



Africa Criminal Justice Reform  
Organisation pour la Réforme de la Justice Pénale en Afrique  
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**Key issues in the NPA**

**In search of strategy**

**Issue Paper 1**

by

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# 1. Introduction

This paper problematises the strategy environment of the National Prosecuting Authority (NPA) and raises questions about how strategy is developed, the priorities set and how performance is measured. The overall impression is of a situation where strategy priorities and objectives emanate from different sources, but that the most measurable is what drives performance at operational level and not necessarily the most needed or most important to make the country safer and build trust in the state.

The Cambridge Dictionary defines strategy as: "a detailed plan for achieving success in situations such as war, politics, business, industry, or sport, or the skill of planning for such situations". There is a significant body of literature on the requirements for good or effective strategy. The four most commonly accepted components of a strategy are:

- Visioning
- Objective setting
- Resource allocation
- Prioritization or strategic trade-offs.<sup>1</sup>

The focus here will be on the fourth requirement, being Prioritization or strategic trade-offs:

"Prioritization – or identifying strategic trade-offs – is one of the most challenging aspects of corporate strategy at its core. Since it's not always possible to take advantage of all feasible opportunities, and because business decisions almost always entail a degree of risk, companies need to take these factors into account in arriving at the optimal strategic mix. It's important for companies to balance the strategic trade-offs between risk and return and ensure that the desired levels of risk management and return generation are being pursued."<sup>2</sup>

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<sup>1</sup> Ottawa University, 'Four Key Components of Corporate Strategy | Business Blog Article | Ottawa University | Online Degrees | Ottawa University'.

<sup>2</sup> Ottawa University.

The mandate of the NPA is to prosecute suspects on behalf of the state.<sup>3</sup> There seems to be a rather rigid interpretation of this mandate *vis-a-vis* the mandate of the police which includes the duty to investigate crimes.<sup>4</sup> One particular interpretation is that the police investigates and that the NPA can only prosecute what the police has investigated, in other words, a reactive function.<sup>5</sup> This could have counter-productive results that the police investigate what it regards as the priorities and that the prosecution service must work with what the police present to it. This would indeed be a case of the tail wagging the dog.

## 2. The strategy environment of the NPA

The NPA does not exist in isolation: it is a programme the Dept of Justice and Constitutional Development (DoJCD) for budgetary purposes and is part of the Justice, Crime Prevention and Security cluster (JCPS). It is highly dependent on the police for investigations and on the functioning of the courts as administered by the DoJCD. Apart from these basic structural arrangements, the NPA also exists in a particular strategy- and policy environment. At least on paper, there are a number of high-level documents providing guidance to government departments and entities. Logically, high-level and rather abstract goals and objectives are described in increasingly precise and operationally measurable targets against indicators as one moves closer to ground-level. In theory one ought to be able to read the relationship between these documents in both directions: from the abstract and general to the precise and measurable, and then in the other direction to clearly see how detail actions contribute to larger objectives and goals. There ought to be some degree of coherence and consistency in order to produce results that are supportive of high-level outcomes.

A survey of the strategy environment of the NPA pointed to the following documents:

- National Development Plan<sup>6</sup>

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<sup>3</sup> Constitution of the Republic of South Africa, sec. 179(2).

<sup>4</sup> Constitution of the Republic of South Africa, sec. 205(3).

<sup>5</sup> Institute for Security Studies, 'Understanding the National Prosecuting Authority'; Matthews, 'The National Prosecuting Authority'.

<sup>6</sup> National Planning Commission, 'National Development Plan 2030 - Our Future-Make It Work'.

- Medium Term Strategic Framework (MTSF)<sup>7</sup>
- ENE & Budget Vote DoJCD<sup>8</sup>
- Prosecution Policy<sup>9</sup>
- Prosecution Policy Directives<sup>10</sup>
- NPA Strategic Plan 2020-25<sup>11</sup>
- NPA Annual Performance Plan<sup>12</sup>
- NPA Annual Reports.<sup>13</sup>

Based on this survey a number of general observations can be made about strategic planning and alignment in the NPA:

- There is a significant level of inconsistency in the use and categorisation of information setting outcomes, indicators, targets and so forth, across these documents. Trying to find a logical path cascading from high level frameworks to operational plans (and back again) is thus not easy, if indeed possible, at all. This may very well be the result of the position of the drafters of a particular document (e.g., Department of Monitoring and Evaluation compared to National Treasury) and what the priorities are at that particular level of state functioning. There may also be other more practical and mundane reasons.
- At the risk of stating the obvious, it should also be noted that the NDP was published in 2012 whilst other documents are produced once-off, or more regularly in five-year or annual cycles, and regularly updated.

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<sup>7</sup> Dept of Planning, Monitoring and Evaluation, 'Revised Medium-Term Strategic Framework 2019-2024'.

<sup>8</sup> National Treasury, 'Budget 2021 - Estimates of National Expenditure'.

<sup>9</sup> National Prosecuting Authority, 'Prosecution Policy'.

<sup>10</sup> National Prosecuting Authority, 'Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions'.

<sup>11</sup> National Prosecuting Authority, 'NPA Strategic Plan 2020-2025'.

<sup>12</sup> National Prosecuting Authority, 'NPA Annual Performance Plan 2021/22'.

<sup>13</sup> National Prosecuting Authority, 'Annual Report 2016/17'; National Prosecuting Authority, 'Annual Report 2018/19'; National Prosecuting Authority, 'Annual Report 2019/20'; National Prosecuting Authority, 'Annual Report 2020/21'.

- The high-level planning documents such as the NDP and MTSF, although highly relevant, give limited clear guidance on what the NPA should do. For example, the NDP recommends the revival of the 7-point plan for the reform of the criminal justice system, but stops there. The MTSF gives surprisingly little information on the NPA and seems to shift most of the criminal justice workload to SAPS. This may be symptomatic of a particular understanding of crime and what constitutes an effective response.
- The ENE and budget vote set the clearest and most tangible targets for the NPA, but this does not mean that they link these to the NDP and MTSF.
- The ENE and budget vote is also the basis for the annual audit by the Auditor-General of South Africa (AGSA) and it seems there is notable effort to report on these targets and indicators regardless of their merits, and overlap with NDP and MTSF targets appear to be more coincidental than planned. The ENE also functions in a three-year cycle and very much binds a department to a particular set of outcomes and indicators for a term.
- The NPA APP is presumed to annualise the MTSF (and budget vote), but the APP brings in additional targets; uses different nomenclature; duplicates or overlaps some targets; and introduces new outcomes.
- The NPA Strategic Plan (2020-25) introduces three new high-level outcomes and it is not clear how these should or could link up with the budget vote and ENE. This is not to argue the merits of these outcomes, but rather that their links with the ENE are not clear. And this may have implications for their support at operational level and ultimately achievement.
- The more recent annual reports (after 2018/19) do not present the outcomes, targets and indicators in an accessible tabular format, but rather in a text narrative often linked to case studies. This type of narrative description does not assist in gaining a systemic understanding of challenges and achievements.
- The annual report (2018/19) lists detailed targets derived from the ENE and emphasise conviction rates.

- The Prosecution Policy and Prosecution Policy Directives are largely focussed on the procedural guidelines for making the decision to prosecute or not, and other options available to prosecutors (such as alternative dispute resolution mechanisms), as opposed to setting substantive strategic priorities, such as corruption or gender-based violence. The Prosecution Policy Directives also sets an additional requirement for the prosecution of certain government officials, namely that permission is required from the Director: Public Prosecutions.<sup>14</sup>

To the above should be added at least the following contextual factors:

- Political interference in the NPA and questions about its independence.
- The findings and recommendations from the Zondo Commission.<sup>15</sup>
- Pressure on the NPA to prosecute those implicated in state capture, corruption and maladministration.
- A decline in the performance of the NPA and the criminal justice system more generally.<sup>16</sup>
- Leadership turnover at the NPA and the loss of skills and institutional knowledge to implement reforms.
- Declining trust in the state and in particular the criminal justice system.<sup>17</sup>
- The findings of the expert panel into the July 2021 civil unrest.<sup>18</sup>

While the planning at macro-level (i.e., NDP and MTSF) encourages an open-minded and inclusive approach, planning at the other end of the spectrum (i.e., departmental and

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<sup>14</sup> National Prosecuting Authority, 'Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions', 25–26.

<sup>15</sup> Zondo, 'Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Part 1)'; Zondo, 'Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Part 2)'.

<sup>16</sup> Muntingh and Redpath, 'Recommendations for Reform of the NPA'.

<sup>17</sup> Moosa and Hofmeyr, 'South Africans' Trust in Institutions and Representatives Reach New Low'.

<sup>18</sup> Africa, 'Report of the Expert Panel into the July 2021 Civil Unrest'.

programme levels) is preserving and conservative in nature; remaining close to, if not locked into, the indicators and targets articulated in the ENE to ensure compliance presumably in anticipation of the AGSA's audit. There is thus an inherent tension between the aspirations of the high-level analysis and recommendations of the NDP and the practical realities of changing strategic direction bound by the confines of the five-year cycle and the tightly defined numerical targets articulated in the ENE and annual report. This tension may indeed be debilitating, especially when new leadership have *bona fide* intentions to steer the ship in a new direction, but the barnacles of mandarin compliance make a change of tack difficult if not impossible.

### 3. Crime is not the same everywhere

There are a number of broad crime types posing a serious threat to the stability and sustainability of the democracy and constitutional order. These are, at least: violent and sexual crimes; corruption and maladministration; organised crime (domestic and international); targeted stripping of state infrastructure; politically motivated and linked crimes and violence (e.g., intimidation, looting and assassinations).

Some crime types find expression in: geographical areas (e.g., organised stock theft in the Free State<sup>19</sup>; drug trafficking in the Western Cape<sup>20</sup>; high rates of murder and violent crimes in poor and poorly policed areas compared to affluent areas<sup>21</sup>; excessive use of force and firearms by SAPS in KwaZulu-Natal<sup>22</sup>); corruption in government (e.g., procurement processes at all levels<sup>23</sup>); and crimes against women by repeat offenders.<sup>24</sup>

Crime posing a threat to the stability of the democracy and welfare of people therefore do not exist equally everywhere as indicated in the above examples. Addressing crime effectively therefore requires a targeted approach<sup>25</sup> focussing on those crimes that (a) have the most

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<sup>19</sup> Muntingh, 'The Prosecution Service and the Provinces', 27.

<sup>20</sup> Goga, 'The Drug Trade and Governance in Cape Town'.

<sup>21</sup> Social Justice Coalition and Others v Minister of Police and Others.

<sup>22</sup> Cano, 'The Use of Lethal Force by Police in South Africa REPORT | JULY 2021', 30.

<sup>23</sup> Zondo, 'Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Part 1)', chap. 4.

<sup>24</sup> Stats SA, 'Crime against Women in South Africa - An in-Depth Analysis of the Victims of Crime Survey Data'.

<sup>25</sup> Sherman, 'The Rise of Evidence-Based Policing'.

adverse impact on safety and perceptions of safety (b) divert public funds from their intended purposes, and (c) undermine the very fabric of democracy and good governance (e.g., assassinations and rights violations). Strategic priorities therefore have to be identified, pursued, the impact of actions measured, and adjusted accordingly.

## 4. Efficiency and effectiveness

There are limited resources available to the criminal justice system and this means that what there is, must be used effectively and efficiently. Efficiency and effectiveness are discussed in the ACJR Issue Paper 3, but the following are noted for the purposes of the discussion here since they relate to prioritisation:

- invest in criminal justice system staff skills; retain such skills by offering a rewarding career
- strive towards impact prosecutions and convictions that will improve safety and perceptions of safety;
- strengthen democracy by supporting good governance through transparency and accountability
- measure impact performance by perceptions of trust
- ensure a solid value-chain in law enforcement from intelligence through to the detection, investigation, prosecution, convictions, sentence implementation and post-release monitoring.

## 5. The conviction rate as a red herring

The NPA has the mandate to prosecute, but the *Prosecution Policy*<sup>26</sup> and *Prosecution Policy Directives* give little guidance on the substantive prosecution priorities and their method of

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<sup>26</sup> National Prosecuting Authority, 'Prosecution Policy'.

identification. Maintaining a high conviction rate at all costs appears to be the overarching strategic focus regardless of whether this contributes to public safety or not. The annual reports of the NPA emphasise the conviction rate in the various court levels, but fail to contextualise this with reference to crimes reported, cases enrolled and so forth. Seen out of context, a 92% conviction rate does sound impressive, but the same is not true when it is noted that the overall number of convictions is in decline.<sup>27</sup> There also seems to be uncertainty in drawing the boundaries of justifiable strategic prioritisation by the elected government (national and provincial) and political interference to protect individuals, factions or interest groups from prosecution. High-level strategic prioritisation by an elected government is forward-looking, of a more general application (e.g., targeting particular crimes to protect losses or particular forms of victimisation), and a legitimate action of an elected government, and the latter seems to be more an effort at pushing back at prosecutorial focus and coaxing discretion to favour some.

The indicators listed in the ENE and annual report of 2018/19 are listed and matched below in Table 1. From the list it is evident that much emphasis is placed on the conviction rate, which is perhaps motivated by the availability of data on this, but also because the prosecutor has the discretion to select the cases where there is a high likelihood of conviction and not pursue those where the chances are less favourable. The conviction rate is a useful figure, but it only tells part of the story. As has been argued in the Issue Paper on Effectiveness and Efficiency, it probably has some utility as an indicator of efficiency rather than of effectiveness. It does not speak to the scale of prosecutions over time, or the impact of sustained and focussed prosecutions on a particular problem in a specific area. A further observation is that the indicator does not link up with higher level strategic goals, for example, the level of safety in South Africa. A high conviction rate simply does not mean that society is safe, or that the state is trusted.

*Table 1*

<b>ENE</b>	<b>Annual report</b>
Conviction rate: High Court, Regional Court and District Court	Conviction rate: HC, RC and DC
	Conviction rate in priority crime cases
	Conviction rate in organised crime
	Conviction rate in environmental crimes

<sup>27</sup> Muntingh and Redpath, 'Recommendations for Reform of the NPA'.

ENE	Annual report
	Conviction rate in trio crimes
	Conviction rate in murder prosecutions
	Conviction rate in violent protests and industrial actions prosecuted
	Conviction rate in cybercrime prosecutions
	Conviction rate in copper theft prosecutions
	Conviction rate in money laundering
Total number of Thuthuzela care centres	Number of victims assisted at TCC sites
	Conviction rate of TCC reported cases
Conviction rate in sexual offences	Conviction rate in sexual offences
Conviction rate in complex commercial crime	Conviction rate in complex commercial crime
Number of people convicted of corruption in the private sector per year	Number of persons convicted of private sector corruption
	* Number of persons convicted of corruption where the amount involved is more than R5 m.
Number of government officials convicted of corruption and/or related offences per year	Number of Government officials convicted for offences related to corruption
	* Number of persons convicted of corruption where the amount involved is more than R5 m.
Value of freezing orders obtained for corruption or related offences per year	
Value of recoveries relating to corruption or related offences per year	
	Number of criminal matters finalised
	Clearance ratio on decision dockets received

## 6. Lacking harmonisation

SAPS data reveals that vast numbers of suspects are arrested for minor crimes (e.g., possession of drugs) that do not pose a threat to public safety, whilst seemingly more serious crimes are not adequately investigated. A closer look at arrest data from SAPS as well as the number of cases enrolled and withdrawn, as reported by the NPA, reveals the following trends for the period 2015/16 to 2019/20:

- There has been a steady decline in the number of arrests and number of enrolments.

- There has been an increase in the proportion of cases withdrawn following enrolment; from 11% in 2016/17 to 15.4% in 2019/20; or almost one in six cases.
- Between 44% and 53% of police arrests were ultimately counted as enrolled cases and not withdrawn.<sup>28</sup>

In a sense one can then observe that there is a mismatch of roughly 50% (44% to 53%) between what the police regards as sufficient grounds for arrest and what the NPA regards as sufficiently supported by evidence for enrolment to prosecute. It should be emphasised that if there is no real intention to prosecute, the police should not arrest.<sup>29</sup> A lack of harmonisation in police and prosecution priorities consequently undermine safety. It should be added that there are other reasons why a charge may be withdrawn (e.g., it is not in the public interest to pursue), but for the purposes here, it is accepted that the majority of decisions are based on the availability and quality of evidence. Of a more temporary nature is the fact that SAPS continues, and in fact increased the number of arrests<sup>30</sup> for possession of drugs despite the decision of the Constitutional Court that effectively permits possession of cannabis for personal use.<sup>31</sup>

## 7. Performance indicators

The lack of strategy is reflected in the formulation of performance indicators that are typically not useful in supporting an effective response to crime, or if they are, are not applied to this effect. The NPA Strategic Plan 2020/25 list three high -level performance indicators, as set out in Table 2:<sup>32</sup>

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<sup>28</sup> National Prosecuting Authority, 'Annual Report 2015/16'; National Prosecuting Authority, 'Annual Report 2016/17'; National Prosecuting Authority, 'Annual Report 2017/18'; National Prosecuting Authority, 'Annual Report 2018/19'; National Prosecuting Authority, 'Annual Report 2019/20'; SAPS, 'Annual Report 2015/16'; SAPS, 'Annual Report 2016/17'; SAPS, 'Annual Report 2017/18'; SAPS, 'Annual Report 2018/19'; SAPS, 'Annual Report 2019/20'.

<sup>29</sup> S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae).

<sup>30</sup> SAPS, 'Annual Report 2020/21'.

<sup>31</sup> Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton.

<sup>32</sup> National Prosecuting Authority, 'NPA Strategic Plan 2020-2025', 43–44.

Table 2

NPA sub-outcome	Outcome indicator
Increased feelings of safety and security	Level of satisfaction with the prosecution of identified crime types
Improved investor confidence in South Africa through high-impact prosecution.	Percentage of identified high impact corruption prosecutions instituted
Improved access to NPA services for all	Level of customer satisfaction with NPA services

In its most recent annual report, the NPA reports that "To achieve these outcomes, the NPA commenced the implementation of several strategic initiatives:

- Enhancing internal accountability through the development of an internal Office for Complaints and Ethics to monitor and strengthen internal integrity and service delivery.
- Capacitating the NPA and ensuring that all regions and business units have the requisite specialist capacity.
- Increasing the use of information technology and digitisation.
- Institutionalising the internal Innovation and Policy Support Office.
- Implementing a countrywide Community Prosecution Initiative.<sup>33</sup>

Strategy development and coordination is centralised in the NPA at the head office with seemingly little devolved discretion. There is no formal mechanism for input or coordination between the NPA and provincial governments or civil society structures (see CPFs by comparison).<sup>34</sup> The overall impression is a one-shoe-fits-all approach, and that this one shoe is also derived from the lowest common denominator - the conviction rate.

NPA reporting is largely done on an aggregated national basis, making it difficult to critically examine if geographical or other priorities are addressed in a targeted manner, or if successes are *ad hoc* and serendipitous. Recent annual reports have also reflected on successful case

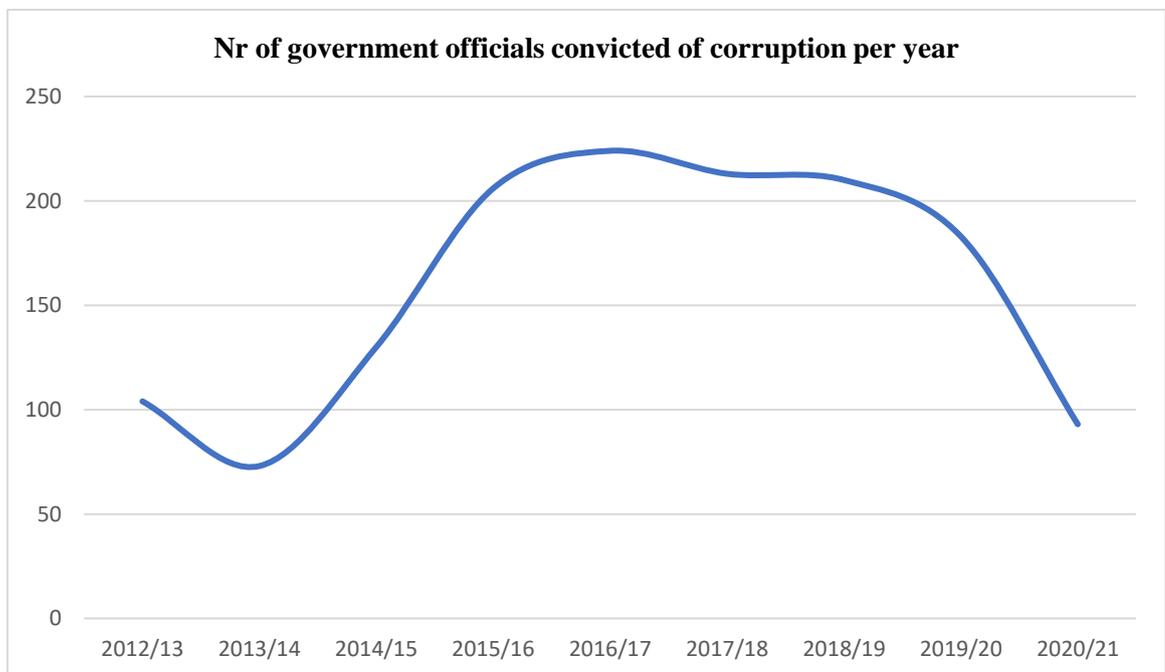
<sup>33</sup> National Prosecuting Authority, 'Annual Report 2020/21', 12.

<sup>34</sup> Muntingh, 'The Prosecution Service and the Provinces'.

studies and whilst these are important, they do not contribute to an analysis of how the NPA is addressing strategic priorities and if such initiatives are indeed having the desired impact.

The results reported from the various NPA units are not contextualised and a closer examination reveals modest if not declining results. For example, the conviction of government officials for corruption has indeed declined in recent years, as shown in Fig 1. The value of asset recoveries in cases linked to government officials have also declined from a high of R13 million in 2015/16 to R127 000 in 2020/21. The evidence simply does not support claims of a particular focus on corruption.

Figure 1



## 8. Conclusion

In summary, the current response to crime (intelligence, detection, investigation and prosecution) suffers from a number of weaknesses. In the case of the NPA, this largely relates to a lack of strategy and consequently lack of effective performance and results-management. Symptomatic are *ad hoc* responses under political pressure; court rolls filled with minor cases and few serious prosecutions (such as corruption and violent or sex crimes); trial courts sitting

for shorter and shorter periods, while cases take longer to finalise; numerous postponements before decisions are made; a lack of urgency in processing matters; declining numbers in prosecutions; and ultimately a worsening crime situation.

The strategy-policy environment reflected in the various key documents reviewed is confusing as it is difficult to form a coherent understanding of what are indeed the priorities and how shorter-term targets relate to the overall goals. The lack of strategic priorities also adds to a decline in specialisation and expertise and consequently adds to staff turnover and skills departing the organisation.

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