DISCUSSION PAPER 165

REVIEW OF THE CRIMINAL JUSTICE SYSTEM: NON-TRIAL RESOLUTIONS: DEFERRED PROSECUTION, ALTERNATIVE DISPUTE RESOLUTION AND NON-PROSECUTION

PRE-TRIAL PROCESSES

PART A

Closing date for comments:

31 March 2025

ISBN: 978-177977-375-7

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Date of first publication: 20 February 2025

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Non-trial Resolutions: Deferred Prosecution – Alternative Dispute Resolution and Non-Prosecution – Alternative Dispute Resolution

This discussion document was drafted by the Advisory Committee on Criminal Procedure Reform Investigation. The South African Law Reform Commission (SALRC) is considering the material in this discussion document and submissions received from stakeholders. Many of the questions raised below are still under consideration and the SALRC welcomes further submissions from stakeholders and the public.

A The Zondo Recommendations

1. The investigations of the Judicial Commission of Inquiry into State Capture have brought to light substantial evidence indicating the extensive participation of private sector entities in corruption and state capture. This includes direct participation in procurement corruption, fraud, money laundering, and efforts to weaken institutions that stood in the way of state capture. Those responsible for these acts include management consultants, advisors, accountants, auditors, lawyers, bankers, and providers of goods and services, including large multinational firms.[1]

2. The Commission recommended the introduction of deferred prosecution agreements (DPAs) as an alternative to criminal prosecution for companies[2] implicated in economic crimes. This "entails an agreement between prosecutors and the accused corporation in which the corporation admits facts from which criminal liability could be inferred and agrees to engage in specific conduct in the near future. In exchange, the prosecutor defers the criminal charges – provided that the corporation adheres to the terms and conditions of the agreement. If the corporation complies with the DPA, the charges are dropped, but if it fails to comply, the prosecution will proceed."[3]

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1 Response by President Cyril Ramaphosa *to the recommendations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud* October 2022.

2 Throughout this paper, the term "corporation" refers to both private companies and close corporations, unless stated otherwise.

3 Judicial Commission of Inquiry into State Capture Report: Part I, Vol.I 813 -814.

3. To ensure that DPAs are in the interest of justice, the Commission outlined the following terms and conditions for the conclusion of such agreements:

(i) A company must have self-reported facts from which criminal liability could be inferred and cooperated fully in making such a report.

(ii) The company must agree to engage in specific conduct or other remedial action to ensure that such conduct (illegal economic activity) is not repeated.

(iii) The company must pay a fine.

(iv) The Tribunal[4] of the Agency must sanction the terms and conditions of DPAs.

4. The SALRC intends to build on the strong foundation of the Zondo Recommendations. As such, it has conducted further research into the international use of DPAs and similar legal instruments. It has widened the scope of its inquiry to consider the wide use of Non-Trial Resolutions (NTRs), of which DPAs are one sub-type in other jurisdictions. NTRs are 'any agreement between a legal or natural person and an enforcement authority to resolve bribery cases without a full trial on the merits of the allegations either before or after conviction (e.g. plea deals) or a non-conviction mechanism (e.g. non-prosecution or deferred-prosecution agreements)'.[5]

B. International framework

5. NTRs are a form of public-private cooperation, an anti-corruption strategy prescribed by the United Nations Convention Against Corruption (UNCAC). Articles 12, 37 and 39 of the UNCAC provide that States Parties 'shall' consider encouraging cooperation between law enforcement authorities and legal and natural persons in exchange for leniency. Article 39 calls on states to encourage corporations to cooperate with anti-corruption enforcement authorities by supplying information or depriving offenders of the benefits of corruption. Article 37 provides that forms of

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4 The Commission recommended the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA). It proposes that PPACA be comprised, inter alia, of an Inspectorate, a Litigation Unit, a Tribunal and a Court.

5 OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial Agreements by Parties to the Anti-Bribery Convention,* 2019, p. 11, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

cooperation could include the mitigation of punishment (Art. 37(2)), granting a form of immunity (Art. 37(3)), and cooperation in multijurisdictional cases (Art. 37(5)).

6. The Technical Guide to the UNCAC explains that the approach of public-private cooperation originated in the experience of law enforcement with organised crime. In both corruption and organised crime, violations are committed by secretive and compartmentalised networks, and access to information from a person within the network is indispensable to investigators.[6]

7. The United Nations Office on Drugs and Crime recognises the importance of using settlements or alternative mechanisms to address certain corruption cases. In its Resolution 6/2 titled "Facilitating international co-operation in asset recovery and the return of proceeds of crime", the Conference of the States Parties to the United Nations Convention against Corruption "directs the Open-ended Intergovernmental Working Group on Asset Recovery to collect information regarding State parties' use of settlements and other alternative mechanisms and analyse the factors that influence the differences between the amounts realised in settlements and other alternative legal mechanisms and the amounts returned to affected States, with a view to considering the feasibility of developing guidelines to facilitate a more coordinated and transparent approach for co-operation among affected States parties and effective return of stolen money.

8. In accordance with the direction of the Conference of the States Parties, the Open-ended Intergovernmental Working Group on Asset Recovery presented recent developments in the use of settlements and other alternative mechanisms in both developing and developed countries.[7] This was done at the seventh session of the Conference of the States Parties held in November 2017. Their presentation made reference, among others, to deferred prosecution agreements introduced in the United Kingdom in 2014 non-trial resolutions (plea agreements, deferred prosecution agreements, non-prosecution agreements and declinations) in the USA. Their presentation further highlighted that the following monetary sanctions typically seem to form the

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6 UNODC; UNICRI, *Technical Guide to the United Nations Convention Against Corruption,* 2009, Vienna: United Nations. p. 118-119, www.unodc.org/unodc/en/treaties/CAC/technical-guide.html

7 CAC/COSP/2017/8.

composite elements of settlements in different jurisdictions: confiscation (forfeiture), disgorgement, fines, restitution, compensation, and reparations.

9. In its resolution 8/9, entitled "Strengthening Asset Recovery to support the 2030 Agenda for Sustainable Development", the Conference of the State Parties directed the Working Group to continue to collect information regarding the use by States parties of alternative legal mechanisms and non-trial resolutions, including settlements, with a view to considering the feasibility of developing the mentioned. In accordance with the direction of the State Parties, the Working Group held a meeting from 6 – 10 September 2021. Several State Parties, including South Africa, were represented at the meeting. Several speakers outlined the mechanisms in their respective domestic systems that provide effective and efficient alternatives to the judicial process for discovering illicit activity and recovering stolen assets.[8] The issue of alternative legal mechanisms and non-trial resolutions, including settlements, to deal with corruption cases was again discussed at the Conference of the State Parties to the United Nations Convention against Corruption at its ninth session held from 13 – 17 December 2021.[9] However, there was little progress made towards developing the said guidelines.

10. South Africa is a signatory of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. The 2021 OECD Anti-Bribery Recommendation recommends that Member States consider using NTRs to resolve corruption cases without a full trial. The OECD recommends that Member States develop frameworks to provide for NTRs incorporating the following principles: transparency, accountability and due process of law. Member States are advised *inter alia* to adopt a clear and transparent framework to provide for NTRs, to make elements of NTRs public including: names of natural/legal persons concerned; the main facts; and the criteria for deciding to resolve the matter with a NTR. Member States should ensure that NTRs provide for 'effective, proportionate and dissuasive sanctions'. They should also ensure that NTRs are 'subject to appropriate oversight, such as by a judicial, independent public or other relevant competent authority, including law enforcement authorities.'[10]

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8 "Report on the meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna from 6 to 10 September 2021" CAC/COSP/WG.2/2021/5.

9 CAC/COSP/2021/14.

10 OECD, *OECD Anti-Bribery Recommendation,* 2021 www.oecd.org/corruption/2021-oecd-anti-briberyrecommendation.htm#:~:text=About%20the%20Recommendation,measures%20to%20make%20this%20effective.

C. The benefits of NTRs

11. The world's leading academic expert on NTRs, Dr Abiola Makinwa, writes that serious corruption is a uniquely difficult crime to prosecute, because several factors combine to create impunity.[11] First, traditional methods of prosecution are not well-suited to a globalised economy, where rapid cross-border transactions between layers of corporate structures conceal beneficial ownership. Secondly, victims of corruption are unaware of the identities of the perpetrators, so there are no witnesses able to testify. Thirdly, corruption is hidden by complex schemes designed by teams of highly qualified professionals. Fourthly, rules of financial secrecy complicate multijurisdictional investigations. The resulting information asymmetries between the prosecution and implicated persons make it very difficult for prosecutors to meet the criminal burden of proof. In this light, the traditional anti-corruption enforcement framework cannot be described as effectively upholding the rule of law.[12]

12. By incentivising self-reporting and cooperation, NTRs help to address the resource and information asymmetries between prosecutors and the complex multijurisdictional corporate structures and schemes characteristic of corrupt networks.[13] NTRs have become the primary enforcement mechanism in foreign bribery cases among Member States of the OECD Anti-Bribery Convention and 'could indirectly contribute to an overall increased enforcement' rate for these offences.[14] 'The last decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions… at a pace that has increased exponentially since 2016. This trend is likely to continue, especially as countries continue to cooperate in the investigatory

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11 Makinwa, A., 2020. *Current Trends in Foreign Bribery Investigation and Prosecution.* FACTI Panel Background Paper 6. At pp 4 - 15. Available at: https://www.factipanel.org/news/in-depth-background-papers-have-been-published

12 A. Makinwa, *Current Trends in Foreign Bribery Investigation and Prosecution,* FACTI Panel Background Paper 6, 2020, pp 4 – 15, www.factipanel.org/news/in-depth-background-papers-have-been-published

13 Makinwa, A., *Private Remedies for Corruption: Towards an International Framework.* 2012,. PhD: Erasmus Universiteit Rotterdam, p. 54.

14 OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial Agreements by Parties to the Anti-Bribery Convention,* 2019, p. 13, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

stages, strengthen their anti-corruption laws, and prioritise prosecutions of foreign bribery.'[15] One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty.' [16] Parties to the OECD Convention are 'continuing to harmonise their legal frameworks… in order to facilitate cooperation in complex foreign bribery cases.'[17] It is almost impossible to coordinate foreign bribery investigations and resolutions with enforcement authorities in other jurisdictions without using NTRs.

13. NTRs improve the efficiency of the criminal justice system by dealing outside the court system with matters more suited to methods of public-private cooperation. This allows courts more time to focus on cases more suitable for trials. Hence, in view of South Africa's high crime rate and over-burdened court system, it is necessary to find alternative solutions for resolving certain criminal cases without resorting to court proceedings. It is, therefore, crucial to identify the most effective manner to accomplish this within the country's unique circumstances.

14. Companies are often willing to cooperate and remediate in order to avoid a conviction which would harm their ability to do business in future. 'The power to allow the defendant to settle without a finding of guilty is a powerful card in the hands of the prosecutor. They can use that power to extract concessions from corporate defendants. The potential collateral damage from a finding of guilt can be so enormous that any corporation given the choice will accede to many things that prosecutors want in exchange for being allowed to avoid a guilty plea.'[18] NTRs have benefits for the economy: they reduce the collateral damage of convictions. For example, the US DOJ started using non-conviction-based NTRs in the early 2000s after the multinational

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[15] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial Agreements by Parties to the Anti-Bribery Convention,* 2019, p. 38, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

[16] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial Agreements by Parties to the Anti-Bribery Convention,* 2019, p. 14, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

[17] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial Agreements by Parties to the Anti-Bribery Convention,* 2019, p. 22, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

[18] P. Solmssen, Interview, 2020.

accounting firm Arthur Andersen was wrongfully convicted of fraud, resulting in its liquidation and the consequent loss of 85 000 jobs worldwide.[19]

D. The current legal position and its deficiencies

15. There is a gap in South African law: the absence of a law meaningfully enforced that incentivises companies to enforce effective internal compliance measures at their own expense. This is out of step with international best practice and has arguably resulted in a corporate culture of non-compliance with anti-corruption rules and norms. It is time for South Africa to join the global movement toward prosecuting corruption using NTRs. Currently, South Africa has no statute providing for the use of NTRs.[20] The absence of a legislative framework for NTRs in South Africa makes it challenging for prosecutors to deal with corporate wrongdoing in any way other than prosecution. Without a tool to incentivise cooperation and voluntary disclosure, prosecutors have limited options to deal with offences committed by corporations.

16. In terms of section 332 of the Criminal Procedure Act, 51 of 1977, (CPA) corporations can be held liable for the unlawful acts or omissions of their directors, servants, or members. The problem with the current legal framework is that corporations that want to cooperate with the State and provide potentially self-incriminating evidence run the risk of facing criminal charges, as South

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19 Tom Fox, 2014. *The Destruction of Arthur Andersen and the Use of DPAs in FCPA Enforcement.* Retrieved 7 May 2021 from http://fcpacompliancereport.com/2014/03/the-destruction-of-arthur-andersen-and-the-use-of-dpas-in-fcpa-enforcement/

20 Judicial Commission of Inquiry into State Capture Report: Part I, Vol.I 816. The process set out in the Competition Act 89 of 1998 comes the closest to a DPA in criminal matters. It establishes a Competition Tribunal, which has as one of its functions to adjudicate on any conduct prohibited in terms of Chapter 2 of the Act. This includes determining whether prohibited conduct has occurred and, if so, imposing any remedy provided for in the Act. The prohibited conduct primarily relates to commercial practices that hinder or decrease competition in the market. If the Competition Commission and the respondent or any person under investigation in a complaint or market inquiry agree on the terms of an appropriate order, then the Competition Tribunal may, without hearing any evidence, confirm that agreement as a consent order in accordance with section 58(1)(b) of the Act. If the complainant agrees, a consent order may include an award of damages to the complainant. In this regard, see sections 27, 49D(1) and 49(D)(3) of the Act.

African law does not provide such corporations with immunity from prosecution. This may result in corporations opting not to cooperate or report corruption.[21]

17. The position of corporations implicated in wrongdoing is further complicated by the provisions of section 34 of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 (PRECCA). This provision mandates individuals in positions of authority to report any knowledge or suspicion of corruption involving their corporations to the police under certain circumstances. As the obligation does not extend to the corporation itself, it creates conflict between management and the corporation, as non-compliance with the said provision is a criminal offence. As a result, management may be compelled to self-report and initiate an inquiry into their employer, with no apparent legal protection.[22] To some extent this position has been remedied by the introduction of section 34A of PRECCA, which creates the offence of 'failure to prevent' bribery. While this is an important development in the evolution of South Africa's anti-corruption framework, there is a need for more guidance to be provided to the public about how this section will be applied, as is the case in overseas jurisdictions which provide comprehensive, detailed guidance to companies. (See for instance the FCPA Resource Guide[23], the US DOJ's Corporate Enforcement Policy[24]). In other countries this guidance is drafted and published by prosecuting authorities.

18. In terms of section 204 of the CPA, accused persons who testify for the prosecution against their co-offenders may avoid prosecution if they answer frankly and honestly all questions put to them, even if their responses incriminate them in the offence in question or any other offence that could result in a guilty verdict.

19. Although section 204 offers legal clarity and immunity for individuals, it falls short in providing the same for corporations. In fact, the absence of immunity from prosecution for corporations may incentivise corrupt employees to become state witnesses in exchange for testifying against their employers.

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[21] Edward James "The case for deferred prosecution agreements in South Africa" 31 March 2022 Pinsent Masons Put-Law Analysis.

[22] Edward James 2022 Pinsent Masons Put-Law Analysis.

[23] FCPA Resource Guide, US Department of Justice, 2020, 2nd ed., dl (justice.gov)

[24] Corporate Enforcement Policy, US Department of Justice, https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline

E . Submissions received

20. The NPA has expressed support for the inclusion of a NTR system in the new CPA. They believe that this system should be governed by legislation. The NPA submitted that NTRs are forms of non-trial resolutions that should be dealt with as part of Alternate Dispute Resolution Mechanisms such as diversion. Hence, they propose inserting it before plea and other processes related to trials in the Bill.

21. The NPA has explained that any amount recovered or paid under a NTR should be seen as a "penalty," not a "fine," as a fine presupposes a finding of guilt. Additionally, the NPA has highlighted that the NTR system should not exempt owners or directors from liability for their actions. Consequently, NTRs should not apply to close corporations or private companies where it is difficult to distinguish between the actions of the individuals and the corporate entity.

22. The NPA said that a scenario where wealthy individuals are able to 'buy' their freedom should be avoided, as this will result in inequalities between different types of accused based on their financial status. Thus, the NTR system cannot apply to individuals, as this will result in egregious selective or discriminatory prosecutions that must be avoided. They have also called for judicial oversight over NTRs to prevent abuse of the system.

23. At the National Conference on the Integrated Criminal Justice System and Review of the Criminal Procedure Act in February 2024, a presentation was done to the plenary of the research results of the SALRC on NTRs contained in this section, including the difference between the US and UK models (below). In one breakaway group Deputy National Director of Public Prosecutions (DNDPP) Adv. Ouma Rabaji-Rasethaba gave a presentation on *inter alia* the NPA's new directive providing for a simple form of NTR, namely the Corporate Alternative Dispute Resolution (C-ADR) directive. Feedback was collated from discussion in the plenary and another breakaway group facilitated by DNDPP Adv. Rodney de Kock. In general, most feedback was broadly in support of the introduction of NTRs in principle. More particularly, a concern was raised was about a specific model – two commentators were concerned that the US model lacked sufficient judicial oversight. For these commentators the element of judicial oversight in the UK model was preferred. It was suggested that a synthesis of the more appropriate features of both models should be considered by the SALRC. The recommendations to the SALRC below have been drafted on that basis but are subject to further stakeholder engagement.

24. In July 2024 the SALRC received a written submission by Prof. Lukas Muntingh, head of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights, summarised below:

24.1 Any framework for NTRs needs to be understood in the context of a NPA with severe constraints on its ability to prosecute complex commercial crimes and the need to remedy this deficiency.
24.2 In the context of systemic corporate wrongdoing, it is important to ask whether, in light of the income of a corporation, penalties in terms of NTRs provide a sufficient deterrent for future wrongdoing or whether they are viewed as a mere cost of doing business. Reference should be had to the manner in which penalties are calculated by the Competition Commission, i.e. as a percentage of income or turnover.
24.3 The public should be able to participate in the NTR process at the stage of judicial oversight and be given the opportunity to make meaningful representations on a draft NTR. Victims of corruption should be afforded a seat at the negotiating table at which NTRs are discussed by law enforcement and implicated parties.
24.5 NTRs should be carefully framed so that parties remain liable for all offences not explicitly covered by the NTR, and they may be subject to public or private prosecution for such offences.

25. Non-Conviction-Based Non-Trial Resolutions are a new instrument. The SALRC invites further submissions on the use of this instrument in the South African context.

F. Consideration of previous investigations

24. In August 2002, the South African Law Reform Commission (SALRC) released a report containing recommendations regarding out-of-court settlements in criminal cases.[25] Out-of-court settlements are equivalent to NTRs in that both involve an agreement between the prosecution and the defence in which the accused agrees to comply with certain conditions. In return, the prosecutor undertakes not to prosecute the accused for the offence(s) committed.

25 SALRC *Project 73*: Report on the Sixth Interim Report on Simplification of Criminal Procedure out of Court Settlements in Criminal Cases (August 2002) 49 – 65 (SALRC Pr 73 Report).

25. A number of the SALRC's recommendations regarding out-of-court settlements are relevant to the issue of NTRs.[26] The SALRC recommended that the following provision be included in the CPA:

"104A Out-of-court settlements

(1) If the prosecutor is satisfied, at any time before any evidence has been adduced against the accused and considering all the facts at his or her disposal that –

(a) it is in the public interest to do so;[27] and
(b) a court would, in the case of a conviction, impose a sentence other than imprisonment, or imprisonment for a period not exceeding one year,

he or she may enter into an out-of-court settlement with the accused, in terms of which the prosecution undertakes to discontinue prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.

(2) In considering whether it will be in the public interest to enter into an out-of-court settlement, the prosecution shall have regard to –

(a) whether the accused poses a significant threat to the community and is likely to benefit from the settlement;
(b) the effect of a conviction on the accused;
(c) whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who has entered into a settlement as provided for in this section on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement; and
(d) the interests of the victim of the crime.

(3) …

(4) …

(5) An out-of-court settlement is, for a period as agreed upon between the parties, but not more than two years, subject to one or more of the following conditions, as expressly stipulated in the settlement:

(a) compensation;

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[26] The SALRC's recommendations have not been implemented.

[27] The SALRC provided the following opinion regarding the public interest.: "A variety of factors should be considered in determining whether public interest dictates that a prosecution should follow or not. The relevance of these factors, and the weight to be attached to each of them, depends on the circumstances of each individual case and, therefore, on the discretion of the prosecutor. The factors that are involved basically centre around the triad of factors entailed in sentencing, namely the seriousness of the offence, the circumstances of the offender and the interests of society. More detailed, these factors include the relationship between the accused and the victim, the economic impact of the offence, its impact on public order and morale, the attitude of the victim, the likely expense of the prosecution, the accused's previous convictions, the willingness of the accused to co-operate with the authorities in the investigation and prosecution of others, and whether the objectives of criminal justice would be served better by preferring a non-criminal alternative to a prosecution." See in this regard SALRC Pr 73 Report at 7.

(b) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(c) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organisation or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(d) payment of an amount of money to the State or a state agency, whether in instalments or otherwise, of not more than the amount prescribed from time to time by the Minister in the Gazette, as directed by the prosecution;

(e) submission to instruction or treatment;

(f) submission to supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No 116 of 1991);

(g) the compulsory attendance or residence at some specified centre for a specified purpose;

(h) referral to community dispute resolution structures that have been put into place in terms of an Act of Parliament.

(6) Notwithstanding the above, a condition in terms of paragraph (c) shall be limited to a maximum period of one year."

26. The SALRC's 2002 recommendations were limited to minor offences. These were written before the birth of the global ant-corruption movement with the promulgation of the UNCAC in 2002. Newer research shows that this method is also suitable for offences which should be resolved using methods of public private cooperation, including corruption and related offences.

G. Benchmarking from comparative research

27. A number of countries provide NTRs as an alternative to trials for corruption and related offences. The rules regarding who can negotiate a NTR vary by country. In certain places, such as the United Kingdom (UK) and Argentina, only corporations are eligible, while in other places such as the United States of America (USA), individuals are also eligible for NTRs.[28] The frameworks providing for different types of NTRs vary between jurisdictions.

28. DPAs are used in Singapore and Argentina, where the courts must consider whether the terms of DPAs are fair, reasonable, proportionate and in the interest of justice. A DPA can only

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28 Davis FT "Judicial review of deferred prosecution agreements: A comparative study" (2022) 60:3 *Columbia Journal of Transitional Law* 755, 812 and 815; Section 4 of Schedule 17 of the Crime and Courts Act 2013.

come into force after the court's approval.**[29]** This is also the case in the United Kingdom.[30] In Kenya, DPAs are offered in respect of corruption and economic offences[31] and in France, DPAs apply only to overseas corruption, money-laundering and other financial crimes.[32]

29. The USA's NTR framework is designed to reward greater levels of cooperation with greater levels of leniency. In order of increasing leniency, the USA uses plea bargains; Deferred Prosecution Agreements (DPAs); Non-Prosecution Agreements (NPAs) and Declinations. Under the "Speedy Trial Act" (18 U.S.C. §§ 3161-3174), U.S. federal courts are required to set a date for trial within 70 days of a criminal charge being filed. However, under § 3161(h)(2), this period can be extended as a result of "*[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.*" Over time, this provision has been interpreted to give rise to instruments such as DPAs, which are given further content and detail in terms of prosecution policy documents: (1) Principles of Federal Prosecution of Business Organisations[33] and (2) A Resource Guide to the Foreign Corrupt Practices Act.[34] These guidance documents contain the criteria for how implicated parties can earn 'cooperation credits', creating legal certainty and heightened transparency.

30. In the USA a DPA is a contract between the authorities and a legal/natural person implicated in criminal conduct. The US DOJ files charges with a court, simultaneously requesting that the prosecution is postponed to allow the company to demonstrate its good conduct in several ways: The agreement between the DOJ and the company provides that the company will pay a fine, hand over information and improve its anti-corruption compliance programme. If, over the next three years, the company complies with the terms of the DPA, the DOJ will apply to the court

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29 In this regard, see Davis FT (2022) 60:3 Columbia Journal of Transitional Law 811 and 815.

30 Paragraphs 7 and 8 of Schedule 17 of the Crime and Courts Act 2013.

31 Section 2 of the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021.

32 Davis FT (2022) 60:3 *Columbia Journal of Transitional Law* 803 and 812.

33 DOJ, *Principles of Federal Prosecution of Business Organisations,* www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business organizations#:~:text=General%20Principle%3A%20Prosecutors%20should%20consider,how%20best%20to%20resolve%20cases.

34 DOJ, *A Resource Guide to the Foreign Corrupt Practices Act*, www.justice.gov/criminal-fraud/file/1292051/download

to dismiss the filed charges. If the company breaches the agreement, the DPA allows prosecutors to restart the case.

31. Non-prosecution agreements also entail an agreement between the DOJ and an implicated party in terms of which the party must cooperate, make financial restitution and improve its anti-corruption compliance measures.

> 'Under a non-prosecution agreement, or an NPA as it is commonly known, DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties. In circumstances where an NPA is with a company for FCPA-related offenses, it is made available to the public through DOJ's website. The requirements of an NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty. If the company complies with the agreement throughout its term, DOJ does not file criminal charges. If an individual complies with the terms of his or her NPA, namely, truthful and complete cooperation and continued law-abiding conduct, DOJ will not pursue criminal charges.'[35]

32. NPAs are less severe than DPAs since no charges are filed and the prosecution does not pend. As such, NPAs are more desirable than DPAs and implicated parties need to demonstrate higher levels of cooperation, restitution and remediation. In the USA the distinction is evident in policy documents published by the DOJ[36], and not in legislative provisions.

33. The most desirable NTR for implicated parties is a Declination. These are only given to parties who demonstrate exemplary conduct. For example, companies that approach the DOJ to self-disclose information about the company's corrupt conduct *before* the DOJ is aware of such conduct are eligible for a Declination.

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[35] US DOJ, *Resource Guide to the Foreign Corrupt Practices Act,* 2020, p. 76, www.justice.gov/criminal-fraud/file/1292051/download

[36] US DOJ, *Resource Guide to the Foreign Corrupt Practices Act,* 2020, www.justice.gov/criminal-fraud/file/1292051/download

34. DPAs, NPAs and Declinations are published on the website of the DOJ. The statement usually contains a set of agreed facts in terms of which the implicated party (usually a company) takes *responsibility* for certain conduct, which is detailed, and undertakes to make financial restitution of a specified amount by a set date. It usually also contain details of improvements to the company's anti-corruption compliance programme.

35. In the UK, only DPAs are used. Schedule 17 of the Crime and Courts Act 2013 sets a detailed framework for DPAs. It sets out a broad range of offences for which a DPA may be concluded.[37] These offences relate to illicit activities that involve monetary transactions and the broader field of economic crimes.

36. Criminal proceedings instituted against a corporation[38] are automatically suspended once a prosecutor enters into a DPA with that corporation. This means that neither the State nor any other person may prosecute the corporation for the offences committed, provided that the accused complies with the terms of the DPA.[39]

37. Even though only certain types of partnerships[40] have separate legal personality from their members and unincorporated associations have no separate legal identity, prosecutors are still allowed to enter into a DPA with them. When a prosecutor and a partnership enter into a DPA, it must be in the name of the partnership and not any of its partners. Any money payable under the DPA must come from the partnership's funds. If the DPA is between a prosecutor and an unincorporated association, it must be in the name of the association and not in any of its

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37 Part 2 of the Schedule provides that a DPA may be entered into in respect of the common law offences of conspiracy to defraud and cheating the public revenue. Additionally, it lists several statutory offences that qualify for a DPA, which are part of the following Acts: the Theft Act 1968, the Customs and Excise Management Act 1979, the Forgery and Counterfeiting Act 1981, the Companies Act 1985, the Value Added Tax Act 1994, the Financial Services and Markets Act 2000, the Proceeds of Crime Act 2002, the Companies Act 2006, the Fraud Act 2006, the Bribery Act 2010, and the Money Laundering Regulations 2007. This includes any ancillary offence relating to the aforementioned offences.

38 A corporation in the United Kingdom is a body corporate, a partnership or an unincorporated association.

39 Paragraph 2 of the Schedule.

40 A Limited Liability Partnership and a Scottish Limited Partnership have a legal identity. However, an English Limited Partnership has no legal identity. See in this regard Trident Trust "Key Facts Partnerships" 2018 (available at www.tridenttrust.com).

members' names. Also, any money payable under the DPA must come from the association's funds[41].

38. Schedule 17 outlines the necessary content that must be included in DPAs.[42] A DPA must contain a statement of facts relating to the alleged offence, which may include admissions made by the accused.[43] It must specify the date on which the DPA ceases to have effect.[44] Additionally, a DPA may include a term setting out the consequences of a failure by a corporation to comply with any of its terms.[45] The Schedule also provides a non-exhaustive list of requirements that may be imposed on the accused corporation. These include paying a financial penalty,[46] compensating victims of the offence, donating money to a charity or other third party, disgorging any profits made from the offence, cooperating in any investigation related to the offence, appointing a monitor to assess and monitor the corporation's internal controls, implementing a compliance programme or making changes to an existing compliance programme. A DPA may impose time limits within which an accused must comply with the requirements imposed.[47]

39. The Crown Prosecution Service may commence negotiations with a company when it has a *reasonable suspicion* (i.e. not *prima facie* evidence) that the company is implicated in corruption or related offences. After the commencement of negotiations for a DPA but before the terms of the DPA are agreed upon, the prosecutor must apply to the court for a declaration that entering into a DPA with the accused corporation is *likely* to be in the interests of justice and the *proposed*

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41 Paragraph 4 of the Schedule.

42 Both Singapore and Kenya require DPAs to include a charge, a statement of facts related to the offence which may include the accused's admissions, the rights and obligations of the parties to the agreement, the conditions imposed on the accused, time limits for complying with a DPA, the consequences of non-compliance with a DPA, and a date on which a DPA expires. In this regard see the Criminal Justice Reform Act, 19 of 2018 of Singapore, and the Anti-Corruption and Economic Crimes Bill, 2021 of Kenya.

43 Paragraph 5(1) of the Schedule.

44 Paragraph 5(2) of the Schedule.

45 Paragraph 5(5) of the Schedule.

46 The financial penalty agreed upon by the prosecutor and accused must be similar to the fine that a court would have imposed on the accused on conviction for the offence. In this regard, see section 5(4) of the Schedule.

47 Paragraph 5(3) of the Schedule.

terms of the DPA are fair, reasonable and proportionate.[48] The court must give reasons for its decision to either grant or deny the declaration.[49] This step in the process is known as the preliminary hearing. Once a prosecutor and an accused corporation have agreed on the terms of a DPA, the prosecutor must apply to the court for a declaration that the DPA is in the interests of justice and that the terms of the DPA are fair, reasonable and proportionate.[50] The court must give reasons for its decision to either grant or deny the declaration.[51] This step in the process is known as the final hearing. A DPA only comes into force when it is approved by the court after the final hearing through the granting of a declaration to this effect. This must take place in open court.[52]

40. Once approved by the court, the prosecutor must publish the DPA together with the following:[53]

(a) the initial declaration of the court and the reasons for its decision to make the declaration;

(b) where the court initially declined to make a declaration, the court's reason for that decision; and

(c) the court's final declaration and the reasons for its decision to make the declaration.[54]

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48 Paragraph 7(1) of the Schedule.

49 Paragraph 7(2) of the Schedule.

50 Paragraph 8(1) of the Schedule.

51 Paragraph 8(4) of the Schedule.

52 Paragraph 8(3) of the Schedule.

53 Brazil, Colombia, the Dominican Republic, Ecuador, France, Guatemala, the Netherlands and the United Kingdom have also published information on their settlements. Brazil, France and the United Kingdom have posted entire texts of their settlement agreements on publicly accessible websites, as well as explanations of both the legal basis for the settlements and the policy goals of accountability, efficiency and efficacy underlying the use of settlement mechanisms. However, relatively less information about cases is publicly available in civil-law jurisdictions such as Germany, Italy and Kazakhstan owing to the stringent privacy protections afforded to individual defendants. In this regard, see the Note by the Secretariat of the Conference of the State Parties to the United Nations Convention against Corruption titled "Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return" CAC/COSP/2021/14.

54 Paragraph 8(7) of the Schedule.

41. If, upon application by the prosecutor, the court finds that the accused corporation has failed to comply with the terms of the DPA, it may invite the prosecutor and the accused to agree on proposals to remedy the failure, after which the court may approve a variation of the DPA, or the court may terminate the DPA.[55] Where the court terminates the DPA, the prosecutor must publish the fact that the DPA has been terminated and the court's reasons for its decision.[56]

42. During the duration of a DPA, the prosecutor and the accused may agree to vary its terms if unforeseen circumstances arise that could prevent the accused from complying with such terms.[57] Once they have agreed to vary the terms of a DPA, the prosecutor must apply to the court for a declaration that the variation is in the interests of justice and that the terms of the DPA as varied are fair, reasonable and proportionate.[58] If the court decides not to approve the variation, the prosecutor must publish its decision and its reasons.[59] On the other hand, if the court decides to approve the variation, the prosecutor must publish the DPA as varied and the court's declaration and the reasons for its decision to make the declaration.[60]

43. Fresh criminal proceedings may be instituted against an accused corporation after a successful DPA has come to an end. This can occur if the prosecutor finds that during the negotiations for the DPA, the accused provided inaccurate, misleading or incomplete information and that he or she knew or ought to have known that the information was inaccurate, misleading or incomplete.[61]

44. Furthermore, where a DPA has not been concluded and the prosecutor chooses to pursue criminal proceedings against an accused corporation, information obtained by a prosecutor during a DPA negotiation may only be used as evidence against an accused corporation if they are being prosecuted for providing inaccurate, misleading, or incomplete information. It can also be used

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[55] Paragraph 9(1) – (3) of the Schedule.

[56] Paragraph 9(7) of the Schedule.

[57] Paragraph 10(1) of the Schedule.

[58] Paragraph 10(2) of the Schedule.

[59] Paragraph 10(7) of the Schedule.

[60] Paragraph 10(8) of the Schedule.

[61] Paragraph 11(3) of the Schedule.

as evidence if the accused corporation has made a statement inconsistent with the material[62] during a prosecution for another offence.[63] However, material cannot be used against an accused corporation in the latter-mentioned case unless evidence relating to it is adduced or a question relating to it is asked, by or on behalf of the corporation in the proceedings arising out of the prosecution.[64]

45. In compliance with Schedule 17, the Serious Fraud Office and the Crown Prosecution Service jointly issued the Deferred Prosecution Agreements Code of Practice, which provides significant detail concerning the DPA negotiating procedures.[65] It further explains the steps that must be followed in giving effect to the provisions of Schedule 17. This Code specifies the factors that a prosecutor may consider when deciding whether to charge a corporation with a crime or enter into a DPA.[66] In doing so, the prosecutor must weigh the public interest factors that support prosecution against those that do not.[67]

46. The prosecutor must consider the following additional public interest factors in favour of prosecution:[68]

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62 Paragraph 6 of Schedule 17 defines material as any material showing that an accused organisation entered into negotiations for a DPA. This includes any draft of the DPA, any draft of a statement of facts intended to be included within the DPA, as well as any statement indicating that an organisation entered into such negotiations. Material that was created solely for the purpose of preparing the DPA or statement of facts is also included.

63 Paragraph 13(4) of the Schedule.

64 Paragraph 13(5) of the Schedule.

65 Davis FT (2022) 60:3 *Columbia Journal of Transitional Law* 788.

66 When considering whether to enter into a DPA in Kenya, the Director of Public Prosecution (DPP) must consider the following factors: the prior criminal history of the accused person(s), the extent of their cooperation with the investigative agency and adherence to relevant processes, whether they have taken steps to address the issues raised by the investigative agency, whether entering into the DPA would be in the public interest, and any other relevant factors that the DPP may consider. In this regard, see section 50B of the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021.

67 The relevant factors and their importance are determined by the prosecutor handling the case. It is possible for one public interest factor to outweigh several others that point in the opposite direction. Each decision is made on a case-by-case basis.

68 Serious Fraud Office and the Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice* 2013 at paragraph 2.8.1.

(a) A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against the corporation and/or its directors/partners and/or majority shareholders).
(b) The conduct alleged is part of the established business practices of the corporation.
(c) The offence was committed at a time when the corporation had no or an ineffective corporate compliance programme and has not been able to demonstrate a significant improvement in its compliance programme since then.
(d) The corporation has been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct or had continued to engage in the conduct.
(e) Failure to notify the wrongdoing within a reasonable time of the offending conduct coming to light.
(f) Reporting the wrongdoing but failing to verify it or reporting it knowing or believing it to be inaccurate, misleading or incomplete.
(g) Significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments.

47. The prosecutor must consider the following additional public interest factors against prosecution and in favour of entering into a DPA:[69]

(a) Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by a corporation’s management team when the offending is brought to their notice. This includes reporting the wrongdoing to the authorities within a reasonable timeframe and taking remedial actions, including, where appropriate, compensating victims.
(b) A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the corporation and/or its directors/partners and/or majority shareholders. The prosecutor should contact relevant regulatory departments (including, where applicable, those overseas) to ascertain whether there are existing investigations in relation to the corporation and/or its directors/partners and/or majority shareholders.

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69 Serious Fraud Office and the Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice* 2013 at paragraph 2.8.2.

(c) The existence of a proactive corporate compliance programme both at the time of the wrongdoing and at the time of reporting but which failed to be effective in this instance.

(d) The wrongdoing represents isolated actions by individuals, for example, by a rogue director.

(e) The wrongdoing is not recent, and the corporation in its current form is effectively a different entity from that which committed the offences – for example, another corporation has taken it over, it no longer operates in the relevant industry or market, the corporation in question management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending.

(f) A conviction is likely to have disproportionate consequences for the corporation, under domestic law, the law of another jurisdiction including but not limited to that of the European Union, always bearing in mind the seriousness of the offence and any other relevant public interest factors.

(g) A conviction is likely to have collateral effects on the public, the corporation's employees and shareholders or the corporation's institutional pension holders.

H. Preliminary recommendations and questions for further consideration

(a) The UK and US models

48. While it is instructive to study models from other countries, their unexamined adoption into the South African legal framework may not achieve optimal results. Careful examination of a jurisdiction's socioeconomic and political context should be conducted before importing anti-corruption reforms. Anti-corruption measures are 'likely to fail if they are not adequately adapted to the local political, cultural, social, historical, economic, constitutional and legal background...'[70]

[70] Basel p. 22

of a country. One such analysis has been conducted and it concluded that the use of NTRs in South Africa would probably improve anti-corruption enforcement.[71]

49. However, the context in South Africa is materially different from that of the USA and UK, which are developed countries with relatively well-resourced prosecuting authorities. Where the US DOJ and Serious Fraud Office (SFO) have reasonable prospects of successfully prosecuting large companies for corruption, at this stage South Africa probably does not. Since concluding NTRs depends on the willingness of companies to cooperate, the effectiveness of the NTR framework depends in part on how threatening the alternative of prosecution is. Given South Africa's low rate of prosecuting serious corruption[72] South African authorities probably have less bargaining power than the DOJ and SFO. It is worth considering whether to use elements of a model more attractive to companies, such as NPAs and Declinations, in South Africa.

50. Careful consideration should also be given to the incentive structure for companies to enter into NTRs in South Africa. While South Africa should adopt *elements* of models from other countries most likely to be effective in South Africa, it may need to offer more incentives than countries with stronger enforcement capabilities. Such incentives may include greater leniency in areas like debarment/blacklisting, or lower penalties, or no corporate monitor.

51. South Africa could benefit from adopting elements of the UK model of DPAs when developing its own NTR system. These include a degree of judicial oversight and the factors that prosecutors must consider when deciding whether to enter into a DPA. However, it is worth noting that compared to the USA, the UK has concluded relatively few DPAs. Since 2015, twelve corporations have entered into DPAs in the UK.[73] In the same time period, there have been over

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[71] C. Ashton, 2021, *Dismantling the Machine: A role for non-trial resolutions in anti-corruption enforcement in South Africa?* https://www.iaca.int/media/attachments/2022/06/27/colette-ashton-mt-23-june-22.pdf

[72] See for instance OECD, *Implementing the OECD Anti-Bribery Convention in South Africa.*Paris: OECD Directorate for Financial and Enterprise Affairs, www.oecd.org/corruption/southafrica-oecdanti-briberyconvention.htm and NPA, 2021, *NPA Annual Report 2020-2021,* www.npa.gov.za/sites/default/files/annual-reports/NPA%20Annual%20Report%202020_2021.pdf

[73] Since 2015, twelve corporations have negotiated a DPA with the SFO. In this regard, see SFO, *Guidance Policy: Deferred Prosecution Agreements*, www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/.

three hundred NTRs with corporations in the USA.[74] In the absence of empirical research on the reasons for the discrepancies in the relative rates of resolution, it is reasonable to hypothesise that several factors may be responsible for this discrepancy, including: the relative size of the two countries' economies; the greater flexibility and informality of the instruments in the hands of the US prosecutors, and their likely greater attractiveness to companies.

52. It is noteworthy that the NPA recently adopted a policy directive (the Corporate Alternative Dispute Resolution directive – C-ADR) to provide for a simple form of NTR akin to a Declination, i.e. a non-prosecution decision.[75] This instrument is designed to incentivise companies to co-operate and remediate in corruption cases. This instrument involves the simple exercise of prosecutorial discretion not to prosecute an implicated party when it is in the public interest to do so, in accordance with criteria in the directive. As such, prosecutorial policy is sufficient to provide for this instrument, which does not require legislative reform. DPAs and NPAs are a different matter. The NPA probably has no capacity to enter into *agreements* with implicated parties without legislative reform; statutory provisions are required to empower the NPA to do this. The same is true regarding the imposition of penalties, which activity lies strictly in the purview of the judiciary. Under a statutory NTR regime the NPA would select a proposed penalty from Sentencing Guidelines for consideration by a court and any DPAs and NPAs would require approval by said court.

53. Similar to the UK, a provision should be included in the CPA to require the development of the South African equivalent of a Code on Deferred Prosecution Agreements to guide the prosecuting authority in their decision-making process as to when they should consider it appropriate to offer a DPA to an accused corporation. This will also ensure equal treatment of offenders. In South Africa, the equivalent of the UK's Code would be a NPA Policy Directive in terms of Section 21 of the NPA Act 32 of 1998. Another provision should provide that an organ of state such as the DOJCD or NPA should publish a public guidance document for companies on criteria for NTRs including how what 'adequate procedures' would be in terms of section 34A of PRECCA. These guidance documents are provided in other jurisdictions and it would be in line

74 Gibson Dunn, *Corporate Resolutions Update,* 2023, www.gibsondunn.com/corporate-resolutions-update-2023/

75 O. Rabaji-Rasethaba, 2024, *NPA gets new weapon that brings companies on board in the fight against corruption,* www.dailymaverick.co.za/opinionista/2024-02-06-npa-gets-new-weapon-that-brings-companies-on-board-in-fight-against-corruption/

with the principle of legality in the South African constitution for the state to publish such guidelines. Exactly which organ of state should publish the public guidance document.

54. It is essential that the National Prosecuting Authority provides adequate training to prosecutors on how to negotiate DPAs and oversee them after their approval by the court. This training should include courses on how to evaluate the effectiveness of a company's anti-corruption compliance programme, a highly technical task.

(b) Judicial oversight for DPAs and NPAs in South Africa

55. The State Capture Commission report recommended that the proposed Public Procurement Anti-Corruption Agency, specifically its Tribunal, should be responsible for sanctioning the terms and conditions of DPAs. This model would be suitable for the administrative enforcement of corruption-related offences, which is a pathway to reform worth considering.[76] However, this Recommendation is counter to the principle that, since only the NPA is empowered by the Constitution to prosecute criminal offences, only the NPA can enter into a NTR with a corporate accused. This means that the courts should properly exercise judicial oversight of NTRs.[77] Hence, similar to plea and sentence agreements under section 105A of the CPA, the courts should have oversight over NTRs instead of the Tribunal recommended in the State Capture Commission Report.[78]

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76 J.P. Rui and T Soreide, Government's enforcement of corporate bribery laws: A call for a two track regulatory regime, 2018, www.researchgate.net/publication/323535022_Governments'_Enforcement_of_Corporate_Bribery_Laws_A_Call_for_a_Two-Track_Regulatory_Regime

77 This is in line with section 179(1) of the Constitution, which provides for the establishment of a single National Prosecution Authority.

78 This is a view expressed by Dr David Broughton during the Criminal Procedure Reform Project Team meeting held on 30 June 2023. Dr Broughton is a Senior State Advocate at the Office of the NDPP.

56. In line with feedback from the abovementioned conference, the SALRC is considering whether South Africa should develop a NTR framework that is a synthesis of elements of the US and UK models, incorporating various instruments of the US model with an a degree of judicial oversight inspired by the UK model.[79] This would decrease the likelihood of secret dealing, fraudulent activities and abuse, curb the potential for prosecutorial overreach, and ensure that any violations are adequately addressed within the terms of NTRs. In the UK, courts have substantive jurisdiction to review the content of the DPA and determine whether it is in the public interest. The two-stage procedure is used in the UK: (1) Preliminary hearing of application in chambers; and (2) Final hearing of application in chambers, before the court's declaration that the DPA is in the public interest takes place in open court.

57. The South African legal context is different to that of the UK, providing unusually wide grounds of *locus standi* for parties to challenge NTRs as well as a progressive written constitution in terms of which such challenges can be brought. In the South African context it is necessary to insulate NTRs from such challenges to the extent that it is constitutional to do so. Legislation providing for NTRs should not invite judges to impose their views on the desirability of NTRs in general or the DPA/NPA before them in particular. In South Africa, a 'light touch' approach to judicial oversight of NTRs should be preferred. Negotiating DPAs and NPAs is the preserve of the NPA. There are two options for judicial oversight: (1) Oversight by a court; (2) Oversight by a panel of retired judges. This document develops option (1): Oversight by a court. Option 2 requires further research.

58. Judges should be invited to comment on whether the DPA/NPA is in the public interest and on the 'sentence' imposed by the instrument. The two-stage process used in the UK is not suitable for the South African legal system, since the first stage (application to a court to declare that a DPA would be in the public interest) would open the process up to the risk of legal challenges. DPAs and NPAs should be subject to judicial oversight in similar *procedural* fashion to plea and sentence agreements, i.e. a one-stage process. This should consist in an application in chambers followed by a ruling in open court.

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79 A judicial officer should not play any role during the DPA negotiation process until an agreement is reached between the prosecutor and the accused corporation.

59. Since this framework is based on the willingness of companies to enter into co-operation agreements, the instruments need to be attractive to companies. It is reported that companies are less willing to enter into the more punitive type of NTRs, namely DPAs. Companies tend to prefer NPAs and Declinations, which intrude less into the business affairs of the company and are completed quicker, affecting the degree of reputational risk to which the company is exposed. This would be a good reason to consider using elements of the US model which incorporate other types of NTRs, such as Non-Prosecution Agreements (NPAs), alongside DPAs. The NPA is already using declination-type instruments in terms of prosecution policy, so research suggests that legislation should provide for DPAs and NPAs, which require legislative amendments.

(c) Offences eligible for NTRs

60. Research suggests that the South African NTR regime be restricted to cases involving economic crimes such as fraud, bribery, money laundering, corruption and related offences including accounting offences.[80] This will be consistent with the practice in other jurisdictions where NTRs are only available in respect of offences of an economic nature.

(d) Extending NTRs to corporations and partnerships

61. NTRs should be extended to a company as defined in the Companies Act, 71 of 2008, and a close corporation as defined in the Close Corporations Act, 69 of 1984 (hereafter referred to as corporations). However, NTRs should not be offered to a corporation that operates primarily for criminal purposes or by illegal means.[81] These corporations are unlikely to report any criminal activity within their organisation. They should face the full might of the law when caught. On the contrary, NTRs are designed for companies and individuals *which demonstrate the will and ability to reform.*

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80 The commission of one or more of these offences should be clear from the self-reported facts by the corporation.

81 In the UK, a public interest factor in favour of instituting criminal proceedings against a corporation is the fact that the alleged offence committed is part of the established business practices of the corporation. Examples of such corporations would include those established as a front for a scheme designed to commit fraud or participate in the illegal manufacture, importation or distribution of an illegal substance.

62. It is crucial to hold directors and employees accountable for their actions. Therefore, in accordance with the NPA's proposal, NTRs should not be applicable to corporations where it is difficult to distinguish between the actions of the individuals and the corporate entity.

63. Consideration should be given to whether NTRs should be extended to partnerships, as in the United Kingdom. However, it should be noted that in South Africa, a partnership is not regarded as a legal entity and liability in respect of the partnership falls on the partners in their personal capacities. Unlike private companies and close corporations, which are considered legal or juristic persons, a partnership is not, and no formalities are required to set up a partnership.[82]

(e) Database of corporations that have entered into NTRs

64. Creating a database of corporations that have entered into NTRs is crucial. This will allow prosecutors to verify independently whether an accused corporation is subject to a current NTR, has successfully fulfilled the requirements of a previous NTR, or has failed to comply with the conditions of the NTR. Having access to this information is crucial for prosecutors to make informed decisions. It is also essential for government institutions to determine whether applicants for tenders are subject to a NTR.

65. It is recommended that the NPA should take responsibility for establishing and maintaining a database for corporations entering into NTRs.

(f) Role of victims of corporate crimes in the decision to enter into NTR

66. An issue that arises is the role that victims of corporate crimes should play in the decision-making process prior to entering into a NTR with an accused corporation. Specifically, should

[82] Nicci du Plessis "Private Company vs Partnership – how do you decide?" Du Plessis and Co. Attorneys and Conveyances (available at Private Company vs Partnership - how do you decide? (duplessislaw.co.za); and Fawzia Khan "Partnerships – risks and rewards" Fawzia Khan and Associates (available at https://www.findanaccountant.co.za/content_partnerships#)

they have a say in the decision to enter into a NTR, and if so, to what extent? Additionally, should they be allowed to reject the prosecutor's decision to enter into a NTR?

67. It is difficult to identify victims of economic crimes such as corruption with any degree of accuracy.[83] It is submitted that the subject of broadening this definition is beyond the scope of this study. While the principle of vindicating victims' rights is important, there are several pragmatic reasons not to involve 'victims' in the actual negotiations between the NPA and implicated parties. First, the victim of corruption is often the state. Secondly, it is reported that having victims at the negotiating table for NTRs would disincentivise companies to participate since they have an obligation to protect sensitive commercial information.[84] Thirdly, victims of corruption such as State Owned Companies (SOCs) have more appropriate avenues to seek compensation such as via the Special Investigating Unit or the civil courts. Civil society organisations may bring public interest litigation. There are innovative ways to empower individual victims of corruption to vindicate their rights, such as the inclusion of sleeping beneficiary clauses in procurement contracts.[85] These avenues for reform should form the subject of another study.

68. Due to the difficulty of identifying victims of economic crimes such as corruption, and the difficulties of establishing their *locus standi*, the prosecutor should represent the interests of victims. Provision may be made for victims, appropriately identified, to make representations to the prosecutor, but this provision should not be extended to a right to appear at negotiations for a NTR.

(g) Content of NTRs

69. Regarding the conditions for entry into a NTR, it is suggested that NTRs should be subject to conditions including, but not limited, to the following:

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83 S. Hawley, 2016, *Compensation for victims of corruption: Why does it matter?* www.uncaccoalition.org/compensation-for-victims-of-corruption-why-does-it-matter/

84 P. Solmssen, Interview, 2020.

85 A. Makinwa, 2016, *Legal Remedies for Grand Corruption,* Open Society Foundation, www.justiceinitiative.org/uploads/82ce7863-dfb2-41dc-b4db-49b8956fafb7/legal-remedies-7-abiola-20160802_0.pdf

(a) Payment into the criminal asset recovery account of a penalty,[86] determined in terms of sentencing guidelines provided by the legislature, whether in instalments or otherwise.

(b) Payment of reparations to the victims of the crime, appropriately identified.

(c) The surrender of profits obtained through committing the offence and any assets purchased with those profits.

(d) Full, proactive co-operation in investigations related to the offence committed by the corporation, including offences committed by its directors and employees (as natural persons).[87]

(e) The implementation of a compliance programme or making changes to an existing one related to an organisation's policies and/or employee training, with a focus on preventing, detecting and reporting criminal conduct that may occur within the organisation.[88]

(f) The institution by the company of disciplinary and, where appropriate, civil action against all directors and employees implicated in offences committed.

70. The content of a NTR should be determined on a case-by-case basis. However, it should be fair, reasonable, and proportionate to the offence committed. This should include the date on which a NTR will come to an end. It should include a clause that the company should cover the cost of the state's investigation.

71. It is important to consider whether the content of a NTR should include appointing a monitor to assess and monitor an accused corporation's internal controls, for the company's

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86 The State Capture Commission Report recommended the payment of a fine. However, the word "fine" has been changed to the word "penalty". This is in line with the NPA's suggestion that any amount recovered or paid under a DPA should be considered a "penalty," not a "fine," as a fine presupposes a finding of guilt. Furthermore, the financial penalty must be similar to the penalty that a court would have imposed on the accused on conviction for the offence.

87 This is in line with the NPA's view that the DPA system should not exempt owners or directors from liability for their actions.

88 To prevent any misuse of the system of DPAs, the new CPA should include stringent enforcement provisions. One way to achieve this is by establishing a rigorous compliance-monitoring system where offenders are either required to self-report or be monitored by an independent agent, such as the monitor used in the UK to ensure compliance. In this regard, see FTI Consulting Inc "Deferred prosecution agreements: a solution to prosecuting backlog? South Africa". It would be worth exploring how the proposed independent Public Procurement Anti-Corruption Agency could assist with compliance.

account, as is done in the UK.[89] In the USA, prosecutors have discretion whether to appoint a monitor. Since the monitor has access to sensitive corporate information, this system is unpopular with companies. It is reportedly difficult to convince them to agree to it – i.e. it is a disincentive for a company to enter into a NTR. In the UK, the monitor's agreement may cover various terms, such as ensuring that a corporation has the following in place:

(a) a code of conduct;
(b) an appropriate training and education programme;
(c) internal procedures for reporting conduct issues which enable officers and employees to report issues in a safe and confidential manner;
(d) processes for identifying key strategic risk areas;
(e) reasonable safeguards to approve the appointment of representatives and payment of commissions;
(f) a gifts and hospitality policy;
(g) reasonable procedures for undertaking due diligence on potential projects, acquisitions, business partners, agents, representatives, distributors, sub-contractors and suppliers;
(h) procurement procedures which minimise the opportunity for misconduct;
(i) contract terms between the corporation and its business partners, subcontractors, distributors, and suppliers include express contractual obligations and remedies in relation to misconduct;
(j) internal management and audit processes, which include reasonable controls against misconduct where appropriate;
(k) policies and processes in all of its subsidiaries and operating businesses, and joint ventures in which it has management control, and that the Corporation uses reasonable endeavours to ensure that the joint ventures in which it does not have management control, together with key subcontractors and representatives, are familiar with and are required to abide by its code of conduct to the extent possible;
(l) procedures compatible with money laundering regulations;
(m) policies regarding charitable and political donations;

[89] In the UK, the accused corporation is responsible for paying all the costs of the monitor's selection, appointment, and remuneration. In this regard, see Serious Fraud Office and the Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice* 2013 at paragraph 7.13.

(n) terms related to external controls, e.g. procedures for selection of appropriate charities;

(o) policies relating to internal investigative resources, employee disciplinary procedures, and compliance screening of prospective employees;

(p) policies relating to the extent to which senior management takes responsibility for implementing relevant practices and procedures;

(q) mechanisms for review of the effectiveness of relevant policies and procedures across business and jurisdictions in which the corporation operates; and

(r) compensation structures that remove incentives for unethical behaviour.[90]

72. Penalties for corporations that have engaged in unlawful conduct should be standardised to maintain lawfulness, consistency and fairness. This should ideally be done by promulgating Sentencing Guidelines, which are used in both the USA and UK. Prosecutors calculate an appropriate penalty based on transparent, clear criteria published in advance. These criteria provide formulae to calculate deductions from the maximum penalty for cooperation by the company. The following aggravating and mitigating factors should be considered when determining an appropriate penalty and any reduction from the maximum as a reward for cooperation and remediation:

(a) The nature and gravity of the offence.

(b) The degree of harm caused to the victims of the offence.

(c) The public interest.

(d) The principle of proportionality

(e) The extent of the corporation's assistance to law enforcement authorities in investigating the offences committed and/or prosecuting crimes committed by individuals not directly affiliated with the corporation.

(e) Whether the corporation has paid or has agreed to pay remedial costs to the victims of the offence(s) and the extent of such payment in relation to the harm suffered.

(f) The extent to which value was delivered by the company in terms of the business project that is the basis of the impugned conduct.

(g) Fluctuations in the value of currency.

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90 Serious Fraud Office and the Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice* 2013 at paragraph 7.21.

(h) An undertaking by the company not to claim as an expense, for tax purposes, the costs of any restitution.

(i) The profit made by the company in the course of the business project that is the basis of the impugned conduct; and

(j) any other relevant factor.

73. In the USA prosecutors calculate an appropriate penalty based on transparent, clear criteria published in advance in Sentencing Guidelines. These criteria provide formulae to calculate deductions for cooperation credits earned by the company for cooperation and remediation. The total amount of financial restitution may include not only penalties, but also forfeiture, disgorgement and interest. Where profit is used as a basis for calculating the amount of disgorgement, regard should be had only to valid business expenses legitimately incurred for the purpose of the relevant business project, and not fixed or overhead business expenses that would have been incurred in the normal course of business. There is a risk that using a system of DPAs and NPAs in South Africa without Sentencing Guidelines may violate the principle of legality. This risk would be mitigated by either the DOJCJ or NPA publishing clear guidelines for leniency.

74. It is important to consider providing incentives to corporations that proactively report criminal activities within their organisation prior to them being implicated in criminal activity.[91] Incentives such as reduced penalties or a less severe NTR, e.g. a non-prosecution agreement, could be offered to corporations who voluntarily disclose the commission of an offence. This would encourage corporations to take proactive measures towards addressing any illicit activities they may have engaged in, thereby promoting accountability and integrity in the corporate sector. Such reductions should be predictable in terms of clear, published criteria.

75. It is important for NTRs to have a clause that explicitly delineates the consequences that will be imposed in the event that a corporation is discovered to have provided false, misleading, or incomplete information either during or subsequent to the NTR process.

(h) Variation of NTRs

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[91] In this regard, see the Competition Commission's Corporate Leniency Policy. This policy offers immunity to cartel members who voluntarily report their involvement in cartel activity to the Commission.

76. In South Africa, just like in the UK, any new framework should provide for the variation of NTRs. This is important as the changed circumstances of a corporation should be taken into account during the course of a NTR. However, ensuring that a varied NTR remains fair, reasonable and in the public interest is crucial. Prosecutors should have the power to amend NTRs if there is a valid reason to do so and it is in the public interest. This should also take into account the extent to which the conditions of a NTR have been complied with.

77. To ensure victims have a say in any changes made to a NTR, they should be given the chance to make representations to the prosecutor, provided they can be identified. Moreover, the prosecutor must make it a point to inform them of any proposed modifications to the NTR. This is crucial to ensure that all parties involved are properly heard and that any changes made to the NTR are done with the utmost transparency and fairness. It is recommended that the SALRC should consider whether all modifications to a NTR should be sanctioned by the court.

(i) Failure to comply with conditions of NTR

78. It is imperative that the procedure for NTRs addresses not only situations where the failure was beyond the corporation's control but also cases where the corporation's actions may have caused the failure to comply with the conditions of a NTR.

79. If a corporation fails to comply with the conditions of a NTR due to its own actions, the prosecutor should be allowed to initiate criminal proceedings against the corporation.

(j) Publication of NTRs

80. As part of the government's efforts to restore the public's trust in the justice system, ensuring transparency in the NTRs system is crucial. Unless prohibited by law, the public should have access to the details of the offences committed and the conditions of NTRs. South Africa

can learn from Kenya[92] and the UK[93] where it is required that NTRs must be published. Publication is also in line with the 2021 OECD Anti-Bribery Recommendation[94] with which South Africa should comply if it wishes to avoid censure in the country reviews by the OECD Working Group on Bribery.

(k) Protection against prosecution when entering into a NTR

81. It is imperative that the new CPA include a provision outlining the protection that would be granted to corporations who fully comply with the conditions of their NTRs. Specifically, such protection must extend to shielding them from prosecution based on the same offence. Furthermore, a victim of an offence by a corporation should not be able to institute a private prosecution, in terms of section 7 of the CPA, against a corporation that has entered into a NTR. A private prosecution should not be allowed while a NTR is ongoing or after it has been completed successfully. It is, however, important to note that a NTR will not shield a corporation from civil liability.

82. To maximise the effectiveness of NTRs in our criminal justice system, it is imperative that corporate entities are incentivised to make use of them. From a corporation's perspective, negotiations with a prosecutor do not necessarily commit them to reaching an agreement. However, engaging in discussions with a prosecutor poses a potential risk as it may provide a prosecutor with useful information or strategic advantage. Anyone representing or advising a corporation knows that any discussion with a prosecutor, especially one unaware of the client's wrongdoing, may inform a prosecutor that something presumably illegal has happened and may be worthy of investigation. Some NTR regimes attempt to address this issue by formally safeguarding corporations from potential legal repercussions that may arise from failed negotiations. Both the English and French NTR regimes have particular provisions related to this

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92 Section 50M(7) of the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021.

93 Paragraph 8(7) of Schedule 17 of the Crimes and Courts Act 2013.

94 OECD, *OECD Anti-Bribery Recommendation,* 2021 www.oecd.org/corruption/2021-oecd-anti-briberyrecommendation.htm#:~:text=About%20the%20Recommendation,measures%20to%20make%20this%20effective

matter. If a NTR attempt does not lead to a definitive public outcome, neither the proposed agreement nor the negotiations that led to it can be used as evidence against the corporation.[95]

83. Research suggests that the English approach, as outlined above, should be recommended.[96]

(l) Review of decision to grant a NTR

84. If a corporation accused of wrongdoing considers the conditions of a NTR unreasonable, they have the choice of not complying with the conditions. However, in doing so, the case will likely proceed as usual, resulting in the reinstitution of the prosecution against the corporation.

85. Victims of corporate crimes who are identifiable, who have *locus standi,* and who consider the conditions of a NTR unreasonable have the right to take the matter on review to the High Court.

(m) Should NTRs be offered to individuals?

86. The 2021 OECD Anti-Bribery Recommendation provides:

> 'Non-trial resolutions refer to mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority.'[97]

In terms of this definition, South Africa's current framework already provides for a type of NTR for individuals in the form of the immunity provision for cooperating witnesses in section 204 of the CPA. The question is whether different types of NTRs such as Deferred Prosecution Agreements and Non Prosecution Agreements should be offered to individuals. There are different views about the use of these types of NTRs for individuals. The NPA submitted that they oppose the application of NTRs to individuals. They correctly stated that wealthy individuals should not be

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95 Davis FT (2022) 60:3 *Columbia Journal of Transitional Law* 821 – 822.

96 See the position in the UK as set out under the comparative research above.

97 OECD, *OECD Anti-Bribery Recommendation,* 2021 www.oecd.org/corruption/2021-oecd-anti-briberyrecommendation.htm#:~:text=About%20the%20Recommendation,measures%20to%20make%20this%20effective

allowed to 'buy' their freedom. The recommendations of the Judicial Commission of Inquiry into State Capture regarding NTRs only apply to corporate criminal liability.

87. However, it is worth considering the extension of NTRs in the form of Deferred Prosecution Agreements and Non Prosecution Agreements to individuals who have committed economic offences. The 2021 OECD Recommendation recommends that Member States consider the use of NTRS for legal *and* natural persons.[98] While the UK does not use NTRs for individuals, other countries including the USA, Malaysia and Kenya do. Malaysia offered non-conviction-based NTRs for less culpable individuals during the 1MDB scandal: for example, non-conviction-based NTRs were given to professional enablers of corruption but not the masterminds of the scheme.[99] [100] Non-conviction-based NTRs for individuals are usually used for less culpable offenders while other instruments such as plea bargains are used for more culpable offenders. The question of culpability and therefore eligibility depends on the circumstances of the case.

88. According to the 2021 OECD Recommendation, it is important to set principled criteria for offering NTRs. While NTRs are not suitable for the most harmful economic offences, they should not be restricted to the most minor offences either. It is submitted that it is in the public interest to offer NTRs to individuals who are (1) probably capable of reform; (2) can offer the authorities information that may be helpful in prosecuting high-level offenders; (3) are willing to make proportional financial restitution.

89. It is therefore recommended that the SALRC consider the question of introducing NTRs for individuals under certain circumstances and should invite submissions from stakeholders and the public on this open question. Some research suggests that if the prosecutor is satisfied that it is in the public interest, he or she should be able to enter into a NTR with the accused, in terms of which the prosecution undertakes to discontinue prosecution on condition that the accused complies with the conditions as agreed upon in the NTR.[101] This may ensure that suitable

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98 OECD, *OECD Anti-Bribery Recommendation,* 2021 www.oecd.org/corruption/2021-oecd-anti-briberyrecommendation.htm#:~:text=About%20the%20Recommendation,measures%20to%20make%20this%20effective

99 Abu Kassim, Interview, 2022.

100 The Guardian, 2022, *Malaysia ex-PM Najib Razak loses 1MDB appeal,* www.theguardian.com/world/2022/aug/23/malaysia-ex-pm-najib-razak-loses-1mdb-appeal

101 This is in line with the recommendation set out in the proposed clause 104A(1) in SALRC Pr 73 Report at 52.

economic crimes are diverted from the criminal justice system, thereby reducing the burden on the courts. This may provide individuals who are not implicated in the most serious acts of corruption and related offences with an opportunity to address their behaviour and avoid long-term consequences associated with a criminal record. Furthermore, it is unrealistic to expect every dispute and crime to be resolved through traditional court proceedings as the criminal justice system cannot handle such a high volume of cases. On the other hand, it is important to address appropriate economic offences speedily while avoiding the unnecessary use of limited resources.

90. A NTR should not be offered to an individual who poses a significant threat to the community and is likely to benefit from the NTR, has a prior conviction for the same or similar offences, or has previously entered into a NTR for the same or similar offences, unless there are compelling circumstances meriting a NTR.[102] A NTR should not be offered to an individual who is a mastermind of a corrupt scheme; or one of its primary beneficiaries.

91. As in the case of NTRs for accused corporations, any NTRs entered into with accused individuals should be in the public interest and should be subject to the following conditions:[103]

(a) Payment into the criminal asset recovery account of a penalty, whether in instalments or otherwise.

(b) Compensation to the victims of the crime, appropriately identified.

(c) The rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(d) The surrender of profits obtained through committing the offence and any assets purchased with those profits.

(e) The performance without remuneration of a specific community service.

(f) The compulsory attendance or residence at some specified centre for a specified purpose.

(g) The referral to community dispute resolution structures.

(h) Most importantly, co-operation with authorities in the investigation of the crime, including handing over information that may be useful to the authorities in the investigation of high-level corruption and related offences.

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102 See the proposed clause 104A(2) in SALRC Pr 73 Report at 52 - 53.

103 See also SALRC Pr 73 Report at 53.

Further submissions on this question are invited.

(n) Considerations regarding charging directors

92. When a director exceeds the scope of his/her authority by engaging in unlawful conduct, for instance, by offering a bribe, that director can be charged alongside the company with the same offence. In such a case, when the company is offered a NTR, the following question may arise: does it offend section 36 of the Constitution if the director is not offered leniency in a similar form? How can and should any difference in treating the legal person and the natural person be justified? This question requires a full section 36 analysis; in particular it probably requires an assessment of section 9(1) and 9(3) read with section 36 of the Constitution.

This is an open question for further research.

(o) The NTR ecosystem

92. NTRs function best in an ecosystem of laws, policies and regulations working together to incentivise public-private cooperation, financial restitution and building cultures of integrity in the public and private sectors. It is a necessary but insufficient condition for the success of NTRs to provide a procedure in the Criminal Procedure Act; further reforms are required. The most important one is the promulgation of relevant Sentencing Guidelines, with which a provision in the CPA providing for NTRs could function more optimally. Other possible options include the creation of a two-track system of anti-corruption enforcement – criminal and administrative. Research should be conducted into expanding the mandate of the Financial Sector Conduct Authority to include administrative enforcement, similar to the Securities and Exchange Commission in the USA, which operates in parallel to the US DOJ. The Companies and Intellectual Property Commission should be mandated to support companies to develop effective, good faith anti-corruption compliance programmes. The debarment (sometimes known as 'blacklisting') framework needs to be harmonised with a clear, transparent framework in order to incentivize companies to enter NTRs in order to avoid debarment. Parliament should increase maximum penalties for accounting fraud including the offence of falsifying accounting records to facilitate

more effective penalties for financial reporting misconduct as a competent verdict. In addition to the proposed conditions for NTRs, it is worth considering a provision in terms of which corporations that fail to comply with the terms of their NTRs would be barred from contracting with the State. Section 29 of the Prevention and Combating of Corrupt Activities Act establishes a Register for Tender Defaulters. When a court convicts a contractor of corruption offences related to public procurement under sections 12 or 13 of the Corruption Act, the court may order the contractor to be listed on this register. In terms of section 28 of the Act, listed contractors may be barred from accessing public contracts for a period ranging from five to ten years. Corporations may be motivated to comply with the terms of their NTRs due to the risk of debarment. Failure to comply could result in significant financial repercussions for many corporations. Furthermore, the new CPA should specify further repercussions that corporations may encounter if they violate the conditions of their NTRs.

93. The introduction of the new section 34A of PRECCA (the new offence of 'failure to prevent' corruption) is an important new development. In other jurisdictions, such as the UK and Malaysia, the introduction of a similar 'failure to prevent' corruption offence has incentivised companies to enter into NTRs. An important part of this framework is the publication by the DOJCJ or prosecuting authority of clear guidelines about how the offence will be enforced. This is currently a gap in the South African legal framework in this regard.

(p) Suggested basis for amendments

94. It is recommended that the SALRC consider whether legislative amendments to the CPA providing for deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) for legal and natural persons for corruption and related offences should be drafted. Such provisions would find a natural home in a chapter providing for alternative dispute resolution processes,before the plea stage. It is submitted that DPAs and NPAs should not be incorporated into either section 105A (Plea and sentence agreements) or section 204 (Incriminating evidence by witness for the prosecution). NTRs are of a different species entirely and belong with ADR processes. Alternatively it is proposed that NTRs are provided for in section 6 of the CPA (a chapter dealing with NPA matters), since they are the preserve of the prosecuting authority. It is proposed that DPAs and NPAs are named differently in South Africa, to avoid confusion between the prosecuting authority and a non-prosecution agreement. It is suggested that they are called:

Deferred Prosecution – Alternative Dispute Resolution (DP-ADR) and Non Prosecution – Alternative Dispute Resolution (NP-ADR).

95. For DP-ADRs and NP-ADRs, a one-stage procedure should be followed: an application heard in chambers, followed by a ruling handed down in open court. DP-ADRs would be used in matters where a case is already underway; NP-ADR's would be used before the charge stage. The legislation should specify whether the presiding magistrate or any other magistrate may consider the DP-ADR or NP-ADR.

96. This subsection sets out a suggested basis for the drafting of legislative amendments to be considered by the SALRC:

Purpose of DP-ADRs and NP-ADRs

The primary purpose of DP-ADRs and NP-ADRs is to gather information that can be used to investigate and prosecute high-level serious economic offences. Secondary purposes include: providing a framework for facilitating financial restitution proportional to the harm done and the levels of cooperation provided by the implicated party and, in the case of legal persons, providing a framework for encouraging and rewarding companies for implementing improved anti-corruption compliance measures with appropriate degrees of leniency.

Principles governing DP-ADRs and NP-ADRs

In the UK, these principles are determined and published by the prosecuting authority. In South Africa, the principles should similarly be determined and published by the prosecuting authority, since this is the constitutional domain of the NPA. The legislation should provide that the NPA shall provide such guidance and it will be published. These can be in the form of Directives similar to what is required by legislation with regard to Child Justice or Sexual Offences, for instance.

Characteristics of a DP-ADR and NP-ADR

A DP-ADR or NP-ADR is an agreement ('the agreement') between the prosecuting authority and a legal or natural person ('the implicated party') which/whom the prosecuting authority is considering prosecuting for an offence in the category set out below ('the alleged offence'). The legislation should empower a prosecutor to enter into said agreement, for example:

A designated prosecutor and an implicated party may negotiate and enter into an agreement (a DP-ADR or a NP-ADR) in respect of the alleged offence/s, the suspension of any criminal proceedings in connection with the alleged offence/s, a statement of facts and the requirements imposed on the implicated party by the DP-ADR or NP-ADR.

Negotiations should be managed by the prosecuting authority. The court should not participate in such negotiations.

Under a DP-ADR or NP-ADR:

1. The implicated party agrees to comply with the requirements imposed on it by the agreement;
2. The prosecutor agrees that, upon approval of the DP-ADR or NP-ADR by the court, the proceedings are suspended or no prosecution is instituted as provided below.

Effect of a DP-ADR or NP-ADR on prosecution and/or court proceedings

1. Under a DP-ADR:
    a. Proceedings in respect of the alleged offence/s must have been instituted by the prosecuting authority.
    b. As soon as the court is advised of a proposed DP-ADR, the proceedings should be remanded to allow the conclusion of the DP-ADR and the prosecution should be automatically suspended.
    c. Where a court approves a DP-ADR, the matter should be removed from the roll and the party excused from further attendance. Should no agreement be reached, the proceedings may continue.
    d. The suspension of a prosecution may only be lifted on an application to the court by the prosecuting authority; and no such application may be made at any time when the DP-ADR or NP-ADR is in force.
    e. At a time when proceedings are suspended under sub-section (b) no other person may prosecute the implicated party for the alleged offence.

2. Under a NP-ADR:
    a. The implicated party is not charged with the alleged offence/s and no proceedings in respect of the alleged offence are instituted.

b. The NP-ADR may only come into effect on application to the court by the designated prosecutor for a ruling as contemplated below.

Designated prosecutors

Designated prosecutors empowered to enter into a DP-ADR or NP-ADR should be:

1. Directors of Public Prosecutions; or
2. The Investigating Director.

Persons which may enter into a DP-ADR or NP-ADR/NPA

The implicated party may be an individual, or an 'entity', such as a company.

Content of a DP-ADR or NP-ADR/NPA

1. A DP-ADR or NP-ADR must contain a statement of facts relating to the alleged offence, which may include admissions made by the implicated party.

2. A DP-ADR or NP-ADR must specify an expiry date, which is the date on which the DP-ADR or NP-ADR ceases to have effect if it has not already been terminated under a sub-section on breach.

3. The requirements that a DP-ADR or NP-ADR may impose on the implicated party should include, but should not be limited to, the following requirements:
    a. co-operation in any investigation related to the alleged offence;
    b. a financial penalty;
    c. compensation for victims of the alleged offence;
    d. a donation of money to a charity;
    e. the disgorgement of any profits made or benefit received by the implicated party from the alleged offence;
    f. the implementation of an effective anti-corruption compliance programme or making improvements to an existing anti-corruption compliance programme;
    g. the payment of any reasonable costs of the prosecuting authority and the SAPS in relation to the alleged offence or the DP-ADR OR NP-ADR;
    h. time limits within which the implicated party must comply with the requirements imposed on it.

i. A DP-ADR may, in addition to the above, require a company to accept a corporate monitor appointed by the NPA at the company's expense.

4. The amount of any financial penalty agreed between the prosecuting authority and the implicated party should be broadly comparable to the fine that a court would have imposed on the implicated party on conviction for the alleged offence following a guilty plea, subject to any deductions in terms of the cooperation framework set out in the section on sentencing below.

5. A DP-ADR or NP-ADR should include a term setting out the consequences of a failure by the implicated party to comply with any of its terms.

Court approval of DP-ADRs or NP-ADRs

When a prosecutor and implicated party have agreed the terms of a DP-ADR and NP-ADR, the prosecutor should inform the court that an agreement contemplated in the relevant subsection has been entered into and apply to court for a ruling that:

1. the DP-ADR or NP-ADR is in the interests of justice; and
2. the penalty imposed by the DP-ADR or NP-ADR is proportional, taking into account the public interest, the nature and seriousness of the misconduct and the circumstances of the implicated party.

The hearing at which this application is determined may be held in chambers. The judge may request amendments to the agreement. If the court decides to approve the DP-ADR or NP-ADR and make a ruling it must do so, and give its reasons, in open court.

Upon approval of the DP-ADR or NP-ADR by the court, the prosecuting authority must publish—

1. the agreement; and
2. the ruling of the court together with its reasons;

unless the court orders that publication is postponed to avoid prejudicing proceedings.

Public guidance document on DP-ADR OR NP-ADRs

The NPA should publish guidance for the public about the negotiation of DP-ADRs and NP-ADRs. This guidance should incorporate the abovementioned purpose; the principles in terms of which

these instruments are negotiated; a framework for evaluating cooperation which provides clear criteria for leniency; and guidance for companies on what it considers to be an effective corporate compliance programme.

Use of material in criminal proceedings

Negotiations with implicated parties are on the record and with prejudice. The information and evidence gathered through negotiations with implicated parties may be used to investigate and prosecute other individuals or institute asset forfeiture related proceedings in terms of POCA. Such information and evidence may not form part of the ADR court record.

The statement of facts may contain formal admissions. This will form part of the court record.

Money received in terms of a DP-ADR or NP-ADR/NPA

Money received in terms of a DP-ADR or NP-ADR/NPA must be deposited into the Criminal Asset Recovery Account or paid to parties named in the agreement.

Offences in relation to which a DP-ADR OR NP-ADR/NPA may be entered into

Serious economic offences: fraud, bribery, money laundering, corruption and related offences including accounting offences.

Breach of DP-ADR OR NP-ADR/NPA

At any time when a DP-ADR or NP-ADR is in force, if the prosecutor believes that the implicated party has failed to comply with its terms, the prosecutor may make an application to the court to:

1. Decide whether, on a balance of probabilities, the implicated party has failed to comply with the terms of the DP-ADR or NP-ADR.

2. If the court finds that the implicated party has failed to comply with the terms of the DP-ADR or NP-ADR, it may—
(a) invite the prosecutor and implicated party to agree to proposals to remedy the implicated party's failure to comply, or
(b) terminate the DP ADR or NP-ADR.

3. The court must give reasons for its decisions and the prosecutor must publish the court's decision and its reasons for that decision unless by an order of the court publication is postponed to avoid prejudicing proceedings.

Variation of DP-ADR OR NP-ADR

At any time when a DP-ADR or NP-ADR is in force, the prosecutor and implicated party may agree to vary its terms if:

1. the court has invited the parties to vary the terms;
2. variation is necessary to avoid a failure by the implicated party to comply with its terms in circumstances that were not, and could not have been, foreseen by the prosecutor or the implicated party at the time that the DP-ADR or NP-ADR was agreed.

The procedure for the application for variation is the same as the procedure for the application for court approval of DP-ADRs and NP-ADRs.

Discontinuing proceedings on expiry of the DP-ADR

If a DP-ADR remains in force until its expiry date, then after the expiry of the DP-ADR the proceedings instituted are to be discontinued by the prosecutor giving notice to the court that the prosecutor does not want the proceedings to continue, and the matter is removed from the court roll.

Where proceedings are discontinued in terms of this section, fresh criminal proceedings may not be instituted against the implicated party for the alleged offence, unless the prosecutor finds that, during the course of the negotiations for the DP-ADR:

1. The implicated party provided inaccurate, misleading or incomplete information to the prosecutor; and
2. The implicated party knew or ought to have known that the information was inaccurate, misleading or incomplete.