

Strengthening Law Enforcement Agencies in Combating Corruption: Mandates and Resourcing

1. Introduction

The NACAC research finds a number of challenges and limitations to the operation of Law Enforcement Agencies (LEA) combatting corruption. This is apparent in their mandates and resourcing. Alarming, combatting corruption does not appear as a clear priority in their mandates, budgets nor the posts allocated. Overall, a picture emerges of constrained legislative mandates, structural challenges and a weak financial and human resource capacity. The recommendations below are aimed at what can be achieved in the short term and place particular emphasis on, amongst others, long overdue law reform with reference to the NPA and SAPS.

2. National Prosecuting Authority (NPA)

The entire accountability architecture of the state hinges on an effective, efficient, independent and accountable National Prosecuting Authority (NPA). The NPA performs poorly in relation to the scope and volume of prosecutions of crime in general and corruption in particular. Success in high-level corruption matters remain elusive. Lacking institutional and financial independence, effective functioning of the (NPA) is a core challenge and must be addressed to improve law enforcement capability. It is, constitutionally speaking, intolerable that the NPA functions as a programme in the Dept of Justice's budget.

To combat corruption effectively it will require the overhaul the legislative framework of the NPA with reference to at least:

- its financial and institutional independence,
- the appointment and removal of the senior echelon,
- conditions of service of staff to attract and retain critical skills, and
- setting standards for accountability and transparency.

In support of the preceding:

- Special consideration will need to be given to mechanisms such as independent or special prosecutors (or even an additional anti-corruption prosecution entity) in cases of corruption involving members of the high or former high executive.
- Significant delegation or expansion of the prosecuting role to other players will be required, as well as significantly better allocation and support of judicial officers in courts hearing these matters, and efficient management of their time. There is an urgent need to bolster the independence, accountability and effectiveness of the NPA, to protect whistle-blowers from physical violence and not just in the employment relationship and not only when they are to give evidence in court.

3. The South African Police Services (SAPS)

The South African Police Services (SAPS) and its Directorate Priority Crimes Investigation (DPCI) and Crime Intelligence are not fit for the purpose of combating corruption. These are more suited to the investigation of serious and violent crime and organised crime, in both mandate and resources. The SAPS legislation is poorly drafted and requires completing redrafting into one new consolidated Act, including providing for Crime Intelligence. The latter is constitutionally required but remains unfulfilled.

4. Courts

The courts are a key component in our constitutional democracy. Yet their resourcing is fractured and insufficient, and there appears to be inadequate attention paid to their optimal operation.

5. Conclusion

Across the criminal justice and law enforcement sector the following are required:

- Clear and aligned legal frameworks that are harmonised across sectors and levels of government to avoid gaps, contradictions, or unresolvable overlaps.
- Institutional coordination and role clarity enabled by defined mandates and established, clear mechanisms for inter-agency coordination and cooperation
- Political commitment and leadership sending a unified and sustained message that corruption will not be tolerated and enabling law enforcement and oversight bodies to be independent.

Recommendations

5.1. To be actioned in the short term

The legislation for SAPS requires thorough overhaul. In particular, the following should be provided for in legislation:

- a) A **dedicated, budget ring-fenced anti-corruption component of the DPCI** whose mandate covers all corruption. The legislation should provide for discretion to delegate less serious matters to other levels, but the starting point should be that all corruption may be investigated by this component. A process should be provided for which permits the DPCI to decide who should investigate what, or whether a shared investigation should be pursued.
- b) The vetting of Crime Intelligence personnel should be the responsibility of an external agency.
- c) The **budget of the SAPS contains anomalies** (billions allocated to single posts) which require urgent clarification.

The **SAPS should be obliged consistently to report**, in relation to dockets investigated, dockets referred, cases to court, cases convicted, for all crime types including corruption matters.

The **legislation for the NPA requires amendment**, toward greater financial and operational independence, which favours the prosecution of corruption, coupled with greater transparency,

accountability and safeguards. In particular, the following should be provided for in the short term in legislation:

- a) The NDPP, DNDPPs and DPPs should be **appointed through a public consultative process**, rather than Presidential fiat. This is urgent as some of these positions become vacant next year. Dynamic leadership is urgently required. In this regard, such leadership and will only be attracted if the NPA has greater independence.
- b) **The NPA should have its own budget vote**. At the very least, section 38 of the Act should be amended so that Ministerial and Departmental approval is not required to secure outside skills, up to an agreed budgetary amount. With its own Budget Vote, allocations to units of the NPA such as SOCA and SCCU should transparently be listed.
- c) The **salary structure** within the NPA should be reviewed and adjusted, to be more in line with equivalent positions in the Special Investigation Unit (SIU). At the same time, consideration should be given to raising the requirements for appointment as a prosecutor to the NPA. It should be possible for the NPA itself to address vacancies not filled within one year, by short-term procurement processes involving contracts.
- d) A system needs to be established to brief counsel in private practice to prosecute certain matters
- e) The **mandate of the Investigation Directorate (ID) should be clarified**. It should be granted a large ring-fenced discretionary budget for the procurement of ad-hoc specialist skills.
- f) **Term limits** should apply to DPPs, and the age limit of 65 should be removed.
- g) The NPA should be required to **respond with a decision to referrals** for prosecution for corruption from other agencies within specified time limits, and it should be required to maintain a register of all referrals for prosecution.
- h) An external agency **should be mandated to receive and investigate complaints of unethical or corrupt conduct by prosecutors**. This currently falls to the NPA itself.
- i) The **NPA Prosecution policy and policy directives** should be transparently developed and required by legislation to be tabled in Parliament. Compliance should be monitored. It is submitted the NPA should withdraw its Deferred Prosecution Policy (aka Corporate Alternative Dispute Resolution) and invite Parliament to consider the issue.
- j) The Office of Witness Protection (OWP) should provide for the **protection of whistle-blowers** and related persons even if they are not to testify in court. Whistle-blower protection must effective and perceived to be effective.

The legislation or regulations of the **Financial Intelligence Centre (FIC) should require mandatory routine reporting** on its data.

5.2. To be actioned in the medium term

The issue of **curator fees and dissipation of value during freezing of assets** requires closer interrogation. AFU recoveries could be tripled if dissipation is avoided. At the same time, safeguards to prevent the abuse of freezing processes should be considered. An external agency should also be mandated to maintain a register of curators appointed in freezing matters.

The cause of the discrepancy between **potential and actual recoveries** in the SIU should also be investigated toward increasing recoveries.

The SIU legislation should permit the **SIU to conduct prosecutions or forfeitures** on behalf of the NPA, where this is so authorised by the NPA, and under the supervision of the NPA. The latter would require amendment to the Prevention of Organised Crime (POCA) Act. If the SIU is to take on such roles, additional skilled posts may need to be allocated to it. The SIU should, in its investigations, be mindful of potential prosecutions and where possible, build dockets to the criminal standard of proof as it carries out its work.

The Courts not have sufficient judicial officers. All judges, as well as magistrates allocated to Commercial Crime Courts, should each be allocated a **dedicated, high-quality legal researcher** to bolster their capacity. Saturday and additional court sittings and the associated overtime budgets should be made available. Consideration should be given for CARA to finance these overtime interventions.

The Chief Justice should be prevailed upon to issue a **Practice Direction** that 1) Acting Judges not be allocated high profile corruption matters 2) corruption matters take priority, and may not be postponed for more than one month (or another benchmarked period) hence.

5.3. To be actioned in the long term

In the long term, an entirely **new model of prosecution** should be discussed and consulted upon, which permits either the appointment of special counsel in sensitive matters, or that, as a matter of course, provides for the briefing of prior-approved counsel in private practice by the prosecuting authority (the Commonwealth model).

The budget and posts allocated to the ID, SCCU in the NPS, and the Asset Forfeiture Unit (AFU) do not indicate a serious intention to tackle corruption, and should be increased. Far greater allocations from CARA to support forfeiture and anti-corruption prosecutions should be considered.

Court infrastructure challenges contributing to court delays should urgently be addressed. A thorough critical review of the operation of the courts towards maximising efficiency should be carried out. Clarity and accountability are needed on roles and responsibilities between the Office of the Chief Justice, Public Works, and the Department of Justice and Constitutional Development.