



# POLICY BRIEF

## How civil society can contribute to effective prosecutions

Gareth Newham and Miché Roberts

The relationship between the National Prosecuting Authority (NPA) and civil society has been strained due to the NPA's poor leadership, inadequate performance and perceived lack of independence. The appointment of a new National Director of Public Prosecutions in 2019 gave civil society an opportunity to engage the NPA in a more constructive manner. This policy brief shows how civil society can help improve NPA performance and enhance its independence and accountability.

## Key findings

- ▶ The National Prosecuting Authority (NPA) has been severely undermined by political interference and, for most of the last decade, by poor leadership. This negatively affected its performance, independence and accountability, and contributed to a loss of public trust in the wider criminal justice system.
- ▶ Civil society has as a result generally had an antagonistic relationship with the NPA and in many instances turned to the courts to hold it to account.
- ▶ Civil society generally welcomed the new National Director of Public Prosecutions with a stated commitment to rebuilding the NPA, signalling an opportunity for collaboration to enable prosecutorial reforms.
- ▶ Reform of the NPA will hopefully ensure not only that those who benefited from state capture are held to account but also that the people of South Africa are afforded a greater level of criminal justice more generally.

## Recommendations

For civil society:

- ▶ Build a civil society network with the aim of understanding, promoting and supporting prosecutorial reform.
- ▶ Investigate how the independence of the NPA was undermined before and during the state capture years. Use this to identify reforms needed to prevent future attempts to undermine its independence.
- ▶ Identify performance-related challenges facing the NPA.
- ▶ Identify areas and opportunities for reforms to strengthen the performance and public credibility of the NPA.
- ▶ Educate the public on the mandate and powers of the NPA, and create realistic expectations of the organisation and its prosecutors.
- ▶ Educate the public on the different mandates held by commissions of inquiry and the NPA.
- ▶ Maintain an independent voice that supports the NPA against unfair attacks by powerful individuals who are being prosecuted for serious crimes while continuing to hold the NPA accountable for achieving its mandate.

‘Public confidence in the government and criminal justice institutions is at a dangerously low level, and we have a very small window of opportunity to turn this situation around before all credibility is lost.’

Adv Shamila Batohi, National Director of Public Prosecutions, 6<sup>th</sup> Annual Kader Asmal Lecture 2019

## Introduction

Civil society organisations (CSOs) that promote justice and equality before the law can represent the interests of millions of people who want a fair and prosperous South Africa. This can only become possible with an independent, accountable and professional National Prosecuting Authority (NPA) as part of an effective criminal justice system. Civil society therefore has a direct interest in ensuring the NPA is as effective as possible in delivering on its responsibilities.

Many CSOs are aware of the importance of a well-functioning NPA to the success of South Africa’s democracy. Many are also keen to play a role in contributing to the reform of the NPA. The aim of this policy brief is to present ideas about how CSOs can work independently and with the NPA to ensure it is fit for purpose and can deliver justice without fear, favour or prejudice. It is based on a series of engagements, starting at the end of 2018, between various CSOs interested in promoting justice in South Africa.

## Importance of the NPA

In South Africa’s constitutional democracy, the criminal justice system is expected to uphold the rule of law by ensuring that crime victims receive justice and that perpetrators are appropriately and fairly sanctioned. The extent to which the criminal justice system is perceived as responsive and effective therefore has a notable impact on people’s perception of the constitution and their trust in the state. The Constitutional Court has gone as far as to say that at ‘the centre of any functioning constitutional democracy is a well-functioning criminal justice system.’<sup>11</sup>

South Africa’s alarmingly high crime rate and the negative impact of corruption on the state’s ability to deliver

services has eroded the public’s trust in government. Low or non-existent conviction rates, particularly of those accused of involvement in state capture and other grand-scale private and public sector corruption scandals, have cast widespread doubt on the state’s ability or willingness to uphold the rule of law.

## Challenges facing the NPA

Manipulation of South Africa’s criminal justice system was already evident under former president Thabo Mbeki, but was taken to greater extremes under Jacob Zuma’s presidency. During the Zuma administration organised crime flourished as criminal justice agencies were manipulated for political and personal gain.

The closure of the Scorpions and inappropriate political interference in the South African Police Service (SAPS) – particularly its Crime Intelligence Division, the Hawks, the NPA, and other government security agencies – helped to facilitate state capture. As the capacity to investigate complex commercial crimes was slashed, the large-scale looting of state resources went unhindered as powerful politically connected interests were allowed to operate with impunity.

Low conviction rates, especially for grand corruption, have cast doubt on the state’s ability to uphold the rule of law

The main method of enabling this was through poor leadership appointments, primarily of Zuma faction loyalists, resulting in severe mismanagement of the criminal justice agencies. This led to notable declines in their overall performance and capabilities. Many skilled and experienced law enforcement officials were forced out or left for greener pastures. As a result of this sustained assault on the criminal justice system, the challenges faced by the NPA are many and complex.

In addition to serving the narrow interests of a corrupt political elite, tainted senior NPA officials also undermined the operations of an already constrained organisation. Between 2015 and March 2019 the NPA saw 600 resignations and retirements, leaving it with 20% of its posts unfilled. This lack of skills and resources contributed to the NPA’s inability to not just tackle crimes

related to state capture but also deliver justice to most victims of crime and violence.

### Civil society's work to strengthen the NPA

The systematic undermining of the NPA by the Zuma administration prompted a cross-section of civil society to try to protect the NPA's independence. This involved litigation, research, advocacy and the promotion of public awareness of the impact of state capture on the NPA.

Litigation by CSOs and opposition parties mainly focused on the appointment and dismissal of the national directors of public prosecutions (NDPPs) by the president. It resulted in the overturning of the appointment of NDPP Menzi Simelane,<sup>2</sup> and tackling the politically expedient dismissal of NDPP Mxolisi Nxasana and the subsequent illegal appointment of Shaun Abrahams.<sup>3</sup>

The CSOs that brought these cases were Corruption Watch, Freedom Under Law (FUL) and the Council for the Advancement of the South African Constitution (CASAC). In addition to clarifying limitations on presidential powers to appoint and dismiss NDPPs, the litigation served to clarify what 'fit and proper' person means in relation to NPA leadership, as required by the NPA Act. In the Simelane case the Constitutional Court ruled that the requirement of 'fit and proper' was not to be determined by the subjective opinion of the president, but rather that it was a jurisdictional prerequisite to be determined objectively.<sup>4</sup>

Fewer convictions were secured in 2017/2018 than in 2002/2003 despite a 153% increase in serious crime arrests by police in the same period

It became apparent that public perceptions of the criminal justice system were deteriorating during the state capture era. For example, Statistics South Africa recorded a decline in public approval of the courts from 63.9% in 2013/14 to only 41.1% in 2017/18.<sup>5</sup> Some CSOs undertook more detailed research into public perceptions of the NPA in particular. For example, the Institute for Justice and Reconciliation found that only 30% of people trusted the NPA in 2017.<sup>6</sup>

Monitoring of NPA performance by Africa Criminal Justice Reform (ACJR) highlighted that fewer convictions were secured in 2017/2018 than in 2002/2003. This was despite a 153% increase in serious crime arrests made by the SAPS during the same period.<sup>7</sup> This type of civil society action informed advocacy campaigns and public debate on the need for prosecutorial reform of and support for the NPA.

At the end of 2018, the Institute for Security Studies (ISS) convened the first of a series of roundtable discussions to discuss how civil society could focus on the NPA following the change in administration from Zuma to President Cyril Ramaphosa. One idea was to form a network of CSOs interested

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20%

PROPORTION OF VACANT  
NPA POSTS IN  
MARCH 2019

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in promoting prosecutorial reform. This was based on the achievements of a similar initiative in Mexico called *Fiscalía Que Sirva* ('Prosecution that Serves'), which enabled civil society to meaningfully monitor and advocate for reforms of their NPA equivalent.

Mexico's prosecutorial body, the Office of the Prosecutor General (OPG), has experienced challenges akin to those in South Africa. The president's appointment to the OPG of politically connected individuals from his personal network resulted in allegations of corruption, undue influence of political leadership in the decisions of its prosecutor general, and impunity at the expense of human rights.<sup>8</sup>

Mexican civil society responded with multiple coordinated campaigns to highlight threats to prosecutorial independence and accountability. They included a focus on better coordination between all agencies in the criminal justice system, a review of performance indicators, the creation of a suitable profile for the prosecutor general, and minimum criteria to be met for a successful appointment.<sup>9</sup>

The 2018 South African workshop reflected on the Mexican example and encouraged the establishment of an emergent South African civil society network that could develop new opportunities for working on matters related to the NPA.

### **Civil society network on prosecutorial reform**

Participants at the roundtable discussions agreed that a network of organisations that collectively focused their efforts on prosecutorial reform was desirable and needed. While civil society had accomplished much during the state capture years in defending the independence of the NPA, this was mostly achieved in an adversarial manner and often through litigation. While few CSOs had worked directly on NPA issues, there were many that worked on related matters, including tackling corruption, promoting social justice, and supporting victims of violence.

There was general support for greater collaboration among different organisations, focusing on efforts to reform and strengthen the NPA. It was agreed that such a network should be led by a steering committee and that different working groups could be set up to harness

different skills and interests. This could be approached in various ways, summarised below.

One group, consisting of experienced researchers, could provide technical expertise and practical options on challenges facing the NPA. This could include comparative research into NPA performance indicators, mechanisms for promoting ethical conduct, channels that allow public complaints to be adequately addressed, or methods for enhancing NPA relations with community-based organisations (CBOs). Other working groups could explore how the NPA could better support crime victims, ensure the rights of suspects are upheld, and educate the public on the NPA's mandate, how it functions and its role in dispensing criminal justice.

A Mexican initiative enabled civil society to meaningfully monitor and advocate for reforms of their prosecution service

It was generally agreed that, to ensure greater representation of different types of CSOs, efforts should be made to encourage the participation of smaller non-governmental organisations (NGOs), CBOs and those outside of the main urban centres.

A larger and more inclusive network would not necessarily have to be engaged in all matters but rather with particular issues as they arise. For example, if the NPA came under unfair attack by powerful political or other interests facing criminal charges, such a broader network could be activated to counter 'fake news' or spurious allegations, and to demonstrate support for prosecutions without fear or favour. Similarly, if efforts to reform the NPA were not being adequately implemented, or being frustrated by powerful political interests, the broader network could raise concerns and call for appropriate reforms.

### **Initial priorities identified by the coalition**

There was broad agreement that civil society advocate for the institutionalisation of the procedure adopted by Ramaphosa to appoint Adv Shamila Batohi as NDPP. This would ensure an open and transparent leadership appointment process for all senior NPA appointments.

The same procedure should be followed for senior appointments in the SAPS, in keeping with the recommendations of the National Development Plan (NDP).

The constitution and Section 10 of the NPA Act, which deals with the president's appointment of the NDPP;<sup>10</sup> do not currently require such an open and transparent leadership appointment process. The absence of these requirements in legislation could place the country at the mercy of a future president who does not respect the independence of the NPA, as was arguably the situation under Zuma.

CSOs should therefore promote legislative amendments that prescribe a transparent and merit-based appointment process, and develop formal criteria that should be met for such appointments.

Civil society could help to familiarise the public with the NPA's role, its processes, and whether it is functioning optimally or not

Recommendations should be developed on the skills and characteristics to be expected from future NDPPs and Deputy Directors of Public Prosecutions and how they ideally should be appointed. Civil society should then campaign and advocate for the adoption and formalisation of these legislative amendments and recommendations.

### Understanding governance challenges facing the NPA

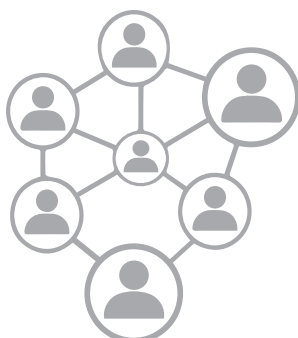
While people working within the NPA are fully aware of the impact of the governance challenges that emerged owing to poor leadership and political interference, this needs to be better understood across government and society. This could help prevent a similar situation from reoccurring, and encourage civil society and the public in general to better understand and support appropriate governance and managerial reforms at the NPA.

A detailed review of the evidence presented to commissions of inquiry in relation to the NPA would help civil society gain a better appreciation of how NPA governance was weakened. This should include evidence presented before the Mokgoro Commission of Inquiry<sup>11</sup> and the Zondo Commission.<sup>12</sup>

### Ensuring greater accountability of the NPA

Section 22 of the NPA Act lays out the powers, duties and functions of the NDPP. Section 22(5) states that:

The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors*, advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice



A NETWORK COULD RAISE VALID CONCERNS AND CALL FOR NPA REFORMS

on the part of a member of the *prosecuting authority*, and determining the powers and functions of such structure.

Civil society should engage with the NPA on having such a complaints mechanism established so it can meet the requirements set out in the Act. CSOs could then monitor or conduct research to ensure that the NPA complaints mechanism has the necessary resources to offer a substantive recourse to aggrieved parties.

In tandem, research and advocacy organisations should campaign for the NPA to release more detailed data. This would enable researchers to track prosecutorial progress and improvements and identify areas of concern.

### Managing public expectations of the NPA

The NPA's many challenges and controversies affect the public's perception of the organisation, its prosecutors and the wider criminal justice system. But many people are not familiar with the onerous legal requirements for a successful prosecution that results in a conviction. This can lead to unrealistic or unfounded negative perceptions of the NPA and what it can reasonably be expected to achieve.

Civil society could therefore help to familiarise the broader public with the NPA's role, its processes, and whether it is functioning optimally or not given its resource capability. This could include, for example, explaining the difference between a commission of inquiry and a prosecution in court, and why it is taking so long for testimony at the Zondo Commission to be used to support robust prosecutions.

### Conclusion

The years of state capture had a devastating impact on public safety and confidence in the criminal justice system, and were characterised by an oppositional relationship between civil society and the NPA. The new NPA, committed to reform under Batochi's leadership, has created opportunities for a collaborative relationship and constructive engagement with a civil society coalition. This can lead to an independent and accountable prosecuting authority that serves as lawyers for the people.

### Notes

- 1 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*, CC, 13 August 2018.
- 2 *Democratic Alliance v President of South Africa and Others*, CC, 5 October 2012.
- 3 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*, CC, 13 August 2018.
- 4 *Democratic Alliance v President of South Africa and Others*, CC, 5 October 2012.
- 5 Statistics South Africa, Victims of Crime Survey 2017/2018, <http://www.statssa.gov.za/?p=11632>.
- 6 Institute for Justice and Reconciliation, *SA Reconciliation Barometer 2017*, <https://www.ijr.org.za/portfolio-items/south-african-reconciliation-barometer-survey-2017-report/>.
- 7 Africa Criminal Justice Reform, Factsheet 8 – Performance of the NPA, November 2018, <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf>.
- 8 Due Process of Law Foundation, #FiscalíaQueSirva, <http://www.dplf.org/en/program/fiscaliaquesirva>.
- 9 Presentation by Dr Martin Schönteich and Ana Lorena Delgadillo on Civil Society's involvement in prosecutorial independence at a Civil Society roundtable, 29 October 2018.
- 10 National Prosecuting Authority Act (Act 32 of 1998), Section (10).
- 11 The Presidency, Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998, <http://www.thepresidency.gov.za/sites/default/files/Section%2012%286%29%20Enquiry%20report%20-%20unabridged%20version.pdf>, also known as the Mokgoro Commission of Enquiry.
- 12 Commission of Inquiry into State Capture, The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector <https://sastatecapture.org.za/>, also known as the Zondo Commission.

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