for the police (case) docket and require the prosecutor to supply reasons for his/her decision. The Director may then consider the

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668 Section 22(2)(b) NPA Act.
669 Section 22(4)(b) NPA Act.
670 It is not certain what the status of a prosecution in conflict with such circular or guideline would be. See Du Toit(ed), Commentary on the Criminal Procedure Act, loose-leaf, Cape Town: Juta Publishers, 1987at 1-4H which suggests that such action would be null and void. Also the contra position in S v Magistrate, Regional Division 1972 (3) SA 377 (N).
matter afresh and exercise his/her own discretion. If (s)he overrules the decision of the prosecutor, the prosecutor must then comply with the instructions of the superior.\textsuperscript{672}

**Political Control over prosecuting authority**

Although this aspect is not central to this study, it is an aspect of considerable importance which has recently been the centre of attention of a number of prominent court cases, amongst which the now famous judgments in \textit{S v Zuma}.\textsuperscript{673} The pertinent question is – is the prosecution authority in South Africa totally independent, or are they subject to political control? For a start, it is important to note that the prosecuting authority in SA is clearly not part of the judiciary, but forms part of the executive branch of government.\textsuperscript{674} The appointment of the NDPP by the President, therefore, does not infringe on the separation of powers.

Government opted for a centralised prosecution authority directly under the control of a National Director of Public Prosecutions appointed by the President. A democratically elected government is answerable to their electorate for their efforts to combat crime. In terms of sec 179(6) of the Constitution and section 33(1) of the National Prosecuting Authority Act, the Minister of Justice must exercise \textit{final responsibility} over the prosecuting authority. This ensures democratic accountability for the conduct of the prosecuting authority, thereby promoting public confidence in the prosecution process.\textsuperscript{675} Ministerial responsibility is, however, not the same as ministerial control and intervention. The Minister, in exercising political responsibility, will ultimately be held to account for the conduct of


\textsuperscript{673} Of particular importance are the High Court judgment of Nicholson J in \textit{Zuma v National Director of Public Prosecutions [2009] 1 All SA 54 (N)}, and the subsequent Supreme Court of Appeal judgment (by Harms DP) 2009 (1) SACR 361 (SCA) overturning it. Other recent cases dealing with this same issue include the Constitutional Court judgment in Glensten v President of the Republic of South Africa (Case CCT 48/10 [2011] ZACC 6) dealing with the constitutionality of the legislative decision to disband the Directorate of Special Operations (which fell under the control of the National Director of Public Prosecutions) and replacing it with a priority crime investigating unit (located within the South African Police Service) and the High Court appeal judgment in \textit{Yengeni v The State (S v Yengeni A1079/03 [2005] ZAGPHC 117)}. See also W le Roux, Section 39(2) and shadows of history over the post-apartheid constitution, \textit{Stellenbosch Law Review} 2009-1, p.31

\textsuperscript{674} In re: Certification of the Constitution of the Republic of South Africa, 1996 10 BCLR 1253 (CC). See also the critical discussion of L Wolf, \textit{Pre- and post-trail equality in criminal justice in the context of the separation of powers} \textit{PER/PELJ} 2011-14 -5 evaluating the position in Germany and South Africa.

\textsuperscript{675} See however the contra position in Ex parte Attorney-General, Namibia: In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 (NmS) where the Supreme Court of Namibia expressed the opinion that the political control over criminal prosecutions is in conflict with the separation of powers and could give rise to despotism.
the prosecuting authority. To enable the Minister to exercise his responsibility, the National Director shall, at the request of the Minister\textsuperscript{676}: 

(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the NDPP or a DPP in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a DPP in the exercise of their powers, the carrying out of their duties or the performance of their functions;

(c) furnish the Minister with information with regard to the prosecution policy referred to in s 21(1)(a);

(d) furnish the Minister with information with regard to the policy directives referred to in s 21(1);

(e) submit the reports contemplated in s 34 to the Minister; and

(f) arrange meetings between the Minister and members of the prosecuting authority.

The Constitution or the NPA Act does not make provision for the Minister interfering or intervening in any prosecutorial decision. He may ask for reasons, reports, explanations, information and have meetings, but he may not override a decision made by the prosecuting authority. It is, however, clear that prosecution policy is determined by the NDPP with the concurrence of the Minister.

Section 32 of the NPA Act under the heading \textit{Impartiality of, and oath or affirmation by the members of the prosecuting authority} prescribes that – (1)(a) “A member of the prosecuting authority shall serve impartially, and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice\textsuperscript{677} and subject only to the Constitution and the law”.\textsuperscript{678} Every (NPA) member is obliged to undertake on oath or affirmation to uphold this provision. The Minister of Justice does not take this oath.

In a democratic system where government is accountable, it is untenable to expect a totally independent prosecuting authority.\textsuperscript{679} But when does influence become undue influence from the executive or any other source? Will a NDPP lending an ear to a politician (for example the Minister, or President etc.) necessarily be deemed as undue influence? It is not correct to suggest that there should be no relationship between the NPA and the

\textsuperscript{676} Section 33(2) National Prosecuting Authority Act 32 of 199.

\textsuperscript{677} These same words are also used in the Standards of professional responsibility and statement of essential duties and rights of prosecutors adopted by the International Association of Prosecutors. See also the UN guidelines on the role of prosecutors.

\textsuperscript{678} This reiterates the provisions of section 179(4) of the Constitution.

\textsuperscript{679} This is the mistake J Nicholson made in the High Court decision of S v Zuma where he found “political meddling” by the executive in the prosecution decision by the NDPP. See also DS de Villiers, Nolle Prosequi van ’n prima facie-saak beoordeel teen die lig van die onafhanklikheid en vervolgingsdiskresie van die staatsaanklaer, \textit{TSAR} 2006 – 1, p. 178.
Minister as some interaction is impossible to avoid.\textsuperscript{680} The NDPP may, but does not necessarily have to be, a political appointee, but is required to act independently and not take political considerations into account when making prosecutorial decisions. But Bennun\textsuperscript{681} argues that the adjective “independent” does not carry the same meaning for prosecutors and judges alike. They stand in different relationships with the executive and have different tasks to discharge. De Villiers also points out that most Commonwealth and Common Law jurisdictions provide for an Attorney-General who is in fact a Minister (in or out of cabinet) politically responsible for prosecution decisions.\textsuperscript{682} It would, however, not be incorrect to conclude that the South African prosecuting authority acts as a “functionally independent” body.\textsuperscript{683} Unlike the (repealed) Attorney-General Act 92 of 1992 which deprived the Minister entirely of any responsibility regarding the prosecuting authority, the NPA Act returned ministerial responsibility (but not ministerial power to exercise any power of the prosecutor as was the case prior to 1992).

\section*{Security of tenure}

The NDPP is appointed for a maximum term of 10 years. The NDPP, DNDPP or a DPP may be provisionally suspended by the President pending an enquiry and may be removed from office for misconduct, ill-health or incapacity to carry out their duties efficiently, if they are no longer fit and proper persons to hold such office. If this should take place, the removal from office must be confirmed by a resolution passed by both houses of Parliament. However, the recent example of the presidential suspension of a previous NDPP, ostensibly for lack of a “proper working relationship” with the Minister of Justice, and the subsequent confirmation of the removal of him by Parliament for no longer being a “fit and proper” person to occupy the position, has placed the de facto independence of the NDPP on rather insecure footing. In the absence of objective criteria and evaluation of whether a person is “fit and proper” by a professional watchdog institution in/for the legal fraternity (similar to the Judicial Services Commission) serious questions could be asked regarding the ability of the prosecuting authority to withstand undue political meddling in prosecution decisions.

\section*{Accountability to Parliament}

The Prosecuting Authority shall be accountable to Parliament in respect of its powers, functions and duties.\textsuperscript{684} What this means in effect is less clear,

\begin{thebibliography}{9}
\bibitem{680} Mervyn Bennun \textit{S v Zuma: the implications for prosecutors’ decisions, SACJ 2009 – 3, p. 371}
\bibitem{681} Mervyn Bennun, \textit{S v Zuma: the implications for prosecutors’ decisions, SACJ 2009 – 3, p. 371}
\bibitem{682} WP de Villiers, \textit{Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models, THRHR 2011-7, p. 247.}
\bibitem{683} L Wolf, \textit{Pre-and post-trail equality in criminal justice in the context of the separation of powers PER/PEJL 2011-14-5.}
\bibitem{684} Section 35(1) National Prosecuting Authority Act, No 32 of 1998.
\end{thebibliography}
since Parliament cannot exercise the powers, functions and duties itself. The role of parliament is rather limited to aspects dealing with the removal, suspension and remuneration of the national director and the budget of the prosecuting authority. The prosecution policies and policy directives are also to be tabled in parliament, as well as the annual report by the NDPP. In addition, the national director is empowered, (but not compelled), to submit a report to parliament at any time with regard to any matter relating to the prosecuting authority, if (s)he deems it necessary.

**Private prosecution**

When the Prosecuting Authority refuses to institute prosecution, private individuals\(^685\) may institute a private prosecution of an alleged offender.\(^686\)

Private prosecution is a development of English law. In English law private prosecutions go back a very long time and are still seen as an important safeguard against passivity, bias, corruption or incompetence on the side of the State. In practice private prosecutions in South African criminal justice are extremely rare. It serves as a safety valve to prevent possible injustice which may result when the State is hesitant to prosecute conduct which is deemed to be unlawful. It also aims to prevent aggrieved persons from taking the law into their own hands and to console the victim of a wrong that is not vindicated by the State. The aggrieved person will institute the prosecution in his personal capacity and attempt to prove the guilt of the alleged perpetrator and have him punished within the ambit of what the law allows for. The accused retains all the procedural rights that would have been available if the prosecution had been at the instance of the state.

**Requirements for private prosecution**

There are three requirements before an aggrieved individual can proceed with a private prosecution:

Substantial or peculiar interest in the issue of the trial\(^687\)

Although the legislature had financial interest in mind, it may also apply to claims arising out of some injury which he had suffered that do not sound in money, such as the chastity or reputation of a person etc.\(^688\)

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\(^685\) Barclays Zimbabwe Nominees (Pty) Ltd v Black 1990 (4) SA720 (A). Legal persons are not entitled to bring private prosecution.

\(^686\) The rights of an aggrieved person to institute private prosecution is set out in Sections 7 – 15 of the Criminal Procedure Act and has been left unaffected by the new National Prosecuting Authority Act and the Constitution. Other legislation, e.g. the Extension of Security of Tenure Act 62 of 1997 also makes specific provision for private prosecution although with slightly different requirements.

\(^687\) Section 7(1)(a) Criminal Procedure Act, 51 of 1977. The spouse, children or next-of-kin of a deceased would also qualify.

\(^688\) Attorney-General v Van der Merwe and Borman 1946 OPD 197.
Certificate *nolle prosequi* signed by the Director of Public Prosecutions

This is a certificate from the prosecuting authority certifying that it is not going to prosecute the particular case against the accused. The prosecuting authority must issue such a certificate if requested by a prospective private prosecutor within a reasonable time. The content of the certificate is a statement by the Director of Public Prosecutions that he has read the contents of the statements pertaining to the case, and that he refuses/declines to institute a public prosecution. The issue of such certificate does not mean the prosecuting authority may never reopen the case against the accused. If circumstances change, or more information becomes available, the state may continue with prosecution. The certificate is valid for three months and if no private prosecution takes place in this time, it lapses.

Security for the costs of the accused person

The private prosecutor must provide security for the costs of the proposed trial. If the prosecution results in an acquittal, the court can order the private prosecutor to pay the legal costs of the accused. The security for costs aims to prevent vexatious prosecution. A judicial officer (judge or magistrate) determines the amount of security. In case of a conviction after the trial, the court can order the accused to pay the legal costs of the private prosecutor. The court could also rule that the State should pay these costs.

Mode of conducting private prosecution

The private prosecution is conducted in the name of the private prosecutor by the persons themselves, or through a legal representative. The private prosecutor proceeds in the same manner as if it were a prosecution by the State. The accused can only be brought before court by way of a summons or indictment. Should the accused plead guilty to the charge, the prosecution shall be continued at the instance of the State. The Director of Public Prosecutions may intervene in any private prosecution. This is done by way of an application to the Court to stop all further proceedings so that it can be continued by the State. The court must make such order. The High court can interdict a private prosecution if it deems it to be unfounded or an abuse of judicial process. A court can also stop a

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689 Section 7(2) Criminal Procedure Act, 51 of 1977. See also Singh v Minister of Justice and Constitutional Development 2009 1 SACR 87 (N).
690 Section 9 Criminal Procedure Act, 51 of 1977.
691 If prosecution does not follow without delay, this security is forfeited to the State.
692 If the private prosecutor does not appear at the trial, the charge against the accused is dismissed.
693 Section 13 Criminal Procedure Act, 51 of 1977.
694 Van Deventer v Reichenberg and another 1996 (1) SACR 119 (C).
(further) private prosecution if it is irregular, vexation or constitutes an
abuse of the court process. Private prosecution may not be instituted
against a child in respect of whom the matter has been diverted.\textsuperscript{696}

\textsuperscript{695} Solomon v Magistrate, Pretoria 1950 (3) SA 603 (T); Phillips v Botha 1999 (1) SACR 1 (SCA.)
\textsuperscript{696} Section 59(2) Child Justice Act 75 of 2008.